CODE OF CIVIL PROCEDURE

CHAPTER 1.

GENERAL DEFINITIONS AND PROVISIONS.

§ 6731. Title. This act shall be known as the code of civil procedure of the state of North Dakota. [C. Civ. P. 1877, § 1; R. C. 1895, § 5145.]

§ 6732. Not retroactive. No part of it is retroactive unless expressly so declared. [C. Civ. P. 1877, § 2; R. C. 1899, § 5146.]

§ 6733. Code is law of this state. Excludes common law. The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed with a view to effect its objects and to promote justice. [C. Civ. P. 1877, § 3; R. C. 1899, § 5147.]

§ 6734. Prior rights not affected. No action or proceeding commenced before this code takes effect and no right accrued is affected by its provisions, but the proceedings therein must conform to the requirements of this code as far as applicable. [C. Civ. P. 1877, § 4; R. C. 1899, § 5148.]

§ 6735. Limitation commenced to run not interrupted. When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this code goes into effect, and the same or any limitation is prescribed in this code, the time which has already run shall be deemed part of the time prescribed as such limitation by this code. [C. Civ. P. 1877, § 5; R. C. 1899, § 5149.]

Limitation may depend upon happening of subsequent event. **Time when cause of action accrues.** Effect of limitation statute upon existing causes of action. **Osborne v. Lindstrom**, 9 N. D. 1, 81 N. W. 72.

§ 6736. Computation of time. The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday, and then it is also excluded. [C. Civ. P. 1877, § 6; R. C. 1899, § 5150.]

Time, computation of. Taylor v. Brown, 5 Dak. 335, 40 N. W. 525.

Applies in highway proceedings. Williams v. Township, 15 S. D. 182, 87 N. W. 968.

A holiday, not the last day, must be included in computing time. **C., M. & St. P. Ry. v. Nieuld,** 16 S. D. 370, 92 N. W. 1069.

§ 6737. Language, how construed. Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition. [C. Civ. P. 1877, § 7; R. C. 1899, § 5151.]

§ 6738. Definition of words. The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context:

1. The word "writ" signifies an order or precept in writing, issued in the name of the state or of a court or judicial officer; and the word "process," a writ or summons issued in the course of judicial proceedings.

2. The word "state," when applied to the different parts of the United States, includes the District of Columbia and the territories; and the words "United States" may include the district and territories. [C. Civ. P. 1877, § 8; R. C. 1899, § 5152.]

§ **6739. Effect upon former laws. Repeals.** No statute, law or rule is continued in force because it is consistent with the provisions of this code on the same subject; but in all cases provided for by this code all statutes, laws and rules heretofore in force in this state, whether consistent or not with the provisions of this code, unless expressly continued in force by it, are repealed and abrogated. This repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued or any action or proceeding already taken, except as in this code provided, nor does it affect any private statute not expressly repealed. [C. Civ. P. 1877, § 9; R. C. 1899, § 5153.]

§ **6740. Act, how cited.** This act, whenever cited, enumerated, referred to or amended, may be designated simply as "the code of civil procedure," adding, when necessary, the number of the section. [C. Civ. P. 1877, § 10; R. C. 1899, § 5154.]

§ **6741. Remedies classified.** Remedies in the courts of justice are divided into:

1. Actions.
2. Special proceedings. [C. Civ. P. 1877, § 11; R. C. 1899, § 5155.]

Disbarment is a special proceeding. In re Eaton, 7 N. D. 269, 74 N. W. 870.

§ **6742. Action defined.** An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong or the punishment of a public offense. [C. Civ. P. 1877, § 12; R. C. 1899, § 5156.]

Prosecution for a public offense is an action. State v. Rozum, 8 N. D. 548, 80 N. W. 477.

A party may consent to dismissal of action without consent of his attorney. Paulson v. Lyson, 12 N. D. 354, 97 N. W. 533.

§ **6743. Special proceedings.** Every other remedy is a special proceeding. [C. Civ. P. 1877, § 13; R. C. 1899, § 5157.]

Contempt proceedings should be remedial to be special proceedings. State ex rel Edwards v. Davis, 2 N. D. 461, 51 N. W. 942.

§ **6744. Actions classified.** Actions are of two kinds:

1. Civil.
2. Criminal. [C. Civ. P. 1877, § 14; R. C. 1899, § 5158.]

§ **6745. Criminal action defined.** A criminal action is one prosecuted by the state as a party against a person charged with a public offense for the punishment thereof. [C. Civ. P. 1877, § 15; R. C. 1899, § 5159.]

§ **6746. Civil action. Process.** Every other is a civil action; and all process in civil actions shall run in the name of the state of North Dakota. [C. Civ. P. 1877, § 16; R. C. 1899, § 5160.]

§ **6747. Civil and criminal remedies not merged.** When the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other. [C. Civ. P. 1877, § 17; R. C. 1899, § 5161.]

CHAPTER 2.

COURTS.

Article 1.—Of the Courts in General.

§ **6748. Courts.** The following are the courts of justice of this state:

1. The supreme court.
2. The district courts.

3. The county courts.
4. The courts of justices of the peace.
5. Such other courts as are or may be created by law for cities, incorporated towns and villages.

Of these the supreme, district and county courts are courts of record. [C. Civ. P. 1877, § 18; R. C. 1895, § 5162.]

§ **6749. Sittings of courts public. Persons may be excluded, when.** The sittings of every court of this state shall be public and every citizen may freely attend the same, except that on the trial of cases of a scandalous or obscene nature the presiding judge or justice may, in his discretion, exclude therefrom all persons not necessarily present as parties or witnesses. [1890, ch. 104, § 1; R. C. 1895, § 5163.]

§ **6750. Courts not open on Sundays and holidays. Jurisdiction of magistrates on such days.** Courts shall not be open on Sundays or legal holidays, unless for the purpose of instructing or discharging a jury, or receiving a verdict. Any magistrate may, however, on such days exercise his jurisdiction in criminal cases to preserve the peace or arrest offenders, and may in all cases either civil or criminal admit any person arrested to bail. [1895, § 5164.]

Article 2.—The Supreme Court.

§ **6751. Jurisdiction defined. Power to issue writs.** The supreme court shall have and exercise appellate jurisdiction only, except when otherwise specially provided by law or the constitution. The supreme court has power in the exercise of its original jurisdiction to issue writs of habeas corpus, mandamus, quo warranto, certiorari and injunction; and in the exercise of its appellate jurisdiction and in its superintending control over inferior courts it may issue such original and remedial writs as are necessary to the proper exercise of such jurisdiction; provided, that said court shall exercise the said original jurisdiction only in habeas corpus cases and in such cases of strictly public concern as involve questions affecting the sovereign rights of the state or its franchises or privilege. [1891, ch. 118, § 1; R. C. 1899, § 5165.]

Courts of general jurisdiction have inherent power to set aside any judgment or decree procured by fraud or deceit of successful party practiced upon complaining party to action and the court. Cannot dismiss with costs. Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095.

Prerequisites of issuance of injunctional orders by supreme court. See Anderson v. Gordon et al, 9 N. D. 480, 83 N. W. 993

§ **6752. Issue and return of writs.** The supreme court shall be always open for the issue and return of all writs and process which it may lawfully issue and for the hearing and determination of the same, subject to such regulations and conditions as the court may prescribe. And any judge of said court may order the issuance of any such writ or process, and prescribe the time and manner of service and the time and place of return of the same; provided, that in cases of habeas corpus the judge of the supreme court who issues or causes the writ to issue may, at his discretion, direct that the writ shall be made returnable and heard and determined, either before the supreme court or any judge thereof, or before any district court of the state or any judge of any district court of the state; provided, further, that any district court or judge thereof before whom any writ is made returnable as prescribed in this section is hereby vested with full power and authority necessary for carrying into complete execution all of its judgments, decrees and determinations, subject to appeal as provided by law. [1891, ch. 118, § 2; R. C. 1899, § 5166.]

§ **6753. Issues of fact to be sent to district court for trial.** Whenever an issue of fact shall be joined or assessment of damages by a jury be necessary in any action or proceeding commenced in the supreme court, the court may, in its discretion, send the same to some district court, and it shall be there determined in the same manner as other issues of fact are tried or assessments

made and return be made thereof as directed by the supreme court. In such cases the supreme court may order a special verdict to be found and returned. [R. C. 1895, § 5167.]

§ **6754. Power to execute judgments, decrees, etc.** Said court is vested with full power and authority necessary for carrying into complete execution all its judgments, decrees and determinations in the matters aforesaid and for the exercise of its jurisdiction as the supreme judicial tribunal of the state; and shall by order made at general or special term from time to time make and prescribe such general rules and regulations for the conduct and hearing of causes in said court not inconsistent with the statute law of the state, as it may deem proper; and the said court shall by order prescribe the manner of publication at the expense of the state of such rules and regulations; and the same shall not be in force until thirty days after the publication thereof. [1891, ch. 118, § 3; R. C. 1899, § 5168.]

§ **6755. Decisions. Syllabus.** The said court shall in all cases decided by it give its decision in writing, which shall be filed with the clerk of said court with the other papers in the case. Decisions in cases heard at a general or special term and all orders affecting the same may be filed in vacation, and judgment entered thereon in pursuance of the finding and order of the court with the same effect as upon decisions made and filed in term. Said court at the time of announcing its decisions in any action determined by said court shall file with the clerk thereof a syllabus of the decision in such action, so prepared as to embody as briefly as practicable the principles settled in and by such decision. [1891, ch. 118, § 4; R. C. 1899, § 5169.]

§ **6756. Adjournments.** If any two judges of said court shall not attend on the first or on any other day of the term, the clerk shall enter such fact on record, and the judge present shall adjourn the court to the next day and so on from day to day for six days, if neither of the absent judges appears; at the end of which period said court shall be adjourned, and all matters pending therein shall stand continued until the next regular or special term. If none of the judges appears, the clerk of said court may adjourn from day to day as provided in this section. [1891, ch. 118, § 5; R. C. 1899, § 5170.]

§ **6757. When causes on calendar stand over.** Whenever there is no general term of said court at the time fixed therefor by law for any cause, or whenever there is a continuance of the term of said court or a change in the time of holding any term by act of the legislative assembly, all causes then upon the calendar of said court, all writs, recognizances, appeals and proceedings commenced, taken or made returnable to said court at said term shall stand over to and be heard at the next general term with like effect as if no such failure, continuance or change had occurred. [1891, ch. 118, § 6; R. C. 1899, § 5171.]

§ **6758. Preference on calendar.** On a second and each subsequent appeal to the supreme court or when an appeal has once been dismissed for defect or irregularity the cause shall be placed upon the calendar as of the time of filing the first appeal; and whenever in any action or proceeding in which the state of North Dakota, or any state officer, or any board of state officers, is or are sole plaintiff or defendant, an appeal has been or shall be brought from any judgment or order for or against him or them in any court, such appeal shall have a preference in the supreme court and may be moved by either party out of the order on the calendar. [C. Civ. P. 1877, § 24; R. C. 1899, § 5172.]

§ **6759. Majority of judges must concur.** The concurrence of a majority of the judges is necessary to pronounce judgment. If a majority does not concur, the case must be reheard. But no more than two rehearings shall be had; and if on the second rehearing a majority of the judges does not concur, the judgment shall be affirmed. [C. Civ. P. 1877, § 25; R. C. 1895, § 5173.]

§ **6760. Adjournment to other buildings.** The supreme court may be held in other buildings than those designated by law as places for holding courts

and at a different place in the same city from that at which it is appointed to be held. [C. Civ. P. 1877, § 26; 1879, ch. 53, § 1; R. C. 1895, § 5174.]

ARTICLE 3.—THE DISTRICT COURTS.

§ 6761. Jurisdiction of district courts defined. The district courts have the general jurisdiction conferred upon them by the constitution and in the exercise thereof they have power to issue all writs, process and commissions provided therein or by law or which may be necessary to the due execution of the powers with which they are vested. They have power to hear and determine all civil actions and proceedings and all cases of crimes and misdemeanors of every kind; and they have all the powers according to the usages of courts of law and equity necessary to the full and complete jurisdiction of the causes and parties and the full and complete administration of justice and to carrying into effect their judgments, orders and other determinations, subject to a re-examination by the supreme court as provided by law. They have jurisdiction of appeals from all final judgments of justices of the peace and police magistrates, and from all judgments, decrees or orders of the county court, and from the determination of inferior officers, boards or tribunals, in such cases and pursuant to such regulations as may be prescribed by law. [R. C. 1895, § 5175.]

If application for removal to federal court is not made at proper time, right is lost. Filing petition does not divest state court of jurisdiction. Intervenor's right to have action removed. State ex rel Mers v. Barnes, 5 N. D. 350, 65 N. W. 688.

§ 6762. Court always open. Procedure. The district court is always open for the purpose of hearing and determining all actions, special proceedings, motions and applications of whatever kind or character, and whether of a civil or criminal nature, arising under the laws of the state, and of which such court has jurisdiction, original or appellate, except issues of fact in civil and criminal actions. Such issues must be tried in term time in the county or judicial district in which the action is brought or to which the place of trial is changed by order of the court upon the written consent of the parties to such action or upon the grounds provided by law; provided, that issues of fact in civil actions triable by the court without a jury, or in which a jury trial has been waived, may, in the discretion of the court and upon the consent of the parties in open court entered in the minutes or in writing filed with the clerk, be tried and determined and judgment given out of term time at any place within the district in which such action is pending. [1893, ch. 86, § 2; R. C. 1899, § 5176.]

Judge has authority to order mandamus writ at chambers. Territory v. Shearer, 2 Dak. 332, 8 N. W. 135.

Judges have authority at all times in or out of session to hear and determine questions of law. Johnson v. N. P. Ry., 1 N. D. 354, 48 N. W. 227; Schaetzel v. City of Huron, 6 S. D. 134, 60 N. W. 741.

Judge cannot at his option determine whether a given matter is or is not a court matter. Insurance Co. v. Weber, 2 N. D. 239, 50 N. W. 703.

Judge may direct entry of judgment while outside of his district. Gould v. Elevator Co., 3 N. D. 96, 54 N. W. 316.

Before review of order made by judge will be made, motion to vacate must be made. Mining Co. v. Grand Island, W. C. R., 2 S. D. 546, 51 N. W. 342.

Powers conferred upon a judge may be exercised by the court. King v. McClurg, 7 S. D. 67, 63 N. W. 219.

§ 6763. Judgments by default. Ex parte applications may be made, heard and determined and judgments by default given at any place within the state. [1893, ch. 86, § 2; R. C. 1899, § 5177.]

§ 6764. Acts of judge are acts of the court. All orders made, judgments given or other acts done by any judge of the district court in any action, special proceeding or other matter, civil or criminal, shall be deemed and held to be the orders, judgments and acts of the court and the several judges of the district court shall have jurisdiction throughout the state to exercise

all the powers conferred by law upon the district court or judges thereof, subject to the limitations in this article provided. [1893, ch. 86, § 3; R. C. 1899, § 5178.]

§ 6765. No judge to act on matters not pending in his district. Exceptions. No judge of the district court shall hear or determine any action, special proceeding, motion or application, or make any order or give any judgment in any action or proceeding not pending in the judicial district for which he is elected except in the following cases:

1. Upon the written request of the judge of the district in which such action or proceeding is at the time pending.

2. When, upon the application of either party to such action or proceeding and upon due notice to the opposite party, if he shall have appeared and is entitled to such notice, it shall be made to appear by affidavit to the satisfaction of such judge who shall have power to hear and determine such preliminary application, that the judge of the district in which such action, proceeding, motion or application is pending or about to be commenced, is absent from his district, or incapacitated or disqualified to act therein, such application shall be made only to the judge of a district adjoining that in which such action or proceeding is pending, and upon the hearing thereof counter affidavits may be used. [1893, ch. 86, § 4; R. C. 1899, § 5179.]

Power of judge in relation to matters pending in another district, see Gould v. Elevator Co., 3 N. D. 96, 54 N. W. 316; Holden v. Haserodt, 2 S. D. 220, 49 N. W. 97; Id. 3 S. D. 4, 51 N. W. 340; Williams v. Williams, 6 S. D. 284, 61 N. W. 38.

§ 6766. Order or judgment, how vacated. No order or judgment given by the judge of any district contrary to the limitations of the preceding sections shall for that reason be void, but such order or judgment may be vacated upon application within thirty days from the time the same shall have been made or given to the judge of the district in which the action or proceeding in which the same was made or given is pending, and if appealable by the supreme court on appeal. [1893, ch. 86, § 5; R. C. 1899, § 5180.]

CHAPTER 3.

FORM OF CIVIL ACTIONS.

§ 6767. Distinction between actions at law and suits in equity abolished. Parties named. The distinction between actions at law and suits in equity and the forms of all such actions and suits heretofore existing are abolished; and there shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action. In such action the party complaining shall be known as the plaintiff and the adverse party as the defendant. [C. Civ. P. 1877, §§ 33, 34; R. C. 1899, § 5181.]

Does not refer to special proceedings. State ex rel Hail Association v. Carey, 2 N. D. 36, 49 N. W. 164.

Section implies inhibition to bringing of civil actions in name of county to oust officers. Wishek v. Becker, 10 N. D. 63, 84 N. W. 590.

Distinction in form of action abolished. Law and equity still remain two distinct systems. Sykes v. Bank, 2 S. D. 242, 49 N. W. 1058.

Does not change common law rule where recovery is sought on quantum meruit. Caldwell v. Myers, 2 S. D. 506, 51 N. W. 210.

§ 6768. Actions upon judgments. No action shall be commenced upon a judgment rendered in any court of this state between the same parties within nine years after its rendition without leave of the court for good cause shown and notice to the adverse party. [C. Civ. P. 1877, § 35; R. C. 1895, § 5182.]

When actions accrue, and limitation of, see Osborne v. Lindstrom, 9 N. D. 1, 81 N. W. 72.

Right to sue may be granted in proper case after suit is brought. Stoddard Mfg. Co. v. Mattice, 10 S. D. 253, 72 N. W. 891.

§ **6769. Issues must be stated.** Feigned issues are abolished, and instead thereof in the cases where the power now exists to order a feigned issue, or when a question of fact not put in issue by the pleadings is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried; and such order shall be the only authority necessary for a trial. [C. Civ. P. 1877, § 36; R. C. 1899, § 5183.]

CHAPTER 4.

TIME OF COMMENCING ACTIONS.

Article 1.—In General.

§ **6770. Limitations.** Civil actions can only be commenced within the periods prescribed in this code after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute. But the objection that the action was not commenced within the time limited can only be taken by answer. [C. Civ. P. 1877, § 37; R. C. 1899, § 5184.]

The defense of statute of limitations is waived if not pleaded in answer. Facts constituting bar, not conclusions of law must be pleaded. Satterlund v. Beal, 12 N. D. 122, 95 N. W. 518.

Plea of limitation deemed denied without reply. Meyer v. School District, 4 S. D. 420, 57 N. W. 68.

Note sued upon barred by statute of limitations on its face, plaintiff must show fact to take out of bar. Dielmann v. Bank, 8 S. D. 263, 66 N. W. 311.

Averment that cause of action did not accrue within six years of commencement sufficient. McConnell v. Spicker, 15 S. D. 98, 87 N. W. 574; Searls v. Knapp, 5 S. D. 325, 58 N. W. 807.

Actions on ground of fraud do not accrue until fraud is discovered. Pollock v. Wright, 15 S. D. 134, 87 N. W. 584.

Article 2.—Time of Commencing Actions for the Recovery of Real Property.

§ **6771. By the state.** The state of North Dakota will not sue any person for or in respect to any real property or the issues or profits thereof by reason of the right or title of the state to the same, unless:

1. Such right or title shall have accrued within forty years before any action or other proceeding for the same shall be commenced; or,

2. The state or those from whom it claims shall have received the rents and profits of such real property or of some part thereof within the space of forty years. [C. Civ. P. 1877, § 38; R. C. 1899, § 5185.]

§ **6772. Persons claiming under state.** No action shall be brought for or in respect to real property by any person claiming by virtue of grants from the state, unless the same might have been commenced as herein specified in case such grant had not been issued or made. [C. Civ. P. 1877, § 39; R. C. 1899, § 5186.]

§ **6773. Extension of limitation when.** When grants of real property shall have been issued or made by the state and the same shall be declared void by the determination of a competent court rendered upon an allegation of a fraudulent suggestion, or concealment, or forfeiture, or mistake, or ignorance of a material fact, or wrongful detaining, or defective title, in such case an action for the recovery of the premises so conveyed may be brought either by the state or by any subsequent grantee of the same premises, his heirs or assigns, within twenty years after such determination was made, but not after that period. [C. Civ. P. 1877, § 40; R. C. 1899, § 5187.]

§ **6774. Seizin within twenty years.** No action for the recovery of real property or for the recovery of the possession thereof shall be maintained, unless it appears that the plaintiff, his ancestor, predecessor or grantor was

seized or possessed of the premises in question within twenty years before the commencement of such action. [C. Civ. P. 1877, § 41; R. C. 1899, § 5188.]

§ **6775. Same.** No cause of action, or defense, or counterclaim to an action founded upon the title to real property or to rents or services out of the same shall be effectual, unless it appears that the person prosecuting the action or interposing the defense or counterclaim, or under whose title the action is prosecuted or the defense or counterclaim is made, or the ancestor, predecessor or grantor of such person was seized or possessed of the premises in question within twenty years before the committing of the act in respect to which such action is prosecuted or defense or counterclaim made. [C. Civ. P. 1877, § 42; R. C. 1895, § 5189.]

§ **6776. One year after entry.** No entry upon real estate shall be deemed sufficient or valid as a claim unless an action is commenced thereon within one year after the making of such entry and within twenty years from the time when the right to make such entry descended or accrued. [C. Civ. P. 1877, § 43; R. C. 1899, § 5190.]

§ **6777. Possession presumed.** In every action for the recovery of real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that such premises have been held and possessed adversely to such legal title for twenty years before the commencement of such action. [C. Civ. P. 1877, § 44; R. C. 1899, § 5191.]

§ **6778. Occupation under written instrument.** Whenever it shall appear that the occupant or those under whom he claims entered into the possession of premises under claim of title exclusive of any other right, founding such claim upon a written instrument as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree or judgment, or of some part of such premises, under such claim for twenty years, the premises so included shall be deemed to have been held adversely; except that when the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract. [C. Civ. P. 1877, § 45; R. C. 1899, § 5192.]

§ **6779. Adverse possession.** For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases:

1. When it has been usually cultivated or improved.
2. When it has been protected by a substantial inclosure.
3. When, although not inclosed, it has been used for the supply of fuel or of fencing timber for the purposes of husbandry, or the ordinary use of the occupant.
4. When a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated. [C. Civ. P. 1877, § 46; R. C. 1899, § 5193.]

§ **6780. Actual adverse holding.** When it shall appear that there has been an actual continued occupation of premises under a claim of title exclusive of any other right, but not founded upon a written instrument, or a judgment or decree, the premises so actually occupied and no other shall be deemed to have been held adversely. [C. Civ. P. 1877, § 47; R. C. 1899 § 5194.]

§ **6781. Under claim not written.** For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument, or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only:

1. When it has been protected by a substantial inclosure.

2. When it has been usually cultivated or improved. [C. Civ. P. 1877, § 48; R. C. 1899, § 5195.]

Actual possession of land consists in subjecting it to the will and dominion of the occupant. Pendo v. Beakey, 15 S. D. 344, 89 N. W. 655.

Adverse holding by party knowing he has no title is not in good faith. Deffebach v. Hawke, 115 U. S. 393.

§ **6782. Landlord and tenant.** Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or, when there has been no written lease, until the expiration of twenty years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited. [C. Civ. P. 1877, § 49; R. C. 1899, § 5196.]

§ **6783. Effect of descent.** The right of a person to the possession of any real property shall not be impaired or affected by a descent being cast in consequence of the death of a person in possession of such property. [C. Civ. P. 1877, § 50; R. C. 1899, § 5197.]

§ **6784. Disabilities extend time.** If a person entitled to maintain any of the actions mentioned in this article, or to interpose a defense or counterclaim thereto, or to make an entry upon real property, is, when his title first descends or his cause of action or right of entry first accrues, or when such defense or counterclaim might be interposed, either:

1. Within the age of twenty-one years; or,

2. Insane; or,

3. Imprisoned on a criminal charge or in execution upon conviction of a criminal offense for a term less than for life, the time of such disability is not a part of the time in this article limited for the commencement of such action, or the making of such entry, or the interposing of such defense or counterclaim; but the time so limited cannot be extended more than ten years after the disability ceases or after the death of the person so disabled. [C. Civ. P. 1877, § 51; R. C. 1895, § 5198.]

Time of commencement of actions for the recovery of real property applies to actions at law only and not to equitable actions. Houts v. Hoyne, 14 S. D. 176, 84 N. W. 773.

Article 3.—Time of Commencing Other Actions.

§ **6785. Other periods.** The following actions must be commenced within the periods, set forth in the following five sections after the cause of action has accrued:

No limitation of action to foreclose tax lien. Wells County v. McHenry, 7 N. D. 246, 74 N. W. 241.

Computation of time under statute shortening limitation. Bank v. Braithwaite, 7 N. D. 358, 75 N. W. 244. Osborne v. Lindstrom, 9 N. D. 1, 81 N. W. 72; Power v. Kitching, 10 N. D. 254, 86 N W. 737.

Statement "Did not accrue within six years from commencement of action" is a good plea of statute of limitations. McConnell v. Spicker, 15 S. D. 98, 87 N. W. 574.

§ **6786. Ten years.** Within ten years:

1. An action upon a judgment or decree of any court of the United States or of any state or territory within the United States.

2. An action upon a contract contained in any conveyance or mortgage of or instrument affecting the title to real property, except a covenant of warranty, an action upon which must be commenced within ten years after the final decision against the title of the covenantor.

3. Any proceeding by advertisement or otherwise for the foreclosure of a mortgage upon real estate. [C. Civ. P. 1877, § 53; R. C. 1899, § 5200; 1901, ch. 120.]

Legislature may lesson statutory period within which action can be brought. Bank v. Braithwaite, 7 N. D. 358, 75 N. W. 244; Osborne v. Lindstrom, 9 N. D. 1, 81 N. W. 72.

County warrant a sealed instrument and action may be brought at any time within twenty years. Heffleman v. Pennington County, 3 S. D. 162, 52 N. W. 851; Stewart v. Custer County, 14 S. D. 155, 84 N. W. 764.

§ 6787. **Six years.** Within six years:

1. An action upon a contract, obligation or liability, express or implied, excepting those mentioned in section 6186.

2. An action upon a liability created by statute, other than a penalty or forfeiture, when not otherwise expressly provided.

3. An action for trespass upon real property.

4. An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property.

5. An action for criminal conversion, or any other injury to the person or rights of another not arising on contract and not hereinafter enumerated.

6. An action for relief on the ground of fraud in cases which heretofore were solely cognizable by the court of chancery, the cause of action in such cases not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

7. An action for the foreclosure of a mechanic's lien; provided, that this subdivision shall not apply to any mechanic's lien filed prior to July 1, 1903. [C. Civ. P. 1877, § 54; R. C. 1895, § 5201; 1903, ch. 2.]

Where cause of action barred in foreign state, bar available here. Rathbone v. Coe, 6 Dak. 91, 50 N. W. 620.

Tax lien is not barred in six years. Wells County v. McHenry, 7 N. D. 246, 74 N. W. 241; Land Co. v. Douglas County, 8 S. D. 491, 67 N. W. 52.

Action may be maintained to recover money obtained by fraud. Krump v. Bank, 8 N. D. 75, 76 N. W. 995.

A payment by one joint debtor will not interrupt running of statute as against another joint debtor. Grovenor v. Signor, 10 N. D. 503, 88 N. W. 278.

Averment that cause of action did not accrue within six years of commencement sufficient plea of limitation. Searls v. Knapp, 5 S. D. 325, 58 N. W. 807.

Under a plea of the statute of limitation on a note showing limitation on its face burden of proof that it is not barred, is on plaintiff. Dielmann v. Bank, 8 S. D. 263, 66 N. W. 311; McConnell v. Spicker, 15 S. D. 98, 87 N. W. 574.

School warrants subject to six years limitation. Coler v. Sterling, 15 S. D. 415, 89 N. W. 1022.

Failure to state residence in state for six years not fatal to defense. Saxton v. Musselman et al, 17 S. D. 35, 95 N. W. 291.

Suit cannot be commenced on registered township warrant until there are funds for payment in treasurer's hands or sufficient time elapsed for collecting them; six years limitation does not begin until that time. Brannon v. White Lake Twp., 17 S. D. 83, 95 N. W. 284.

§ 6788. **Three years.** Within three years:

1. An action against a sheriff, coroner or constable upon a liability incurred by the doing of an act in his official capacity and by virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this section shall not apply to an action for an escape.

2. An action upon a statute for a penalty or forfeiture, when the action is given to the party aggrieved, or to such party and the state, except when the

statute imposing it prescribes a different limitation. [C. Civ. P. 1877, § 55; R. C. 1899, § 5202.]

Usurious interest paid may be set up as counterclaim. Wilson v. Selby, 7 S. D. 494, 64 N. W. 537.

Limitation does not apply to action brought against sureties on sheriff's bond, when. Connor v. Corson, 13 S. D. 550, 83 N. W. 588.

§ **6789. Two years.** Within two years:

1. An action for libel, slander, assault, battery or false imprisonment.
2. An action upon a statute for a forfeiture or penalty to the state.
3. An action for the recovery of damages resulting from malpractice.
4. An action for injuries done to the person of another, when death ensues from such injuries; and the cause of action shall be deemed to have accrued at the time of the death of the party injured. [C. Civ. P. 1877, § 56; 1893, ch. 87, § 1; R. C. 1895, § 5203.

§ **6790. One year.** Within one year:

1. An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process. [C. Civ. P. 1877, § 57; R. C. 1899, § 5204.]

§ **6791. Balance of open account.** In an action brought to recover a balance due upon a mutual, open and current account, when there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side. [C. Civ. P. 1877, § 58; R. C. 1899, § 5205.]

§ **6792. Forfeiture by person. State.** An action upon a statute for a penalty or forfeiture given in whole or in part to any person who will prosecute for the same must be commenced within one year after the commission of the offense; and if the action is not commenced within the year by a private party, it may be commenced within two years thereafter in behalf of the state by the attorney general, or by the state's attorney of the county where the offense was committed. [C. Civ. P. 1877, § 59; R. C. 1895, § 5206.]

§ **6793. Other relief ten years.** An action for relief not hereinbefore provided for must be commenced within ten years after the cause of action shall have accrued. [C. Civ. P. 1877, § 60; R. C. 1899, § 5207.]

Action for accounting under a mortgage and to redeem may be commenced in ten years. Houts v. Hoyne, 14 S. D. 176, 84 N. W. 773; Houts v. Olson, 14 S. D. 475, 85 N. W. 1015.

Person voluntarily paying mortgage to be subrogated to rights of mortgagee barred if action not brought within ten years from payment. Pollock v. Wright, 15 S. D. 134, 87 N. W. 584.

§ **6794. Same to state and persons.** The limitations prescribed in this chapter shall apply to actions brought in the name of the state, or for its benefit, in the same manner as to actions by private parties. [C. Civ. P. 1877, § 61; R. C. 1899, § 5208.]

Proceedings to enforce taxes not barred. Land Co. v. Douglas County, 8 S. D. 491, 67 N. W. 52; Coler v. Sterling, 15 S. D. 415, 89 N. W. 1022.

ARTICLE 4.—GENERAL PROVISIONS AS TO THE TIME OF COMMENCING ACTIONS.

§ **6795. When action deemed commenced.** An action is commenced as to each defendant when the summons is served on him, or on a codefendant who is a joint contractor or otherwise united in interest with him. An attempt to commence an action is deemed equivalent to the commencement thereof within the meaning of this chapter, when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants, or one of them usually or last resided; or, if a corporation is defendant, to the sheriff or other officer of the county in which was situated the principal place of business of such corporation, or where its general business was transacted, or where it kept an office for the transaction of business. But such an attempt must be followed by the

first publication of the summons, or the service thereof, within sixty days. [C. Civ. P. 1877, § 62; R. C. 1895, § 5209.]

Summons deemed issued when signed by attorney. Smith v. Nicholson, 5 N. D. 426, 67 N. W. 296.

In adverse proceedings not sufficient that claimant place summons in hands of sheriff unless service secured without unreasonable delay. Mars v. Oro Fino Mining Co., 7 S. D. 605, 65 N. W. 19.

No person can be deemed party to an action unless he is served with summons. Bunker v. Taylor, 10 S. D. 526, 74 N. W. 450.

Motion to quash service and to dismiss lien constitute a waiver of defect in service. Reedy v. Howard, 11 S. D. 160, 76 N. W. 304.

Action cannot be instituted by stipulation. Ramsdell v. Duxberry, 14 S. D. 222, 85 N. W. 221.

§ **6796. Exception. Absentee.** If, when the cause of action shall accrue against any person, he shall be out of the state, such action may be commenced within the terms herein respectively limited after the return of such person into the state; and if after such cause of action shall have accrued such person shall depart from and reside out of this state and remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action; provided, however, that the provisions of this section shall not apply to the foreclosure of real estate mortgages by action or otherwise; provided, further, that action against trustees acting under the townsite laws of the United States and this state, must be commenced within two years of the date when the cause of action accrued. [C. Civ. P. 1877, § 63; R. C. 1895, § 5210; 1905, ch. 5.]

Note executed in one state, maker subsequently moving to another before lapse of six years, maker should be regarded as absent from state where made from date note became due and statute of limitations does not run. McConnell v. Spicker, 15 S. D. 98, 87 N. W. 574.

§ **6797. Same. Disabilities.** If a person entitled to bring an action other than for the recovery of real property, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, is at the time the cause of action accrued, either:

1. Within the age of twenty-one years; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than his natural life, the time of such disability is not a part of the time limited for the commencement of the action; provided, that the period within which the action must be brought cannot be extended more than five years by any such disability except infancy, nor can it be extended in any case longer than one year after the disability ceases. [C. Civ. P. 1877, § 64; R. C. 1899, § 5211.]

§ **6798. Limitation in case of death.** If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof and the cause of action survives, an action may be commenced by his representatives after the expiration of that time and within one year from his death. If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof and the cause of action survives, an action may be commenced against his executors or administrators after the expiration of that time and within one year after the issuing of letters testamentary or of administration. [C. Civ. P. 1877, § 65; R. C. 1899, § 5212.]

§ **6799. In case of war.** When a person shall be an alien subject or a citizen of a country at war with the United States, the time of the continuance of the war is not a part of the period limited for the commencement of the action. [C. Civ. P. 1877, § 66; R. C. 1899, § 5213.]

§ **6800. When judgment reversed.** If an action is commenced within the time prescribed therefor and the judgment therein is reversed on appeal, the

plaintiff, or, if he dies and the cause of action survives, his heirs or representatives may commence a new action within one year after the reversal. [C. Civ. P. 1877, § 67; R. C. 1895, § 5214.]

§ **6801. Stay by injunction, etc.** When the commencement of an action is stayed by injunction or other order of a court or judge, or by statutory prohibition, the time of the continuance of the stay is not a part of the time limited for the commencement of the action. [C. Civ. P. 1877, § 68; R. C. 1895, § 5215.]

Commencement of an action on a judgment is not stayed during time judgment creditor is required to obtain leave of court in order to bring suit thereon. Osborne v. Lindstrom, 9 N. D. 1, 81 N. W. 72.

§ **6802. When disability available.** No person can avail himself of a disability, unless it existed when his right of action accrued. [C. Civ. P. 1877, § 69; R. C. 1899, § 5216.]

§ **6803. Coexisting disabilities.** When two or more disabilities coexist at the time the right of action accrues, the limitation does not attach until they are all removed. [C. Civ. P. 1877, § 70; R. C. 1899, § 5217.]

§ **6804. Bank notes.** This chapter does not affect actions to enforce the payment of bills, notes or other evidence of debt, issued by moneyed corporations, or issued or put in circulation as money. [C. Civ. P. 1877, § 71; R. C. 1899, § 5218.]

§ **6805. Moneyed corporations.** This chapter shall not affect actions against directors or stockholders of a moneyed corporation or banking association to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within six years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached or the liability was created. [C. Civ. P. 1877, § 72; R. C. 1899, § 5219.]

§ **6806. New promise must be in writing.** No acknowledgment or promise is sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this chapter, unless the same is contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest. [C. Civ. P. 1877, § 73; R. C. 1899, § 5220.]

Payment made by one joint debtor does not bar statute from running against another joint debtor. Grovenor v. Signor, 10 N. D. 503, 88 N. W. 278.

CHAPTER 5.

PARTIES TO CIVIL ACTIONS.

§ **6807. Action must be prosecuted by party in interest.** Every action must be prosecuted in the name of the real party in interest except as otherwise provided in section 6809. [C. Civ. P. 1877, § 74; R. C. 1895, § 5221.]

Mandamus should be brought in the name of the state ex rel. State ex rel Hail Association v. Carey, 2 N. D. 36, 49 N. W. 164.

S conveyed land to H while D was in possession claiming title. In action brought for possession, S and H were proper parties plaintiff. Hegar v. DeGroat, 3 N. D. 354, 56 N. W. 150.

The legal title to chose in action necessary to maintain action in own name. Seybold v. Bank, 5 N. D. 460, 67 N. W. 682; Coughran v. Sundback, 9 S. D. 483, 70 N. W. 644.

Party contracting for undisclosed principal may maintain action upon contract. Stewart v. Gregory, Carter & Co., 9 N. D. 618, 84 N. W. 553.

Action may be maintained in name of grantor for use and benefit of grantee as real party in interest. Galbraith v. Payne, 12 N. D. 164, 96 N. W. 258.

That action is not prosecuted in the name of the real party in interest may be raised by answer or demurrer. J. I. Case Co. v. Pederson, 6 S. D. 140, 60 N. W. 747; Smith v. Trust Co., 8 N. D. 451, 79 N. W. 981.

Action on bail bond properly brought in name of state. State v. Newson, 8 S. D. 327, 66 N. W. 468.

Wife who joins in acceptance of an offer for husband's property and in deed tendered to party making offer, not necessary party to action for specific performance. Edmison v. Zborowski, 9 S. D. 40, 68 N. W. 288.

Where claim has been assigned for collection party to whom assigned may sue as trustee of express trust. Citizens Bank v. Corkings, 9 S. D. 614, 70 N. W. 1059.

The county is not a necessary party to a suit on sheriff's bond. Hollister v. Hubbard, 11 S. D. 461, 78 N. W. 949.

§ 6808. **Assignee. Equities.** In the case of an assignment of a thing in action the action by the assignee shall be without prejudice to any set-off or other defense existing at the time or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before due. [C. Civ. P. 1877, § 75; R. C. 1899, § 5222.]

§ 6809. **Executors and trustees.** An executor or administrator, a trustee of an express trust or a person expressly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust within the meaning of this section shall be construed to include a person with whom or in whose name a contract is made for the benefit of another. [C. Civ. P. 1877, § 76; R. C. 1899, § 5223.]

Real party in interest. Suit by trustee of express trust. McLaughlin v. Bank, 6 Dak. 406, 43 N. W. 715; Lewis v. Railway Co., 5 S. D. 148, 58 N. W. 580; Hudson v. Archer, 4 S. D. 128, 55 N. W. 1099; Braithwaite v. Power, 1 N. D. 455, 48 N. W. 354; Smith v. Trust Co., 8 N. D. 451, 79 N. W. 981; Hegar v. DeGroat, 3 N. D. 354, 56 N. W. 150.

Assignee of creditors may sue in own name. Sandmeyer v. Insurance Co., 2 S. D. 346, 50 N. W. 353.

Suit in name of state as trustee for county may be maintained. State v. Newson, 8 S. D. 327, 66 N. W. 468.

Agent who purchases township warrant with his principal's funds taking assignment in his own name, may sue thereon. Brannon v. White Lake Twp., 17 S. D. 83, 95 N. W. 284.

§ 6810. **Married woman.** When a married woman is a party, her appearance, the prosecution or defense of the action and the joinder with her of any other person or party must be governed by the same rules as if she was single. [C. Civ. P. 1877, § 77; R. C. 1899, § 5224.]

§ 6811. **Infant must appear by guardian.** When an infant is a party he must appear either by his general guardian or by a guardian appointed by the court, in which the action is prosecuted, or by a judge thereof. A guardian may be appointed in any case, when it is deemed by the court, in which the action is prosecuted, or by a judge thereof, expedient to represent the infant in the action, notwithstanding he may have a general guardian and may have appeared by him. [C. Civ. P. 1877, § 78; R. C. 1899, § 5225.]

§ 6812. **Guardian, how appointed.** The guardian shall be appointed:

1. When the infant is plaintiff, upon the application of the infant, if he is of the age of fourteen years; or if under that age, upon the application of his general or testamentary guardian, if he has any, or of a relative or friend of the infant. If made by a relative or friend of the infant, notice thereof must first be given to such guardian, if he has one; if he has none, then to the person with whom such infant resides.

2. When the infant is defendant, upon the application of the infant, if he is of the age of fourteen years and applies within twenty days after the service of summons. If he is under the age of fourteen or neglects so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant, after notice of such application being first given to the general or testamentary guardian of such infant, if he has one within this state; if he has none, then to the infant himself, if over fourteen years of age and within the state; or, if under that age and within the state, to the person

with whom such infant resides. In actions for the partition of real property, or for the foreclosure of a mortgage or other instrument, and in all actions affecting the title to real property or wherein such infant is a proper or necessary party defendant, when an infant resides out of this state, the plaintiff may apply to the court or judge thereof, in which the action is pending, and will be entitled to an order designating some suitable person to be the guardian for the infant defendant for the purposes of the action, unless the infant defendant or some one in his behalf within a number of days after the service of a copy of the order, which number of days shall be in the said order specified, shall procure to be appointed a guardian for the said infant; and the court shall give special directions in the order for the manner of service thereof, which may be upon the infant himself or by service upon any relation or person with whom the infant resides, and either by mail or personally upon the person so served. And in case an infant defendant having an interest in the event of the action shall reside in any state with which there shall not be a regular communication by mail, on such fact satisfactorily appearing to the court, the court may appoint a guardian ad litem for such absent infant party, for the purpose of protecting the right of such infant in said action, and on such guardian ad litem, process, pleadings and notices in the action may be served in like manner as upon a party residing in this state. [1897, ch. 96; R. C. 1899, § 5226.]

§ **6813. Guardian for person of unsound mind.** When the defendant is a person of unsound mind at the time the action is commenced and no guardian has been appointed of his person or estate, the court or a judge thereof shall appoint a guardian for him for the action. If during the pendency of an action either party shall become or prove to be of unsound mind, the action may be prosecuted or defended by his guardian in like manner as if it had been commenced after the appointment of the guardian, or the court or judge may appoint a guardian for the action as the case may require. Such guardian for the action may be appointed upon the application of any party thereto or any relative or friend of such person of unsound mind after at least five days' notice of such application shall have first been given to such person personally, if a resident of this state, and if not a resident, in such manner as the court or judge shall direct. Upon the hearing of such application the court or judge may, if deemed desirable and practicable, order such person of unsound mind to appear or be brought in by the sheriff in person. [R. C. 1895, § 5227.]

§ **6814. Guardian's security.** No guardian appointed for an infant or a person of unsound mind under the provisions of this chapter shall be permitted to receive any money or other property of the ward except costs and expenses allowed to the guardian by the court, or recovered by the ward in the action, until he has given sufficient security approved by the judge of the court to account for and apply the same under the direction of the court. And no person appointed a guardian for the purpose of defending an action brought against an infant or person of unsound mind shall be liable for the costs of such action, unless specially charged by the order of the court for some personal misdemeanor therein. [C. Civ. P. 1877, § 80; R. C. 1895, § 5228.]

§ **6815. Who to be plaintiffs.** All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs except as otherwise provided in this chapter. [C. Civ. P. 1877, § 81; R. C. 1899, § 5229.]

§ **6816. Defendants.** Any person may be made a defendant, who has or claims an interest in the controversy adverse to the plaintiff or who is a necessary party to a complete determination or settlement of the questions involved therein; and in an action to recover possession of real estate the landlord and tenant thereof may be joined as defendants, and any person claiming title or right of possession to real estate may be made party, plaintiff or

defendant, as the case may require, to any such action. [C. Civ. P. 1877, § 82; R. C. 1899, § 5230.]

For intervener within jurisdiction of court, see Braithwaite v. Akin, 3 N. D. 365, 56 N. W. 133.

In an action for the recovery of money only, plaintiff cannot be compelled to litigate his claim against a stranger he has not chosen to sue. Bolton v. Donovan, 9 N. D. 575, 84 N. W. 357.

Real party in interest may move to set aside judgment in action to quiet title in which he was not served. Brettell v. Deffebach, 6 S. D. 21, 60 N. W. 167; Leighton v. Serveson, 8 S. D. 350, 66 N. W. 938.

§ **6817. Persons holding unrecorded conveyance need not be made parties.** In an action to foreclose a mortgage or other lien upon real property no person holding a conveyance from or under the mortgagor of the property mortgaged, or other owner thereof, or person having a lien upon such property, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered and the proceedings therein had are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action. [1890, ch. 84, § 1; R. C. 1899, § 5231.]

§ **6818. Parties to be joined.** Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint; and when the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole. [C. Civ. P. 1877, § 83; R. C. 1899, § 5232.]

"Those united in interest" does not embrace tenants in common. Mather v. Dunn, 11 S. D. 196, 76 N. W. 922.

§ **6819. When severally liable.** Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, whether the action is brought upon the instrument, or by a party thereto to recover against other parties liable over to him, and persons liable severally for the same debt or demand, although upon different obligations or instruments, may all, or one or more of them, be included in the same action at the option of the plaintiff. [C. Civ. P. 1877, § 84; R. C. 1895, § 5233.]

§ **6820. Action does not abate.** No action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survives or continues. In case of the death or other disability of a party, the court on motion at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued by or against his representatives or successor in interest. In case of any other transfer of interest the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. After a verdict is rendered in any action for a wrong, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action now survives by law. At any time after the death or other disability of the party plaintiff the court in which an action is pending upon notice to such persons as it may direct and upon application of any person aggrieved may, in its discretion, order that the action be deemed abated, unless the same is continued by the proper parties within a time to be fixed by the court, not less than six months nor exceeding one year from the granting of the order. [C. Civ. P. 1877, § 85; R. C. 1899, § 5234.]

Action of claim and delivery begun by real party in interest may be continued after his death by his personal representatives. O'Neill v. Murry, 6 Dak. 107, 50 N. W. 619.

Purchaser of property from defendants pendente lite may intervene to defend his interest at any stage of the proceedings. Anheier v. Signor, 8 N. D. 499, 79 N. W. 983.

As to unwarranted substitution of parties, see Friese v. Friese, 12 N. D. 82, 95 N. W. 446.

On transfer of interest in subject of action, the case may proceed in the name of the original or substituted party. Purchaser has right to ask for substitution, and allowance of it discretionary. Sykes v. Beck, 12 N. D. 242, 96 N. W. 844.

No action can be taken in name of an administrator who has been discharged. McCormick v. Snedigar, 3 S. D. 302, 53 N. W. 83.

Without jurisdiction of administrator or subject-matter of estate, court cannot substitute other party or make order in case. McCormick H. M. Co. v. Snedigar, 3 S. D. 625, 54 N. W. 84.

Administrator may continue action commenced by predecessor. Bunker v. Taylor, 13 S. D. 433, 83 N. W. 555.

§ 6821. **Successor may revive judgment.** Where judgment has heretofore or shall hereafter be recovered for the possession of real property and the party recovering such judgment shall have died subsequent to the recovery thereof, his successor in interest in said real property, whether by grant, devise or inheritance, may revive said judgment and enforce the same by execution on motion within one year after said death, or afterwards on supplemental complaint. [C. Civ. P. 1877, § 86; R. C. 1899, § 5235.]

§ 6822. **Nonresident intestate.** When an intestate, not being an inhabitant of the state, shall die out of the state, not leaving assets therein, and there is pending in the supreme court an appeal brought by such intestate from a judgment against him, the court in which such appeal is pending may order the judgment appealed from affirmed with costs, unless the attorney for the intestate on said appeal procures such action to be revived within six months after notice to perfect such appeal by the substitution of a representative in said action. [C. Civ. P. 1877, § 87; R. C. 1899, § 5236.]

§ 6823. **Death of one of several parties.** In case of the death of one of two or more plaintiffs or one of two or more defendants, if part only of the cause of action or part of some of two or more distinct causes of action survives to or against the others, the action may proceed without bringing in the successor to the rights or liabilities of the deceased party; and the judgment will not affect him or his interest in the subject of the action; but when it appears proper so to do, the court may require or compel the successor, or a person who claims to be the successor, to be brought in as a party upon his own application or upon the application of a party to the action. [C. Civ. P. 1877, § 88; R. C. 1895, § 5237.]

§ 6824. **Power of court. Interpleader.** The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in. [C. Civ. P. 1877, § 89; R. C. 1899, § 5238.]

Power of court to bring in parties. Interpleader unnecessary, when. Northwestern Telephone Co. v. N. P. Ry., 9 N. D. 339, 83 N. W. 215; Boulton v. Donovan, 9 N. D. 575, 84 N. W. 357; Kyes v. Wilcox, 13 S. D. 228, 83 N. W. 93; Sykes v. Bank, 2 S. D. 242, 49 N. W. 1058.

§ 6825. **Intervention when.** Any person may before the trial intervene in an action or proceeding, who has an interest in the matter in litigation in the success of either party, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court and served upon the parties to the action or proceeding who have not appeared

and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it was an original complaint. [C. Civ. P. 1877, § 90; R. C. 1899, § 5239.]

Leave of court must be had to intervene. State ex rel Mears v. Barnes, 5 N. D. 350, 65 N. W. 688; Gale v. Frazier, 4 Dak. 196, 30 N. W. 138.

To give right to intervene, interest must be direct and immediate. Dickson v. Dows, 11 N. D. 407, 92 N. W. 798; Bray v. Booker, 6 N. D. 526, 72 N. W. 933; Braithwaite v. Akin, 1 N. D. 475, 48 N. W. 361; Yetzer v. Young, 3 S. D. 263, 52 N. W. 1054; Judd v. Patton, 13 S. D. 648, 84 N. W. 199; Schaetzel v. City of Huron, 6 S. D. 134, 60 N. W. 741.

Assignee for benefit of creditors cannot intervene to defend purely personal action against assignor. McClurg v. State Bindery Co., 3 S. D. 362, 53 N. W. 428.

Though otherwise protected, interested party may intervene. Taylor v. Bank, 9 S. D. 572, 70 N. W. 834.

Payee of certificate of deposit, which has been obtained of him by fraud, may intervene in an action thereon by the holder. Dunn v. Bank, 11 S. D. 305, 77 N. W. 111.

§ **6826. Interpleader.** A defendant against whom an action is pending upon a contract, or for specific, real or personal property, may, at any time before answer upon affidavit that a person not a party to the action and without collusion with him makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place and discharge him from liability to either party on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct, and the court may in its discretion make the order. [C. Civ. P. 1877, § 91; R. C. 1899, § 5240.]

CHAPTER 6.

OF THE PLACE OF TRIAL OF CIVIL ACTIONS

§ **6827. Where subject matter is.** Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial in the cases provided by statute:

1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.
2. For the partition of real property.
3. For the foreclosure of a mortgage of real property.
4. For the recovery of personal property distrained for any cause.
5. All actions brought on a policy of insurance to recover for loss or damage to the property insured shall be tried in the county or judicial subdivision where such property is situated at the time of its loss or damage. [C. Civ. P. 1877, § 92; 1887, ch. 23, § 1; R. C. 1899, § 5241.]

Action to foreclose mortgage may be brought in other county than one in which land is situate. Territory ex rel Insurance Co. v. Judge Third District, 5 Dak. 275, 38 N. W. 439.

Action may be commenced in district court in any district in state subject to removal for cause. Benedict v. Johnson, 4 S. D. 387, 57 N. W. 66.

§ **6828. Where the cause arose.** Actions for the following causes must be tried in the county where the cause or some part thereof arose, subject to the like power of the court to change the place of trial:

1. For the recovery of a penalty or forfeiture imposed by statute except that when it is imposed for an offense committed on a lake or river or other stream of water situated in two or more counties, the action may be brought in any county bordering on such lake, river or stream, and opposite to the place where the offense was committed.

2. Against a public officer, or person specially appointed to execute his duties, for an act done by him by virtue of his office, or against a person who by his command or his aid shall do anything touching the duties of such officer. [C. Civ. P. 1877, § 93; R. C. 1899, § 5242.]

§ **6829. Where any party resides.** In all other cases, subject to the power of the court to change the place of trial as provided by statute, the action shall be tried in the county in which the defendant or some of the defendants reside at the time of the commencement of the action; provided, if such county is attached to another county for judicial purposes, the action shall be tried in the latter county; and if none of the defendants shall reside in the state, the action may be commenced in any county which the plaintiff shall designate in the summons. [C. Civ. P. 1877, § 94; 1881, ch. 35, § 1; R. C. 1895, § 5243.]

§ **6830. Defendant must ask change.** If the county designated for that purpose in the complaint is not the proper county, the action may, notwithstanding, be tried therein, unless the defendant before the time for answering expires demands in writing that the trial be had in the proper county and the place of trial be thereupon changed by consent of the parties, or by order of the court as provided in this section. The court may change the place of trial in the following cases:

1. When the county designated for that purpose in the complaint is not the proper county.

2. When there is reason to believe that an impartial trial cannot be had therein.

3. When the convenience of witnesses and the ends of justice would be promoted by the change. [C. Civ. P. 1877, § 95; R. C. 1899, § 5244.]

Order granting change of venue is appealable as affecting merits of action. Robertson Lumber Co. v. Jones, 13 N. D. 112, 99 N. W. 1082.

Demand for change of venue should be made before expiration of time to answer. Searles v. Lawrence, 8 S. D. 11, 65 N. W. 34.

Right to change absolute on proper showing. Smail v. Gilruth, 8 S. D. 287, 66 N. W. 452.

Change of place of trial for convenience of witnesses discretionary. Fletcher v. Church, 11 S. D. 537, 78 N. W. 947.

§ **6831. Transfer of papers.** When the place of trial is changed all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties in writing duly filed; and the papers shall be filed or transferred accordingly. [C. Civ. P. 1877, § 95; R. C. 1895, § 5245.]

CHAPTER 7.

MANNER OF COMMENCING CIVIL ACTIONS.

§ **6832. Action, how commenced.** Civil actions in the courts of this state shall be commenced by the service of a summons. [C. Civ. P. 1877, § 96; R. C. 1899, § 5246.]

Sheriff's return may be amended after judgment. Mills v. Howland, 2 N. D. 30, 49 N. W. 413.

Summons is issued when drawn and signed with intent to be served. Smith v. Nicholson, 5 N. D. 426, 67 N. W. 296.

Voluntary appearance equivalent to service of summons. Ayers & Co. v. Sundback, 5 S. D. 31, 58 N. W. 4.

Proof of service of summons. Brettell v. Deffebach, 6 S. D. 21, 60 N. W. 167.

Corporation is served by service on proper officer. Mars v. Oro Fino Mining Co., 7 S. D. 605, 65 N. W. 19.

In an action against an attorney, his clerk cannot accept service. Lower v. Wilson, 9 S. D. 252, 68 N. W. 545.

Insertion of name of party to action without service, of no effect. Bunker v. Taylor, 10 S. D. 526, 74 N. W. 450.

An action is commenced by the service of a summons. Action cannot be commenced by stipulation. Reedy v. Howard, 11 S. D. 160, 76 N. W. 304; Woodward v. Stark, 4 S. D. 588, 57 N. W. 496; Ramsdell v. Duxberry, 14 S. D. 222, 85 N. W. 221.

