

PROBATE CODE.

CHAPTER 1.

THE CODE AND ITS OPERATION.

§ 6160. **Title.** This act shall be known as the probate code of the state of North Dakota.

§ 6161. **Code establishes the law. How construed.** This code establishes the law of this state upon the subjects to which it relates; and its provisions and all proceedings under it shall be liberally construed, with a view to effect its objects and promote justice.

§ 6162. **Rights not affected.** No right accrued or act done in any proceeding commenced before this code takes effect is in any manner impaired or injuriously affected by its provisions; but the mode of procedure shall thereafter conform as nearly as may be to its requirements.

§ 6163. **Provisions, when in force.** When a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute in force before this code takes effect, such provisions shall remain in force and be deemed a part of this code as respects the right so affected.

§ 6164. **Time, how computed.** Unless otherwise specially provided, every period of time herein prescribed with reference to the commencement of a proceeding or the performance of any other act, shall be computed from the date of the event at which such period begins although such event happened before the taking effect of this code. But this section shall not be construed so as to conflict in any manner with the provisions of the preceding section.

§ 6165. **Words and phrases, how construed.** Unless otherwise defined herein, words and phrases used in this code are to be construed according to the rules and definitions recognized in or prescribed by other statutes applicable thereto.

§ 6166. **Signification of certain words and phrases.** The following words and phrases have in this code the signification herein prescribed, except where a different signification is apparent from the context:

1. The word "case" refers to a subject matter which by the provisions of this code is cognizable in a county court, and includes every proceeding therein maintained in relation to the same matter or estate.

2. The words "county court," "county judge," and "clerk," are to be understood as referring only to the exercise of the jurisdiction and powers herein conferred.

3. The word "will" includes "codicil" and denotes a last will and testament, or an instrument purporting to be such, according to the context.

4. The phrase "person interested," when used with reference to an estate or fund includes every person entitled either absolutely or conditionally, to share in the same or the proceeds thereof, except a creditor.

5. The word "mandate" includes any process or order issuing from the court directing or prohibiting the performance of any act.

CHAPTER 2.

THE COUNTY COURT.

ARTICLE 1.—ORGANIZATION, POWERS AND DUTIES.

§ 110. Const. **§ 6167. County court established.** There is established in each organized county of this state a county court, which shall be a court of record, held by the county judge in the manner hereinafter prescribed.

§ 90, c. 21, Pol.C. am'd. **§ 6168. Terms of.** There are no stated terms of the county court but the court is deemed to be always open, and every official act of the judge done in pursuance of this code shall be deemed to be the act of the court.

§ 6169. Seal. Each county court shall have a seal upon which shall be inscribed the name of the state and county, and the words "Seal of the County Court." Such seal must be furnished by the board of county commissioners and be at least one and five-eighths of an inch in diameter, but when the court is unprovided with a seal the judge may procure one at the expense of the county, and a scroll or other device may be used as a seal until a seal can be procured.

§ 91, c. 21, Pol.C. am'd. **§ 6170. Office of the judge, where.** The county judge shall have an office at the county seat in rooms provided by the county, and furnished in like manner with tables, chairs, desks, cases for books and papers, books or record blanks, stationery and other articles required for the purposes of the office.

§ 6171. Office when open. The judge shall keep his office open at all proper times during reasonable hours for the purpose of holding court and transacting business as prescribed by law. He shall safely keep the records of the court and all documents and other papers lawfully intrusted to him by virtue of his office, or in the course of any proceeding before him and deliver the same over to the persons entitled thereto or to his successor in office; but the records

must be open during office hours to access and inspection by persons having any business therewith.

§ 6172. Judge not to act as attorney, when. A county judge shall not be attorney in any civil or criminal action or other judicial proceeding, which involves or relates to an estate or any part thereof or other matter over which he has or may thereafter obtain jurisdiction, either for or against a surviving husband or wife, heir, devisee, executor, administrator, guardian or ward, debtor, creditor or other person, and he shall not counsel or advise as to any such action or proceeding or contemplated action or proceeding, or have a law partner or be otherwise connected in business with a practicing attorney. A willful violation of any of the foregoing provisions of this section shall be deemed willful misconduct in office. § 92, c.21, Pol.C. am'd.

§ 6173. Clerk, how appointed. A clerk may be appointed for the county court by an order duly entered in the journal, and the appointment may be in like manner revoked by the judge at his pleasure. A clerk so appointed may until his appointment is revoked exercise the powers expressly conferred upon the clerk by the provisions of this code, but the judge shall be responsible for all his official acts, and may at all times act as his own clerk. No practicing attorney shall be appointed as clerk and no clerk shall act as attorney or as executor, administrator, guardian or appraiser in any matters before the court.

§ 6174. Clerk, powers of. A clerk may exercise concurrently with the judge the following powers:

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

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

3. He may sign as clerk and affix the seal of the court to a subpoena, and issue the same with the same effect as if issued by the court.

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

5. He may postpone for a definite time not exceeding thirty days any hearing or other matter, when the judge is absent from his office.

§ 6175. Sheriff to execute process. The sheriff of the county must in person or by deputy attend the sittings of the county court whenever the judge shall so direct and must execute according to law or the direction of the court every process or other mandate issuing from the court. But when he is absent or unable to act in the discharge of any duty required of him by this section, the judge may direct any constable of the county to act in his place.

§ 6176. Compensation of sheriff. Sheriffs and other officers shall receive for their services rendered in the county court or in the execution of its mandates the same compensation as for like services in the district court payable by the county or by a party in like manner.

ARTICLE 2.— JURISDICTION AND POWERS OF THE COUNTY COURT.

§ 6177. Jurisdiction. The county court has exclusive original jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of exec- § 111, Const.

utors, administrators and guardians, the sale of lands by executors, administrators and guardians, and such other probate jurisdiction as may be conferred by law.

§ 1. Prob. C.
am'd.

§ 6178. Powers of the court. In the exercise of its jurisdiction the county court has power:

1. To take the proof of wills, to admit wills to probate and to revoke the probate thereof.
2. To take proof of and determine heirship, and to revoke such determination.
3. To grant and revoke letters testamentary and letters of administration, and to appoint a successor in place of a person whose letters have been revoked.
4. To direct and control the conduct and settle the accounts of executors and administrators.
5. To direct the disposition of the property of decedents for the payment of their debts and funeral expenses and expenses of administration.
6. To enforce the payment of legacies and the distribution of estates of decedents and the payment or delivery by executors and administrators of money or other property in their possession belonging to the estate.
7. To appoint and remove guardians, to direct and control their conduct, settle their accounts and compel the payment and delivery by them of money or other property belonging to their wards.
8. To administer justice in all matters within its jurisdiction according to the provisions of the statutes relating thereto.

§ 7. Prob. C.
am'd.

§ 6179. Jurisdiction in wills and administration. The county court of each county has jurisdiction to take the proof of a will and grant letters testamentary, to grant administration or determine heirship, as the case requires:

1. When the decedent was at the time of his death a resident of that county, whether his death happened there or elsewhere.
2. When there is property of the decedent within that county which remains unadministered, he not being a resident of the state at the time of his death in whatever place the death happened.
3. When the application was first made in that county, if the jurisdiction as defined in the preceding subdivision or in section 6180 is in two or more counties.

§ 6180. Appointment of a guardian. The jurisdiction to appoint a guardian is in the county court of the county in which the ward resides or in a case relating exclusively to his estate in the county where the property or some part thereof is situated. But the provisions of this chapter have no application to the appointment of a guardian for the special purpose of maintaining or defending the interests of a minor or other party in an action or proceeding in any court of competent jurisdiction.

§ 6181. County includes other territory, when. For the purposes of the two preceding sections, a county is deemed to extend to all adjoining territory situated within the same judicial district which is not embraced in or attached to any organized county.

§ 6182. Judge disqualified. Procedure. When the judge of the county court having jurisdiction as defined in sections 6178 and 6179 is disqualified from acting in a case for any cause specified in section 6188 of this code, the county court of the county to which

the same may be transferred has also jurisdiction, but can do no act in the exercise thereof until the transfer has been ordered.

§ 6183. Jurisdiction, how obtained. The court obtains jurisdiction in each case by the existence of the jurisdictional facts prescribed by statute and the presentation of a petition setting forth the facts; and may thereupon obtain jurisdiction of the persons interested by their appearance or by the process of citation.

§ 6184. Jurisdiction extends over state, when. Jurisdiction once duly exercised in a case by a county court is coextensive with the state, and, except as otherwise specially prescribed by law, excludes the subsequent exercise of jurisdiction by another court over the same case, or any of its incidents; and all further proceedings to be taken in a county court in relation to the same matter or estate must be taken in the same court.

§ 9, Prob. C. am'd.

§ 6185. Objection to decree. Jurisdiction. Proceedings. How taken. An objection to a decree or order of a county court for an erroneous determination of any fact necessary to jurisdiction or for a defect or omission in such decree or order, or in the pleadings or other papers on which it was founded, or the finding or statement of a jurisdictional fact which actually existed or for a failure to take any intermediate proceeding prescribed by law is available only on direct application to the same court or on appeal.

§ 6186. Proceedings, how construed. The proceedings of a county court in the exercise of its jurisdiction are construed in the same manner and with like intendments, as the proceedings of courts of general jurisdiction, and to its records, orders and decrees there is accorded like force, effect and legal presumptions as to the records, orders, judgments and decrees of courts of general jurisdiction.

§ 2, Prob. C. am'd.

§ 6187. County Courts, authority and power of. The county court has authority and power in each case:

1. To issue citations, subpoenas and other process under the seal of the court to any part of the state, and enforce obedience thereto or return thereof according to law.
2. To postpone from time to time for proper cause a hearing or other proceeding.
3. To compel the attendance of a party or other person whenever his presence is lawfully required.
4. To restrain by order an executor, administrator or guardian to whom a citation or other process has been duly issued from acting as such until the further order of the court.
5. To require by order an executor, administrator, guardian or other person subject to the jurisdiction of the court to perform any duty imposed on him by statute or by the court under the authority of the statute.
6. To maintain order and decorum during the sittings of the court; and to punish any person for a contempt of court where the district court might punish him for a similar contempt and in like manner.
7. To open, vacate or modify a decree or order of the court for fraud, mistake, newly discovered evidence or other sufficient cause.
8. To enter as of a former time a decree or order of the court for the purpose of correcting a mistake or supplying an omission.

9. To complete all unfinished business and certify and sign with the date of so doing all papers or other records previously left uncompleted or unsigned and to make and certify transcripts of all records of the court.

10. With respect to any matter not expressly provided for in this code, to act as nearly as may be according to the code of civil procedure, and to exercise such other incidental powers as are necessary to carry into effect the powers expressly conferred.

ARTICLE 3.—TRANSFER OF CASES IN THE COUNTY COURT.

§ 4. Prob. C.
am'd.

§ 6188. **Cases, how transferred.** A case may be transferred by order of the county court in which it is pending for either of the following causes:

1. When the judge is a party or claims to have an interest actual or contingent in the estate to which the case relates.

2. When he is or has been attorney for a party in some proceeding therein.

3. When he is related to a party by consanguinity or affinity within the fourth degree.

4. When the case involves the proof of a will to which the judge was a subscribing witness or witness examined or necessary to be examined, or in which he is named as executor unless he declines to act as such.

§ 6189. **Transfer of case, when made.** A transfer must be made upon the presentation of the first petition in the case or at the time when the parties are cited to appear thereto if the cause is then known to exist, or, if not, as soon as may be after the existence of such cause is discovered; and no objection to a decree or other act of the court for any of the causes specified in the preceding section is in any manner available except by application for such transfer within the time herein prescribed.

§ 6190. **Summary transfer, when.** Such transfer may be ordered summarily upon facts within the knowledge of the judge or upon the affidavit of a party, setting forth particularly one or more of the cases enumerated in section 6188 according to the facts, and such further facts as may be necessary under the provisions of the last section and demanding a transfer. The facts set forth in such affidavit shall be taken as true unless controverted by affidavit. The order for a transfer must direct that the case be transferred to the county court of some other county having jurisdiction by the provisions of section 6179 or section 6180 of this chapter or if there is none such, to that of the county most convenient to the parties.

§ 5. Prob. C.
am'd.

§ 6191. **Transfer, effect of.** When a transfer has been made, all further proceedings in the court making the order must be suspended and unless an appeal is taken, the original papers and a transcript of the docket and journal entries must be certified and transmitted within thirty days to the judge of the county court designated in the order, who shall record the proceedings anew and thereafter proceed as if he had jurisdiction of the case from the beginning.

ARTICLE 4.—RECORDS OF THE COUNTY COURT.

§ 6192. **Records, what constitute.** The records of each county court consist of the original papers in the cases adjudicated or pending therein and the books prescribed in the next section.

§ 6193. Records to be kept. There shall be kept in each county court the following books of record:

1. A journal, in which there shall be entered under the proper dates and in the order in which the transactions take place, respectively, a brief statement of the nature and object of each proceeding; a minute or statement of each act of the judge or of the parties therein, except the filing of a paper; a minute of each hearing or postponement; the facts appearing by the return to each process or mandate issued from the court; and each decision or direction given by the court in the progress of a proceeding and such other matters as are specially required to appear of record; but these provisions do not require a minute of the issuance or return of a subpoena or a statement of the evidence or any particulars relating to the introduction of testimony, except the names of the witnesses sworn and examined. Every order affecting a substantial right or directing the performance of a duty and every final order or decree shall appear thereon in full with the signature of the judge attached; but as to other matters, a minute of his approval dated and signed by him at the close of the entries for each day is sufficient.

2. A docket in which there shall be set apart at least two pages to each case by entering thereon its title and number, underneath which there shall be entered the following particulars relating to that case:

On the first page, a register containing the name of each party to any proceeding therein; each guardian or other person having the custody of a party who is under any legal disability; each special guardian appointed for a party and each attorney appearing for a party; together with the post office address of each and a word or words describing his relation to the case, if a party, as for example "heir," "devisee," or "ward," or his relation to the party as "attorney," or otherwise, according to the fact. The name of the attorney, guardian or custodian must immediately follow that of the party whom he represents; and there shall be left sufficient space below the name of each party to admit of such entries from time to time as occasion requires. New parties including persons to whom letters testamentary, of administration or of guardianship are issued shall be registered in like manner. In the margin on the left there shall be entered opposite the name of each special guardian or attorney the date of his appointment or appearance and opposite the name of each new party, the date on which he became a party; and in the margin on the right, when the relation of a party, attorney or other person ceases, a minute to that effect.

On the page following, a chronological index or minute of all the proceedings in that case from the beginning until the final disposition thereof, including a brief statement of the object of each proceeding and a minute of the filing of each pleading or other paper, each preliminary act of the court or judge, the issuance and return of each citation or other process except a subpoena, each hearing or postponement, each intermediate or final order or decree and each act done to carry the same into effect. There shall be entered in the left hand margin the date of each transaction and in the margin on the right, a reference to the book and page of the journal or other record, where the same appears.

3. A record in which there shall be transcribed in full all wills which are admitted to probate and all bonds of executors, administrators and guardians, which are accepted and approved; and all

letters issued to executors, administrators and guardians: but wills may be recorded in a separate book.

4. There shall be appended to each docket a numerical index referring to each case by number and title, containing the number of each case progressively, its title and the number of the page on which it is docketed; also an alphabetical index arranged with reference to the first letter of the family name in the title of each case and containing, in addition to each title, the number of the page on which the docket entries begin. When the cases are not all docketed in one book, there shall be kept in a separate book a general index, both numerical and alphabetical, of similar character, referring in each instance to the book and page of the docket. The general index shall include all cases heretofore commenced in the county court or appearing on the records of the probate court, conforming in relation thereto as nearly as may be to the above requirements.

§ 6194. **Docket, form of.** The docket prescribed by the preceding section shall be substantially in the following form:

Estate of Richard Roe.		
Register.		
	Jane Roe, wife, Athens, N. D.	
June 20, 1894.	Mary Roe, minor heir, Athens, N. D.	Revoked Aug. 2, 1894.
Aug. 2, 1894.	John Bates, custodian, Athens, N. D.	
	Chitty, special guardian, Athens, N. D.	
	Coke, special guardian, Rome, N. D.	

Estate of Richard Roe.		
Proceedings.		
Proceeding for appointment of administrator.		
June 20, 1894.	John Chitty, Esq., is appointed special guardian for Mary Roe, minor, at her request.	
June 21, 1894.	Mary Roe, by her special guardian, filed petition for administration of said estate.	J. 185.
	Citation issued returnable Aug. 20, 1894.	

§ 6195. **Citation, how issued.** Before issuing a citation, the court shall if necessary, examine the applicant and other witnesses under oath concerning the correct name and post office address of each party to be cited and may issue a subpoena for that purpose. If he is unable after reasonable diligence to ascertain such name, the party may be designated by his relation to the decedent or otherwise, as nearly as may be. Each party and each guardian or attorney for a party, who appears in any proceeding must also be required to give his own name and post office address which shall be entered in the register accordingly and be taken as true thereafter until the court is notified of a change.

§ 6196. **Books to be numbered progressively.** When the docket, journal or record consists of more than one book, all books of the same name shall be numbered progressively from one upwards.

§ 6197. **Cases, to be numbered how.** For convenience in keeping the books of record the cases in each county court shall be numbered in a single and continuing series, beginning with one or with a number exceeding by one the highest number so employed before this code takes effect.

CHAPTER 3.

PARTIES AND PROCESS.

ARTICLE 1.—GENERAL RULES OF PROCEDURE.

§ 6198. **Parties in a case, who are.** The general parties in a case in the county court are the persons interested in the estate or other subject matter, and the executor, administrator or guardian thereof. They are likewise the parties who must be cited in each special proceeding in the case, unless the parties are specially prescribed, but for distinction the party who presents a petition in a special proceeding is known as the petitioner or claimant, and the parties to be cited are known as respondents. If a citation issues for an incidental purpose in the course of the administration, the only parties are those appearing or cited for such purpose.

§ 6199. **Substitution of parties, when.** When an heir or devisee dies or transfers an interest in the estate, his legal representative or successor in interest, grantee or assignee may be made a party in lieu of such heir or devisee; and when a party to a special proceeding dies or transfers his interest, while the same is pending, his legal representative or successor in interest may likewise be substituted at his own suggestion or at the request of another party. Such substitution may be made at any time by order of the court, and without notice when the facts are shown by the allegations of a pleading or affidavit.

§ 6200. **Persons interested may become parties.** Any other person interested in securing or preventing the relief sought in a special proceeding may, by leave of court, become a party and support or oppose the application or pray for affirmative relief consistent with the facts; but leave must not be granted unless his interest sufficiently appears; and this section shall not be construed to affect a right or interest of such person unless he so becomes a party.

§ 6201. **Special proceeding, how to become a party to.** When a statute provides that a person may present a petition or otherwise become a party in a special proceeding, an allegation of his interest in a pleading or affidavit is sufficient for that purpose although his interest is denied, unless he has been excluded from such interest by a decree of the court from which he has not taken an appeal.

§ 6202. **Citation gives jurisdiction. Form of.** The process by which the court obtains jurisdiction in each proceeding of the parties, who do not appear therein, is a citation addressed to such parties by name or other sufficient description, informing them of the petition or other application upon which it issued and the relief thereby claimed or the grounds of the order upon which it is issued and the direction therein given; and the time and place at which they are required to appear before the court to answer the same with such further particulars as may be specially prescribed by statute.

§ 6203. **Time for appearance.** The time for appearance must not be more than sixty days from the date of the citation and each citation must be addressed by the style of "The State of North Dakota," and contain the signature of the judge attested by the seal of the court.

§ 302, Prob. C.
am'd.

§ 302, Prob. C.
am'd.

ARTICLE 2.—SERVICE OF CITATIONS AND OTHER PAPERS.

§ 603, Prob. C.
am'd.

§ 6204. Citations and notices, how served. Citations and notices, issuing for service in any proceeding in a county court, must be served upon the parties personally or in some other mode as hereinafter prescribed.

§ 6205. Service on attorney or guardian, when. When a party on whom service is required has a guardian or attorney of record in the case, service must be made on the guardian or attorney and such service is deemed to be service on the party so represented: except that a citation must be served on a party represented by a guardian if more than ten years of age, as well as on the guardian.

§ 6206. Service by mail, when and how made. After a party has appeared or has been once cited to appear in a case, each citation or notice subsequently issued in the same case may be served by mail upon him or upon his guardian or attorney of record as prescribed by the last section. But service by mail is not sufficient when a citation requires a party to appear in person, or issues upon an application to revoke the probate of a will or set aside a decree awarding a final settlement or distribution, or when the court directs service in some other mode.

§ 6207. Service by publication, when. Service by publication may be substituted for personal service by a direction of the court authorizing such service, and designating a newspaper published at the county seat or some other convenient newspaper in which the citation or notice may be published, in either of the following cases:

1. When the party who is required to make or procure service or his attorney files an affidavit stating that he cannot obtain personal service on a person to be served, because he is unable to ascertain where such person may be found, he having no known place of residence within the state, if the court is further satisfied upon an examination as prescribed in section 6195 that the statements of the affidavit are true.

2. When it is established in like manner or appears upon the records in the case, that the person to be served is a nonresident of this state.

§ 6208. Mode of service indorsed on citation or notice. Every direction for service by publication or other direction given by the court respecting the mode of service must be indorsed on the citation or notice and when so given service must be made in accordance with such direction.

§ 6209. Personal service, how made. Personal service within the state or elsewhere may be made and proved in the manner prescribed by the code of civil procedure for the personal service of a summons.

§ 300, Prob. C.
am'd.

§ 6210. Service by publication, how made and proved. Service by publication is effected by printing and publishing the citation or notice to be served three times, once each week for three successive weeks in the newspaper designated in the order, and is deemed complete on the day of the last publication and may be proved by affidavit made as provided by section 5693 of the code of civil procedure.

§ 6211. **Service by mail, how made and proved.** Service by mail is effected by depositing in the post office a true copy of the citation or notice to be served, inclosed in a sealed wrapper postage paid and directed to the person to be served at his registered post office address; and is proved by the affidavit of any person having knowledge of the facts, or by a statement thereof in the journal when the mailing is done by the judge.

§ 6212. **Citation, when it must be served.** Unless otherwise specially prescribed by law, a citation issued upon a petition must be served at least twenty days before the time therein specified for appearance; every other citation must be served at least five days before the time specified for appearance; and each notice which refers to a future time must be served at least five days before the time so designated. When service is made by publication such time must be computed from the date of the last publication, and when service is made by mail there must be allowed in every instance an additional period of five days computed from the date of mailing.

§ 305, Prob. C.
am'd.

ARTICLE 3. — MANNER AND EFFECT OF APPEARANCE.

§ 6213. **Appearance, how made.** In a county court every party of full age, who has not been judicially declared incompetent to manage his affairs, may appear and prosecute or defend a proceeding in any case either in person or by an attorney regularly admitted to practice in this state, except when he is required to appear or otherwise act in person, pursuant to a special provision of this code; and is held to appear in each proceeding from the time when he has been duly cited to appear.

§ 6214. **Appearance by a minor, how made.** When a minor or a person who has been judicially declared to be incompetent to manage his affairs is a party, he must appear and act by guardian, except when he makes application for the appointment of a guardian; but if he is a respondent, the guardian cannot appear for him until he has been duly served with a citation unless the proceeding relates directly to his estate or he is a minor under ten years of age. If he has no guardian appearing for him, a special guardian must be appointed, as prescribed in the next section.

§ 6215. **Special guardian. Qualifications. How appointed.** A special guardian must be some capable and disinterested person appointed by order of the court with the written consent of the person appointed. Such appointment may be made summarily at any time upon the application of the incompetent party or a relative or friend of such party, for the purpose of commencing a proceeding or maintaining his interest in a pending proceeding; or without an application at any time after he has been duly cited to appear in any proceeding; or wherever in the course of a proceeding in which he is represented by a guardian the court has any reason to suppose that his interest requires the appointment of another guardian. A special guardian so appointed in any case is authorized to appear in the subsequent proceedings therein to which his ward is a party until the appointment is revoked.

§ 308, Prob. C.
am'd.

§ 6216. **Special guardian to qualify same as general guardian.** A special guardian must not receive any money or property belonging to the ward's estate, unless he qualifies in the same man-

ner as a general guardian; and a guardian, general or special, cannot act in any matter in which his interest is adverse to that of the ward.

§ 311, Prob. C.
am'd.

§ 6217. **Appearance of guardian, effect of.** Subject to the foregoing restrictions and in the absence of fraud, collusion or mistake, prejudicial to the interest of the ward, the appearance in his name of his general or special guardian by leave or direction of the court in any proceeding is deemed to be the appearance of the ward, and has the same effect in that proceeding as if he was competent to appear in person.

§ 6218. **Appearance, how effected.** An appearance in any proceeding is effected by giving notice of the appearance in open court either orally or in writing or by pleading, or making application therein to the court for an order or direction of any kind.

§ 6219. **Appearance, notice of all proceedings.** A party who appears or is held to appear as hereinbefore prescribed is deemed to have knowledge of each postponement and all other acts done in the course of the proceeding from the commencement until the final disposition thereof without further notice except such as is imparted by the records of the court.

ARTICLE 4. — COMMENCEMENT OF A SPECIAL PROCEEDING AND THE PLEADINGS THEREIN.

§ 6220. **Special proceeding, how commenced.** A special proceeding in the county court is commenced by the voluntary appearance and pleading of all the parties, or by the presentation of a petition by a competent party and the issuance of a citation to the other parties; and no proceeding so commenced shall be dismissed for any cause except a failure of proof.

§ 6221. **Proceeding by citation. Time to plead.** When the proceeding is commenced by citation the respondents shall plead at the time when they are cited to appear unless the court allows further time; but a party in default may be allowed to plead at any time before the hearing is concluded on such terms as the court deems just.

§ 6222. **Pleadings in a special proceeding.** The pleadings in a special proceeding in the county court are the petition and the answer or cross petition of a respondent. Several parties may unite in a pleading when, as between themselves, their respective interests are not adverse. All pleadings must be filed in writing and every pleading except the answer of a special guardian must be verified as prescribed in the code of civil procedure.

§ 6223. **Petition, contents of.** A petition must set forth the facts which authorize the special proceeding, entitle the petitioner to relief therein and show the relation of the other parties to the estate or matter in question according to the provisions of this code which relate to that proceeding, with a prayer for the relief which the petitioner claims therein.

§ 6224. **Answer, contents of.** The answer may admit or deny the allegations of the petition or any material fact therein stated and allege new matter of defense to the whole or any part of the relief claimed.

§ 6225. **Pleadings, requisites of.** The formal requisites of a pleading are as follows:

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

2. The statement of facts.

3. The prayer for relief; but no prayer is necessary in an answer except for the purpose of claiming affirmative relief.

4. The signature of the party or his attorney or guardian.

5. The verification.

§ 6226. **Issue, how raised.** An issue arises upon each of the following allegations of a pleading:

1. Upon each averment in the petition of the execution of a will, or of the death of any person when necessary to jurisdiction, or of any fact alleged as cause for setting aside a decree or order of the court, although not controverted by answer.

2. Upon every other material allegation of a petition which is controverted by answer.

3. Upon every fact alleged in the answer except an admission of a fact alleged in the petition.

ARTICLE 5.—POSTPONEMENT, HEARING AND TRIAL.

§ 6227. **Respondent, when a new citation issues.** When a respondent fails to appear at the time specified in a citation the court must ascertain from the proofs of service, whether he has been duly cited to appear; and unless the service is deemed sufficient a new citation must be issued to such party or parties and the hearing must be postponed until the time therein specified.

§ 6228. **Postponement, when granted or ordered.** After issue is joined by the pleadings either party is entitled to a postponement for a reasonable time to procure the attendance or deposition of a witness or otherwise prepare for the trial. A reasonable postponement may also be granted at any time to allow a party to plead, or for any other meritorious cause. A postponement may also be ordered because the judge is sick or otherwise engaged, or because he desires time in which to prepare his decision.

§ 6229. **Postponement, how ordered.** A postponement may be ordered without a written application and an adjournment of the court from time to time in the progress of a hearing operates as a postponement without a formal order. Every postponement must be to a day certain; but an indefinite postponement or a failure to resume the hearing at the appointed time by reason of the absence of the judge or for other cause does not invalidate or otherwise affect any act previously done, but operates only as a postponement of the hearing until further notice.

§ 6230. **Court to try issues, when.** After the respondents have had an opportunity to plead the court must try the issues, hear the allegations and proofs of the respective parties, and make such decision upon the facts thereby found as justice and equity requires. Every issue prescribed by section 6226 of this chapter must be tried upon the testimony of witnesses sworn and examined in open court or taken in the form of deposition according to the rules of evidence

§ 307, Prob. C. am'd.

applicable in a civil action except when the same are modified by the following provisions of this article.

§ 6231. **Court, powers of.** The court may examine the parties and other witnesses and inquire into all the facts and circumstances as to any material fact, although no issue is joined thereon: and may also in its discretion refuse to hear the deposition of any witness residing within the state, who is competent and able to appear and give testimony in person, unless satisfied that the necessary expense or inconvenience of procuring his attendance ought not to be incurred.

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

ARTICLE 6.—DECREES AND ORDERS.

§ 299, Prob. C
am'd.

§ 6233. **Decision in a special proceeding contains what.** A decision of the county court upon the pleadings and proofs in a special proceeding shall state the material facts found by the court and award relief consistent therewith and with such directions as may be necessary or proper to give effect to the same and is a final determination of the rights of the parties so adjudicated, styled indifferently a decree or final order.

§ 6234. **Decree, to contain what.** A decree which settles an account must intelligibly refer to a statement of the account on file and contain a summary thereof as settled.

§ 6235. **Order, how obtained.** Every direction entered of record or given in writing by a county court and not included in a decree is styled an order. Each order must be founded on a written application, unless the court is expressly authorized to make the same at its discretion or otherwise on its own motion. Each application for an order is styled a motion, but when the facts relied on as ground of a motion do not appear of record they must be set forth by affidavit.

§ 6236. **Order, contents of.** An order based upon facts, within the knowledge of the judge or upon facts proven by the testimony of a witness, must contain a statement or recital of the existence or proof of the facts which authorize the order. But when an order is made upon matter of record, a reference to an affidavit, pleading or other record upon which such facts appear is sufficient.

§ 6237. **Order, may be given when.** An order prescribing the mode of serving a citation or appointing a special administrator or appraiser, a restraining order, an order requiring a return to be made, or an account to be rendered, or any peremptory or other order which the court is expressly authorized to make without a previous application, may be given at any time when a motion for such order is made or presented.

§ 6238. **Order, persons affected to be cited.** Before an order can be given upon a motion which does not come within the provisions of the last section, all persons who will be affected by the order must be cited to appear and be given an opportunity to defend against the same, but when a motion is presented in the course of a pending proceeding it is not necessary to cite any person who at the time of presentation appears or is held to appear in such proceeding.

§ 6239. **Objections to an order, how taken.** At any hearing upon a motion, or in pursuance of a citation issued upon an order, any objection arising upon the facts set forth in the motion or order or otherwise appearing of record may be presented either orally or in writing; but no issue of fact arises unless the respondent answers by affidavit, controverting a material fact set forth as ground of the motion or order or alleging new matter in defense, justification or excuse. When an issue is so presented it may be submitted by consent of the parties upon their respective affidavits, which shall thereupon be treated as depositions; otherwise such issue must be tried in the same manner as the issue specified in section 6226 of this chapter.

§ 6240. **Costs, when awarded.** Costs may be awarded in a decree or order as follows:

1. When there is no contest, the petitioner if successful is entitled to costs payable out of the estate.

2. When there is a contest, the successful party is entitled to costs payable by the adverse party or out of the estate as justice requires; but if the opposing parties are each in part successful, the award of costs is in all respects in the sound discretion of the court with the limitations hereinafter prescribed.

3. Costs cannot be awarded against an executor, administrator or guardian, personally, unless incurred by his neglect or misconduct.

4. Costs payable out of the estate may be awarded in favor of an executor, administrator or guardian, acting in good faith although unsuccessful.

5. A reasonable sum payable out of the estate must be awarded in favor of a party appearing by a special guardian as compensation for his services; but for the benefit of the estate the court may include a like sum in the amount awarded against an adverse party, or direct the same to be deducted in the final distribution from the share of the party so appearing.

6. Except as provided in the preceding subdivision, the sum awarded as costs in favor of a party must not exceed the amount of his expenses actually and necessarily incurred in procuring the service of process and the attendance of his witnesses or their depositions, and must be determined by the court upon an itemized statement of the expenses so incurred, verified by the affidavit of the party or his attorney and presented at or before the announcement of the decision.

§ 6241. **Decree or order for money, how enforced.** A decree or final order, which directs the payment of a sum of money by a party personally, may be enforced by an execution against his property issued by the judge and made returnable to the county court, and must require the officer to apply the money thereupon collected in accordance with the order or decree. In other respects the process and mode of collection shall conform to the provisions of the code of civil procedure relating thereto, a decree being for that purpose regarded as a judgment.

§ 6242. Decree or order to perform any act, how enforced. A decree or order, which requires or prohibits the performance of any act other than the payment of money by a party or other person, may be enforced by serving a certified copy of such order or decree personally on the party or person who is required thereby or by law to obey it and by punishing him for a contempt of court if he refuses or willfully neglects to obey it. A decree or order, which directs the payment or delivery of money to an executor, administrator or guardian entitled to receive it or directs the payment or delivery by an executor, administrator or guardian of money by him received by virtue of his trust, may be enforced in like manner.

§ 6243. Punishment for contempt does not bar action on bond. The punishment of a delinquent for a contempt or the levy of an execution upon his property as prescribed in the last two sections does not bar or suspend an action against him or the sureties on his bond in relation to the same matter, or otherwise affect such action as respects any sum remaining unpaid.

ARTICLE 7. — MISTAKES, OMISSIONS AND AMENDMENTS.

§ 6244. Amendments to process or pleadings allowed. No process, return, pleading, order, decree or other proceeding in a county court shall at any stage be disregarded, dismissed, arrested, vacated, revoked or reversed for any defect or want of form; but the court shall proceed and determine always according as the right of the matter shall appear without regarding any such defect or want of form and may amend the same or direct an amendment at its discretion.

§ 6245. Court may amend process, when. A county court may at any time on motion of a party amend its process by correcting a mistake or supplying an omission in any respect, when the defect has not prejudiced and the amendment will not injure the party to or against whom such process was issued; and may in like manner permit a return or other intermediate proceeding to be amended in accordance with the facts.

§ 296, Prob. C.
am'd.

§ 6246. Amendments to pleadings for mistake allowed. A county court may also on motion of a party and in furtherance of justice at any time permit such party to amend any pleading or motion by adding or striking out the name of a party or by correcting a mistake in the name of a party or a mistake in any other respect or by inserting other allegations material to the case or by conforming the allegations to the facts proved. And no decree or order shall be vacated, revoked or reversed for an omission in the findings of any material fact which actually existed or for the non-averment of any fact in a pleading or other paper if the existence of such fact is established when the objection is taken; but the court shall amend the defect or direct an amendment as the circumstances require.

§ 6247. Amendment, costs allowed when. Every amendment authorized by this article may be made without prejudice to any act previously done to take effect as of the date of the original proceeding, but when an amendment is made in any proceeding after a decision is rendered costs may be awarded against a party in whose favor the amendment operates as the court shall deem just and proper.

§ 6248. **Hour intended.** Whenever a future day is specified in a citation, notice or order for any purpose, and no particular hour is specified the time intended shall be taken to be the hour of ten o'clock in the forenoon of the day named.

ARTICLE 8.—REHEARINGS.

§ 6249. **Rehearing is what.** A rehearing is a re-examination of the facts involved in a decree or order upon grounds set forth in a motion or petition to open and vacate or modify the same or some part thereof.

§ 6250. **Rehearing, for what causes granted.** A rehearing may be granted for either of the following causes:

- 1. Mistake, inadvertence, surprise or excusable neglect of the party making the application.
- 2. Any irregularity in the service of process or any fraud or misconduct of the prevailing party or his attorney or agent, or any abuse of discretion on the part of the court, which prevented the applicant from appearing or maintaining a material issue on his part at the former hearing.
- 3. Newly discovered evidence material to the issue which could not with reasonable diligence have been produced at the former hearing by the party making the application.
- 4. The nonexistence of any fact necessary to jurisdiction.

§ 6251. **Rehearing, application for.** An application for a rehearing may be made by motion or petition according to the mode in which the original application was made, and the parties interested must be cited accordingly. But every application upon any ground specified in the first subdivision of the preceding section must be made within thirty days from the date of the order or decree, and every application made upon grounds specified in the second and third subdivisions must be made within one year from the date of the decree or order to which it relates.

§ 6252. **Application for a rehearing, must show what.** In addition to one or more of the foregoing causes every application for a rehearing must set forth each material issue which the applicant expects to maintain or designate the same by reference to his former pleading and no other issue can be tried. The causes so alleged and the issues so presented may be controverted as in other cases; and after hearing the allegations and proofs of the parties the court shall grant or deny the application as justice and equity require.

§ 6253. **Application granted. Duty of court.** If the application is granted the court must make a decree or order vacating the former decree or order, or revoking so much thereof as may be necessary and awarding such further relief as the facts may justify.

ARTICLE 9.—APPEALS.

§ 6254. **Appeals, who may take and from what.** Any party or other person specified in the next section who deems himself aggrieved may appeal, as prescribed in this article, from a decree or from any order affecting a substantial right made by a county court to the district court of the same county.

§ 312, Prob. C.
am'd.

- § 314, Prob. C. am'd. **§ 6255. Appeal, parties to.** Each person who was a party to the proceeding in the county court and each other person, who has or claims in the subject matter of the decree or order, a right or interest which is affected by an appeal must be made a party to the appeal.
- § 315, Prob. C. am'd. **§ 6256. Appeal, how taken.** To effect an appeal the appellant must cause a notice of the appeal to be served on each of the other parties and file such notice with the proofs of service, and an undertaking for appeal in the county court within thirty days from and after the date of the order or decree; but when the party taking an appeal files such notice and announces the filing orally in open court at the time when the decision is given no other or further service of the notice is necessary.
- § 319, Prob. C. am'd. **§ 6257. Appeal not effected, when.** An appeal from an order which directs the payment of a fine as a punishment for a contempt is not effected, unless the amount of the fine is also deposited with the county judge within the prescribed time to abide the order of the appellate court.
- § 331, Prob. C. am'd. **§ 6258. Appeal by executor, administrator or guardian.** An executor, administrator or guardian may appeal without filing an undertaking from a decree or order made in any proceeding in a case in which he has given an official bond; and when he appeals in that manner the bond stands in place of such undertaking. A special guardian may appeal without filing an undertaking although he has not given bond, but the appeal will not operate as a stay unless taken from an order which grants or refuses a transfer of the case.
- § 328, Prob. C. am'd. **§ 6259. Appeal, extension of time.** When the appellant seasonably and in good faith serves a notice of appeal on some of the parties, but through mistake or excusable neglect fails to obtain service on all, or in like manner omits to do any other act necessary to perfect the appeal or effect a stay, the county court upon proofs of the facts by affidavit may, in its discretion, extend the time for perfecting the service or other act and permit an amendment accordingly upon such terms as justice requires.
- § 6260. Parties to an appeal, how brought in.** A party specified in section 6255, who was not served with notice by reason of the fact that his interest or claim did not appear upon the records of the county court at the time when the appeal was taken, is deemed to have been duly served from the time when he appears in the district court for any purpose connected with the appeal, or he may be brought in by order of the district court on such notice as the court shall prescribe.
- § 316, Prob. C. am'd. **§ 6261. Appeal on question of law, how perfected.** For the purpose of taking an appeal on questions of law alone, the notice must contain a statement to that effect, and specify the errors in law which the appellant intends to rely on as grounds of the appeal and the time and place at which the appeal will be brought on for trial. Every other notice of appeal is sufficient which designates the party who appeals and the order or decree from which the appeal is taken and the intermediate orders if any upon which the appellant desires a review. And every appeal must be held to have been taken upon the facts and matter in law generally, unless the notice clearly indicates an intention to appeal on questions of law alone, but the appellant may by his notice restrict the appeal to any specific direction or award contained in a decree, if the issue upon which the same depends

can be separately tried and determined without prejudice to any other part of the decree.