Where by agreement of parties a cause in justice court was transferred to circuit court, circuit court had jurisdiction by reason of defendant's voluntary appearance. Ramsdell v. Duxberry, 17 S. D. 311, 96 N. W. 132.

§ **6833. Requisites of summons.** The summons must contain the title of the action, specifying the court in which the action is brought, the names of the parties to the action and the name of the county in which the plaintiff desires the trial, and shall be subscribed by the plaintiff or his attorney, who must add to his signature his address, specifying a place within the state where there is a post office. [C. Civ. P. 1877, § 97; R. C. 1895, § 5247.]

Irregularity in summons may be waived, how. Nashua Savings Bank v. Lovejoy, 1 N. D. 211, 46 N. W. 411.

Amendment of summons, how made. Gans v. Beasley, 4 N. D. 140, 59 N W. 714.

§ **6834. Form of summons.** The summons exclusive of the title of the action and the subscription must be substantially in the following form, the blanks being properly filled:

The state of North Dakota to the above named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer upon the subscriber within thirty days after the service of this summons upon you, exclusive of the day of service; and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated ..... [R. C. 1895, § 5248.]

Summons making erroneous statement of fact will be set aside on motion. St. Paul Harvester Co. v. Forbreg, 2 S. D. 357, 50 N. W. 628; Berry v. Bingaman, 1 S. D. 525, 47 N. W. 825.

§ **6835. Contents of summons.** A copy of the complaint need not be served with the summons. In such case the summons must state that the complaint is, or will be, filed with the clerk of the district court in the county in which action is commenced, and if the defendant within thirty days thereafter causes notice of appearance to be given and in person, or by attorney, demands in writing a copy of the complaint, specifying a place within the state where it may be served, a copy thereof must, within thirty days thereafter, be served accordingly, and after such service the defendant has thirty days to answer, but only one copy need be served on the same attorney. Where the summons states that the complaint is or will be filed with the clerk of court and the same is not so filed within thirty days after the date of such summons, the action will be deemed discontinued. [C. Civ. P. 1877, § 99; R. C. 1899, § 5249; 1903, ch. 3.]

Summons by mail is served when summons is mailed. Clyde v. Johnson, 4 N. D. 92, 58 N. W. 512.

Demand of copy of complaint may be waived. Whittaker v. Warren, 14 S. D. 611, 86 N. W. 638.

§ **6836. Notice of no personal claim.** In the case of a defendant against whom no personal claim is made the plaintiff may deliver to such defendant with the summons a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects specific, real or personal property, and that no personal claim is made against such defendant, in which case no copy of the complaint need be served on such defendant, unless within the time for answering he shall in writing demand the same. If a defendant on whom such notice is served unreasonably defends the action, he shall pay costs to the plaintiff. [C. Civ. P. 1877, § 100; R. C. 1899, § 5250.]

§ **6837. Lis pendens, effect of.** In an action affecting the title to real property the plaintiff at the time of filing the complaint or at any time after-

wards, or the defendant, when he sets up an affirmative cause of action in his answer and demands substantive relief, at the time of filing his answer or at any time afterwards, if the same is intended to affect real property, may file for record with the register of deeds of each county in which the real property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action and the description of the real property in that county affected thereby; from the time of filing only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby; but if the action is for a foreclosure of a mortgage or the enforcement of a mechanic's or miner's lien, no such notice need be filed; and every person, whose conveyance or incumbrance is subsequently executed or subsequently recorded, shall be deemed a subsequent purchaser or incumbrancer and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he was a party to the action. For the purpose of this section an action shall be deemed to be pending from the time of filing such notice; provided, however, that such notice shall be of no avail unless it shall be followed by the first publication of the summons, or by the personal service thereof on a defendant, within sixty days after such filing. And the court in which the action was commenced may, at any time on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized by this section to be canceled of record in whole or in part by the register of deeds of any county in whose office the same may have been filed or recorded, and such cancellation shall be made by an indorsement to that effect on the margin of the record which shall refer to the order. Such cancellation may in like manner be made by the register of deeds upon a written request, directing such cancellation, signed by the party or the attorney of the party who caused such notice to be filed. [C. Civ. P. 1877, § 101; 1885, ch. 117, § 1; 1887, ch. 22, § 1; R. C. 1895, § 5251.]

Purchaser pendente lite from one not named as defendant in notice of lis pendens not affected by final judgment in the case. Purchaser with knowledge takes subject to final judgment. Presumption of no notice. Owner must be named in lis pendens. Buxton v. Sargent, 7 N. D. 503, 75 N. W. 811.

The lien of an unrecorded deed or mortgage is superior to an attachment, when. Kohn v. Lapham, 13 S. D. 78, 82 N. W. 408; Bateman v. Backus, 4 Dak. 433, 34 N. W. 66; Roblin v. Palmer, 9 S. D. 36, 67 N. W. 949; Hale v. Grigsby, 12 S. D. 198, 80 N. W. 199.

Lis pendens will not prolong judgment lien. Is a constructive notice. Ruth v. Wells, 13 S. D. 482, 83 N. W. 568; McCarthy v. Speed, 12 S. D. 7, 80 N. W. 135.

§ 6838. Summons, how served. The summons shall be served by delivering a copy thereof as follows:

1. If the defendant is a minor under the age of fourteen years, to such minor personally and also to his father, mother or guardian; or if there is none within the state, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed.

2. If the defendant is a person judicially declared to be of unsound mind or incapable of conducting his own affairs in consequence of habitual drunkenness or any other cause and for whom a guardian has been appointed, to such guardian and to the defendant personally.

3. If the defendant is a public corporation within this state, to the mayor or any of the aldermen of any city; to any of the commissioners of a county; to the president or any of the trustees of any incorporated town or village; to any of the supervisors of a civil township; to any of the members of a school district board. If the defendant is the state, to the governor or attorney general.

4. If the defendant is a domestic corporation organized under the laws of the territory of Dakota, or of this state, to the president, or other head of the corporation, secretary, cashier, treasurer, a director or managing or author-

ized agent thereof, and such service may be made within or without this state. In case the sheriff shall return the summons with his certificate that no such officer, director or agent can conveniently be found in his county, service may be made by leaving a copy of the summons at any office of such corporation within this state, with the person in charge of such office.

5. If the defendant is a foreign corporation, joint stock company or association, to the secretary of state, unless the defendant is an insurance company, in which case, to the commissioner of insurance, or to the president, secretary, cashier, treasurer, a director or managing agent thereof, if within the state, doing business for the defendant.

6. In all cases when a foreign corporation, joint stock company or association shall not have appointed either the secretary of state or commissioner of insurance, as the case may be, as its lawful attorney upon whom service of process may be made, and such foreign corporation, joint stock company or association cannot be personally served with such process according to the provisions of subdivision 5 of this section, it shall be lawful to serve such process on any person who shall be found within this state acting as the agent of, or doing business for, such corporation, joint stock company or association. But the service provided for in this subdivision can be made upon a foreign corporation, joint stock company or association only when it has property within the state or the cause of action arose therein.

7. In all other cases, to the defendant personally; and if the defendant cannot conveniently be found, by leaving a copy thereof at his dwelling house in the presence of one or more of the members of his family over the age of fourteen years; or if the defendant resides in the family of another, with one of the members of the family in which he resides over the age of fourteen years.

Service made in any of the modes provided in this section shall be taken and held to be personal service; and all writs, process or orders issued by any of the courts of this state or by the judges thereof in any action or proceeding shall be served in the manner and upon the persons or officers mentioned in this section and none other, except in cases when service of papers can be made upon an attorney after his appearance as provided by this code. [C. Civ. P. 1877, § 102; 1881, ch. 37, § 1; 1897, ch. 74; R. C. 1899, § 5252.]

Service cannot be made on husband by leaving copy with wife at dwelling house of neighbor where she is staying temporarily, the husband having left the state with the intention of remaining permanently. Phelps v. McCollam, 10 N. D. 536, 88 N. W. 292; Massilion Engine & Thresher Co. v. Hubbard, 11 S. D. 325, 77 N. W. 588.

Service of summons within the state upon a managing agent is sufficient. A station agent authorized to sell and collect passenger tickets and to receive and deliver freight and collect for freight shipments, is a managing agent hereunder. Brown v. C., M. & St. P. Ry. Co., 12 N. D. 61, 95 N. W. 153.

Managing agent, what constitutes. Foster v. Lumber Co., 5 S. D. 57, 58 N. W. 9.

Attorney in fact of a corporation is not a managing agent. Mars v. Oro Pino Mining Co., 7 S. D. 605, 65 N. W. 19.

Service cannot be made on attorney by leaving summons with clerk. Lower v. Wilson, 9 S. D. 252, 68 N. W. 545.

§ **6839. By whom summons served.** The summons may be served by the sheriff of the county where the defendant may be found, or by any other person not a party to the action. The service shall be made and the summons returned with proof of the service to the person whose name is subscribed thereto with all reasonable diligence. The person subscribing the summons may, at his option by an indorsement on the summons, fix a time for the service thereof, and the service shall then be made accordingly; provided, however, that whenever any summons or other process shall be served by any person other than a sheriff or his duly appointed deputy, no fees shall be allowed therefor, either for mileage in traveling or making such service, or for serving

said summons or process. [C. Civ. P. 1877, § 103; 1883, Sp. ch. 35, § 1; 1885, ch. 138, § 1; R. C. 1899, § 5253.]

Reasonable diligence required in the service. Brettell v. Deffebach, 6 S. D. 21, 60 N. W. 167.

Minor cannot serve summons. Gilson v. Kuenert, 15 S. D. 291, 89 N. W. 472.

Service by agent of plaintiff, good. Plano Mfg. Co. v. Murphy, 16 S. D. 380, 92 N. W. 1072.

§ **6840. Service by publication. Cases and manner.** Service of the summons in an action may be made on any defendant by publication thereof upon filing a verified complaint therein with the clerk of the district court of the county in which the action is commenced, setting forth a cause of action in favor of the plaintiff and against the defendant, and also filing an affidavit stating the place of defendant's residence, if known to the affiant, and if not known, stating that fact, and further stating:

1. That the defendant is not a resident of this state; or,

2. That the defendant is a foreign corporation, joint stock company or association and has no agent or person in this state upon whom service may be made under the provisions of section 6838; or,

3. That personal service cannot be made on such defendant within this state to the best knowledge, information and belief of the person making such affidavit, and in cases arising under this subdivision the affidavit shall be accompanied by the return of the sheriff of the county in which the action is brought, stating that after diligent inquiry for the purpose of serving such summons he is unable to make personal service thereof upon such defendant.

The affidavit shall also state or the complaint show:

1. That the defendant has property within this state or debts owing to him from residents thereof; or,

2. That the defendant is a resident of this state and has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself secreted therein with a like intent; or,

3. That the relief sought in the action consists wholly or partly in excluding the defendant from any interest in or lien upon specific real or personal property within this state, or in enforcing, regulating, defining or limiting such interest or lien in favor of either party to the action; or otherwise affecting the title to such property; or,

4. That the action is for divorce or for a decree annulling a marriage; or,

5. That the defendant in any of the cases mentioned in the last preceding subdivisions 1, 2, 3 and 4 is unknown to the plaintiff. [C. Civ. P. 1877, § 104; R. C. 1895, § 5254.]

Requisites of an affidavit for order of publication. Beach v. Beach, 6 Dak. 371, 43 N. W. 701; Bank v. Jacobson, 8 S. D. 292, 66 N. W. 453; Davis v. Cook, 9 S. D. 319, 69 N. W. 18; Plummer v. Blair, 12 S. D. 23, 80 N. W. 139; Bothel v. Hoellwarth, 10 S. D. 491, 74 N. W. 231; Woods v. Pollard, 14 S. D. 44, 84 N. W. 214; Coughran v. Markley, 15 S. D. 37, 87 N. W. 2; Coughran v. Germain, 15 S. D. 77, 87 N. W. 527; Hartzell v. Vigen, 6 N. D. 117, 69 N. W. 203.

Affidavit which entirely fails to show any diligence was used to find defendant in this state, and fails to state positively the residence of the defendant or diligence used to find defendant's residence, defective, and publication based thereon confers no jurisdiction of person of defendant. Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095.

First publication of a summons must be made on a week day. McLaughlin v. Wheeler, 2 S. D. 379, 50 N. W. 834.

Publication of summons. Iowa State Bank v. Jacobson, 8 S. D. 292, 66 N. W. 453.

A verified complaint is equivalent to affidavit. Woods v. Pollard, 14 S. D. 44, 84 N. W. 214.

§ **6841. Number of publications.** Service of the summons by publication may be made by publishing the same six times, once in each week for six suc-

cessive weeks, in a newspaper published in the county in which the action is pending, if a newspaper is published in such county and if no newspaper is published in such county, then in a newspaper published at the seat of government of this state. [R. C. 1895, § 5255.]

§ **6842. Mailing summons and complaint.** A copy of the summons and complaint must, within ten days after the first publication of the summons, be deposited in some post office in this state, postage prepaid, and directed to the defendant to be served, at his place of residence, unless the affidavit for publication states that the residence of the defendant is unknown. Such copy of summons and complaint may be so mailed by registered letter, in which case, the return registry receipt of the post office department shall be prima facie proof of its mailing and of its receipt by the defendant to whom it was mailed. [R. C. 1895, § 5256; 1901, ch. 194.]

Summons must be mailed in ten days. Affidavit made of mailing. Service dates from mailing of copy. Davis v. Cook, 9 S. D. 319, 69 N. W. 18; Clyde v. Johnson, 4 N. D. 92, 58 N. W. 512; Star v. Mahan, 4 Dak. 213, 30 N. W. 169.

§ **6843. Personal service equivalent to publication.** After the affidavit for publication and the complaint in the action are filed, personal service of the summons and complaint upon the defendant out of the state shall be equivalent to and have the same force and effect as the publication and mailing provided for in this chapter. [R. C. 1895, § 5257.]

Summons and complaint mailed to defendant were taken from the post office by defendant's husband and delivered to her in a sealed envelope, held not personal service. Rhode Island Hosp. Tr. Co. v. Keeney, 1 N. D. 411, 48 N. W. 341.

Summons and complaint left at dwelling outside state after order for service by publication not equivalent to personal service. Such service applies only within state. Bank v. Holmes, 12 N. D. 38, 94 N. W. 764.

§ **6844. Time when service must be made.** The first publication of the summons or personal service of the summons and complaint upon the defendant out of the state must be made within sixty days after the filing of the affidavit for publication: if not so made, the action shall be deemed discontinued. [R. C. 1895, § 5258.]

§ **6845. When service complete.** Service by publication is complete upon the expiration of thirty-six days after the first publication of the summons, or in case of personal service of the summons and complaint upon the defendant out of the state, upon the expiration of fifteen days after the date of such service. [R. C. 1895, § 5259.]

§ **6846. When defendant permitted to defend.** The defendant upon whom service by publication is made, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, except in an action for divorce, the defendant upon whom service by publication is made, or his representatives, upon making it appear to the satisfaction of the court by affidavit, stating the facts, that he has a good and meritorious defense to the action, and that he had no notice or knowledge of the pendency of the action so as to enable him to make application to defend before the entry of judgment therein, and upon filing an affidavit of merits, may, in like manner, be allowed to defend after judgment, or at any time within one year after notice or knowledge thereof, and within three years after its entry, and on such terms as may be just; and if the defense is successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled as the court directs; but the title to property sold under such judgment to a purchaser in good faith shall not be thereby affected. Any such defendant, who shall have received a copy of the summons and complaint in the action, mailed to him as provided in section 6842, or upon whom the summons and complaint shall have been personally served out of the state, as provided in section 6843, shall be deemed to have had notice of the pendency of the action, and of

the judgment entered therein. [C. Civ. P. 1877, § 104; R. C. 1895, § 5260; 1901, ch. 67.]

§ **6847. Joint and several debtors.** When the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

1. If the action is against defendants jointly indebted upon contract, he may proceed against the defendant served, unless the court otherwise directs; and if he recovers judgment, it may be entered against all the defendants thus jointly indebted so far only as that it may be enforced against the joint property of all and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants served; or,

2. If the action is against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants.

3. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants, if the action had been against them or any of them alone.

4. If the name of one or more partners shall for any cause have been omitted in any action, in which judgment shall have passed against the defendants named in the summons, and such omission shall not have been pleaded in such action, the plaintiff in case the judgment therein shall remain unsatisfied may by action recover of such partner separately upon proving his joint liability, notwithstanding he may not have been named in the original action; but the plaintiff shall have satisfaction of only one judgment rendered for the same cause of action. [C. Civ. P. 1877, § 105; R. C. 1899, § 5261.]

For action against partners, see Braithwaite v. Power, 1 N. D. 455, 48 N. W. 354.

A surety jointly bound with his principal may independently of statute offset against such joint indebtedness his individual indebtedness where both creditor and principal are insolvent. Clark v. King, 2 N. D. 103, 49 N. W. 416.

Action against two defendants, only one of whom is served, may be tried as to the defendant served in the same manner as if both defendants served. Black Hills Co. v. Kellogg, 4 S. D. 312, 56 N. W. 1071; Ross v. Waite, 4 S. D. 584, 57 N. W. 497.

In an action on official bond sureties liable for several amounts for which they sign. Custer County v. Albien, 7 S. D. 482, 64 N. W. 533.

§ **6848. Proof of service. Acceptance.** Proof of the service of the summons and of the complaint or notice, if any, accompanying the same, must be as follows:

1. If served by the sheriff or other officer, his certificate thereof; or,

2. If by any other person, his affidavit thereof; or,

3. In case of publication an affidavit made as provided in section 7294 of this code and an affidavit of a deposit of a copy of the summons and complaint in the post office as required by law, if the same shall have been deposited; or,

4. The written admission of the defendant.

In cases of service otherwise than by publication the certificate, affidavit or admission must state the time, place and manner of service. [C. Civ. P. 1877, § 107; 1885, ch. 125, § 1; R. C. 1895, § 5262.]

Proof of service may be made when original summons and return are lost, how. Brettell v. Deffebach, 6 S. D. 21, 60 N. W. 167.

Acknowledgment of service need not state place of service. Stoddard Mfg. Co. v. Mattice, 10 S. D. 253, 72 N. W. 891.

§ **6849. Removal of pleadings, etc., from files.** Any original pleading or paper in any civil action or proceeding, which by law is required to be filed in the office of the clerk of the court in which such action or proceeding is pending, may upon the request of the party filing the same be removed from

the files for the purpose of serving the same either within or without the state. [R. C. 1895, § 5263.]

§ 6850. Jurisdiction. Appearance. From the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction and to have control of all the subsequent proceedings. A voluntary appearance of a defendant is equivalent to personal service of the summons upon him. [C. Civ. P. 1877, § 108; R. C. 1899, § 5264.]

No jurisdiction is conferred where appearance is by unauthorized attorney. Williams v. Neath, 4 Dak. 360, 31 N. W. 630.

Defendant appealing from justice court on questions of law and fact, cannot deny jurisdiction of district court, although justice court was without jurisdiction. Lyons v. Miller, 2 N. D. 1, 48 N. W. 514.

Where a party not properly served with process appears in a case and asks to have decree against him set aside on ground of no jurisdiction of person and for fraud and deceit in obtaining decree and that the decree is not supported by the evidence, appearance is general and waives all defects in service of process. General appearance does not validate void decree. Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095.

Appearance makes void process valid and gives jurisdiction from date of appearance. Simensen v. Simensen, 13 N. D. 305, 100 N. W. 708.

As to whether voluntary appearance without issuance of summons gives jurisdiction in South Dakota, see Ayers v. Sundback, 5 S. D. 31, 58 N. W. 4; Ramsdell v. Duxberry, 14 S. D. 222, 85 N. W. 221.

See note to section 6832. Ramsdell v. Duxberry, 17 S. D. 311, 96 N. W. 132.

CHAPTER 8.

OF PLEADINGS IN CIVIL ACTIONS.

Article 1.—The Complaint.

§ 6851. Forms of pleading abolished. All forms of pleading heretofore existing are abolished; and hereafter the forms of pleadings in civil actions in courts of record and the rules by which the sufficiency of the pleading is to be determined are those prescribed by this code. [C. Civ. P. 1877, § 109; R. C. 1895, § 5265.]

Attachment proceedings no part of the pleadings proper. Jordan v. Frank, 1 N. D. 206, 46 N. W. 171.

Court determines upon what pleadings case must be tried. First M. E. Church v. Fadden, 8 N. D. 162, 77 N. W. 615.

Facts relied on to show creation of a trust need not be more distinctly alleged than facts relied on in other civil actions. Swenson v. Swenson, 17 S. D. 558, 97 N. W. 845.

§ 6852. Complaint. What to contain. The first pleading on the part of the plaintiff is the complaint. The complaint shall contain:

1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had and the names of the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts constituting a cause of action without unnecessary repetition.

3. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money is demanded, the amount thereof shall be stated. [C. Civ. P. 1877, §§ 110, 111; R. C. 1899, § 5266.]

When supplemental complaint proper. New cause of action cannot be alleged. Bank v. Dickinson Co., 6 N. D. 222, 69 N. W. 455.

Where an exhibit attached to a complaint negatives it, exhibit governs. Johnson v. Kindred State Bank, 12 N. D. 336, 96 N. W. 588.

An exhibit is no part of a pleading. Aultman v. Siglinger, 2 S. D. 442, 50 N. W. 911; Russ-Owen Lumber Co. v. Fitch, 3 S. D. 213, 52 N. W. 879; (reversed in Bank v. Insurance Co., 6 S. D. 424, 61 N. W. 439.)

Complaint must allege all facts necessary to be proven. Busta v. Wardall, 3 S. D. 141, 52 N. W. 418; Sherman v. Engine Co., 8 S. D. 343, 66 N. W. 1077; Iowa & Dakota Co. v. Schamber, 15 S. D. 588, 91 N. W. 78; Clay County v. Simonson, 2 Dak. 112, 2 N. W. 260.

For allegations of complaint against partners, see Bank v. Hattenbach, 13 S. D. 365, 83 N. W. 421; Van Brunt v. Harrigan, 8 S. D. 96, 65 N. W. 421.

See note to section 5265. Swenson v. Swenson, 17 S. D. 558, 97 N. W. 845.

Article 2.—The Demurrer.

§ **6853. Defendant may demur or answer.** The only pleading on the part of the defendant is either a demurrer or an answer. It must be served within thirty days after the service of the copy of the complaint. [C. Civ. P. 1877, § 112; R. C. 1899, § 5267.]

§ **6854. When may demur.** The defendant may demur to the complaint when it shall appear upon the face thereof, either:

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,
2. That the plaintiff has not legal capacity to sue; or,
3. That there is another action pending between the same parties for the same cause; or,
4. That there is a defect of parties, plaintiff or defendant; or,
5. That several causes of action have been improperly united; or,
6. That the complaint does not state facts sufficient to constitute a cause of action. [C. Civ. P. 1877, § 113; R. C. 1899, § 5268.]

Demurrer ore tenus. General objection to the introduction of any evidence under the complaint on the ground that facts stated do not constitute a cause of action, will not be considered on appeal where the evidence was received without specific objection to prove allegations wanting. Bowman v. Eppinger, 1 N. D. 21, 44 N. W. 1000.

The pleading of a conclusion is demurrable. Van Dyke v. Doherty, 6 N. D. 263, 69 N. W. 200.

Demurrer to amended complaint proper where original complaint is to foreclose seed lien and amendment sounds in tort. Mares v. Wormington, 8 N. D. 329, 79 N. W. 441.

Proper method to test legal sufficiency of affirmative defenses is by demurrer and not by motion to strike out. Gjerstadengen v. Hartzell, 8 N. D. 424, 79 N. W. 872.

Objection to evidence for insufficiency of complaint must point out defect. Chilson v. Bank of Fairmount, 9 N. D. 96, 81 N. W. 33; Schweinber v. Great Western Elevator Co., 9 N. D. 113, 81 N. W. 35; James River National Bank v. Purchase, 9 N. D. 280, 83 N. W. 7; Pine Tree Lumber Co., v. City of Fargo, 12 N. D. 360, 96 N. W. 357.

Joint demurrer properly overruled where sufficient cause stated against one of the defendants. Dalrymple v. Security L. & T. Co., 9 N. D. 306, 83 N. W. 245.

Joint demurrer will be overruled where action can be maintained as to one defendant, and new parties are not necessary. Dalrymple v. Security L. & T. Co., 9 N. D. 306, 83 N. W. 245.

Defect of parties upon face of complaint, objection must be by demurrer; may be by answer when it does not appear on face of complaint. Ross v. Page, 11 N. D. 458, 92 N. W. 822.

Will lie for defect but not excess of parties. Olson v. Shirley, 12 N. D. 106, 96 N. W. 297.

Defect of parties can be raised by answer. Clements v. Miller et al, 13 N. D. 176, 100 N. W. 239.

A demurrer must specify grounds of objections. Hudson v. Archer, 4 S. D. 128, 55 N. W. 1099.

General demurrer does not raise question of jurisdiction. Wood v. Sheldon, 9 S. D. 392, 69 N. W. 602.

Objections on ground of failure of corporation to file articles should be raised by answer not by demurrer. Acme Agency v. Rochford, 10 S. D. 203, 72 N. W. 466; State v. Ry. Co., 4 S. D. 261, 56 N. W. 894; American Buttonhole Co. v. Moore, 2 Dak. 280, 8 N. W. 131.

Defects appearing on face of papers only, demurrable. Burnett v. Costello, 15 S. D. 89, 87 N. W. 575.

In an action for conspiracy, where acts alleged to have been done in furtherance of the conspiracy embrace different transactions, but there is one cause of

action and one conspiracy alleged, held not several causes improperly joined. Emerick v. Sweeney Cattle Co., 17 S. D. 270, 96 N. W. 93.

By "defect of parties" nonjoinder of parties is meant. Mader et al v. Plano Mfg. Co., 17 S. D. 553, 97 N. W. 843.

§ **6855. Requisites of demurrer.** The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it does so, it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein. [C. Civ. P. 1877, § 114; R. C. 1899, § 5269.]

Grounds for should be distinctly specified. O'Rourke v. Sioux Falls, 4 S. D. 47, 54 N. W. 1044; Mather v. Dunn, 11 S. D. 196, 76 N. W. 922; Hudson v. Archer, 4 S. D. 128, 55 N. W. 1099; Hill v. Walsh, 6 S. D. 421, 61 N. W. 440.

Joint demurrer to complaint in action by several plaintiffs must be overruled, if facts alleged are sufficient in favor of either plaintiff against either of parties demurring. Evans v. County, 9 S. D. 130, 68 N. W. 195.

§ **6856. Amended complaint. Service, etc.** If the complaint is amended, a copy thereof must be served on the defendant, who must answer it within thirty days, or the plaintiff upon filing with the clerk due proof of the service and of the defendant's omission may proceed to obtain judgment as provided by section 7001, but when an application to the court for judgment is necessary, ten days' notice thereof must be given to the defendant. [C. Civ. P. 1877, § 115; R. C. 1899, § 5270.]

Has no application to amendment made by order of court. J. I. Case Co. v. Eichinger, 15 S. D. 530, 91 N. W. 82.

§ **6857. When answer.** When any of the matters enumerated in section 6854 do not appear upon the face of the complaint, the objection may be taken by answer. [C. Civ. P. 1877, § 116; R. C. 1899, § 5271.]

All matters not apparent on face of complaint should be raised by answer. Trotter v. Life Association, 9 S. D. 596, 70 N. W. 843; Acme Mercantile Agency v. Rochford, 10 S. D. 203, 72 N. W. 466; Lee v. Town of Mellette, 15 S. D. 586, 90 N. W. 855.

§ **6858. When objection waived.** If no such objection is taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court and the objection that the complaint does not state facts sufficient to constitute a cause of action. [C. Civ. P. 1877, § 117; R. C. 1899, § 5272.]

Presumption favors validity of pleading. Fahey v. Esterley Machine Co., 3 N. D. 220, 55 N. W. 580; Sherwood v. City of Sioux Falls, 10 S. D. 405, 73 N. W. 913.; Whitbeck v. Sees, 10 S. D. 417, 73 N. W. 915; J. I. Case Co. v. Pederson, 6 S. D. 140, 60 N. W. 747; Southard v. Smith, 8 S. D. 230, 66 N. W. 316.

See J. I. Case Co. v. Pederson, 6 S. D. 140, 60 N. W. 747; Evans v. Fall River Co., 9 S. D. 130, 68 N. W. 195; Ross v. Waite, 4 S. D. 584, 57 N. W. 497; Heegaard v. Trust Co., 3 S D. 569, 54 N. W. 656; Mather v. Dunn, 11 S. D. 196, 76 N. W. 922; Porter v. Booth, 1 S. D. 558, 47 N. W. 960; Nelson v. Ladd, 4 S. D. 1, 54 N. W. 809; James River Bank v. Purchase, 9 N. D. 280, 83 N. W. 7.

Article 3.—The Answer.

§ **6859. Requisites of answer.** The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defense or counterclaim in ordinary and concise language without repetition. [C. Civ. P. 1877, § 118; R. C. 1899, § 5273.]

Surety jointly bound with his principal may, independently of statute, offset against such joint indebtedness his individual claim against the creditor in such joint indebtedness, where both the creditor and the principal are insolvent. Clark v. King & Sullivan, 2 N. D. 103, 49 N. W. 416.

One who buys a set-off to a claim against him without notice of a prior assignment, may use the set-off as a defense. Clark v. King & Sullivan, 3 N. D. 280, 55 N. W. 733.

Cause of action for tort cannot be sustained as an equitable set-off, no averment of insolvency. Mere fact of non-residence does not warrant application of

doctrine of equitable set-off. Cause of action in tort not set-off against cause of of action upon contract. Braithwaite v. Akin, 3 N. D. 365, 56 N. W. 133.

Deny both knowledge and information. Sigmund v. Bank of Minot, 4 N. D. 164, 59 N. W. 966.

Same facts may be pleaded as defense and counterclaim. Defense of non-performance. Nollman & Lewis v. Evenson, 5 N. D. 344, 65 N. W. 686.

Answer pleading conclusions only, demurrable. Denial on information insufficient. Van Dyke v. Doherty, 6 N. D. 263, 69 N. W. 200.

As to denial for want of sufficient information to form a belief, see Mass. L. & T. Co. v. Twitchell, 7 N. D. 440, 75 N. W. 786; Gjerstadengen v. Hartzell, 8 N. D. 424, 79 N. W. 872; Russell v. Amundson, 4 N. D. 112, 59 N. W. 477; State ex rel Gunderson v. King, 6 S. D. 297, 60 N. W. 75; Hardy v. Purington, 6 S. D. 382, 61 N. W. 158; Cummings v. Lawrence County, 1 S. D. 158, 46 N. W. 182; Wilson v. Insurance Co., 15 S. D. 322, 89 N. W. 649.

Separate inconsistent defenses may be pleaded. Stebbins v. Lardner, 2 S. D. 127, 48 N. W. 847; Lawrence v. Peck, 3 S. D. 645, 54 N. W. 808; Green v. Hughitt Twp., 5 S. D. 452, 59 N. W. 224; Ormsby v. Insurance Co., 5 S. D. 72, 58 N. W. 301; Minn. Thresher Co. v. Schaack, 10 S. D. 511, 74 N. W. 445.

Liberal construction should be given to answer. Laney v. Ingalls, 5 S. D. 183, 58 N. W. 572.

§ **6860. Requisites of counterclaim.** The counterclaim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action. The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they are such as have been heretofore denominated legal, or equitable or both. They must each be separately stated and refer to the causes of action which they are intended to answer in such manner that they may be intelligibly distinguished. [C. Civ. P. 1877, § 119; R. C. 1899, § 5274.]

Defense by way of counterclaim in equitable actions, see Powers v. Bowdle, 3 N. D. 107, 52 N. W. 404; Sussenbach v. Bank, 5 Dak. 477, 41 N. W. 662.

Counterclaim for money paid upon note fraudulently altered. Objections waived by failure to demur. Bank v. Laughlin, 4 N. D. 391, 61 N. W. 473.

What is a statutory counterclaim. Heebner v. Shepard, 5 N. D. 56 (see note), 63 N. W. 892.

Demands existing at the commencement of the action only can be set up. Heebner v. Shepard, 5 N. D. 56, 63 N. W. 892; Oswald v. Moran, 8 N. D. 111, 77 N. W. 281; Kirby v. Jameson, 9 S. D. 8, 67 N. W. 854.

In action to quiet title defendant sets up counterclaim when he alleges he is the owner of the land. Betts v. Signor, 7 N. D. 399, 75 N. W. 781.

Slander cannot be counterclaimed against slander. Each slander constitutes a separate transaction. Wrege v. Jones, 13 N. D. 267, 100 N. W. 705.

The averments of a counterclaim must be those necessary in a complaint. McKinney v. Sundback, 3 S. D. 106, 52 N. W. 322. See Phelps v. McCollam, 10 N. D. 536, 88 N. W. 292; Bank v. Feeney, 9 S. D. 550, 70 N. W. 874; Minn. Mach. Co. v. Darnall, 13 S. D. 279, 83 N. W. 266; McHarg v. Williams, 8 S. D. 381, 66 N. W. 930; Schuster v. Thompson, 6 Dak. 10, 50 N. W. 125.

§ **6861. Demurrer and answer.** The defendant may demur to one or more of several causes of action stated in the complaint and answer the residue. [C. Civ. P. 1877, § 120; R. C. 1899, § 5275.]

§ **6862. Sham defenses.** Sham and irrelevant answers and defenses may be stricken out on motion and upon such terms as the courts may in their discretion impose. [C. Civ. P. 1877, § 121; R. C. 1899, § 5276.]

Absolute denial cannot be stricken out as sham. The statutory right to deny allegations by denying knowledge or information sufficient to form a belief is not an absolute right. Gjerstadengen v. Hartzell, 8 N. D. 424, 79 N. W. 872; Woodenware Co. v. Jensen, 4 Dak. 149, 27 N. W. 206; King v. Waite, 10 S. D. 1, 70 N. W. 1056; Loranger v. Mining Co., 6 S. D. 478, 61 N. W. 686; Green v. Hughitt, 5 S. D. 452, 59 N. W. 224.

ARTICLE 4.—THE REPLY.

§ 6863. Reply when. Demurrer to answer. When the answer contains new matter constituting a counterclaim, the plaintiff may within thirty days reply to such new matter, denying generally or specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language without repetition any new matter not inconsistent with the complaint constituting a defense to such new matter in the answer; and the plaintiff may in all cases demur to an answer containing new matter, when upon its face it does not constitute a counterclaim or defense, and the plaintiff may demur to one or more of such defenses or counterclaims and reply to the residue of the counterclaims. And in other cases, when an answer contains new matter constituting a defense by way of avoidance, the court may in its discretion on the defendant's motion require a reply to such new matter; and in that case the reply shall be subject to the same rules as a reply to a counterclaim. [C. Civ. P. 1877, § 122; R. C. 1899, § 5277.]

Discretionary with court to require reply, when. Star Wagon Co. v. Matthiessen, 3 Dak. 233, 14 N. W. 107; Gull River Lumber Co. v. Keefe, 6 Dak. 160, 41 N. W. 743; Cornwall v. McKinney, 9 S. D. 213, 68 N. W. 333.

Reply waived. Power v. Bowdel, 3 N. D. 107, 54 N. W. 404.

Objections waived by failure to demur. Bank v. Laughlin, 4 N. D. 391, 61 N. W. 473; Van Dyke v. Doherty, 6 N. D. 263, 69 N. W. 200; Gjerstadengen v. Hartzell, 8 N. D. 424, 79 N. W. 872.

Demurrer need not specify particulars wherein answer is insufficient. Answer pleading conclusions only, demurrable. Van Dyke v. Doherty, 6 N. D. 263, 69 N. W. 200.

§ 6864. Judgment on answer. If the answer contains a statement of new matter constituting a counterclaim, and the plaintiff fails to reply or demur thereto within the time prescribed by law, the defendant may move on a notice of not less than ten days for such judgment as he is entitled to upon such statement, and if the case requires it, a writ of inquiry of damages may be issued. [C. Civ. P. 1877, § 123; R. C. 1899, § 5278.]

Judgment on counterclaim for want of reply, may be ordered. Heebner v. Shepard, 5 N. D. 56, 63 N. W. 892. (See note at end of this decision.)

§ 6865. Demurrer to reply. If a reply of the plaintiff to any defense set up by the answer of the defendant is insufficient, the defendant may demur thereto, and shall state the grounds thereof. [C. Civ. P. 1877, § 124; R. C. 1899, § 5279.]

ARTICLE 5.—GENERAL RULES OF PLEADING.

§ 6866. Pleading. Subscription. Verification. Every pleading in a court of record must be subscribed by the party or his attorney; and when any pleading is verified, every subsequent pleading except a demurrer must be verified also. [C. Civ. P. 1877, § 125; R. C. 1899, § 5280.]

§ 6867. Requisites of verification. The verification must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated upon information and belief, and as to those matters he believes it to be true, except when it is made by any person other than the party to the action, in which case it must be to the effect that the same is true to the best knowledge, information and belief of the person making it; and such verification must be by the affidavit of the party, his agent or attorney, or if there are several parties united in interest and pleading together, by one at least of such parties acquainted with the facts, or by the agent or attorney of such party. When a corporation is a party, the verification may be made by any officer thereof, and when the state, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts. The verification may be omitted when an admission of the truth of the allegation might subject the party to a prosecution for felony, and no pleading can be used in a criminal prosecution against the

party as proof of a fact admitted or alleged in such pleading. [C. Civ. P. 1877, § 126; 1885, ch. 149, § 1; R. C. 1895, § 5281.]

§ **6868. Statement of account.** It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged; but he shall deliver to the adverse party, within ten days after the demand thereof in writing, a copy of the account, which, if the pleading is verified, must be verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court, or a judge thereof, may order a further account, when the one delivered is defective; and the court may in all cases order a bill of particulars of the claim of either party to be furnished. [C. Civ. P. 1877, § 127; R. C. 1899, § 5282.]

§ **6869. Liberal construction.** In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view of substantial justice between the parties. [C. Civ. P. 1877, § 128; R. C. 1899, § 5283.]

Liberal construction. Donovan v. Elevator Co., 7 N. D. 513, 75 N. W. 809; Stutsman County v. Mansfield, 5 Dak. 78, 37 N. W. 304; Laney v. Ingals, 5 S. D. 183, 58 N. W. 572; Finch v. Park, 12 S. D. 63, 80 N. W. 155; Catholicon Hot Springs Co. v. Ferguson, 8 S. D. 534, 67 N. W. 615.

Proof cannot be broader than allegations of complaint. McCormick v. Rae, 9 N. D. 482, 84 N. W. 346.

See note to section 6851. Swenson v. Swenson, 17 S. D. 558, 97 N. W. 845.

§ **6870. Making pleading definite.** If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby. And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment. [C. Civ. P. 1877, § 129; R. C. 1899, § 5284.]

As to redundant matter, see Gjerstadengen v. Hartzell, 8 N. D. 424, 79 N. W. 872.

Section only applies when answer or complaint is uncertain. The remedies afforded by sections 6868 and 6870 are distinct and apply exclusively under circumstances therein pointed out. Johnson v. G. N. Ry. Co., 12 N. D. 420, 97 N. W. 546.

§ **6871. Pleading a judgment.** In pleading a judgment or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation is controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction. [C. Civ. P. 1877, § 130; R. C. 1899, § 5285.]

§ **6872. Conditions precedent.** In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegations are controverted, the party pleading shall be bound to establish on the trial the facts showing such performance. In an action or defense founded upon an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party a specified sum which he claims. [C. Civ. P. 1877, § 131; R. C. 1899, § 5286.]

General denial of conditions precedent not a frivolous answer. Sifton v. Sifton, 5 N. D. 187, 65 N. W. 670; Sundback v. Gilbert, 8 S. D. 359, 66 N. W. 941; DeFord v. Hyde, 10 S. D. 386, 73 N. W. 265.

Section applies to actions for recovery of money only, not to foreclosure of mortgages. Scottish Mtg. Co. v. Reeve, 7 N. D. 99, 72 N. W. 1088; Andrews v. Wynn, 4 S. D. 40, 54 N. W. 1047.

Complaint which sets out copy of note and demands specific amount as due, sufficient. Scott v. Esterbrooks, 6 S. D. 253, 60 N. W. 850.

§ **6873. Private statute.** In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof. [C. Civ. P. 1877, § 132; R. C. 1899, § 5287.]

§ **6874. Libel or slander.** In an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff, and if such allegation is controverted, the plaintiff shall be bound to establish on the trial that it was so published or spoken. [C. Civ. P. 1877, § 133; R. C. 1895, § 5288.]

§ **6875. Same. Defendant's answer.** In the actions mentioned in the last section, the defendant may in his answer allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances. [C. Civ. P. 1877, § 134; R. C. 1899, § 5289.]

Both justification and mitigation may be pleaded. Wrege v. Jones, 13 N. D. 267, 100 N. W. 705; Myers v. Longstaff, 14 S. D. 98, 84 N. W. 233.

Truth of alleged defamatory matter in mitigation must be pleaded in answer; otherwise cannot be proven. Lauder v. Jones, 13 N. D. 525, 101 N. W. 907.

§ **6876. Answer of possession.** In an action to recover the possession of property distrained doing damage, an answer that the defendant or person by whose command he acted was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good, without setting forth the title to such real property. [C. Civ. P. 1877, § 135; R. C. 1899, § 5290.]

§ **6877. Joinder of actions.** The plaintiff may unite in the same complaint several causes of action, whether they are such as have been heretofore denominated legal or equitable, or both, where they all arise out of:

1. The same transaction, or transactions connected with the same subject of action; or,
2. Contract, express or implied; or,
3. Injuries, with or without force, to person and property, or either; or,
4. Injuries to character; or,
5. Claims to recover real property with or without damages for the withholding thereof, and the rents and profits of the same, or waste committed thereon; or,
6. Claims to recover personal property with or without damages for the withholding thereof; or,
7. Claims against a trustee by virtue of a contract, or by operation of law.

But the causes of action so united must all belong to one of these classes and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated. [C. Civ. P. 1877, § 136; R. C. 1895, § 5291.]

Where complaint embodies several causes of action, one equitable and the others at law, demurrer will lie. Jasper v. Hazen, 2 N. D. 401, 51 N. W. 583.

For joinder of causes of action, uniting causes of action, and motion to make more definite, see Bank v. Dickinson, 6 N. D. 222, 69 N. W. 455; Mares v. Wormington, 8 N. D. 329, 79 N. W. 441; Aultman Co. v. Ferguson, 8 S. D. 458, 66 N. W. 1081; Tripp v. City of Yankton, 10 S. D. 516, 74 N. W. 447; Campbell v. Trust Co., 14 S. D. 483, 85 N. W. 1015; Bush v. Froelick, 8 S. D. 353, 66 N. W. 939; Austin etc. Co. v. Heiser, 6 S. D. 429, 61 N. W. 445.

A complaint in an action to quiet title and for cancellation of certain instruments affecting title, in first cause showing no interest in one of the plaintiffs, and in second showing interest in both, bad for misjoinder. Allegations of one cause not to be taken in consideration with those of another cause. First National Bank of Charles City v. Johnson Land Mortg. Co, 17 S. D. 522, 97 N. W. 748.

§ **6878. Allegations. When deemed true or denied.** Every material allegation of the complaint, not controverted by the answer as prescribed in section 6859, and every material allegation of new matter in the answer, constituting a counterclaim, not controverted by the reply as prescribed in section 6863, shall for purposes of the action be taken as true. But the allegation of new matter in the answer, not relating to a counterclaim, or of new matter in a reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require. [C. Civ. P. 1877, § 137; R. C. 1899, § 5292.]

Admissions of residence in answer not conclusive. Court may inquire. Smith v. Smith, 10 N. D. 219, 86 N. W. 721.

New matter in answer is deemed denied where it does not constitute a counterclaim. Meyer v. School District, 4 S. D. 420, 57 N. W. 68; Risden v. Davenport, 4 S. D. 555, 57 N. W. 482; Lyon v. Bank, 15 S. D. 400, 89 N. W. 1017; Friedrich v. Fergen, 15 S. D. 541, 91 N. W. 328; Minneapolis T. M. Co. v. Hanrahan, 9 S. D. 520, 70 N. W. 656; Boucher v. Pub. Co., 14 S. D. 72, 84 N. W. 237; Wyman v. Werner, 14 S. D. 300, 85 N. W. 584.

Denial of "each and all the allegations in the affidavit contained except such as are herein admitted or qualified" though not a form to be encouraged, is held good in Hardy v. Purington, 6 S. D. 382, 61 N. W. 158.

A denial as to "material allegations" not sufficient. Bank v. Jackson, 9 S. D. 605, 70 N. W. 846.

Article 6.—Mistakes in Pleading and Amendments.

§ **6879. Variance material and misleading.** No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been misled, the facts shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just. [C. Civ. P. 1877, § 138; R. C. 1895, § 5293.]

Proof of passive trust upon allegation of absolute title is not a fatal variance. Halloran v. Holmes & White, 13 N. D. 411, 101 N. W. 310.

Materiality of a variance depends upon satisfactory proof that it has misled adverse party to his prejudice. Halloran v. Holmes, 13 N. D. 411, 101 N. W. 310.

Variances not misleading, are immaterial. Brace v. Doble, 3 S. D. 416, 53 N. W. 859; North Star Boot & Shoe Co. v. Stebbins, 3 S. D. 540, 54 N. W. 593; Hermiston v. Green, 11 S. D. 81, 75 N. W. 819; Cornwall v. McKinney, 12 S. D. 118, 80 N. W. 171; Meldrum v. Kenefick, 15 S. D. 370, 89 N. W. 863.

§ **6880. If not material.** When the variance is not material as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs. [C. Civ. P. 1877, § 139; R. C. 1899, § 5294.]

§ **6881. Failure to prove variance.** When, however, the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof. [C. Civ. P. 1877, § 140; R. C. 1899, § 5295.]

An objection for variance is unavailing unless variance is of such degree as to be a failure of proof. Halloran v. Holmes, 13 N. D. 411, 101 N. W. 310.

§ **6882. Amendments. When and how.** Any pleading may be once amended by the party of course without costs and without prejudice to the proceedings already had at any time within twenty days after it is served, or at any time before the period for answering it expires; or it can be so amended at any time within twenty days after the service of the answer or demurrer to such pleading, unless it is made to appear to the court that it was done for the purpose of delay and the plaintiff or defendant will thereby lose the benefit of a term for which the cause is or may be noticed; and if it appears to the court that such amendment was made for such purpose,

the same may be stricken out and such terms imposed as to the court may seem just. In such case a copy of the amended pleading must be served on the adverse party. After the decision of a demurrer the court may, in its discretion, if it appears that the demurrer was interposed in good faith, allow the party to plead over upon such terms as may be just. If the demurrer is allowed for the cause mentioned in the fifth subdivision of section 6854, the court may, in its discretion and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned. [C. Civ. P. 1877, § 141; R. C. 1899, § 5296.]

Affidavit for attachment may be amended. Gans v. Beasley, 4 N. D. 140, 59 N. W. 714.

Amendment may be made at trial to conform to proof. Anderson v. Bank, 5 N. D. 80, 64 N. W. 114.

The discretion to allow or refuse amendments to pleadings is a legal and not an arbitrary discretion. Where reasonable doubt about propriety of an amendment, better and safer practice is to allow amendment. Martin v. Luger Furniture Co., 8 N. D. 220, 77 N. W. 1003.

Amendment of complaint improperly allowed when action originally brought to foreclose seed lien and amendment sounds in tort. Mares v. Wormington, 8 N. D. 329, 79 N. W. 441.

Where an amendment of complaint at trial is allowed and defendant announces himself ready to proceed, he cannot thereafter urge prejudice by allowance of such amendment. McCabe Bros. v. Aetna Insurance Co., 9 N. D. 19, 81 N. W. 426.

Amended pleading must be rewritten. Amendment deemed abandoned unless leave is acted upon. Court should rule at time request is made to amend. Satterlund v. Beal, 12 N. D. 122, 95 N. W. 518.

The general rule is to allow amendments. For cases bearing on various phases of amendments, see Kelsey v. Ry. Co., 1 S. D. 80, 45 N. W. 204; Nashua Savings Bank v. Lovejoy, 1 N. D. 211, 46 N. W. 411; Anderson v Bank, 5 N. D. 80, 64 N. W. 114; Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570; Haggarty v. Strong, 10 S. D. 585, 74 N. W. 1037; Chaffee v. Runkle, Rowley & Co., 11 S. D. 333, 77 N. W. 579; J. I. Case Co. v. Eichinger, 15 S. D. 530, 91 N. W. 82; Heegaard v. Trust Co., 3 S. D. 569, 54 N. W. 656; Martin v. Bank, 7 S. D. 263, 64 N. W. 127; Loverin Browne v. Bank, 7 N. D. 569, 75 N. W. 923.

Second amendment without leave not authorized. Tripp v. City of Yankton, 10 S. D. 516, 74 N. W. 447; Tripp v. City of Yankton, 11 S. D. 353, 77 N. W. 580.

On proper motion, a bill of exceptions may be returned to trial court for correction. Hedlum v. Mining Co., 14 S. D. 369, 85 N. W. 861.

Judgment may be set aside after one year, when obtained by fraud, in discretion of court. Whittaker v. Warren, 14 S. D. 611, 86 N. W. 638.

§ **6883. Court may amend. Terms.** The court may, before or after judgment in furtherance of justice and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any 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, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. [C. Civ. P. 1877, § 142; R. C. 1899, § 5297.]

§ **6884. Pleading after time.** The court may likewise, in its discretion and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited by this code, or by an order enlarge such time; and may also, in its discretion and upon such terms as may be just at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding; and whenever any proceeding taken by a party fails to conform in any respect to the provisions of this code, the court may, in like manner and upon like terms, permit an amendment of such proceedings, so as to make it conformable thereto. [C. Civ. P. 1877, § 143; R. C. 1899, § 5298.]

Ex parte order extending time to answer not void. Warder v. Patterson, 6 Dak. 83, 50 N. W. 484.

Order extending time to settle bill of exceptions discretionary. Johnson v. Ry. Co., 1 N. D. 354, 48 N. W. 227; Moe v. Railway Co., 2 N. D. 282, 50 N. W. 715.

To vacate judgment on ground of mistake something not intended must have been done. To relieve from a default judgment an affidavit of merits and verified answer necessary. Sargent v. Kindred, 5 N. D. 8, 63 N. W. 151; Idem, 5 N. D. 472, 67 N. W. 826.

Notice to attorney is notice to client. Sargent v. Kindred, 5 N. D. 472, 67 N. W. 826.

Petitioner must present affidavit and act promptly. Kirschner v. Kirschner, 7 N. D. 291, 75 N. W. 251; Judd v. Patton, 13 S. D. 648, 84 N. W. 199; Pettigrew v. City of Sioux Falls, 5 S. D. 646, 60 N. W. 27; Minn. Thresher Co. v. Holz, 10 N. D. 16, 84 N. W. 581; Hood v. Fay, 15 S. D. 84, 87 N. W. 528; Searles v. Christensen, 5 S. D. 650, 60 N. W. 29; Gauthier v. Rusicka, 3 N. D. 1, 53 N. W. 80.

Statute of limitations will begin to run only upon actual notice or knowledge of judgment. Formal or written notice not necessary. Minn. Thresher Co. v. Holz, 10 N. D. 16, 84 N. W. 581.

An independent action in equity to enjoin the collection of a judgment will not lie. Kitzman v. Minn. Thresher Co., 10 N. D. 26, 84 N. W. 585.

District judge has power to extend time in which exceptions to charge may be taken, before or after time has elapsed, but only upon good cause shown and in furtherance of justice. Lindblom v. Sonstelie, 10 N. D. 140, 86 N. W. 357.

Judgment void for want of jurisdiction may be attacked by motion or action, and remedy not barred by statutory period of one year. Freeman v. Wood, 11 N. D. 1, 88 N. W. 721.

Burden is on party attacking judgment to show diligence in seeking relief. On motion to set aside a default judgment and a valid defense is set out in the affidavit, it is discretionary with trial court to accept such affidavit in lieu of verified answer. Wheeler v. Castor, 11 N. D. 347, 92 N. W. 381.

Power to modify a judgment in discretion of court. Griswold Oil Co. v. Lee, 1 S. D. 531, 47 N. W. 955; Evans v. Fall River County, 4 S. D. 119, 55 N. W. 862; G. S. Congdon Co. v. Mining Co., 11 S. D. 376, 77 N. W. 1022; Minnehaha National Bank v. Hurley, 13 S. D. 18, 82 N. W. 87; Yerkes v. McHenry, 6 Dak. 5, 50 N. W. 485.

Neglect of defendant must be excusable. State v. Casey, 9 S. D. 436, 69 N. W. 585; Pettigrew v. City of Sioux Falls, 5 S. D. 646, 60 N. W. 27, Sargent v. Kindred, 5 N. D. 8, 63 N. W. 151; Weber v. Tschetter, 1 S. D. 205, 46 N. W. 201.

Power to amend notice of motion for new trial. Bunker v. Taylor, 10 S. D. 526, 74 N. W. 450.

Docketing transcript of justice's judgment in circuit court, gives no jurisdiction to set it aside, and grant new trial. Garlock v. Calkins, 14 S. D. 90, 84 N. W. 393.

Judgment of reversal of appeal from county court cannot be set aside. In re Seydel's Estate, 14 S. D. 115, 84 N. W. 397.

§ **6885. Unknown name.** When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name; and when his true name shall be discovered the pleading or proceeding may be amended accordingly. [C. Civ. P. 1877, § 144; R. C. 1899, § 5299.]

Summons which only describes partners by firm name is irregular. May be amended and will sustain an attachment. Gans v. Beasley, 4 N. D. 140, 59 N. W. 714.

§ **6886. Trivial defects disregarded.** The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect. [C. Civ. P. 1877, § 145; R. C. 1899, § 5300.]

Trivial defects disregarded. Braithwaite v. Power, 1 N. D. 455, 48 N. W. 354; Western Twine Co. v. Wright, 11 S. D. 521, 78 N. W. 942; Heegaard v. Trust Co., 3 S. D. 569, 54 N. W. 656; Hulst v. Association, 9 S. D. 144, 68 N. W. 200; Wyman v. Werner, 14 S. D. 300, 85 N. W. 584; Green v. Hughitt Twp., 5 S. D. 452, 59 N. W. 224.

Court will not presume "E. H." and "Edward H." are one and the same person. Andrews v. Wynn, 4 S. D. 40, 54 N. W. 1047.

§ **6887. Supplemental pleading.** The plaintiff and defendant respectively may be allowed on motion to make a supplemental complaint, answer or reply, alleging facts material to the case occurring after the former complaint,

answer or reply, or of which the party was ignorant when his former pleading was made. [C. Civ. P. 1877, § 146; R. C. 1899, § 5301.]

Supplementary pleading must relate to same cause of action. Swedish-American Bank v. Dickinson Co., 6 N. D. 222, 69 N. W. 455.

Leave to file usually granted. Schoweiler v. Hough, 7 S. D. 163, 63 N. W. 776; Kirby v. Muench, 12 S. D. 616, 82 N. W. 93.

CHAPTER 9.

OF THE PROVISIONAL REMEDIES IN CIVIL ACTIONS.

§ **6888. Classified.** The provisional remedies in civil actions are:

1. Arrest and bail.
2. Claim and delivery of personal property.
3. Injunction.
4. Attachment.
5. Receivers.
6. Deposit in court. [C. Civ. P. 1877, § 147; R. C. 1899, § 5302.]

ARTICLE 1.—ARREST AND BAIL.

§ **6889. Arrest limited. Contempt.** No person shall be arrested in a civil action except as prescribed by this code; but this provision shall not apply to proceedings for contempt. [C. Civ. P. 1877, § 148; R. C. 1899, § 5303.]

§ **6890. Defendant may be arrested, when.** The defendant may be arrested as hereinafter prescribed in the following cases:

1. In an action for the recovery of damages for an injury to person or character, or for injuring or for wrongfully taking, detaining or converting property.

2. In an action for money or property embezzled or fraudulently misapplied or converted to his own use by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent or other person in a fiduciary capacity, in the course of his employment as such.

3. In an action to recover the possession of personal property unjustly detained, when the property, or any part thereof, has been concealed, removed or disposed of, so that he cannot be found or taken by the sheriff and with the intent that it should not be found taken, or with the intent to deprive the plaintiff of the benefit thereof.

4. When the defendant has been guilty of a fraud in contracting the debt, or in incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit.

5. When the defendant has removed or disposed of his property or is about to do so with the intent to defraud his creditors.

But no female shall be arrested in any action except for willful injury to person, character or property. [C. Civ. P. 1877, § 149; R. C. 1895, § 5304.]

Order may be issued in action in claim and delivery to secure possession of mortgaged personal property, in which it is claimed defendant has concealed such property with intent to deprive plaintiff of security. Concealment signifies to hide or to secrete with intent to deprive the mortgagee of his security. Thompson v. Thompson, 10 N. D. 564, 88 N. W. 565.

Where defendant could have been arrested, execution may issue against the person of defendant. Vinton v. Knott, 7 S. D. 179, 63 N. W. 783; Horman v. Sherin, 8 S. D. 36, 65 N. W. 434.

§ **6891. Where order obtained.** An order for the arrest of the defendant must be obtained from a judge of the court in which the action is brought. [C. Civ. P. 1877, § 150; R. C. 1899, § 5305.]

Order of arrest and bail may issue. Thompson v. Thompson, 10 N. D. 564, 88 N. W. 565.

§ **6892. Basis of order.** The order may be made whenever it appears to the judge by the affidavit of the plaintiff or some other person, that a sufficient cause of action exists and that the case is one of those mentioned in section 6890. The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded. If an order of arrest is made, the affidavit must be filed in the office of the clerk of the court. [C. Civ. P. 1877, § 151; R. C. 1899, § 5306.]

"Information and belief" must be founded upon the facts stated. State v. McKnight, 7 N. D. 444, 75 N. W. 790; Kaeppler v. Bank, 8 N. D. 406, 79 N. W. 869; Hart v. Grant, 8 S. D. 248, 66 N. W. 322.

§ **6893. Undertaking from plaintiff.** Before making the order the judge shall require a written undertaking on the part of the plaintiff with or without sureties, to the effect that if the defendant recovers judgment, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least one hundred dollars. If the undertaking is executed by the plaintiff without sureties, he shall annex thereto an affidavit that he is a resident and householder or free holder within the state, and worth double the sum specified in the undertaking over all his debts and liabilities and exclusive of all property exempt from execution by the laws of this state. [C. Civ. P. 1877, § 152; R. C. 1899, § 5307.]

§ **6894. When order issued and served.** The order may be made to accompany the summons, or at any time afterwards before judgment. It shall require the sheriff of the county, where the defendant may be found, forthwith to arrest him and hold him to bail in a specified sum, and return the order at a place and time therein mentioned to the plaintiff or his attorney by whom it shall be subscribed or indorsed. But such order of arrest shall be of no avail and shall be vacated or set aside on motion, unless the same is served upon the defendant as provided by law before the docketing of any judgment in the action; and the defendant shall have thirty days after the service of the order of arrest, in which to answer the complaint in the action and to move to vacate the order of arrest or to reduce the amount of bail. [C. Civ. P. 1877, § 153; R. C. 1895, § 5308.]

§ **6895. Papers served on defendant.** The affidavit and order of arrest shall be delivered to the sheriff, who upon arresting the defendant shall deliver to him a copy thereof. [C. Civ. P. 1877, § 154; R. C. 1899, § 5309.]

§ **6896. Sheriff's duties. Bail.** The sheriff must execute the order by arresting the defendant and keeping him in custody until discharged by law, and may call the power of the county to his aid in the execution of the arrest as in case of process. The defendant may give bail whenever arrested at any hour of the day or night, and must have reasonable opportunity to procure it before being committed to prison. [C. Civ. P. 1877, § 155; R. C. 1899, § 5310.]

§ **6897. Discharge.** The defendant at any time before execution shall be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest as provided in this article. [C. Civ. P. 1877, § 156; R. C. 1899, § 5311.]

§ **6898. Bail how given.** The defendant may give bail by causing a written undertaking in the sum specified in the order of arrest to be executed by two or more sufficient bail, stating their places of residence and occupations, to the effect that the defendant shall at all times render himself answerable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment thereon, or if he is arrested for the cause mentioned in the third subdivision of section 6890, an undertaking to the same effect as that provided in section 6922. [C. Civ. P. 1877, § 157; R. C. 1899, § 5312.]

§ **6899. Surrender by bail.** At any time before a failure to comply with the undertaking the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested in the following manner:

1. A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon as upon an order of arrest, and shall by a certificate in writing acknowledge the surrender.

2. Upon the production of a copy of the undertaking and sheriff's certificate, a judge of the court may, upon a notice to the plaintiff of eight days with a copy of the certificate, order that the bail be exonerated; and on filing the order and the papers used on said application they shall be exonerated accordingly. But this section shall not apply to an arrest for a cause mentioned in subdivision 3 of section 6890, so as to discharge the bail from an undertaking given to the effect provided by section 6922. [C. Civ. P. 1877, § 158; R. C. 1899, § 5313.]

§ **6900. Bail may arrest.** For the purpose of surrendering the defendant the bail at any time or place before they are finally charged may themselves arrest him, or by a written authority indorsed on a certified copy of the undertaking may empower any person of suitable age and discretion to do so. [C. Civ. P. 1877, § 159; R. C. 1899, § 5314.]

§ **6901. Action against bail.** In case of failure to comply with the undertaking the bail may be proceeded against by action only. [C. Civ. P. 1877, § 160; R. C. 1899, § 5315.]

§ **6902. Bail exonerated.** The bail may be exonerated either by the death of the defendant, or his imprisonment in the penitentiary, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested in execution thereof, within twenty days after the commencement of the action against the bail or within such further time as may be granted by the court. [C. Civ. P. 1877, § 161; R. C. 1899, § 5316.]

§ **6903. Plaintiff may except to bail.** Within the time limited for that purpose the sheriff shall deliver the order of arrest to the plaintiff, or the attorney by whom it is subscribed, with his return indorsed, and a certified copy of the undertaking of the bail. The plaintiff within ten days thereafter may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted it and the sheriff shall be exonerated from liability. [C. Civ. P. 1877, § 162; R. C. 1899, § 5317.]

§ **6904. Justification.** On the receipt of such notice the sheriff or defendant may, within ten days thereafter, give to the plaintiff, or the attorney by whom the order of arrest is subscribed, notice of the justification of the same or other bail, specifying the place of residence and occupation of the latter, before a judge of the court at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bail is given there shall be a new undertaking in the form prescribed in section 6898. [C. Civ. P. 1877, § 163; R. C. 1899, § 5318.]

§ **6905. Requisites of bail.** The qualifications of bail must be as follows:

1. Each of them must be a resident and householder or freeholder within the state.

2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge, or a justice of the peace, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification is equivalent to that of two sufficient bail. [C. Civ. P. 1877, § 164; R. C. 1899, § 5319.]

§ **6906. Examination of bail.** For the purpose of justification each of the bail shall attend before any judge of a district court, or a justice of the peace at the time and place mentioned in the notice, and may be examined on oath on the part of the plaintiff touching his sufficiency in such manner as the judge or justice of the peace in discretion may think proper. The examination shall be reduced to writing and subscribed by the bail if required by the plaintiff. The costs of the justification shall be paid by the party offering the bail, if the same is found not sufficient, but if sufficient then the party excepting shall pay such costs. Such costs shall be returned by the officer with his report of the justification and shall be taxed by the court in which the action is pending as other costs are taxed. [C. Civ. P. 1877, § 165; 1889, ch. 21, § 1; R. C. 1895, § 5320.]

§ **6907. Allowance of.** If the judge or justice of the peace finds the bail sufficient, he shall annex the examination to the undertaking, indorse his allowance thereon and cause them to be filed with the clerk; and the sheriff shall thereupon be exonerated from liability. [C. Civ. P. 1877, § 166; R. C. 1899, § 5321.]

§ **6908. Deposit. Discharge.** The defendant may at the time of his arrest instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged out of custody. [C. Civ. P. 1877, § 167; R. C. 1899, § 5322.]

§ **6909. Payment into court.** The sheriff shall within four days after the deposit pay the same into court, and shall take from the officer receiving the same two certificates of such payment, one of which he shall deliver to the plaintiff and the other to the defendant or his attorney. For any default in making such payment the same proceedings may be had on the official bond of the sheriff to collect the sum deposited as in other cases of delinquency. [C. Civ. P. 1877, § 168; R. C. 1899, § 5323.]

§ **6910. Refunded on approved bail.** If money is deposited as provided in the last two sections, bail may be given and justified upon notice as prescribed in section 6904 at any time before judgment; thereupon the judge, before whom the justification is had, shall direct in the order of allowance, that the money deposited be refunded by the sheriff to the defendant and it shall be refunded accordingly. [C. Civ. P. 1877, § 169; R. C. 1899, § 5324.]

§ **6911. Applied on judgment.** When money shall have been so deposited, if it remains on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk shall under the direction of the court apply the same in satisfaction thereof, and after satisfying the judgment shall refund the surplus, if any, to the defendant. If the judgment is in favor of the defendant, the clerk shall refund to him the whole sum deposited and remaining unapplied. [C. Civ. P. 1877, § 170; R. C. 1895, § 5325.]

§ **6912. Sheriff's liability.** If after being arrested, when there is a jail to which the defendant may be committed, the defendant escapes or is rescued, or bail is not given or justified, or a deposit is not made instead thereof, the sheriff shall himself be liable as bail. But he may discharge himself from such liability by the giving and justification of bail as provided in sections 6904, 6905, 6906 and 6907 at any time before process against the person of the defendant to enforce an order or judgment in the action. [C. Civ. P. 1877, § 171; R. C. 1899, § 5326.]

§ **6913. Judgment against sheriff.** If a judgment is recovered against the sheriff upon his liability as bail and an execution thereon is returned unsatisfied in whole or in part, the same proceedings may be had on the official bond of the sheriff to collect the deficiency as in other cases of delinquency. [C. Civ. P. 1877, § 172; R. C. 1899, § 5327.]

§ **6914. Bail liable to sheriff.** The bail taken upon the arrest shall, unless they justify or other bail is given or justified, be liable to the sheriff by action

for damages which he may sustain by reason of such omission. [C. Civ. P. 1877, § 173; R. C. 1899, § 5328.]

§ 6915. Motion to vacate arrest. A defendant arrested may at any time before judgment apply on motion to vacate the order of arrest or to reduce the amount of bail. [C. Civ. P. 1877, § 174; R. C. 1899, § 5329.]

§ 6916. Heard upon affidavits. If the motion is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proofs, in addition to those on which the order of arrest was made. [C. Civ. P. 1877, § 175; R. C. 1899, § 5330.]

Article 2.—Claim and Delivery of Personal Property.

§ 6917. When may claim. The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons or at any time before answer, claim the immediate delivery of such property as provided in this article. [C. Civ. P. 1877, § 176; R. C. 1899, § 5331.]

Where ownership of plaintiff is put in issue by answer, burden of proof is on plaintiff. Haveron v. Anderson, 3 N. D. 540, 58 N. W. 340.

Ownership, right of possession and wrongful detainer are in issue under general denial. Plano Mfg. Co. v. Daley, 6 N. D. 330, 70 N. W. 277.

May replevin when holds contract title to crops; but not after unjust refusal to divide. Judgment in such case for owner's share. Angell v. Egger, 6 N. D. 391, 71 N. W. 547.

When replevin will not lie against depositary. See Nichols & Shepard Co. v. Bank, 6 N. D. 404, 71 N. W. 135.

When replevin maintainable against sheriff. When sheriff protected by writ. See Welter v. Jacobson, 7 N. D. 32, 73 N. W. 65.

When party in possession pendente lite may sell property. Bank v. Moline & C. Co., 7 N. D. 201, 73 N. W. 527.

In claim and delivery for recovery of grain grown upon land in possession of defendant, where plaintiff's right to possession is based upon a written contract, competent for defendant to show contract never went into effect. Lane v. O'Toole, 8 N. D. 210, 78 N. W. 77.

Action not one of replevin where prayer is for recovery of a like quantity, quality and kind of grain, or value thereof. Marshall v. Andrews & Gage, 8 N. D. 364, 79 N. W. 851.

Action lies to recover exempt property. Oliver v. Wilson, 8 N. D. 590, 80 N. W. 757; Linander v. Longstaff, 7 S. D. 157, 63 N. W. 775.

Allegation of value of property in pleadings not conclusive. Bank v. Magnusson, 9 N. D. 151, 82 N. W. 748.

Property not attachable in foreign jurisdiction. Woodhull v. Trust Co., 11 N. D. 157, 90 N. W. 705.

Demand not necessary, when. Thompson v. Thompson, 11 N. D. 208, 91 N. W. 44.

Takes place of common law action of replevin and detinue. Willis v. DeWitt, 3 S. D. 281, 52 N. W. 1090.

Not necessary to take possession of property, when. Brick Co. v. Marshall, 5 S. D. 528, 59 N. W. 728.

Mortgagee may bring action against officer who wrongfully levies on mortgaged property. Coughran v. Sundback, 9 S. D. 483, 70 N. W. 644.

§ 6918. Plaintiff's affidavit. When a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf stating:

1. That the plaintiff is the owner of the property claimed, particularly describing it, or is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth.
2. That the property is wrongfully detained by the defendant.
3. The alleged cause of the detention thereof according to his best knowledge, information and belief.
4. That the same has not been taken for a tax, assessment or fine pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is by statute exempt from such seizure; and,
5. The actual value of the property. [C. Civ. P. 1877, § 177; R. C. 1899, § 5332.]

§ **6919. Requisition to sheriff.** The plaintiff may, thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county, where the property claimed may be, to take the same from the defendant and deliver it to the plaintiff. [C. Civ. P. 1877, § 178; R. C. 1899, § 5333.]

§ **6920. Security by plaintiff.** Upon the receipt of the affidavit and notice with a written undertaking executed by one or more sufficient sureties approved by the sheriff, to the effect that they are bound in double the value of the property as stated in the affidavit for the prosecution of the action for the return of the property to the defendant, if return thereof is adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it is in the possession of the defendant or his agent and retain it in his custody. He shall also without delay serve on the defendant a copy of the affidavit, notice and undertaking by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either with some person of suitable age and discretion. [C. Civ. P. 1877, § 179; R. C. 1899, § 5334.]

§ **6921. Exceptions by defendant.** The defendant may, within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice in like manner as bail upon an arrest. And the sheriff shall be responsible for the sufficiency of the sureties, until the objection to them is either waived as above provided, or until they shall justify, or new sureties shall be substituted and justify. If the defendant excepts to the sureties, he cannot reclaim the property as provided in the next section. [C. Civ. P. 1877, § 180; R. C. 1899, § 5335.]

§ **6922. Redelivery to defendant.** At any time before the delivery of the property to the plaintiff the defendant may, if he does not except to the sureties of the plaintiff, require the return thereof upon giving to the sheriff a written undertaking executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property as stated in the affidavit of the plaintiff for the delivery thereof to the plaintiff, if such delivery is adjudged and for the payment to him of such sum as may for any cause be recovered against the defendant. If a return of the property is not so required within three days after the taking and service of notice on the defendant, it shall be delivered to the plaintiff except as provided in section 6927. [C. Civ. P. 1877, § 181; R. C. 1899, § 5336.]

§ **6923. Justification.** The defendant's sureties upon a notice to the plaintiff of not less than two nor more than six days shall justify before a judge or justice of the peace in the same manner as bail on arrest; upon such justification the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties, until they justify, or until justification is completed or expressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff. [C. Civ. P. 1877, § 182; R. C. 1899, § 5337.]

§ **6924. Same.** The qualifications of sureties and their justification shall be as are prescribed by sections 6905 and 6906 in respect to bail upon an order of arrest. [C. Civ. P. 1877, § 183; R. C. 1899, § 5338.]

§ **6925. Concealed property.** If the property, or any part thereof, is concealed in a building or inclosure, the sheriff shall publicly demand its delivery. If it is not delivered, he shall cause the building or inclosure to be broken open and take the property into his possession; and, if necessary, he may call to his aid the power of his county. [C. Civ. P. 1877, § 184; R. C. 1899, § 5339.]

§ **6926. Keeping property.** When the sheriff shall have taken property as in this article provided, he shall keep it in a secure place and deliver it to the party entitled thereto upon receiving his lawful fees for taking and his necessary expenses for keeping the same. [C. Civ. P. 1877, § 185; R. C. 1899, § 5340.]

Officer may hold until fees are paid. Fox v. Deering, 7 S. D. 443, 64 N. W. 520.

§ **6927. Claim by third persons.** If the property taken is claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff on demand of him or his agent shall indemnify the sheriff against such claim by an undertaking executed by two sureties, accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit of the plaintiff exclusive of property exempt from execution, and freeholders or householders of the county. And no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff, unless made as aforesaid; and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity. [C. Civ. P. 1877, § 186; R. C. 1899, § 5341.]

Replevin will not lie against sheriff in possession under previous replevin requisition unless he fails to deliver property as required under first writ. Interference with sheriff's possession is contempt of court. Where statute is complied with and sheriff nevertheless delivers property to plaintiff in action, he becomes liable in trover. Sheriff is exonerated if plaintiff refuses to indemnify him for surrendering property to defendant. Sheriff is protected by writ only for taking property from defendant. Welter v. Jacobson, 7 N. D. 32, 73 N. W. 65.

Notice given according to statutory requirements sufficient. Guernsey v. Tuthill, 12 S. D. 584, 82 N. W. 190.

§ **6928. Papers filed with clerk.** The sheriff shall file the notice and affidavit with his proceedings thereon with the clerk of the court in which the action is pending within twenty days after taking the property mentioned therein. [C. Civ. P. 1877, § 187; R. C. 1899, § 5342.]

Sheriff failing to file report in twenty days, demand not necessary in action to recover property wrongfully seized. Complaint sufficient against sheriff as regards demand and notice sufficient as to sureties. Guernsey v. Tuthill, 12 S. D. 584, 82 N. W. 190; Bank v. Feeney, 9 S. D. 550, 70 N. W. 874.

Article 3.—Injunction.

§ **6929. Injunction by order.** The writ of injunction as a provisional remedy is abolished, and an injunction by order is substituted therefor. The order may be made by the court in which the action is brought, or by a judge thereof in the cases provided in the next section and, when made by a judge, may be enforced as the order of the court. [C. Civ. P. 1877, § 188; R. C. 1899, § 5343.]

Injunction must be obeyed while in force, regardless of its erroneousness. State v. Markuson, 7 N. D. 155, 73 N. W. 82.

Injunction by supreme court a quasi prerogative writ only. Issues upon information filed by attorney general or with his authority, by leave of court and in name of state. Anderson v. Gordon, 9 N. D. 480, 83 N. W. 993; State ex rel Moore v. Archibald, 5 N. D. 359, 66 N. W. 234; Anderson v. Gordon, 9 N. D. 480, 83 N. W. 993.

The granting or refusal of a preliminary injunction, or the dissolution thereof rests in sound judicial discretion of trial court and its order will not be reversed except for an abuse of discretion. Dickson v. Dows, 11 N. D. 404, 92 N. W. 797; Donovan v. Allert, 11 N. D. 289, 91 N. W. 441.

Will not be granted to take property from possession of one to place in possession of another. Dickson v. Dows, 11 N. D. 404, 92 N. W. 797.

Injunction will only be granted in independent action. Foreman v. Healey, 11 N. D. 563, 93 N. W. 866.

Uncertainties in injunctional order make same void. Regan v. Sorenson, 13 N. D. 357, 100 N. W. 1095.

Complaint charging offense upon information and belief insufficient to secure injunction. State ex rel Poul v. McLain, 13 N. D. 368, 102 N. W. 407.

§ 6930. **Cases when granted.** An injunction may be granted in either of the following cases:

1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff; or,

2. When during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, or procuring or suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

3. And, when during the pendency of an action it shall appear by affidavit that the defendant threatens to, or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition. [C. Civ. P. 1877, § 189; R. C. 1895, § 5344.]

For cases in which injunction will not lie for the various reasons given in the cases cited, see Wood v. Bangs, 1 Dak. 179, 46 N. W. 586; State ex rel Cranmer v. Thorson, 9 S. D. 149, 68 N. W. 202; Forman v. Healey, 11 N. D. 563, 93 N. W. 866; Beaty v. Smith, 14 S. D. 24, 84 N. W. 208; Lone Tree Ditch Co. v. Rapid City Co., 16 S. D. 451, 93 N. W. 650; Farwell v. Sturges Water Co., 10 S. D. 421, 73 N. W. 916; Patterson v. Woolmann, 5 N. D. 608, 67 N. W. 1040; State ex rel Adams v. Herried, 10 S. D. 16, 71 N. W. 319; Franklin v. Appel, 10 S. D. 391, 73 N. W. 259; St. Lawrence v. Gross, 12 S. D. 350, 81 N. W. 640; Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 202; Gates v. McGee, 15 S. D. 247, 88 N. W. 115; Frost v. Flick, 1 Dak. 131, 46 N. W. 508; Farrington v. New England Co., 1 N. D. 102, 45 N. W. 191; Bank v. Fair Association, 2 S. D. 145, 48 N. W. 852; Schaffner v. Young, 10 N. D. 245, 86 N. W. 733; N. P. Ry. Co., v. Barnes, 2 N. D. 310, 51 N. W. 386; N. P. Ry. Co. v. McGinnis, 4 N. D. 494, 61 N. W. 1032; Dakota Loan & Trust Co. v. Codington County, 9 S. D. 159, 68 N. W. 314; Northwestern Loan Co. v. Muggli, 8 S. D. 160, 65 N. W. 442; N. W. Loan Co. v. Muggli, 7 S. D. 527, 64 N. W. 1122; Grant County v. Colonial Co., 3 S. D. 390, 53 N. W. 746.

As to proper parties to action for injunction, see Bode v. Investment Co., 1 N. D. 121, 45 N. W. 197. See note to 6 Dak. 499.

To restrain irregular tax proceedings that would result in cloud on title. N. P. Ry. Co. v. McGinnis, 4 N. D. 494, 61 N. W. 1032.

Proper remedy to employ when one without authority of law operates ferry to injury of another, who is owner of a ferry franchise. Patterson v. Wollmann, 5 N. D. 608, 67 N. W. 1040.

Will lie to prevent location of road at different place than reported by viewers. Dunston v. City of Jamestown, 7 N. D. 1, 72 N. W. 899.

To restrain mortgagee from foreclosing mortgage when he has knowledge of second mortgage before exhausting securities he holds on property not contained in second mortgage. Bank v. Moline Co., 7 N. D. 201, 73 N. W. 527.

To restrain carrying out ultra vires contract with city. Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292.

To enjoin disbursement of public funds without authority of law. Storey v. Murphy, 9 N. D. 115, 81 N. W. 23.

Proper remedy to prevent use of streets until constitutional provision in regard to compensation complied with. Donovan v. Allert, 11 N. D. 289, 91 N. W. 441.

Possession of property will not be changed by preliminary injunction. Dickson v. Dows, 11 N. D. 407, 92 N. W. 797; Forman v. Healey, 11 N. D. 563, 93 N. W. 866.

Complaint must set up perfect cause of action entitling complainant to injunction, showing irreparable injury to authorize order pendente lite. Defect in complaint cannot be supplied by affidavit. McClure v. Hunnewell, 13 N. D. 84, 99 N. W. 48; Forman v. Healey, 11 N. D. 563, 93 N. W. 866.

To restrain removal of school house at suit of tax payer injured. Graves v. Jasper Twp., 2 S. D. 414, 50 N. W. 904.

To restrain collection of tax on property on which tax has been paid in another county. Knapp v. Charles Mix County, 7 S. D. 399, 64 N. W. 187.

For injunction pendente lite in action at law, see Catholican Hot Springs Co. v. Ferguson, 7 S. D. 503, 64 N. W. 539.

To restrain a highway officer from entry upon land beyond limits of highway. Webster v. White, 8 S. D. 479, 66 N. W. 1145; Bowman v. McGilvray, 8 S. D. 490, 66 N. W. 1149; Orlander v. Jacobson, 8 S. D. 491, 66 N. W. 1149.

To restrain a bank from assigning a judgment where county warrant has been deposited with bank on agreement judgment should be paid therefrom. Fall River County v. Bank, 8 S. D. 538, 67 N. W. 617.

To prevent setting up judgment fraudulently obtained in divorce proceeding. Stereitwolf v. Stereitwolf, 181 U. S. 170, 21 Sup. Ct. Rep. 553.

§ **6931. Time. Papers served.** The injunction may be granted at the time of commencing the action or at any time afterwards before judgment upon its appearing satisfactorily to the court or judge by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction. [C. Civ. P. 1877, § 190; R. C. 1895, § 5345.]

§ **6932. After answer.** An injunction shall not be allowed after the defendant shall have answered unless upon notice or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction. [C. Civ. P. 1877, § 191; R. C. 1899, § 5346.]

§ **6933. Security. Damages.** When no provision is made by statute as to security upon an injunction, the court or judge shall require a written undertaking on the part of the plaintiff with or without sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise as the court shall direct. [C. Civ. P. 1877, § 192; R. C. 1899, § 5347.]

Action on bond must be brought promptly after termination of injunction suit. Edmison v. Sioux Falls Co., 10 S. D. 440, 73 N. W. 910.

§ **6934. Order to show cause.** If the court or judge deems it proper that the defendant, or any of the several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown at a specified time and place, why the injunction should not be granted; and the defendant may in the meantime be restrained. [C. Civ. P. 1877, § 193; R. C. 1899, § 5348.]

§ **6935. Against corporation.** An injunction to suspend the general and ordinary business of a corporation must not be granted without due notice of the application therefor to the proper officer of the corporation, except when the state is a party to the proceeding. [C. Civ. P. 1877, § 194; R. C. 1899, § 5349.]

§ **6936. Application to vacate.** If the injunction is granted by a judge of the court without due notice, the defendant at any time before the trial may apply, upon notice to a judge of the court in which the action is brought, to vacate or modify the same. The application may be made upon the complaint and the affidavits on which the injunction was granted or upon affidavits on the part of defendant with or without the answer. [C. Civ. P. 1877, § 195; R. C. 1899, § 5350.]

Injunction granted without notice may on motion and without notice be modified or dissolved. Black Hills Mining Co. v. Grand Island & W., 2 S. D. 546, 51 N. W. 342.

A preliminary injunction will be dissolved where answer fully and unequivocally denies all the allegations in complaint, neither side being supported by evidence outside of the pleadings. Grant County v. Col. & U. S. Co., 3 S. D. 390, 53 N. W. 746; Water Works Co. v. City of Huron, 3 S. D. 610, 54 N. W. 652.

Will be dissolved, when. Phillips v. City of Sioux Falls, 5 S. D. 524, 59 N. W. 881; Black Hills Co. v. Grand Island & W., 2 S. D. 546, 51 N. W. 342; Grant County v. Colonial Co., 3 S. D. 390, 53 N. W. 746; Huron Water Co., v. City of Huron, 3 S. D. 610, 54 N. W. 652.

§ **6937. Counter affidavits.** If the application is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the

same by affidavit or other proofs in addition to those on which the injunction was granted. [C. Civ. P. 1877, § 196; R. C. 1899, § 5351.]

Rebutting affidavits cannot be used, when. McCann v. Mortgage Co., 3 N. D. 172, 54 N. W. 1026; Bank v. Smith, 1 S. D. 28, 44 N. W. 1024.

ARTICLE 4.—ATTACHMENT.

§ **6938. When attachment may issue.** In an action on a contract or judgment for the recovery of money only, for the wrongful conversion of personal property, or for damages, whether arising out of contract or otherwise, the plaintiff at or after the commencement thereof may have the property of the defendant attached in the following cases:

1. When the defendant is not a resident of this state or is a foreign corporation.
2. When the defendant has absconded or concealed himself.
3. When the defendant has removed or is about to remove his property, or a material part thereof from this state, not leaving enough therein for the payment of his debts.
4. When the defendant has sold, assigned, transferred, secreted or otherwise disposed of, or is about to sell, assign, transfer, secrete or otherwise dispose of his property, with intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts.
5. When the defendant is about to remove his residence from the county where he resides with the intention of permanently changing the same and fails or neglects on demand to give security for the debt upon which the action is commenced.
6. When the debt upon which the action is commenced was incurred for property obtained under false pretenses.
7. When the defendant is about to remove his property or a material part thereof from the state with the intent or to the effect of cheating or defrauding his creditors or hindering or delaying them in the collection of their debts.
8. In an action to recover purchase money, for personal property sold to the defendant, an attachment may be issued and levied upon such property. [1897, ch. 30; R. C. 1899, § 5352.]

Defendant cannot claim exemptions from property attached on ground it was obtained under false pretenses. Taylor v. Rice, 1 N. D. 72, 44 N. W. 1017.

Cannot exist as an independent action. Gans v. Beasley, 4 N. D. 140, 59 N. W. 714; Western Twine Co. v. Scott, 11 S. D. 27, 75 N. W. 273; Jordan v. Frank, 1 N. D. 206, 46 N. W. 171.

Summons must issue before attachment is allowed. Gans v. Beasley, 4 N. D. 140, 59 N. W. 714.

An affidavit stating "that the defendant, R. G. has left the state of North Dakota with intent to cheat and defraud his creditors," held insufficient in substance to authorize attachment. Severn v. Giese, 6 N. D. 523, 72 N. W. 922.

Property in hands of a receiver not attachable in a foreign jurisdiction by creditors of an insolvent debtor. Property seized before receiver appointed, subject to attachment. Woodhull v. Trust Co., 11 N. D. 157, 90 N. W. 795.

Service of summons by leaving copy at dwelling house of non-resident defendant outside of state insufficient to validate attachment. Bank v. Holmes, 12 N. D. 38, 94 N. W. 764.

Grounds mentioned in subdivision 6 available only when action is commenced on a debt assented to by defendant. Does not apply to actions to recover for torts. Sonnesyn v. Akin, 12 N. D. 227, 97 N. W. 557.

Non-residence. Pech Mfg. Co. v. Groves, 6 S. D. 504, 62 N. W. 109.

Mere insolvency not a ground for attachment. Trebilcock v. Mining Co., 9 S. D. 206, 68 N. W. 330.

For property obtained under false pretenses, see Ask v. Armstrong, 9 S. D. 265, 68 N. W. 740; Bank v. Folds, 9 S. D. 295, 68 N. W. 747; Finch v. Armstrong, 9 S. D. 255, 68 N. W. 740.

§ **6939. Attachment on claim before due.** The plaintiff may bring an action on his claim before it is due and have the property of the defendant attached in any of the cases mentioned in the preceding section except in

subdivisions 1, 2 and 5. The proceedings on such attachment shall be conducted in all respects as if the claim was due, but judgment must not be rendered in the action until the debt upon which such action is commenced shall become due, and the complaint must state that the action is commenced before the debt is due for the purpose of obtaining the issuance of an attachment, but need not state the grounds of the attachment; and upon the discharge of such attachment except under the provisions of section 6957 the action shall be dismissed, but without prejudice to the bringing of a new action. [C. Civ. P. 1877, § 218; 1881, ch. 32, § 2; 1885, ch. 18, § 1; R. C. 1895, § 5353.]

§ **6940. When action deemed commenced.** Within the meaning of the last two sections an action shall be deemed commenced when the summons is issued, but personal service of such summons must be made or publication thereof commenced within sixty days after the issuance of the warrant of attachment. [C. Civ. P. 1877, § 197; R. C. 1895, § 5354.]

When and how summons must be served, see Rhode Island Hospital Trust Co. v. Keeney, 1 N. D. 411, 48 N. W. 341.

Summons is issued when drawn and signed with intent to be served. Smith v. Nicholson, 5 N. D. 426, 67 N. W. 296.

§ **6941. Warrant, by whom issued.** The warrant of attachment shall be issued by the clerk of the court in which the action is commenced, shall be attested in the name of the presiding judge and sealed with the seal of the court. [C. Civ. P. 1877, § 198; R. C. 1895, § 5355.]

§ **6942. Warrant, upon what issued.** The warrant shall issue upon a verified complaint, setting forth a proper cause of action for attachment in favor of the plaintiff and against the defendant, and an affidavit, setting forth in the language of the statute one or more of the grounds of attachment enumerated in section 6938, if the claim is due upon which the action is commenced; and if not due, one or more of the grounds of attachment enumerated in subdivisions 3, 4, 6 and 7 of that section. [C. Civ. P. 1877, § 199; 1881, ch. 32, § 1; R. C. 1895, § 5356.]

Affidavit must be positive, not alternative. Birchall v. Griggs, 4 N. D. 305, 60 N. W. 842.

§ **6943. Requisites of warrant.** The warrant must briefly recite the statutory grounds of the attachment, but shall not set forth plaintiff's cause of action, and must be directed to the sheriff of any county in which property of such defendant may be and must require him to attach and safely keep all the property of such defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand with costs and disbursements, the amount of which demand must be stated in the warrant in conformity with the complaint, unless the defendant delivers to him an undertaking in favor of the plaintiff with sufficient surety to the effect that he will pay any judgment which the plaintiff may obtain against him in the action, or an undertaking with like surety to the effect that the property of such defendant, which has been or is about to be attached, shall be forthcoming in substantially as good condition as it is at the time of giving the undertaking to answer such judgment, which undertaking shall be in an amount equal to the value of such property according to the sheriff's inventory. Several warrants may be issued at the same time to the sheriffs of different counties. [C. Civ. P. 1877, § 201; R. C. 1895, § 5357.]

§ **6944. Plaintiff's undertaking. Exceptions thereto.** Before issuing the warrant the clerk must require a written undertaking on the part of the plaintiff with sufficient surety, to the effect that if the defendant recovers judgment or the attachment is set aside by the order of the court, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum named in the undertaking, which must be at least the amount of the claim specified in the warrant and in no case less than two hundred and fifty dollars.

The defendant may at any time within ten days after a levy under a warrant of attachment except to the sufficiency of the surety upon such undertaking. Thereupon the surety must justify upon the like notice and in like manner as bail upon an arrest; or a new undertaking must be given with new surety which shall be filed as provided in section 6945, and thereupon the same proceedings may be had upon such undertaking as upon the original undertaking. If the defendant does not except as prescribed in this section he is deemed to have waived all objection to the surety. If the attachment is set aside by order of the court the defendant may bring an action upon such undertaking without first obtaining judgment against the plaintiff in the action in which such undertaking was given. [C. Civ. P. 1877, § 200; R. C. 1895, § 5358.]

§ **6945. What papers must be filed.** The plaintiff at the time of procuring the warrant must file in the office of the clerk of the court, in which the action is commenced, the complaint, affidavit and undertaking upon which such warrant is issued. [R. C. 1895, § 5359.]

§ **6946. Execution of warrant.** The sheriff must immediately execute the warrant by levying upon so much of the personal and real property of the defendant within his county, not exempt from execution, as will satisfy the plaintiff's demand with the costs and disbursements. He must take into his custody all books of account, vouchers and other papers relating to the personal property attached, and all evidences of defendant's title to the real property attached, which he must safely keep to be disposed of as prescribed in this article. The sheriff, to whom a warrant of attachment is delivered, may levy from time to time and as often as is necessary, until the amount for which it was issued has been secured, or final judgment has been rendered in the action. [C. Civ. P. 1877, § 202; R. C. 1895, § 5360.]

§ **6947. Inventory to be made. Perishable property.** Immediately upon making such seizure the sheriff shall make a true and complete inventory of all the property so seized and of the books, vouchers and papers taken into his custody, stating therein the estimated value of the several articles and kinds of personal property, enumerating such of them as are perishable, and giving a description of the real property so attached, which inventory must be signed by the sheriff. Any subsequent execution of the warrant of attachment upon other property of the debtor must be made, and an inventory thereof made in like manner. The sheriff shall within twenty days after making such seizure file such inventory and a return of his doings upon such attachment with the clerk of the district court who issued the warrant. In case a forthcoming undertaking is given by the defendant under the provisions of section 6943 for property before a levy has been made thereon, the sheriff shall make and return an inventory of such property in accordance with the provisions of this section. [C. Civ. P. 1877, § 203; 1887, ch. 24, § 1; R. C. 1899, § 5361.]

§ **6948. Attachment, how levied.** A levy under a warrant of attachment must be made as follows:

1. Upon real property, by the sheriff's filing with the register of deeds of the county, in which the property is situated, a notice of the attachment subscribed by him, stating the names of the parties to the action, the amount of the plaintiff's claim as stated in the warrant and a description of the property levied upon, which notice must be recorded and indexed by the register of deeds in like manner and in the same book as a notice of the pendency of an action.

2. Upon personal property which by reason of its bulk or other cause cannot be immediately removed, by the sheriff's filing with the register of deeds a notice of the same kind as described in subdivision 1 of this section; and such levy shall be equally valid and effectual as if the articles had been seized and the possession and control thereof retained by the officer. Upon

cattle or horses running at large and commonly known as range stock, between the first day of November and the next succeeding fifteenth day of May, by the sheriff's filing with the register of deeds of the county in which such property is running at large a notice of the same kind as described in subdivision 1 of this section, specifying the number as near as may be and containing a description of such stock by marks and brands; and such levy shall be equally valid and effectual as if such cattle and horses had been seized and the possession and control thereof retained by the officer. The register of deeds shall receive and file all such notices, numbering the same consecutively, and must keep the same in his office in regular and orderly file and shall make an entry thereof in a book to be kept for that purpose, and designated as the index of attachments, in the order in which they are received, which entry shall contain in separate columns the names of the defendants alphabetically arranged, the names of the plaintiffs, the number indorsed upon the notice, the amount claimed by the plaintiff and the time of the filing. Notwithstanding the provisions of this subdivision an attachment may, by direction of the plaintiff or his attorney, be levied upon the property mentioned in this subdivision in accordance with subdivision 3 of this section; but if additional costs are made by such a levy the same shall not be allowed to the plaintiff, if in the judgment of the court the taking of the property into the custody of the sheriff was unnecessary.

3. Upon personal property capable of manual delivery, including bonds, promissory notes or other instruments for the payment of money, by taking the same into the sheriff's actual custody. He must thereupon without delay deliver a copy of the warrant to the person from whose custody such property is taken.

4. Upon other personal property by leaving a copy of the warrant and a notice showing the property attached with the person holding the same; or, if it consists of a demand other than as specified in the last subdivision, with the person against whom it exists, or if it consists of a right or share in the stock of a corporation or interest or profits thereon, with the president or other head of the corporation, or the secretary, cashier or managing agent thereof.

The lien of the attachment shall be effectual from the time when a levy is made in accordance with the foregoing provisions. [R. C. 1895, § 5362.]

Levy must be made in strict compliance with statute. Sheriff not presumed to have done more than set forth in levy. Ireland v. Adair, 12 N. D. 29, 94 N. W. 766.

§ **6949. Pledged or mortgaged property may be levied on.** When property is pledged or mortgaged for the payment of money or the performance of any contract or agreement, the right and interest in such property of the person pledging or mortgaging the same may be attached and sold on execution, and the purchaser at such sale shall acquire all the right and interest of the defendant therein. [R. C. 1895, § 5363.]

Interest of a pledgor of bank stock pledged is liable to seizure on attachment and sale upon execution. Bank v. Bank, 8 N. D. 50, 76 N. W. 504.

§ **6950. Warrant and notice of levy to be served.** In the cases mentioned in subdivisions 1 and 2 of section 6948 the sheriff shall within thirty days after the levy of an attachment serve the warrant of attachment together with a notice of levy, describing the particular property levied on in the manner provided for the service of a summons in section 6838, as follows:

1. If the levy is made upon real property, upon the occupant thereof, if any.

2. If upon personal property mentioned in said subdivision 2, upon the person in whose custody the same may be.

The failure of the sheriff to serve such warrant or notice shall not invalidate the levy, but the sheriff shall be liable to the person whose property is attached

for any damages which he may sustain by reason of such failure. [R. C. 1895, § 5364.]

§ **6951. Property claimed by third person. Claim how made.** If any property levied upon by the sheriff by virtue of a warrant of attachment is claimed by any other person than the defendant and such person, his agent or attorney, makes affidavit of his title thereto or right to the possession thereof, stating the value thereof and the ground of such title or right, the sheriff may release such levy, unless the plaintiff on demand indemnifies the sheriff against such claim by an undertaking executed by a sufficient surety; and no claim to such property by any other person than the defendant shall be valid against the sheriff, unless so made; and notwithstanding such claim, when so made he may retain such property under levy a reasonable time to demand such indemnity. [C. Civ. P. 1877, § 206; R. C. 1895, § 5365.]

§ **6952. Certificate of defendant's interest.** Upon the application of the sheriff, holding a warrant of attachment, the president or other head of a corporation, or the secretary, cashier or managing agent thereof, or a debtor of the defendant, or a person holding property, including a bond, promissory note or other instrument for the payment of money belonging to the defendant, must furnish to the sheriff a certificate under his hand, specifying the rights or number of shares of the defendant in the stock of the corporation with all dividends declared or incumbrances thereon; or the amount, nature and description of the property held for the benefit of the defendant, or of the defendant's interest in property so held, or of the debt or demand owing to the defendant, as the case requires. If such officer, debtor or individual refuses to furnish such certificate, or if it is made to appear by affidavit or otherwise to the satisfaction of the court or judge thereof, that there is reason to suspect that any certificate given by him is untrue or that it fails to set forth fully the facts required to be shown thereby, he may be required by order of the court or judge to attend before him and be examined on oath concerning the same and obedience to such order may be enforced by proceedings as for a contempt. [C. Civ. P. 1877, § 209; R. C. 1895, § 5366.]

§ **6953. Custody and collection of property. Action by sheriff.** The sheriff must, subject to the direction of the court or judge, collect and receive all debts, effects and things in action attached by him. He may maintain any action or special proceeding in his name or in the name of the defendant, which is necessary for that purpose, or to reduce to his actual possession an article of personal property capable of manual delivery, but of which he has been unable to obtain possession and in such action to obtain possession of personal property the defendant may be enjoined from disposing of such property; and he may discontinue such an action or special proceeding at such time and on such terms as the court or judge directs. [C. Civ. P. 1877, § 204; R. C. 1895, § 5367.]

§ **6954. Plaintiff may prosecute actions. Undertaking.** The actions and special proceedings herein authorized to be commenced by the sheriff may be prosecuted by the plaintiff or under his direction upon the delivery by him to the sheriff of an undertaking executed by sufficient surety, to the effect that the plaintiff will indemnify the sheriff for all damages, costs and expenses on account thereof, not exceeding two hundred and fifty dollars in any one action. Such surety shall in all cases, when required by the sheriff, justify in like manner as bail upon an arrest. [C. Civ. P. 1877, § 211; R. C. 1895, § 5368.]

§ **6955. Property perishable or likely to depreciate in value may be sold.** If property attached is perishable the court may, by an order made with or without notice as the urgency of the case may require, direct the sheriff to sell such property at public auction and thereupon the sheriff must sell it accordingly. If the attached property is of such a character that it is liable greatly to depreciate in value during the pendency of the action or consists

of live animals, the same proceedings may be had as in the case of perishable property, but such notice of the application for the order shall be given to the parties to the action as the court prescribes. The order directing the sale must fix the time and place of sale, and notice thereof must be given in such manner and for such time as is prescribed in the order. [C. Civ. P. 1877, § 205; R. C. 1895, § 5369.]

§ **6956. Defendant may apply for discharge.** The defendant may at any time after he has appeared in the action and before final judgment apply to the clerk who issued the attachment or to the court to discharge the attachment as to the whole or any part of the property attached. [C. Civ. P. 1877, § 213; R. C. 1895, § 5370.]

§ **6957. Undertaking for discharge.** Upon such application the defendant must give an undertaking with sufficient surety to the effect that the property of such defendant, which has been attached, shall be forthcoming in substantially as good condition as it is at the time of the application to answer any judgment which the plaintiff may recover against him in the action, which undertaking shall be in an amount equal to the value of the property according to the sheriff's inventory; or the defendant may at his election give an undertaking with sufficient surety to the effect that he will on demand pay to the plaintiff the amount of any judgment which may be recovered in the action against him not exceeding a sum specified in the undertaking with interest. The sum so specified must be at least equal to double the amount of the plaintiff's demand as specified in the warrant of attachment; or, at the option of the defendant, equal to double the appraised value of the property attached according to the sheriff's inventory, or, if the application is to discharge the attachment as to a part only of the property attached, equal to double the appraised value of that part. [C. Civ. P. 1877, § 214; R. C. 1895, § 5371.]

The giving of undertaking does not merely release the levy but destroys writ itself. Fox v. Mackenzie, 1 N. D. 298, 47 N. W. 386.

§ **6958. Undertaking when there are two or more defendants.** When there are two or more defendants and an application is made as prescribed in the last two sections by one or more, but not all of them, the undertaking must provide for the payment of any judgment, which may be recovered against any of the defendants in the action, unless the applicant makes proof by affidavit to the satisfaction of the court, that the property in respect to which the application is made belongs to him separately; in which case the undertaking must provide for the payment of any judgment, which may be recovered in the action against the applicant either alone or jointly with any other defendant. When an application is made as prescribed in this section, at least two days' notice thereof with a copy of the affidavit must be served upon the plaintiff's attorney, who may oppose the application by affidavit on the ground that one or more of the other defendants own or have an interest in the property. [R. C. 1895, § 5372.]

§ **6959. Partnership property. Undertaking.** If the warrant of attachment is levied upon the interest of one or more partners in personal property of the firm, the other partners, or one or more of them, may at any time before judgment apply to the court from which the warrant of attachment issued, or a judge thereof, upon affidavit, stating such fact, for an order to discharge the attachment as to the partnership property. The applicant must give an undertaking with sufficient surety to the effect, that if judgment shall be rendered in the action in favor of the plaintiff, they will pay to the sheriff on demand the amount of defendant's interest in such partnership property, the amount of such interest to be determined by reference or otherwise as the court may direct. The amount of such undertaking must be fixed by the court or judge thereof, and must not be less than the value of the interest of the defendant in the personal property of the partnership;

and for the purpose of fixing the amount of the undertaking the court may hear affidavits or oral testimony respecting the value of the defendant's interest in the attached property. [C. Civ. P. 1877, § 216; R. C. 1895, § 5373.]

§ **6960. Undertaking must be filed and served. Exceptions thereto.** An undertaking given as prescribed in the last three sections must be forthwith filed with the clerk. A copy thereof with a notice of the filing must be forthwith served upon the plaintiff's attorney; who may within three days thereafter give notice to the sheriff that he excepts to the sufficiency of the surety. Thereupon the surety must justify upon the like notice and in like manner as bail upon an arrest; or a new undertaking must be given with new surety and thereupon the same proceedings must be had upon such undertaking as upon the original undertaking. If the plaintiff does not except as prescribed in this section he is deemed to have waived all objection to the surety. The sheriff shall be responsible for the sufficiency of the surety upon any undertaking given by the defendant and may retain possession of the property attached and the proceeds thereof in his hands, until the objection to the surety is either waived as above provided, or until he justifies or new surety is substituted and justifies. [R. C. 1895, § 5374.]

§ **6961. Giving undertaking not waiver of right to move discharge.** The giving of any of the undertakings mentioned in this article by the defendant shall not operate as a waiver of his right to move to discharge the attachment, and if such attachment is discharged on motion any undertaking given by the defendant shall be null and void and shall be returned to him. [R. C. 1895, § 5375.]

§ **6962. Who may move discharge.** In all cases the defendant, or any person who has acquired a lien upon or interest in the defendant's property after it was attached, may move to discharge the attachment. If the motion is made upon affidavit on the part of the defendant, or a person who has acquired a lien upon or interest in the defendant's property after it was attached, but not otherwise, the plaintiff may oppose the same by affidavit or other proof in addition to the affidavit upon which the attachment was granted; and in such case the defendant, or person who has acquired a lien upon or interest in the defendant's property after it was attached, may sustain the motion by affidavit or other proof in rebuttal of the affidavits or other proof offered and submitted on the part of the plaintiff to oppose the motion. And if on such hearing it appears to the satisfaction of the court or judge that the attachment was irregularly issued, or that the affidavit upon which it was issued is untrue, the attachment must be discharged. [C. Civ. P. 1877, § 215; 1881, ch. 93, § 1; R. C. 1895, § 5376.]

Motion to vacate attachment cannot be reviewed before a different judge. Remedy by appeal. Bank v. Jennings, 4 N. D. 228, 59 N. W. 1058.

Attachment will be vacated for falsity of affidavit, action being to recover for a tort. Sonnesyn v. Akin, 12 N. D. 227, 97 N. W. 557.

§ **6963. Proceedings upon discharge.** When the warrant of attachment is vacated or annulled or the attachment is discharged upon the application of the defendant, or person who has acquired a lien upon or interest in the defendant's property after it was attached, the sheriff must deliver over to the defendant or to the person entitled thereto upon reasonable demand all the attached personal property remaining in his hands, or that portion thereof as to which the attachment is discharged, or the proceeds thereof, if it has been sold by him. [R. C. 1895, § 5377.]

Where attachment has been dissolved, if party appeal and give undertaking as required in section 7217, benefits he might receive under attachment are continued. State ex rel Bank v. Rose, 4 N. D. 319, 58 N. W. 514.

§ **6964. Judgment, how satisfied.** In case judgment is entered for the plaintiff in such action, the sheriff shall satisfy the same out of the property attached by him, if it shall be sufficient for that purpose:

1. By paying over to such plaintiff the proceeds of all sales of perishable property, and of any vessel or share or interest in any vessel sold by him, or of any debts or credits collected by him or so much as shall be necessary to satisfy such judgment.

2. If any balance remains due and an execution shall have been issued on such judgment, he shall proceed to sell under such execution so much of the attached property, real or personal, except as provided in subdivision 4 of this section, as may be necessary to satisfy the balance, if enough for that purpose shall remain in his hands; and in case of the sale of any rights or shares in the stock of a corporation or association, the sheriff shall execute to the purchaser a certificate of sale thereof, and the purchaser shall thereupon have all the rights and privileges in respect thereto, which were had by such defendant.

3. If any of the attached property belonging to the defendant shall have passed out of the hands of the sheriff without having been sold or converted into money, such sheriff shall repossess himself of the same, and for that purpose shall have all the authority which he had to seize the same under the attachment and any person, who shall willfully conceal or withhold such property from the sheriff, shall be liable to double damages at the suit of the party injured.

4. Until the judgment against the defendant shall be paid, the sheriff may proceed to collect the notes and other evidences of debt that may have been seized or attached under the warrant of attachment, and to prosecute any bond he may have taken in the course of such proceedings and apply the proceeds thereof to the payment of the judgment. At the expiration of six months from the docketing of the judgment the court shall have power upon the petition of the plaintiff, accompanied by an affidavit setting forth fully all the proceedings, which have been had by the sheriff since the service of the attachment, the property attached and the disposition thereof, and also the affidavit of the sheriff that he has used diligence and endeavored to collect the evidences of debt in his hands so attached and that there remains uncollected of the same any part or portion thereof, to order the sheriff to sell the same upon such terms and in such manner as shall be deemed proper. Notice of such application shall be given to the defendant or his attorney, if the defendant shall have appeared in the action. In case the summons has not been personally served on the defendant, the court shall make such order as to the service of notice and the time of service as shall be deemed just. When the judgment and all costs of the proceedings shall have been paid, the sheriff upon reasonable demand shall deliver over to the defendant the residue of the attached property, or the proceeds thereof. [C. Civ. P. 1877, § 210; R. C. 1899, § 5378.]

§ **6965. Proceedings upon judgment for defendant.** If the defendant recovers judgment against the plaintiff in the action, any undertaking given by the defendant, all the proceeds of sales and moneys collected by the sheriff and all property attached, remaining in his hands shall upon the order of the court be delivered by him to the defendant or his agent on request, and the warrant shall be discharged and the property released therefrom. [R. C. 1895, § 5379.]

§ **6966. Cancellation of notices of attachment.** At any time after the warrant of attachment has been vacated or annulled, or the attachment has been discharged, the court may, upon the application of any person aggrieved and with or without notice in the discretion of the court, direct that any notice filed for the purpose of attaching the property be canceled of record by the register of deeds of the county where it is filed or recorded. The cancellation must be made by the register of deeds, upon a certified copy of the order directing such cancellation being filed in his office, by an entry to that effect on the margin of the record referring to the order. Such cancella-

tion may in like manner be made by the register of deeds upon a written request directing such cancellation, signed by the plaintiff or his attorney. [R. C. 1895, § 5380.]

§ **6967. Return by officer.** When the warrant shall be fully executed or discharged the sheriff must return the same with his proceedings thereon to the court in which the action was commenced. [C. Civ. P. 1877, § 217; R. C. 1895, § 5381.]

Sheriff must state all he did toward levy. Statute must be strictly followed. Ireland v. Adair, 12 N. D. 29, 94 N. W. 766.

ARTICLE 5.—GARNISHMENT.

§ **6968. Creditors may proceed by garnishment.** Any creditor shall be entitled to proceed by garnishment in any court having jurisdiction of the subject of the action against any person, including a public corporation, who shall be indebted to or have any property whatever, real or personal, in his possession or under his control, belonging to such creditor's debtor, in the cases upon the conditions and in the manner prescribed in this chapter. The term plaintiff is used in this chapter to embrace every judgment creditor and the term defendant, a judgment debtor. [1895, ch. 65, § 1; R. C. 1899, § 5382; 1905, ch. 69.]

In an action against "A" in one state, the pendency of garnishment proceedings against "A" in another state is no defense when it appears that at the time they were commenced "A" knew the defendant in the action in which they were instituted did not own the claim against "A". Purcell v. Insurance Co., 5 N. D. 100, 64 N. W. 943.

§ **6969. Affidavit for garnishment.** Either at the time of the issuing of a summons, or at any time thereafter before final judgment, in any action to recover damages founded upon contract, express or implied, or upon judgment or decree, or at any time after the issuing in any case of an execution against property and before the time when it is returnable, the plaintiff, or some person in his behalf, may make an affidavit stating that he verily believes that some person, naming him, is indebted to, or has property, real or personal, in his possession or under his control, belonging to the defendant, or either or any of the defendants in the action or execution, naming him, and that such defendant has not property in this state liable to execution, sufficient to satisfy the plaintiff's demand, and that the indebtedness or property mentioned in such affidavit is, to the best of the knowledge and belief of the person making such affidavit, not by law exempt from seizure or sale upon execution. Any number of garnishees may be embraced in the same affidavit, but if a joint liability is claimed against any, it shall be so stated, and the garnishee named as jointly liable shall be deemed jointly proceeded against; otherwise the several garnishees shall be deemed severally proceeded against. [1895, ch. 65, § 2; R. C. 1899, § 5383.]

§ **6970. Garnishee summons.** The plaintiff shall annex or subjoin to such affidavit a garnishee summons, which shall be substantially in the following form:

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

A. B., plaintiff,
vs.
C. D., defendant, and
E. F., garnishee.

The state of North Dakota to the said garnishee:

You are hereby summoned pursuant to the annexed affidavit, as a garnishee of the defendant, C. D., and required within thirty days after the service of this summons upon you, exclusive of the day of service, to answer according to law, whether you are indebted to or have in your possession or under your control any property, real or personal, belonging to such defendant, and

to serve a copy of your answer on the undersigned at..... in the county of.....; and in case of your failure so to do, you will be liable to further proceedings according to law; of which the said defendant will also take notice.