§ 6262. Specification of errors on appeal. A specification of errors may contain a reference to each particular error appearing of record in the decree or order in the proceedings on which it is founded to which the appellant objects without giving any reason for the objection and no other form of exception is necessary.

§ 6263. Undertaking on appeal. Stay. An undertaking on appeal must be executed in favor of the appellees in such sum as the county court shall prescribe by the appellant or his agent or attorney in his name and sufficient sureties approved by the judge, to the effect that the subscribers will pay to the parties entitled thereto all costs of the appeal that shall be awarded against the appellant by direction of the district court not exceeding the sum therein stated. But the execution or enforcement of the decree or order appealed from shall not be stayed, unless the instrument contains a further undertaking to the effect that the subscribers will also pay all damages which the appellees or any of them shall sustain by reason of the appeal or a separate undertaking to that effect is executed and filed in like manner.

§ 317. Prob. C.
am'd.

§ 6264. Undertaking, amount of. The sum prescribed in an undertaking for costs must not be less than one hundred dollars. The sum prescribed in an undertaking for damages shall be such further sum as the judge deems sufficient, and to aid him in determining the same or the sufficiency of the sureties, the judge may examine the sureties and other witnesses under oath. After an appeal is perfected the district court may by order require the appellant to give a new undertaking in a larger sum or with other sureties when the sum specified in the original undertaking is deemed insufficient or a surety is found to be insolvent, has removed from the state or is of doubtful financial responsibility, and unless the order is complied with the appeal may be dismissed or the stay dissolved as the case requires.

§ 320. Prob. C.
am'd.

§ 6265. Undertaking, obligations of. The prescribed undertaking for the payment of damages creates an obligation on the part of the principal and sureties executing the same to compensate each of the appellees for all pecuniary loss and injury which he shall sustain in consequence of the appeal respecting each and every right or claim which was determined or enforced in his favor by the decree or order from which the appeal is taken so far as the same shall be affirmed or otherwise sustained by the appellate court. When the decree or order directs the appellant or another party to pay or deliver money or other property, or to perform any other act to which the stay applied, all loss and injury sustained by an appellee in consequence of its detention from the time when the direction was given, or by reason of any failure on the part of the appellant or such other party to pay or deliver the same in accordance with the decision or direction of the appellate court, and in as good condition as at the time when he was directed to do so by the county court, is deemed to be sustained in consequence of the appeal. When the order directs the commitment of the appellant or another person for disobeying any order except for the payment of a fine, all loss and injury resulting from his disobedience is likewise deemed to have been suffered in consequence of the appeal. The obligation matures at the time of the decision in the appellate court, but no action can be maintained thereon until ten days thereafter.

§§ 315-319.
Prob. C.
am'd.

§ 6266. Appeal stays further proceedings, when. Except when there is an express provision to the contrary in this article, a perfected appeal stays the execution or enforcement of the decree or order appealed from until there has been a determination of the appeal or a dissolution of the stay in the district court; and an appeal from an order granting or refusing a transfer of the case likewise stays all further proceedings in that case. In other respects the decree or order of the county court remains unaffected until reversed or modified by direction of the appellate court.

§ 322, Prob. C.

§ 6267. Appeal does not stay probate of will or letters of administration, when. 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 when, in the opinion of the county judge manifested by an entry upon the journal, 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 a will or to pay or satisfy legacies, or to distribute the property of the decedent until the determination of the appeal.

§ 323, Prob. C.
am'd.

§ 6268. Appeal does not stay order for special administrator or revoke probate of will. An appeal does not stay the execution or enforcement of a decree or order which appoints a special administrator or revokes the probate of a will or suspends or removes an executor, administrator or guardian, or revokes his appointment.

§§ 324-327,
Prob. C.
am'd.

§ 6269. Transcript on appeal, judge perfects. When an appeal is perfected, the county judge must make and certify to the district court a complete transcript of the papers and other records upon which the appeal is taken or so much thereof as may be material together with the notice of appeal and proof of service, the undertaking and other matters of record relating to the appeal; and unless such transcript is delivered to the clerk within ten days, the district court may on motion of any party interested require and compel him to make and certify the same and may in like manner require him to amend the transcript as often as may be necessary or to certify and send up a will or other written instrument in its original form. When all the proofs upon which the court acted appear in the transcript the certificate shall so state.

§ 6270. Appeal docketed in district court, when. Upon the delivery of such transcript and payment of the clerk's fees, the appeal must be docketed in the district court and placed on the calendar of causes for trial according to the date on which it was perfected and without a notice of trial or note of issue at the next term convening, not less than ten days after the taking of the appeal, and must be disposed of accordingly during the term, unless sooner disposed of in pursuance of the provisions of the next section.

§ 6271. Appeal on questions of law. Time of hearing. When the appeal is taken upon questions of law alone, the time and place of hearing specified in the notice of appeal may be any time and place at which an issue of law may be tried in the district court, and a hearing may be had accordingly; provided, however, that such time shall not be less than ten days after the service of the notice, nor later than the first day of the term specified in the preceding section. Upon a failure to obtain a hearing a new notice of the time and place

of hearing may be given as often as may be necessary, and the appeal may, notwithstanding any such notice, be brought to a hearing at any time by an appellee upon a like notice served on the appellant or his attorney of record in the county court.

§ 6272. Appeal to be dismissed, when. If the transcript is not certified to the district court on or before the second day of the term designated in section 6270 and the appellant does not make application for an order requiring the same to be certified forthwith or if the appeal has not been sooner disposed of and the appellant fails to do any act necessary in order to have the same docketed and brought upon the calendar on or before the second day of such term, any appellee may have the same so entered by order of the court upon the production of a certified copy of the decree or order appealed from and the notice of appeal and thereupon the appeal shall be summarily dismissed with ten dollars costs to such appellee, unless the appellant satisfactorily excuses his default and forthwith pays such costs.

§ 6273. Appeal dismissed affirms decree or order. A dismissal of an appeal by order of the district court in pursuance of any provision of this article is in effect an affirmance of the decree or order appealed from.

§ 324, Prob. C.
am'd.

§ 6274. Powers of district court on appeal. At a hearing in the district court on an appeal taken upon questions of law alone the decree or order of the county court shall be reviewed only so far as may be necessary and with a view to correct errors appearing upon the record which injuriously affect a right or claim of the appellant and are specified in the notice of appeal; but when a specification relates to a discretionary award or direction given upon facts shown by the record, the district court has the same discretion that the county court had. Each specification may be overruled or sustained according as the right of the matter appears and the court shall give its decision accordingly, affirming or reversing the decree or order appealed from or reversing in part and affirming as to the remainder, with such directions as may be necessary or proper respecting the decree or order to be entered in the county court.

§ 325, Prob. C.
am'd.

§ 6275. Questions of fact tried de novo. When an appeal is taken generally, all the issues must be tried and determined anew in the district court and the court must hear the allegations and proofs of the parties and determine all questions of law and fact arising thereon according to the mode of trying similar issues originating in that court, except that an issue involved in the probate of a will and issues arising upon a petition for the allowance of a claim or demand for money only must be tried according to the mode of trying issues to a jury if a jury is demanded. When the appeal is taken from a decree or final order, the court may before trying the issues review any intermediate order specified in the notice of appeal, which materially affected the issues and vacate the same or otherwise make such order as the county court ought to have made. And upon every appeal taken generally the court has the same power that the county court had to permit or direct a pleading to be filed or otherwise amend the issues and try the same accordingly, but in other respects, when the proofs on which the county court acted were submitted in the form of affidavits or otherwise appear of record, the appeal must be determined upon the certified transcript.

§ 326, Prob. C.
am'd.

§ 6276. District court findings on appeal. A decision of the district court upon the facts must designate the issues tried and contain the material facts found by the court, or the substance of the verdict returned by the jury, as the case may be, and the direction of the court thereon affirming the decree or order from which the appeal was taken generally, or reversing the same or a distinct part thereof as justice requires and as to any or all of the parties, with specific directions respecting the decree or order to be entered in the county court.

§ 332, Prob. C.
am'd.

§ 6277. Reversal of decree does not affect lawful acts. The reversal of a decree or order of the county court for any cause except for want of jurisdiction does not affect the validity of any act otherwise lawfully done in pursuance of the order or decree, and in the course of the administration by an executor, administrator or guardian while the appeal is pending.

§ 329, Prob. C.
am'd.

§ 6278. Costs, payable how. The costs of an appeal shall be settled and determined by the district court agreeably to the provisions of section 6240 of this chapter except that like fees and disbursements may be allowed as in other cases in that court. The amount of costs so allowed shall be stated in the order or decision which determines the appeal, with a direction specifying the party in whose favor and the party against whom the same shall be awarded by the county court. If the appellant is required to pay costs, the amount thereof shall be awarded by the county court jointly against him and the sureties on his undertaking as prescribed in the next section without an express direction to that effect.

§ 330, Prob. C.
am'd.

§ 6279. Decision on appeal. Enforcement of the decree. Each order or decision of the district court which dismisses or determines an appeal and each preliminary order which affects the merits must be given in writing and filed with the clerk and by him entered of record, after which the clerk shall attach thereto the original of each paper filed by the parties in the district court and each paper certified to that court in the original form and certify and transmit the same without delay to the county court there to become part of the record: but when a stay is granted or effected in the district court, they shall not be transmitted until the stay has expired. Each order or decision so transmitted shall be immediately entered in the journal and a decree or order as the case requires shall likewise be entered by the county court in conformity to the directions of the appellate court and be enforced in the same manner as other decrees or orders of the county court.

ARTICLE 10. — APPROVAL OF UNDERTAKINGS AND BONDS.

§ 331, Prob. C.
am'd.

§ 6280. Bonds, justification and approval of. Every surety in a bond or undertaking prescribed by this code must make affidavit in connection with the instrument to the effect that he is a resident and freeholder of this state, and is worth the sum specified in the instrument in property within the state over and above all his debts and liabilities and property exempt by law from execution. But when there are more than two sureties each may state in his affidavit a sum less than that so specified, if the total amount stated in their affidavits is double the amount of the bond or undertaking, and before approving such sureties, the court must also be satisfied of the truth of their affidavits and may require them to appear before

him and examine them under oath and hear the testimony of other witnesses respecting the matters therein stated or any other fact affecting their financial responsibility.

§ 6281. **Money deposit in lieu of sureties.** In lieu of the sureties required in an undertaking for costs prescribed by this code, the party giving the same may deposit with the county judge a sum of money equal to the amount of his undertaking to be applied by the court agreeably to the provisions of the instrument in payment of any costs thereafter awarded against him, or restored to him after he is exonerated from such payment as the event shall determine.

§ 6282. **Bond, approval to be indorsed.** When a bond or undertaking is approved, the judge shall indorse his approval thereon, and file and preserve the instrument in his office. Except when otherwise specially provided, all bonds and undertakings in anywise required by the provisions of this code shall run to the state of North Dakota as nominal payee, and an action may be brought and maintained on any such bond or undertaking by and in the name of any person injured by any violation of the provisions thereof.

CHAPTER 4.

SPECIAL PROCEEDINGS FOR THE PROBATE OF WILLS AND OTHER PURPOSES.

ARTICLE 1.—PRODUCTION AND CUSTODY OF A WILL.

§ 6283. **County judge opens will and gives notice.** Every county judge, having the custody of a will or to whom a will is delivered, must after the death of the testator publicly open and examine such will and file the same in his office and give notice thereof to the persons interested in its provisions or deliver such will to the county judge having jurisdiction of the case. § 700, Civil C. am'd.

§ 6284. **Custodian to deliver will. Liability for failure.** Every other person having the custody of a will must immediately after receiving knowledge or information of the death of the testator deliver the same to the judge of the county court having jurisdiction of the case; and if he neglects to perform that duty he shall be liable to each and every person interested in the will for all damages caused by such neglect. § 10, Prob. C. am'd.

§ 6285. **Compulsory production of will, when.** When a party makes affidavit that any person has possession of a will which he neglects or refuses to deliver as prescribed in the last section, the county court may cite him to appear forthwith or at any future time in its discretion, and upon his appearance may examine him under oath and compel him to make a full disclosure in relation to such will. If it appears from his examination or from the testimony of other witnesses that he has any will of the decedent in his possession or under his control, he must be ordered to deliver the same to the court and may be committed to the jail of the county until he complies with the order. § 14, Prob. C. am'd.

§ 43, Prob. C.
am'd.

§ 6286. Limitations affecting probate of nuncupative will. Before a petition can be entertained for the probate of a nuncupative will a statement of the testamentary words or other substance in writing, verified by one of the witnesses within thirty days after they were spoken, must be delivered to the county judge having jurisdiction of the case. A delivery of such statement may be compelled in the manner prescribed in the last section and the statement must be filed in the same manner as a written will.

§ 6287. Original will, where filed. Every original will or statement of the substance or provisions of a will filed as prescribed in this chapter shall remain in the office of the county judge except when certified to the district court on appeal.

§ 6288. Will unexecuted until probated. A will, foreign or domestic, shall not be carried into effect until admitted to probate as hereinafter prescribed.

ARTICLE 2. — SPECIAL PROCEEDINGS FOR THE PROBATE OF A WILL.

§ 42, Prob. C.
am'd.

§ 6289. Wills, original and nuncupative, when probated.

A special proceeding for the probate of a written will may be commenced at any time within six years after the testator's death, or if the will is not made known within that time, then within one year after its discovery. A proceeding for the probate of a nuncupative will must be commenced within six months after the testamentary words are spoken.

§§ 11, 12, 38, 47,
Prob. C.
am'd.

§ 6290. Petition to probate, contents of. A petition for the probate of a will shall, in addition to the facts prescribed in section 6223 of this code, give a brief description of the will referring to the same as filed or allege that it has been lost or destroyed and set forth its provisions in full, and must set forth the state and county in which the property is situated and allege its probable value distinguishing between personal and real property and the probable yearly value of the rents, profits and income of the real property, and may pray for the appointment of the executor named in the will or allege his disability or refusal to act and pray for the appointment of a testamentary administrator. Such petition may be presented by any party designated in the next section or by a creditor of the testator.

§ 32, Prob. C.
am'd.

§ 6291. Citation issues to all interested. The parties who must be cited upon a petition for the probate of a will include the surviving husband or wife, if any, all the heirs of the testator, the devisees and legatees named therein, all persons in being who would take an interest in any portion of the property under the provisions of the will and the executor or executors, trustee or trustees named therein.

§§ 15, 16, Prob.
C.
am'd.

§ 6292. Service of notice to persons interested, when another will exists. When there is reason to suppose that there may be another will of the testator in existence or persons interested in the estate who are not named in the petition, the court shall annex to the names of the respondents to whom the citation is addressed the words "and all other persons interested" and direct service thereof by publication in addition to the service otherwise prescribed by this code.

§ 6293. Proceedings, when probate of will is contested.

§§ 22, 47.
Prob. C.
am'd.

A respondent may by his answer deny the execution of the will or the competency of the decedent to make the same or allege any facts showing that it has been revoked, or was procured by duress, menace, fraud, undue influence or other cause affecting its validity, and may at his election pray for the appointment of an administrator; or he may allege any ground of objection there may be to the appointment of the proposed executor or testamentary administrator and pray the appointment of some other person. He may also make his answer a cross petition and thereby allege the execution of another will by the decedent of earlier or later date, and pray that the same be admitted to probate instead of that proposed by the petition. A cross petition may be answered in the same manner as a petition; but if there are new parties interested in the will thereby proposed, who do not appear, they must before the trial be cited to appear as in other cases.

§ 6294. Executor to accept trust.

§ 13, Prob. C.
am'd.

Each person named in a will as executor shall state in his pleading whether or not he is willing to accept the trust.

§ 6295. Probate admitted, if no contest, how.

§ 20, Prob. C.
am'd.

The court may in its discretion grant the probate of a written will, unless the same is contested on the testimony of one only of the subscribing witnesses, if he testifies that the instrument was subscribed by the testator or was acknowledged and declared by him to be his will as prescribed by law, and that he believes that the testator was at the time of sound mind.

§ 6296. Will contested. Necessary witnesses.

§ 24, Prob. C.
am'd.

If the will is contested, all the subscribing witnesses to a written will or all the witnesses to the making of a nuncupative will, who are within the state and are competent and able to testify must be produced and examined before probate thereof can be granted.

§ 6297. Absence of subscribing witness to be explained.

Before the presence of a witness whose examination is required by either of the two preceding sections can be dispensed with, it must be shown by affidavit or other competent evidence to the satisfaction of the court that he is dead or disqualified or that he cannot after due diligence be found within this state or if within the state that he is so aged, sick or infirm that his presence cannot safely be required.

§ 6298. Lost will. Special requisites of proof.

§ 39, Prob. C.
am'd.

A will alleged to have been lost or destroyed shall not be admitted to probate unless proven to have been in existence at the time of the testator's death or fraudulently destroyed in his lifetime, nor unless the tenor of its provisions is clearly established by the testimony of at least two credible witnesses.

§ 6299. Evidence of the genuineness and execution of the will.

§ 24, Prob. C.
am'd.

Subject to the foregoing restrictions the court may admit the testimony of any competent witness respecting the execution of the will, the capacity of the testator or other material fact, and may also admit proof of the handwriting of the testator or of a subscribing witness and such other evidence as is admissible in courts of justice to establish or disprove written contracts in similar cases. The court shall also inquire particularly into all the facts and circumstances and may in its discretion require proof of the circumstances attending the delivery and possession of the instrument and shall grant the

probate if satisfied upon all the proofs of the genuineness of the will, the competency and freedom of the testator to make the same and the validity of its execution.

§ 23. Prob. C. am'd.

§ 6300. Probate of. Findings and conclusions of court.

The decree shall state whether the probate was contested and if so by whom, and shall contain the findings of the court upon the testimony and grant or deny the probate accordingly with proper directions, if the probate is granted, respecting the appointment and qualification of an executor or testamentary administrator. If there is a cross petition the decree shall in like manner grant or deny the probate of the will thereby proposed or grant administration as the case requires.

§ 26. Prob. C. am'd.

§ 6301. Certificate of probate. Upon granting the probate of a will the court must indorse on or attach to the instrument a certificate of the probate signed by the judge and attested by the seal of the court. If the will is nuncupative, such certificate shall be indorsed on or appended to the statement of the substance thereof on file.

§ 40. Prob. C. am'd.

§ 6302. Statement, when will lost. When probate of a lost or destroyed will is granted, the provisions thereof as established by the evidence must be distinctly stated in writing and certified by the judge accordingly and filed as other wills are filed.

§ 27. Prob. C. am'd.

§ 6303. Will or certified statement to be recorded. The will or the certified statement of the substance or provisions thereof as the case may be and the certificate of proof must be entered at length in the record of wills.

§§ 31, 32, 33, 34. Prob. C. am'd.

§ 6304. Contest when will admitted to probate, how.

After a will has been admitted to probate any person interested may contest the same on a rehearing for like causes and to the same extent as upon the former hearing or for any cause affecting the competency of the former proof and relief may be granted accordingly.

§ 37. Prob. C. am'd.

§ 6305. Probate conclusive, when. A decree which grants the probate of a will is conclusive if the court had jurisdiction, unless reversed on appeal or vacated on a rehearing applied for within one year saving to minors and persons of unsound mind or otherwise incompetent a like period of one year after their respective disabilities are removed.

§ 45. Prob. C. am'd.

§ 6306. Executors, who appointed. When a will is admitted to probate, every person named therein as executor who has consented to act and is legally competent to discharge the trust shall be appointed as such.