L. M., Plaintiff's Attorney.

P. O. address....., ...county, N. D.

[1895, ch. 65, § 3; R. C. 1899, § 5384.]

No second summons in garnishment. Summons issued by justice of the peace must be served in county where issued. Searl v. Shanks, 9 N. D. 204, 82 N. W. 734.

§ **6971. Service of summons and affidavit.** Such garnishee summons and affidavit may be served by the sheriff of the county, where any garnishee or defendant may be found, or by any other person not a party to the action. The service shall be made and the same returned with proof of the service to the person whose name is subscribed thereto with reasonable diligence. The person subscribing such garnishee summons may, at his option by an indorsement thereon, fix a time for the service thereof, and the service shall then be made accordingly. [1895, ch. 65, § 4; R. C. 1899, § 5385.]

§ **6972. To be served on garnishee and defendant.** The garnishee summons and annexed affidavit shall be served on each of the several garnishees named in the manner provided for service of a summons in an action; and, except when service of the summons in the action is made without the state or by publication, also on the defendant to the action in like manner, either before or within ten days after service on a garnishee. When the defendant shall have appeared in the action by an attorney such service may be made upon such attorney or upon the defendant. Unless the garnishee summons is so served on the defendant or his attorney in accordance with the provisions of this section, the service on the garnishee shall become void and of no effect from the beginning. [1895, ch. 65, § 5; R. C. 1899, § 5386.]

§ **6973. Subsequent garnishments.** The plaintiff may in like manner subsequently proceed within the period limited against other garnishees, or against the same garnishees after they shall have once been discharged, upon a new affidavit, if he shall have reason to believe they have subsequently become liable; and he may summon garnishees resident in other counties than that in which the action is pending; but if an issue for trial shall be joined between the plaintiff and such garnishee, the court may on motion change the place of trial of such issue to the county of the garnishee's residence. [1895, ch. 65, § 6; R. C. 1899, § 5387.]

§ **6974. Garnishment discharged if complaint not served.** If the plaintiff shall not within ten days after demand for a copy of the complaint serve upon the garnishee or his attorney, except in case of garnishment upon execution, a copy of the complaint showing the amount of the indebtedness of the defendant in the action to the plaintiff, the proceeding against the garnishee shall be dismissed on motion of the garnishee with costs, unless the court or a judge shall in discretion and upon terms permit the same to stand. [1895, ch. 65, § 7; R. C. 1899, § 5388.]

§ **6975. Affidavit denying liability.** Within thirty days from the service of such garnishee summons the garnishee may, if the truth warrants, file with the clerk of the court in which the action is pending, and serve a copy thereof upon the plaintiff, his affidavit in the following form, substantially:

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

.....Court.

A. B., plaintiff,
vs.
C. D., defendant, and
E. F., garnishee.

E. F., being duly sworn, says that on the.....day of ....., A. D. 19...., he was served with a garnishee summons

in the above entitled action; that he was then and is now in no manner and upon no account whatever indebted or under liability to the defendant (naming him), and that he then had and now has in his possession or under his control, no real estate and no personal property, effects or credits of any description whatever, belonging to said defendant or in which he has any interest; and is in no manner liable as garnishee in this action.

.....

Subscribed and sworn to before me this.....day of ....., A. D. 19....

Thereby the proceeding against such garnishee shall be deemed discontinued, and the plaintiff shall pay the garnishee one dollar for his costs, unless within thirty days thereafter the plaintiff serves notice on such garnishee, that he elects to take issue on his answer to the garnishee summons and will maintain him to be liable as garnishee, in which case the issue shall stand for trial as a civil action, in which the affidavit on the part of the plaintiff shall be deemed the complaint, and the garnishee's affidavit the answer thereto. [1895, ch. 65, § 8; R. C. 1899, § 5389.]

§ 6976. Affidavit when liability admitted. Question may be submitted to court. Unless the garnishee shall make the affidavit provided for in the preceding section, he shall within thirty days from the service of the garnishee summons file and serve in like manner an affidavit in which he shall state:

1. Whether he was at the time of service of the garnishee summons, or has since become indebted, or under any liability to the defendant named in the garnishee summons, in any manner upon any account, specifying, if indebted or liable, the amount, the interest thereon, the manner in which evidenced, when payable, whether an absolute or contingent liability and all the facts and circumstances necessary to a complete understanding of such indebtedness or liability. When the garnishee shall be in doubt respecting any such liability or indebtedness, he may set forth all the facts and circumstances concerning the same and submit the question to the court.

2. Whether he held at the time aforesaid, or now holds the title or possession of any real estate, or any interest in land of any description, or of any personal property, effects or credits, or any instruments or papers relating to such, belonging to the defendant or in which he is in any wise interested. And if he shall admit any such or be in any doubt respecting the same, he shall set forth the description of such property and all the facts and circumstances concerning the same, and the title, interest or claim of the defendant in or to the same.

3. If he shall claim any set-off or defense to any indebtedness or liability or any lien or claim to said property, he shall set forth the facts and circumstances thereof fully.

4. He may state any claim of exemption from execution on the part of the defendant, or other objection known to him against the right of the plaintiff to apply upon his demands the indebtedness or property disclosed.

5. If he shall disclose any indebtedness, or the possession of any property to which the defendant, and any other person as well, make claim, he may set forth the names and residences of such other claimants and so far as known the nature of their claims. [1895, ch. 65, § 9; R. C. 1899, § 5390.]

§ 6977. When judgment may be rendered against garnishee. If any garnishee, having been duly summoned, shall fail to serve his affidavit as required in the preceding section, the court may render judgment against him for the amount of the judgment which the plaintiff shall recover against the defendant in the action for damages and costs, together with the costs of such garnishee action. Such garnishee may also be proceeded against as for a contempt according to the provisions of chapter 35 of this code. [1895, ch. 65, § 10; R. C. 1899, § 5391.]

§ **6978. Indebtedness paid to officer. Officer may levy.** In case the answer of the garnishee shall show indebtedness to the defendant, he may pay the amount thereof less three dollars for his costs to the officer having a warrant of attachment in the action, if any, or otherwise to the clerk of the court; or, if the garnishment is in aid of an execution, to the sheriff having the execution; and the officer to whom such payment is made shall give him a receipt specifying the facts and such receipt shall be a complete discharge of all liability to any party for the amount so paid. If the answer discloses any money, credits or other property, real or personal, in the possession or under the control of the garnishee, the officer having a writ of attachment or an execution, if any, may levy upon the interest of the defendant in the same; otherwise the garnishee shall hold the same until the order of the court thereon. [1895, ch. 65, § 11; R. C. 1899, § 5392.]

§ **6979. Answer conclusive unless traversed.** The answer of the garnishee shall in all cases be conclusive of the truth of the facts therein stated, unless the plaintiff shall within thirty days serve upon the garnishee a notice in writing, that he elects to take issue on his answer; in which case the issue shall stand for trial as a civil action, in which the affidavit on the part of the plaintiff shall be deemed a complaint and the garnishee's affidavit the answer thereto. The plaintiff may in all cases move the court upon the answer of the garnishee and of the defendant, if he shall also answer, for such judgment as he shall be entitled to thereon, but any such judgment shall be no bar beyond the facts stated in such answers. [1895, ch. 65, § 12; R. C. 1899, § 5393.]

§ **6980. Answer of corporation.** The answer of a corporation summoned as a garnishee may be made by any officer thereof; and of any other garnishee, by any agent or attorney in his behalf, who shall be acquainted with the facts. [1895, ch. 65, § 13; R. C. 1899, § 5394.]

§ **6981. Defendant may defend garnishee proceedings.** The defendant may in all cases by answer duly verified, to be served within thirty days from the service of the garnishee summons on him, defend the proceeding against any garnishee upon the ground that the indebtedness of the garnishee, or any property held by him, is exempt from execution against such defendant or for any other reason is not liable to garnishment; or, upon any ground upon which a garnishee might defend the same; and may participate in the trial of any issue between the plaintiff and garnishee for the protection of his interests. And the garnishee may at his option defend the principal action for the defendant, if the latter does not, but shall be under no obligations so to do. [1895, ch. 65, § 14; R. C. 1899, § 5395.]

§ **6982. Proceedings deemed an action.** The proceedings against a garnishee shall be deemed an action by the plaintiff against the garnishee and defendant as parties defendant, and all provisions of law relating to proceedings in civil actions at issue, including examination of the parties, amendments and relief from default or proceedings taken and appeals and all provisions for enforcing judgments, shall be applicable thereto; but when the garnishment is not in aid of an execution, no trial shall be had of the garnishee action, until the plaintiff shall have judgment in the principal action, but the garnishment action may be noticed for trial at the same term if issue therein is joined in time; and if the defendant has judgment, the garnishee action shall be dismissed with costs. The court shall render such judgment in all cases as shall be just to all the parties, and properly protect their respective interests, and may adjudge the recovery of an indebtedness, the conveyance, transfer or delivery to the sheriff, or any officer appointed by the judgment, of any real estate or personal property disclosed or found to be liable to be applied to the plaintiff's demand, or by the judgment pass the title thereto; and may therein or by its order, when proper, direct the manner of making sale and of disposing of the proceeds thereof, or of any money or other thing paid

over or delivered to the clerk or officer. The judgment against a garnishee shall acquit and discharge him from all demands by the defendant, or his representative, for all money, goods, effects or credits paid, delivered or accounted for by the garnishee by force of such judgment. [1895, ch. 65, § 15; R. C. 1899, § 5396.]

§ **6983. Interpleader, when had.** When the answer of the garnishee shall disclose that any other person than the defendant claims the indebtedness or property in his hands, and the name and residence of such claimant, the court may on motion order that such claimant be interpleaded as a defendant to the garnishee action; and that notice thereof, setting forth the facts, with a copy of such order, in such form as the court shall direct, be served upon him, and that after such service shall have been made, the garnishee may pay or deliver to the officer or the clerk such indebtedness or property, and have a receipt therefor, which shall be a complete discharge from all liability to any party for the amount so paid or property so delivered. Such notice shall be served in the manner required for service of a summons in a civil action, and may be made without the state or by publication thereof, if the order shall so direct. Upon such service being made such claimant shall be deemed a defendant to the garnishee action and within thirty days shall answer, setting forth his claim, or any defense which the garnishee might have made. In case of default, judgment may be rendered which shall conclude any claim upon the part of such defendant. [1895, ch. 65, § 16; R. C. 1899, § 5397.]

§ **6984. Liability of garnishee.** From the time of the service of the summons upon the garnishee he shall stand liable to the plaintiff to the amount of the property, money, credits and effects in his possession or under his control belonging to the defendant, or in which he shall be interested, to the extent of his right or interest therein, and of all debts due or to become due to the defendant, except such as may be by law exempt from execution. Any property, moneys, credits and effects held by a conveyance or title void as to the creditors of the defendant shall be embraced in such liability. [1895, ch. 65, § 17; R. C. 1899, § 5398.]

§ **6985. When judgment not rendered.** No judgment shall be rendered upon a liability of the garnishee arising either:

1. By reason of his having drawn, accepted, made, indorsed or guaranteed any negotiable bill, draft, note or other security.

2. By reason of any money or other thing received or collected by him as sheriff, or other officer, by force of an execution or other legal process in favor of the defendant.

3. By reason of any money in his hands as a public officer and for which he is accountable to the defendant merely as such officer.

4. By reason of any money or other thing owing from him to the defendant, unless before judgment against the defendant, it shall have become due absolutely and without depending on any future contingency; but judgment may be given for any money or other thing owing after it shall have become due absolutely and without depending on any contingency. [1895, ch. 65, § 18; R. C. 1899, § 5399.]

§ **6986. Defendant not to sue garnishee until, etc.** No action shall be commenced by the defendant or his assignee against a garnishee upon any claim or demand liable to garnishment, or to recover any property garnished, or execution be issued upon a judgment in favor of the defendant against such garnishee subsequent to the service of the garnishee summons upon him, until the termination of the garnishee action; and, if an action shall have been commenced or an execution issued, it shall be stayed by the court or a judge thereof upon the garnishee's application, except that upon cause shown, the court or judge may by order permit the commencement of such an action,

or the issue of an execution, or the further prosecution of one stayed. [1895, ch. 65, § 19; R. C. 1899, § 5400.]

§ **6987. Defendant may release garnishment, how.** The defendant may, at any time after the complaint is filed and before judgment, file with the clerk of the court an undertaking executed by at least two sureties, resident freeholders of the state, to the effect that they will on demand pay to the plaintiff the amount of the judgment with all costs that may be recovered against such defendant in the action, not exceeding a sum specified, which sum shall not be less than double the amount demanded by the complaint, or in such less sum as the court shall upon application direct. The sureties shall justify their responsibility by affidavit annexed, stating a sum which each is worth in property within this state over and above all debts and liabilities and property exempt from execution, the aggregate of which sums shall be double the amount specified in the undertaking. The defendant shall serve on the plaintiff a copy of such undertaking with a notice where and when the same was filed. Within three days after the receipt thereof the plaintiff shall give notice to the defendant that he excepts to the sufficiency of the sureties, or he shall be deemed to have waived all objections to them. When the plaintiff excepts, the sureties shall justify in like manner as bail upon an arrest. Thereafter all the garnishees shall be discharged and the garnishment proceedings shall be deemed discontinued, and any money or property paid or delivered to any officer shall be surrendered to the person entitled thereto and the costs shall be taxable as disbursements of the plaintiff in the action, if he recovers. [1895, ch. 65, § 20; R. C. 1899, § 5401.]

§ **6988. Costs in garnishee actions.** In case of the trial of an issue between the plaintiff and any garnishee costs shall be awarded to the plaintiff and against the garnishee in addition to his liability, if the plaintiff recovers more than the garnishee admitted by his answer; and if he does not, the garnishee shall recover costs of the plaintiff. In all other cases under this article not expressly provided for, the court may award costs in favor of or against any party in its discretion. When there is no issue for trial and any liability on the part of the garnishee is disclosed, the costs of the garnishment proceeding shall be taxed for the plaintiff, if he recovers, as disbursements in the principal action. [1895, ch. 65, § 21; R. C. 1899, § 5402.]

Article 6.—Receivers.

§ **6989. Cases when appointed.** A receiver may be appointed by the court in which an action is pending, or by a judge thereof:

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund or the proceeds thereof is probable, and when it is shown that the property or fund is in danger of being lost, removed or materially injured.

2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property when it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the conditions of the mortgage have not been performed and that the property is probably insufficient to discharge the mortgage debt.

3. After judgment, to carry the judgment into effect.

4. After judgment, to dispose of the property according to the judgment or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied or when the

judgment debtor refuses to apply his property in satisfaction of the judgment.

5. In the cases provided in this code, when a corporation has been dissolved, or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights; and in like cases within this state, of foreign corporations.

6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity. [C. Civ. P. 1877, § 219; R. C. 1895, § 5403.]

Practice of appointing receivers ex parte not to be tolerated by courts except in cases of gravest emergency and to prevent irreparable injury. Grandin v. La Bar, 2 N. D. 206, 50 N. W. 151.

Conditions upon which a receiver will be appointed for judgment creditor. Minkler v. U. S. Sheep Co., 4 N. D. 507, 62 N. W. 594.

Apportionment of receiver's expenses. Cutter v. Pollock, 7 N. D. 631, 76 N. W. 235.

Not a prerequisite that mortgagor be insolvent for appointment of receiver in foreclosure. Roberts v. Parker, 14 S. D. 323, 85 N. W. 591.

As to duty of court to appoint receiver for insolvent corporation, see Gates v. McGee, 15 S. D. 247, 88 N. W. 115; Kelly v. Fargo Merc. Co., 16 S. D. 73, 91 N. W. 350; Dudley v. Hot Springs Co., 11 S. D. 559, 79 N. W. 839; Gales v. Bank, 13 S. D. 622, 84 N. W. 192.

§ **6990. Who may be receiver. Undertaking by applicant.** No party or person interested in an action can be appointed receiver therein without the written consent of the party filed with the clerk. If a receiver is appointed upon an ex parte application, the court before making the order may require from the applicant an undertaking with sufficient sureties in an amount to be fixed by the court to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously or without sufficient cause; and the court may in its discretion at any time after said appointment require an additional undertaking. [C. Civ. P. 1877, § 221; R. C. 1899, § 5404.]

Stockholder not a proper person to be appointed receiver of a corporation. McKenzie v. Water Co., 6 N. D. 361, 71 N. W. 608.

§ **6991. Qualification of receiver.** Before entering upon his duties the receiver must be sworn to perform them faithfully, and with one or more sureties approved by the court or judge execute an undertaking to such person and in such sum as the court or judge may direct, to the effect that he will faithfully discharge the duties of receiver in the action and obey the orders of the court therein. [C. Civ. P. 1877, § 222; R. C. 1899, § 5405.]

Purchase of trust property by receiver, when proper. When may make personal contracts. Compensation of receiver judicial matter. Patterson v. Ward, 6 N. D. 609, 72 N. W. 1013.

§ **6992. Powers.** The receiver has, under the control of the court, power to bring and defend actions in his own name as receiver, to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers and generally to do such acts respecting the property as the court may authorize. [C. Civ. P. 1877, § 223; R. C. 1899, § 5406.]

Accounts of a receiver should be passed and his compensation provided for before discharge. Hoffman v. Bank of Minot, 4 N. D. 473, 61 N. W. 1031.

§ **6993. Investment of funds on consent.** Funds in the hands of a receiver may be invested upon interest by order of the court; but no such order can be made except upon the consent of all the parties to the action. [C. Civ. P. 1877, § 224; R. C. 1899, § 5407.]

Article 7.—Of Deposit.

§ **6994. What subject to order of deposit.** When it is admitted by the pleadings or the examination of a party that he has in his possession or under

his control any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party with or without security, subject to the further direction of the court. [C. Civ. P. 1877, § 225; R. C. 1899, § 5408.]

§ **6995. Voluntary deposit in court of property adversely claimed.** Whenever two or more persons make claim for the whole or any part of the same money, personal property or effects in the possession or control of any other person as bailee or otherwise and the right of any such claimant is adverse to the right of any other claimant, or is disputed or doubtful, and the bailee, custodian or person in control of any part of such property, money or effects is unable to determine to whom the same rightfully belongs, or who is rightfully entitled to the possession thereof; or whenever such bailee, custodian or person in control has notice or knowledge of any right, or claim of right of any person in or to any part of such property, money or effects adverse to the right of any other claimant therefor; or whenever any debt, money, property or effects owing by or in the possession or under the control of any person may be attached by garnishment or other process, and there is any dispute as to who is entitled to the same or any part thereof; in any such case the person in the possession or control of any such property, money or effects, when an action in any form has been commenced for an account of or growing out of the same or in which the same has been attached as aforesaid, may pay such money or deliver such property or effects to the clerk of the court in which any such action having reference to said money, property or effects, or the value thereof, may be pending, or out of which any garnishment or other process may issue with reference thereto; or if no such suit is commenced, he may apply to the district court of the district where such property, money or effects may be situated, and upon showing to the satisfaction of the court the existence of facts bringing him within the operation of this section, said court shall make an order designating a depositary with whom said property, money or effects may be deposited by the applicant for such order. In either case such person in the possession or control of such property, money or effects shall at once notify personally or by registered mail all persons of whose claims he may have notice or knowledge, having or claiming any interest, property, lien or right in, to or upon such property, money or effects, of such deposit; and upon giving such notice the person so depositing the same shall thereupon be relieved from further liability to any person on account of such property, money or effects; provided, that such depositor may be required upon the application of any party interested therein to appear and make disclosure before the court, in which any such action may be pending or by which any order designating a depositor may be made, concerning the said property, money, debts or effects held, controlled or owed by him. If the address of any persons having or making any claim as aforesaid cannot be ascertained, an affidavit to that effect shall be filed with the depositary, and the giving of such notice shall not be required in such case. [1895, ch. 39 § 1; R. C. 1899, § 5409.]

§ **6996. Disobedience. Contempt.** Whenever in the exercise of its authority a court shall have ordered the deposit, delivery or conveyance of money or other property and the order is disobeyed, the court besides punishing the disobedience as for contempt may make an order requiring the sheriff to take the money or property and deposit, deliver or convey it in conformity with the direction of the court. [C. Civ. P. 1877, § 226; R. C. 1899, § 5410.]

§ **6997. Defendant's admissions.** When the answer of the defendant expressly or by not denying admits part of the plaintiff's claim to be just, the court on motion may order such defendant to satisfy that part of the

claim, and may enforce the order as it enforces a judgment or a provisional remedy. [C. Civ. P. 1877, § 227; R. C. 1899, § 5411.]

Order cannot be predicated on affidavit for attachment alone. Jordan v. Frank, 1 N. D. 206, 46 N. W. 171.

Order may be that of judge or of court. Black Hills F. & M. Co. v. Grand Island Co., 2 S. D. 546, 51 N. W. 342.

CHAPTER 10.

DISMISSAL OF CIVIL ACTIONS.

§ **6998. How.** A civil action may be dismissed, without a final determination of its merits, in the following cases:

1. By the plaintiff, at any time before trial, if a provisional remedy has not been allowed, or counterclaim made, or affirmative relief demanded in the answer; provided, that an action on the same cause of action against any defendant shall not be dismissed more than once without the written consent of the defendant or an order of the court on notice and cause shown.

2. By either party, with the written consent of the other; or by the court, upon the application of either party, after notice to the other, and sufficient cause shown, at any time before the trial.

3. By the court, when upon the trial and before the final submission of the case, the plaintiff abandons it, or fails to substantiate or establish his claim, or cause of action, or right to recover.

4. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal.

5. By the court, on the application of some of the defendants, when there are others whom the plaintiff fails to prosecute with diligence.

6. The dismissal mentioned in the first and second subdivisions of this section may be made by an entry in the clerk's register, by the plaintiff or his attorney, and a written notice of such dismissal and entry served on the adverse party, and judgment may thereupon be entered accordingly; provided, that in the cases mentioned in the said first subdivision, and in cases in which the parties to the action consent in writing to the dismissal of such action, the judgment of dismissal may be entered by the clerk on motion of either party without any notice to the opposite party, and without an order from the court or judge.

7. In every case, other than those mentioned in this section the judgment in the action shall be rendered on the merits.

8. All other modes of dismissing an action, except as provided in this chapter, by non-suit or otherwise, are hereby abolished. [1905, ch. 6.]

§ **6999. Actions deemed dismissed, when.** All actions which have been commenced, or hereafter may be commenced, in any of the courts of record in this state wherein the plaintiff, or his successor in interest, shall have neglected, or shall neglect, for a period of five years after the commencement of said action, to bring the same to trial and to take proceedings for the final determination thereof, are hereby deemed dismissed and abandoned by the plaintiff, and the defendant or his successor in interest, or any other person having an interest in said action, or in the subject matter thereof, may apply to the court for a formal order dismissing said action. If upon such application to the court, facts shall be presented thereto, showing that said action is one covered by the provisions of this section, the court shall make an order formally dismissing said action, which order shall be entered of record in the office of the clerk of the court of the county where said action is pending, and shall have the effect of a final judgment of dismissal. [1903, ch. 5.]

CHAPTER 11.

OF THE TRIAL AND JUDGMENT IN CIVIL ACTIONS.

ARTICLE 1.—JUDGMENT UPON FAILURE TO ANSWER, ETC.

§ 7000. Judgment defined. A judgment is the final determination of the rights of the parties in the action. [C. Civ. P. 1877, § 228; R. C. 1899, § 5412.]

Order overruling demurrer with leave to amend is not final judgment. Bode v. N. E. Inv. Co., 1 N. D. 121, 45 N. W. 197.

When a judgment is final. Order is not a judgment. In re Weber, 4 N. D. 119, 59 N. W. 523.

As to sufficiency of judgment, see Hunter v. Karcher, 8 S. D. 554, 67 N. W. 621; Williams v. Wait, 2 S. D. 210, 49 N. W. 209; Mouser v. Palmer, 2 S. D. 466, 50 N. W. 967; Locke v. Hubbard, 9 S. D. 364, 69 N. W. 588; Mattice v. Street, 15 S. D. 63, 87 N. W. 522.

§ 7001. On failure to answer. Counterclaim. Relief. Publication. Restitution. Judgment may be had if the defendant fails to answer the complaint in the following cases:

1. In an action arising on contract for the recovery of money only the plaintiff may file with the clerk proof of the personal service of the summons and complaint on one or more of the defendants, or of the summons according to the provisions of section 6835 and that no answer or demurrer has been received. Judgment shall thereupon be entered for the amount demanded in the complaint against the defendant or defendants, or against one or more of the several defendants in the cases provided for in section 6847; but if the complaint is not sworn to and such action is on an instrument for the payment of money only, the court on its production shall assess the amount due to the plaintiff thereon, and in other cases shall ascertain the amount which the plaintiff is entitled to recover in such action from his examination under oath or other proof and enter the judgment for the amount so assessed or ascertained. In case the defendant gives notice of appearance in the action, he shall be entitled to five days' notice of the time and place of such assessment. When the defendant by his answer in any such action shall not deny the plaintiff's claim, but shall set up a counterclaim amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of such claim over the said counterclaim in like manner in any such action upon the plaintiff's filing with the clerk of the court a statement admitting such counterclaim, which statement shall be annexed to and be a part of the judgment roll.

2. In other actions the plaintiff may upon the like proof apply to the court after the expiration of the time for answering for the relief demanded in the complaint. If the taking of an account, or the proof of any fact is necessary to enable the court to give judgment or to carry the judgment into effect, the court may take the account or hear the proof, or may in its discretion order a reference for that purpose. And when the action is for the recovery of money only, or of specific real or personal property with damages for the withholding thereof, the court may order the damages to be assessed by a jury or, if the examination of a long account is involved, by a reference as above provided. If the defendant gives notice of appearance in the action before the expiration of the time for answering, he shall be entitled to eight days' notice of the time and place of application to the court for the relief demanded by the complaint.

3. In actions when the service of the summons was by publication, the plaintiff may in like manner apply for judgment, and the court must thereupon require proof to be made of the demand mentioned in the complaint; and if the defendant is not a resident of the state must require the plain-

tiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff or to any one for his use on account of such demand and may render judgment for the amount which he is entitled to recover. Before rendering judgment the court may in its discretion require the plaintiff to cause to be filed satisfactory security, to abide the order of the court, touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant or his representatives shall apply and be admitted to defend the action and shall succeed in such defense. [C. Civ. P. 1877, § 229; R. C. 1895, § 5413.]

Formal findings not necessary when defendant fails to appear. Cole v. Asson, 3 S. D. 272, 52 N. W. 1086.

Judgment may be taken against one of several defendants failing to appear. Black Hills Bank v. Kellogg, 4 S. D. 312, 56 N. W. 1071.

Defendant who has appeared but not answered, not entitled to notice. Searles v. Lawrence, 8 S. D. 11, 65 N. W. 34.

Notice of application for judgment not necessary where demurrer overruled and party stands on demurrer. Halley v. Ingersoll, 14 S. D. 7, 84 N. W. 201.

§ 7002. **On frivolous pleading.** If a demurrer, answer or reply is frivolous, the party prejudiced thereby upon a previous notice of five days may apply to a judge of the court either in or out of the court for judgment thereon, and judgment may be given accordingly. [C. Civ. P. 1877, § 230; R. C. 1899, § 5414.]

Answer indicating good defense, but stating it imperfectly, not frivolous. Yerkes v. Crum, 2 N. D. 72, 49 N. W. 422; State ex rel Gunderson v. King, 6 S. D. 297, 60 N. W. 75; Bank v. Humphrey, 6 S. D. 415, 61 N. W. 687; Catholicon Hot Springs Co. v. Ferguson, 8 S. D. 534, 67 N. W. 615.

Motion on frivolous pleadings needs no support by proof of extrinsic facts. What is frivolous pleading. Sigmund v. Bank of Minot, 4 N. D. 164, 59 N. W. 966.

§ 7003. **Procedure in civil actions when judgment pending.** When, during the pendency of an action, a judgment upon the claim which constitutes the plaintiff's cause of action is rendered in another action, the plaintiff may by supplemental complaint allege the recovery of such judgment in aid of his original action and shall not be required to dismiss such action and commence a new suit upon such judgment; nor shall the recovery of such judgment constitute any bar to the further prosecution of such action, but such action shall thereafter proceed in all respects the same as if originally instituted upon such judgment. [1899, ch. 47, § 3; R. C. 1899, § 5414a.]

Article 2.—Issues and Mode of Trial.

§ 7004. **Origin and classes of issues.** Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party, and controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact. [C. Civ. P. 1877, § 231; R. C. 1899, § 5415.]

§ 7005. **Issues of law.** An issue of law arises upon a demurrer to the complaint, answer or reply, or to some part thereof. [C. Civ. P. 1877, § 232; R. C. 1899, § 5416.]

§ 7006. **Of fact classified.** An issue of fact arises:

1. Upon a material allegation in the complaint controverted by the answer; or,
2. Upon new matter in the answer not requiring a reply, or controverted by a reply; or,
3. Upon new matter in the reply, unless an issue of law is joined thereon. [C. Civ. P. 1877, § 233; R. C. 1895, § 5417.]

§ 7007. **Both. Order of trial.** Issues both of law and fact may arise upon different parts of the pleadings in the same action. In such cases the issues

of law must be first tried, unless the court otherwise directs. [C. Civ. P. 1877, § 234; R. C. 1899, § 5418.]

§ 7008. Trial defined. A trial is the judicial examination of the issues between the parties, whether they are issues of law or of fact. [C. Civ. P. 1877, § 235; R. C. 1899, § 5419.]

Trial by jury means an examination of issues of fact. State v. Hazledahl, 2 N. D. 521, 52 N. W. 315.

Trial presumed to take place, when. Second National Bank v. Bank, 8 N. D. 50, 76 N. W. 504.

§ 7009. By whom triable. An issue of law must be tried by the court or by the judge. An issue of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial is waived as provided in section 7038, or a reference is ordered as provided in sections 7046 and 7047. Every other issue is triable by the court, which, however, may order the whole issue or any specific question of fact involved therein to be tried by a jury or by a referee as provided in sections 7046 and 7047. [C. Civ. P. 1877, § 236; 1885, ch. 146; § 1; R. C. 1895, § 5420.]

Trial of equity cases by court; jury's verdict or referee's findings advisory. Prondzinski v. Garbutt, 8 N. D. 191, 77 N. W. 1012; Peckham v. Van Bergen, 8 N. D. 595, 80 N. W. 760.

Court not compelled to try issues in a common law action. Meldrum v. Kenefick, 15 S. D. 370, 89 N. W. 863.

§ 7010. Issues of fact, how tried. All issues of fact triable by a jury or by the court must be tried before a single judge. Issues of fact must be tried at a regular term of the district court, when the trial is by jury, otherwise at a regular or special term as the court may by its rules prescribe. Issues of law must be tried at a regular or special term of the district court, or by the court in vacation, or judge at chambers. If by the court in vacation, or judge at chambers, the same may be heard, tried and determined in any county of the district within which the action is brought, and judgment thereon entered in the proper county upon the giving by either or any party of the notice prescribed by section 7011; but in such case no note of issue need be filed, and any judgment, final decision or actual determination made upon such trial and hearing may be appealed from in the same manner and subject to the same rules and provisions as in cases of other appeals from actual determinations and final decisions of any regular or special terms of the district courts of this state. [C. Civ. P. 1877, § 237; 1885, ch. 147, § 1; R. C. 1899, § 5421.]

Court may try mandamus proceeding outside of county. Territory v. Shearer, 2 Dak. 332, 8 N. W. 135.

§ 7011. Note of issue. Contents. Notice of trial. Order of trial. At any time after issue and at least ten days before the court, either party may give notice of trial. The party giving the notice shall furnish the clerk, at least eight days before the court, with a note of the issue containing the title of the action, the names of the attorneys and the time when the last pleading was served, and the clerk shall thereupon enter the cause upon the calendar according to the date of the issue. The party upon whom notice of trial is served may also file the note of issue and cause the action to be placed on the calendar without further notice on his part. There need be but one notice of trial and one note of issue and the action must then remain on the calendar until disposed of. Either party, after the notice of trial—whether given by himself or by the adverse party—may bring the issue to trial. The issues on the calendar shall be disposed of in the following order unless, for the convenience of parties or the dispatch of business, the court shall otherwise direct:

1. Issues of fact to be tried by a jury.

2. Issues of fact to be tried by the court.
3. Issues of law. [1899, ch. 114; R. C. 1899, § 5422.]

Note of issue must be filed with clerk and notice of trial upon adverse party before case on calendar for trial. Note of issue must state whether question of law or fact. Oswald v. Moran, 9 N. D. 170, 82 N. W. 741.

New notice of trial required on remittitur from supreme court. Oswald v. Moran, 9 N. D. 170, 82 N. W. 741.

New note of issue and trial required when issue of law finally disposed of. Renoticed on remand from supreme court. Judgment irregular if case not renoticed. Oswald v. Moran, 9 N. D. 170, 82 N. W. 741.

New notice of trial not required, where new trial granted in district court. Connor v. Corson, 13 S. D. 550, 83 N. W. 588; In re Olson's Estate, 17 S. D. 1, 94 N. W. 421.

Service of new notice not required after amendment of complaint. J. I. Case Co. v. Eichinger, 15 S. D. 530, 91 N. W. 82.

§ 7012. **Either party proceeds. Separate trials.** Either party, when the case is reached upon the calendar and in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with his case, and take a dismissal of the complaint, or a verdict or judgment as the case may require. A separate trial between a plaintiff and any of the several defendants may be allowed by the court, whenever in its opinion justice will be promoted. [C. Civ. P. 1877, § 239; R. C. 1899, § 5423.]

Appeal from justice court cannot be dismissed without notice. Myers v. Mitchell, 1 S. D. 249, 46 N. W. 245; Keehl v. Schaller, 1 S. D. 290, 46 N. W. 934.

Granting separate trials is within discretion of court. Noyes v. Belding, 5 S. D. 603, 59 N. W. 1069.

§ 7013. **Who to furnish papers.** When the issue shall be brought to trial by the plaintiff, he shall furnish the court with a copy of the summons and pleadings with the offer of the defendant, if any shall have been made. When the issue shall be brought to trial by the defendant, and the plaintiff shall neglect or refuse to furnish the court with a copy of the summons and pleadings and the offer of the defendant, the same may be furnished by the defendant. [C. Civ. P. 1877, § 240; R. C. 1899, § 5424.]

Article 3.—Formation of the Trial Jury.

§ 7014. **Jury ballots.** At the opening of the court the clerk must prepare separate ballots containing the names of the persons returned as jurors, which must be folded as nearly alike as possible and so that the names cannot be seen, and must deposit them in the trial jury box. [C. Civ. P. 1877, § 241; R. C. 1899, § 5425.]

§ 7015. **Clerk to draw jury.** When the action is called for trial by jury, the clerk must draw from the trial jury box of the court the ballots containing the names of the jurors summoned, until the jury is completed or the ballots are exhausted. [C. Civ. P. 1877, § 242; R. C. 1899, § 5426.]

§ 7016. **Challenges classed, by whom.** Either party may challenge the jurors, but when there are several parties on either side, they must join in a challenge before it can be made. The challenges are to individual jurors, and are either peremptory or for cause. Each party is entitled to three peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately commencing with the plaintiff. [C. Civ. P. 1877, § 243; R. C. 1899, § 5427.]

Peremptory challenge; when to be exercised. Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003.

§ 7017. **Challenges for cause, grounds of.** Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by the political code to render a person competent as a juror.
2. Consanguinity or affinity within the fourth degree to either party.
3. Standing in the relation of guardian and ward, master and servant, employer and clerk or principal and agent to either party, or being a member

of the family of either party, or being a partner in business with either party, or surety on any bond or obligation for either party.

4. Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action.

5. Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation.

6. Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or some of them.

7. The existence of a state of mind in the juror evincing enmity against or bias to or against either party.

8. That he does not understand the English language as used in the courts. [C. Civ. P. 1877, § 244; R. C. 1899, § 5428.]

Overruling challenge while party has peremptory challenges remaining not error. Herbert v. Ry. Co., 3 Dak. 38, 13 N. W. 349; N. P. Ry. Co. v. Herbert, 116 U. S. 642.

Juror's qualification challenged for cause is question of fact for trial court. Haugen v. Ry. Co., 3 S. D. 394, 53 N. W. 769.

§ **7018. Trial of same.** Challenges for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge. [C. Civ. P. 1877, § 245; R. C. 1899, § 5429.]

§ **7019. Oath to jurors.** As soon as the jury is completed the following oath must be administered to the jurors:

"You, and each of you, do solemnly swear, that you will well and truly try the matters in issue between ....., the plaintiff, and ....., the defendant, and a true verdict render according to the evidence. So help you God."

If any person is conscientiously scrupulous of taking an oath, he shall be allowed to make affirmation, substituting for the words, "so help you God," at the end of the oath the following: "This you do affirm under the pains and penalties of perjury." [C. Civ. P. 1877, § 246; R. C. 1899, § 5430.]

Article 4.—Of the Conduct of the Trial.

§ **7020. Order of trial.** When the jury has been sworn, the trial must proceed in the following order, unless the judge for special reasons otherwise directs:

1. The plaintiff after stating the issue and his case must produce the evidence on his part.

2. The defendant may then open his defense and offer evidence in support thereof.

3. The parties may then respectively offer rebutting evidence only, unless the court for good reasons in furtherance of justice permits them to offer evidence upon their original case.

4. When the evidence is concluded, unless the case is submitted to the jury on either side or both sides without argument, the plaintiff must commence and may conclude the argument.

5. If several defendants having separate defenses appear by different counsel, the court must determine their relative order in the evidence and argument.

6. The court may then charge the jury. [C. Civ. P. 1877, § 247; R. C. 1899, § 5431.]

Error in charge of court not injurious is not ground for reversal. Not error to refuse to give instructions where point aleady given fairly and properly covered. Daeley Bros. v. Elevator Co., 4 N. D. 269, 60 N. W. 59.

As to discrediting own witness whose testimony is surprise, see George v. Triplett, 5 N. D. 50, 63 N. W. 891.

Argument of counsel is presumed to be based upon the evidence. Becker v. Cain, 8 N. D. 615, 80 N. W. 805.

Opening and closing argument by wrong party, error without prejudice. Laney v. Ingalls, 5 S. D. 183, 58 N. W. 572; Plymouth County Bank v. Gilman, 9 S. D. 278, 68 N. W. 735.

§ 7021. **Charge wholly written. Giving and refusing.** The court in charging a jury shall only instruct as to the law of the case; and no court shall instruct the jury in any civil case, unless such instructions are first reduced to writing. Either party may request instructions to the jury. Each instruction so requested must be written on a separate sheet and may be given or refused by the court, and the court shall write on the margin of such requested instruction given by him the word, "given," and on the margin of those which he does not give he shall write the word, "refused," and all instructions asked for by the counsel shall be given or refused by the court without modification or change, unless modified or changed by consent of counsel asking the same. The court may in its discretion submit the written instructions, which it proposes to give to the jury, to counsel in the case for examination, and require such counsel after a reasonable examination thereof to designate such parts thereof as he may deem objectionable, and such counsel must thereupon designate such parts of such instructions as he may deem improper, and thereafter only such parts so designated shall be excepted to by the counsel so designating the same. [C. Civ. P. 1877, § 248; 1893, ch. 84, § 1; R. C. 1895, § 5432.]

Instructions must be given as requested or refused. Galloway v. McLeen, 2 Dak. 372, 9 N. W. 98; Peart v. Ry. Co., 8 S. D. 431, 66 N. W. 814; Idem, 8 S. D. 634, 67 N. W. 837; Sutton v. Ry. Co., 14 S. D. 111, 84 N. W. 396.

Court must charge jury on every material point. Moline Plow Co. v. Gilbert, 3 Dak. 239, 15 N. W. 1.

To instruct orally not error unless objected to at time given. Boss v. Ry. Co., 2 N. D. 128, 49 N. W. 655; Stamm v. Coates, 4 Dak. 69, 22 N. W. 593.

When no request to instruct jury is made, failure to instruct not prejudicial error. State v. Haynes, 7 N. D. 352, 75 N. W. 267.

An instruction defective when considered alone, will not be considered erroneous when the charge as a whole states law correctly. Gagnier v. City of Fargo, 12 N. D. 219, 96 N. W. 841.

§ 7022. **Taken by jury. Exceptions.** All instructions given to the jury must be read to them by the court without disclosing to them whether such instructions were requested or not and must be signed by the judge and delivered to the jury and shall be taken by the jury in their retirement and returned with their verdict into court, and upon the close of the trial all instructions given or refused must be filed with the clerk and either party may within twenty days from the date of such filing file with the clerk exceptions to any of such instructions or refusals to instruct and the same shall thereupon be deemed duly excepted to; provided, that with the consent of both parties entered in the minutes the court may instruct the jury orally, in which case such oral instructions shall be taken down by the official stenographer and written out at length and the shorthand notes thereof together with such instructions so written out shall be filed in the case with the clerk, and either party may except to any of such instructions within twenty days after the date of such filing as hereinbefore provided; provided, that the official stenographer shall receive for writing out such instructions the same fees as for making transcripts; and provided, further, that when oral instructions are given, the jury shall not take the charge in their retirement, unless so ordered by the court. [C. Civ. P. 1877, § 249; 1893, ch. 84, § 1; R. C. 1899, § 5433.]

Judge may extend time to file exceptions to charge before or after time has elapsed. Lindblom v. Sonstelie, 10 N. D. 140, 86 N. W. 357.

Exceptions to charge may be taken at any time before final judgment is entered. Uhe v. Ry. Co., 4 S. D. 505, 57 N. W. 484; Idem, 3 S. D. 563, 54 N. W. 601.

§ 7023. **View by jury.** When in the opinion of the court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person, other than the person so appointed,

shall speak to them on any subject connected with the trial. [C. Civ. P. 1877, § 250; R. C. 1899, § 5434.]

Court has power, to compel injured person to submit to examination in personal injury suit. Discretionary. Brown v. C., M. & St. P. Ry. Co., 12 N. D. 61, 95 N. W. 153.

§ **7024. Admonitions to jury.** The jurors sworn to try a civil action, may, in the discretion of the court, be kept in charge of proper officers during each recess of the court pending the trial; and whether the jurors are permitted to separate, or are kept in charge of an officer, they shall be admonished by the court that it is their duty not to converse with or suffer themselves to be addressed by any person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them. [1897, ch. 46; R. C. 1899, § 5435.]

Separation of jury may not be prejudicial. Kirby v. Telegraph Co., 4 S. D. 105, 55 N. W. 759.

§ **7025. What papers jury may take.** Upon retiring for deliberation the jury may take with them all papers which have been received as evidence in the cause except depositions or copies of such papers as ought not in the opinion of the court to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial taken by themselves or any of them, but none taken by any other person. [C. Civ. P. 1877, § 252; R. C. 1899, § 5436.]

Jury not allowed to take pleadings to jury room. Harding v. Insurance Co., 10 S. D. 64, 71 N. W. 755; Mount Terry Mining Co. v. White, 10 S. D. 620, 74 N. W. 1060.

§ **7026. Conduct of jury in retirement.** When the case is finally submitted to the jury they may decide in court or retire for deliberation. If they retire, they must be kept together in some convenient place under charge of an officer, until they agree upon a verdict or are discharged by the court. Unless by order of the court, the officer having them under his charge must not suffer any communication to be made to them, or make any himself except to ask them if they have agreed upon a verdict; and he must not before their verdict is rendered communicate to any person the state of their deliberations or the verdict agreed upon. [C. Civ. P. 1877, § 253; R. C. 1899, § 5437.]

§ **7027. Disagreement. Information as to law.** After the jury have retired for deliberation, if there is a disagreement between them as to any part of the testimony or if they desire to be informed of any point of law arising in the case, they may require the officer to conduct them into court. Upon their being brought into court the information required must be given in the presence of or after notice to the parties or counsel. [C. Civ. P. 1877, § 254; R. C. 1899, § 5438.]

§ **7028. Sick jurors discharged.** If after the impaneling of a jury and before a verdict, a juror becomes sick so as to be unable to perform his duty, the court may order him to be discharged. In that case the trial may proceed with the other jurors, or another juror may be sworn and the trial begin anew; or the jury may be discharged and a new jury then or afterwards impaneled. [C. Civ. P. 1877, § 255; R. C. 1899, § 5439.]

§ **7029. Verdict prevented. New trial.** In all cases when the jury are discharged or prevented from giving a verdict by reason of accident or other cause during the progress of the trial or after the cause is submitted to them, the action may be again tried immediately or at a future time as the court may direct. [C. Civ. P. 1877, § 256; R. C. 1899, § 5440.]

§ **7030. Sealed verdict. Adjournment.** While the jury are absent, the court may adjourn from time to time in respect to other business; but it is nevertheless open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of the court in case

of an agreement during a recess or adjournment for the day. A final adjournment of the court for the term discharges the jury. [C. Civ. P. 1877, § 257; R. C. 1899, § 5441.]

Verdict may be received after adjournment of court to following day. Cranmer v. Kohn, 11 S. D. 245, 76 N. W. 937; State v. McDonald, 16 S. D. 78, 91 N. W. 447.

§ 7031. How verdict received. When the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman. The verdict must be in writing signed by the foreman, and must be read by the clerk to the jury and the inquiry made whether it is their verdict. If any juror disagrees, they must be sent out again; but if no disagreement is expressed and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict. If any one answers in the negative, the jury must again be sent out. [C. Civ. P. 1877, § 258; R. C. 1899, § 5442.]

Parties have a right to demand jury be polled. Peart v. Ry. Co., 5 S. D. 337, 58 N. W. 806.

§ 7032. Correcting verdict. When the verdict is announced if it is informal or insufficient in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out. [C. Civ. P. 1877, § 259; R. C. 1899, § 5443.]

ARTICLE 5.—OF THE VERDICT.

§ 7033. General and special verdict defined. The verdict of a jury is either general or special:

1. A general verdict is that by which they pronounce generally upon all or any of the issues either in favor of the plaintiff or defendant; and,

2. A special verdict is that by which the jury find the facts only leaving the judgment to the court.

The special verdict must present the conclusions of fact as established by the evidence and not the evidence to prove them; and these conclusions of fact must be so presented that nothing shall remain to the court but to draw from them conclusions of law. [C. Civ. P. 1877, § 260; R. C. 1899, § 5444.]

Whether special verdict be directed is in discretion of court. Moline Plow Co. v. Gilbert, 3 Dak. 239, 15 N. W. 1; McCormack v. Phillips, 4 Dak. 506, 34 N. W. 39; Langness v. Pettigrew, 5 Dak. 45, 37 N. W. 758.

Special verdict defined. Russell v. Meyer, 7 N. D. 335, 75 N. W. 262.

As to contents of special verdict, see Russell v. Meyer, 7 N. D. 335, 75 N. W. 262; Bartow v. Assurance Co., 10 S. D. 132, 72 N. W. 86.

Motion for verdict at close of plaintiff's case waived unless renewed after testimony in the case is closed. Tetrault v. O'Connor, 8 N. D. 15, 76 N. W. 225.

A party must renew motion for directed verdict at close of case to avail himself of error in refusing motion for directed verdict. First National Bank v. R. R. Valley Bank, 9 N. D. 319, 83 N. W. 221.

In general verdict, jury applies the law to the facts and pronounces upon all the issues generally. In special verdict jury "finds the facts" only—judge determines their legal effect. Morrison v. Lee, 13 N. D. 591, 102 N. W. 223.

General verdict controlled by special verdict. Cronk v. Ry. Co., 3 S. D. 93, 52 N. W. 420; Everett v. Buchanan, 2 Dak. 249, 6 N. W. 439.

§ 7034. When special verdict directed. How prepared. When either. The court in its discretion may, and when either party at or before the close of the testimony and before any argument to the jury is made or waived shall so request, shall direct the jury to find a special verdict. Such verdict shall be prepared by the court in the form of questions in writing, which shall be confined to matters involving the merits of the case and shall admit of direct answer and the jury shall make their answer thereto in writing. The court may also direct the jury, if they render a general verdict, to find in writing upon any particular questions of fact, to be stated as afore-

said. In every action for the recovery of money only, or of specific real property, the jury may in their discretion, when not otherwise directed by the court, render a general or a special verdict. The special verdict or finding must be filed with the clerk and entered upon the minutes. When the special findings of fact are inconsistent with the general verdict, the former controls the latter and the court must give judgment accordingly. [C. Civ. P. 1877, § 261; R. C. 1895, § 5445.]

Error to direct verdict when there is a substantial conflict of evidence. McRea v. Bank, 6 N. D. 353, 70 N. W. 813.

Motion for instructions or for directed verdict, when proper. Kolka v. Jones, 6 N. D. 461, 71 N. W. 558.

When conclusive defense proved without objection on ground not set up in answer, and court amends answer on motion, duty of court to direct verdict. Machine Co. v. Larson, 6 N. D. 533, 72 N. W. 921.

When both parties move for directed verdict with no question to be submitted to jury, court's decision will not be disturbed if it have support in the testimony. First M. E. Church v. Fadden, 8 N. D. 162, 77 N. W. 615.

Instructions should conform to the character of verdict required. Not to be instructed as to effect of their answers nor authorized to answer in form of legal conclusions. Morrison v. Lee, 13 N. D. 591, 102 N. W. 223.

§ 7035. Jury to find amount. Assessment when judgment rendered on pleadings. When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counterclaim for the recovery of money is established exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of the recovery; and they may also under the direction of the court assess the amount of the recovery when the court gives judgment on the pleadings for either party. [C. Civ. P. 1877, § 262; R. C. 1895, § 5446.]

As to amendment by court of verdict failing to find amount due, see English v. Goodman, 3 N. D. 129, 54 N. W. 540.

§ 7036. Specific personal property. Jury value and damages. In an action for the recovery of specific personal property the jury must find by their verdict the facts as the case may be as follows:

1. In case they find against the defendant and the property has not been delivered to the plaintiff, they must find the value of the property, or of the plaintiff's interest therein, if less than its full value, at the time of the taking and that the plaintiff is entitled to a delivery of the property, and they must also assess the damages, if any are claimed in the complaint, which the plaintiff has sustained by reason of the taking and detention of such property; or,

2. In case they find against the defendant and the property has been delivered to the plaintiff, they must find that the plaintiff is entitled to the property and they must also assess the damages, if any are claimed in the complaint, which the plaintiff has sustained by reason of the taking and detention of such property.

3. In case they find against the plaintiff and the property has been delivered to him, and the defendant in his answer claims a return of the property, they must find the value thereof, or of the defendant's interest therein, if less than its full value, at the time of the taking, and they must also assess the damages, if any are claimed in the answer, which the defendant has sustained by reason of the taking and detention of such property; or,

4. In case they find against the plaintiff and the property has been retained by the defendant, they must find that the defendant is entitled to such property.

5. In case the jury find that each party is entitled to specific portions of the property in controversy and such portion has been delivered to the opposite party and a return is claimed in the complaint or answer, they must find the value of such portion, or of the party's interest therein, if less than its full value, at the time of the taking, and also assess the damages, if any are claimed in the complaint or answer, in favor of the plaintiff or

defendant as hereinbefore provided as to the portion to which they find the plaintiff or defendant entitled.

Whenever the jury are so instructed, they must find the value of specific portions of the property in controversy or of the interest of either party therein, if less that its full value, at the time of the taking, and shall also assess the damages, if any are claimed by the party in whose favor they find sustained by reason of the taking and detention of such property. [C. Civ. P. 1877, § 263; R. C. 1895, § 5447.]

Where action tried in lower court as one of conversion, the point cannot be raised for the first time in the supreme court that the action is properly replevin and verdict is not such as the law requires in replevin. Marshall v. Andrews & Gage, 8 N. D. 364, 79 N. W. 851.

As to right to recover property independent of right to recover damages, see Nichols Shepard Co. v. Paulson, 10 N. D. 440, 87 N. W. 977.

As to judgment in claim and delivery for actual value of property and damages, see National Bank v. Feeney, 9 S. D. 550, 70 N. W. 874; Coughran v. Sundback, 9 S. D. 483, 70 N. W. 644; Holt v. Van Eps, 1 Dak. 98, 46 N. W. 689; Willis v. De Witt, 3 S. D. 281, 52 N. W. 1090.

§ 7037. Verdict and entries. Upon receiving a verdict an entry must be made by the clerk in the minutes of the court, specifying the time of trial, the names of the jurors and witnessess and setting out the verdict at length; and when a special verdict is found, either the judgment rendered thereon or, if the case is reserved for argument or further consideration, the order thus reserving it. [C. Civ. P. 1877, § 264; R. C. 1899, § 5448.]

Article 6.—Of the Trial by the Court.

§ 7038. How jury waived. Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, or for the recovery of specific real or personal property with or without damages, and with the assent of the court in other actions in the manner following:

1. By failing to appear at the trial.
2. By written consent in person or by attorney filed with the clerk.
3. By oral consent in open court entered in the minutes. [C. Civ. P. 1877, § 265; R. C. 1899, § 5449.]

Where both parties move for directed verdict, jury trial waived. Erickson v. Citizen's National Bank, 9 N. D. 81, 81 N. W. 46.

Court cannot substitute itself for jury without consent or waiver of parties. Yankton Insurance Co. v. Ry. Co., 7 S. D. 428, 64 N. W. 514.

Court not compelled to try issues of fact in common law action. Meldrum v. Kenefick, 15 S. D. 370, 89 N. W. 863.

§ 7039. Decision compulsory within thirty days. All motions or applications in any action, special proceeding or other matter in the district court must be decided and such decision be reduced to writing and filed with the clerk within thirty days after the same shall have been submitted to the court for decision, unless prevented by the sickness of the judge whose duty it is to decide the same or by other unavoidable casualty, and upon the trial of any question or issue of fact by the court its decision thereon and conclusions of law upon such decision, and direction for entry of judgment in accordance with such conclusions must be given in writing and filed with the clerk within sixty days after the cause has been submitted for decision, unless such decision is prevented for the reason hereinbefore stated, and judgment shall be entered by the clerk in accordance with such direction upon the application of the party entitled thereto and the filing of such decision and conclusions of law. Each judge of the district court shall not less than five nor more than fifteen days before each quarterly installment of his salary becomes due file in the office of the auditor of the state a certificate under his hand stating in effect that no motion, application or question or issue of fact submitted to him remains undecided contrary to the provisions of this section. And in case any such decision has been prevented by any of the causes enum-

erated in this section, such certificate shall state the facts constituting the cause of such prevention, and the state auditor is hereby directed not to sign or issue any warrant for the payment of any quarterly installment of salary to any judge of the district court until after such judge shall have filed such certificate as herein provided. [C. Civ. P. 1877, § 266; 1887, ch. 25, § 1; 1893, ch. 89, § 1; R. C. 1899, § 5450.]

Duty of court in preparation of findings, see Gull River Lumber Co. v. School District, 1 N. D. 500, 48 N. W. 427.

Provision that findings of fact and conclusions of law be separately stated is mandatory. Gaar-Scott Co. v. Spaulding, 2 N. D. 414, 51 N. W. 867.

As to failure to file decision before judgment, see Cole v. Stock Association, 3 S. D. 272, 52 N. W. 1086.

Failure to file decision within time no ground for reversal of judgment. Roblin v. Palmer, 9 S. D. 36, 67 N. W. 949; Edmonds v. Riley, 15 S. D. 470, 90 N. W. 139.

Statement of ultimate facts responsive to issue is required. McKenna v. Whittaker, 9 S. D. 442, 69 N. W. 587.

Stipulation of facts a substitute for findings. Brown v. Brown, 12 S. D. 506, 81 N. W. 883.

§ **7040. Facts and conclusions separately stated.** In giving the decision the facts found and the conclusions must be separately stated. Judgment upon the decision must be entered accordingly. [C. Civ. P. 1877, § 267; R. C. 1899, § 5451.]