§ 46. Prob. C. am'd.

§ 6307. Administrator appointed, when. A testamentary administrator having the powers and duties of an executor shall be appointed:

1. If there is no executor named in the will and the appointment is necessary for the purpose of carrying the will into effect or settling claims chargeable against the estate.

2. When an executor named in the will is not competent or does not consent to act or fails to qualify and enter upon his duties and there is no other executor competent and willing to act.

§§ 49, 104. Prob. C. am'd.

§ 6308. Administrator appointed when executor dies or resigns.

When an executor dies, resigns or is removed after entering upon his duties and there is no executor competent to complete the execution of the trust or when no appointment is made at the time of the probate, a testamentary administrator may be appointed in a special proceeding for that purpose.

§ 6309. **Minor named as executor, when can be appointed.**

§ 50, Prob. C.
am'd

An executor named in a will, who cannot be appointed for the reason that he is under age or a nonresident when the will is probated, may thereafter in a special proceeding apply for and receive the appointment, if otherwise competent, at any time before the trust is fully executed and if thereupon letters have in the meantime been issued to a testamentary administrator, they must be revoked.

§ 6310. **Executor, duties of.** It is the duty of an executor named in a will to present the same for probate, but he has no authority before letters are issued to do any other act except to preserve the assets of the estate coming into his hands and apply so much thereof as may be necessary in payment of the expenses of the testator's burial. Executors appointed by the court after duly qualifying and receiving letters have, subject to the provisions of this code, all the authority delegated by the will to the exclusion of those not appointed or failing to qualify. On the death, resignation or removal of an executor such authority devolves upon the surviving executor or executors, or if there is no surviving executor upon the succeeding testamentary administrator.

§ 6311. **Restraint of former administrator, when.** While a proceeding for the probate of a will is pending or while an application for a rehearing is pending in such proceeding, if administration had previously been granted upon the estate or letters testamentary issued, the court may by order restrain the administrator or executor from doing any act detrimental to the interests of a party claiming under the proposed will or claiming adversely to the will which is contested in the application for a rehearing, as the case may be.

§ 41, Prob. C.
am'd.

§ 6312. **Letters of administration revoked.** When after letters of administration on the ground of intestacy have been granted a will is admitted to probate or when after letters have been issued upon a will the probate thereof is revoked or a subsequent will is admitted to probate, the decree granting or revoking probate must revoke the former letters.

§ 101, Prob. C.
am'd.

ARTICLE 3.—SPECIAL PROCEEDINGS FOR THE APPOINTMENT OF ADMINISTRATORS.

§ 6313. **Administration, when granted.** When a person dies leaving property within this state which he has not disposed of by will, administration of the estate may be granted as hereinafter prescribed.

§ 56, Prob. C.
am'd.

§ 6314. **Administration, when not granted.** Administration shall not be originally granted in any case in a proceeding commenced after the lapse of six years from the death of the decedent or from the time when his death became known.

§ 6315. **Administration, who entitled to.** The parties who must be cited in a special proceeding for the appointment of an administrator are the surviving husband or wife if any and all the heirs of the decedent; but administration may be granted upon the petition of any person hereinafter mentioned, those of each class being entitled to preference in the following order:

§ 56, Prob. C.
am'd.

1. The surviving husband or wife of the decedent.
2. His heirs.
3. His creditors.

§ 6316. Time to apply for administration. To each of the above classes in succession a period of ten days commencing with the death of the decedent is allowed within which to apply for administration before a petition can be presented by any person of a subsequent class.

§ 62. Prob. C.
am'd.

§ 6317. Petition for administration, contents of. A petition for administration shall contain a statement of the probable value of the estate distinguishing between personal and real property and of the probable yearly value of the rents, profits and income of the real property.

§ 65. Prob. C.
am'd.

§ 6318. Petition, who may contest. Any person interested may answer the petition and allege any ground of objection that may exist to the granting of administration or to the appointment of the proposed administrator; or allege his own right or claim to the administration and pray for appointment accordingly.

§§ 59, 70,
Prob. C.
am'd.

§ 6319. Person entitled to administration may waive right. A party entitled to the administration whether personally competent to receive the appointment or not may by his pleading nominate some other person for appointment in his place.

§ 69. Prob. C.
am'd.

§ 6320. Proof of intestacy and value of property requisite. Before granting administration the court must be satisfied by competent testimony of the death of the person whose estate is in question, and may, in its discretion require proof as to whether or not he left a will and of the time, place and circumstances of his death, his residence at the time, the character, situation and value of the property, the fact of the intestacy or any other material fact.

§§ 57, 58, 66, 68,
Prob. C.
am'd.

§ 6321. Preferences. Equally entitled. Power of court. Administration may be granted to an applicant or to one of several applicants according to the prescribed order of preference, without regarding any party having an equal or a better right who fails to assert his claim; and when there are several applicants of the same class the appointment may be awarded according to their relative fitness. But in every case, when the welfare of the estate manifestly so requires, an heir may be joined with a surviving husband or wife or two or more applicants of the same class may be united in the administration or the court may in its discretion appoint some suitable and discreet person who is disinterested as between the parties.

§ 6322. Decree to fix amount of bond. A decree granting administration shall prescribe the sum in which bond shall be given and may limit the time in which the person receiving the appointment shall qualify or the time within which each of several applicants may successively qualify upon the failure of those having precedence, to qualify and enter on the discharge of their duties.

§§ 71, 72, 73, 74,
Prob. C.
am'd.

§ 6323. Rehearing for revocation of administration. After administration has been granted to any person other than the surviving husband or wife, any party having a better right to the same, which he failed to allege in the original proceeding may for that cause alone obtain a rehearing at any time within one year for the purpose of asserting such right and if his right is established he shall receive the appointment and the former letters shall be revoked.

§ 6324. Authority of administrator. An administrator has only the authority prescribed by statute or conferred on him according to law by a decree or order of the county court.

ARTICLE 4. — APPOINTMENT OF SPECIAL ADMINISTRATORS.

§ 6325. **Special administrators, appointed when.** A special administrator shall be appointed when necessary or proper for the protection of the property or the rights of creditors or other persons interested in the estate, in either of the following cases: § 94, Prob. C. am'd.

1. On the motion of a party or a creditor of the decedent and without citation or notice while a proceeding for probate or administration is pending, or after a decree granting the probate or administration when there is delay in issuing letters in consequence of the temporary absence from the state of the executor or administrator entitled to the same or for any other cause; or after letters have issued when the executor or administrator dies or is suspended, or his letters are revoked and there is delay in issuing letters to a successor.

2. In a special proceeding in which probate or general administration is denied because the death of the person whose estate is in question is not satisfactorily proved; but he is shown to have disappeared under circumstances which afford reasonable grounds to believe either that he is dead or has been secreted, confined or otherwise unlawfully made away with.

3. On the application of a state's attorney or of a creditor of the decedent in a special proceeding for that purpose when a person of whose estate the court has jurisdiction dies intestate and after diligent inquiry no person can be found who is entitled to succeed to his property.

§ 6326. **Administration, when no heirs known. Duty of state's attorney.** In a case specified in the third subdivision of the preceding section it is the duty of the state's attorney of the county in which the jurisdiction lies to petition for administration as soon as the facts come to his knowledge. If the application is made by a creditor such state's attorney must be cited as a party. The citation must also be addressed generally to all persons interested in the estate of the deceased and published as prescribed for service in that mode. At the hearing the fact of intestacy shall be presumed unless the contrary appears.

§ 6327. **Special administrator, who may be appointed.** A special administrator may be any person competent to serve as administrator approved or selected by the court with due regard to the rights of parties claiming letters or otherwise interested in the estate. § 96, Prob. C. am'd.

§ 6328. **Special administrator, authority and duties of.** A special administrator has the same authority as a general administrator to take into his possession personal property, to secure and preserve it, to collect debts due the estate, and to take charge of the real estate and preserve it from waste or other injury and receive the rents, profits and income thereof, and for either of those purposes he may maintain any action or special proceeding. He must also make an inventory and render an account and may sell perishable property or do any other act which he may be specially required to do by direction of the court but cannot act generally in matters pertaining to the settlement of the estate. §§ 98, 100, Prob. C. am'd.

§ 6329. **Special administrator. Notice to creditors.** After the expiration of six months from the time when letters were issued to a special administrator he may be directed the same as a general administrator under directions of the court to publish the notice requiring creditors of the decedent or absentee to present their claims and the publication thereof shall have the same effect as if published by an executor or general administrator.

§ 6330. **Special administrator. Authority after notice to creditors.** From the time when he is directed to publish notice to creditors as prescribed by the preceding section, a special administrator has the same authority as an executor or general administrator to approve and adjust claims, set off the exempt property and make provision for the payment of debts and charges against the estate by sale of so much of the property as may be necessary for that purpose and apply the proceeds accordingly.

§ 99. Prob. C.
am'd.

§ 6331. **Special administration ceases, when.** When letters testamentary or of general administration on the estate are 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 remaining in his hands.

ARTICLE 5. — FOREIGN WILLS AND LETTERS OF ADMINISTRATION.

§ 28. Prob. C.
am'd.

§ 6332. **Probate of foreign will. Proceedings.** A will of a testator who was not a resident of this state at the time of his death, which has been probated in any other state or country may be admitted to probate as prescribed in this article in any county of this state in which any property devised by the will is situated upon the petition of the executor or any person interested in such property by, through or under the provisions of the will, when the petition is accompanied by a duly authenticated copy of such will and of the original record or certification of probate. When probate is or has been so granted, ancillary letters testamentary or of testamentary administration as the case requires, may likewise be granted on the petition of the executor or testamentary administrator if accompanied by a duly authenticated copy of the original letters or record of his appointment.

§ 6333. **Ancillary letters, when.** When administration has been granted in any other state or country upon the estate of an intestate who was not a resident of this state at the time of his death, ancillary letters of administration may be granted as prescribed in this article by the county court of any county in which there are assets belonging to the estate upon petition of the administrator, if accompanied by a duly authenticated copy of the original record of the granting of administration and of his appointment.

§ 29. Prob. C.
am'd.

§ 6334. **Citation to whom notice given.** A citation issued upon the presentation of any petition specified in the two preceding sections may be addressed to all creditors of the decedent and other persons interested, and a direction for service by publication shall be indorsed thereon without the affidavit required in other cases and service in accordance with such direction shall be deemed sufficient. At the hearing any person interested as a creditor or otherwise may appear and maintain any valid objection to the competency of the proof or other defense to the application.

§ 6335. **Foreign will, not probated when.** A will shall not be admitted to probate under the provisions of this article, unless it appears to have been executed according to law and the court is further satisfied that the authentication of the probate is sufficient and that the probate was granted by a court of competent jurisdiction and remains in force. A decree admitting the same to probate shall contain the findings of the court to that effect and shall have the same force and effect as if the probate was originally granted thereby. § 30, Prob. C.
am'd.

§ 6336. **Ancillary letters not granted, when.** Ancillary letters shall not be granted to an executor or testamentary administrator making application therefor, unless the court is satisfied by competent evidence that the original appointment has not been revoked. The court may also refuse to issue letters to such applicant when objection is made for nonresidence or any other cause which would disqualify him for appointment in this state and it appears that the rights of creditors having claims payable in this state or other persons residing therein, who are interested in the estate may be prejudiced by his appointment; if letters have been issued such letters may be revoked for like cause.

§ 6337. **Ancillary letters.** Ancillary letters shall not be issued to an administrator making application therefor, unless the court is satisfied that the proofs accompanying the petition are duly authenticated, that the administration was granted by a court of competent jurisdiction and that the original appointment remains in force; or in any case when it appears that another county court of this state has acquired jurisdiction of the estate for any purpose or when a resident of this state entitled to administration therein as a creditor or otherwise prays that letters may be issued to himself or some other resident of the state.

§ 6338. **Letters may issue, when.** When letters are refused for any cause specified in the two preceding sections except a failure to establish the original probate or grant of administration, letters may be issued to a competent resident of the state as in other cases; and when probate is granted as herein prescribed and no application for letters is made by the executor or testamentary administrator, letters may be issued as in a case when no executor is named in a will if necessary to give effect to the provisions of the will or protect the rights of creditors residing in the state.

§ 6339. **Executors and administrators to qualify, how.** An executor or administrator appointed under the provisions of this article must qualify in the same manner as other executors or administrators and thereafter has like powers, duties and obligations respecting the property of the decedent within this state.

§ 6340. **Foreign executor or administrator to appoint agent.** Every executor, administrator or guardian appointed in, but residing out of the state shall before entering upon the duties of his trust, in writing, appoint an agent residing in the county where he is appointed and shall by such writing stipulate and agree that the service of any legal process against him as such executor, administrator or guardian if made on said agent shall be of the same legal effect as if made on himself personally within the state. Such writing shall give the proper address of such agent and shall be filed in the office of the judge of the county court where such appointment is made and the notice to creditors shall state the name and address of such agent. § 1, c. 106, 1883.
am'd.

ARTICLE 6.—SPECIAL PROCEEDINGS FOR PROBATE OF HEIRSHIP.

§ 1. c. 51, 1893.
am'd.

§ 6341. Petition to establish heirship. Proceedings. When a person dies leaving real property within this state, which he has not disposed of by will and there are no debts of the decedent which are payable to residents of this state, after the expiration of one year from the date of his death, if no county court of this state has acquired jurisdiction of his estate for the purposes of administration, any heir or other person deriving title from or through an heir or heirs of such decedent may present to the county court of the county in which he last resided or if he was not a resident of this state at the time of his death, to the county court of the county in which the real property or some part thereof is situated a petition alleging the facts which authorize the special proceeding, according to the foregoing provisions with a particular description of the real property, and stating the interest of the petitioner and the interest or share of each heir according to his relationship to the deceased and praying for a decree determining the right of succession to the property. Upon the presentation of such a petition a citation shall be issued to all the heirs of the decedent.

§ 2. c. 51, 1893.
am'd.

§ 6342. Petition, hearing of. Allegations established. At the hearing any person interested may appear and answer the petition; but this section does not affect a right or interest of any person except an heir unless he so becomes a party to the special proceeding. The answer of a respondent may allege any valid defense to the petition, any part of the same or any right or interest which the respondent claims in the property. The allegations of the petition must be established to the satisfaction of the court by competent testimony before a decree can be entered although no issue is joined by answer.

§ 3. c. 51, 1893.
am'd.

§ 6343. Decree, when to issue. Effect of. When the facts are established to the satisfaction of the court a decree shall be given specifying who are the heirs of the decedent and what are the interests or shares of the parties, respectively, in the property and declaring the right of succession accordingly. Such decree is conclusive upon the parties, and their successors in interest, subject however, to such disposition of the property as may be made in any subsequent proceeding in the same court in pursuance of the probate of a will or grant of administration.

§ 4. c. 51, 1893.
am'd.

§ 6344. Record of the decree. A certified copy of such decree may be recorded in the office of the register of deeds of each county in which the real property is situated in the manner prescribed by law for recording a deed.

§ 5. c. 51, 1893.
am'd.

§ 6345. Costs, how paid. The costs of such proceeding must in every case be paid by the petitioner.

CHAPTER 5.

REQUISITES FOR QUALIFICATION.

ARTICLE 1.—QUALIFICATIONS, REMOVAL AND DISCHARGE OF EXECUTORS, ADMINISTRATORS AND GUARDIANS.

§ 6346. **Executor, administrator, guardian, who competent for.** No person under twenty-one years of age or other person who is incapable by law of making a contract or has been convicted of a felony, is competent to serve as executor, administrator or guardian; and no person shall be appointed as such, who is not in good faith a resident of this state or was a partner of the decedent at the time of his death or is by the court found unfit to discharge the duties of the trust by reason of drunkenness, improvidence, mental or physical infirmity or lack of integrity. A married woman must not be appointed administratrix, but may be appointed executrix, and serve as such independent of her husband if married at the time of the testator's death. §§ 46, 48, 60, 61.
Prob. C.
am'd.

§ 6347. **Oath and bond of executor.** Before letters are issued to an executor, administrator or guardian he must qualify by taking an oath and giving bond as prescribed in this article; and before letters are issued to any person who has in his possession or under his control any money or property belonging to the estate he may be required to exhibit an inventory or otherwise render a satisfactory account of his doings with such property. A failure to comply with the foregoing requirements within such time as the court allows is a relinquishment of the appointment. § 75, Prob. C.
am'd.

§ 6348. **Oath, form of, where filed.** Every executor, administrator or guardian must take and subscribe an oath administered by some competent officer and file the same with the county judge to the effect that he will faithfully and according to law to the best of his ability perform all the duties of his trust. § 75, Prob. C.
am'd.

§ 6349. **Bond. Justification.** Every executor, administrator or guardian must give bond to the state of North Dakota for the benefit of all persons interested in the estate in such sum as the court prescribes, with sufficient sureties to be approved by the judge, and conditioned for the faithful discharge of all the duties of the trust imposed on him by law or by order of the court according to law. Except as otherwise specially prescribed by law the required sum must not be less than twice the aggregate value as ascertained by the court of the personal property and the rents, profits and income for one year of the real property, belonging to the estate. Every bond must be held to be the joint and several contract of the principal and sureties executing the same notwithstanding any express provisions therein to the contrary. §§ 76, 78.
Prob. C.
am'd.

§ 6350. **Bond for sale of real estate.** Whenever an executor, administrator or guardian is authorized to sell or mortgage any real estate, he must in like manner be required to give an additional bond in a sum equal to twice the probable amount to be realized upon such sale or mortgage. But such additional bond may be dispensed with by the decree authorizing such sale or mortgage, when it appears to the satisfaction of the court that the former bond of such executor, § 77, Prob. C.
am'd.

administrator or guardian is at least twice the value of the estate remaining in his hands together with the amount of such increased liability and is in all other respects sufficient.

§ 88. Prob. C. am'd.

§ 6351. **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 requires one to be executed; but the executor may at any time afterwards if it appears from any cause necessary or proper, be required to file a bond as in other cases.

§ 79. Prob. C. am'd.

§ 6352. **Separate bond.** When two or more persons are appointed as executors, administrators or guardians, the court may require and take a separate bond from each.

ARTICLE 2. — FORM OF LETTERS.

§ 6353. **Letters of administration.** When an executor, administrator or guardian has duly qualified, letters shall issue accordingly under the seal of the county court upon which there shall be indorsed if required a direction for the publication of the notice to creditors prescribed by this code.

§ 53. Prob. C. am'd.

§ 6354. **Letters testamentary, form of.** Letters testamentary may be substantially in the following form:

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

Whereas, the last will of A. B., deceased, a copy of which is hereto annexed has been duly proved and recorded in the county court of said county, and C. D. has been appointed executor thereof and has duly qualified pursuant to the order of said court, of date.....

Now, therefore, know ye, that he, the said C. D., is authorized to enter upon the discharge of his duties as such executor and continue therein until the revocation of these letters.

Given with the seal of said court hereto affixed the....day of.... A. D. 189...

[Seal.]

(Official signature of the judge.)

§ 54. Prob. C. am'd.

§ 6355. **Letters of testamentary administration, form of.** Letters issued to a testamentary administrator may be substantially in the following form:

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

Whereas, the last will of A. B., deceased, a copy of which is hereto annexed has been duly proved and recorded in the county court of said county, and C. D. has been duly appointed testamentary administrator to execute the same, and has duly qualified pursuant to the order of said court of date.....

Now, therefore, know ye, that he, the said C. D., is authorized to enter upon the discharge of his duties as such testamentary administrator and continue therein until the revocation of these letters. (Conclude as above.)

§ 55. Prob. C. am'd.

§ 6356. **Letters of administration, form of.** Letters of administration, either general or special, may be substantially in the following form:

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

Whereas, A. B. was appointed administrator (or special administrator) of the estate of C. D., deceased, by order of the county court of said county of date..... and has duly qualified accordingly:

Now, therefore, know ye, that he, the said A. B., is authorized to enter upon the discharge of his duties as such administrator (or special administrator) and continue therein until the revocation of these letters. (Conclude as above.)

§ 6357. Letters of guardianship, form of. Letters of guardianship may be in the form prescribed in the last section with such variations as the facts require.

ARTICLE 3.—NEW BONDS AND NEW SURETIES.

§ 6358. Bond becoming insufficient. Proceedings. Any creditor or other person interested in the estate may present to the county court an affidavit alleging that a surety in any bond taken as prescribed in this chapter is insufficient or has removed or is about to remove from the state or that the bond is inadequate in amount and demanding that the executor, administrator or guardian may be required to give a new bond in a larger amount or new or additional sureties as the case requires, or in default thereof that he may be removed from his office and thereupon, if there is reason to believe that the statements of the affidavit are true, such executor, administrator or guardian may be cited to appear and show cause why the demand should not be granted.

§§ 84, 85.
Prob. C.
am'd.

§ 6359. Judge issues citation as to insufficiency of bond. When it comes to the knowledge of the county judge that the bond of an executor, administrator or guardian is inadequate or that a surety therein is insufficient or has removed or is about to remove from the state and no application is made as provided in the last section, an order shall be made requiring such executor, administrator or guardian to show cause why he should not be required to give further security upon which he shall be cited to appear as upon the application of a party.

§ 89, Prob. C.
am'd.

§ 6360. Hearing and order. If it satisfactorily appears at the hearing that the security is inadequate or insufficient, the court must make an order requiring the executor to give new or additional sureties or a new bond in a sufficient amount as the case requires, within a reasonable time not exceeding ten days and directing that in default thereof his letters be revoked. If he fails to give such security, the court must make a supplemental order removing him and revoking his letters accordingly.

§§ 86, 87.
Prob. C.
am'd.

§ 6361. Release of sureties on application. Any or all of the sureties in a bond taken as prescribed in this chapter may present to the county court a petition praying to be released from responsibility on account of any future breach of the condition of the bond, and thereupon the executor, administrator or guardian must be cited to appear in person and give new security. If he files in the office of the county judge a sufficient bond with new sureties to the satisfaction of the court at the time specified in the citation or thereafter within such reasonable time not exceeding ten days as the court fixes, the court must make a decree releasing the petitioner from liability

§§ 90, 91, 92.
Prob. C.
am'd.

upon the bond for any subsequent act or default of the principal otherwise he must make a decree removing him and revoking his letters.

ARTICLE 4. — REMOVAL, SUSPENSION AND DISCHARGE OF EXECUTORS, ADMINISTRATORS AND GUARDIANS.

§ 6362. Decree granting or revoking probate of will, revokes former letters. When a will is admitted to probate after letters of administration have been issued or when the probate is revoked after letters have been issued, the decree granting or revoking probate shall revoke the former letters.

§ 108, Prob. C. am'd.

§ 6363. Causes for revocation of letters. An executor, administrator or guardian may also be removed by a decree of the county court revoking his letters upon satisfactory proof of the existence of either of the following causes:

1. Any legal disability which renders him incompetent or unfit to act as such executor or administrator when the same has been incurred since his letters were issued, or was not alleged in the proceeding in which he was appointed.
2. Any wrongful act or omission on his part conducive to waste or misappropriation of the estate or affording opportunity therefor.
3. Willfully refusing or neglecting without sufficient cause to obey any lawful direction of the county court or any provision of law relating to the discharge of his duties.
4. In the case of an executor, when by the terms of the will his office ceases upon a contingency which has happened.
5. In the case of a special administrator appointed upon the estate of an absentee, when it is shown that the absentee is living and capable of resuming the management of his affairs or that an executor or administrator has been appointed upon the estate by another court having jurisdiction thereof.

§ 109, Prob. C. am'd.

§ 6364. Removal of executor, administrator or guardian, how. A petition alleging the facts and praying for the removal of an executor, administrator or guardian pursuant to the provisions of the preceding section may be presented by a creditor or other person interested in the estate and may contain a prayer for the appointment of a successor and if the court deems the allegations sufficient a citation shall issue to the executor, administrator or guardian and all other persons who by the terms of a will or by law are entitled to any portion of the estate.

§ 110, Prob. C. am'd.

§ 6365. Court may remove, when. When the facts which authorize a removal come to the knowledge of the court and no application is made as above provided, the court may make an order requiring the executor, administrator or guardian to show cause why he should not be removed upon which he shall be cited to appear; and at the hearing the court may revoke his letters as upon a petition, but cannot appoint a successor.

§ 112, Prob. C. am'd.

§ 6366. Court may compel attendance. At any hearing contemplated by the two preceding sections the court may require and compel the attendance of the executor, administrator or guardian in person and examine him under oath respecting the alleged cause for his removal.

§ 6367. Court may enjoin and suspend powers, when. Upon issuing a citation in a proceeding for the removal of an executor, administrator or guardian or in a proceeding to require him to give new security, if he is wasting or misappropriating or alleged to be wasting or misappropriating the estate, the court may by order summarily suspend his powers or enjoin him from doing any specific act in the exercise thereof as the case requires until its final determination.

§ 88, Prob. C.
§ 2, c. 106, 1883.
am'd.

§ 6368. Final settlement of account. Discharge. An executor, administrator or guardian may at any time present to the county court a petition praying that his account may be settled and that a decree may thereupon be made revoking his letters and discharging him accordingly. The petition must set forth the facts upon which the application is founded; but the application shall not be entertained while a proceeding is pending for the removal of the executor, administrator or guardian or if in the opinion of the judge there is good cause for his removal or other sufficient cause for refusing to entertain the same.

§ 105, Prob. C.
am'd.

§ 6369. Proceedings pending discharge. If the court entertains such application, a citation must issue to all parties interested in the estate. At the hearing any creditor or other person interested may allege cause for denying the application or allege cause for his removal and pray relief accordingly. Upon a trial of the issue if the court determines that sufficient cause exists for granting the application, the petitioner must be allowed to account; and after he has fully accounted and paid over all money which is found to be due from him to the estate and delivered over all books, papers and other property of the estate in his hands as the court directs a decree shall be made discharging him and revoking his letters, otherwise such decree shall be made as justice requires.

§ 297, Prob. C.
am'd.

§ 6370. Acts valid until letters revoked or suspended. All acts of an executor or administrator capable by law of making a contract notwithstanding any cause for removal remain as valid and effectual as if he continued lawfully to execute the duties of his trust until his letters are revoked or his powers suspended by a decree or order of the court.

§ 106, Prob. C.
am'd.

§ 6371. Procedure, when one executor dies or is removed. When one of two or more executors or administrators dies or becomes incapable of discharging the trust or when letters are revoked as to one of them, a successor to such person shall not be appointed unless such appointment is necessary in order to comply with the express provisions of a will, but the others shall proceed and complete the administration of the estate pursuant to the letters.

§§ 103, 104,
Prob. C.
am'd.

CHAPTER 6.

SETTLEMENT OF THE ESTATES OF DECEDENTS.

ARTICLE 1.—COLLECTION, INVENTORY AND APPRAISEMENT OF THE ESTATE.

§§ 122, 210.
Prob. C.
am'd.

§ 6372. **Possession, powers and duties of executors and administrators.** The executor or administrator is entitled to possession of all the real and personal property of the decedent except the homestead and other exempt property reserved by law to the surviving husband or wife or children; and must protect the real property from waste or other injury and collect the rents and profits thereof until ordered to surrender the same and collect the goods, chattels and other effects of the decedent and the debts and demands of every description due to the decedent or accruing to the estate in his right, and safely keep and dispose of the same according to law.

§ 6373. **Unauthorized person having property of decedent.** Every person having or obtaining property of a decedent without authority from the executor or administrator, is liable to account for the same at its full value and shall not be allowed to retain or deduct therefrom any debt due from such decedent.

§ 124, Prob. C.
am'd.

§ 6374. **Embezzlement of decedent's property.** Any person who embezzles, conceals or alienates any moneys, goods, chattels or effects of a decedent is liable in a civil action for double the value of such property or for the return of the property with damages to the extent of its value to be recovered by the executor or administrator for the benefit of the estate.

§ 123, Prob. C.
am'd.

§ 6375. **Possession of real estate, terms of.** Unless it satisfactorily appears to the county 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.

§ 6376. **Lease of real estate.** An executor or administrator may lease the real property under his control until ordered to surrender the same and may keep in suitable repair all houses, buildings and fixtures thereon.

§ 214, Prob. C.
am'd.

§ 6377. **Inventory by surviving partner.** In case of the death of one partner the surviving partner must make a full, true and complete inventory of the property of the copartnership within his knowledge with a list of all the liabilities thereof at the time of the death of the deceased partner and deliver the same to his executor or administrator or to the county court. Such surviving partner or partners have the right to continue in possession of the effects of the partnership, pay its debts out of the same and settle its business; but must proceed thereto without delay and account with the executor or administrator and pay over such balances as may from time to time be payable to him in the right of the decedent. Upon the application of the executor or administrator the county court may whenever it

appears necessary after citation order such surviving partner to deliver an inventory or render an account and may enforce the order as in other cases.

§ 6378. Possession from third persons, how. An executor or administrator may present to the county court an affidavit setting forth facts which tend to show that money, goods, chattels, conveyances, bonds, contracts or other writings containing evidences of a right or claim of the decedent to any property or of any demand due such decedent which should be delivered to him or included in an inventory or appraisal, is in the possession or under the control of a person who withholds or refuses to account for the same or that a person has knowledge or information which he refuses to impart respecting such money, goods, chattels, conveyances, bonds, contracts or other writings so that the same cannot be discovered, inventoried or appraised, and praying that he may be required to appear and be examined concerning the same. If the court is satisfied that there are reasonable grounds for an investigation such person must be cited to appear in person. He may also be directed to appear forthwith and in that case the citation may be served at any time before the hearing.

§§ 125, 127.
Prob. C.
am'd.

§ 6379. Examination of third persons as to possession. On the attendance of the person so cited he must be sworn and examined under oath and may be compelled to answer any question that may be put to him respecting any money, goods, chattels, conveyances, contracts or other writings specified in the preceding section and make a full disclosure of all the facts within his knowledge or information in relation thereto; but his answers cannot be given in evidence against him in a criminal prosecution. If his testimony tends to show that other persons have knowledge or information that will aid the executor or administrator in the discovery of property to be inventoried or appraised, they may be subpoenaed and examined in like manner. After the examination the court may hear the testimony of other witnesses. And when it appears that a person so examined has in his possession or under his control any money, goods, chattels, conveyances, contracts or other writings belonging to the estate he may be ordered and compelled to deliver the same to the executor or administrator or to produce the same for inventory and appraisement as the case requires, unless he interposes a written answer duly verified to the effect that he is the owner of the property or is entitled to possession thereof by virtue of a special property therein or by virtue of a lien under which he obtained possession in the life time of the testator.

§ 126, Prob. C.
am'd.

ARTICLE 2.—INVENTORY AND APPRAISEMENT OF THE ESTATE.

§ 6380. Inventory of executor or administrator, contents of. Every executor or administrator must within thirty days after his appointment make and return to the county court a true inventory and appraisement of all the real and personal property of the decedent which has come to his knowledge including a list of all bonds, mortgages, notes, book accounts and other securities or evidences of debt which appear by the books or papers of the deceased to be unsettled with a statement of the sums credited thereon if any. If no money has come to the hands of the executor or administrator,

§§ 113, 116.
Prob. C.
am'd.

that fact must be stated in the inventory. The property inventoried shall be classed under separate heads as follows:

1. All the real estate with a statement showing what portion thereof if any is occupied or claimed as a homestead.

2. All the personal property money included, which is supposed to be exempt distinguishing between such as is deemed absolutely exempt and other property.

3. All other property not above specified.

§ 119, Prob. C. am'd. **§ 6381. Inventory, how made.** The inventory must be signed by the executor or administrator, who must take and subscribe thereon 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.

§ 117, Prob. C. am'd. **§ 6382. Executor's personal debt.** A person named in a will as executor is not thereby discharged from any just claim which the testator has against him but the claim must be included in the inventory and collected or accounted for in the same manner as other claims.

§ 6383. Inventory to contain partnership interest. The interest of the decedent in an unsettled partnership must be included in the inventory and appraised upon the statement rendered by the surviving partner or otherwise, like other property.

§ 118, Prob. C. am'd. **§ 6384. Bequest to executor.** A discharge or bequest in a will of a debt or demand of the testator against an executor or other person is not valid against creditors of the testator but must be treated as a specific bequest of the amount of the debt or demand. Such demand must be included in the inventory and be collected and applied so far as necessary in payment of the creditors after which the surplus if any shall be paid as other legacies.

§ 6385. Decedent's life insurance. The avails of a life insurance policy or of a contract payable by any mutual aid or benevolent society upon the death of a member of such society are not subject to the debts of the decedent except by special contract, but in other respects shall be inventoried and disposed of like other property.

§ 114, Prob. C. am'd. **§ 6386. Appraisers to be appointed. Oath. Compensation.** To make the appraisement the judge must appoint three competent and disinterested persons any two of whom may act. The appointment may be made by order at any time. A notice of the appointment must be issued upon which before entering upon their duties the appraisers must each subscribe an oath administered by a competent officer to the effect that he will truly and impartially according to the best of his ability appraise the property of the decedent and discharge all other duties required of him as such appraiser. If any portion of the property is in another county the same appraisers may serve or others may be appointed in that county. The notice and oath of the appraisers must be returned with the inventory together with a verified statement of their services and expenses. They shall be allowed a reasonable compensation for their services not exceeding the amount of their necessary expenses and two dollars a day in addition to be paid by the executor or administrator as expenses of the administration.

§ 6387. **Appraisers, duties of.** The appraisers must estimate and appraise at its actual value according to their best judgment all the property described in the inventory submitted by the executor or administrator except money and must set down in figures opposite each item the value thereof as agreed upon in dollars and cents and after completing the appraisement they must subscribe and annex thereto an affidavit to the effect that the value appearing opposite each item was entered by them or by their direction and is the true value agreed upon as their appraisement, and deliver the same to the executor or administrator or to the court.

§ 115, Prob. C.
am'd.

§ 6388. **Supplementary inventory, when made.** Whenever property, which is not included in an inventory previously made in the same case, comes to the knowledge or possession of an executor or administrator, he must within one month thereafter or within such time as the court orders make a supplementary inventory and cause an appraisement thereof to be made and returned in like manner.

§ 121, Prob. C.
am'd.

ARTICLE 3. — POSSESSION OF THE HOMESTEAD AND ALLOTMENT OF EXEMPT PROPERTY.

§ 6389. **Homestead exempt from debt or liability. Delivery of.** Upon the death of either husband or wife the survivor may continue to possess and occupy the whole homestead and upon the death of both husband and wife the children may continue to possess and occupy the same until otherwise disposed of according to law. Such homestead as defined in section 3605 of the civil code must be ascertained and set apart as hereinafter prescribed upon the selection of the person or persons entitled to possession thereof and shall not be subject to the payment of any debt or liability contracted by or existing against the husband or wife or either of them previous to or at the time of the death of such husband or wife except as provided in the law relating to homesteads.

§ 128, Prob. C.
§ 131, Prob. C.
i, c. 108, 1881,
am'd.

§ 6390. **Appraisers to value homestead.** The appraisers must procure from such person or persons a description of the property claimed as a homestead and appraise the same at its value at the time of the death of the testator or intestate and shall if necessary cause the boundaries thereof to be ascertained and marked in their presence by a competent surveyor. If they find that it has been selected in such form as will materially diminish the value of any remaining part of the property, they may modify its boundaries so as to avoid such injury if it can be done without material injury to the homestead property. If they find that the property selected as a homestead exceeds in value the sum of five thousand dollars, they shall in like manner set off the homestead in such form as to exclude the excess unless they further find that the property cannot be divided without material injury. They shall make a full report of all their proceedings and findings in relation to the homestead and annex the same to the inventory.

§ 6391. **Exempt personal property, disposition of.** There shall also be set apart absolutely to the surviving wife or husband or minor children all the personal property of the testator or intestate which would be exempt from execution, if he was living including all property absolutely exempt and other property selected by the

§ 135, Prob. C.
am'd.

person or persons entitled thereto to the amount in value of fifteen hundred dollars according to the appraisal and such property shall not be liable for any prior debt of the decedent except the necessary charges of his last sickness and funeral and expenses of the administration when there are no other assets available for the payment of such charges.

§ 6392. Return of inventory and appraisal. Objections. Hearing. Upon the return of the inventory and appraisal the court must fix a day for hearing objections thereto concerning the homestead and other exempt property and the executor or administrator must cause notice thereof to be given to all parties interested. At the hearing the court may confirm the proceedings as to the inventory and appraisal or modify the same or set them aside and order a new appraisal as justice requires. If the court finds that the homestead exceeds in value the sum of five thousand dollars and further finds that the property cannot be divided without material injury, the order setting it apart must determine the amount of such excess and the property may thereafter be subjected to the payment of debts in the same manner as other property to the extent of the excess so determined after all the other available property has been exhausted.

§ 132, Prob. C. am'd. **§ 6393. Allowance for the family.** If the amount so set apart is insufficient for the support of the widow and children or either and there is other estate of the decedent, the court may in its discretion order 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, Prob. C. am'd. **§ 6394. Allowance is a preferred claim.** Any allowance made by the court in accordance with the preceding section 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.

ARTICLE 4. — PROPERTY CHARGEABLE WITH THE PAYMENT OF DEBTS.

§ 162, Prob. C. am'd. **§ 6395. Property of decedent chargeable with.** 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.

§ 193, Prob. C. am'd. **§ 6396. Provisions of the 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 allowance to the family, they must be paid according to such provision or designation out of the estate thus appropriated so far as the same is sufficient.

§ 195, Prob. C. am'd. **§ 6397. Provisions insufficient. Proceedings.** If the provision made by the will or the estate appropriated therefor is insufficient to pay the debts, expenses of administration and the allowance to the family, 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 article 6 of this chapter.

§ 6398. **Property liable for debts.** The estate real and personal given by will to legatees or devisees is liable for the debts, expenses of administration and allowance to the family 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. § 196, Prob. C. am'd.

ARTICLE 5.— OF CLAIMS AGAINST THE ESTATE.

§ 6399. **Claims. Duties of judge.** It shall be the duty of the county judge granting letters testamentary or of administration to receive, examine and adjust the claims and demands of all persons against the decedent or his estate, which may be presented to him in accordance with the provisions of this article.

§ 6400. **Notice to creditors.** At the time of issuing letters or upon the return of the inventory the court shall direct the executor or administrator to give notice of his appointment to all persons having claims against the decedent or his estate specifying the place where the same may be exhibited to him, and the time within which they must be presented to the court for adjustment and allowance. Such notice must be given by publishing the same at least four times once each week for four successive weeks in some newspaper of the county if there is one, or if not then in some convenient newspaper of the state to be designated in the order. The court may also require further notice to be given by publication or by posting. § 137, Prob. C. am'd.

§ 6401. **Time of notice. Filing claims.** 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 according to the appraisal and four months when it does not. § 138, Prob. C. am'd.

§ 6402. **Proof and record of notice.** A copy of the notice with due proof of publication or of publication and posting must be filed, and if the court is satisfied therefrom that due notice to creditors has been given, a finding to that effect shall be entered in the journal. § 139, Prob. C. am'd.

§ 6403. **Claims presented for adjustment.** All claims of every description against a decedent or his estate for the payment of money including judgments, unliquidated demands, debts not due, claims arising out of a liability of any person as surety for the decedent and other contingent claims must be presented to the court for adjustment within the time limited in the notice prescribed by section 6401. A demand maintained in or arising out of an action commenced by or against the decedent in his lifetime and continued by or against his representative, which has not been finally adjudicated, is deemed a contingent claim for the purposes of this section. A claim may be presented after the expiration of the time herein prescribed when it is shown to the satisfaction of the court before the final distribution that the owner and holder thereof has not been negligent and was prevented from presenting the same within such time by reason of his absence from the state or other sufficient cause. § 140, Prob. C. am'd.