§ **7041. How findings waived.** Findings of fact may be waived by the several parties to an issue of fact:

1. By failing to appear at the trial.
2. By consent in writing filed with the clerk. [C. Civ. P. 1877, § 268; 1887, ch. 25 § 2; R. C. 1899, § 5452.]

Waiver of findings. Cole v. Association, 3 S. D. 272, 52 N. W. 1086; N. W. Elevator Co. v. Lee, 15 S. D. 114, 87 N. W. 581; Chandler v. Kennedy, 8 S. D. 56, 65 N. W. 439; Nichols-Shepard Co. v. Stangler, 7 N. D. 102, 72 N. W. 1089; Gaar-Scott Co. v. Spaulding, 2 N. D. 414, 51 N. W. 867.

§ **7042. Preparation of findings by parties.** At the time the cause is submitted the judge may direct either or both parties to prepare findings of facts, unless they have been waived, and when so directed the party must within two days prepare and serve upon his adversary and submit to the judge such findings, and may within two days thereafter briefly suggest in writing to the judge why he desires findings upon the points included within the findings prepared by himself, or why he objects to findings upon the points included within the findings prepared by his adversary. The judge may adopt, modify or reject the findings so submitted. If at the time of the submission of the cause the judge does not direct the preparation of findings, or those prepared are rejected, then he must himself prepare the findings. [C. Civ. P. 1877, § 269; R. C. 1899, § 5453.]

Order to enter judgment in the absence of findings or waiver thereof is without authority of law. Prondzinski v. Garbutt, 9 N. D. 239, 83 N. W. 23.

§ **7043. Making up judgment.** On a judgment for the plaintiff upon an issue of law he may proceed in the manner prescribed by the first two subdivisions of section 7001 upon the failure of the defendant to answer. If judgment is for the defendant upon an issue of law and the taking of an account or proof of any fact is necessary to enable the court to complete the judgment, a reference may be ordered as in that section provided. [C. Civ. P. 1877, § 270; R. C. 1899, § 5454.]

§ **7044. Judgments, district and supreme courts to direct.** In all cases where at the close of the testimony in the case tried, a motion is made by either party to the suit requesting the trial court to direct a verdict in favor of the party making such motion, which motion was denied, the trial court on motion made, that judgment be entered notwithstanding the verdict, or on motion for a new trial, shall order judgment to be entered in favor of the party

who was entitled to have a verdict directed in his or its favor; and the supreme court of the state on appeal from an order granting or denying a motion for a new trial in the action in which such motion was made, or upon a review of such order or on appeal from the judgment, may order and direct judgment to be entered in favor of the party who was entitled to have such verdict directed in his or its favor, whenever it shall appear from the testimony that the party was entitled to have such motion granted. [1901, ch. 63.]

Judgment notwithstanding the verdict is ordered only when a motion for a directed verdict has been previously made and denied. Johns v. Ruff, 12 N. D. 74, 95 N. W. 440.

Judgment non obstante is granted only when it appears from the evidence that the party making the motion is entitled to it as a matter of law upon the merits. Aetna Indemnity Co. v. Schroeder, 12 N. D. 110, 95 N. W. 436.

Where there is an issue for the jury, judgment non obstante will not be granted. Nelson v. Grondahl, 12 N. D. 130, 96 N. W. 299.

Failure to unite a motion for new trial with one for judgment non obstante does not waive the former. Id. But see Pine Tree Lumber Co. v. City of Fargo, 12 N. D. 360, 96 N. W. 357.

On reversal in supreme court of a judgment notwithstanding the verdict, the cause will be remanded to the district court, with leave to the respondent to perfect a motion for a new trial, in cases where he has asked for a new trial in connection with the motion for a judgment notwithstanding the verdict. Nelson v. Grondahl, 13 N. D. 363, 100 N. W. 1093.

To justify a judgment notwithstanding the verdict, the verdict must not only not be justified by the evidence, but it must also appear that there is no reasonable probability that the defects in the proof necessary to support the verdict may be remedied on another trial. Meehan v. G. N. Ry. Co., 13 N. D. 432, 101 N. W. 183; Richmire v. Elevator Co., 11 N. D. 453, 92 N. W. 819.

Judgment notwithstanding the verdict. Beidler & Robinson Lumber Co. v. Coe Commission Co., 13 N. D. 639, 102 N. W. 880; Richmire v. Elevator Co., 11 N. D. 453, 92 N. W. 819.

§ 7045. When another judge may be called for prejudice or bias. When either party to a civil action pending in any of the district courts of the state shall, after issue joined and before the opening of any term at which the cause is to be tried, file an affidavit, corroborated by the affidavit of his attorney in such cause and that of at least one other reputable person, stating that there is good reason to believe that such party cannot have a fair and impartial trial of said action by reason of the prejudice, bias or interest of the judge of the district court in which the action is pending, the court shall proceed no further in the action, but shall forthwith request, arrange for and procure the judge of some other judicial district of the state to preside at said trial in the county of the judicial subdivision in which the action is pending. The actual expenses of such judge while in attendance upon the trial of the cause for which the change was had and the extra expense of the court and jury, incurred by reason of said change, shall be paid by the person asking for the change, in advance, or a bond to be approved by the clerk of the district court given therefor, the amount of said bond being fixed by the presiding judge; provided, that not more than one such change shall be granted on the application of either party. [1899, ch. 51; R. C. 1899, § 5454a.]

Change of judge not allowed in contempt proceedings. Township of Noble v. Aasen, 10 N. D. 264, 86 N. W. 742.

Disqualified judge may be compelled by mandamus to call another judge. Gunn v. Lauder, 10 N. D. 389, 87 N. W. 999.

Judge after being disqualified, not a competent court; and devoid of authority to act in matter of appointing a receiver; has certain ministerial duties to perform. Orcutt v. Conrad, 10 N. D. 431, 87 N. W. 982.

Article 7.—Of References and Trials by Referees.

§ 7046. Reference by consent. Fees of referee. All or any of the issues in an action whether of fact or law or both may be referred by the court

or judge thereof upon the written consent of the parties. The fees of referees shall be fixed by the court and shall in no case exceed ten dollars per day except upon the written consent of both parties to the reference. [C. Civ. P. 1877, § 271; 1889, ch. 112, § 1; R. C. 1895, § 5455.]

Reference by consent, see Illstad v. Anderson, 2 N. D. 167, 49 N. W. 659.

No further or written consent required where order of reference recites that in open court both parties consented. Where under a reference so made by consent of parties the order recites that case is sent to the referee to take and report the evidence, parties cannot be heard to say reference was a nullity and not a full reference under the statute. Heald v. Yumisko, 7 N. D. 422, 75 N. W. 807.

§ **7047. Reference without consent.** When the parties do not consent to the reference the court may upon the application of either party or of its own motion direct a reference in the following cases:

1. When the trial of an issue of fact will require the examination of a long account on either side, in which case the referee may be directed to hear and decide the whole issue or to report upon any specific question of fact therein: or,

2. When the taking of an account is necessary for the information of the court before judgment or for carrying a judgment or order into effect; or,

3. When a question of fact other than upon the pleadings shall arise upon motion or otherwise in any stage of the action. [C. Civ. P. 1877, § 272; 1889, ch. 112, § 2; R. C. 1899, § 5456.]

Order referring "the action" to a referee "with the usual powers" based on consent of the defendants, warrants the referee in making and reporting findings of facts and conclusions of law. Illstad v. Anderson, 2 N. D. 167, 49 N. W. 659.

The determination of amount of assessment of damages which merely requires inspection of by-laws and books of association, does not require examination of a long account. Kelly v. Oksall, 17 S. D. 185, 97 N. W. 11.

It must affirmatively appear from pleadings that examination of a long account is necessary. Ewart et al v. Koss, 17 S. D. 220, 95 N. W. 915.

§ **7048. To whom reference ordered.** A reference may be ordered to any person or persons not exceeding three agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees not exceeding three, who reside in the county or subdivision in which the action or proceeding is triable and against whom there is no legal objection. [C. Civ. P. 1877, § 273; R. C. 1899, § 5457.]

§ **7049. Objections to referee. Grounds of.** Either party may object to the appointment of any person as referee for the same cause for which challenges for cause may be taken to a petit juror in the trial of a civil action. [C. Civ. P. 1877, § 274; R. C. 1899, § 5458.]

§ **7050. Heard by court.** The objections taken to the appointment of any person as referee must be heard and disposed of by the court or judge thereof. Affidavits may be read and witnesses examined as to such objections. [C. Civ. P. 1877, § 275; R. C. 1899, § 5459.]

§ **7051. How trial conducted.** The trial by referee shall be conducted in the same manner as a trial by the court. Upon such trial the referee shall have the same power to grant adjournments and allow amendments to any pleading as the court would have and upon the same terms and with like effect. He shall also have the same power to preserve order and punish all violations thereof upon such trial and compel the attendance of witnesses before him and to punish them as for contempt for non-attendance or refusal to be sworn or testify as is possessed by the court. He shall give to the parties or their attorneys at least eight days' notice of the time and place of trial. He must state the facts found and conclusions of law separately and report his findings together with all of the evidence taken by him and all exceptions taken on the hearing to the district court and the district court may review such report and on motion enter judgment thereon, or set aside, alter or modify the same and enter judgment upon the same so

altered or modified, and may require the referee to amend his report when necessary. The judgment so entered by the district court may be appealed from to the supreme court in like manner as from judgments in other cases. [C. Civ. P. 1877, § 276; 1889, ch. 112, § 3; R. C. 1895, § 5460.]

Report of referee only advisory to court in equity case. Prondzinski v. Garbutt, 8 N. D. 191, 77 N. W. 1012.

Defects in report waived by filing exceptions, when. Hulst v. Association, 9 S. D. 144, 68 N. W. 200.

Report should state all rulings made, exceptions taken, and all material evidence. Sutterfield v. Magowan, 12 S. D. 139, 80 N. W. 180.

§ 7052. **Oath of referees.** The referees before proceeding to hear any testimony must be sworn well and truly to hear and determine the facts referred to them and true findings render according to the evidence, and they have power to administer oaths to all witnesses produced before them. [C. Civ. P. 1877, § 278; R. C. 1899, § 5461.]

ARTICLE 8.—EXCEPTIONS.

§ 7053. **Exception defined.** An exception is an objection upon a matter of law to a decision made either before or after judgment by a court or judge in an action or proceeding. The exception must be taken at the time the decision is made except as provided in section 7054. [1887, ch. 21, § 1; R. C. 1899, § 5462.]

For objections to introduction of evidence on ground of insufficiency of complaint, see note to section 6854 under title demurrer ore tenus.

Exception to giving or refusing instructions may be taken any time before entry of judgment. St. Croix Lumber Co. v. Pennington, 2 Dak. 467, 11 N. W. 497; Uhe v. Ry. Co., 4 S. D. 505, 57 N. W. 484.

Presumed to have been taken at the time ruling was made. Hall v. Harris, 2 S. D. 331, 50 N. W. 98.

§ 7054. **What deemed excepted to.** The verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision finally determining the rights of the parties, or some of them, an order granting or refusing a new trial, an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out a pleading or a portion thereof, refusing a continuance, an order made upon ex parte application and an order or decision made in the absence of a party are deemed to have been excepted to and the same may be reviewed both as to questions of law and the sufficiency of the evidence upon motion for a new trial or upon appeal as fully as if exception thereto had been expressly taken. [1877, ch. 21, § 2; R. C. 1895, § 5463.]

The particulars in which evidence is alleged to be insufficient should be specified. Pickert v. Rugg, 1 N. D. 230, 46 N. W. 446; Holcomb v. Keliher, 3 S. D. 497, 54 N. W. 535; Narregang v. Brown County, 14 S. D. 357, 85 N. W. 602; Henry v. Dean, 6 Dak. 78, 50 N. W. 487.

Action of district court in directing verdict and refusing to allow plaintiff to dismiss, cannot be reviewed on appeal without exceptions. De Lendrecie v. Peck, 1 N. D. 422, 48 N. W. 342.

Exception must be taken, except "when deemed excepted to." Hall v. Harris, 2 S. D. 331, 50 N. W. 98; Benedict v. Johnson, 4 S. D. 387, 57 N. W. 66; Cranmer v. Kohn, 11 S. D. 245, 76 N. W. 937; Smith v. Commercial Bank, 7 S. D. 465, 64 N. W. 529; Long v. Collins, 15 S. D. 259, 88 N. W. 571.

When exception taken in fact, record will be liberally construed in furtherance of justice. Hall v. Harris, 2 S. D. 331, 50 N. W. 98.

§ 7055. **Statement of the case defined.** A statement of the evidence or a part thereof settled by the court for the purpose of reviewing either errors of law or the sufficiency of the evidence or both is designated in this code a statement of the case. [R. C. 1895, § 5464.]

Record may be remanded for correction. Baumer v. French, 8 N. D. 319, 79 N. W. 340.

On appeal from an order granting motion for new trial, abstract must state particular grounds and errors upon which trial court acted. McMillan v. Conat, 11 N. D. 256, 91 N. W. 67.

§ 7056. Exceptions settled at time or after. A statement containing exceptions to any ruling may be presented to the judge for settlement at the time the ruling is made, or the exception may be entered on the judge's minutes and afterwards settled. Such statement must be conformable to the truth or be at the time corrected until it is so, and signed by the judge and filed with the clerk. [C. Civ. P. 1877, § 280; R. C. 1895, § 5465.]

Not duty of judge to engross bill of exceptions. Edwards Lumber Co. v. Baker, 3 N. D. 170, 54 N. W. 1026.

District court has power to settle bill of exceptions after appeal. Coulter v. G. N. Ry. Co., 5 N. D. 568, 67 N. W. 1046.

Duty of judge to strike out redundant and useless matter. Dewey v. Fifler, 10 S. D. 623, 74 N. W. 1052.

Not duty of judge to require stenographer to read notes; requirement of transcript. Myers v. Campbell, 11 S. D. 433, 78 N. W. 353; but see Kaeppler v. Pollock, 8 N. D. 59, 76 N. W. 987.

§ 7057. Exceptions on trial by referee. Service of findings and conclusions. In any trial by a referee either party may take exceptions in the same manner as on trials by the court and the referee shall note in his minutes any exceptions so taken as they are taken. The prevailing party shall serve upon the other a copy of the referee's findings of fact and conclusions of law after the same shall have been filed with a notice of the time and place of such filing, and either party may except to any finding of fact or conclusion of law by a referee by filing written exceptions with the clerk at any time before the expiration of twenty days after service of such copy and notice. All such exceptions may be incorporated with the statement of the case which may be thereafter settled. When the referee's findings of fact or conclusions of law are set aside or modified by the court, no exceptions shall be necessary to enable a full review of such orders upon appeal. [R. C. 1895, § 5466.]

§ 7058. Preparation and settlement of statement of the case. When a party desires to have a statement of the case settled he may within thirty days after receiving notice of the entry of judgment, or such further time as the court may allow, prepare the draft of a statement and serve the same upon the adverse party. Such draft must contain all the exceptions upon which the party relies, but no particular form of exception is required. The objection must be stated with so much of the evidence or other matter as is necessary to explain it and no more. Only the substance of the reporter's notes of the evidence shall be stated. Documents on file in the action or proceeding may be copied or the substance thereof stated. There shall be incorporated in every such statement a specification of the particulars in which the evidence is alleged to be insufficient to justify the verdict or other decision and of the errors of law upon which the party settling the same intends to rely. If no such specification is made the statement shall be disregarded on motion for a new trial and on appeal. Within twenty days after the service of the draft of a statement the adverse party may propose amendments to the same and serve such amendments upon the other party. The proposed statement and amendments must within twenty days thereafter be presented by the party seeking the settlement thereof to the judge who tried or heard the case upon five days' notice to the adverse party. At the time designated the judge must settle the statement. If no amendments are served, or if served, are allowed, the proposed statement may be presented with the amendments, if any, to the judge for settlement without notice to the adverse party. If the judge is absent from the district at the time when the proposed statement should be presented to him for settlement, the time of such absence shall not be deemed any portion of the time herein limited for the settlement thereof. It is the duty of the judge in settling the statement to strike out of it all redundant and useless matter and to make the statement truly represent the case, notwithstanding the assent of the

parties to such matter. When settled the statement must be signed by the judge with his certificate to the effect that the same is allowed and shall then be filed with the clerk. [1887, ch. 21, § 4; R. C. 1895, § 5467.]

Bill to be settled within statutory limit, or such further time as allowed by court. St. Croix Lumber Co. v. Pennington, 2 Dak. 467, 11 N. W. 497; Gold Street v. Newton, 2 Dak. 149, 3 N. W. 329.

After a trial judge has announced what shall be embodied in bill of exceptions, not his duty to engross the bill, and he cannot be said to have neglected to settle such bill unless he neglects to sign. Lumber Co. v. Baker, 3 N. D. 170, 54 N. W. 1026.

Action upon appeal bond in admiralty, see Braithwaite v. Jordan, 5 N. D. 196, 65 N. W. 701.

Errors in rulings or verdict not specified in statement must be disregarded. Thompson v. Cunningham, 6 N. D. 426, 71 N. W. 128.

In cases tried by court, settlement of statement required. Nichols-Shepard Co. v. Stangler, 7 N. D. 102, 72 N. W. 1089.

Substance of reporter's notes of evidence only to be stated. Thuet v. Strong, 7 N. D. 565, 75 N. W. 922.

Statement of case and abstract must conform to law and rules of court. McTavish v. G. N. Ry. Co., 8 N. D. 94, 76 N. W. 985.

Filing of statement of case before motion for new trial may be waived, when. Plano Mfg. Co. v. Jones, 8 N. D. 315, 79 N. W. 338.

Irregularity in filing statement of case cannot be first raised on appeal. Plano Mfg. Co. v. Jones, 8 N. D. 315, 79 N. W. 338.

Statement of case without specifications is to be disregarded. Mooney v. Donovan, 9 N. D. 93, 81 N. W. 50; Chandler v. Kennedy, 8 S. D. 56, 65 N. W. 439.

Twenty days begins to run at expiration of statutory time for service of amendments. McDonald v. Beatty, 9 N. D. 293, 83 N. W. 224.

Statement of case in jury action. See N. P. Ry. Co. v. Lake, 10 N. D. 541, 88 N. W. 461.

Record of the facts upon which court erred in ruling, necessary before review had in appellate court. Facts essential to a review must be brought into statement of case. Errors based on facts extrinsic to the record proper, not reviewable unless they appear in statement of case. State v. Gerhart, 13 N. D. 663, 102 N. W. 880.

Duty of clerk to present bill of exceptions to judge. Filing bill with clerk. See Pollock v. Aikens, 4 S. D. 374, 57 N. W. 1.

Extension of time to settle bill discretionary with court. McGillicuddy v. Morris, 7 S. D. 592, 65 N. W. 14.

As to amendment of bill, see Spencer v. Forcht, 14 S. D. 145, 84 N. W. 765.

§ 7059. **Exceptions after judgment.** Exceptions to any decision made after judgment may be presented to the judge at the time of such decision and may be settled or noted as provided in section 7056 and a statement thereof may be presented and settled afterwards as provided in section 7058, and within like periods after entry of the order, upon appeal from which such decision is reviewable. [C. Civ. P. 1877, § 282; R. C. 1895, § 5468.]

§ 7060. **Application to supreme court when judge refuses to settle.** If the judge in any case refuses to allow an exception in accordance with the facts, the party desiring the statement settled may apply by petition to the supreme court to prove the same. The application may be made in the manner and under such regulations as that court may prescribe and the statement when proven must be certified by a justice thereof as correct and filed with the clerk of the court in which the action was tried, and when so filed it has the same force and effect as if settled by the judge who tried the cause. [C. Civ. P. 1877, § 283; R. C. 1895, § 5469.]

As to settlement by supreme court of bill, see Taylor v. Miller, 10 N. D. 361, 87 N. W. 597; Plano Mfg. Co. v. Person, 11 S. D. 539, 79 N. W. 833; Baird v. Gleckler, 3 S. D. 300, 52 N. W. 1097.

§ 7061. **In case of vacancy.** A judge may settle and sign a statement of the case after as well as before he ceases to be such judge. If such judge before the statement of the case is settled dies, is removed from office, becomes disqualified, is absent from the state or refuses to settle the same, or if no mode is provided by law for the settlement of the same, it shall be settled and

certified in such manner as the supreme court may by its order or rules direct. [C. Civ. P. 1877, § 284; 1887, ch. 21, § 5; R. C. 1895, § 5470.]

Article 9.—Of New Trials.

§ 7062. New trial defined. A new trial is a re-examination of an issue of fact in the same court, after a trial and decision by a jury or court or by referees. [C. Civ. P. 1877, § 285; R. C. 1899, § 5471.]

§ 7063. Causes for new trial. The former verdict or other decision may be vacated and a new trial granted on the application of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict or to a finding on any question submitted to them by the court by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

3. Accident or surprise, which ordinary prudence could not have guarded against.

4. Newly discovered evidence material to the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.

5. Excessive damages appearing to have been given under the influence of passion or prejudice.

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

7. Error in law occurring at the trial and excepted to by the party making the application. [C. Civ. P. 1877, § 286; R. C. 1899, § 5472.]

To warrant granting a new trial, affidavits must show such new facts as will probably lead to a different result. Facts must be established by affidavits of persons personally familiar. Not sufficient to set forth that another will testify to them. Affidavits must be produced unless some strong reason shown why requirement should be dispensed with. Application looked upon with disfavor and distrust. There must be a legal ground for granting new trial. Abuse of discretion by trial court subject to review. Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419.

Conflict in evidence should be substantial, not illusory. Fuller v. N. P. Elevator Co., 2 N. D. 220, 50 N. W. 359.

Verdict without support in evidence or contrary to instructions of court, cannot be permitted to stand. Admission of irrelevant testimony tending to prejudice jury, reversible error. McMillan v. Aitchison, 3 N. D. 183, 54 N. W. 1030.

Affidavit must state evidence is newly discovered or give other substantial reason why not introduced. Goose River Bank v. Gilmore, 3 N. D. 188, 54 N. W. 1032.

As to requisites of newly discovered evidence, see Goose River Bank v. Gilmore, 3 N. D. 188, 54 N. W. 1032; Ochsenreiter v. Elevator Co., 11 S. D. 91, 75 N. W. 822; Gaines v. White, 1 S. D. 434, 47 N. W. 524.

Explicit and consistent testimony of one witness will support verdict. Taylor v. Jones, 3 N. D. 235, 55 N. W. 593.

In claim and delivery verdict finding plaintiff entitled to possession of property will support judgment for plaintiff for possession or its value as found by jury. Branstetter v. Morgan, 3 N. D. 290, 55 N. W. 758.

New trial granted for newly discovered evidence, seldom disturbed on appeal. Patch v. N. P. Ry. Co., 5 N. D. 55, 63 N. W. 207.

Error in charge of court can be reviewed on appeal from judgment without motion for new trial. McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685.

Instruction as to credibility of witness, see McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685.

Variance between pleading and proof, see Coulter v. G. N. Ry., 5 N. D. 568, 67 N. W. 1046.

As to verdict result of passion or prejudice, see Flugel v. Henschel, 6 N. D. 205, 69 N. W. 195.

When motion made for insufficiency of evidence is addressed to discretion of trial court. See Lumber Co. v. Elevator Co., 6 N. D. 276, 69 N. W. 691.

"Errors in law" are such errors in rulings and instructions as occur during trial and before rendition of verdict or decision. McKenzie v. Water Co., 6 N. D. 361, 71 N. W. 608.

Sufficiency of evidence challenged by request for directed verdict or exceptions to charge of court. Henry v. Maher, 6 N. D. 413, 71 N. W. 127.

Insufficiency of evidence not considered on appeal unless assigned as error. Colby v. McDermont, 6 N. D. 495, 71 N. W. 772.

Where jury follow instructions limiting them to particular ground of negligence, verdict cannot be sustained if there is no evidence to support a finding of that particular negligence. Roehr v. G. N. Ry. Co., 7 N. D. 95, 72 N. W. 1084.

As to sufficiency of the evidence, see Black v. Walker, 7 N. D. 414, 75 N. W. 787.

Excess remitted. Where by inadvertence verdict excessive by a few dollars, point cannot be urged for first time in supreme court. Loverin-Browne Co. v. Bank, 7 N. D. 569, 75 N. W. 923.

Where substantial conflict in testimony, verdict cannot be disturbed. Muri v. White, 8 N. D. 58, 76 N. W. 503.

In cases tried by jury, the appellate court will not examine the evidence further than to determine whether sufficient to sustain the verdict. Howland v. Ink, 8 N. D. 63, 76 N. W. 992.

As to proof necessary for new trial, on motion, for misconduct of jury, see Kinneberg v. Kinneberg, 8 N. D. 311, 79 N. W. 337.

Judgment will not be disturbed where there is a substantial conflict in the evidence. Becker v. Duncan, 8 N. D. 600, 80 N. W. 762.

Appellate court will not disturb discretionary findings of trial court, where motion is on insufficiency of evidence. Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762.

New trial in claim and delivery, proper, where allegations and admissions in pleadings were made with reference to the lump value and these could not be resorted to in fixing the value of a different mass of property. Northwood T. & S. Bank v. Magnusson, 9 N. D. 151, 82 N. W. 748.

Motion for new trial properly granted where instructions to jury "inapplicable," "misleading" and "confusing to jury." Welter v. Leistikow, 9 N. D. 283, 83 N. W. 9.

In absence of motion for new trial supreme court will not pass on the sufficiency of the evidence. Ness v. Jones, 10 N. D. 587, 88 N. W. 706.

Court has authority to order reduction of verdict or require prevailing party to accept or submit to new trial. Discretion of court will not be disturbed except for abuse. Ross v. Robertson, 12 N. D. 27, 94 N. W. 765.

Motion for new trial need not be united with one for judgment notwithstanding the verdict. Motion for new trial not waived thereby. Nelson v. Grondahl, 12 N. D. 130, 96 N. W. 299.

Particulars wherein evidence insufficient must be specified. Specification that verdict is against the law is not sufficient. Gagnier v. City of Fargo, 12 N. D. 219, 96 N. W. 841.

Motion for a judgment notwithstanding the verdict must unite alternative of a new trial or latter will not be awarded. Pine Tree Lumber Co. v. City of Fargo, 12 N. D. 360, 96 N. W. 357.

Order granting new trial rests in sound discretion of trial court. Not disturbed except for abuse of discretion. State v. Howser, 12 N. D. 495, 98 N. W. 352; Pengilly v. J. I. Case Co., 11 N. D. 249, 91 N. W. 63.

Failure of witness, not subpenaed, to attend, not ground for new trial. Josephson v. Sigfusson, 13 N. D. 312, 100 N. W. 703.

Correctness of order granting new trial will be reviewed. Reason assigned for order not involved in appeal. Davis v. Jacobson & Dinnie, 13 N. D. 430, 101 N. W. 314.

Discretionary as to granting new trial for newly discovered evidence. Longley v. Daly, 1 S. D. 257, 46 N. W. 247.

Impeachment of verdict not to be accomplished by jurors' affiadvit. Murphy v. Murphy, 1 S. D. 316, 47 N. W. 142; Gaines v. White, 2 S. D. 410, 50 N. W. 901; Ulrick v. Loan Co., 2 S. D. 285, 49 N. W. 1054.

Irregularity in proceedings includes misconduct of attorney, see Lindsay v. Pettigrew, 3 S. D. 199, 52 N. W. 873; Morris v. Hubbard, 14 S. D. 525, 86 N. W. 25.

Must specify particular errors. Tootle v. Petrie, 8 S. D. 19, 65 N. W. 43; Franz Brewing Co. v. Mielenz, 5 Dak. 136, 37 N. W. 728.

It is irregular to exclude after trial without notice note sued on and admitted in evidence. Moddie v. Breiland, 9 S. D. 506, 70 N. W. 637.

As to new trial for excessive verdict and result of passion and prejudice, see Murray v. Leonard, 11 S. D. 22, 75 N. W. 272.

Irregular to allow jury to take improper papers to jury room. Cranmer v. Kohn, 11 S. D. 245, 76 N. W. 937.

Verdict obtained by chance will be set aside. Long v. Collins, 12 S. D. 621, 82 N. W. 95.

If there is legal evidence to support verdict, new trial will not be granted. Weiss v. Evans, 13 S. D. 185, 82 N. W. 388.

That newly discovered evidence is cumulative, is no objection. Wilson v. Seaman, 15 S. D. 103, 87 N. W. 577.

Granting of new trial in discretion of court, although an amendment is necessary for introduction of defense sought to be interposed on new trial. Polk v. Carney, 17 S. D. 436, 97 N. W. 360.

§ 7064. **How application made.** When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the preceding section, it must be made upon affidavit; for any other cause it may be made at the option of the moving party either upon a statement of the case or upon the minutes of the court. On such hearing reference may be had in all cases to the pleadings and orders of the court on file; and when the motion is made on the minutes, reference may also be had to any depositions, documentary evidence and stenographic report of the testimony or other papers used upon the trial. [C. Civ. P. 1877, § 287; 1881, ch. 33, § 2; R. C. 1895, § 5473.]

Error to grant new trial on stated case without specification of particulars. Baumer v. French, 8 N. D. 319, 79 N. W. 340.

Setting aside verdict by court on its own motion must be done promptly. Clement v. Barnes, 6 S. D. 483, 61 N. W. 1126.

Application must be made in accordance with statute. Parrott v. Hot Springs, 9 S. D. 202, 68 N. W. 329; Williams v. Ry. Co., 11 S. D. 463, 78 N. W. 949.

Application on ground of improper language in addressing jury must be made on affidavits. Morris v. Hubbard, 14 S. D. 525, 86 N. W. 25.

§ 7065. **Notice. Contents. When heard.** The party intending to move for a new trial must within twenty days after the verdict of the jury, if the action was tried by jury, or after notice of the decision of the court, if the action was tried without a jury, serve upon the adverse party a notice of his intention designating the statutory grounds upon which the motion will be made and whether the same will be made upon affidavits, or the minutes of the court, or a statement of the case:

1. If the motion is to be made upon affidavits the moving party must within thirty days after serving the notice, or such further time as the court in which the action is pending may allow, serve a copy of such affidavits upon the adverse party, who shall have ten days to serve counter affidavits, a copy of which must be served upon the moving party. Motions for new trial on the ground of newly discovered evidence may be made at any time before the close of the term next succeeding that at which the trial was had.

2. If the motion is to be made upon a statement of the case and no statement has already been settled as hereinbefore provided the moving party shall have the same time after service of the notice of intention to move for a new trial to prepare and obtain a settlement of a statement of the case as is provided in section 7058.

3. When the motion is to be made upon the minutes of the court and the ground of the motion is the insufficiency of the evidence to justify the verdict or other decision, the notice of intention must specify the particulars in which the evidence is alleged to be insufficient; and, if the ground of the motion is error in law occurring at the trial and excepted to by the moving party, the notice of intention must specify the particular errors upon which the party will rely. If the notice does not contain the specifications herein stated and the motion is made on the minutes of the court, the motion must be denied.

If an appeal is taken from the decision on such motion the party appealing shall have the same time after such decision in which to prepare and have settled a statement of the case to be used on appeal as is provided in section 7058. [C. Civ. P. 1877, § 288; 1887, ch. 21, § 6; R. C. 1895, § 5474.]

Motion made upon bill of exceptions. Transcript of stenographer's minutes not bill of exceptions. Wood v. Nissen, 2 N. D. 26, 49 N. W. 103.

Errors of law must be specified in the bill. Ilstad v. Anderson, 2 N. D. 167, 49 N. W. 659; Gould v. Elevator Co., 2 N. D. 216, 50 N. W. 969; Pickert v. Rugg, 1 N. D. 230, 46 N. W. 446; Billingsley v. Hiles, 6 S. D. 445, 61 N. W. 687; Hostetter v. Elevator Co., 4 N. D. 357, 61 N. W. 49; Chandler v. Kennedy, 8 S. D. 56, 65 N. W. 439; Schmitz v. Hegar, 5 N. D. 165, 64 N. W. 943; Nelson v. Jordeth, 15 S. D. 46, 87 N. W. 140; Davis v. Cook, 9 S. D. 319, 69 N. W. 18; Tootle v. Petrie, 8 S. D. 19, 65 N. W. 43.

Bad practice to unite in same instrument notice of intention to move and notice of motion for new trial. Anderson v. Bank, 5 N. D. 80, 64 N. W. 114.

Specifications of error must be embodied in bill of exceptions. Schmitz v. Heger, 5 N. D. 165, 64 N. W. 943.

Notice must specify the particular errors or grounds for the motion. May be waived, when. Fletcher Bros. v. Nelson, 6 N. D. 94, 69 N. W. 53.

Order vacating judgment and granting new trial must be served upon attorney of record. McKenzie v. Water Co., 6 N. D. 361, 71 N. W. 608.

Statement must specify particulars in which evidence is insufficient. Holcomb v. Keliher, 3 S. D. 497, 54 N. W. 535.

Bill or statement must be settled and filed before hearing of motion. Parrott v. Hot Springs, 9 S. D. 202, 68 N. W. 329; Plano Mfg. Co. v. Jones, 8 N. D. 315, 79 N. W. 338.

Must specify grounds. Moddie v. Breiland, 9 S. D. 506, 70 N. W. 637; McMahon v. Crockett, 12 S. D. 11, 80 N. W. 136; Nelson v. Jordeth, 15 S. D. 46, 87 N. W. 140; Baumer v. French, 8 N. D. 319, 79 N. W. 340; Anderson v. Medbery, 16 S. D. 324, 92 N. W. 1089.

"Minutes of court," meaning defined. Distad v. Shanklin, 11 S. D. 1, 75 N. W. 205.

Motion made upon minutes of court; notice of intention must specify particular errors or grounds relied upon. Reagan v. McKibben, 11 S. D. 270, 76 N. W. 943; Hall v. Harris, 1 S. D. 279, 46 N. W. 931; Henry v. Maher, 6 N. D. 413, 71 N. W. 127; Herman v. Silver, 15 S. D. 476, 90 N. W. 41; Bunker v. Taylor, 10 S. D. 526, 74 N. W. 450; Regan v. Whittaker, 14 S. D. 373, 85 N. W. 863; Narregang v. Brown County, 14 S. D. 357, 85 N. W. 602.

Must be service of notice of decision before twenty days begins to run. First National Bank v. McCarthy, 13 S. D. 356, 83 N. W. 423.

"Notice of intention" a prerequisite. MacGregor v. Pierce et al, 17 S. D. 51, 95 N. W. 281; Moddie v. Breiland, 9 S. D. 506, 70 N. W. 637.

Where no notice of intention served and record does not show service or presence of opposing counsel, waiver of notice of intention not presumed. On failure to serve notice of intention, court without authority to entertain motion, and status of appeal, that of from judgment alone. MacGregor v. Pierce et al, 17 S. D. 51, 95 N. W. 281.

Bill of exceptions containing no specifications of law or in which evidence deemed insufficient to sustain findings, will be disregarded. Wenke v. Hall, 17 S. D. 305, 96 N. W. 103; Clarke v. Mitchell, 17 S. D. 430, 97 N. W. 358.

Defect not cured by assignment of errors presented for first time on appeal. Clarke v. Mitchell, 17 S. D. 430, 97 N. W. 358.

§ 7066. Verdict vacated by court. The verdict of a jury may also be vacated and a new trial granted by the court in which the action is pending on its own motion without the application of either of the parties, when there has been such plain disregard by the jury of the instructions of the court or the evidence in the case as to satisfy the court that the verdict was rendered under a misapprehension of such instructions or under the influence of passion or prejudice. [C. Civ. P. 1877, § 289; R. C. 1899, § 5475.]

New trial not to be granted after long lapse of time after verdict and where both parties had initiated proceedings based on the verdict. Gould v. Duluth & Dakota Elevator Co., 2 N. D. 216, 50 N. W. 969.

Verdict against instructions of court cannot be permitted to stand. McMillen v. Aitchison, 3 N. D. 183, 54 N. W. 1030.

As to verdict "result of passion" or "prejudice," and "disregarding instructions," see Flugel v. Henschel, 6 N. D. 205, 69 N. W. 195; Distad v. Shanklin, 11 S. D. 1, 75 N. W. 205.

§ 7067. Where hearing may be had. The application for a new trial shall be heard at the earliest practicable period after service of the notice of intention, if the motion is to be heard upon the minutes of the court, and in other cases, after the affidavits are served or the statement of the case is filed, and may be brought to a hearing in open court or before the judge at chambers in any county in the district in which the action was tried by either party upon notice of eight days to the adverse party, specifying the time and place of hearing. On such hearing reference may be had in all cases to the pleadings and orders of the court on file and when the motion is made on the minutes, reference may also be had to any depositions, documentary evidence and stenographic report of the testimony on file. [C. Civ. P. 1877, § 290; 1887, ch. 21, § 7; R. C. 1895, § 5476.]

§ 7068. Time may be extended. The court or judge may upon good cause shown in furtherance of justice extend the time within which any of the acts mentioned in sections 7058 and 7065 may be done, or may, after the time limited therefor has expired, fix another time within which any of such acts may be done. [1887, ch. 21, § 8; R. C. 1895, § 5477.]

Extension of time within sound discretion of court. Johnson v. Ry. Co., 1 N. D. 354, 48 N. W. 227; Gardner v. Gardner, 9 N. D. 192, 82 N. W. 872.

Authority is not an absolute non-reviewable authority. Moe v. N. P. Ry. Co., 2 N. D. 282, 50 N. W. 715; McDonald v. Beatty, 9 N. D. 293, 83 N. W. 224.

Order made after expiration of time, extends time for settlement. Edwards & McCullough Lumber Co. v. Baker, 2 N. D. 289, 50 N. W. 718.

Trial court powerless to extend time where no cause for extension appears affirmatively of record. McDonald v. Beatty, 9 N. D. 293, 85 N. W. 224; McGillicudy v. Morris, 7 S. D. 592, 65 N. W. 14.

Judge has power to extend time to file exceptions to charge. Lindblom v. Sonstelie, 10 N. D. 140, 86 N. W. 357.

Power to extend time to settle statement discretionary; disturbed for abuse only. Sykes v. Beck, 12 N. D. 242, 96 N. W. 844.

Amendment of record in supreme court. See Foley-Wadsworth Imp. Co. v. Porteous, 7 S. D. 34, 63 N. W. 155.

Allowing amendment of notice of intention is in effect extension of time within which to move for new trial. McKittrick v. Pardee, 8 S. D. 39, 65 N. W. 23.

Extension of time will be presumed, unless contrary is shown. Gade v. Collins, 8 S. D. 322, 66 N. W. 466.

Notice of motion may be amended. Bunker v. Taylor, 10 S. D. 526, 74 N. W. 450.

Application to amend bill of exceptions within one year not too late. Hedlum v. Mining Co., 14 S. D. 369, 85 N. W. 861.

Court's power to fix another time in which to settle bill of exceptions limited to cases where good cause shown, and exercise of such authority subject to review by supreme court. McPherson v. Julius, 17 S. D. 98, 95 N. W. 428.

Amendment of bill of exceptions allowed by trial court, without good cause, will be stricken out on motion. Blackman v. City of Hot Springs, 17 S. D. 378, 97 N. W. 7.

§ 7069. Statement used on appeal. A statement of the case settled as provided in section 7058, whether the same is used upon a motion for a new trial or not, may be used on appeal from the final judgment. [1887, ch. 21, § 9; R. C. 1895, § 5478.]

ARTICLE 10.—MANNER OF GIVING, ENTERING AND SATISFYING JUDGMENTS.

§ 7070. Judgment entered by clerk on order. Judgment upon an issue of law, or fact, or upon confession, or upon failure to answer, may be entered by the clerk upon the order of the court or of the judge thereof. [C. Civ. P. 1877, § 291, R. C. 1899, § 5479.]

An order overruling demurrer with leave to amend is not a final judgment. Bode v. Investment Co., 1 N. D. 121, 45 N. W. 197.

Judgment may be applied for ex parte. Notice not necessary unless a stay exists or court directs that notice be given, when. Gould v. Elevator Co., 3 N. D. 96, 54 N. W. 316.

Order dismissing action for jurisdictional reasons is not a judgment, and is not appealable, although it will authorize the clerk to enter judgment. In re Weber, 4 N. D. 119, 59 N. W. 523.

Upon withdrawal of answer through misconduct of attorney, default cannot be taken without notice. Nichells v. Nichells, 5 N. D. 125, 64 N. W. 73.

As to judgment by default on failure to serve one of defendants, see Stewart v. Parsons, 5 N. D. 273, 65 N. W. 672.

Appeal must be from final judgment not from order for judgment. Field v. Elevator Co., 5 N. D. 400, 67 N. W. 147.

Effect of judgment irregularly entered. See Cameron v. G. N. Ry., 8 N. D. 124, 77 N. W. 1016.

Judgment void for want of jurisdiction may be attacked by motion or by action and remedy not barred by statutory limit of one year. Freeman v. Wood, 11 N. D. 1, 88 N. W. 721; Wheeler v. Castor, 11 N. D. 347, 92 N. W. 381.

As to judgment entered by "inadvertence" and "mistake" being vacated, see City of Fargo v. Keeney, 11 N. D. 484, 92 N. W. 836.

No time fixed for entry. Williams v. Wait, 2 S. D. 210, 49 N. W. 209.

§ 7071. **Notice of entry of judgment served.** Within ten days after entry of judgment in an action in which an appearance has been made, notice of such entry together with a general description of the nature and amount of relief and damages thereby granted, shall be served by the prevailing upon the adverse party. [R. C. 1895, § 5480.]

§ 7072. **Against whom. Counterclaim.** Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and the court may determine the ultimate rights of the parties on each side as between themselves.

2. If a counterclaim established at a trial exceeds the plaintiff's demand so established, judgment for the defendant must be given for the excess; and the court may grant to the defendant any affirmative relief to which he may be entitled.

3. In an action against several defendants the court may in its discretion render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper.

4. The court may also dismiss the complaint with costs in favor of one or more defendants in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served. In an action brought by or against a married woman judgment may be given against her as well for costs as for damages or both for such costs and for such damages in the same manner as against other persons, to be levied and collected of her separate estate and not otherwise. [C. Civ. P. 1877, § 292; R. C. 1899, § 5481.]

As to entry of judgment against joint obligors served with summons, see Braithwaite v. Power, 1 N. D. 455, 48 N. W. 354; North Star Shoe Co. v. Stebbins, 3 S. D. 540, 54 N. W. 593; Black Hills Bank v. Kellogg, 4 S. D. 312, 56 N. W. 1071; Merchants National Bank v. Stebbins, 15 S. D. 280, 89 N. W. 674.

§ 7073. **Relief limited by complaint.** The relief granted to the plaintiff, if there is no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him relief consistent with the case made by the complaint and embraced within the issue. [C. Civ. P. 1877, § 293; R. C. 1899, § 5482.]

Amount demanded in complaint in an action for damages caused by negligence controls in determining whether matter in dispute exceeds $2,000 on application to remove cause to federal court. Smith v. N. P. Ry. Co., 3 N. D. 17, 53 N. W. 173.

Where general verdict is in favor of plaintiff without fixing amount of recovery, not error prejudicial to defendant to order judgment for plaintiff for amount admitted by the pleadings. English v. Goodman, 3 N. D. 129, 54 N. W. 540.

Relief limited by prayer of complaint. Parszyk v. Mach, 10 S. D. 555, 74 N. W. 1027.

§ 7074. **Death before judgment.** If a party dies after a verdict or decision upon any issue of fact and before judgment, the court may nevertheless

render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate. [C. Civ. P. 1877, § 294; R. C. 1899, § 5483.]

§ 7075. To recover personalty. In an action to recover the possession of personal property the judgment for the plaintiff may be for the possession, or for the recovery of possession, or the value thereof in case a delivery cannot be had and for damages for the taking and detention thereof. If the property has been delivered to the plaintiff and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had and damages for the taking and detention thereof. [C. Civ. P. 1877, § 295; R. C. 1895, § 5484.]

In claim and delivery, owner who purchases property at judicial sale not entitled to value of property, but to sum it cost him to regain possession. Northrup v. Cross, 2 N. D. 433, 51 N. W. 718.

As to conclusiveness of judgment in claim and delivery, see Paulson v. Nichols & Shepard Co., 8 N. D. 606, 80 N. W. 765.

Rights to judgment for return and for value and damages are two separate rights. Judgment for damages does not impair the right to recover the property or its value. Nichols & Shepard Co. v. Paulson, 10 N. D. 440, 87 N. W. 977.

As to judgments providing for actual value in cases where delivery cannot be had, see National Bank v. Feeney, 9 S. D. 550, 70 N. W. 874; Willis v. DeWitt, 3 S. D. 281, 52 N. W. 1090.

§ 7076. Putting in possession. Every judgment that contains a direction for the sale of any specific real property may also direct the delivery of the possession of such property to the purchaser; and the officer receiving the execution or order of sale may enforce such judgment by putting the purchaser in possession of the premises in like manner and with like authority as if special execution had been directed to him for that purpose. [C. Civ. P. 1877, § 296; R. C. 1899, § 5485.]

§ 7077. Transfer of title or discharge of incumbrance by court. In all actions arising under chapter 31 of this code and in actions commenced for the satisfaction of record of mortgages or other liens upon real property or for the specific performance of contracts relating to real property the court may by its judgment without any act on the part of the defendant transfer the title to real property and remove or discharge a cloud or incumbrance thereon, and a certified copy of such judgment may be recorded in the office of the register of deeds of the county in which the property affected is situated. [1889, ch. 111, § 1; R. C. 1895, § 5486.]

§ 7078. Judgment book. The clerk shall keep among the records of the court a book for the entry of the judgments to be called the "judgment book." [C. Civ. P. 1877, § 297; R. C. 1899, § 5487.]

As to entry of judgment in judgment book after appeal taken, see Greenly v. Hopkins, 7 S. D. 561, 64 N. W. 1128.

As to effect of certain omissions in entry of judgment, see Muller v. Flavin, 13 S. D. 595, 83 N. W. 687.

§ 7079. How judgment entered. The judgment shall be entered in the judgment book and shall specify clearly the relief granted or other determination of the action. [C. Civ. P. 1877, § 298; R. C. 1899, § 5488.]

As to inconsistency between verdict and judgment, see Kellogg, Johnson & Co. v. Gilman, 3 N. D. 538, 58 N. W. 339.

Original judgment is the entered record of judgment. In re Weber, 4 N. D. 119, 59 N. W. 523; Gould v. Elevator Co., 3 N. D. 96, 54 N. W. 316; Cameron v. G. N. Ry. Co., 8 N. D. 124, 77 N. W. 1016; McTavish v. G. N. Ry., 8 N. D. 333, 79 N. W. 443; Rolette County v. Pierce County, 8 N. D. 613, 80 N. W. 804; Locke v. Hubbard, 9 S. D. 364, 69 N. W. 588.

Order for judgment is not the final judgment unless its wording is such as to express the final decision of the court on all matters contained in the record. McTavish v. G. N. Ry., 8 N. D. 333, 79 N. W. 443.

Judgment is not required to be entered at any particular time. Williams v. Wait, 2 S. D. 210, 49 N. W. 209.

§ 7080. **Judgments, execution of.** Entry of judgments upon the decision of the court or the verdict of a jury in civil actions in the district court shall not be stayed; but the court may stay execution of such judgment for such reasonable time as may be necessary to move for a new trial in the action, or to perfect an appeal from the judgment entered therein. [1901, ch. 111.]

§ 7081. **Judgment roll. Contents.** Unless the party or his attorney shall furnish a judgment roll, the clerk immediately after entering the judgment shall attach together and file the following papers, which shall constitute the judgment roll:

1. In case the complaint is not answered by any defendant the summons and complaint or copies thereof, the affidavit for service of summons by publication, if any, proof of service and that no answer has been received, the report, if any, and a copy of the judgment.

2. In all other cases, the summons, pleadings or copies thereof, the verdict, decision or report, the offer of the defendant, a copy of the judgment, the statement of the case, if any, and all orders and papers in any way involving the merits and necessarily affecting the judgment. [C. Civ. P. 1877, § 299; R. C. 1895, § 5489.]

Transcript of the proceedings embracing the evidence is neither bill of exceptions or statement of case, and no part of the judgment roll. Nor is the same an order "involving the merits." Wood v. Nissen, 2 N. D. 26, 49 N. W. 103.

An order denying motion to quash mandamus is not a part of the judgment roll. Mooney v. Donovan, 9 N. D. 93, 81 N. W. 50.

Findings are a part of the judgment roll. Colonial Mtg. Co. v. Bradley, 4 S. D. 158, 55 N. W. 1108.

Proof of service of summons is a part of judgment roll. Brettell v. Deffebach, 6 S. D. 21, 60 N. W. 167.

Stenographer's or referee's notes of the evidence are not a part of the judgment roll. Even when so stipulated by the parties, they cannot take the place of a bill of exceptions or statement of the case. Merchants National Bank v. McKinney, 6 S. D. 58, 60 N. W. 162.

Judgment roll must be filed before appeal is taken. Greenly v. Hopkins, 7 S. D. 561, 64 N. W. 1128; Dyea Electric Co. v. Easton, 14 S. D. 520, 86 N. W. 23; Martin v. Smith, 11 S. D. 437, 78 N. W. 1001.

Letter from judge stating the reasons for his action not a part of the judgment roll. Morrow v. Letcher, 10 S. D. 33, 71 N. W. 139.

An order refusing to dismiss appeal from justice court is not an order involving the merits of an action and is not part of the judgment roll. Brown v. Brown, 12 S. D. 380, 81 N. W. 627.

Where an order consolidates two cases, it is a part of the judgment roll. Spencer v. Forcht, 14 S. D. 145, 84 N. W. 765.

§ 7082. **Judgments, lien of. Docketing in other counties. Secured on appeal. Effect.** On filing a judgment roll upon a judgment directing in whole or in part the payment of money, it may be docketed with the clerk of the court, in which it was rendered, in a book to be known as the judgment docket, and in any other county upon filing with the clerk of the district court for said county a transcript of the original docket, and it shall be a lien on all the real property except the homestead in the county where the same is so docketed of every person against whom any such judgment shall be rendered, which he may have at the time of the docketing thereof in the county in which such real property is situated or which he shall acquire at any time thereafter, for ten years from the time of docketing the same in the county where it was rendered, and no judgment heretofore rendered shall hereafter become a lien on real property as herein provided, unless it is docketed in the county where the land is situated; provided, however, that when the land is situated in an unorganized county said judgment may be filed in the county to which such unorganized county is attached for judicial purposes, and it shall thereupon become a lien upon the land of the judgment debtor in such unorganized county; but when said unorganized county becomes organized the said lien must be filed in the office of the clerk of the district court of such county within

ninety days after the organization of such county or it shall cease to be a lien upon such real estate. But whenever an appeal from any judgment shall be pending and the undertaking requisite to stay execution on such judgment shall have been given and the appeal perfected as provided in this code, the court in which such judgment was recovered may, on special motion after notice to the person owning the judgment, direct the clerk to make an entry on the judgment docket that the judgment is secured on appeal, and thereupon it shall cease during the pendency of the appeal to be a lien on the real property of the judgment debtor as against purchasers and mortgagees in good faith and for value. [C. Civ. P. 1877, § 300; 1883, ch. 82, § 1; R. C. 1899, § 5490.]

Where judgment docketed, execution may issue to sheriff of county. Minkler v. U. S. Sheep Co., 4 N. D. 507, 62 N. W. 594.

Execution must issue from county where judgment taken. Bostwick v. Benedict, 4 S. D. 414, 57 N. W. 78.

Docketing creates a lien on real estate. Bostwick v. Benedict, 4 S. D. 414, 57 N. W. 78; Williams v. Rice, 6 S. D. 9, 60 N. W. 153.

Judgment must be entered in judgment book to create lien. Locke v. Hubbard, 9 S. D. 364, 69 N. W. 588.

Lien of judgment lost after ten years although action has been commenced to enforce within ten years, but not reached until after expiration thereof. Ruth v. Wells, 13 S. D. 482, 83 N. W. 568.

§ 7083. Judgments, renewal of. Continuing lien. Any judgment directing in whole or in part the payment of money which has been heretofore, or may hereafter, be duly entered and docketed in the judgment book in the office of the clerk of any district court of this state, whether said judgment was originally rendered by the court in whose clerk's office the same is entered, or whether entered upon a transcript of judgment from any other county in the state, pursuant to sections 7082, 7085 and 7086, or upon a certified transcript of the docket entry of a judgment or decree of any district court or circuit court of the United States, within the state of North Dakota, pursuant to sections 7087 and 7088, or entered upon a certified transcript of the judgment of a justice of the peace, pursuant to section 7093, or entered pursuant to any other provision of law, may be renewed, and the lien thereof continued for a further period of ten years from and after the filing of the affidavit for renewal, as hereinafter provided. [1901, ch. 110, § 1.]

§ 7084. Affidavit, who may make. When. Any judgment creditor, his personal representative, agent, assignee or attorney may at any time within the ninety days next preceding the expiration of the ten-year period within which a judgment may be a lien under existing law, make an affidavit, entitled as in the original judgment, setting forth the names of the parties, plaintiff and defendant, the name of the court in which docketed, the date and amount of the original judgment, the number of the judgment book in which entered and the page of the entry of the same, and such affidavit shall set forth the name of the owner of said judgment, and the source of his title thereto, if not the party in whose name the judgment was entered, a statement of each assignment of said judgment necessary to trace the title thereof from the original judgment creditor, and if the judgment was entered upon a certified transcript from any other court or county, this fact shall be made to appear, together with a statement of each county in which a transcript of said judgment has been filed, that no execution is outstanding and unreturned upon said judgment, either in the county of its original entry or in any county in which the same has been transcripted, or, if any execution is outstanding, that fact shall be stated, the date and amount of all payments upon said judgment, whether collected under execution or otherwise, and said affidavit shall make it appear that all payments have been duly credited upon said judgment, and whether any amount has been realized that has not been credited upon the judgment and upon the records in the court in which the judgment was originally rendered, or in any other court in which it has

been transcripted, that there are no set-offs or counterclaims against the person for whose benefit the renewal is sought and in favor of the judgment debtor or debtors, and if a counterclaim or set-off does exist in favor of the judgment debtor, the affidavit must contain a statement of the amount, if ascertained or certain, and an offer to allow the same as a credit pro tanto upon the amount due from the judgment debtor; or, if the counterclaim or set-off is unsettled or undetermined, an offer that when the same shall be settled or determined, by suit or otherwise, the same may be allowed as a payment or credit upon said judgment to the full amount which may subsequently be adjudged due the judgment debtor thereon. Said affidavit shall also show the exact amount due upon said judgment, after allowing all set-offs and counterclaims known to the affiant, and must set forth any other facts or circumstances necessary to a complete disclosure as to the exact condition of said judgment; said affidavit must be verified positively by the person making it, and not on information and belief, and the filing of such affidavit in the office of the clerk of the district court where said judgment is duly entered and docketed, shall operate to renew and revive said judgment to the extent of the balance shown due in said affidavit for the period of ten years from the date of the filing of such affidavit and the docketing of said affidavit of renewal, as hereinafter set forth. An execution may issue upon said judgment as renewed under the same conditions and to the same force and effect within said renewal period as upon a judgment primarily rendered and entered at the date of said renewal; and all other remedies for the enforcement of judgments shall apply to the enforcement of said renewal judgment. [1901, ch. 110, § 2.]

§ 7085. **Clerk enters affidavit.** The affidavit mentioned in the preceding section shall be immediately entered by the clerk at length in the judgment book, and the clerk shall enter in his judgment book forthwith, after a statement of said original judgment, the date of said renewal, the fact of renewal, and the amount for which said judgment is renewed, and the entry and docketing of said affidavit of renewal shall operate to continue the lien of said judgment on all the real property, excepting the homestead of the judgment debtor or debtors, in the county where the same is so docketed, which he or they may have at the time of the docketing thereof in the county in which such real estate is situate, or in which he or they shall acquire at any time thereafter for ten years from the time of such docketing in the county where the same is so entered; and a certified copy of said renewal affidavit and of the docket entries thereon, certified by the clerk of the district court wherein the same is filed, entered and docketed, as aforesaid, may be by the plaintiff filed and docketed in any other county of the state of North Dakota in which a transcript of the original judgment was filed, pursuant to sections 7082 and 7086. [1901, ch. 110, § 3.]

§ 7086. **Duties of clerk on filing transcript.** Upon the filing of a transcript of judgment in the office of any clerk of the district court as provided herein the clerk with whom such transcript is filed shall forthwith by mail notify the clerk issuing the same of the time when such judgment was docketed in the county in which such transcript is filed, and a memorandum showing the time of such docketing shall be entered by the clerk who issued the transcript upon his judgment docket. [R. C. 1895, § 5491.]

§ 7087. **Docketing judgments of United States courts in clerk of district court's office.** A transcript of the docket entry of any judgment or decree rendered in any district or circuit court of the United States within this state, duly certified by the clerk of such district or circuit court of the United States, may be filed with the clerk of the district court of any county in this state, and the same shall be immediately docketed by said clerk in the same manner as judgments rendered in the district courts in this state are docketed. [1890, ch. 83, § 1; R. C. 1899, § 5492.]

§ 7088. **Becomes a lien from date of docketing.** From the date of such docketing and not before such judgment or decree shall be a lien upon all the real estate of the judgment debtor not exempt from execution in such county, owned by him or the title to which he may subsequently acquire in the county where such docketing is made, in the same manner and to the same extent and under the same conditions only as if such judgment or decree had been rendered by the district court of this state. [1890, ch. 83, § 2; R. C. 1899, § 5493.]

§ 7089. **How article construed.** Nothing herein shall be construed to require the docketing of a judgment or decree of the United States court in the office of the clerk of the district court of this state in the same county, in which a judgment or decree of the United States court is rendered, in order that such judgment or decree shall be a lien upon any property within such county. [1890, ch. 83, § 3; R. C. 1899, § 5494.]

§ 7090. **How judgment docketed.** The clerk shall docket the judgment by entering alphabetically in the judgment docket the names of the judgment debtor or debtors, the names of the party or parties in whose favor the judgment was rendered, the sum recovered or directed to be paid in figures, the date of the judgment, the year, day, hour and minute when the judgment roll or transcript was filed, the year, day, hour and minute when the judgment was docketed in his office and the page in the judgment book where the same is entered, the name of the court in which the judgment was rendered, the name of the attorney or attorneys for the party recovering the judgment and, if there are two or more judgment debtors, such entries must be repeated under the initial letter of the surname of each. [C. Civ. P. 1877, § 301; R. C. 1899, § 5495.]

§ 7091. **Assignment of judgment to be entered in judgment book.** Every clerk of the district court upon the presentation to him of an assignment of any judgment rendered or docketed therein, signed by the party in whose favor the judgment is rendered, his executor or administrator and acknowledged in the manner prescribed by law for the acknowledgment of deeds, must immediately enter the same in the judgment book and must note the fact of such assignment, the date thereof and the name of the assignee in the margin of the entry of such judgment in such judgment book and also upon the docket of such judgment. And the clerk of the district court of any other county or subdivision where such judgment is docketed must note the fact of such assignment, the date thereof and the name of the assignee upon the presentation to and filing with him of a certified copy of the original judgment docket with the said facts of such assignment noted thereon. [C. Civ. P. 1877, § 302; R. C. 1899, § 5496.]

§ 7092. **Cancellation and discharge.** Any judgment rendered or docketed in the district courts of the state may be canceled and discharged by the clerk thereof:

1. Upon the filing with him of an acknowledgment of the satisfaction thereof signed by the party in whose favor the judgment was obtained, his attorney of record, his executor, administrator or assignee and duly acknowledged in the manner required to admit a deed of real property to record.

2. Upon the return of any execution issued upon such judgment wholly satisfied, or the presentation of a satisfaction piece duly executed and acknowledged as hereinbefore provided, to the clerk of any district court, he must immediately note upon the judgment docket and in the margin of the judgment book where such judgment is entered the date of such cancellation, and the manner thereof, by satisfaction piece filed, execution returned satisfied, or otherwise.

3. And any partial satisfaction of the judgment may be made and noted upon the records in like manner; and thereupon all judgments and liens

thereby created must be taken and deemed to be canceled and discharged to the extent of the entries so made upon the judgment docket and no more.

4. And the clerk of any other district court, or the district court of any other county or subdivision, wherein a transcript of any such judgment docket shall have been filed and judgment docketed accordingly, must cancel the same in like manner upon his judgment docket upon the filing in his office of a certified copy of the original judgment docket entry duly canceled as hereinbefore provided. [C. Civ. P. 1877, § 303; R. C. 1899, § 5497.]

Where a judgment is void for want of jurisdiction, it may be vacated by a motion made in the original action. As to power of attorney of record over judgment after entry, see Beach v. Beach, 6 Dak. 371, 43 N. W. 701.

§ 7093. **Justice must give abstract. Duty of clerk of court.** A justice of the peace, on the demand of a party in whose favor he shall have rendered a judgment, must give a certified abstract thereof in substantially the form prescribed by section 8446 of the justices' code, which may be filed in the office of the clerk of the district court of the county or subdivision in which the judgment was rendered, and such clerk must thereupon enter such judgment in the judgment book and upon the judgment docket; and from the time of the docketing thereof it becomes a judgment of such district court, for purposes of execution, and a lien upon real property owned by the debtor, and a certified transcript of the docket of such judgment may be filed, and the judgment docketed accordingly, in any other county or subdivision with the like effect in every respect as if the judgment had been rendered in the district court where such judgment is filed. [C. Civ. P. 1877, § 304; R. C. 1899, § 5498; 1903, ch. 115.]

The docketing of justice's judgment does not create a presumption in favor of the jurisdiction of the justice. Phelps v. McCollam, 10 N. D. 536, 88 N. W. 292.

Justice's judgment docketed in circuit court becomes a judgment of that court. Williams v. Rice, 6 S. D. 9, 60 N. W. 153.

§ 7094. **Mutual judgments set-off.** Mutual final judgments may be set-off pro tanto the one against the other by the court upon proper application and notice. [C. Civ. P. 1877, § 305; R. C. 1899, § 5499.]

For set-off of mutual judgments, see Patterson v. Ward, 8 N. D. 87, 76 N. W. 1046; Cleveland v. McCanna, 7 N. D. 455, 75 N. W. 908; Hroch v. Aultman & Taylor Co., 3 S. D. 477, 54 N. W. 269; Lindsay v. Pettigrew, 8 S. D. 244, 66 N. W. 321; Sweeney v. Bailey, 7 S. D. 404, 64 N. W. 188; Pirie v. Harkness, 3 S. D. 178, 52 N. W. 581.

§ 7095. **Satisfaction of judgments when persons having authority to satisfy same cannot be found.** Whenever any person against whom there exists a judgment for the payment of money, or on whose property such a judgment is a lien, files in the office of the clerk of the court in which said judgment was rendered, an affidavit setting forth the existence of such judgment, and that he desires to pay the same, and has made diligent effort, but has been unable to find any person having power or authority to satisfy the same, or that the person having power or authority refuses to satisfy the same, such person may pay the amount shown by the records of such court to be due on such judgment to the clerk of the court in which such judgment was entered, and such clerk shall receive such money when tendered in payment of any such judgment, and shall thereupon note satisfaction of such judgment on the judgment docket, and on the register of the action in which such judgment was entered, and shall execute under his hand and official seal, and deliver to the person paying such judgment, a certificate reciting the receipt by him, said clerk, of such money in satisfaction of such judgment, and that the same is fully paid and satisfied of record. Such clerk shall immediately notify all persons appearing of record to have any interest in, or lien upon said judgment, including the attorney of record of the original judgment creditor, that he has received the amount due on such judgment and

has satisfied the same of record, which notice shall be given in writing and be mailed by registered letter to the last known post office address of each of such persons, and the registry receipts for such letters shall be filed with the other papers in the case. Such clerk shall, upon demand therefor, pay over such money to the person entitled thereto, and take his duplicate receipts therefor, one of which said clerk shall retain, and the other he shall file in the action in which such judgment was rendered; provided, however, that such clerks shall not discharge any judgments until the time for perfecting any appeal provided by law therefor has expired, and any discharge in violation of this proviso shall be void without prejudice to a judgment creditor or his assigns in any way. [1901, ch. 112.]

§ 7096. Cancellation of judgment against bankrupts. Procedure. Any person discharged from his debts pursuant to the act of congress known as "an act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, may, at any time after obtaining such discharge in bankruptcy, file in the office of the clerk of any court of record in which a judgment shall have been rendered, or a transcript thereof filed against him, a certified copy of such discharge in bankruptcy, and may make application to the judge of such court for a discharge of such judgment from record; and, if it shall appear to the court that the applicant has thus been discharged from the payment of such judgment, the court may order and direct that such judgment be discharged and satisfied of record; and, when such order is filed in the office of the clerk of such court, the said clerk shall immediately enter a satisfaction of such judgment upon his records; provided, however, that no such application shall be made, or order granted, except upon thirty days' notice to the judgment creditor whose judgment is sought thereby to be satisfied of record, or his executors, administrators or assigns, served in the manner provided for the service of notices in civil actions; or, in case such judgment creditor or his executors, administrators or assigns shall not reside within the state of North Dakota, in such manner as the court shall provide by order; provided, further, that nothing in this article shall be construed to apply to judgments not listed among the liabilities of the bankrupt in his petition in bankruptcy under said act of congress. [1905, ch. 125, § 1.]

§ 7097. Certificate of clerk of bankruptcy court to be prima facie evidence of service. A certificate from the clerk of the bankruptcy court stating the names and addresses of the persons to whom notices of the hearing of the application for discharge in bankruptcy has been mailed by him, shall be prima facie evidence of service under said act of congress. [1905, ch. 125, § 2.]

§ 7098. Affidavit of applicant served with notice of motion. It shall not be necessary to serve, with the motion papers, a copy of the discharge in bankruptcy, or a copy of the certificate of the clerk of the bankruptcy court, but all the necessary facts may be incorporated in an affidavit of the applicant, or his attorney, which affidavit shall be served with the notice of motion [1905, ch. 125, § 3.]

CHAPTER 12.

OF THE EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS.

ARTICLE 1.—THE EXECUTION AND LEVY.

§ 7099. **Execution at any time within ten years.** The party in whose favor judgment has been given and in case of his death his personal representatives duly appointed may at any time within ten years after the entry of judgment proceed to enforce the same by execution as provided in this chapter. [C. Civ. P. 1877, § 306; R. C. 1895, § 5500.]

Execution may issue at request of representatives of deceased. Judgment creditor. Revival of judgment unnecessary. Daisey Roller Mills v. Ward, 6 N. D. 317, 70 N. W. 271.

Execution issued after five years is voidable, not void. Dakota Inv. Co. v. Sullivan, 9 N. D. 303, 83 N. W. 233.

A court of equity may stay execution of judgment, when. Griswold v. M., St. P. & S. S. M. Ry., 12 N. D. 435, 97 N. W. 538.

Issue of execution after five years. See Williams v. Rice, 6 S. D. 9, 60 N. W. 153.

Execution cannot issue until after entry of judgment. Locke v. Hubbard, 9 S. D. 364, 69 N. W. 588.

Judgment debtor not estopped by order of revival to set up equitable defenses. Cassill v. Morrow, 13 S. D. 109, 82 N. W. 418.

§ 7100. **For delivery or sale.** When a judgment requires the payment of money or the delivery of real or personal property, the same may be enforced in those respects by execution as provided in this chapter. When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment by making the sale and applying the proceeds in conformity therewith. When it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuses, he may be punished by the court as for contempt. [C. Civ. P. 1877, § 308; R. C. 1899, § 5501.]

A judgment in mechanic's lien foreclosure directing the issuance of an execution and sale of the property to satisfy the lien, is not erroneous. McCormack v. Phillips, 4 Dak. 506, 34 N. W. 39.

Order must be served personally as basis for contempt proceeding. Larson v. Larson, 9 S. D. 1, 67 N. W. 842.

§ 7101. **Three kinds of execution.** There shall be three kinds of execution: one against the property of the judgment debtor; another against his person; and the third for the delivery of the possession of real or personal property or such delivery with damages for withholding the same. [C. Civ. P. 1877, § 309; R. C. 1899, § 5502.]

§ 7102. **Against property. To different counties.** When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. When it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property or some part thereof is situated. Executions may be issued at the same time to different counties. Real property adjudged to be sold must be sold in the county where it lies by the sheriff of such county, or by a referee appointed by the court for that purpose, and thereupon the sheriff or referee must execute a certificate of sale to the purchaser as hereinafter provided. An execution may issue against a married woman, and it must direct the levy and collection of the amount of the judgment against

her from her separate property, and not otherwise. [C. Civ. P. 1877, § 310; R. C. 1899, § 5503.]

As to irregularity in execution, when amendable. See State v. Cassidy, 4 S. D. 58, 54 N. W. 928.

Execution must be issued from county where judgment was rendered. Bostwick v. Benedict, 4 S. D. 414, 57 N. W. 78.

Execution to sheriff of another county is valid though taken from office before transcript is filed in that county. McDonald v. Fuller, 11 S. D. 355, 77 N. W. 581.

§ 7103. **When against person.** If the action is one in which the defendant might have been arrested as provided in section 6890 and section 6892, an execution against the person of the judgment debtor may be issued to any county within the jurisdiction of the court after the return of an execution against his property unsatisfied in whole or in part. But no execution shall issue against the person of a judgment debtor unless an order of arrest has been served as in this code provided, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section 6890. [C. Civ. P. 1877, § 311; R. C. 1899, § 5504.]

As to execution against the person, see Griffith v. Hubbard, 9 S. D. 15, 67 N. W. 850; Winton v. Knott, 7 S. D. 179, 63 N. W. 783; Hormann v. Sherin, 8 S. D. 36, 65 N. W. 434; Granholm v. Sweigle, 3 N. D. 476, 57 N. W. 509.

§ 7104. **Issue and contents of execution.** The writ of execution must be issued in the name of the state of North Dakota, attested in the name of the judge, sealed with the seal of the court and subscribed by the clerk, and directed to the sheriff, or to the coroner when the sheriff is a party or interested; and it must intelligibly refer to the judgment, stating the court, the county where the judgment roll or transcript is filed, the names of the parties, the amount of judgment, if it is for money, and the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

1. If it is against the property of the judgment debtor, to satisfy the judgment with interest and accruing costs out of the personal property of such debtor; and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county or at any time thereafter.

2. If it is against real or personal property in the hands of personal representatives, heirs, devisees, legatees or tenants of real property or trustees, to satisfy the judgment out of such property.

3. If it is against the person of the judgment debtor, to arrest such debtor and commit him to the jail of the county, until he shall pay the judgment or be discharged according to law.

4. If it is for the delivery of the possession of real or personal property, to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages or rents or profits recovered by the same judgment out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein; if a delivery thereof cannot be had, and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed or at any time thereafter, and shall in that respect be deemed an execution against property. [C. Civ. P. 1877, § 312; R. C. 1899, § 5505.]

§ 7105. **Time of return.** The execution shall be returnable within sixty days after its receipt by the officer to the clerk with whom the record of judgment is filed. [C. Civ. P. 1877, § 313; R. C. 1899, § 5506.]

§ 7106. **Property liable to execution. Manner of levy.** All goods, chattels, moneys and other property both real and personal or any interest therein of the judgment debtor not exempt by law and all property and rights of

property seized and held under attachment in the action are liable to execution. Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, and any interest in real or personal property and all other property not capable of manual delivery, shall be liable to be taken on execution and sold as hereinafter provided. The levy of an execution shall be made in the same manner as a levy under a warrant of attachment. [C. Civ. P. 1877, § 314; R. C. 1895, § 5507.]

Levy may be made upon debt due judgment debtor. Faber v. Wagner, 10 N. D. 287, 86 N. W. 963.

As to levy upon and sale of a judgment, see McLaughlin v. Alexander, 2 S. D. 226, 49 N. W. 99.

Mortgagor's equity of redemption is subject to sale on execution. Muller v. Flavin, 13 S. D. 595, 83 N. W. 687.

§ 7107. **Pledged or mortgaged property may be levied on.** When property is pledged or mortgaged or subject to a lien for the payment of money or the performance of any obligation the right and interest of the execution debtor therein may be sold on execution without taking possession of or removing the property to the place of sale, but the entire right and interest of such debtor in all the property separately pledged or covered by each separate mortgage or lien shall be sold together as a distinct parcel or thing and the purchaser at such sale shall acquire all the right and interest of such debtor therein. [R. C. 1895, § 5508.]

§ 7108. **Officer's proceedings on execution.** When an execution is delivered to any officer, he must indorse thereon the day and hour when he received it and must proceed to execute the same with diligence; and if executed, an exact description of the property at length with the date of the levy, sale or other act done by virtue thereof must be indorsed upon or appended to the execution; and if the writ was not executed or executed in part only, the reason in such case must be stated in the return. If no personal property is found an indorsement to that effect must be made on the writ before levy is made on real property. [C. Civ. P. 1877, § 315; R. C. 1899, § 5509.]

There must be an indorsement of no personal property found before levy upon real property. As to sufficiency of indorsement, see First National Bank v. Fair Association, 2 S. D. 145, 48 N. W. 852.

§ 7109. **Levy and sale.** The officer must execute the writ by levying on the property of the judgment debtor, collecting the things in action by suit in his own name, if necessary, or by selling the same, selling the other property, and paying to the plaintiff the proceeds, or so much thereof as will satisfy the execution. [C. Civ. P. 1877, § 316; R. C. 1899, § 5510.]

Judgment, how levied upon. McLaughlin v. Alexander, 2 S. D. 226, 49 N. W. 99.

As to levy upon debts due the judgment debtor, see Lindskog v. Schouweyler, 12 S. D. 176, 80 N. W. 190.

§ 7110. **Amount levied. When lien on personalty.** The officer must in all cases select such property and in such quantities as will be likely to bring the exact amount required to be raised as nearly as practicable, and having made one levy, may at any time thereafter, make other levies if he deems it necessary. But no writ of execution shall be a lien on personal property before the actual levy thereof. [C. Civ. P. 1877, § 317; R. C. 1899, § 5511.]

§ 7111. **Things in action.** Judgments, bank bills and other things in action may be sold or appropriated as provided in the next following section, and assignment thereof by the officer shall have the same effect as if made by the defendant. [C. Civ. P. 1877, § 318; R. C. 1899, § 5512.]

§ 7112. **What need not be sold.** Money levied on may be appropriated without being advertised or sold. The same may be done with bank bills, drafts, promissory notes or other papers of the like character, if the plaintiff

will receive them at their par value as cash, or if the officer can exchange them for cash at that value. [C. Civ. P. 1877, § 319; R. C. 1899, § 5513.]

§ 7113. **Payment to sheriff by third person.** After the rendition of the judgment any person indebted to the defendant in execution may pay to the sheriff the amount of such indebtedness, or so much thereof as is necessary to satisfy the execution and the sheriff's receipt shall be a sufficient discharge therefor. [C. Civ. P. 1877, § 320; R. C. 1899, § 5514.]

Payment of money to sheriff by person indebted to defendant discharges the debt. Faber v. Wagner, 10 N. D. 287, 86 N. W. 963; Bostwick v. Benedict, 4 S. D. 414, 57 N. W. 78.

Applies to payments made to a constable. Bedford v. Kissick, 8 S. D. 586, 67 N. W. 609.

§ 7114. **Claim by third person. Sheriff's jury.** If the property levied on is claimed by a third person as his property, the sheriff may summon from his county six persons qualified as jurors between the parties to try the validity of the claim. He must also give notive of the claim and of the time of trial to the plaintiff, who may appear and contest the claim before the jury. The jury and the witnesses must be sworn by the sheriff; and if their verdict is in favor of the claimant the sheriff may relinquish the levy, unless the judgment creditor gives him a sufficient indemnity for proceeding thereon. The fees of the jury, the sheriff and the witnesses must be paid by the claimant, if the verdict is against him; otherwise by the plaintiff. Each party must deposit with the sheriff before the trial the amount of his fees and the fees of the jury and the sheriff must return to the prevailing party the amount so deposited by him. [C. Civ. P. 1877, § 321; R. C. 1899, § 5515.]

Undertaking given without calling jury is valid. Matheson v. Johnson, 16 S. D. 347, 92 N. W. 1083.

Article 2.—Exemptions.

§ 7115. **Property exempt from all process.** Except as hereinafter provided the property mentioned in this chapter is exempt to the head of a family as defined by chapter 41 of the civil code, from attachment or mesne process and from levy and sale upon execution and from any other final process issued from any court. [C. Civ. P. 1877, § 322; R. C. 1895, § 5516.]

§ 7116. **Absolute exemptions.** The property mentioned in this section is absolutely exempt from all such process, levy or sale:

1. All family pictures.
2. A pew or other sitting in any house of worship.
3. A lot or lots in any burial ground.
4. The family bible and all school books used by the family and all other books used as a part of the family library not exceeding in value one hundred dollars.
5. All wearing apparel and clothing of the debtor and his family.
6. The provisions for the debtor and his family necessary for one year's supply, either provided or growing, or both, and fuel necessary for one year.
7. The homestead as created, defined and limited by law. [C. Civ. P. 1877, § 323; R. C. 1899, § 5517.]

Reservation of exemptions in assignment is no evidence of fraud. Red River Bank, v. Freeman, 1 N. D. 196, 46 N. W. 36; Dawley v. Sherwin, 5 S. D. 594, 59 N. W. 1027.

Exemptions become absolute property of family on death of husband. Fore v. Fore, 2 N. D. 260, 50 N. W. 712.

Personal property exemptions not repealed by constitution. Roesler v. Taylor, 3 N. D. 546, 58 N. W. 342.

Mutual judgments cannot be set off to defeat exemption laws. Cleveland v. McCanna, 7 N. D. 455, 75 N. W. 908; Pirie v. Harkness, 3 S. D. 178, 52 N. W. 581.

Selection of homestead; extent and value; liability for debts. Foogman v. Patterson, 9 N. D. 254, 83 N. W. 15; Van Doren v. Miller, 14 S. D. 264, 85 N. W. 187.

Exemption claim made by wife, when. Ness v. Jones, 10 N. D. 587, 88 N. W. 706.

Additional exemptions a personal privilege, and must be claimed, or they are waived. Longley v. Daly, 1 S. D. 257, 46 N. W. 247.

A watch and chain habitually worn is exempt as wearing apparel. Brown v. Edmonds, 8 S. D. 271, 66 N. W. 310.

Homestead is exempt from a mechanic's lien. Fallihee v. Wittmayer, 9 S. D. 479, 70 N. W. 642; Morgan v. Beuthein, 10 S. D. 650, 75 N. W. 204.

Homestead exempt from sale for purchase money. See N. W. Loan Co v. Johnson, 11 S. D. 566, 79 N. W. 840.

In bankruptcy of partnership individual exemptions are not allowed. In re Lenz, 97 Fed. 486.

§ 7117. **Additional exemptions.** In addition to the property mentioned in the preceding section, the head of the family may, by himself or his agent, select from all other of his personal property, not absolutely exempt, goods, chattels, merchandise, money or other personal property, not to exceed in the aggregate one thousand dollars in value, which is also exempt and must be chosen and appraised as hereinafter provided. [C. Civ. P. 1877, § 324; R. C. 1895, § 5518; 1901, ch. 76.]

Debtor must indicate to officer property selected. Northrup v. Cross, 2 N. D. 433, 51 N. W. 718.

Failure to make out schedule, or property omitted therefrom, subject to levy. Wagner v. Olson, 3 N. D. 69, 54 N. W. 286; Holdridge v. Lee, 3 S. D. 134, 52 N. W. 265; Brown v. Edmonds, 5 S. D. 508, 59 N. W. 731.

Additional exemptions, how selected. Bissonette v. Barnes, 4 N. D. 311, 60 N. W. 841; Linander v. Longstaff, 7 S. D. 157, 63 N. W. 775.

Mutual judgments cannot be set off to defeat exemptions. Cleveland v. McCanna, 7 N. D. 455, 75 N. W. 908.

Unmarried man may be head of family. Webster v. McGauvran, 8 N. D. 274, 78 N. W. 80.

Schedule not necessary to show debtor to be head of family. Webster v. McGauvran, 8 N. D. 274, 78 N. W. 80.

Duty of officer to have appraisement made when schedule has been delivered. Paddock v. Balgord, 2 S. D. 100, 48 N. W. 840; Linander v. Longstaff, 7 S. D. 157, 63 N. W. 775.

For exemption of life insurance policy, see Skinner v. Holt, 9 S. D. 427, 69 N. W. 595.

Admission of the service of a copy of schedule, sufficient service. Swenson v. Christoferson, 10 S. D. 188, 72 N. W. 459.

Selection of exemptions by wife. Ecker v. Lindskog, 12 S. D. 428, 81 N. W. 905.

§ 7118. **Specific alternative exemptions.** Instead of the exemption granted in the preceding section the head of the family may select and choose the following property, which shall then be exempt:

1. All miscellaneous books and musical instruments for the use of the family not exceeding five hundred dollars in value.

2. All household and kitchen furniture, including beds, bedsteads and bedding used by the debtor and his family not exceeding five hundred dollars in value; and in case the debtor shall own more than five hundred dollars worth of such property, he must select therefrom such articles to the value of five hundred dollars leaving the remainder subject to legal process.

3. Three cows, ten swine, one yoke of cattle and two horses or mules or two yokes of cattle, or two spans of horses or mules, one hundred sheep and their lambs under six months old and all wool of the same and all cloth or yarn manufactured therefrom, the necessary food for the animals hereinbefore mentioned for one year either provided or growing, or both, as the debtor may choose; also one wagon, one sleigh, two plows, one harrow and farming utensils, including tackle for teams, not exceeding three hundred dollars in value.

4. The tools and implements of any mechanic, whether a minor or of age, used and kept for the purpose of carrying on his trade or business, and in addition thereto stock in trade not exceeding two hundred dollars in value. The library and instruments of any professional person not exceeding six hundred dollars in value. [C. Civ. P. 1877, § 325; R. C. 1895, § 5519.]

§ 7119. **Those by number chosen; by value appraised.** All the articles enumerated in the preceding section, which are exempt by limitation of number, must be chosen by the debtor, his agent or attorney; so, also, all property exempt by limitation of value must be determined by an appraisement made under the direction of the sheriff or other officer. Whenever any debtor, against whom an execution, warrant of attachment or other process has been issued, desires to avail himself of the benefit of section 7117 of this code, said debtor, his agent or attorney, shall make a schedule of all his personal property of every kind and character, including money on hand and debts due and owing to the debtor and deliver the same to the officer having the execution, warrant of attachment or other process, which said schedule shall be subscribed and sworn to by the debtor, his agent or attorney, and any property owned by the debtor and not included in said schedule shall not be exempt as aforesaid. [C. Civ. P. 1877, § 326; 1885, ch. 55, § 1; R. C. 1899, § 5520.]

§ 7120. **How appraisers selected.** To make the appraisement the debtor, his agent or attorney must select one person and the creditor, his agent or attorney, another person, and these two so selected, a third person, who must all be disinterested citizens of the county, not related to either party nearer than the fourth degree. If the two fail to agree upon the third person, the sheriff or other officer must select the third person; and in like manner, if either the debtor or creditor fails or refuses upon notice to select a person to act as one of the appraisers, the sheriff or other officer must select one for them. [C. Civ. P. 1877, § 327; R. C. 1899, § 5521.]

§ 7121. **Oath and duties of appraisers.** The three appraisers so selected must take and subscribe an oath before the sheriff or other officer, to be attached to the inventory of appraisement, that they will truly, honestly and impartially appraise the property of the debtor. The property must be appraised at the actual value of the several articles at the place where they are situated as near as can be determined, and must be set down in an inventory by articles or by lots, when definitely descriptive, with the value opposite. From the appraisement so made, if over the amount of one thousand dollars, the debtor, his agent or attorney, may select the amount in value of one thousand dollars, or the alternative amount in value of each class, leaving the remainder, if any, subject to legal process. [C. Civ. P. 1877, § 328; 1885, ch. 55, § 2; R. C. 1899, § 5522; 1901, ch. 76.]

§ 7122. **Wife, or child over sixteen, may act.** If in any case the debtor neglects or refuses or for any cause fails to claim the whole or any of the aforesaid exemptions, his wife is entitled to make such claim or demand and to select and choose the property, to select and designate one of the appraisers and to do all other acts necessary in the premises the same and with like effect as the debtor himself might do; and if she neglects, refuses or for any cause fails so to do in whole or in part, then one of their children of sixteen years of age or upwards, being a member of the family, may do so in like manner and with like effect. [C. Civ. P. 1877, § 329; R. C. 1899, § 5523.]

On failure of husband to select homestead, wife may do so. Thirty days delay not unreasonable, when. Noyes v. Belding, 5 S. D. 603, 59 N. W. 1069; Noyes v. Belding, 6 S. D. 629, 62 N. W. 953; Foogman v. Patterson, 9 N. D. 254, 83 N. W. 15; Meyer v. Beaver, 9 S. D. 168, 68 N. W. 310.

§ 7123. **Sheriff's inventory of exemptions.** The sheriff or other officer having any process of levy or sale must make return with his writ or warrant of any inventory and appraisement of any such exempted or other personal property. [C. Civ. P. 1877, § 330; R. C. 1899, § 5524.]

§ 7124. **Notice to debtor. Claim within three days.** In all cases of a levy upon personal property by the sheriff, constable or other officer, he must give notice thereof to the debtor, his attorney, agent or wife or, failing conveniently to find either, to such child as is described in section 7122; and

the debtor or such other person for him must claim or demand the benefit of these exemptions within three days after such notice from the officer; and said notice of levy may be by copy or by reading. [C. Civ. P. 1877, § 331; R. C. 1899, § 5525.]

Not necessary to demand exemption until service of notice of levy. Bates v. Callender, 3 Dak. 256, 16 N. W. 506.

Replevin by third party does not extend time for claiming exemptions. Furrow v. Zollars, 8 S. D. 522, 67 N. W. 612.

Serving of notice is not alone equivalent to making levy. Auby v. Rathbun, 11 S. D. 474, 78 N. W. 952.

For refusal of garnishee to pay over money because exempt, see Black Hills Co. v. Mitchell, 11 S. D. 615, 79 N. W. 999.

§ 7125. **Cases in which only absolute exemptions are allowed.** No personal property except absolute exemptions, shall be exempt from execution or attachment in an action for laborer's or mechanic's wages, or for a debt incurred for property obtained under false pretenses; and no personal property shall be exempt from such process in an action for the collection of the bills of a legally practicing physician or nurse for professional service or medicine, or in an action for the collection of a bill for board, medicine or attendance furnished patients at any hospital in this state, except absolute exemptions and household and kitchen furniture, stoves and two cows, the value of which, exclusive of absolute exemptions, shall not exceed five hundred dollars, which value in case of dispute shall be determined by appraisers to be selected in accordance with the provisions of section 7120. [C. Civ. P. 1877, § 332; 1881, ch. 34, § 1; R. C. 1899, § 5526; 1901, ch. 77.]

The question of false pretenses must be litigated as a fact in action against sheriff. Sobolisk v. Jacobson, 6 N. D. 175, 69 N. W. 46.

Exemptions allowed as against execution on judgment for property obtained under false pretenses. In re Kaeppler, 7 N. D. 435, 75 N. W. 789; Sobolisk v. Jacobson, 6 N. D. 175, 69 N. W. 46; Sundback v. Griffith, 7 S. D. 109, 63 N. W. 544; Hall v. Harris, 1 S. D. 279, 46 N. W. 931; Perrott v. Owen, 7 S. D. 454, 64 N. W. 526; Taylor v. Rice, 1 N. D. 72, 44 N. W. 1017.

Judgment for labor is not equivalent to judgment for "laborers' or mechanics' wages." Paddock v. Balgord, 2 S. D. 100, 48 N. W. 840; Busta v. Wardall, 3 S. D. 141, 52 N. W. 418.

§ 7126. **Property not exempt in action for its purchase price.** No property shall be exempt from execution or attachment in an action brought for its purchase price or any part thereof. [1883, ch. 50, § 1; R. C. 1895, § 5527.]

Where goods of merchant are mingled, entire stock not liable to seizure. When owner brings action of claim and delivery on ground that goods are exempt from seizure, burden is on officer to show what specific property liable to seizure. Wagner v. Olson, 3 N. D. 69, 54 N. W. 286.

But see N. W. Loan Co. v. Johnson, 11 S. D. 566, 79 N. W. 840.

§ 7127. **Partnership can claim but one exemption.** A partnership firm can claim but one exemption of one thousand dollars in value or alternative property, when so applicable, instead thereof, out of the partnership property. All partnership property claimed as exempt shall constitute a part of the exemptions of the several partners, the same being divided in proportion to the interests of the partners in the firm assets, and in no case shall the aggregate exemptions of the several partners exceed the amount which would have been allowed to them if the partnership had not existed; provided, however, that the provisions of this section shall not apply to or affect any debt contracted prior to the taking effect thereof. [C. Civ. P. 1877, § 333; R. C. 1895, § 5528; 1901, ch. 76.]

Exemption to partnership not repealed by constitution. Roesler & White v. Taylor, 3 N. D. 546, 58 N. W. 342.

Exemptions of partnership belong to firm, not to individuals. Betts v. Letcher, 1 S. D. 182, 46 N. W. 193.

Wife of partner may claim exemptions on failure of husband to do so. Noyes v. Belding, 5 S. D. 603, 59 N. W. 1069; Noyes v. Belding, 6 S. D. 629, 62 N. W. 953.

§ 7128. When no exemptions. Except those made absolute, the exemptions herein provided for must not be construed to apply to the following persons:

1. To a corporation for profit.
2. To a nonresident.
3. To a debtor who is in the act of removing with his family from the state; or,
4. Who has absconded, taking with him his family. [C. Civ. P. 1877, § 333; R. C. 1899, § 5529.]

§ 7129. Only absolute exemptions against fines, penalties and costs. No property, either real or personal, except the homestead and other exemptions made absolute shall be exempt from levy, seizure and sale by virtue of any final writ or process issued on a judgment for fines, penalties or costs of criminal prosecutions and no property except the homestead and other exemptions made absolute, and personal property of any kind in addition thereto to the value of five hundred dollars, shall be exempt from levy, seizure or sale by virtue of any final writ or process issued on a judgment for forfeitures of undertakings and bonds, or of recognizance taken and entered in criminal cases. [C. Civ. P. 1877, § 334; R. C. 1899, § 5530.]

Article 3.—Sales.

§ 7130. Personalty. Notice of sale. Perishable. The officer, who levies upon personal property by virtue of an execution, must before he proceeds to sell the same cause public notice to be given of the time and place of such sale for at least ten days before the day of sale. The notice must be given by advertisement published in some newspaper printed in the county or subdivision or, in case no newspaper is printed therein, by posting advertisements in five public places in the county. Perishable property may be sold by order of the court or a judge thereof, prescribing such notice, time and manner of sale as may be reasonable, considering the character and condition of the property. [C. Civ. P. 1877, § 335; R. C. 1899, § 5531.]

Eight days notice insufficient. Bowman v. Knott, 8 S. D. 330, 66 N. W. 457.

Notice of sale under execution issued by justice must be posted. Fodness v. Juelfs, 13 S. D. 145, 82 N. W. 396.

Purchaser who made first payment and held contract from commissioners of school lands, has interest which may be subject to execution. Brooke v. Eastman, 17 S. D. 339, 96 N. W. 699.

§ 7131. Real property. Same. Before any real property or interest therein taken on execution shall be sold the officer making such sale must cause public notice of the time and place thereof in manner following:

1. If there is a newspaper printed in the county or subdivision, where the real property to be sold is situated, such notice must be given by advertisement in some newspaper printed in such county or subdivision, once a week, for at least thirty days prior to making such sale.
2. In case there is no newspaper printed in such county or subdivision, then the officer making such sale must cause such advertisement to be made by posting a copy of such advertisement on the outer door of the court house or building wherein the district court of the county or subdivision was last held, and in five other public places in the county. All sales made without notice as provided in this section must be set aside by the court to which the execution is returnable, upon motion to confirm the sale. [C. Civ. P. 1877, § 336; R. C. 1899, § 5536.]

§ 7132. Where sale made. All sales of real property, or any interest therein, under execution, must be held at the court house, if there is one in the county or subdivision in which such real property is situated, and if there is no court house, then at the door of the house in which the district court was last held, and if there is no court house and no district court has been held in the county or subdivision, then at such place within the county or

subdivision as the sheriff shall designate in his notice of sale. [C. Civ. P. 1877, § 337; R. C. 1899, § 5533.]

§ **7133. Time and manner of sale.** All sales of property under execution must be made at public auction to the highest bidder between the hours of nine in the morning and four in the afternoon. After sufficient property has been sold to satisfy the execution no more can be sold. No sheriff or other officer, nor his deputy, holding the execution or making the sale of property, either personal or real, can become a purchaser or be interested directly or indirectly in any purchase at such sale, and every purchase so made shall be considered fraudulent and void. When the sale is of personal property capable of manual delivery, it must be within view of those who attend the sale and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property consisting of several known lots or parcels they must be sold separately. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels or of articles which can be sold to advantage separately, and the sheriff or other officer must follow such directions. [C. Civ. P. 1877, § 338; R. C. 1899, § 5534.]

Sale of corporation stock may be without actual seizure or manual possession of certificate. Van Cise v. Bank, 4 Dak. 485, 33 N. W. 897.

Waiver of right to have sale set aside for inadequacy of price, and because of selling separate parcels in one mass. Redemption adequate remedy. Where right of redemption interfered with account of sale of several parcels in a lump, sale will be set aside if attacked in a reasonable time, ordinarily before redemption period has expired. Sale in lump voidable. Sale not void or voidable because sheriff and plaintiff only were present. Power v. Larabee, 3 N. D. 502, 57 N. W. 789.

§ **7134. Postponements.** When there are no bidders or when the amount offered is grossly inadequate, or when from any cause the sale of any real or personal property upon execution or upon the foreclosure of a mortgage or other lien is prevented from taking place on the day fixed, the sheriff, or person making the same, may postpone the sale for not more than three days without being required to give any further notice thereof, but he shall not make more than two such postponements and such postponements must be publicly announced when and where the sale should have taken place. Such sale may be postponed for a longer period than three days by continuing the publication of the original notice of sale together with notice of such postponement, specifying the time and place at which such postponed sale will be made. [C. Civ. C. 1877, § 339; 1885, ch. 136, § 1; R. C. 1895, § 5535.]

§ **7135. Surplus paid defendant.** When the property sells for more than the amount required to be collected, the surplus must be paid to the defendant, unless the officer has another execution in his hands on which said surplus may be rightfully applied. [C. Civ. P. 1877, § 340; R. C. 1899, § 5536.]

§ **7136. Sale after sixty days. Abandonment of levy.** In case of the failure of the sale by reason of irregularities in giving notice thereof, or of its postponement, the property may be sold upon proper notice by virtue of the execution after the expiration of the sixty days allowed for the return thereof, and the officer in his return shall set forth the facts regarding such failure or postponement; or the plaintiff may in writing filed with the clerk abandon such levy upon paying the costs thereof; in which case execution may issue with the same effect as if none had been issued. [C. Civ. P. 1877, § 341; R. C. 1895, § 5537.]

Second execution may issue when property has been released because subject to chattel mortgage which a judgment creditor refuses to pay. Yetzer v. Young, 3 S. D. 263, 52 N. W. 1054.

§ **7137. Purchaser's right. Sheriff's certificate.** Upon a sale of real property the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtor thereto; and when the estate is

less than a leasehold of two years' unexpired term, the sale is absolute. In all other cases the real property is subject to redemption as provided in this chapter. The officer must give to the purchaser a certificate of sale, containing:

1. A particular description of the real property sold.
2. The price bid for each distinct lot or parcel.
3. The whole price paid.
4. When subject to redemption it must be so stated.

Such certificate must be executed by the officer and acknowledged or proved as is or may be required by law for deeds of real property and may be recorded in the office of the register of deeds of the county wherein the real property is situated; and the same or a certified copy thereof certified by such register shall be taken and deemed evidence of the facts therein recited and contained. [C. Civ. P. 1877, § 342; R. C. 1899, § 5538.]

Legal title remains in judgment debtor until expiration of time for redemption. Wood v. Conrad, 2 S. D. 405, 50 N. W. 903; Whithed v. Elevator Co., 9 N. D. 224, 83 N. W. 238.

Purchaser who made first payment and held contract from commissioners of school lands, has interest subject to execution, and execution purchasers acquire such interest. Brooke v. Eastman, 17 S. D. 339, 96 N. W. 699.

Article 4.—Confirmation.

§ 7138. Proceedings upon confirmation. If the court upon the return of any writ of execution for the satisfaction of which any real property or interest therein has been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has in all respects been made in conformity to the provisions of this chapter, the court must make an order confirming the sale and directing the clerk to make an entry on the journal, that the court is satisfied of the legality of such sale and an order that the officer make to the purchaser a deed of such real property, or interest therein, at the expiration of one year from the day of sale unless the same is redeemed as herein provided. And the officer after making such sale may retain the purchase money in his hands, until the court shall have examined his proceedings as aforesaid, when he must pay the same to the person entitled thereto by order of the court. [C. Civ. P. 1877, § 343; R. C. 1899, § 5539.]

Order settles no fact or law, as against the owners of the property. It is duty of court to confirm sale, if report is regular. Warren v. Stenson, 6 N. D. 293, 70 N. W. 279.

Execution sale must be confirmed by court whence execution issued. Order confirming sale appealable. Dakota Investment Co., v. Sullivan, 9 N. D. 303, 83 N. W. 233.

Mere failure to have sale confirmed will not defeat purchaser's title. Baxter v. O'Leary, 10 S. D. 150, 72 N. W. 91.

Article 5.—Redemption.

§ 7139. Who may redeem. Redemptioner. Property sold subject to redemption, or any part sold separately, may be redeemed in the manner hereinafter provided by the following persons, or their successors in interest:

1. The judgment debtor, or his successors in interest.
2. A creditor having a lien by judgment, mortgage or otherwise on the property sold or on some share or part thereof, subsequent to that on which the property was sold.

The persons mentioned in the second subdivision of this section are in this chapter termed redemptioners. [C. Civ. P. 1877, § 344; R. C. 1899, § 5540; 1903, ch. 169.]

Redemption affords remedy against sacrifice of property. Where right of redemption injuriously interfered with by sale of parcels in lump, sale will set

aside on motion if attacked in a reasonable time. Power v. Larabee, 3 N. D. 502, 57 N. W. 789.

Who may redeem. McDonald v. Beatty, 10 N. D. 511, 88 N. W. 281; Scaman v. Galligan, 8 S. D. 277, 66 N. W. 458; Rudolph v. Herman, 4 S. D. 283, 56 N. W. 901.

By accepting and retaining the full amount of redemption money, purchasers at judicial sales waive all legal defects in redemption procedure. Incumbrancer not attempting to redeem from sale under prior mortgage, cannot challenge regularity of redemption therefrom by a junior incumbrancer. Incumbrancer not prejudiced by fact that sheriff's deed under prior mortgage sale is made to a junior incumbrancer. Possible redemptioner who remains inactive during entire period for redemption and permits an actual redemptioner to receive sheriff's deed, loses right of redemption. Redemptioner not bound by secret oral agreement by which his redemptionee has promised to pay an intermediate lien. Time limited to one year. Prior redemption does not extend time. Stocker v. Puckett, 17 S. D. 267, 96 N. W. 91.

§ **7140. Payment on and period for redemption.** The judgment debtor or redemptioner may redeem the property from the purchaser within one year after the sale on paying the purchaser the amount of his purchase with twelve per cent interest thereon together with the amount of any assessment or taxes which the purchaser may have paid thereon after the purchase, and interest at the same rate on such amount; and if the purchaser is also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest. [C. Civ. P. 1877, § 345; R, C. 1899, § 5541.]

Junior execution creditor on redemption from foreclosure of prior mortgage, still retains character of execution creditor subrogated to that of prior mortgagee. MacGregor v. Pierce, 17 S. D. 51, 95 N. W. 281.

§ **7141. Redemption of real estate.** If the property is so redeemed by a redemptioner, another redemptioner may, even after the expiration of one year from the day of sale, redeem from such last redemptioner; provided, the redemption is made within sixty days after such last redemption. This sixty day limitation does not apply to any redemption made within one year after the sale by whomsoever or from whomsoever such redemption is made; but all persons entitled to redeem shall in all cases have the entire period of one year from the day of sale in which to redeem. A redemptioner in redeeming from another redemptioner must pay the sum paid on such last redemption with like interest thereon in addition as provided by the preceding section and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him with like interest on such amount and, in addition, the amount of any liens held by said last redemptioner prior to his own with interest; but the judgment on which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner within sixty days after the last redemption on paying the sum paid on the last previous redemption with interest at the same rate as provided for the first redemption in section 7140 in addition and the amount of any assessment or taxes which the last previous redemptioner paid after the redemption by him with like interest thereon and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest. [1897, ch. 121 § 1; R. C. 1899, § 5542.]

Redemptioner must redeem within sixty days after last preceding redemptioner. State ex rel Brooks v. O'Connor, 6 N. D. 285, 69 N. W. 692.

Court may decree sale of homestead to pay alimony. From such a sale husband has right to redeem. Harding v. Harding, 16 S. D. 406, 92 N. W. 1080.

§ **7142. Record of redemption.** Written notice of redemption must be given to the sheriff and a duplicate filed with the register of deeds of the county, and if any taxes or assessments are paid by the redemptioner or if he has or acquires any lien other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff and filed

with the register of deeds; and if such notice is not filed, the property may be redeemed without paying such tax, assessment or lien. [C. Civ. P. 1877, § 347; R. C. 1899, § 5543.]

§ **7143. Sheriff shall execute deed.** If the property is not redeemed according to law, the purchaser or his assignee or the redemptioner, as the case may be, is entitled to a sheriff's deed of the property and it shall be the duty of the sheriff to execute and deliver such deed immediately after the time for redemption has in each case expired. [1897, ch. 121, § 2; R. C. 1899, § 5544.]

§ **7144. Redemption. Filing of certificate.** In no case shall the debtor be required to pay more to effect a redemption than the purchase price with twelve per cent interest from the day of sale and all taxes and assessments paid with twelve per cent interest thereon from the date of payment, notwithstanding the fact that he seeks to redeem from a redemptioner. If the debtor redeems, the effect of the sale is terminated and he is restored to his estate. Upon a redemption by the debtor the person to whom the payment is made must execute and deliver to him a certificate of redemption acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the register of deeds of the county in which the property is situated, and the register of deeds must note the record thereof in the margin of the record of the certificate of sale. In case the debtor redeems from a redemptioner who has to effect his redemption paid liens on the property, other than for taxes or assessments the redemptioner shall be subrogated to all the rights of the former holders of such liens, and the filing of written notices of such redemptions as required by section 7142 shall constitute notice of the rights of such redemptioner in and to all the liens so held by him as equitable assignee as fully as if formal written assignments thereof had been recorded. All the statutes relating to redemptions from execution sales shall govern sales on mortgage foreclosure and these provisions shall apply to all sales hereafter made. [1897, ch. 121, § 3; R. C. 1899, § 5545.]

Property sold on execution for less than judgment debt if redeemed by judgment debtor may be again levied on under execution issued on same judgment for balance due. Scaman v. Galligan, 8 S. D. 277, 66 N. W. 458.

Redemption period dates from day of sale. Trenery v. American Mortgage Co., 11 S. D. 506, 78 N. W. 991.

§ **7145. Payments to whom.** The payments mentioned in the last five sections may be made to the purchaser or redemptioner, or for him, to the officer who made the sale. [C. Civ. P. 1877, § 350; R. C. 1899, 5546.]

§ **7146. Requisite papers.** A redemptioner must produce to the officer or person from whom he seeks to redeem, and serve with his notice to the sheriff:

1. A copy of the docket of the judgment, under which he claims the right to redeem, certified by the clerk of the district court of the county where the judgment is docketed or, if he redeems upon a mortgage or other lien, a note of the record thereof certified by the register of deeds.
2. A copy of the assignment necessary to establish his claim, verified by the affidavit of himself or of a subscribing witness thereto.
3. An affidavit by himself or his agent showing the amount then actually due on the lien. [C. Civ. P. 1877, § 351; R. C. 1899, § 5547.]

§ **7147. Waste restrained. Use of premises.** Until the expiration of the time for redemption the court may restrain the commission of waste on the property by order granted with or without notice on the application of the purchaser or the judgment creditor. But it is not waste for the person in possession of the property at the time of the sale, or entitled to possession afterwards, during the period allowed for redemption to continue to use it in the same manner in which it was previously used or to use it in the ordinary

course of husbandry or to make the necessary repairs of buildings thereon or to use wood or timber on the property therefor, or for the repair of fences, or for fuel in his family, while he occupies the property. [C. Civ. P. 1877, § 352; R. C. 1899, § 5548.]

§ 7148. **Purchaser entitled to rents. Account for.** The purchaser from the time of the sale until a redemption and a redemptioner from the time of his redemption until another redemption is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold, preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner or judgment debtor before the expiration of the time allowed for such redemption demands in writing of such purchaser or creditor, or his assigns, a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns to such redemptioner or debtor. If the purchaser or his assigns shall for a period of one month from and after such demand fail or refuse to give such statement, such redemptioner or debtor may bring an action in the district court of the county where the real property is situated to compel an accounting and disclosure of such rents and profits and until fifteen days from and after the final determination of such action the right of redemption is extended to such redemptioner or debtor. [C. Civ. P. 1877, § 353; R. C. 1899, § 5549.]

Purchaser can recover rent from lessee of owner as fast as rent falls due, and payment by such lessee to his lessor after notice of the purchaser's rights is no defense. Clement v. Shipley, 2 N. D. 430, 51 N. W. 414.

Purchaser entitled to share of crops under contract reserving title and possession of fixed portion of grain in owner. Whithed v. St. Anthony & Dakota Elevator Co., 9 N. D. 224, 83 N. W. 238.

Mortgagor not entitled to verified statement of the value of use and occupation. Redemption period not extended by failure or refusal to give statement of value of use and occupation. Little v. Worner, 11 N. D. 382, 92 N. W. 456.

Article 6.—The Sheriff's Deed.

§ 7149. **Effect of. Contents.** Upon the expiration of the period for redemption the proper officer must make the purchaser, or the party entitled thereto, a deed of the real property sold. The deed shall be sufficient evidence of the legality of such sale and the proceedings therein, until the contrary is proved, and shall vest in the purchaser or other party as aforesaid as good and perfect a title in the premises therein mentioned and described as was vested in the debtor at or after the time when such real property became liable to the satisfaction of the judgment. And such deed or conveyance to be made by the sheriff or other officer, must recite the execution or executions, or the substance thereof, and the names of the parties, the amount and date of rendition of such judgment by virtue whereof the said real property was sold as aforesaid, and must be executed, acknowledged or proved and recorded as is or may be provided by law to perfect the conveyance of real property in other cases. [C. Civ. P. 1877, § 354; R. C. 1899, § 5550.]

Courts cannot base existence of a jurisdictional fact upon presumption that sheriff has done his duty. Hannah v. Chase, 4 N. D. 351, 61 N. W. 18.

Sheriff's deeds. Murphy v. Plankinton Bank, 13 S. D. 501, 83 N. W. 575; Baxter v. O'Leary, 10 S. D. 150, 72 N. W. 91.

Purchaser who made first payment and held contract from commissioners of school land has interest subject to execution, and execution purchasers acquire such interest and are entitled to deed. Brooke v. Eastman, 17 S. D. 339, 96 N. W. 699.

§ 7150. **Sheriff's successor may make.** If the term of service of the sheriff or other officer, who may make or shall hereafter make sale of any

real property shall expire or if the sheriff or other officer shall be absent or be rendered unable by death, or otherwise, to make a deed or conveyance of the same, any succeeding sheriff or other officer may execute to the purchaser or person entitled thereto or his legal representatives a deed of conveyance of said real property so sold; and such deed shall be as good and valid in law and have the same effect as if the sheriff or other officer who made the sale had executed the same. [C. Civ. P. 1877, § 355; R. C. 1899, § 5551.]

Article 7.—General Provisions.

§ 7151. **Printer's fees in advance.** The officer who levies upon personal property or real property or who is charged with the duty of selling the same by virtue of any writ of execution may refuse to publish a notice of the sale thereof by advertisement in a newspaper, until the party for whose benefit such execution is issued, his agent or attorney shall advance to such officer so much money as will be sufficient to discharge the fees of the printer for publishing such notice. Before any officer shall be excused from publishing the notice as aforesaid, he must demand of the party for whose benefit the execution was issued, his agent or attorney, if either of them resides in the county, the amount of money for such fees. [C. Civ. P. 1877, § 356; R. C. 1899, § 5552.]

§ 7152. **Reversal does not defeat judgment.** If any judgment, in satisfaction of which any real property is sold, shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser: but in such case restitution must be made by the judgment creditor of the money for which such real property was sold with lawful interest thereon from the day of sale. [C. Civ. P. 1877, § 357; R. C. 1899, § 5553.]

§ 7153. **Execution against principal first.** In all cases when judgment is rendered upon any instrument in writing, in which two or more persons are severally bound, and it shall be made to appear to the court by parol or other testimony, that one or more of said persons so bound signed the same as surety or bail for his codefendant, the court must in entering judgment thereon state which of the defendants is principal debtor and which are sureties or bail; and execution issued on such judgment must command the sheriff or other officer to cause the money to be made of the personal property and real property of the principal debtor, but for want of sufficient property of the principal debtor to make the same to cause the same to be made of the personal and real property of the surety or bail. In all cases the property, both personal and real, of the principal debtor within the jurisdiction of the court must be exhausted before any of the property of the surety or bail shall be taken in execution. [C. Civ. P. 1877, § 358; R. C. 1899, § 5554.]

Rights of surety to have debtor's property exhausted. See Bingham v. Mears, 4 N. D. 437, 61 N. W. 808.

§ 7154. **Amercement of sheriff.** If any sheriff or other officer shall refuse or neglect to execute any writ of execution to him directed, which has come to his hands, or to sell any personal or real property, or to return any writ of execution to the proper court on or before the return day, or on demand to pay over to the plaintiff, his agent or attorney of record all moneys by him collected or received for the use of said party at any time after collecting or receiving the same, except as otherwise provided, or on demand made by the defendant, his agent or attorney of record, to pay all surplus received from any sale, such sheriff or other officer shall on motion in court and two days' notice thereof in writing be amerced in the amount of said debt, damages and costs with ten per cent thereon to and for the use of said plain-

tiff or defendant as the case may be. [C. Civ. P. 1877, § 359; R. C. 1899, § 5555.]

In action for amercement against sheriff, it is good defense that judgment debtor had no property liable to execution during the life of writ. Swenson v. Christoferson, 10 S. D. 188, 72 N. W. 459.

§ 7155. **Same of clerk.** If any clerk of a court shall neglect or refuse on demand made by the person entitled thereto, his agent or attorney of record, to pay over all money by him received in his official capacity for the use of such person, every such clerk may be amerced and the proceedings against him and his sureties shall be the same as provided for in the foregoing section against sheriffs and their sureties. [C. Civ. P. 1877, § 360; R. C. 1899, § 5556.]

§ 7156. **Measure of same.** When the cause of amercement is for refusing to pay over money collected as aforesaid, the said sheriff or other officer shall not be amerced in a greater sum than the amount so withheld with ten per cent thereon. [C. Civ. P. 1877, § 361; R. C. 1899, § 5557.]