§ 6404. **Claims, when barred.** Every person having a claim against the deceased person for the payment of money, which is not presented as prescribed in the preceding section, is forever barred § 140, Prob. C. l. c. 108, 1881. am'd.

from recovering such demand or from setting off the same in any action or special proceeding whatever, except under circumstances entitling him to equitable relief. But this section shall not be construed to prohibit or restrict a right to foreclose a mortgage or other lien upon specific property as provided by law in a civil action, or to foreclose a mortgage on real property by advertisement and sale when the county court has not obtained jurisdiction of the estate of the mortgagor.

§ 149, Prob. C.
am'd.

§ 6405. **Vacancy in office not included in limitation.** The time above limited does not include any period during which there is a vacancy in the office of county judge.

§ 6406. **Claims, how entitled.** Every claim when presented shall be entitled in the name of the claimant against the executor or administrator, if he is the claimant against the estate, and if disputed must be clearly and distinctly stated so as to enable the adverse party to demur or answer as in a civil action and issues may be joined thereon accordingly at any hearing contemplated by this article.

§ 141, Prob. C.
am'd.

§ 6407. **Claims, approvals, indorsement.** If a claim has not been exhibited to the executor or administrator and indorsed with his approval or disapproval before presentation, a copy thereof must be served upon him thereafter, and unless he files his approval in writing within ten days after such service he shall be deemed to have disapproved of the same. Before approving any claim the executor or administrator shall require an affidavit of verification to be attached thereto by the claimant or some person competent to make the same in his behalf to the effect that there are no payments or other offsets to be credited or allowed except such as are therein stated and that the amount claimed is justly due and owing to the claimant out of the estate of the deceased. If the claim is based on a contingent liability, the amount which the affiant believes will be due and payable must be stated with the particulars upon which his belief is founded. The executor or administrator must not approve any claim unless satisfied that the same is in all respects just.

§§ 144 151,
Prob. C.
am'd.

§ 6408. **Claims, when allowed by court.** A claim may be allowed by order of the court upon the approval of the executor and the production of such proofs as may be required by the provisions of section 6407 or of such further proof as the court shall deem sufficient, but the court may decline to act thereon until the executor or administrator is cited as hereinafter prescribed. When an executor offers to approve a claim in part or subject to an offset, the amount so admitted may be allowed in like manner if the creditor consents thereto in writing, otherwise the entire claim shall be deemed disapproved and the claimant shall not be awarded costs upon proving the same unless he is awarded an amount greater than that so offered.

§ 145, Prob. C.
am'd.

§ 6409. **Claim rejected. Citation for. Hearing.** When a claim is not allowed as prescribed in the preceding section after it has been duly exhibited or served the court shall, at the request of the claimant, issue a citation to the executor as upon a petition and the claimant shall cause the same to be served accordingly. At the hearing the claim shall be deemed denied without any pleading on behalf of the estate; and any party appearing may demur or allege any legal defense to the demand. The executor or administrator may likewise allege an offset or counterclaim that might have been maintained by the decedent. Upon a trial of the issues the court shall make a decree

allowing or disallowing such claim or counterclaim, or any part of the same as justice requires; or if both are established the court shall ascertain and allow the balance in favor of the claimant or the estate as the same shall be found. If such balance is found in favor of the estate, the decree must direct payment accordingly.

§ 6410. Decree allowing claim. Every decree or order which allows a claim must classify the same according to the order in which it is entitled to payment and when a claim is established and allowed as a lien upon specific property, personal and real, must also specify the particular property covered by the lien.

§ 6411. Claim by executor or administrator. If an executor or administrator is a creditor of the decedent his claim may be allowed by the court, when presented in the same manner and upon like proof as the claim of another person by him approved or if the court declines to allow the same, the parties interested in the estate may be cited in the same manner and with like effect as in other cases. § 158, Prob. C. am'd.

§ 6412. Claim of judge against decedent, how allowed. A judge of the county court having jurisdiction of the estate may exhibit a claim to the executor or administrator, and upon his approval or disapproval thereof may present the same for allowance to the county judge of an adjoining county, who shall proceed as if he had jurisdiction of the estate and his order or decree shall be entered as that of the court in which the case is pending. § 143, Prob. C. am'd.

§ 6413. Claims upon judgment or written instrument. A claim which is founded upon the judgment or other determination of a court having jurisdiction to render the same must be allowed upon the production of a duly authenticated copy thereof and satisfactory proof of the amount remaining unsatisfied. When a claim is founded on a bond, bill or other written instrument, the original must be produced and filed with the county judge or its absence must be satisfactorily accounted for and a copy thereof produced if practicable. An instrument so filed can be withdrawn only by order of the court for good cause shown and upon the substitution of a true copy. § 145, Prob. C. am'd.

§ 6414. Claims barred cannot be allowed. No claim or counterclaim which was barred by the statute of limitations when the claim was first presented must be allowed under the provisions of this article, but after presentation no claim is affected by the statute of limitations while pending before the county court or on appeal. § 147, Prob. C. am'd.

§ 6415. Executor's settlement. Creditors notified. At the time when the executor or administrator presents his account for settlement, every creditor having claims pending in the county court which have not been disposed of as hereinbefore prescribed, must be notified of the hearing and have an opportunity to present his proofs and upon his failure to do so a final order shall be made disallowing the same. At the same time there may be a rehearing upon any claim previously allowed by order, but not afterwards.

§ 6416. Claims proved and allowed. Every claim proved and allowed as prescribed in this article must be classed among the acknowledged debts and charges to be paid in the due course of administration. § 145, Prob. C. am'd.

ARTICLE 6. — PAYMENT OF DEBTS AND CHARGES.

§ 6417. **Debts, order of payment.** The acknowledged debts and charges must be paid in the following order:

1. The necessary expenses of the administration.
2. The expenses of the last sickness and funeral.
3. Allowances made to the family in excess of the exempt property.
4. Debts having preference by the laws of the United States.
5. Debts which are liens upon specific property whether by judgment, mortgage or otherwise in the order of their priority.
6. All other demands against the estate.

§ 259, Prob. C.
am'd.

§ 6418. **Limitation as to mortgages.** The preference given in the preceding section to a mortgage or other lien only extends to the proceeds of the property subject to such lien. If the proceeds of such property are insufficient to pay the demand, the part remaining unsatisfied must be classed with other demands against the estate.

§ 202, Prob. C.
am'd.

§ 6419. **Liens on realty to be paid.** When any sale is made by an executor or administrator pursuant to the provisions of this chapter of land or other property that is 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 property is subject to such mortgage or lien until the purchase money has been actually so applied. The purchase money or so much thereof as may be sufficient to pay such mortgage or lien with interest and any lawful costs and charges thereon may be paid into the county court, and thereupon the lien 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, must be returned to the executor or administrator.

§ 260, Prob. C.
am'd.

§ 6420. **Creditors equal within classes.** If the estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim; and no creditor of any class shall receive any payment until all those of the preceding class are fully paid and no preference shall be given in the payment of a debt over other debts of the same class except those specified in the fifth class.

§ 261, Prob. C.
am'd.

§ 6421. **Certain expenses, paid when.** 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 pay or 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.

§ 161, Prob. C.
am'd.

§ 6422. **Payment of taxes, pledges and liens.** If satisfied that it will be for the benefit of the estate, the county court may by order authorize or direct the executor or administrator on the application of any person interested, to pay taxes and demands maturing upon any debt secured by a mortgage, pledge or other lien existing

on the property of the decedent or upon a contract for the purchase of real property whenever there are sufficient funds properly applicable thereto although such demand has not been presented and allowed. But the provisions of this section shall not relieve the executor or administrator from responsibility for all injury or loss resulting from any misapplication of the money in his hands.

§ 6423. Decree for payment of debts. Upon the settlement of the account of an executor or administrator at the expiration of the time allowed for presenting claims if there are debts or charges remaining unpaid, the court must make such decree for the payment thereof as the circumstances of the estate require, unless it appears that there are no more assets available for that purpose. If the assets are ready for distribution to the creditors the court shall make a peremptory decree for payment after declaring a dividend if necessary. If there are other assets available which are not ready for such distribution, the executor or administrator must be directed to take the necessary steps to convert them into money for that purpose, as speedily as possible without material injury to the estate and if the estate is solvent, a partial dividend may be declared. The court must proceed in like manner at each subsequent settlement until the debts are paid.

§ 262, Prob. C.
am'd.

§ 6424. Contingent claim pending. Proceedings. At the time of such settlement, each person having a contingent claim pending which cannot be proved as a debt must be required to produce proof of the liability of the decedent by a previous notice given as prescribed in section 6415. If it appears upon such proof that there is reason to believe that the liability will become absolute, the court may order the executor or administrator to retain in his hands sufficient assets to pay the same in that event or, if the estate is insolvent, sufficient to pay a proportion equal to the dividends of other creditors or if a final distribution is made, the court may require the persons to whom the estate is distributed to give bond with sufficient sureties for the payment of such sum as may be found due by the county court in case the liability shall thereafter become absolute and upon proof of such amount the claimant may be authorized to bring an action on the bond for its recovery.

§ 263, Prob. C.
am'd.

§ 6425. Executor or administrator liable for debts ordered paid. When a decree is made for the payment of creditors, the executor or administrator becomes personally liable to each for the sum specified therein and execution may issue accordingly, or each creditor may recover the amount due him in an action on the bond of the executor or administrator upon his failure to comply with the order.

§ 264, Prob. C.
am'd.

§ 6426. Legacies and distribution of estate. 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 article 11 of this chapter, but if there are debts remaining unpaid, or, if for other reasons the estate is 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.

§ 265, Prob. C.
am'd.

§ 6427. Liability of executor or administrator on failure to give notice to creditors. 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

§ 265, Prob. C.
am'd.

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 sections 6400 and 6415 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.

ARTICLE 7. — SALES BY EXECUTORS AND ADMINISTRATORS.

§§ 163, 209,
Prob. C.
am'd.

§ 6428. **Property of decedent may be sold, how.** The property of a decedent, personal and real, which is chargeable with the payment of his debts and legacies or the expenses of the administration and the allowance to the family, may be sold as herein-after prescribed. But no executor or administrator shall directly or indirectly purchase any property of the estate which he represents or be interested in any sale. No sale by an executor or administrator is valid unless made and confirmed in pursuance of a decree of the county court, except as otherwise provided in the next two sections.

§ 6429. **Perishable property to be sold, when.** After the return of the inventory, the executor or administrator may from time to time sell such portion of the personal effects as are of a perishable nature, or would otherwise be likely to depreciate in value, or so much other personal property as may be necessary to pay expenses of the administration and the last sickness of the decedent; but is responsible for all property so sold until the sale is confirmed.

§ 194, Prob. C.
am'd.

§ 6430. **Sale of property 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 county court 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.

§§ 167, 169,
Prob. C.
am'd.

§ 6431. **Sales, when to be made. Personalty first sold.** Whenever a sale becomes necessary for the payment of debts, legacies, allowances or expenses chargeable upon the estate, or whenever such sale will be for the benefit of the estate and the parties interested therein, the executor may from time to time, so long as any personal property remains in his hands, present an application to the county court setting forth the facts and praying for an order directing him to sell the same or so much thereof as may be deemed necessary or proper; and thereupon all parties interested in the estate must be cited as in other cases.

§§ 171, Prob. C.
l. c. 53, 1890,
am'd.

§ 6432. **Sale of real estate. Proceedings.** When a sale of real property becomes necessary for the payment of debts, expenses or allowances chargeable thereon, the executor or administrator shall petition the county court for a decree directing a sale of the same or so much thereof as may be necessary for that purpose or a sale of both personal and real property; and a citation shall issue to all parties interested accordingly.

§ 180, Prob. C.
am'd.

§ 6433. **Petition for sale by third person.** If an executor or administrator neglects to make application under either of the two preceding sections, any creditor whose claim has been presented or

other person interested may make the application in the same manner and with like effect as if made by the executor or administrator, and when an executor or testamentary administrator neglects to make any sale which he is required to make under the provisions of a will, any creditor or other person interested may in like manner make application, as the case requires, for a decree or order directing such sale.

§ 6434. **Petition, contents of.** Every petition for the sale of real estate must show as nearly as can be ascertained the value of the personal property remaining in the hands of the executor, the amount of expenses of the administration and allowances to the family, if any, remaining unpaid and the amount which will be required to pay the debts of the deceased and legacies, if any, given in his will; also a general description of all the real estate and the value thereof and a particular description of the part which it is proposed to sell with a statement of its condition and value.

§ 172, Prob. C. 2, c. 33, 1890. am'd.

§ 6435. **Petition, hearing of.** At any hearing contemplated by the foregoing provisions of this article, the court may direct a sale of personal property if satisfied that such sale is necessary or for the interest of the estate and the parties entitled thereto. At a hearing upon an application for the sale of real property, the court must inquire fully into the condition of the estate and direct a sale of only so much thereof as shall appear to be necessary; but if the parties consent that real estate may be sold in preference to personal property, the decree may direct a sale accordingly.

§§ 164, 173, 176, 178, 256, Prob. C. § 3, c. 33, 1890. am'd.

§ 6436. **Sale of all the real estate may be authorized, when.** If it appears 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 character with reference to its future disposition among the heirs or devisees as clearly to render it for the interest 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 interest of all concerned.

§ 177, Prob. C. am'd.

§ 6437. **One sale, when.** When the petition alleges that the estate is insolvent or that it will require a sale of all the property to pay the debts, allowances and expenses with which it is chargeable with such further particulars as are required in a petition for the sale of real property, and it appears to the satisfaction of the court after full inquiry into the facts and circumstances, that the property is no more than sufficient to pay the same, the decree may direct the sale of all the property chargeable with such payment and there need be no further order of sale thereafter.

§ 165, Prob. C. am'd.

§ 6438. **No sale to be directed, when. Bond.** A sale of real estate shall not be directed if any of the persons interested in the estate give bond to the state of North Dakota for the use and benefit of all persons having claims against the estate, in a sum and with sureties approved by the court and with condition to pay, so far as the personal estate of the deceased shall be insufficient therefor, all legacies, debts and charges that shall eventually be found due from the estate.

§ 6439. **Sale directed, stopped, how.** After a sale is directed any person interested in the estate may prevent a sale of the whole or any part of the property designated in the decree or order by giving

bond, in like manner, with a condition to pay all demands that shall be found due from the estate, to the extent of the value of the property thus kept from sale as soon as called upon by the court for that purpose.

§ 6440. **Order to resort to security.** If it becomes necessary to resort to such security, the executor or administrator shall apply to the court for an order determining the amount of the liability so incurred and directing payment accordingly, and after obtaining such order the executor or administrator must proceed to collect such amount by an action upon the bond if necessary and apply the proceeds as the court shall direct.

§ 179, Prob. C.
am'd.

§ 6441. **Decree for sale of real estate, contents of. Terms of sale.** A decree for the sale of real estate must describe the lands to be sold and direct the terms of sale, which may be for cash or for one-third cash and the remainder on a credit not exceeding two years with such interest as the court shall deem proper, secured by a mortgage on the property and may direct that the sale be made in one parcel or in such subdivisions as may be deemed most convenient. If a decree directs the sale of devised property which is not charged by the will with the payment of debts or legacies, such property must not be sold until the other property is exhausted.

§ 6442. **Private sale, when.** The court may direct that any property, real or personal, be sold at private sale, if satisfied that the interest of the estate will be thereby promoted; otherwise every sale must be made at public auction after giving the same notice of the time and place of sale, as would be necessary for the sale of such property on execution.

§§ 170, 179, 184,
Prob. C.
am'd.

§ 6443. **Notice of place of private sale to be given.** If a private sale is authorized the court may direct the executor or administrator to publish a notice of the place where such sale will be made and the time when the same will commence.

§ 168, Prob. C.
am'd.

§ 6444. **Partnership interests and claims may be sold.** Partnership interests, interests 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 interest of the estate, but before ordering a sale of any partnership interest the court must inquire into the condition of the partnership affairs and examine the surviving partner if in the county and able to be present.

§ 293, Prob. C.
am'd.

§ 6445. **Lien on the property purchased.** When the holder of any mortgage or other lien, whose claim has been presented and allowed, purchases any property which is subject to the lien at a sale made by an executor or administrator, his receipt for the amount, which he would be entitled to receive by virtue of the lien from the proceeds after deducting expenses of the sale, shall be accepted as a payment of so much money.

§ 184, Prob. C.
am'd.

§ 6446. **Limit of price. Reappraisal.** No property can be sold at private sale for less than ninety per cent of the appraised value thereof. No real estate can be sold at private sale unless it has been appraised within one year. If it has not been so appraised or if the court deems the appraisal too high or too low, a new appraisal must be made before the sale is confirmed.

§ 182, Prob. C.
am'd.

§ 6447. **Hour of real estate sale.** A sale of real estate at public auction must be made between the hours of nine in the morning and four in the afternoon of the day specified in the notice of sale unless the same is postponed.

§ 6448. **Postponement of the 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. § 191. Prob. C. am'd.

§ 6449. **Notice of postponement, how given.** In case of a postponement, notice thereof must be given by a public declaration at the time and place first appointed for the sale, and if the postponement is for more than one day, further notice must be given by posting notices in three or more public places in the county where the land is situated or by publishing the same, or both, as the time and circumstances will admit. § 192. Prob. C. am'd.

§ 6450. **Security for deferred payments.** When real property is sold at public auction, the purchaser must immediately deposit with the executor or administrator the money agreed upon as a cash payment and execute and deliver to him a note and mortgage on the property to secure each deferred payment, and upon his failure to do so the property shall be again offered for sale. When sold at private sale the money and securities must be deposited or delivered in like manner before the sale is reported for confirmation. § 185. Prob. C. am'd.

§ 6451. **Sale of personal property. Report to the court.** When an executor or administrator has made any sales of personal property, he must return to the court at his next settlement or sooner if the court so directs, a full report of such sales, with a detailed account of all moneys received therefrom, to be acted upon in the settlement of his accounts. § 208. Prob. C. am'd.

§ 6452. **Sale of real estate, report of. Hearing. Notice.** Immediately after making a sale of real estate, the executor or administrator must return to the county court a full report of his proceedings containing a statement of the money deposited for the purchase of the property and accompanied by each note and mortgage likewise deposited as security for any deferred payment, also a copy of the notice of sale and proof of publication. The court shall thereupon fix a day for hearing objections to the confirmation of such sale, and direct notice thereof to be given to each party whose post office address is known and each creditor who has a claim pending, specifying in the notice each parcel sold and the sum offered for the same and referring to the return for further particulars. §§ 186, 190. Prob. C. am'd.

§ 6453. **Hearing for confirmation of sale. Resale, when.** At the hearing pursuant to such notice, any person interested in the estate may file written objections to the confirmation of the sale and witnesses may be examined in support of the same or in opposition thereto, as upon the trial of an issue of fact. If the court is satisfied after hearing the testimony and inquiring into the facts that the sale was legally and fairly made, and that the sum offered is not disproportionate to the value of the property and there is no good reason to suppose that a greater sum can be realized upon another sale, an order must be made confirming the sale and directing a conveyance to be executed accordingly; otherwise an order shall be made setting aside the sale and directing the return of all money and securities on deposit, after which the executor may proceed anew to make sale of the property. §§ 187, 188. Prob. C. am'd.

§ 6454. **Conveyance and record upon confirmation, effect of.** When a sale of real estate is confirmed the executor or administrator must execute to each purchaser a conveyance, referring to the decree authorizing the sale and the order of confirmation. Such

conveyance is presumptive evidence of the regularity and validity of the sale and from the date of sale conveys all right, title and interest of the decedent in the property described therein, whether vested in him at the time of his death or thereafter acquired in the right of the decedent prior to its execution.

§ 198. Prob. C. am'd. **§ 6455. Contract for purchase of land, may be sold.** If a decedent at the time of his death was possessed of a contract for the purchase of land, his interest in such land and under such contract 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. Prob. C. am'd. **§ 6456. Terms and conditions of such a sale.** The sale must be made subject to all payments that may hereinafter become due on such contract and if there are any such, the sale must not be confirmed by the court until the purchasers execute a bond to the executor or administrator for the benefit and indemnity of himself and of the persons entitled to the interest of the decedent in the lands so contracted for in double the whole amount of payments thereafter to become due on such contract, with such sureties as the county judge shall approve.