§ 7157. **Return of writ by mail.** When execution shall be issued in any county and directed to the sheriff or coroner of another county, it shall be lawful for such sheriff or coroner having the execution after having discharged all the duties required of him by law to inclose such execution by mail to the clerk who issued the same. On proof being made by such sheriff or coroner, that the execution was mailed soon enough to have reached the said clerk within the time prescribed by law, the sheriff or coroner shall not be liable for any amercement or penalty, if it does not reach the office in due time. [C. Civ. P. 1877, § 362; R. C. 1899, § 5558.]

§ 7158. **Procedure against officer.** No sheriff shall forward by mail any money made on any such execution, unless he shall be specially instructed to do it by the plaintiff, his agent or attorney of record. In all cases of a motion to amerce a sheriff or other officer of any county other than the one from which the execution issued, notice in writing shall be given to such officer as hereinbefore required by leaving it with him or at his office at least fifteen days before the first day of the term at which such motion shall be made, or by transmitting the notice by mail at least sixty days prior to the first day of the term at which such motion shall be made. All amercements so procured shall be entered on the record of the court and shall have the same force and effect as a judgment. [C. Civ. P. 1877, § 363; R. C. 1899, § 5559.]

§ 7159. **Surety of sheriff made party.** Each and every surety of any sheriff or other officer may be made a party to the judgment rendered as aforesaid against the sheriff or other officer by action to be commenced and prosecuted as in other cases; but the property, personal or real, of any such surety shall not be liable to be taken on execution, when sufficient property of the sheriff or other officers against whom execution may be issued can be found to satisfy the same. Nothing herein contained shall prevent either party from proceeding against such sheriff or other officer by attachment or other proceeding at his election. [C. Civ. P. 1877, § 364; R. C. 1899, § 5560.]

§ 7160. **Officer's reimbursement.** In cases when a sheriff or other officer may be amerced and shall not have collected the amount of the original judgment, he must be permitted to take out executions and collect the amount of said judgment in the name of the original plaintiff for his own use. [C. Civ. P. 1877, § 365; R. C. 1899, § 5561.]

CHAPTER 13.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

§ 7161. **Examination of debtors for discovery. Procedure.** When an execution against property of the judgment debtor, or of any one of the several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business or, if he does not reside in the state, to the sheriff of the county, where a judgment roll or a transcript of a justice's judgment for twenty-five dollars or upwards exclusive of costs is filed, is returned unsatisfied in whole or in part, the judgment creditor at any time after such return made is entitled to an order from a judge of the court requiring such judgment debtor to appear and answer concerning his property before such judge at a time and place specified in the order within the county to which the execution was issued.

2. After the issuing of an execution against property and upon proof by affidavit of a party or otherwise to the satisfaction of the court or judge thereof, that any judgment debtor residing in the district where such judge resides has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may by an order require the judgment debtor to appear at a specified time and place to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as are provided upon a return of an execution.

3. On an examination under this section either party may examine witnesses in his behalf and the judgment debtor may be examined in the same manner as a witness.

4. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon proof by affidavit or otherwise to his satisfaction that there is danger of the debtor leaving the state or concealing himself and that there is reason to believe he has property which he unjustly refuses to apply to such judgment, issue a warrant requiring the sheriff of any county where such debtor may be to arrest him and bring him before such judge. Upon being brought before the judge he may be examined on oath and, if it then appears that there is danger of the debtor leaving the state, and that he has property which he has unjustly refused to apply to such judgment, ordered to enter into an undertaking with one or more sureties, that he will from time to time attend before the judge as he shall direct and that he will not during the pendency of the proceedings dispose of any portion of his property not exempt from execution. In default of entering into such undertaking he may be committed to prison by warrant of the judge as for contempt.

5. No person shall on examination pursuant to this chapter be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. Nor shall he be excused from answering any question on the ground that he has before the examination executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. [C. Civ. P. 1877, § 366; R. C. 1899, § 5562.]

Supplementary proceedings cannot be instituted on barred judgment. **Bank** v. Braithwaite, 7 N. D. 358, 75 N. W. 244.

May be instituted against corporation. South Bend **Co. v. Insurance Co., 4 S.** D. 173, 56 N. W. 98.

§ 7162. **Payment to sheriff by debtor's debtor.** After the issuing of execution against property any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid. [C. Civ. P. 1877, § 367; R. C. 1899, § 5563.]

When execution issued, person indebted to judgment debtor may pay sheriff. Bostwick v. Benedict, 4 S. D. 414, 57 N. W. 78; Faber v. Wagner, 10 N. D. 287, 86 N. W. 963; Bedford v. Kissick, 8 S. D. 586, 67 N. W. 609.

§ 7163. **Examination of debtor's debtor.** After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon an affidavit that any person or corporation has property of such judgment debtor or is indebted to him in an amount exceeding ten dollars, the judge may by an order require such person or corporation or any officer or member thereof to appear at a specified time and place and answer concerning the same. The judge may also in his discretion require notice of such proceeding to be given to any party to the action in such manner as may seem to him proper. The proceedings mentioned in this section, and in section 7161 may be taken upon the return of an execution unsatisfied, issued upon a judgment recovered in an action against joint debtors, in which some of the defendants have not been served with the summons by which said action was commenced, so far as relates to the joint property of such debtors; and all actions by creditors to obtain satisfaction of judgments out of the property of joint debtors are maintainable in the like manner and to the like effect. These provisions shall apply to all proceedings and actions now pending and not actually terminated by any final judgment or decree. [C. Civ. P. 1877, § 368; R. C. 1899, § 5564.]

§ 7164. **Witnesses. Attendance compelled.** Witnesses may be required to appear and testify on any proceeding under this chapter in the same manner as upon the trial of an issue. [C. Civ. P. 1877, § 369; R. C. 1899, § 5565.]

§ 7165. **Before referee. Answers on oath.** The party or witness may be required to attend before the judge or before a referee appointed by the court or judge; if before a referee, the examination shall be taken by the referee and certified to the judge. All examinations and answers before a judge or referee under this chapter shall be on oath, except that when a corporation answers, the answer shall be on the oath of an officer thereof. [C. Civ. P. 1877, § 370; R. C. 1899, § 5566.]

§ 7166. **Property applied. Wages exempt.** The judge may order any property of the judgment debtor not exempt from execution in the hands either of himself or any other person or due the judgment debtor to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services at any time within sixty days next preceding the order cannot be so applied when it is made to appear by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor. [C. Civ. P. 1877, § 371; R. C. 1899, § 5567.]

§ 7167. **Receiver appointed. Transfers enjoined.** The judge may also by order appoint a receiver of the property of the judgment debtor in the same manner and with like authority as if the appointment was made by the court according to section 6989. But before the appointment of such receiver the judge shall ascertain, if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor and if such proceedings are so pending, the plaintiff therein shall have notice to appear before him and shall likewise have notice of all subsequent proceedings in relation to said receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The

judge may also by order forbid a transfer or other disposition of the property of the judgment debtor not exempt from execution and any interference therewith. [C. Civ. P. 1877, § 372; R. C. 1899, § 5568.]

§ 7168. **Record of order.** Whenever the judge shall grant an order for the appointment of a receiver of the property of the judgment debtor, the same shall be filed in the office of the clerk of the court where the judgment roll in the action or transcript from justice's judgment upon which the proceedings are taken, is filed; and the said clerk shall record the order in a book to be kept for that purpose in his office, to be called "book of orders appointing receivers of judgment debtors," and shall note the time of the filing of said order therein. A certified copy of said order shall be delivered to the receiver named therein and he shall be vested with the property and effects of the judgment debtor from the time of the filing and recording of the order as aforesaid. The receiver of the judgment debtor shall be subject to the direction and control of the court in which the judgment was obtained upon which the proceedings are founded. But before he shall be vested with any real property of such judgment debtor, a certified copy of said order shall also be filed and recorded in the office of the register of deeds of the county in which any real estate of such judgment debtor sought to be affected by such order is situated, and also in the office of the register of deeds of the county in which such judgment debtor resides. [C. Civ. P. 1877, § 372; R. C. 1899, § 5569.]

§ 7169. **Procedure on adverse claims.** If it appears that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver; but the judge may by order forbid a transfer or other disposition of such property or interest until a sufficient opportunity is given to the receiver to commence the action and prosecute the same to judgment and execution; but such order may be modified or dissolved by the judge granting the same at any time on such security as he shall direct. [C. Civ. P. 1877, § 373; R. C. 1899, § 5570.]

Rights of third persons cannot be determined in supplementary proceedings. Feldenheimer v. Tressell, 6 Dak. 265, 43 N. W. 94; Thompson & Sons Mfg. Co. v. Guenthner, 5 S. D. 504, 59 N. W. 727.

§ 7170. **When reference ordered.** The judge may in his discretion order a reference to a referee agreed upon by the parties or appointed by him to report the evidence or the facts and may in his discretion appoint such referee in the first order or at any time. [C. Civ. P. 1877, § 374; R. C. 1899, § 5571.]

§ 7171. **Allowance of witness fees and disbursements.** The judge may allow to the judgment creditor or any party so examined, whether a party to the action or not, witness fees and disbursements. [C. Civ. P. 1877, § 375; R. C. 1899, § 5572.]

§ 7172. **Punishment for contempt.** If any person, party or witness disobeys an order of the judge or referee duly served, such person, party or witness may be punished by the judge as for a contempt. And in all cases of commitment under this chapter, the person committed may, in case of inability to perform the act required or to endure the imprisonment, be discharged from imprisonment by the court or judge committing him or the court in which the judgment was rendered on such terms as may be just. [C. Civ. P. 1877, § 376; R. C. 1899, § 5573.]

CHAPTER 14.

OF THE COSTS AND DISBURSEMENTS IN CIVIL ACTIONS.

§ 7173. **Attorney's fees by agreement. Costs, when allowed.** The amount of fees of attorneys, solicitors and counsel in civil and criminal actions must be left to the agreement, express or implied, of the parties. But in civil actions there may be allowed to the prevailing party upon the judgment certain sums by way of indemnity for his expenses in the action in addition to the disbursements now allowed by law, which allowances are termed costs. The same costs shall be allowed in cases appealed from a justice court as in cases originally commenced in the district court and in such appealed cases the expression "Notice of Trial," appearing in the section following shall be construed to mean "Notice of Appeal" in all places where the same shall appear. [1899, ch. 3; R. C. 1899, § 5574.]

Contract in good faith for attorney's fees enforced, when. Hroch v. Aultman & Taylor Co., 3 S. D. 477, 54 N. W. 269; Woods v. Walsh, 7 N. D. 376, 75 N. W. 767.

§ 7174. **Amount of costs in specific cases.** When allowed the costs mentioned in section 7173 shall be as follows:

1. To the plaintiff for all proceedings before notice of trial in actions arising on contract for the recovery of money only, five dollars; in other actions, ten dollars; for all proceedings after notice of and before trial, three dollars; for each additional defendant served with process not exceeding ten, one dollar.

2. To the defendant, for all proceedings before notice of trial, five dollars; and for all proceedings after notice of and before trial, three dollars.

3. To either party, when a new trial shall be had, for all proceedings after the granting of and before such new trial, five dollars; for attending upon and taking the deposition of a witness conditionally or attending to perpetuate his testimony, two dollars; for drawing interrogatories to annex to a commission for the taking of testimony, two dollars; for making and serving a case or case containing exceptions, five dollars, except that when the case shall necessarily contain more than fifty folios, there shall be allowed two dollars in addition thereto.

4. For every trial of an issue of fact, five dollars.

5. To either party on appeal to the supreme court before argument, five dollars; for argument, fifteen dollars; and when a judgment is affirmed, the court may in its discretion also award damages for the delay not exceeding ten per cent on the amount of the judgment.

6. To either party for every term not exceeding five, at which the cause is necessarily on the calendar and is not tried or is postponed by order of the court, three dollars; and for every term not exceeding five, excluding the term at which the cause is argued in the supreme court, five dollars. [1883, ch. 11, § 1; R. C. 1899, § 5575.]

Reasonable disbursements on appeal allowed. Black v. Elevator Co., 8 N. D. 96, 76 N. W. 984; First National Bank v. North, 6 Dak. 136, 41 N. W. 736; Novotny v. Danforth, 9 S. D. 412, 69 N. W. 585; Swenson v. Christopherson, 10 S. D. 342, 73 N. W. 96; Kirby v. Telephone Co., 8 S. D. 54, 65 N. W. 482; Ellis v. Wait, 4 S. D. 504, 57 N. W. 232; Crane v. Odegard, 12 N. D. 135, 96 N. W. 326.

Cost of printing briefs served out of time upon leave allowed. Crane v. Odegard, 12 N. D. 135, 96 N. W. 326.

Damages will be assessed when appeal is taken for delay. Himebaugh v. Crouch, 3 S. D. 409, 53 N. W. 862; Sigmund v. Bank, 4 N. D. 164, 59 N. W. 966.

Upon setting aside default judgment in justice court, attorney's fee may be allowed as costs. Erpenbach v. Ry. Co., 8 S. D. 575, 67 N. W. 606; Phoenix Ins. Co. v. McDermont, 7 N. D. 172, 73 N. W. 91.

Party making no argument on appeal not entitled to costs. Searle v. City of Lead, 10 S. D. 405, 73 N. W. 913.

No damages on appeal involving unsettled question of law. Hall v. Fisher, 14 S. D. 321, 85 N. W. 591.

Costs limited to items specified by statute. Plaintiff having paid fees for service of process, entitled to tax costs, although deputy serving was merely a de facto officer. Elfring v. New Birdsall Co., 17 S. D. 350, 96 N. W. 703.

§ 7175. **Attorney's fee in instrument void.** Any provision contained in any note, bond, mortgage or other evidence of debt for the payment of an attorney fee in case of default in payment or of proceedings had to collect such note, bond or evidence of debt or to foreclose such mortgage is hereby declared to be against public policy and void. [1889, ch. 16, § 1; R. C. 1899, § 5576.]

Promissory note taken containing provision for payment of attorney fees and cost of collection is non-negotiable, and if changed, after execution of note fraudulently, note becomes void and debt extinguished. Bank v. Laughlin, 4 N. D. 391, 61 N. W. 473.

Stipulation in note for attorney's fee though void, does not destroy negotiability of note. Chandler v. Kennedy, 8 S. D. 56, 65 N. W. 439.

§ 7176. **Costs on foreclosure of liens.** In all actions or proceedings for the foreclosure of a mortgage upon personal property or of a mortgage or other lien upon real property the plaintiff or person commencing such action or proceeding shall be entitled to tax as a part of his costs, when the amount of the debt secured by such mortgage or liens does not exceed the sum of five hundred dollars, the sum of twenty-five dollars; when the amount of the debt so secured exceeds five hundred dollars and does not exceed one thousand dollars, the sum of fifty dollars; when the amount of the debt so secured exceeds one thousand dollars and does not exceed two thousand dollars, the sum of seventy-five dollars; when the amount of the debt so secured exceeds two thousand dollars the sum of seventy-five dollars, and in addition thereto two per cent on the amount so secured in excess of two thousand dollars; provided, that none of the above fees shall be allowed unless the foreclosure proceedings shall be conducted under the supervision of an attorney duly authorized to practice in the courts of this state. [R. C. 1895, § 5577; 1905, ch. 129.]

§ 7177. **Costs taxed in judgment.** In all actions and special proceedings the clerk must tax as a part of the judgment in favor of the prevailing party his necessary disbursements as follows: The legal fees of witnesses and of referees and other officers, the necessary expenses of taking depositions and of procuring evidence necessarily used or obtained for use on the trial, the legal fees for publication, when publication is made pursuant to law and the legal fees of the court stenographer for a transcript of the testimony when such transcript is used on motion for a new trial or in preparing a statement of the case. [C. Civ. P. 1877, § 379; R. C. 1895, § 5578.]

Compensation and expenses of receiver not proper items of cost to be taxed by clerk. Cutter v. Pollock, 4 N. D. 205, 59 N. W. 1062.

Statute does not apply to certiorari proceedings. Kirby v. Court, 10 S. D. 196, 72 N. W. 461.

Costs constitute part of judgment in determining amount, on question of jurisdiction on appeal. Winn v. Sanborn, 10 S. D. 340, 73 N. W. 96.

Costs in disbarment proceedings. In re Kirby, 10 S. D. 416, 73 N. W. 908.

§ 7178. **Costs allowed to plaintiff.** Costs shall be allowed of course to the plaintiff upon a recovery in the following cases:

1. In an action for the recovery of real property or when a claim of title to real property arises on the pleadings or is certified by the court to have come in question at the trial.
2. In an action to recover the possession of personal property.
3. In the actions of which a justice's court has no jurisdiction.
4. In an action for the recovery of money when the plaintiff shall recover fifty dollars. But in an action for assault, battery, false imprisonment libel, slander, malicious prosecution, criminal conversation or seduction, if the plaintiff recovers less than fifty dollars damages, he shall recover no more

costs and disbursements than damages. And in an action to recover the possession of personal property, if the plaintiff recovers less than fifty dollars damages, he shall recover no more costs and disbursements than damages, unless he recovers also property, the value of which with the damages amounts to fifty dollars, or the possession of property is adjudged to him, the value of which with the damages amounts to fifty dollars; such value must be determined by the jury, court or referee by whom the action is tried. When several actions shall be brought on one bond, recognizance, promissory note, bill of exchange or other instrument in writing, or in any other case for the same cause of action against several parties who might have been joined as defendants in the same action, no costs other than the disbursements heretofore allowed by law shall be allowed to the plaintiff in more than one of such actions, which must be at his election; provided, that the party or parties proceeded against in such action or actions, shall at the time of the commencement of the previous action or actions, have been openly within this state and not secreted. Costs shall be allowed of course to the defendant in the actions mentioned in this section unless the plaintiff is entitled to costs therein. [C. Civ. P. 1877, § 381; 1883, ch. 55, § 2; R. C. 1899, § 5579.]

Defendant entitled to, when. Township v. Dow, 4 S. D. 163, 56 N. W. 84; Laney v. Ingalls, 5 S. D. 183, 58 N. W. 572; Pyle v. Hand County, 1 S. D. 385, 47 N. W. 401; St. Paul F. & M. Ins. Co. v. Coleman, 6 Dak. 458, 43 N. W. 693; Grosso v. City of Lead, 9 S. D. 165, 68 N. W. 310; Macomb v. Lake County, 13 S. D. 103, 82 N. W. 417.

§ 7179. **Costs in discretion of court.** In actions other than those specified in section 7178 costs may be allowed for or against either party in the discretion of the court. In all actions when there are several defendants not united in interest and making separate defenses by separate answers and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor. [1883, ch. 55, § 3; R. C. 1895, § 5580.]

When new trial is ordered. Angell v. Egger, 6 N. D. 391, 71 N. W. 547.

Costs when wholly discretionary. Brown v. Skotland, 12 N. D. 445, 97 N. W. 543.

§ 7180. **Costs of appeal. Same.** In the following cases the costs of an appeal must be in the discretion of the court:

1. When a new trial shall be ordered.
2. When a judgment shall be affirmed in part and reversed in part. [C. Civ. P. 1877, § 383; R. C. 1899, § 5581.]

Question of costs is discretionary in equitable actions, and when judgment affirmed in part, and reversed in part. McKenzie v. Water Co., 6 N. D. 361, 71 N. W. 608; Macomb v. Lake County, 13 S. D. 103, 82 N. W. 417; American Banking Co. v. Lynch, 13 S. D. 34, 82 N. W. 77; Sorenson v. Donahoe, 12 S. D. 204, 80 N. W. 179.

§ 7181. **On dismissal of action.** When an action is dismissed from any court for want of jurisdiction or because it has not been regularly transferred from an inferior to a superior court, the costs must be adjudged against the party attempting to institute or bring up the action. [C. Civ. P. 1877, § 384; R. C. 1899, § 5582.]

On dismissal of appeal. See In re Weber, 4 N. D. 119, 56 N. W. 523; Hazeltine v. Browne, 9 S. D. 351, 69 N. W. 579.

Respondent entitled to costs upon dismissal of an appeal from a non-appealable order. Tracy v. Scott, 13 N. D. 577, 101 N. W. 905.

§ 7182. **On appeal from justice.** Costs must be allowed to the prevailing party in judgments rendered on appeal from justices' courts in all cases, including his costs taxed in the court below. [C. Civ. P. 1877, § 385; R. C. 1899, § 5583.]

§ 7183. **Interest on judgment.** When the judgment is for the recovery of money, interest from the time of the verdict or report, until judgment is

finally entered, must be computed by the clerk and added to the costs of the party entitled thereto. [C. Civ. P. 1877, § 386; R. C. 1899, § 5584.]

§ 7184. **Notice of taxing. Verification. Items.** The clerk must insert in the entry of judgment on the application of the prevailing party upon five days' notice to the other, except when the attorneys reside in the same city, village or town and then upon two days' notice, the sum of the allowances for costs as provided by this code. The costs must be stated in detail and verified by the affidavit of the party or his attorney, stating in substance that the items of costs have been or will necessarily be incurred in the action or proceeding. A copy of the items of the costs and the affidavit must be served with a notice of adjustment. Whenever it shall be necessary to adjust costs in any interlocutory proceeding in an action or in any special proceeding, the same shall be adjusted by the judge before whom the same may be heard, or the court before which the same may be decided or pending, or in such other manner as the judge or court may direct. [C. Civ. P. 1877, § 387; R. C. 1899, § 5585.]

Judgment debtor not entitled to release by payment of judgment before taxation of costs. Stakke v. Chapman, 13 S. D. 269, 83 N. W. 261.

§ 7185. **Notice of retaxation. Procedure on.** Costs may also be taxed without notice. But when they are so taxed notice of retaxation thereof must immediately afterwards be given as prescribed in the last section by the party at whose instance they are taxed, in default whereof the court must upon the application of a party entitled to notice direct a retaxation with costs of the motion to be paid by the party in default. Any sum deducted upon a retaxation must be credited upon the judgment. [R. C. 1895, § 5586.]

§ 7186. **Taxation reviewed on motion.** A taxation or a retaxation of costs may be reviewed by the court upon motion. The order made upon such motion may allow or disallow any item objected to before the taxing officer, in which case it has the effect of a new taxation. [C. Civ. P. 1877, § 380; R. C. 1895, § 5587.]

Improper taxation of costs remedied by motion to have judgment modified, and not by appeal. In re Kirby, 10 S. D. 414, 73 N. W. 907; Sorenson v. Donahoe, 12 S. D. 204, 80 N. W. 179.

§ 7187. **Costs of postponement.** When an application is made to a court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed in the discretion of the court or referee as a condition of granting the same. [C. Civ. P. 1877, § 389; R. C. 1899, § 5588.]

§ 7188. **Costs on motion.** Upon a motion in an action or proceeding costs may be awarded, not to exceed twenty-five dollars, either absolutely or to abide the event of the action, to any party in the discretion of the court. [R. C. 1895, § 5589.]

§ 7189. **Against infant plaintiff.** When costs are adjudged against a plaintiff, who is an infant or a person of unsound mind, the guardian by whom he appeared in the action must be responsible therefor and payment thereof may be enforced in the manner provided in section 7201. [C. Civ. P. 1877, § 390; R. C. 1895, § 5590.]

Guardian ad litem personally responsible for costs, when. Granholm v. Sweigle, 3 N. D. 476, 57 N. W. 509.

Obligation to pay costs arises from law. Ca. Sa. attachment proceedings not authorized. Non-payment of such costs, not fraud or tort, not contempt of court. Granholm v. Sweigle, 3 N. D. 476, 57 N. W. 509.

§ 7190. **Of trustee from trust funds.** In an action prosecuted or defended by an executor, administrator, trustee of an express trust or a person expressly authorized by statute, costs shall be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs must by the judgment be chargeable only upon or collected of the estate,

fund or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally for mismanagement or bad faith in such action or defense. [C. Civ. P. 1877, § 391; R. C. 1899, § 5591.]

§ **7191. Against state. Exception.** In all civil actions prosecuted in the name of the state by an officer duly authorized for that purpose the state shall be liable for the costs in the same cases and to the same extent as private parties. If a private person is joined with the state as plaintiff he shall be liable in the first instance for the defendant's costs, which shall not be recovered of the state until after execution is issued therefor against such private party and returned unsatisfied. [C. Civ. P. 1877, § 392; R. C. 1899, § 5592.]

§ **7192. Against party in interest.** In an action prosecuted in the name of the state for the recovery of money or property, or to establish a right or claim for the benefit of any county, city, town, village, corporation or person, costs awarded against the party plaintiff shall be charged against the party for whose benefit the action was prosecuted and not against the state. [C. Civ. P. 1877, § 393; R. C. 1899, § 5593.]

§ **7193. Against assignee.** In actions in which the cause of action shall, by assignment after the commencement of the action or in any other manner, become the property of a person not a party to the action, such person shall be liable for the costs in the same manner as if he were a party and payment thereof may be enforced by attachment. [C. Civ. P. 1877, § 394; R. C. 1899, § 5594.]

§ **7194. On change of venue to county sending.** In all actions or proceedings, including criminal actions, when a change of venue is had or made by the order of any court or of any judge pursuant to law, except in cases when such change is made because such action was not brought in the proper county, the county in which such action was commenced shall pay to the county in which the same is tried the following expenses arising out of such change of venue:

1. The per diem fees allowed by law to the clerk and all costs and fees of such clerk which are a lawful charge against the county.
2. The per diem fees allowed by law to the petit jurors actually in attendance upon said court.
3. The per diem fees allowed by law to the sheriff for attendance upon said court.
4. All lawful charges for boarding the jurors.
5. The legal fees of all witnesses in any criminal case or proceeding which are a lawful charge against the county.
6. The fees or compensation allowed by law to the court stenographer in attendance upon said court and such other fees allowed to such stenographer in criminal proceedings as are a lawful charge against the county.
7. All other lawful costs, fees and disbursements which are a lawful charge against the county.
8. All lawful charges and fees for subpenaing witnesses in any criminal case or proceeding which are a proper charge against the county.

The fees of such officers, jurors and stenographers are to be estimated for each day and part of a day, not less than half a day, occupied in trying or disposing of any such action; but no costs shall be paid to the county to which a change of venue is had which are not properly chargeable against such county. [C. Civ. P. 1877, § 395; R. C. 1895, § 5595.]

§ **7195. Manner of collecting.** The clerk shall make out a correct bill of all the expenses which shall accrue during any such trial as aforesaid and have the same taxed and allowed by the judge of such court; and when so taxed shall without delay transmit the same to the auditor of the county in which such action was commenced, who at the first meeting of the board of county commissioners of such county after receiving such bill shall present

the same to such board; and such board shall direct the issuance of a warrant therefor in favor of the county in which such action or proceeding was had or tried, or its assigns. [C. Civ. P. 1877, § 396; R. C. 1895, § 5596.]

§ 7196. Nonresident must furnish surety. In cases in which the plaintiff is a nonresident of the state or a foreign corporation, the plaintiff must before commencing such action furnish a sufficient surety for costs. The surety must be a resident of the county or subdivision where the action is to be brought and must be approved by the clerk. His obligation shall be complete by simply indorsing the summons or signing his name on the complaint as security for costs. [C. Civ. P. 1877, § 397; R. C. 1899, § 5597.]

§ 7197. Responsibility of surety. He shall be bound for the payment of all costs which may be adjudged against the plaintiff in the court in which the action is brought or in any other to which it may be carried, and for costs of the plaintiff's witnesses, whether the plaintiff obtains judgment or not. [C. Civ. P. 1877, § 398; R. C. 1899, § 5598.]

§ 7198. Dismissal when security not given. An action in which security for costs is required by the last section and has not been given shall be dismissed on motion and notice by the defendant at any proper time before judgment, unless in a reasonable time to be allowed by the court such security for costs is given. [C. Civ. P. 1877, § 399; R. C. 1899, § 5599.]

§ 7199. Security on becoming nonresident. If the plaintiff in an action after its commencement becomes a nonresident of the state, he shall give security for costs in the manner and under the restrictions provided in the two preceding sections. [C. Civ. P. 1877, § 400; R. C. 1899, § 5600.]

§ 7200. When additional security demanded. In an action in which security for costs has been given the defendant may at any time before judgment after reasonable notice to the plaintiff move the court for additional security on the part of the plaintiff; and if on such motion the court is satisfied that the surety has removed from this state or is not sufficient the action may be dismissed, unless in a reasonable time to be fixed by the court sufficient surety is given by the plaintiff. [C. Civ. P. 1877, § 401; R. C. 1899, § 5601.]

§ 7201. Judgment against surety. After final judgment has been rendered in an action in which security for costs has been given as required by this chapter the court on motion of the defendant, or any other person having a right to such costs or any part thereof after ten days' notice of such motion may enter up judgment in the name of the defendant or his legal representatives against the surety for costs, his executors or administrators, for the amount of the costs adjudged against the plaintiff, or so much thereof as may be unpaid. Execution may be issued on such judgment as in other cases for the use and benefit of the person entitled to such costs. [C. Civ. P. 1877, § 402; R. C. 1899, § 5602.]

CHAPTER 15.

OF APPEALS IN CIVIL ACTIONS.

§ 7202. Appeals to supreme court. A judgment or order in a civil action or in a special proceeding in any of the district courts may be removed to the supreme court by appeal as provided in this chapter and not otherwise. [1891, ch. 120, § 1; R. C. 1899, § 5603.]

Acceptance of benefit under judgment is waiver of right of appeal. When not a waiver. Whole case open to investigation on appeal. Appellate tribunal may modify judgment. Tyler v. Shea, 4 N. D. 377, 61 N. W. 468.

Error in charge of court can be reviewed on appeal from judgment without motion for new trial. McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685.

Precluded from appealing by acceptance of alimony in divorce suit. Williams v. Williams, 6 N. D. 269, 69 N. W. 47.

When appeal from default judgment allowed. Mortgage Co. v. Reeve, 7 N. D. 99, 72 N. W. 1088.

Frivolous appeal. See Assurance Co. v. McDermont, 7 N. D. 172, 73 N. W. 91.

Where judgment affirmed on appeal, it cannot be set aside for any alleged infirmity that might have been raised on former appeal. Mortgage Co. v. Reeve, 7 N. D. 552, 75 N. W. 910.

A party who voluntarily pays a judgment against him cannot appeal therefrom. Same, where he pays amount specified in order for judgment. Rolette County v. Pierce County, 8 N. D. 613, 80 N. W. 804.

The manner of taking appeals was revised by the statute. The right is limited to aggrieved parties, and may be taken after final judgment or order only. May be taken before costs are taxed. Prescott v. Brooks, 11 N. D. 93, 90 N. W. 129; Sands v. Cruickshank, 12 S. D. 1, 80 N. W. 173; Gales v. Bank, 13 S. D. 622, 84 N. W. 192; Schlegel v. Sisson, 8 S. D. 476, 66 N. W. 1087; Williams v. Wait, 2 S. D. 210, 49 N. W. 209; State v. Donaldson, 12 S. D. 259, 81 N. W. 299; Adams v. Smith, 6 Dak. 94, 50 N. W. 720; Hughes v. Stearns, 13 S. D. 627, 84 N. W. 196; Mouser v. Palmer, 2 S. D. 466, 50 N. W. 967; Williams v. Ry. Co., 10 S. D. 336, 73 N. W. 74; Nordin v. Berner, 15 S. D. 611, 91 N. W. 308.

§ **7203. Title to action unchanged.** The party appealing is known as the appellant and the adverse party as the respondent, but the title of the action is not to be changed in consequence of the appeal. [1891, ch. 120, § 2; R. C. 1899, § 5604.]

§ **7204. Time for appeal.** An appeal from a judgment may be taken within one year after the entry thereof by default, or after written notice of the entry thereof in case the party against whom it is entered has appeared in the action, and from an order within sixty days after written notice of the same shall have been given to the party appealing; provided, that in all actions heretofore or hereafter tried, when the appeal from an order is based upon errors assigned or set out in a statement of the case submitted to the court or judge thereof for settlement within sixty days after the service of such written notice and at least eight days prior to the expiration of such time and such court or judge neglects to settle such statement within the said sixty days, the party appealing shall have thirty days after such statement shall have been settled in which to take an appeal. [1891, ch. 120, § 3; 1893, ch. 81, § 1; R. C. 1895, § 5605.]

Entry of judgment nunc pro tunc cannot make effective an appeal taken during the time intervening between the date of entry and date as of which entered. McTavish v. G. N. Ry. Co., 8 N. D. 333, 79 N. W. 443; Young v. G. N. Ry. Co., 8 N. D. 345, 79 N. W. 448.

Appeal from a judgment before entry premature, when. Oliver v. Wilson, 8 N. D. 590, 80 N. W. 757.

Written notice of entry of judgment to set time for appeal running, to be available against an appellant, must be served upon time by his adversary. Service by an appellant by a respondent does not operate to limit appellant's time. Service may be by copy. Prescott v. Brooks, 11 N. D. 93, 90 N. W. 129; Keogh v. Snow, 9 N. D. 458, 83 N. W. 864.

Service of notice of appeal on attorney for adverse party. Service on one of firm of attorneys sufficient. Unnecessary to serve clerk of court, filing sufficient. Time for filing. Bank v. Pick, 13 N. D. 74, 99 N. W. 63.

Appeal from an order taken within the period allowed by law, may be taken after time to appeal from judgment has expired. To what order applies. King v. Hanson, 13 N. D. 85, 99 N. W. 1085.

Appeal taken more than two years after entry of judgment, will be dismissed. In re Houghton, 5 S. D. 537, 59 N. W. 733.

Limitation of sixty days does not apply to order denying new trial made before entry of judgment. Granger v. Roll, 6 S. D. 611, 62 N. W. 970.

When party has attorney of record, notice of appeal should be served on attorney, not on party. McKittrick v. Pardee, 8 S. D. 39, 65 N. W. 23.

Appeal cannot be taken without undertaking, unless waived in writing. Bonnell v. Van Cise, 8 S. D. 592, 67 N. W. 685; Coburn v. Board, 10 S. D. 552, 74 N. W. 1026; Hazeltine v. Browne, 9 S. D. 351, 69 N. W. 579.

Appeal in election contest must be taken within sixty days. Murray v. Whitmore, 9 S. D. 288, 68 N. W. 745.

Entry of judgment or order must be made before appeal. **Nordin v. Berner**, 15 S. D. 611, 91 N. W. 308; Dyea Electric Light Co. v. **Easton, 14 S. D. 520, 86 N. W.** 23; **Martin v. Smith**, 11 S. D. 437, 78 N. W. 1001; **State v. Lamm**, 9 S. D. 418, 69 N. W. 592; Bank of Iowa & Dakota v. Oliver, 11 S. D. 444, **78 N. W. 1002; Chamberlain v. Hedger, 10 S. D. 290, 73 N. W. 75; Greenly v. Hopkins, 7 S. D. 561, 64 N. W.** 1128; Coburn v. Board, 10 S. D. 552, 74 N. W. 1026; **Minn. Machine Co. v. Skau,** 10 S. D. 636, 75 N. W. 199; Sinkling v. Ry. Co., 10 S. D. **560, 74 N. W. 1029; Hughes** v. Stearns, 13 S. D. 627, 84 N. W. 196; Smith v. Hawley, **11 S. D. 399, 78 N. W. 355.**

§ 7205. How appeal taken. An appeal must be taken by serving a notice in writing signed by the appellant or his attorney on the adverse party and filing the same in the office of the clerk of the court in which the judgment or order appealed from is entered, stating the appeal from the same, and whether the appeal is from the whole or a part thereof and if from a part only, specifying the part appealed from. The appeal shall be deemed taken by the service of a notice of the appeal and perfected on service of the undertaking for costs, or the deposit of money instead, or the waiver thereof as hereinafter prescribed. When service of a notice of appeal and undertaking cannot in any case be made within this state the court may prescribe a mode for serving the same. [1887, ch. 20, § 3; 1891, ch. 120, § 4; R. C. 1895, § 5606.]

Service of notice of appeal upon clerk of court from which appeal is taken is jurisdictional, and records must show such service. **Hoffman v. Bank**, 4 N. D. 473, 61 N. W. 1031; Valley City Land & Irrigation Co. v. **Schone**, 2 S. D. 344, 50 N. W. 356; Peck v. Phillips, 4 Dak. 430, 34 N. W. 65; **Pierre Savings Bank v. Ellis**, 9 S. D. 251, 68 N. W. 545; Deadwood v. Newton, 2 Dak. 39, **3 N. W. 311.**

Notice of appeal must be served and filed with clerk of district court before appeal is complete. **Stierlen v. Stierlen**, 8 N. D. 297, 78 **N. W. 990.**

When service of notice waived. Mather v. Darst, 11 **S. D. 480, 78 N. W. 954.**

Party whose interest will not be affected is not an **adverse party. Sutton** v. Mining Co., 12 S. D. 576, 82 N. W. 188.

Service on both adverse party and clerk of court requisite. **Appeal valid** where judgment roll filed after service on respondent and **before service on clerk.** Brannon v. White Lake Township, 17 S. D. 83, 95 N. W. 284.

§ 7206. Clerk to transmit papers. Upon an appeal being perfected the clerk of the court from which the appeal is taken shall at the expense of the appellant forthwith transmit to the supreme court, if the appeal is from a judgment, the judgment roll; if the appeal is from an order, he shall transmit the order appealed from and the original papers used by each party on the application for such order. The court may, however, in case of either judgment or order upon motion of either party after notice to the adverse party for good cause shown, direct copies to be transmitted instead of the originals. The clerk shall also in all cases transmit to the supreme court the original notice of appeal and the undertaking given thereon; and he shall annex to the papers so transmitted a certificate under his hand and the seal of the court from which the appeal is taken, certifying that they are the original papers or copies as the case may be, and that they are transmitted to the supreme court pursuant to such appeal. No further certificate or attestation shall be necessary; provided, that if the appellant does not within thirty days after his appeal is perfected cause a proper record in the case to be transmitted to the supreme court by the clerk of the district court, the respondent may cause such record to be transmitted by the clerk of the district court to the clerk of the supreme court; and in such case the respondent may recover the expense thereof as costs on such appeal in case the judgment or order appealed from is in whole or in part affirmed. [1887, ch. 20, § 4; 1891, ch. 120, § 5; R. C. 1895, § 5607.]

Original papers to be sent by clerk, in absence of **order for copies. Jasper** v. Hazen, 1 N. D. 210, 46 N. W. 173; Hedlum v. Mining **Co., 14 S. D. 369, 85 N. W.** 861; Goose River Bank v. Gilmore, 3 N. D. 188, 54 **N. W. 1032; Bailey v. Scott**, 1 S. D. 337, 47 N. W. 286; Bedtkey v. Bedtkey, 15 S. D. 310, **89 N. W. 479.**

When appeal taken from order denying a new trial and motion heard on certain papers and documents, properly identified on **appeal, motion to purge** record of such papers and documents because not authenticated by bill or statement cannot be sustained. No bill or statement required. **Stenographer's tran-**

script of proceedings not authenticated record. Proceedings must be brought into record by bill or statement. Goose River Bank v. Gilmore, 3 N. D. 188, 54 N. W. 1032.

Record cannot be amended in supreme court after case fully argued and submitted, unless remanded for such purpose. Moore v. Booker, 4 N. D. 543, 62 N. W. 607.

Clerk should certify to judgment roll. Hardy v. Purington, 6 S. D. 382, 61 N. W. 158.

§ 7207. **Deposit for undertaking. Waiver of.** When the appellant is required under any provision of this chapter to give an undertaking he may in lieu thereof deposit with the clerk of court in which the judgment or order appealed from is entered, who shall give him a receipt therefor, a sum of money equal to the amount for which such undertaking is required to be given and in lieu of the service of such undertaking serve a notice of the making of such deposit. Such deposit and notice shall have the same effect as the service of the required undertaking and be held to answer the event of the appeal upon the terms prescribed for the undertaking in lieu of which the same is deposited. Any such undertaking and deposit may be waived in writing by the respondent for whose benefit the same is required to be made and such waiver shall have the same effect as the giving of the undertaking would have had. [1887, ch. 20, § 5; 1891, ch. 120, § 6; R. C. 1899, § 5608.]

Undertaking can only be waived in writing. Bonnell v. Van Cise, 8 S. D. 592, 67 N. W. 685; McConnell v. Spicker, 13 S. D. 406, 83 N. W. 435.

§ 7208. **Appeal ineffectual without undertaking.** To render an appeal effectual for any purpose an undertaking must be executed on the part of the appellant by at least two sureties to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal not exceeding two hundred and fifty dollars. [1887, ch. 20, § 6; 1887, ch. 26, § 1; 1891, ch. 120, § 7; R. C. 1899, § 5609.]

Clerical error in bond or undertaking reviewed. Travelers' Ins. Co. v. Weber, 4 N. D. 135, 59 N. W. 529.

Undertaking or deposit or waiver are essential to jurisdiction. Bonnell v. Van Cise, 8 S. D. 592, 67 N. W. 685; Martin v. Smith, 11 S. D. 437, 78 N. W. 1001; McConnell v. Spicker, 13 S. D. 406, 83 N. W. 435.

Service of undertaking not necessary, when. Mather v. Darst, 11 S. D. 480, 78 N. W. 954; Sands v. Cruickshank, 12 S. D. 1, 80 N. W. 173.

§ 7209. **Execution not stayed without undertaking.** If the appeal is from a judgment directing the payment of money, it shall not stay the execution of the judgment unless an undertaking is executed on the part of the appellant by at least two sureties to the effect that if the judgment appealed from, or any part thereof, is affirmed the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it is affirmed only in part, and all damages, which shall be awarded against the appellant on appeal. [1887, ch. 20, § 7; 1891, ch. 120, § 8; R. C. 1899, § 5610.]

On appeal from judgment, usual undertaking for costs and also undertaking provided by this section, held to operate as stay of proceedings in the district court. Bank v. Hanberg, 10 N. D. 383, 87 N. W. 1006; Sutton v. Mining Co., 12 S. D. 576, 82 N. W. 188; Coughran v. Sundback, 13 S. D. 115, 82 N. W. 507.

§ 7210. **Undertaking to stay judgment for delivery of personalty.** If the judgment appealed from directs the assignment or delivery of documents or personal property the execution of the judgment shall not be delayed by the appeal, unless the things required to be assigned or delivered are brought into court or placed in the custody of such officer or receiver as the court or presiding judge shall appoint, or unless an undertaking is entered into on the part of the appellant by at least two sureties in such sum as the court or presiding judge thereof shall direct to the effect that the appellant will

obey the order of the appellate court on the appeal. [1887, ch. 20, § 8; 1891, ch. 120, § 9; R. C. 1899, § 5611.]

Stay bond, sufficiency of. When order necessary. Bank v. Hanberg, 10 N. D. 383, 87 N. W. 1006; Coughran v. Sundback, 13 S. D. 115, 82 N. W. 507.

§ 7211. **To stay execution of conveyance.** If the judgment appealed from directs the execution of a conveyance or other instrument the execution of the judgment shall not be stayed by the appeal, unless the instrument shall have been executed and deposited with the clerk with whom the judgment was entered to abide the judgment of the appellate court. [1887, ch. 20, § 9; 1891, ch. 120, § 10; R. C. 1899, § 5612.]

§ 7212. **Of judgment to sell and deliver realty.** If the judgment appealed from directs the sale or delivery of possession of real property, except in actions for foreclosure of mortgages, the execution of the same shall not be stayed, unless an undertaking is executed on the part of the appellant by at least two sureties in such sum as the court or presiding judge thereof shall direct to the effect that during the possession of such property by the appellant he will not commit nor suffer to be committed any waste thereon and that if the judgment is affirmed he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof pursuant to the judgment. [1887, ch. 20, § 10; 1891, ch. 120, § 11; R. C. 1899, § 5613.]

§ 7213. **To stay mortgage sale.** If the judgment appealed from directs the sale of mortgaged premises, the execution thereof shall not be stayed by the appeal, unless an undertaking is executed on the part of the appellant by at least two sureties, conditioned for the payment of any deficiency which may arise on such sale, not exceeding such sum as shall be fixed by the court or presiding judge thereof; to be specified in the undertaking, and all costs and damages which may be awarded to the respondent on such appeal. [1887, ch. 20, § 11; 1891, ch. 120, § 12; R. C. 1899, § 5614.]

§ 7214. **Abatement of nuisance.** If the judgment appealed from directs the abatement or restraint of the continuance of a nuisance, either public or private, the execution of the judgment shall not be stayed by the appeal, unless an undertaking is entered into on the part of the appellant by at least two sureties in such sum as the court or presiding judge thereof shall direct to the effect that the appellant will pay all damages which the opposite party may sustain by the continuance of such nuisance. [1887, ch. 20, § 12; 1891, ch. 120, § 13; R. C. 1899, § 5615.]

§ 7215. **Other judgments.** If the judgment appealed from directs the doing of any particular act or thing and no express provision is made by statute in regard to the undertaking to be given on appeal therefrom, the execution thereof shall not be stayed by the appeal therefrom, unless an undertaking is entered into on the part of the appellant in such sum as the court or presiding judge thereof shall direct and by at least two sureties to the effect that the appellant will pay all damages which the opposite party may have sustained by not doing the particular thing or act directed to be done by the judgment appealed from and to such further affect as such court or judge shall in discretion direct. [1887, ch. 20, § 13; 1891, ch. 120, § 14; R. C. 1899, § 5616.]

§ 7216. **Intermediate orders.** When the appeal is from an order the execution or performance thereof shall not be delayed, except upon compliance with such conditions as the court or presiding judge thereof shall direct and, when so required, an undertaking shall be executed on the part of the appellant by at least two sureties in such sums and to such effect as the court or presiding judge thereof shall direct; such effect shall be directed in accordance with the nature of the order appealed from, corresponding to the foregoing provisions in respect to appeals from judgments, when applicable and such provision shall be made in all cases as will properly protect

the respondent and no appeal from an intermediate order before judgment shall stay proceedings unless the court or presiding judge thereof shall in his discretion so specially order. [1887, ch. 20, § 14; 1891, ch. 120, § 15; R. C. 1895, § 5617.]

§ 7217. Undertaking on orders as to provisional remedies. When a party shall give immediate notice of appeal from an order vacating or modifying a writ of attachment or from an order denying, dissolving or modifying an injunction he may within six days thereafter serve an undertaking executed on his part by at least two sureties in such sum as the court or presiding judge thereof shall direct to the effect that, if the order appealed from or any part thereof is affirmed, the appellant will pay all costs and damages which may be awarded against him on appeal and all which the adverse party may sustain by reason of the continuance of the attachment or the granting or continuance of the injunction as the case may be. Upon the giving of such undertaking such court or judge shall order the attachment to be continued and in his discretion may order the injunction asked to be allowed or that before granted to be continued until the decision of the appeal, unless the respondent shall at any time pending the appeal give an undertaking with sufficient surety in a sum to be fixed by the court or presiding judge to abide and perform any final judgment that shall be rendered in favor of the appellant in the action, but may at any time subsequently vacate such order if the appeal is not diligently prosecuted. [1887, ch. 20, § 15; 1891, ch. 120, § 16; R. C. 1899, § 5618.]

Attachment continued by giving appeal bond. Bank v. Rose, 4 N. D. 319, 58 N. W. 514; Quebec Bank v. Carroll, 1 S. D. 1, 44 N. W. 723.

Continuation of injunction during appeal. Garvin v. Pettee, 13 S. D. 239, 83 N. W. 251.

§ 7218. From whom undertaking not required. When the state, or any state officer, or state board, in a purely official capacity, or any municipal corporation within the state shall take an appeal service of the notice of appeal shall perfect the appeal and stay the execution or performance of the judgment or order appealed from and no undertaking need be given; but the supreme court may on motion require sureties to be given in such form and manner as it shall in its discretion prescribe as a condition of the further prosecution of the appeal. [1887, ch. 20, § 16; 1891, ch. 120, § 17; R. C. 1899, § 5619.]

Appeal by municipal corporation. Undertaking, when necessary. Territory ex rel Wallace v. Woodbury, 1 N. D. 85, 44 N. W. 1077.

Appeal by school board. Heintz v. Moulton, 7 S. D. 272, 64 N. W. 135.

§ 7219. When new undertaking required. The supreme court upon satisfactory proof that any of the sureties to an undertaking given under this chapter has become insolvent or that his circumstances have become so precarious that there is reason to apprehend that the undertaking is insufficient security, may in its discretion require the appellant to file and serve a new undertaking with such sureties and in such time as shall be prescribed, and that in default thereof the appeal shall be dismissed or the stay of proceedings vacated and the execution or performance of the judgment or order be allowed to be enforced without further delay. [1887, ch. 20, § 17; 1891, ch. 120, § 18; R. C. 1899, § 5620.]

Only applies where surety once accepted has become insufficient. Winton v. Kirby, 6 S. D. 98, 60 N. W. 409.

§ 7220. In one instrument or several. Refusal to stay. The undertakings required by this chapter may be in one instrument or several at the option of the appellant; the original must be filed with a notice of the appeal and a copy showing the residence of the sureties must be served with the notice of appeal. When the sum or effect of any undertaking is required under the foregoing provisions to be fixed by the court or judge at least twenty-four

hours' notice of the application thereof shall be given the adverse party. When the court or the judge thereof from which the appeal is taken or desired to be taken shall neglect or refuse to make any order or direction not wholly discretionary, necessary to enable the appellant to stay proceedings upon an appeal, the supreme court, or one of the justices thereof, shall make such order or direction. [1887, ch. 20, § 18; 1891, ch. 120, § 19; R. C. 1899, § 5621.]

Failure to serve copy of undertaking with notice of appeal, effect of. See Morrison v. O'Brien, 17 S. D. 372, 97 N. W. 2.

§ 7221. **Sureties must justify.** An undertaking upon an appeal shall be of no effect, unless it is accompanied by the affidavit of the sureties in which each surety shall state that he is worth a certain sum mentioned in such affidavit over and above all his debts and liabilities in property within this state not by law exempt from execution, and which sum so sworn to by such sureties shall in the aggregate be double the amount specified in said undertaking. The respondent may, however, except to the sufficiency of the sureties within ten days after such notice of the appeal and unless they or other sureties justify in the same manner as bail upon an arrest within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification shall be upon a notice of not less than five days. [1887, ch. 20, § 19; 1891, ch. 120, § 20; R. C. 1899, § 5622.]

Failure of sureties to justify, when required. See Barber v. Johnson, 4 S. D. 528, 57 N. W. 225.

Justification of sureties, sufficiency of. Tollerton v. Casperson, 7 S. D. 206, 63 N. W. 908.

Bond cannot be executed eight days after notice is served. McConnell v. Spicker, 13 S. D. 406, 83 N. W. 435.

§ 7222. **Effect of perfected appeal. Perishable property.** Whenever an appeal shall have been perfected and the proper undertaking given or other act done prescribed by this chapter to stay the execution or performance of the judgment or order appealed from, all further proceedings thereon shall be thereby stayed accordingly, except that the court may proceed upon any other matter included in the action not affected by the judgment or order appealed from and except that the court or the presiding judge thereof may order perishable property held under the judgment or order appealed from to be sold and the proceeds paid into the court to abide the event. [1887, ch. 20, § 20; 1891, ch. 120, § 21; R. C. 1899, § 5623.]

§ 7223. **Reference to ascertain damages. Breach of undertaking.** When the amount of damages to be paid by the appellant on affirmance of the judgment or order appealed from pursuant to an undertaking is not fixed by the judgment or decision of the supreme court on appeal, the district court may after the remittitur of the record from the supreme court is filed order a reference to ascertain such damages, the expense of which shall be included and recoverable with such damages. In all cases a neglect for the space of thirty days after the affirmance on appeal of a judgment directing the payment of money to pay the amount directed to be paid on such affirmance shall be deemed a breach of the undertaking on such appeal. A neglect for the space of sixty days after the confirmation of a report of a referee, to whom a reference has been ordered for the purpose of ascertaining the damages to be paid on the affirmance of any other judgment or order appealed from, to pay the amount of damages so ascertained and the costs of such reference shall be deemed a breach of the undertaking on such appeal. The dismissal of an appeal by the appellant or by the court for want of prosecution, unless the court shall at the time otherwise expressly order, shall render the sureties upon the undertaking or bond given under this chapter liable in the same manner and to the same extent as if the judgment or order

appealed from had been affirmed. [1887, ch. 20, § 21; 1891, ch. 120, § 22; R. C. 1899, § 5624.]

Liability of sureties on appeal bond; issuance of execution against principal not necessary before suit. Bingham v. Mears, 4 N. D. 437, 61 N. W. 808.

§ 7224. **Amendment of appeals.** When a party shall in good faith give notice of appeal and shall omit through mistake or accident to do any other act necessary to perfect the appeal to make it effectual or to stay proceedings, the court from which the appeal is taken or the presiding judge thereof or the supreme court, or any one of the justices thereof, may permit an amendment or the proper act to be done on such terms as may be just. [1887, ch. 20, § 22; 1891, ch. 120, § 23; R. C. 1899, § 5625.]

Court cannot allow notice to be filed after expiration of time for. Stierlen v. Stierlen, 8 N. D. 297, 78 N. W. 990.

Filing new undertaking, permitted when. Tollerton v. Casperson, 7 S. D. 206, 63 N. W. 908; Skinner v. Holt, 9 S. D. 427, 69 N. W. 595.

Court cannot order entry of judgment nunc pro tunc after appeal for purpose of making appeal effectual. Martin v. Smith, 11 S. D. 437, 78 N. W. 1001; Bank v. Oliver, 11 S. D. 444, 78 N. W. 1002.

§ 7225. **What orders reviewable.** The following orders when made by the court may be carried to the supreme court:

1. An order affecting a substantial right made in any action when such order in effect determines the action and prevents a judgment from which an appeal might be taken.

2. A final order affecting a substantial right made in special proceedings or upon a summary application in an action after judgment.

3. When an order grants, refuses, continues or modifies a provisional remedy or grants, refuses, modifies or dissolves an injunction; when it sets aside or dismisses a writ of attachment for irregularity; when it grants or refuses a new trial or when it sustains or overrules a demurrer.

4. When it involves the merits of an action or some part thereof; when it orders judgment on application therefor on account of the frivolousness of a demurrer, answer or reply; or strikes off such demurrer, answer or reply on account of the frivolousness thereof.

5. Orders made by the district court or judge thereof without notice are not appealable; but orders made by the district court after a hearing is had upon notice which vacate or refuse to set aside orders previously made without notice may be appealed to the supreme court when by the provisions of this chapter an appeal might have been taken from such order so made without notice, had the same been made upon notice. [1887, ch. 20, § 23; 1891, ch. 120, § 24; 1893, ch. 83, § 1; R. C. 1899, § 5626.]

Order denying change of venue is appealable. White v. Ry. Co., 5 Dak. 508, 41 N. W. 730.

Order vacating an attachment is an appealable order. Red River Valley Bank v. Freeman, 1 N. D. 196, 46 N. W. 36.

Order denying motion for judgment not appealable. Nor is it rendered appealable by fact that district court had previously denied defendant's application for judgment on findings of jury. Persons v. Simons, 1 N. D. 243, 46 N. W. 969.

Appeal will lie from an appealable order whether the same is made in or out of term. Insurance Co. v. Mayer, 2 N. D. 234, 50 N. W. 706.

On appeal from judgment, supreme court will review errors of law occurring at the trial, whether motion for new trial was or was not made in the court below. Edwards & McCullough Lumber Co. v. Baker, 2 N. D. 289, 50 N. W. 718.

Appeal may be taken from a judgment void on its face. Gaar, Scott & Co. v. Spaulding, 2 N. D. 414, 51 N. W. 867.

Order passing upon receiver's account appealable. Patterson v. Ward, 6 N. D. 359, 71 N. W. 543.

Habeas corpus not appealable. Carruth v. Taylor, 8 N. D. 166, 77 N. W. 617.

An order dismissing an action on order to show cause, is not appealable. Hanberg v. Bank, 8 N. D. 328, 79 N. W. 336.

Appeal from order in special proceedings. See Oliver v. Wilson, 8 N. D. 590, 80 N. W. 757.

Order for peremptory writ of mandamus appealable. Oliver v. Wilson, 8 N. D. 590, 80 N. W. 757.