§ 200. Prob. C. am'd. **§ 6457. Bond in such sale. Conditions of.** 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. Prob. C. am'd. **§ 6458. Assignment of the contract, when.** 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 was living.

§ 1. c. 54, 1860. am'd. **§ 6459. Mortgage of minor's real estate.** When it is shown to the satisfaction of the court at the hearing upon an application for the sale of real estate or upon a petition praying that the same may be mortgaged as provided in the next section after all the parties interested have been duly cited, that it will be for the benefit of the estate, the county court may direct an executor or administrator to mortgage any real estate of the decedent for the purpose of paying an existing lien or mortgage on the property or for any other purpose for which a sale may be ordered or it may authorize him to make a renewal of an existing mortgage, but the homestead shall not be mortgaged without the consent of the persons entitled thereto.

§ 2. c. 54, 1860. am'd. **§ 6460. Petition for mortgage, contents of.** A petition for the purpose specified in the preceding section must specify the amount of money necessary to be raised and the purposes for which the same is required with such further particulars as are required in a petition for the sale of real property. The decree must fix the amount for which the mortgage may be given and the rate of interest that may be paid thereon, and may order the whole or any part of the

money so secured to be paid from time to time out of the income of the mortgaged property. The mortgage or other contract executed by the executor in pursuance thereof may be approved upon his report in the same manner as a sale.

ARTICLE 8.—SPECIFIC PERFORMANCE.

§ 6461. **Legal representative to convey real estate of decedent.** When a person who is bound by contract in writing to convey any real estate dies before making the conveyance, the county court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto in all cases when the decedent if living, might be compelled to make such conveyance. § 221, Prob. C. am'd.

§ 6462. **Petition for such conveyance, contents of.** 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 all persons interested in the estate must be cited as in other cases. § 222, Prob. C. am'd.

§ 6463. **Decree upon hearing had.** If after a full hearing 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 must be made authorizing and directing the executor or administrator to execute a conveyance thereof to the petitioner and such conveyance must be executed accordingly. § 224, Prob. C. am'd.

§ 6464. **Effect of such conveyance.** Every conveyance made in pursuance of a decree of the court as provided in this chapter and approved by the judge shall pass the title to the estate contracted for as fully as if the contracting party himself was still living and executed the conveyance. § 227, Prob. C. am'd.

§ 6465. **Dismissal and appeal.** If upon the hearing in the county court, 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 thereafter proceed in the district court to enforce a specific performance thereof. § 226, Prob. C. am'd.

ARTICLE 9.—ACTIONS BY AND AGAINST EXECUTORS AND ADMINISTRATORS.

§ 6466. **Action for possession of real estate maintained, by whom.** 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. For the purpose of bringing suits to quiet title or for partition of such estate the possession of the executor or administrator is the possession of the heirs or devisees. Such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator for the purposes of administration as provided in this code. § 210, Prob. C. am'd.

§ 6467. **Actions by and against executors and administrators.** Except as otherwise prescribed in the next section, actions § 211, Prob. C. am'd.

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.

§ 6468. **Action for the recovery of money.** No action for the recovery of money only shall be brought in any of the courts of this state against any executor, administrator or guardian upon any claim or demand which may be presented to the county court except as provided in this chapter.

§ 212, Prob. C.

§ 6469. **Actions for waste, trespass and conversion.** Executors and administrators may maintain actions against any person who has wasted, destroyed, taken, carried away or converted to his own use the goods of their testator or intestate in his life time. They may also maintain actions for trespass committed on the real estate of the decedent in his lifetime.

§ 6470. **Executor or administrator may maintain necessary action.** An executor or administrator may under the direction of the county court maintain any action which may be necessary to enforce his right to the possession of the property and effects of the decedent, collect all demands due the estate and secure an accounting or settlement of any partnership existing between the decedent at or prior to his death and any other person. He may also prosecute to final judgment any action commenced by the decedent, or by a special administrator, or other administrator previously appointed in the same case.

§ 215, Prob. C.
am'd.

§ 6471. **Action against predecessor.** An executor or 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.

§ 80, Prob. C.

§ 6472. **Successive recoveries on the bond.** 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.

§ 205, Prob. C.

§ 6473. **Fraudulent sale. Liability of executor.** 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.

§ 6474. **Order required before action on bond.** Before an action can be maintained on the bond of an executor whose letters have not been revoked, the party aggrieved must first obtain an order of the county court, authorizing him to bring the action, and before authority is given to bring an action upon the bond of a deceased executor or administrator whose account is unsettled, his sureties must be cited and have an opportunity to apply for and obtain a settlement of such account.

§ 150, Prob. C.
am'd.

§ 6475. **Action pending at death of decedent.** If an action pending against the decedent at the time of his death is prosecuted to judgment against his representatives or successors in interest, the judgment does not become a lien but is payable in the course of administration.

§ 6476. Judgments before death, how collected. When any judgment has been rendered for or against the testator or intestate in his lifetime or against his representative or successor in interest, no execution shall issue thereon after his death, except: § 153. Prob. C. am'd.

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

2. In case of the death of the judgment debtor, if the judgment is for the recovery of real or personal property or the enforcement of a lien thereon. 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.

§ 6477. Death after verdict. Judgment not a lien. 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. § 154. Prob. C.

§ 6478. Actions to recover real estate or set aside decree, when begun. No action for the recovery of any estate, sold by an executor or administrator or otherwise disposed of under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent unless it is commenced within three years next after the sale. An action to set aside a decree directing or confirming a sale or otherwise disposing of such property may be instituted and maintained at any time within three years from the discovery of the fraud or other ground upon which the action is based. § 206. Prob. C. am'd.

§ 6479. Minors may begin such action, when. 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. § 207. Prob. C. am'd.

§ 6480. 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. § 218. Prob. C. am'd.

§ 6481. Creditors to require action to recover. 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. § 219. Prob. C.

§ 6482. Sale of such real estate after recovery. 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 county court, and the proceeds of all goods, § 220. Prob. C.

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 hands of the executor or administrator.

§ 217, Prob. C. **§ 6483. Compounding debts.** Whenever a debtor of a decedent is unable to pay all his debts, the executor or administrator with the approbation of the county 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 interest of the estate.

ARTICLE 10.— LIABILITY AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS.

§ 232, Prob. C. **§ 6484. Executor or administrator not liable for debts of decedent. Exception.** 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, Prob. C. **§ 6485. Executor or administrator chargeable with whole estate.** Every executor and administrator is chargeable in his account with the whole of the estate of the decedent, which may come into his possession, at the value of the appraisement contained in the inventory except as provided in the following sections, and with all the interest, profit and income of such estate.

§ 234, Prob. C. **§ 6486. Make neither profit or 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 is sold for less than the appraisement, he is not responsible for the loss if the sale has been justly made.

§ 235, Prob. C. **§ 6487. Uncollected debts, not chargeable with.** No executor or administrator is accountable for any debts due to the decedent if it appears that they remain uncollected without his fault.

§ 237, Prob. C. **§ 6488. Not to purchase claims against estate.** No administrator or executor shall purchase any claim against the estate he represents: and if he pays any claim for less than its nominal value, he is only entitled to charge in his account the amount he actually paid.

§ 6489. Liable for money received before administration. An executor or administrator is liable on his bond for money or other personal property of the estate which was in his hands or under his control when his letters were issued in whatever capacity it was received by him or came under his control.

§ 157, Prob. C. **§ 6490. Costs, when liable for.** When a judgment is recovered with costs against an 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.

§ 236, Prob. C. **§ 6491. Expenses and necessary fees allowed.** 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 full compensation for his services unless by a written instrument filed in the county court, he renounces all claims for compensation provided by the will.

§ 6492. 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 commissions must be allowed administrators. In all cases such further allowance may be made as the county court 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. § 238, Prob. C.

ARTICLE 11.—ACCOUNTING AND SETTLEMENT BY EXECUTORS AND ADMINISTRATORS.

§ 6493. Full statement of accounts must be rendered. 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 and all other matters necessary to show the condition of its affairs. § 239, Prob. C. am'd.

§ 6494. Creditor may require statement. Any creditor or other person interested in the estate may apply for an intermediate account by motion upon facts showing that it is necessary or proper that such exhibit should be made and if the judge deems the application sufficient the executor or administrator must be cited accordingly. §§ 241, 242, Prob. C. am'd.

§ 6495. Statement may be contested. When such 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, and the court may examine the executor or administrator under oath and compel him to account fully in relation thereto. § 243, Prob. C. am'd.

§ 6496. Time for final settlement. Every executor or administrator must render a full account and report of his administration and petition the court for a settlement thereof within sixty days after expiration of the time specified in the notice to creditors, or whenever his authority ceases, and thereupon all parties interested must be cited to appear at the time fixed for such settlement. §§ 245, 250, 251, Prob. C. am'd.

§ 6497. Final account and settlement. At the time designated in the last section, 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 is in a proper condition to be closed, the executor or administrator must render a final account and pray a settlement of his administration. § 257, Prob. C. am'd.

§ 6498. Failure to settle. Proceedings. If the executor or administrator neglects to render such account or to petition the court for a settlement thereof as above prescribed, any creditor or other § 246, Prob. C. am'd.

person interested may present a petition praying that an account may be taken, and that the account may be settled and determined and thereupon the executor or administrator and all other persons interested may be cited to appear in like manner and with the same effect as upon the petition of the executor or administrator. When the authority of an executor or administrator ceases or is revoked for any reason, the citation may be issued upon the petition of the succeeding administrator.

§ 6499. Hearing on settlement. Objections. At the hearing any person interested in the account may by his answer present objections to the account or any portion thereof and may pray for a further accounting or such other relief as the circumstances may justify, and the court shall determine the issues and confirm the report or require a further accounting and otherwise make such decree as the circumstances of the case require.

§ 253, Prob. C. **§ 6500. Heirs may contest all matters on settlement.** 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 may be postponed from time to time 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.

§ 248, Prob. C. **§ 6501. Vouchers for all claims to be filed.** 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, Prob. C. **§ 6502. Settlement of 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 is 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.

§ 266, Prob. C. **§ 6503. Legacies paid and estate distributed.** 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 are debts remaining unpaid, or if, for other reasons, the estate is 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.

ARTICLE 12. — PARTIAL DISTRIBUTION BEFORE FINAL SETTLEMENT.

§ 269, Prob. C. **§ 6504. Petition for legacy or share.** At any time after the lapse of the time limited for filing claims, 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 for the payment of his proportion of the debts of the estate.

§ 6505. **Notice to parties interested.** All parties interested in the estate must be cited as in other cases. § 270. Prob. C. am'd.

§ 6506. **Petition, who may resist.** The executor or administrator, or any creditor or other 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. § 271. Prob. C.

§ 6507. **Petition, may be allowed when.** If at the hearing it appears 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: § 272. Prob. C.

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 county 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 is more than one to be apportioned equally among them.

§ 6508. **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 apply to 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 designating the amount and giving a time within which it must be paid. If the money is not paid within the time allowed, an action may be maintained by the executor or administrator on the bond. § 273. Prob. C.

ARTICLE 13. — DISTRIBUTION OF THE ESTATE UPON FINAL SETTLEMENT.

§ 6509. **Court distributes estate. Deceased heir.** Upon the final settlement of the accounts of the executor or administrator or at any subsequent time, upon the petition of the executor or administrator, or of any heir, legatee or devisee, the court must proceed to distribute the residue of the estate in the hands of the executor or administrator among the persons who by law are entitled thereto; and if the decedent has left a surviving child 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 § 274. Prob. C.

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.

§ 6510. Petition for distribution may be controverted. Any respondent may by his answer controvert the allegations of the petition and claim any share or interest to which he believes himself entitled to receive and pray for partition. The issues so joined shall be tried and determined by the court as in other cases.

§ 278, Prob. C. **§ 6511. Taxes paid before decree.** Before any decree or distribution of an estate is made, the county court must be satisfied by the oath of the executor or administrator, or otherwise, that all state, county, school and municipal taxes legally levied upon personal property of the estate have been fully paid.

§ 275, Prob. C. am'd. **§ 6512. Decree of distribution, to show what.** In the 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. Or the court may order a partition and after such further proceedings as may be necessary under the following sections shall make a further decree assigning to each party his separate share and confirming the distribution accordingly.

§ 260, Prob. C. am'd. **§ 6513. Advancements made. Final decree binding on all.** 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 county court, and must be specified in the decree assigning and distributing the estate; and the final judgment or decree of the court or in case of an appeal, of the district court or supreme court, is binding on all parties interested in the estate.

§ 289, Prob. C. **§ 6514. Residue of estate assigned. Partition not required.** When the county court makes a decree assigning the residue of any estate to two or more persons entitled to the same, it is not necessary 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.

§ 282, Prob. C. **§ 6515. Partition may be made.** 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 share to other persons, and such shares must be assigned to the persons holding the same in the same manner as they otherwise would have been to such heirs, legatees or devisees.

§ 283, Prob. C. **§ 6516. Shares set apart, how.** 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.

ARTICLE 14. — PROCEEDINGS FOR PARTITION.

§ 279, Prob. C. am'd. **§ 6517. Partition made by three commissioners.** To make the partition the court must appoint three commissioners, who must

be disinterested persons and must be sworn to the faithful discharge of their duties and shall receive the same compensation as appraisers. A certified copy of their appointment and of the order or decree assigning and distributing the estate must be issued to them as their warrant and their oaths 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.

§ 6518. Real estate in different counties, division when. § 281. Prob. C.
If the real estate is in different counties, the county 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 was all in one county, and the commissioners must, unless otherwise directed by the court, make division of such real estate wherever situated within this state.

§ 6519. Notice to all parties before partition. § 287. Prob. C.
Before any partition is made or any estate is 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.

§ 6520. Court may assign the whole estate, when. Conditions. § 284. Prob. C.
When the real estate cannot be divided without prejudice or inconvenience to the owners, the county 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 female, 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 the court and recommend that the whole be assigned as herein provided and must find and report the true value of such real estate. On filing the report of the 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.

§ 6521. Whole to one person. Others to be paid. § 285. Prob. C.
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 sum as the commissioners shall award to make the partition equal, and the commissioners must make their award accordingly; but such partition must not be confirmed by the court until the sums awarded are paid to the parties entitled to the same or secured to their satisfaction.

§ 288, Prob. C. **§ 6522. Report by commissioners.** The commissioners must report their proceedings and the partition agreed upon by them to the county 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.

§ 286, Prob. C. **§ 6523. Sale of whole estate.** 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 6 of this chapter.

ARTICLE 15. — DISTRIBUTION OF ESTATES OF DECEASED NON-RESIDENTS.

§ 276, Prob. C. **§ 6524. Delivery to executor of foreign will.** Upon application for distribution after final settlement of the accounts of administration, if the decedent was a nonresident of the state, 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 state, and it is necessary in order that the estate or any part thereof may be distributed according to the will, that the estate in this state should be delivered to the executor or administrator in the state or place of his residence, the court may order such delivery to be made and if necessary order a sale of the real estate and a like delivery of the proceeds. 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 state in relation to all property embraced in such order. 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 county court.

§ 6525. Testamentary disposition regulated by law. The validity and effect of a testamentary disposition of real property situated within the state, or of an interest in real property so situated, which would descend to an heir of an intestate and the manner in which such property or such an interest descends, when it is not disposed of by will, are regulated by the laws of this state without regard to the residence of the decedent. Except when special provision is otherwise made by law, the validity and effect of a testamentary disposition of any other property situated within the state and the ownership and disposition of such property, when it is not disposed of by will, are regulated by the laws of the state or country of which the decedent was a resident at the time of his death.

§ 6526. Residue of personal estate, how disposed of. Upon the settlement of such estate and after the payment of all debts for which the same is liable in this state, the residue of the personal estate may be distributed and disposed of in manner aforesaid by the county court; or in the discretion of the court, it may be transmitted to the executor or administrator, if any, in the state or country where the deceased had his domicile, to be there disposed of according to the laws thereof.

§ 6527. Estate insolvent, creditors to share equally. If such person dies insolvent, his estate found in this state shall, as far as

practicable, be so disposed of that all his creditors here and elsewhere may receive each an equal share in proportion to their respective debts.

§ 6528. Creditors to be paid before transmission to foreign executor. To this end his estate shall not be transmitted to the foreign executor or administrator until all the creditors who are citizens of this state have received their just proportions; and no creditor who is not a citizen of this state shall be paid out of the assets found here until all those who are citizens have received their just proportions as provided in the preceding section.

§ 6529. Residue may be transmitted, when. If there is any residue after such payment to the citizens of this state, it may be paid to any other creditors who have duly proved their debts here, in proportion to the amount due to each of them, but no one shall receive more than would be due to him if the whole estate was divided ratably among all the creditors as before provided. The balance may be transmitted to the foreign executor or administrator, or if there is none, it shall after the expiration of one year from the appointment of the administrator be distributed ratably among all creditors both citizens and others, who have proved their debts in this state.

ARTICLE 16.—DISPOSITION OF UNCLAIMED SHARES.

§ 6530. Agent to take care of property for nonresidents. § 291. Prob. C.
When any estate is assigned or distributed by a decree of the court to any person residing out of and having no agent in this state and it is necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose and authorize him to take charge of such estate as well as to act for such absent person in the distribution.

§ 6531. Agent to give bond. § 292. Prob. C.
The agent must first give a bond to be approved by the county judge, 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.

§ 6532. Sale of property, when unclaimed for a year. § 293. Prob. C.
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 state treasury. When the payment is made, the agent must take from the treasurer duplicate receipts, one of which he must file in the office of the state auditor and the other in the county court.

§ 6533. Agent to render an annual account. § 294. Prob. C.
The agent must render to the county 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 county 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 of such parts of the real or personal property as shall appear to be proper and the purchase money to be deposited in the state treasury to be receipted for and the receipts filed as in like cases before provided.

§ 295, Prob. C. § **6534. Liability of agent 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, Prob. C. § **6535. Claimant for property.** When any person appears and claims the money paid into the treasury, the county 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 state auditor must draw a warrant on the treasurer for the amount.

§ 298, Prob. C. § **6536. Property discovered after final settlement.** 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 is discovered, or if it becomes necessary or proper for any cause that letters should be again issued.

CHAPTER 7.

OF GUARDIAN AND WARD.

ARTICLE 1.— GUARDIANS OF MINORS.

§ 333, Prob. C. § **6537. Guardians of persons and estates.** The county 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 state 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 after the person having the custody of such minor, and such of his relatives as the court shall deem proper, have been cited to appear.

§ 334, Prob. C. § **6538. Minor may nominate, when.** If the minor is under the age of fourteen years, the judge may nominate and appoint his guardian. 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.

§ 6539. **Judge may appoint, when.** If the guardian nominated by the minor is not approved by the judge, or if the minor resides out of the state, 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. § 335, Prob. C.

§ 6540. **Minor may appoint, when.** 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 judge. § 336, Prob. C.

§ 6541. **Father or mother entitled to guardianship.** The father of a 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, are entitled to the guardianship of the minor. § 337, Prob. C.

§ 6542. **Guardian has custody of minor.** 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. § 338, Prob. C.

§ 6543. **Guardian retains custody until majority.** Every guardian so 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. § 339, Prob. C.

§ 6544. **Guardian to give bond.** Before the order appointing any person guardian under this chapter takes effect and before letters issue, the judge must require such person to give bond with sufficient sureties, and otherwise qualify as prescribed in chapter 5 of this code. § 340, Prob. C.

§ 6545. **Conditions inserted as to care, treatment and education.** When any person is appointed guardian of a minor, the county 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. § 341, Prob. C.

§ 6546. **Extra expenses of minor, how paid.** 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 county court; and the charges therefor may be allowed accordingly in the settlement of the accounts of his guardian. § 343, Prob. C.

§ 6547. **Testamentary guardians, duties of.** 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 county court, except so far as their powers and duties are legally modified, enlarged or changed by the will by which such guardian was appointed. § 344, Prob. C.

§ 6548. **Guardian ad litem.** Nothing contained in this chapter affects or impairs the power of any court to appoint a guardian to § 345, Prob. C.

defend the interests of any minor interested in any suit or matter pending therein.

ARTICLE 2. — GUARDIANS OF INSANE AND INCOMPETENT PERSONS.

§ 346, Prob. C. **§ 6549. Petition for guardian for insane.** When it is represented to the county court upon verified petition of any relative or friend, that any person is of unsound mind or from any cause mentally incompetent to manage his property, the judge must cause such person to be cited as in other cases, except that the time of service may be the same as upon a motion.

§ 347, Prob. C. **§ 6550. Guardian appointed, when.** If after a full hearing and examination upon such petition, it appears to the 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, Prob. C. **§ 6551. Powers of guardian and 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 in like manner and with like conditions as before prescribed with respect to the guardian of a minor.

§ 349, Prob. C. **§ 6552. Proceedings to declare restoration of insane.** Any person who has been declared to be of unsound mind or the guardian of any relative of such person within the third degree, or any friend may apply by petition to the county court of the county, in which he was so declared, 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 a citation to be issued to the guardian of the petitioner, if there is a guardian and to his or her husband or wife, if there is one, and to his or her father or mother if living in the county. 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 is found that the petitioner is of sound mind and capable of taking care of himself and property, his restoration to capacity shall be adjudged and the guardianship of such person if such person is not a minor shall cease.

ARTICLE 3. — THE POWERS AND DUTIES OF GUARDIANS.

§ 350, Prob. C. **§ 6553. Payment of debts.** 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, Prob. C. **§ 6554. Collect accounts and appear in legal proceedings.** 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 county court compound 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 a special guardian is appointed for that purpose.

§ 6555. Rules for management of estate of ward. Every § 352, Prob. C.
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 is any; and if such income and profits are insufficient for that purpose, the guardian may sell the real estate upon obtaining a decree of the county court therefor and must apply the proceeds of such sale as far as may be necessary to the maintenance and support of the ward and his family if there is any.

§ 6556. Maintenance and support of ward. When a guardian § 353, Prob. C.
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 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.

§ 6557. Inventory and account of ward's estate. Every § 355, Prob. C.
guardian must return to the county 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, semiannual returns must be made to the court. The court may upon application made for that purpose by any person compel the guardian to render an account of the estate. 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. 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 appraisal thereof that are herein provided in relation to the first inventory and return.

§ 6558. Settlement at end of year. The guardian must, § 356, Prob. C.
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 county court for settlement and allowance.

§ 6559. Account by one of joint guardians. When an § 357, Prob. C.
account is rendered by two or more joint guardians, the court may in its discretion allow the same upon oath of any of them.

§ 358. Prob. C. **§ 6560. Expenses and pay of guardians.** Every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust and he must also have compensation for his services as the court in which his accounts are settled deems just and reasonable.

ARTICLE 4.—SALES OF PROPERTY AND DISPOSITION OF PROCEEDS.

§ 359. Prob. C. **§ 6561. Sale of property may be made, when.** When the income of an estate under guardianship is not sufficient 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 a decree therefor.

§ 360. Prob. C. **§ 6562. Sale of property 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 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 a decree therefor.

§ 361. Prob. C. **§ 6563. Proceeds of sale, 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. Prob. C. **§ 6564. Investment, how made.** If the estate is sold for the purpose of putting out or investing the proceeds, the guardian must make the investment according to his best judgment or in pursuance of any order that may be made by the county court.

§ 363. Prob. C. **§ 6565. Petition for sale.** To obtain a decree for such sale, the guardian must present to the county court of the county, in which he was appointed, a 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. Prob. C. **§ 6566. Hearing and order of sale.** If it appears to the court 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 issue a citation to the next of kin of the ward and all persons interested in the estate to appear before the court and answer thereto.

§ 365. Prob. C. **§ 6567. Court to hear proofs.** The county court, at the time and place appointed or such other time to which the hearing is postponed upon proof of the service of the citation, must hear and examine the proofs and allegations of the petitioner and of the next of kin and all other persons interested in the estate who oppose the application.

§ 367. Prob. C. **§ 6568. Guardian and witnesses.** On the hearing the guardian may be examined on oath and witnesses may be produced and examined by either party.

§ 6569. **Order of sale, to state what.** 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 make a decree directing such sale 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. § 369, Prob. C.

§ 6570. **Bond to be given before sale.** Every guardian authorized to sell real estate must before the sale give bond with sufficient sureties, to be approved by the judge, 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 5 of this code. § 370, Prob. C. am'd.

§ 6571. **Law of estates governs guardians unless otherwise declared.** All proceedings under petitions 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. § 371, Prob. C.

§ 6572. **Order in force one year.** No decree granted in pursuance of this article continues in force more than one year after granting the same without sale being had. § 372, Prob. C.

§ 6573. **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 judge is most beneficial to the ward. Guardians making sales must demand and receive from the purchasers a 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. § 373, Prob. C.

§ 6574. **Order to invest proceeds.** The county 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 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. § 374, Prob. C.

ARTICLE 5.—NONRESIDENT GUARDIANS AND WARDS.

§ 6575. **Guardian for nonresident ward.** When a person liable to be put under guardianship according to the provisions of this chapter resides without this state and has estate therein, any friend of such person or any one interested in his estate in expectancy or otherwise may present a petition to the county judge of any county in which there is any estate of such absent person for the appointment of a guardian, and if after a citation to all interested § 375, Prob. C. am'd.

and a full hearing and examination it appears proper, a guardian for such absent person may be appointed.

§ 376. Prob. C. **§ 6576. Power same as in other cases.** 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 state 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. Prob. C. **§ 6577. Guardian must give bond.** Every such guardian must give bond 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 state.

§ 379. Prob. C. **§ 6578. Removal of property.** When the guardian and ward are both nonresidents and the ward is entitled to property in this state, 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 county court of the county in which the estate of the ward or the principal part thereof is situated.

§ 380. Prob. C. **§ 6579. Application for removal, contents.** The application must be made by petition and citation must issue to the resident executor, administrator or guardian if there is such, and upon such application the nonresident 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 is shown, the county 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. Prob. C. **§ 6580. Effect of order for removal.** 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 county court the receipt therefor of the foreign guardian of such absent ward.

ARTICLE 6. — GENERAL AND MISCELLANEOUS PROVISIONS.

§ 6581. Concealment or embezzlement of ward's property. § 382, Prob. C.
Upon a 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, effects or an instrument in writing belonging to the ward or to his estate, the county court may cite such suspected person to appear before it 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.

§ 6582. Marriage of minor terminates guardianship. § 384, Prob. C.
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 county court when it appears to him on the application of the ward or otherwise that the guardianship is no longer necessary.

§ 6583. Bonds must be preserved. § 386, Prob. C.
Every bond given by a guardian must be filed and preserved in the office of the county judge; 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.

§ 6584. Action against sureties. Three year's limitation. § 387, Prob. C.
No action can be maintained against the sureties on any bond given by a guardian unless 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.

§ 6585. Action for recovery of an estate. Limitation. § 388, Prob. C.
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.

§ 6586. More than one guardian, when. § 389, Prob. C.
The court in its discretion may appoint more than one guardian of any person subject to guardianship, who must give bond and be governed and be liable in all respects as a sole guardian.

§ 6587. Bonds run to the state. Except when otherwise specially provided by this code all bonds and undertakings in anywise required by the provisions of this code shall run to the state of North Dakota as nominal payee and an action may be brought and maintained on any such bond or undertaking by and in the name of any person injured by any violation of the provisions thereof.

CHAPTER 8.

PRACTICE IN COUNTY COURTS WITH INCREASED JURISDICTION.

- § 1, c. 43, 1895. **§ 6588. General provisions to apply.** The general provisions of law which may at any time be in force relating to the district courts, and to civil and criminal proceedings therein shall relate also to the county courts having increased jurisdiction and the rules of practice of district courts shall be in force in said county courts, unless inapplicable and except as herein otherwise provided.
- § 2, c. 43, 1895. **§ 6589. Terms of court.** The regular term of the county court shall be held at the county seat, commencing at 9 o'clock A. M. on the first Tuesday of each calendar month for the trial of such civil and criminal actions as may be brought before such court.
- § 3, c. 43, 1895. **§ 6590. Calendar.** The county judge shall, on the first day of each term, or as soon thereafter as may be, prepare a calendar of the causes standing for trial at such term, placing the causes upon such calendar in the order in which the same are numbered on the docket and setting the causes for trial upon convenient days during such term; provided, that no cause shall be set for trial upon the first day of said term without the consent of all parties thereto.
- § 4, c. 43, 1895. **§ 6591. Appeals from county court.** In all actions brought under the provisions of this chapter an appeal may be taken to the district court of the county or to the supreme court, and if the appeal is to the district court it shall be taken in the same manner as appeals from justice's court and if the appeal is to the supreme court it shall be taken in the same manner and pursuant to the same rules as appeals from the district court; provided, that in civil actions when the amount in controversy, exclusive of costs, is less than two hundred and fifty dollars an appeal to the district court only shall lie; and provided, further, that an appeal to the district court shall not be effectual for any purpose unless an undertaking is filed with two or more sureties in a sum equal to the amount in controversy or to the value of the specific property in controversy plus one hundred dollars.
- § 5, c. 43, 1895. **§ 6592. Concurrent jurisdiction on appeal.** Such county courts shall have concurrent jurisdiction with the district courts in appeals from all final judgments of justices of the peace, police, city or township justices, and the proceedings on such appeals shall be the same as now or may hereafter be provided for appeals from judgments of justices of the peace to district courts.
- § 6, c. 43, 1895. **§ 6593. Cause certified to district court, when.** In any civil or criminal cause of which this court has jurisdiction, whenever at any time before said cause is called for trial it shall appear to the court by affidavit, or if the court shall so order upon other testimony, that a fair and impartial trial cannot be had in such court by reason of the bias or prejudice of the judge or otherwise, the court shall direct said cause and all papers and documents connected therewith to be certified to the district court of the county wherein said county court is held; and such papers shall be delivered to the clerk of the district court at least one day before the first day of the next term thereof and shall be placed upon the trial calendar and stand for trial the same as cases originally commenced in the district court.

§ 6594. **Manner of selecting jury.** Juries in the county court shall be selected by the county judge and summoned in the same manner as is now provided by law for selecting juries before justices of the peace; provided, that each party shall be entitled to the same number of challenges as is now or may hereafter be allowed in the district court in like actions. § 7, c. 43, 1895.

§ 6595. **New trials.** The county court shall have authority to grant new trials, affirm, modify or set aside judgments in actions tried in such court upon a statement of the case prepared and settled in the manner provided in the code of civil procedure. § 8, c. 43, 1895.

§ 6596. **May issue process.** The several county courts shall have power to issue all summons, citations, subpoenas, executions, warrants and process authorized by law which may be necessary to carry into effect any order, judgment or decree thereof, to compel the attendance of witnesses or to carry into execution the powers with which they are vested. § 9, c. 43, 1895.

§ 6597. **Service in other county.** All writs, summons and other process may be executed and served only in the county; provided, that when there is more than one defendant and one of such defendants has been served in the county, service may be made on the other defendants in any county in this state. § 10, c. 43, 1895.

§ 6598. **Continued causes.** When for any cause the county judge fails to attend at the commencement of any regular term or at the time to which any cause is assigned for trial or at the time to which any cause may be continued, the parties shall not be obliged to wait more than one hour and if he does not attend within the hour and no other disposition of the case is made by such judge, the parties in attendance shall be required to attend at 9 o'clock A. M. of the following day and if such judge shall not attend at that time, the cause shall stand continued until the first day of the next regular term. § 11, c. 43, 1895.

§ 6599. **Adjournment.** The time for which any civil action may be adjourned shall be regulated by the county judge in the exercise of a reasonable discretion; provided, that such action cannot be adjourned over more than three regular terms of such court upon the application of either party without the consent of the other. In criminal actions if the defendant has been committed to jail, he must be tried at the first term of such court held after such commitment. If the defendant in a criminal action has given bail for his appearance, his trial must not be postponed longer than until the third term after such bail is given. § 12, c. 43, 1895.

§ 6600. **Bailiff.** The judge of the county court may appoint a competent person as bailiff of the court, who shall hold his office at the pleasure of the judge. Such bailiff shall have the same powers as a constable and shall receive for his services the same fees as are prescribed for constables and bailiffs. § 13, c. 43, 1895.

§ 6601. **Criminal jurisdiction.** Concurrent jurisdiction, power and authority with the district court is hereby conferred and imposed upon county courts having increased jurisdiction of all criminal offenses of which the district court of said county has jurisdiction, below the grade of felony, and of any person accused thereof, and to hear, try, determine, pronounce judgment and sentence and take and have all necessary proceedings concerning or relating thereto as provided by law. The necessary jurisdiction, power and authority is hereby conferred and imposed upon the county court. § 14, c. 43, 1895.

§ 15. c. 43. 1895.

§ 6602. Defendant bound over to. In any criminal action or proceeding for any criminal offense of which the county court has jurisdiction, any justice of the peace or other examining magistrate having jurisdiction must admit to bail, bind over or commit for trial the accused to the county court of such county and the information shall be filed in such county court. If any person accused of a criminal offense is so bailed, bound over or committed for trial to the county court for a crime of which such court has not jurisdiction, such proceeding shall not abate and such county court shall not lose jurisdiction of such person and proceeding, but shall certify the same to the district court of such county and such proceeding shall thereupon be tried in the district court with the same force and effect as if such action or proceedings had been originally commenced therein. If any examining magistrate shall at any time bind over a defendant to the district court for an offense of which the county court has jurisdiction or if it shall appear by evidence or otherwise at any time to the judge of the district court that the offense with which the defendant is or should be charged is triable in the county court, the judge of the district court may certify such cause and all proceedings relative to any person accused of such offense to the county court of such county for trial, determination and adjudication, and thereupon the same and all the papers and files therein shall be transferred by the clerk of the district court to the county court without any further order or certificate and such cause shall thereupon be tried in the county court with the same force and effect as if such cause had originally been commenced therein.

§ 16. c. 43. 1895.

§ 6603. Jury trial. In civil actions when the value in controversy or sum demanded exceeds fifty dollars, either party may demand a jury trial, but such demand shall be made on or before the first day of the term upon the calendar of which said cause appears. In criminal actions when the defendant is arraigned he shall be informed by the court of his right to trial by jury and if he waives his right to a jury trial, an entry to that effect shall be made in the court minutes.

§ 17. c. 43. 1895.

§ 6604. Warrant of arrest. The county court in term time or the judge in vacation may issue warrants of arrest for persons against whom an information has been filed, shall fix the amount of bail to be required of the accused and the clerk shall indorse the same upon the warrant except when the warrant is issued in term time, when the same may be returnable forthwith and it shall not then be necessary to fix the amount of bail until the accused is brought into court.

§ 18. c. 43. 1895.

§ 6605. Receive plea and pass judgment. The court may receive the plea of guilty and pass judgment in term time or vacation; if the accused waives a jury he may be tried by the court without a jury in term time upon notice being first given to the state's attorney.

§ 19. c. 43. 1895.

§ 6606. Preliminary examination. No preliminary examination shall be necessary before trial in criminal actions in the county court.

§ 20. c. 43. 1895.

§ 6607. Assignment of counsel. In all criminal cases triable in the county court when it is satisfactorily shown to the court that the defendant has no means and is unable to employ counsel, the court shall in such cases assign counsel for the defense and allow and direct to be paid by the county in which said court is held a reasonable and just compensation to the attorney or attorneys assigned for such ser-

vices as they may render; provided, however, that such compensation shall not exceed twenty-five dollars in any one case.

§ 6608. **Summons.** The summons shall require the defendant to file a copy of his pleading with the clerk of the county court within ten days after the service of the summons exclusive of the day of service. § 21, c. 43, 1895.

§ 6609. **Complaint filed, when.** The complaint in any civil action together with one copy for each defendant must be filed with the clerk of the county court within five days after the issuance of the summons in such action and any action in which the complaint shall not have been filed in accordance with the provisions of this section shall be dismissed on motion of the defendant. In no case shall the defendant or his attorney be entitled to have a copy of the complaint served upon him. § 22, c. 43, 1895.

§ 6610. **Answer or demurrer.** The defendant must file his answer or demurrer with the clerk of the county court within ten days after the service of the summons. § 23, c. 43, 1895.

§ 6611. **Time of trial.** When the time to answer does not expire at least ten days before the first day of the next term of court, the cause shall stand for trial at the next succeeding term thereafter without further notice to defendant. § 24, c. 43, 1895.

§ 6612. **Judgment lien.** Any person having a judgment rendered by the county court may cause an abstract thereof to be filed in the office of the clerk of the district court in any county in the state and when such abstract is filed in the office of the clerk of the district court and docketed as a judgment, such judgment shall be a lien upon all real estate in the county belonging to any of the defendants against whom such judgment is rendered. Execution on any judgment shall issue out of the county court attested in the name of the judge and sealed with the seal of the court. Execution may be issued to any county where an abstract of such judgment is docketed; before such execution shall be levied, it shall have indorsed thereon by the clerk of the district court of such county the day and hour when such abstract was filed and the amount due thereon. § 25, c. 43, 1895.

§ 6613. **Clerk of district court ex officio clerk of county court.** In all counties having county courts with civil and criminal jurisdiction, having a population of less than eighteen thousand inhabitants, the clerk of the district court shall be clerk of the county court in the same county and shall have the care and custody of all books and papers belonging to such county court which relate to or have any connection with any actions or proceedings commenced in such court by reason of its having increased civil and criminal jurisdiction conferred upon it. Such clerks of the district court and their deputies shall perform all the duties of the clerks of such courts in all actions and proceedings commenced in the county courts by virtue of its enlarged jurisdiction in the same manner as they are required to perform the duties of the clerks or deputy clerks of the district courts, so far as the provisions of law relating to that subject are applicable, and may demand and receive the same fees and compensation therefor except that they shall be entitled to receive no per diem for attendance in court. The judge of the county court, having increased jurisdiction in counties having a population of eighteen thousand or more, shall have power to appoint a clerk of such court, whose duties and powers shall be as nearly as may be the same as those of clerks of § 26, c. 43, 1895.

district courts. Such clerk shall hold his office during the pleasure of the judge appointing him and shall receive a salary of one thousand two hundred dollars a year. He shall charge and receive for all acts performed by him the same fees and commissions as are allowed to clerks of the district courts. He shall keep a true account of all fees and commissions received by him in a book of record to be kept for that purpose and on the first of each calendar month shall pay the same to the treasurer of the county.

§ 27, c. 43, 1895.

§ 6614. Population, how determined. The county auditor or county clerk shall determine the population of his county by multiplying by five the total vote cast in the last general election of county officers and the result shall be taken as the population of such county.

§ 28, c. 43, 1895.

§ 6615. Salary of judge. As compensation for their services under this act there shall be allowed and paid to the judges of county courts having civil and criminal jurisdiction in all counties having a population of eighteen thousand inhabitants the sum of two thousand five hundred dollars per annum, and in counties having less than eighteen thousand inhabitants the sum of two thousand dollars per annum payable monthly by such county.

§ 29, c. 43, 1895.

§ 6616. Process, by whom served and compensation. All writs and process in county courts may be served by a constable as well as a sheriff and when served by a constable he shall be entitled to the same fees as the sheriff receives for like service.

§ 30, c. 43, 1895.

§ 6617. Court stenographer. The judge of any county court having civil or criminal jurisdiction is authorized in his discretion to appoint a court stenographer of such court. Such stenographer shall qualify in the same manner and his duties and compensation shall be the same as the court stenographer of a district court; such compensation shall be paid in the same manner as that of the court stenographer of the district court; provided, that such court stenographer shall not be appointed in any county having less than eight thousand inhabitants, unless the board of county commissioners shall first authorize such appointment.