Order discharging an order to show cause is appealable. Merchant v. Pielke, 9 N. D. 245, 83 N. W. 18.

Order confirming an execution sale is final and appealable. Is not assailable by motion. Dakota Investment Co. v. Sullivan, 9 N. D. 303, 83 N. W. 233.

Order bringing in additional defendants involves the merits, and is appealable. Bolton v. Donavan, 9 N. D. 575, 84 N. W. 357.

An order granting change of venue involves the merits, and is appealable. Robertson Lumber Co. v. Jones, 13 N. D. 112, 99 N. W. 1082.

Order discharging or refusing to discharge or modify an attachment, appealable. Quebec Bank v. Carroll, 1 S. D. 1, 44 N. W. 723.

Order vacating judgment appealable, when. Weber v. Tschetter, 1 S. D. 205, 46 N. W. 201.

Order vacating order which set aside a sheriff's sale is appealable. Bailey v. Scott, 1 S. D. 337, 47 N. W. 286.

Order allowing amendment of complaint after judgment is appealable. Greeley v. Winsor, 2 S. D. 361, 50 N. W. 630.

Judge's order is not appealable. Black Hills Mining Co. v. Ry. Co., 2 S. D. 546, 51 N. W. 342; Bostwick v. Knight, 5 Dak. 305, 40 N. W. 344.

Ruling upon objection to introduction of evidence on ground of insufficiency of complaint not decision on a demurrer. Ross v. Wait, 2 S. D. 638, 51 N. W. 866.

Order denying motion to set aside summons not appealable. Ryan v. Davenport, 5 S. D. 203, 58 N. W. 568.

Order refusing withdrawal of complaint of intervention appealable. Schaetzel v. City or Huron, 6 S. D. 134, 60 N. W. 741.

Order granting or denying new trial is appealable. Bedford v. Kissick, 8 S. D. 586, 67 N. W. 609; Granger v. Roll, 6 S. D. 611, 62 N. W. 970; Sands v. Cruickshank, 12 S. D. 1, 80 N. W. 173; Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419.

Appeal in habeas corpus proceedings. In re Hammill, 9 S. D. 390, 69 N. W. 577.

Order refusing to dismiss appeal from a justice is appealable. Smith v. Coffin, 9 S. D. 502, 70 N. W. 636; Brown v. Brown, 12 S. D. 380, 81 N. W. 627.

Order appointing referee appealable. Russell v. Whitcomb, 14 S. D. 426, 85 N. W. 860.

§ 7226. Appeal without motion for new trial. Upon an appeal from a judgment the supreme court may review any intermediate order or determination of the court below, which involves the merits and necessarily affects the judgment, appearing upon the record transmitted or returned from the district court, whether the same is excepted to or not; nor shall it be necessary in any case to take any exceptions or settle a statement of the case to enable the supreme court to review any alleged error which would without a statement appear upon the face of the record. Any question of fact or law decided upon trials by the court or by a referee and appearing upon the record properly excepted to in a case in which an exception is necessary may be reviewed by the supreme court, whether a motion for a new trial was or was not made in the court below, but questions of fact shall not be reviewed in the supreme court in cases tried before a jury, unless a motion for a new trial is first made in the court below. [1887, ch. 20, § 24; 1891, ch. 120, § 25; 1891, ch. 121, § 1; R. C. 1899, § 5627.]

Error apparent upon record may be reviewed without exception taken. Galloway v. McLean, 2 Dak. 372, 9 N. W. 98.

Errors not excepted to, not reviewable. DeLendrecie v. Peck, 1 N. D. 422, 48 N. W. 342.

Action of the district court in directing a verdict, and refusing to allow plaintiff to dismiss, cannot be reviewed on appeal without an exception. DeLendrecie v. Peck, 1 N. D. 422, 48 N. W. 342.

A transcript of proceedings embracing the evidence is neither bill of exceptions or statement of case, and no part of the judgment roll. Nor is the same an order "involving the merits." Wood v. Nisson, 2 N. D. 26, 49 N. W. 103.

Review of findings of fact on appeal, when. Jasper v. Hazen, 4 N. D. 1, 58 N. W. 454; Paulson v. Ward, 4 N. D. 100, 58 N. W. 792; Randall v. Burk Township, 4 S. D. 337, 57 N. W. 4; Black Hills Merc. Co. v. Gardiner, 5 S. D. 246, 58 N. W. 557; Gade v. Collins, 8 S. D. 322, 66 N. W. 466.

Questions of fact not tried de novo in supreme court. Findings below presumed to be correct. Error must be made to appear. Jasper v. Hazen, 4 N. D. 1, 58 N. W. 454; Paulson & Co. v. Ward, 4 N. D. 100, 58 N. W. 792.

Complaint defective by reason of omission of non-jurisdictional fact which is proved without objection, cured by finding. Paulson & Co. v. Ward, 4 N. D. 100, 58 N. W. 792.

Order denying motion to quash mandamus not part of judgment roll, and not reviewable as such. Mooney v. Donovan, 9 N. D. 93, 81 N. W. 50.

Only errors appearing upon record reviewable. National Cash Register Co. v. Wilson, 9 N. D. 112, 81 N. W. 285; Galloway v. McLean, 2 Dak. 372, 9 N. W. 98; Brown v. Brown, 12 S. D. 380, 81 N. W. 627.

On appeal from final judgment, intermediate orders not necessarily affecting judgment are not reviewable without motion for new trial. Bolton v. Donavan, 9 N. D. 575, 84 N. W. 357.

Questions of fact reviewed only after motion for new trial, McNab v. N. P. Ry. Co., 12 N. D. 568, 98 N. W. 353; Ness v. Jones, 10 N. D. 587, 88 N. W. 706.

Appeal from judgment, and from order overruling motion for new trial after judgment, will not be dismissed as a double appeal. Hawkins v. Hubbard, 2 S. D. 631, 51 N. W. 774; Williams v. Williams, 6 S. D. 284, 61 N. W. 38.

Appeal cannot be taken from two separate and distinct appealable orders. Anderson v. Hultman, 12 S. D. 105, 80 N. W. 165; Hackett v. Gunderson, 1 S. D. 479, 47 N. W. 546.

Order setting aside referee's report in action regularly referred to and heard by him, on motion reviewable. Neeley v. Roberts, 17 S. D. 161, 95 N. W. 921.

§ 7227. **Power of court. Rehearing. What clerk transmits.** Upon an appeal from a judgment or order the supreme court may reverse, affirm or modify the judgment or order and as to any and all of the parties; and may, if necessary or proper, order a new trial and if the appeal is from a part of the judgment or order may reverse, affirm or modify it as to the part appealed from. In all cases the supreme court shall remit its judgment or decision to the court from which the appeal was taken to be enforced accordingly; and if from a judgment, final judgment shall thereupon be entered in the court below in accordance therewith, except when otherwise ordered. The clerk of the supreme court shall remit to such court the papers transmitted to the supreme court on the appeal together with the judgment or decision of the supreme court thereon within sixty days after the same shall have been made, unless the supreme court on application of either of the parties shall direct them to be retained for the purpose of enabling such parties to move for a rehearing. In case such motion for a rehearing is denied the papers shall be remitted within twenty days after such denial. The clerk of the supreme court shall in all cases, except when the order or judgment is affirmed also transmit with the papers so returned by him a certified copy of the opinion of the supreme court and his fees for such copy shall be taxed and allowed with his other fees in the case. [1887, ch. 20, § 25; 1891, ch. 120, § 26; R. C. 1899, § 5628.]

§ 7228. **When new trial ordered. Time limited.** In every case on appeal in which the supreme court shall order a new trial or further proceedings in the court below the record shall be transmitted to such court and proceedings had therein within one year from the date of such order in the supreme court, or in default thereof the action shall be dismissed, unless upon good cause shown the court shall otherwise order. [1887, ch. 20, § 26; 1891, ch. 120, § 27; R. C. 1899, § 5629.]

Mere filing of remittitur does not constitute "further proceedings," so as to prevent dismissal after one year. Failure to file answer after case remanded does not excuse failure of plaintiff to prosecute. Pendency of equitable suit does not excuse failure to prosecute. Insolvency of defendant, no excuse. Root v. Sweeney, 17 S. D. 179, 95 N. W. 916.

§ 7229. **Appeals in cases tried without jury.** In all actions tried by the district court without a jury, in which an issue of fact has been joined, excepting as hereinafter provided, all the evidence offered on the trial shall be received. Either party may have his objections to evidence noted as it

is offered; but no new trial shall be granted by the district court on the ground that incompetent or irrelevant evidence has been received, or on the ground of the insufficiency of the evidence. A party desiring to appeal from a judgment in any such action, shall cause a statement of the case to be settled within the time and in the manner prescribed by article 8 of chapter 10 of this code, and shall specify therein the questions of fact that he desires the supreme court to review, and all questions of fact not so specified shall be deemed on appeal to have been properly decided by the trial court. Only such evidence as relates to the questions of fact to be reviewed shall be embodied in this statement. But if the appellant shall specify in the statement that he desires to review the entire case, all the evidence and proceedings shall be embodied in the statement. All incompetent and irrelevant evidence, properly objected to in the trial court, shall be disregarded by the supreme court, but no objection to evidence can be made for the first time in the supreme court. The supreme court shall try anew the question of fact specified in the statement or in the entire case, if the appellant demands a retrial of the entire case, and shall finally dispose of the same whenever justice can be done without a new trial, and either affirm or modify the judgment or direct a new judgment to be entered in the district court; the supreme court may, however, if it deem such course necessary to the accomplishment of justice, order a new trial of the action. In actions tried under the provisions of this section, failure of the court to make findings upon all the issues in the case shall not constitute a ground for granting a new trial or reversing the judgment; provided, that the provisions of this section shall not apply to actions or proceedings properly triable with a jury. [1897, ch. 5; R. C. 1899, § 5630; 1903, ch. 201.]

Where jury is dismissed and case submitted to court after evidence in, case is not triable anew in supreme court. What certificate of judge should contain. Bank v. Bank, 5 N. D. 161, 64 N. W. 941.

Order of district court granting new trial on "errors in law occurring at trial" is void, and does not operate to grant new trial or vacate judgment. McKenzie v. Water Co., 6 N. D. 361, 71 N. W. 608.

Questions of fact not reviewed when findings waived in trial court. Nichols & Shepard Co. v. Stangler, 7 N. D. 102, 72 N. W. 1089.

Error to exclude from the record any evidence offered at trial. Otto Gas Engine Works v. Knerr, 7 N. D. 195, 73 N. W. 87.

Evidence offered, whether admitted or not, should be preserved in record. Otto Gas Engine Works v. Knerr, 7 N. D. 195, 73 N. W. 87; Prescott v. Brooks, 11 N. D. 93, 90 N. W. 129; Gilman v. Township, 8 N. D. 627, 80 N. W. 889; State ex rel Wiles v. Heinrich, 11 N. D. 31, 88 N. W. 734; Hagen v. Gilbertson, 10 N. D. 546, 88 N. W. 455.

Court will not decide abstract question. When court will not decide merits or review bill of costs. See in re Kaeppler, 7 N. D. 307, 75 N. W. 253.

Statement of case necessary. Court rules govern and counsel cannot waive statute. Thuet v. Strong, 7 N. D. 565, 75 N. W. 922.

Statement of case, when necessary to be settled by trial court. Thuet v. Strong, 7 N. D. 565, 75 N. W. 922; Erickson v. Kelly, 9 N. D. 12, 81 N. W. 77; Erickson v. Bank, 9 N. D. 81, 81 N. W. 46; National Cash Register Co. v. Wilson, 9 N. D. 112, 81 N. W. 285; Eakin v. Campbell, 10 N. D. 416, 87 N. W. 991; Security Imp. Co. v. Cass County, 9 N. D. 553, 84 N. W. 477; Geils v. Flugel, 10 N. D. 211, 86 N. W. 712; State ex rel McClory v. McGruer, 9 N. D. 566, 84 N. W. 363; Kipp v. Angell, 10 N. D. 199, 86 N. W. 706; Douglas v. Glazier, 9 N. D. 615, 84 N. W. 552; Teinen v. Lally, 10 N. D. 153, 86 N. W. 356; U. S. Loan Co. v. McLeod, 10 N. D. 111, 86 N. W. 110.

When answer admits, plaintiff is entitled to relief. Statement of case unnecessary. McHenry v. Roper, 7 N. D. 584, 75 N. W. 903.

Appellate court will not examine the evidence further than to determine whether it is sufficient to sustain the verdict. Howland v. Ink, 8 N. D. 63, 76 N. W. 992.

All evidence offered must be certified before review had. Edmonson v. White, 8 N. D. 72, 76 N. W. 986.

For full discussion of "Newman Law," see Farmers' Bank v. Davis, 8 N. D. 83, 76 N. W. 998.

Not necessary that evidence be reduced to narrative form. Farmers' Bank v. Davis, 8 N. D. 83, 76 N. W. 998; Nichols & Shepard v. Charlebois, 10 N. D. 446, 88 N. W. 80.

A mere transcript of evidence does not constitute "statement of the case." Certain assignments reviewed and held not to comply with rule twelve of supreme court. Brynjolfson v. Township of Thingvalla, 8 N. D. 106, 77 N. W. 284.

Statement of case must embrace specifications of particulars to be reviewed, or review of entire case asked. Ricks v. Bergsvendsen, 8 N. D. 578, 80 N. W. 768.

In equity case where district court calls jury for advisory purposes, appellate court does not try such case anew. Statute applies only to cases tried in district court without jury. Peckham v. Van Bergen, 8 N. D. 595, 80 N. W. 760.

Certificate that statement contains all the evidence introduced is sufficient. Erickson v. Kelly, 9 N. D. 12, 81 N. W. 77.

Where both parties move for directed verdict, jury trial waived. In order to review entire case, there must be a specification in abstract that appellant desires a review of the entire case, and court cannot review findings unsupported by evidence in absence of such specification. Where abstract does not show jurisdiction, record will be explored to determine fact of jurisdiction. Erickson v. Bank, 9 N. D. 81, 81 N. W. 46.

Trial de novo cannot be accorded where there is no statement of case or specifications of error. National Cash Register Co. v. Wilson, 9 N. D. 112, 81 N. W. 285.

Where retrial is not demanded, in statement of case court is precluded from considering evidence to ascertain whether trial court did or did not err in ultimate findings. Security Imp. Co. v. Cass County, 9 N. D. 553, 84 N. W. 477; State ex rel McClory v. McGruer, 9 N. D. 566, 84 N. W. 363.

No jurisdiction to retry issues of fact unless statement of case specifies issues to be retried, or a review of entire case asked. Such specifications in notice of appeal confer no jurisdiction. Douglas v. Glazier, 9 N. D. 615, 84 N. W. 552.

Exhibits must be set out in full or sufficient reference made thereto or substantial statement of contents given. All evidence must be embodied in statement of case. Judge's certificate not conclusive. U. S. Savings & Loan Co. v. McLeod, 10 N. D. 111, 86 N. W. 110; Eakin v. Campbell, 10 N. D. 416, 87 N. W. 991; Hagen v. Gilbertson, 10 N. D. 546, 88 N. W. 455; Littel v. Phinney, 10 N. D. 351, 87 N. W. 593.

Must be statement of case and trial anew demanded, to review evidence of district court. Teinen v. Lally, 10 N. D. 153, 86 N. W. 356.

Motion to affirm judgment because certain documents offered in evidence in district court were not incorporated in statement, granted. Kipp v. Angell, 10 N. D. 199, 86 N. W. 706; Geils v. Fluegel, 10 N. D. 211, 86 N. W. 712; Christianson v. Association, 5 N. D. 438, 67 N. W. 300.

Appeals in contempt cases not governed by this section. Township of Noble v. Aasen, 10 N. D. 264, 86 N. W. 742.

Supreme court has authority to settle a statement of case when it appears that the trial court has, on request, refused to do so, "in accordance with the facts." Until such refusal shown, without authority. Taylor v. Miller, 10 N. D. 361, 87 N. W. 597.

Retrial of particular facts. Douglas v. Richards, 10 N. D. 366, 87 N. W. 600.

Only causes which have been finally determined will be retried. Mapes v. Metcalf, 10 N. D. 601, 88 N. W. 713.

A motion to affirm a judgment, where appellants demand a retrial of entire case upon the sole ground that the statement of the case does not contain all the evidence offered at the trial, will be denied, even if statement is insufficient, when error is properly assigned. State ex rel Wiles v. Heinrich, 11 N. D. 31, 88 N. W. 734.

Appeal must be from whole of the judgment, not a portion. Crane v. Odegard, 11 N. D. 342, 91 N. W. 962; Prescott v. Brooks, 11 N. D. 93, 90 N. W. 129.

Appeal will not be dismissed because statement of the case does not embody all the evidence. Power to review evidence only is affected. This section does not abolish rules of evidence. Sykes v. Beck, 12 N. D. 242, 96 N. W. 844.

Appellants only can specify questions of fact for review. Such specifications must be sufficiently definite to enable respondent to determine, for purpose of amendment, what evidence should be included in statement of case. Salemonson v. Thompson, 13 N. D. 182, 101 N. W. 320.

§ 7230. When printing abstracts not required. Upon appeal from the judgment in an action for the recovery of money only, or of specific real or personal property, in which action the amount in controversy, exclusive of costs, does not exceed three hundred dollars, no printed abstracts or briefs shall be required of either party, but the same shall, unless printed, be

typewritten, and only five copies of the same need be filed in the office of the clerk of the supreme court; provided, that if either party, in cases in which printed briefs or abstracts are not required, shall file printed abstracts or briefs, or both, he shall recover not exceeding ten dollars for printing such abstracts, and not exceeding ten dollars for printing such briefs as he may file, if he is awarded judgment for costs on appeal. [1897, ch. 38; R. C. 1899, § 5631; 1901, ch. 131.]

Where judgment less than $300, improper to allow as disbursements money paid out for printing briefs and abstract. Black v. Elevator Co., 8 N. D. 96, 76 N. W. 984; Ingwaldson v. Skrivseth, 8 N. D. 544, 80 N. W. 475.

§ 7231. When appeals heard. Unless continued for cause all civil cases appealed to the supreme court shall be heard at the next succeeding term of court in either of the cases following:

1. When the appeal is taken sixty days before the first day of the term.
2. When by either party a printed abstract and a printed brief are served twenty-five days before the first day of the term. [1895, ch. 107, § 1; R. C. 1899, § 5632.]

CHAPTER 16.

PROCEEDINGS AGAINST JOINT DEBTORS, HEIRS, DEVISEES, LEGATEES AND TENANTS HOLDING UNDER A JUDGMENT DEBTOR.

§ 7232. Summons after judgment. When a judgment shall be recovered against one or more of several persons jointly indebted upon a contract by proceeding as provided in section 6847, those who were not originally summoned to answer the complaint and did not appear in the action may be summoned to show cause why they should not be bound by the judgment in the same manner as if they had been originally summoned. [C. Civ. P. 1877, § 426; R. C. 1899, § 5633.]

§ 7233. Requisites of. The summons provided in the preceding section must be subscribed by the judgment creditor or his attorney, must describe the judgment and require the person summoned to show cause within thirty days after the service of the summons and must be served in like manner as the original summons. It is not necessary to file a new complaint. [C. Civ. P. 1877, § 427; R. C. 1899, § 5634.]

§ 7234. Accompanied by affidavit. The summons must be accompanied by an affidavit of the person subscribing it, that the judgment has not been satisfied to his knowledge or information and belief and must specify the amount due thereon. [C. Civ. P. 1877, § 428; R. C. 1899, § 5635.]

§ 7235. Answer. Upon such summons the party summoned may answer within the time specified therein, denying the judgment or setting up any defense which may have arisen subsequently; and he may make the same defense which he might have originally made to the action, except the statute of limitations. [C. Civ. P. 1877, § 429; R. C. 1899, § 5636.]

§ 7236. Further pleadings. The party issuing the summons may demur or reply to the answer and the party summoned may demur to the reply; and the issues may be tried and judgment may be given in the same manner as in an action and enforced by execution; or, the application of the property charged to the payment of the judgment may be compelled by proceedings under chapter 35 of this code if necessary. [C. Civ. P. 1877, § 430; R. C. 1895, § 5637.]

§ 7237. Pleadings verified. The answer and reply must be verified in the like cases and manner and be subject to the same rules as the answer and reply in an action. [C. Civ. P. 1877, § 431; R. C. 1899, § 5638.]

CHAPTER 17.

OFFER OF THE DEFENDANT TO COMPROMISE THE WHOLE OR A PART OF THE ACTION.

§ 7238. **Judgment offered. Effect.** The defendant may at any time before the trial or verdict serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property or to the effect therein specified with costs. If the plaintiff accepts the offer and gives notice thereof in writing within ten days, he may file the summons, complaint and offer with an affidavit of notice of acceptance and the court or judge thereof must thereupon order judgment accordingly. If the notice of acceptance is not given the offer is to be deemed withdrawn and cannot be given in evidence; and if the plaintiff fails to obtain a more favorable judgment he cannot recover costs, but must pay the defendant's costs from the time of the offer. [C. Civ. P. 1877, § 432; R. C. 1899, § 5639.]

§ 7239. **Same on counterclaim.** If the defendant sets up a counterclaim in his answer to an amount greater than the plaintiff's claim or sufficient to reduce the plaintiff's recovery below fifty dollars, then the plaintiff may serve upon the defendant an offer in writing to allow judgment to be taken against him for the amount specified, or to allow said counterclaim to the amount specified with costs. If the defendant accepts the offer and gives notice thereof in writing within ten days, he may enter judgment as above for the amount specified, if the offer entitles him to judgment, or the amount specified in said offer shall be allowed him in the trial of the action. If notice of acceptance is not given the offer is deemed to be withdrawn and cannot be given in evidence and if the defendant fails to recover a more favorable judgment, or to establish his counterclaim for a greater amount than is specified in said offer, he cannot recover costs, but must pay plaintiff's costs from the time of the offer. [C. Civ. P. 1877, § 433; R. C. 1899, § 5640.]

§ 7240. **Offer of fixed damages.** In an action arising on contract the defendant may with his answer serve upon the plaintiff an offer in writing, that if he fails in his defense the damages be assessed at a special sum; and if the plaintiff signifies his acceptance thereof in writing with or before the notice of trial and on the trial has a verdict, the damages must be assessed accordingly. [C. Civ. P. 1877, § 434; R. C. 1899, § 5641.]

§ 7241. **Plaintiff refusing. Proof. Costs.** If the plaintiff does not accept the offer, he must prove his damages as if it had not been made and shall not be permitted to give it in evidence. And if the damages in his favor do not exceed the sum mentioned in the offer, the defendant shall recover his costs incurred in consequence of any necessary preparations or defense in respect to the question of damages. [C. Civ. P. 1877, § 435; R. C. 1899. § 5642.]

CHAPTER 18.

ADMISSION OR INSPECTION OF WRITINGS.

§ 7242. **Admission of genuineness. Refusal. Costs.** Either party may exhibit to the other or to his attorney at any time before the trial any paper, material to the action, and request an admission in writing of its genuineness. If the adverse party or his attorney fails to give the admission within four days after the request and if the party exhibiting the paper is afterwards put to costs in order to prove its genuineness and the same is finally proved or admitted on the trial, such costs must be paid by the party refusing the admission, unless it appears to the satisfaction of the court that there were good reasons for the refusal. [C. Civ. P. 1877, § 436; R. C. 1899, § 5643.]

§ 7243. Copy of documents required. Penalty. The court before which an action is pending, or a judge thereof, may in its or his discretion and upon due notice order either party to give to the other within a specified time an inspection and copy, or permission to take a copy of any books, papers and documents in his possession or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order is refused, the court may on motion exclude the paper from being given in evidence, or punish the party refusing, or both. [C. Civ. P. 1877, § 437; R. C. 1899, § 5644.]

CHAPTER 19.

EXAMINATION OF PARTIES.

§ 7244. Action for discovery. No action to obtain discovery under oath in aid of the prosecution or defense of another action shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter. [C. Civ. P. 1877, § 438; R. C. 1899, § 5645.]

§ 7245. Adversary as witness. A party to an action, or in case a corporation is a party, the president, secretary or other principal officer or general managing agent of such corporation, may be examined as a witness at the instance of an adverse party or any of several adverse parties and for that purpose may be compelled in the same manner and subject to the same rules of examination as any other witness to testify either at the trial, or conditionally, or upon commission. [C. Civ. P. 1877, § 439; R. C. 1895, § 5646.]

§ 7246. Examination before trial. The examination instead of being had at the trial as provided in the last section may be had at any time before the trial at the option of the party claiming it before a judge of the court on a previous notice to the party to be examined and any other adverse party of at least five days, unless for good cause shown the judge orders otherwise. But the party to be examined shall not be compelled to attend in any other county than that of his residence or where he may be served with a subpena for his attendance. [C. Civ. P. 1877, § 440; R. C. 1895, § 5647.]

§ 7247. Attendance compelled. Examination filed. The party to be examined as in the last section provided may be compelled to attend in the manner provided in article 2 of chapter 20, and the examination shall be taken and filed with the clerk and may be read by either party on the trial. [C. Civ. P. 1877, § 441; R. C. 1895, § 5648.]

§ 7248. Rebuttal. The examination of the party thus taken may be rebutted by adverse testimony. [C. Civ. P. 1877, § 442; R. C. 1899, § 5649.]

§ 7249. Refusal punished as contempt. If a party refuses to attend and testify as in the last four sections provided, he may be punished as for a contempt and his complaint, answer or reply may be stricken out. [C. Civ. P. 1877, § 443; R. C. 1899, § 5650.]

§ 7250. Party examined on his own behalf. A party examined by an adverse party as in this chapter provided may be examined on his own behalf, subject to the same rules of examination as other witnesses. [C. Civ. P. 1877, § 444; R. C. 1899, § 5651.]

§ 7251. Beneficiary examined. A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness in the same manner and subject to the same rules of examination as if he was named as a party. [C. Civ. P. 1877, § 445; R. C. 1899, § 5652.]

§ 7252. Examination adverse party. A party to the record of any civil action or proceeding, or a person for whose immediate benefit such action or

proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agents of any corporation which is a party to the record in such action or proceeding, may be examined upon the trial thereof as if under cross-examination at the instance of the adverse party or parties, or any of them, and for that purpose may be compelled in the same manner and subject to the same rules of examination as any other witness to testify; but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony; provided, that this section shall not apply to cases tried under the provisions of section 7229, unless the party plaintiff or defendant invoking the statute is at the time exercising the right of rebuttal. [1903, ch. 98.]

CHAPTER 20.

WITNESSES AND EVIDENCE.

Article 1.—Who May Be Excluded.

§ 7253. Who not excluded. Husband and wife. Decedent's statement. No person offered as a witness in any action or proceeding in any court, or before any officer or person having authority to examine witnesses or hear evidence, shall be excluded or excused by reason of such person's interest in the event of the action or proceeding; or because such person is a party thereto, or because such person is the husband or wife of a party thereto, or of any person in whose behalf such action or proceeding is commenced, prosecuted, opposed or defended, except as hereinafter provided:

1. A husband cannot be examined for or against his wife without her consent, nor a wife, for or against her husband without his consent, nor can either during the marriage or afterwards be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this subdivision does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.

2. In civil actions or proceedings by or against executors, administrators, heirs at law or next of kin in which judgment may be rendered or order entered for or against them, neither party shall be allowed to testify against the other as to any transaction whatever with or statement by the testator or intestate, unless called to testify thereto by the opposite party. But if the testimony of a party to the action or proceeding has been taken and he shall afterwards die and after his death the testimony so taken shall be used upon any trial or hearing in behalf of his executors, administrators, heirs at law or next of kin, then the other party shall be a competent witness as to any and all matters to which the testimony so taken relates. [C. Civ. P. 1877, § 446; 1879, ch. 17, § 1; R. C. 1895, § 5653.]

Only a party cannot testify as against the representative of a decedent. Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419.

Party prohibited from testifying to a conversation with plaintiff's intestate though an agent of decedent was present at conversation. Hutchinson v. Cleary, 3 N. D. 270, 55 N. W. 729.

A party is prohibited from testifying to conversations with decedent as against his representative. Hutchinson v. Cleary, 3 N. D. 270, 55 N. W. 729; Starkweather v. Bell, 12 S. D. 146, 80 N. W. 183; Bunker v. Taylor, 10 S. D. 526, 74 N. W. 450; Bunker v. Taylor, 13 S. D. 433, 83 N. W. 555; Witte v. Koeppen, 11 S. D. 598, 79 N. W. 831; Alexander v. Ransom, 16 S. D. 302, 92 N. W. 418.

Witness may testify in his own behalf to a personal transaction had with deceased administrator as against his successor. St. John v. Lofland, 5 N. D. 140, 64 N. W. 930.

Expert evidence, what admissible as. See Tullis v. Rankin, 6 N. D. 44, 68 N. W. 187.

Evidence of deceased witness at former trial, involving same issues between same parties, admissible. Persons v. Smith, 12 N. D. 403, 97 N. W. 551.

Husband and wife cannot testify for or against each other, except by consent. Clark v. Evans, 6 S. D. 244, 60 N. W. 862; Krueger v. Dodge, 15 S. D. 159, 87 N. W. 965.

Husband or wife's right to be witness limited to cases involving personal violence by one against the other. Cannot testify in prosecution for incest. State v. Burt, 17 S. D. 7, 94 N. W. 409.

Testimony of wife in supplemental proceeding on an execution against husband, taken without his consent, not admissible to impeach wife in an action by her against sheriff for seizing her property under the executon. Aldous v. Olverson, 17 S. D. 190, 95 N. W. 917.

Article 2.—Means of Producing Witnesses.

§ 7254. Subpenas issued by whom. Clerks of the supreme and district courts, the judges thereof, notaries public, justices of the peace and referees shall on the application of any person having a cause or any matter pending in court or before any such officer or tribunal issue a subpena for witnesses inserting all the names required by the applicant in one subpena, which may be served by any person, not interested in the action, or by the sheriff, coroner or constable; but when served by any other person, other than a public officer, proof of service shall be shown by affidavit; but no costs of serving the same shall be allowed, except when served by an officer. [C. Civ. P. 1877, § 447; R. C. 1899, § 5654.]

§ 7255. Requisites of. The subpena shall be directed to the person therein named, requiring him to attend at a particular time and place to testify as a witness; and it may contain a clause directing the witness to bring with him any book, writing or other thing under his control, which he is bound by law to produce as evidence. [C. Civ. P. 1877, § 448; R. C. 1899, § 5655.]

§ 7256. For depositions. When the attendance of the witness before any officer authorized to take depositions is required, the subpena may be issued by such officer. [C. Civ. P. 1877, § 449; R. C. 1899, § 5656.]

§ 7257. How served. The subpena shall be served either by reading or by copy delivered to the witness, or left at his usual place of residence; but such copy need not contain the name of any other witness. [C. Civ. P. 1877, § 450; R. C. 1899, § 5657.]

§ 7258. Witnesses not compelled to attend out of county. A witness shall not be obliged to attend for examination, on the trial of a civil action in the district court, except in the judicial district of his residence, nor before any other officer, magistrate, or tribunal, except in the county of his residence, nor to attend to give his deposition out of the county where he resides, or where he may be when the subpena is served upon him. [C. Civ. P. 1877, § 451; R. C. 1899, § 5658; 1901, ch. 214.]

§ 7259. Demand of fees in advance. A witness may demand his traveling fees and fee for one day's attendance when the subpena is served upon him and if the same is not paid the witness shall not be obliged to obey the subpena. The fact of such demand and nonpayment shall be stated in the return. [C. Civ. P. 1877, § 452; R. C. 1899, § 5659.]

§ 7260. Examination of prisoner. Any court may by order require an officer having the custody of any person confined in any prison in this state to produce such person before him for oral examination in the county where he is imprisoned; but in all other cases his examination must be by deposition. [C. Civ. P. 1877, § 458; R. C. 1895, § 5660.]

§ 7261. Prisoner remains in custody. While a prisoner's deposition is being taken he shall remain in the custody of the officer having him in charge, who shall afford reasonable facilities for the taking of the deposition. [C. Civ. P. 1877, § 459; R. C. 1899, § 5661.]

§ 7262. Witness exempt from suit out of his county. A witness shall not be liable to be sued in the county in which he does not reside by being served

with a summons in such county while going, returning or attending in obedience to a subpena. [C. Civ. P. 1877, § 460; R. C. 1899, § 5662.]

A non-resident suitor, while in attendance at court, is entitled to the same exemption as witness. Fisk v. Westover, 4 S. D. 233, 55 N. W. 961; Hicks v. Besuchet, 7 N. D. 429, 75 N. W. 793.

Non-resident cannot be served with process in suit while attending as witness. Malloy v. Brewer, 7 S. D. 587, 64 N. W. 1120.

§ **7263. Demand fees daily.** At the commencement of each day after the first day a witness may demand his fees for that day's attendance in obedience to a subpena and if the same are not paid he shall not be required to remain. [C. Civ. P. 1877, § 461; R. C. 1899, § 5663.]

§ **7264. Oath of witness.** Before testifying the witness must be sworn to testify as follows:

"You do solemnly swear that the evidence you shall give relative to the matter in difference now in hearing between..... plaintiff and....., defendant, shall be the truth, the whole truth and nothing but the truth. So help you God."

Any witness who is conscientiously scrupulous of taking the oath above described, shall be allowed to make affirmation, substituting for the words "so help you God" at the end of the oath the following: "This you do affirm under the pains and penalties of perjury." [C. Civ. P. 1877, § 462; R. C. 1899, § 5664.]

Article 3.—Mode of Taking the Testimony of Witnesses.

§ **7265. Three modes.** The testimony of witnesses is taken in three modes:

1. By affidavit.
2. By deposition.
3. By oral examination. [C. Civ. P. 1877, § 463; R. C. 1899, § 5665.]

§ **7266. Affidavit.** An affidavit is a written declaration under oath made without notice to the adverse party. [C. Civ. P. 1877, § 464; R. C. 1899, § 5666.]

Affidavit not fatally defective because no venue is expressed. State v. Henning, 3 S. D. 492, 54 N. W. 536.

Verified complaint an affidavit within the meaning of this section. Woods v. Pollard, 14 S. D. 44, 84 N. W. 214.

§ **7267. Deposition.** A deposition is a written declaration under oath made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine; or upon written interrogatories. [C. Civ. P. 1877, § 465; R. C. 1899, § 5667.]

§ **7268. Oral examination.** An oral examination is an examination in the presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness. [C. Civ. P. 1877, § 466; R. C. 1899, § 5668.]

Article 4.—Affidavit.

§ **7269. Use of.** An affidavit may be used to verify a pleading, to prove the service of a summons, notice or other process in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings or upon a motion and in any other case permitted by law. [C. Civ. P. 1877, § 467; R. C. 1899, § 5669.]

§ **7270. Where and how made.** An affidavit may be made in and out of this state before any person authorized to administer an oath. [C. Civ. P. 1877, § 468; 1885, ch. 2, § 1; R. C. 1899, § 5670.]

Article 5.—Depositions.

§ **7271. Cases when deposition used.** The deposition of any witness may be used only in the following cases:

1. When the witness does not reside in the county where the action or proceeding is pending or is sent for trial by change of venue, or is absent therefrom.
2. When from age, infirmity or imprisonment the witness is unable to attend court or is dead.
3. When the testimony is required upon a motion or in any other case when the oral examination of the witness is not required. [C. Civ. P. 1877, § 469; R. C. 1899, § 5671.]

§ **7272. When taking commenced.** Either party may commence taking testimony by depositions at any time after service upon or the appearance of the defendant in the action. [C. Civ. P. 1877, § 470; R. C. 1895, § 5672.]

Article 6.—Officers Who May Take Depositions.

§ **7273. Before whom in state.** Depositions may be taken in this state before a judge or clerk of the supreme court or district court, or before a justice of the peace, notary public, United States circuit or district court commissioner or any person empowered by a special commission. [C. Civ. P. 1877, § 471; 1883, ch. 42, § 1; R. C. 1899, § 5673.]

§ **7274. Before whom out of state.** Depositions may be taken out of the state by a judge, justice or chancellor or clerk of any court of record, a justice of the peace, notary public, mayor or chief magistrate of any city or town corporate, a commissioner appointed by the governor of this state to take depositions or any person authorized by a special commission from any court of this state. [C. Civ. P. 1877, § 472; R. C. 1899, § 5674.]

§ **7275. Ineligibility of officer.** The officer before whom depositions are taken must not be a relative or attorney of either party or otherwise interested in the event of the action or proceeding. [C. Civ. P. 1877, § 473; R. C. 1899, § 5675.]

Relationship must appear, cannot be presumed. Moore v. Booker, 4 N. D. 543, 62 N. W. 607.

§ **7276. Commission to take depositions.** Any court of record of this state, or any judge thereof, is authorized to grant a commission to take depositions within or without the state upon the application of either party upon five days' notice to the other. The commission must be issued to a person or persons therein named by the clerk under the seal of the court granting the same. Depositions under it must be taken upon written interrogatories, direct and cross, which shall be attached to the commission by the clerk issuing the same. Unless the parties agree as to the form of the interrogatories, the same shall be presented to the court or judge granting the commission for settlement upon five days' notice, at which time the court or judge shall settle the same. [C. Civ. P. 1877, § 474; R. C. 1895, § 5676.]

Article 7.—Manner of Taking and Authenticating Depositions.

§ **7277. Notice to adverse party. Contents.** Prior to the taking of any deposition, unless the same is taken under a commission, a written notice entitled in the action or proceeding in which it is to be used, and specifying the time and place of taking the same shall be served upon the adverse party. The notice shall be served a sufficient time before the day specified therein to allow the adverse party time to attend by the usual route of travel and one day for preparation, exclusive of Sundays and the day of service. The examination may be adjourned from day to day. [C. Civ. P. 1877, § 475; R. C. 1895, § 5677.]

Notice of street and number of notary before whom deposition is to be taken, not necessary, when. Moore v. Booker, 4 N. D. 543, 62 N. W. 607.

Notice should state names of witnesses to be examined. Ashe v. Beasley & Co., 6 N. D. 191, 69 N. W. 188.

Appearance and cross-examination waives objection that notice does not give sufficient time. Bem v. Bem, 4 S. D. 138, 55 N. W. 1102.

Notice of taking between certain hours is sufficiently specific. J. I. Case Threshing Machine Co. v. Pederson, 6 S. D. 140, 60 N. W. 747.

§ 7278. **When taken without notice.** When the summons in an action has been served upon all of the defendants therein in the manner provided by law, and the time allowed such defendants to answer has expired and they in no way appeared in such action, the plaintiff may take the deposition of any witness without notice to such defendant and such deposition may be introduced in evidence in the action and shall have the same force and effect as a deposition taken upon notice. [R. C. 1895, § 5678.]

§ 7279. **Depositions of additional witnesses.** Whenever notice to take depositions contains a notice that the testimony of other witnesses than those named or that the testimony of witnesses generally, without naming any witnesses, will be taken such notice shall be sufficient to justify the taking of the depositions of unnamed witnesses, but the adverse party shall have the right within ten days after such depositions are filed in the proper office and notice of the filing thereof is given to him, in which to serve notice upon the party on whose behalf such witnesses were sworn that he will cross examine such witnesses at a time and place therein specified. Such notice shall be in substance the same as a notice to take depositions. Such witnesses may be cross examined before the same or another officer. [1897, ch. 71; R. C. 1899, § 5678a.]

§ 7280. **Notice by publication.** When a party against whom the deposition is to be read is absent from or is not a resident of the state and has no agent or attorney therein upon whom service may be made, notice of the taking of a deposition may be served upon him by publishing the same three times, once in each week for three successive weeks in some newspaper printed in the county where the action or proceeding is pending, if one is printed in such county; and if not, in some newspaper printed at the seat of government of this state. Personal service of the notice on the defendant out of the state shall be equivalent to such publication. [C. Civ. P. 1877, § 476; R. C. 1895, § 5679.]

§ 7281. **Written and subscribed.** The deposition must be written by the officer, or in his presence by the witness, or some disinterested person; and must be subscribed by the witness. [C. Civ. P. 1877, § 477; R. C. 1899, § 5680.]

§ 7282. **How returned. Opening.** A deposition so taken shall be sealed up and indorsed with the title of the cause and the name of the officer taking the same and by him addressed and transmitted to the clerk of the district court of the county in which the action or proceeding is pending, if the same is pending in the district court; otherwise to the court, officer or tribunal in which the action or proceeding is pending. It shall remain under seal until opened by order of the court, officer or tribunal or at the request of a party to the action or proceeding, or his attorney. [C. Civ. P. 1877, § 478; R. C. 1895, § 5681.]

Sufficiency of filing. Stone v. Crow, 2 S. D. 525, 51 N. W. 335.

Once taken not invalidated because additional parties plaintiff are made. Salmer v. Lathrup, 10 S. D. 216, 72 N. W. 570.

§ 7283. **How far may be used.** When a deposition has once been taken it may be read in any stage of the same action or proceeding, or in any other action or proceeding upon the same matter between the same parties, subject, however, to all such exceptions as may be taken thereto under the provisions of this chapter. A deposition shall be deemed the evidence of the party reading it. [C. Civ. P. 1877, § 479; R. C. 1899, § 5682.]

Party may read in evidence deposition taken by adversary but his right to introduce the deposition does not extend to introducing mere excerpts or isolated parts thereof at his option. Discretionary with court to allow parts to

be read relating to distinct transaction. Bank v. Elevator Co., 11 N. D. 280, 91 N. W. 436.

A party has no right to read excerpts or isolated portions of a deposition on the trial. Gussner v. Hawk, 13 N. D. 453, 101 N. W. 898.

§ 7284. **How authenticated.** Depositions taken pursuant to this chapter by any judicial or other officer herein authorized to take depositions, having a seal of office, whether resident in this state or elsewhere, shall be admitted in evidence upon the certificate and signature of such officer, under the seal of the court of which he is an officer, or his official seal and no other or further act or authentication shall be required. If the officer taking the same has no official seal the deposition, if not taken in this state, shall be certified and signed by such officer and shall be further authenticated, either by parol proof adduced in court or by the official certificate and seal of any secretary or other officer of the state, keeping the great seal thereof, or of a clerk or prothonotary of any court having a seal, attesting that such judicial or other officer was at the time of taking the same within the meaning of this chapter authorized to take the same. But if the deposition is taken within or without this state under a special commission it shall be sufficiently authenticated by the official signature of the officer or commissioner taking the same. [C. Civ. P. 1877, § 480; R. C. 1899, § 5683.]

§ 7285. **Certificate to deposition.** The officer taking the deposition shall annex thereto a certificate showing the following facts:

1. That the witness was first sworn to testify the truth, the whole truth and nothing but the truth.

2. That the deposition was reduced to writing by some proper person, naming him.

3. That the deposition was written and subscribed in the presence of the officer certifying thereto.

4. That the deposition was taken at the time and place specified in the notice. [C. Civ. P. 1877, § 481; R. C. 1899, § 5684.]

Does not require certificate to state officer is not a relative. Moore v. Booker, 4 N. D. 543, 62 N. W. 607.

§ 7286. **What shown before reading.** When a deposition is offered to be read in evidence it must appear to the satisfaction of the court that for some cause specified in section 7271 of this code the attendance of the witness cannot be procured. [C. Civ. P. 1877, § 482; R. C. 1899, § 5685.]

§ 7287. **When filed.** Every deposition intended to be read in evidence on the trial must be filed at least one day before the trial. [C. Civ. P. 1877, § 483; R. C. 1899, § 5686.]

Article 8.—Exceptions to Depositions.

§ 7288. **How and when exceptions taken.** Exceptions to a deposition on the ground of incompetency or irrelevancy may be made at the time the same is offered in evidence; other exceptions to a deposition must be made in writing, specifying the grounds of objections and filed in the cause before the commencement of the trial. [C. Civ. P. 1877, §§ 484, 485; R. C. 1895, § 5687.]

Exceptions should be filed before commencement of trial. Anderson v. Bank, 6 N. D. 497, 72 N. W. 916; Ueland v. Dealy, 11 N. D. 529, 89 N. W. 325.

Exceptions not specifying wherein and in what particular deposition not taken in time, insufficient. Ueland v. Dealy, 11 N. D. 529, 89 N. W. 325.

§ 7289. **When questions on heard.** The court shall on motion of either party hear and decide the questions arising on exceptions to depositions before the commencement of the trial. [C. Civ. P. 1877, § 486; R. C. 1899, § 5688.]

§ 7290. **How errors waived.** Errors of the court in its decisions upon exceptions to depositions are waived unless excepted to. [C. Civ. P. 1877, § 487; R. C. 1899, § 5689.]

ARTICLE 9.—OF PUBLIC DOCUMENTS, RECORDS, ETC.

§ 7291. **Statutes, codes, decisions, when admissible as evidence.** Books purporting to be printed or published under the authority of any other state, territory or foreign country and purporting to contain the statutes, codes or other written law of such state, territory or country, or proved to be commonly admitted in the tribunals of such state, territory or country as evidence of the written law thereof, are admissible in this state as evidence of such law. The unwritten or common law of any other state, territory or country may be proved as facts by parol evidence; and the books of reports of cases adjudged in their courts may also be admitted as presumptive evidence of such law. [C. Civ. P. 1877, § 488; R. C. 1895, § 5690.]

Public diagrams, maps, charts, and official publications. McCall v. U. S., 1 Dak. 320, 46 N. W. 608; U. S. v. Beebe, 2 Dak. 292, 11 N. W. 505; U. S. v. Adams, 2 Dak. 305, 9 N. W. 718.

Foreign statute, authentication of copy. See Hannah v. Chase, 4 N. D. 351, 61 N. W. 18.

§ 7292. **Copies of judicial records.** Copies of the records and judicial proceedings of any court of the United States, or of any state or territory of the United States shall be admissible as evidence in this state, when attested by the clerk with the seal of the court annexed, if there is a seal, together with a certificate of the judge, chief justice or presiding magistrate that the attestation is in due form, and the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within this state as they have by law or usage in the courts of the United States or of the state or territory from which they are taken. [C. Civ. P. 1877, § 489; R. C. 1895, § 5691.]

§ 7293. **Same of foreign countries.** A judicial record of a foreign country may be proved by the attestation of the clerk with the seal of the court annexed, if there is a clerk and seal, or of the legal keeper of the record with the seal of his office annexed, if there is a seal, together with the certificate of the chief judge or presiding magistrate that the person making the attestation is the clerk of the court, or the legal keeper of the record, and in either case, that the signature of such person is genuine and that the attestation is in due form. The signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister, embassador or a consul, vice consul or consular agent of the United States in such foreign country. [R. C. 1895, § 5692.]

§ 7294. **How proof of publication made.** Proof of the publication of a document or notice required by law or by an order of the court or judge to be published in a newspaper may be made by the affidavit of the publisher or printer of the newspaper, or his foreman, clerk or bookkeeper, annexed to a copy of the document or notice, specifying the paper in which and the times when the publication was made. [C. Civ. P. 1877, § 490; R. C. 1895, § 5693.]

§ 7295. **Transcript of justice's record.** A transcript of the docket record of a justice of the peace in an action or proceeding, when certified by such justice or his successor in office, shall be evidence to prove the facts contained in such transcript in any action or other proceeding in the county or subdivision wherein such record was made. [C. Civ. P. 1877, § 491; R. C. 1895, § 5694.]

Jury not permitted to take transcript of justice's docket to jury room. Territory v. Jones, 6 Dak. 85, 50 N. W. 528.

§ 7296. **How used in another county.** Such transcript may be read in evidence in another county or subdivision, when there shall be attached thereto

a certificate of the clerk of the district court of the county or subdivision in which such record was made under the seal of the court, to the effect that the person subscribing such transcript was at the date thereof a justice of the peace of the county; and also if the judgment was rendered by another, that such other was at the time of the making of the same a justice of the peace of the county. [C. Civ. P. 1877, § 492; R. C. 1895, § 5695.]

§ **7297. Acknowledged instruments, when record evidence.** Every instrument conveying or affecting real property acknowledged, or proved and certified as provided in the civil code may together with the certificate of acknowledgment or proof to be read in evidence in an action or proceeding without further proof; the record of such instrument, or a duly authenticated copy of the record, may also be read in evidence with the like effect as the original on proof by affidavit or otherwise that the original is not in the possession or under the control of the party producing such record or copy. [C. Civ. P. 1877, §§ 493, 494; R. C. 1895, § 5696.]

Proof of chattel mortgage. Lander v. Propper, 6 Dak. 64, 50 N. W. 400.

Neither a record or copy of record of any conveyance of land admissible against objection until proof by affidavit or otherwise is made that original is not in the possession or under the control of the party producing such record or copy. American Mtg. Co. v. Live Stock Co., 10 N. D. 290, 86 N. W. 965.

When pleadings disclose the contents of a document in possession of adverse party which will necessarily have to be proven, a notice to produce such document at the trial not necessary, in order to allow secondary evidence of contents. Nichols & Shepard Co. v. Charlebois, 10 N. D. 446, 88 N. W. 80.

Instrument duly acknowledged admissible in evidence. N. W. Loan Co. v. Jonasen, 11 S. D. 566, 79 N. W. 840; Grandin v. Emmons, 10 N. D. 223, 86 N. W. 723.

Record of instrument admissible, when. Connor v. Corson, 13 S. D. 550, 83 N. W. 588; Williams v. Wait, 2 S. D. 210, 49 N. W. 209; State v. Serenson, 7 S. D. 277, 64 N. W. 130; American Mortgage Co. v. Stock Co., 10 N. D. 290, 86 N. W. 965; Erskine v. Steel County, 4 N. D. 339, 60 N. W. 1050.

§ **7298. Entries by public officers.** Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law are prima facie evidence of the facts stated therein. [C. Civ. P. 1877, § 495; R. C. 1899, § 5697.]

§ **7299. Same.** An entry made by an officer, or board of officers, or under the direction and in the presence of either in the course of official duty is prima facie evidence of the facts stated in such entry. [C. Civ. P. 1877, § 496; R. C. 1899, § 5698.]

§ **7300. How official documents proved.** Official documents may be proved as follows:

1. The acts of the executive of this state, by a copy of the records of the state department thereof, and of the United States, by a copy of the records of the state department thereof, certified by the heads of those departments respectively. They may also be proved by publications thereof printed by order of the legislative assembly or congress, or either house thereof.

2. The proceedings of the legislative assembly of this state or of congress, by the journals of those bodies respectively, or either house thereof, or by copies printed by their order or certified by the clerk.

3. The acts of the executive or the proceedings of the legislature of a sister state, in the same manner.

4. The acts of the executive or the proceedings of the legislature of a foreign country, by publications purporting to be made by their authority and to contain a record of such acts, or commonly received in that country as such, or by a copy of the official record of such act certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the executive of the United States.

5. Acts of a municipal corporation of this state, or of a board or department thereof, by a copy of the official record of such acts, certified by the

legal keeper thereof, or by a printed book purporting to be published by the authority of such corporation and to contain a record of such acts.

6. Documents of any other class in this state by the original or by a copy, certified by the legal keeper thereof.

7. Documents of any other class in a sister state, by the original or by a copy, certified by the legal keeper thereof together with the certificate of the secretary of state, judge of the supreme, superior or county court, or mayor of a city of such state that the copy is duly certified by the officer, who at the date of the certificate had the legal custody of the original.

8. Documents in the departments of the United States government, by the certificate of the legal custodian thereof. [R. C. 1895, § 5699.]

§ 7301. **Requisites of certificate to copy.** Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there is any, or if he is a clerk of a court having a seal, under the seal of such court. [C. Civ. P. 1877, § 497; R. C. 1899, § 5700.]

Custodian of record can certify to copy only, but not to facts. Sykes v. Beck, 12 N. D. 242, 96 N. W. 844.

Certificate from public officer evidence only when so made by law. Billingsley v. Hiles, 6 S. D. 445, 61 N. W. 687.

Copies, when certificate, to be under seal. Woods v. Seldon, 9 S. D. 392, 69 N. W. 602.

§ 7302. **When person deemed dead.** If any person upon whose life any estate in real property depends remains without the United States, or absents himself in the state or elsewhere for seven years together, such person must be accounted naturally dead in any action or proceding concerning such property in which his death shall come in question, unless it is affirmatively proved that he was alive during that time. [C. Civ. P. 1877, § 498; R. C. 1895, § 5701.]

There is a presumption of death after seven years. Burnett v. Costello, 15 S. D. 89, 87 N. W. 575.

§ 7303. **Probable duration of life.** In all cases in which the probable duration of the natural life of any person from and after a particular age is material the statistical tables known as the Carlisle tables of mortality are competent evidence of such probable duration or expectation of life. [1895, ch. 82, § 1; R. C. 1899, § 5702.]

§ 7304. **Confidential relations inviolate.** A person cannot be examined as a witness in the following cases:

1. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

2. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

3. A physician or surgeon cannot, without the consent of his patient, be examined as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.

4. A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure. [C. Civ. P. 1877, § 499; R. C. 1895, § 5703.]

Attorney cannot testify in an action without the consent of client. Austin v. Heiser, 6 S. D. 429, 61 N. W. 445; O'Neill v. Murray, 6 Dak. 107, 50 N. W. 619.

§ 7305. **How waived.** If a person offers himself as a witness, that is to be deemed a consent to the examination, also, of an attorney, clergyman, priest, physician or surgeon on the same subject within the meaning of the first three subdivisions of the preceding section. [C. Civ. P. 1877, § 500; R. C. 1899, § 5704.]

§ 7306. **When judge or juror witness.** The judge himself, or any juror may be called as a witness by either party; but in such case it is in the discretion of the court or judge to order the trial to be postponed and to take place before another judge or jury. [C. Civ. P. 1877, § 501; R. C. 1899, § 5705.]

§ 7307. **Interpreters. Oath.** When the witness does not understand and speak the English language, an interpreter must be sworn to interpret for him. Any person, a resident of the proper county, may be subpenaed by any court or judge to appear before such court or judge to act as an interpreter in any action or proceeding. The subpena must be served and returned in like manner as a subpena for a witness. Any person so subpened who fails to attend at the time and place named in the subpena is guilty of contempt. The oath of the interpreter shall be as follows:

"You do solemnly swear that you will justly, truly and impartially interpret to.....the oath about to be administered to him; and the questions which may be asked him, and the answers that he shall give to such questions, relative to the cause now under consideration before this court (or officer). So help you God."

If the interpreter has conscientious scruples as to taking an oath he may affirm in form as heretofore provided in case of witnesses. [C. Civ. P. 1877, § 502; R. C. 1899, § 5706.]

ARTICLE 10.—PROCEEDINGS TO PERPETUATE TESTIMONY.

§ 7308. **Requisites of petition.** The testimony of a witness may be taken and perpetuated in the following manner: The applicant must produce to the judge of the district court a petition verified by the oath of the applicant, stating:

1. That the applicant expects to be a party to an action in a court in this state and the names of the persons whom he expects will be adverse parties; or,

2. That the proof of some fact is necessary to perfect the title to the property in which he is interested, or to establish marriage, descent, heirship or any other matter which it may thereafter become material to establish, though no action may at the time be anticipated, or, if anticipated, the names of the parties to such action are unknown to the applicant; and,

3. The name of the witness to be examined, his place of residence and a general outline of the facts expected to be proved. The judge to whom such petition is presented shall make an order allowing the examination and designating the officer before whom the same shall be taken and prescribing the notice to be given, which notice, if the parties expectant are known and reside in this state, must be personally served; if the parties reside out of the state or are unknown, such notice shall be served in such manner as the judge shall by order direct. The judge must also designate in his order the clerk of the district court to whom the deposition shall be returned when taken. [C. Civ. P. 1877, § 503; R. C. 1895, § 5707.]

§ 7309. **Officer's authority to act.** The officer designated by the judge to take the deposition is authorized, if a resident of this state, on receiving a copy of the order of the judge, and of the notice prescribed in the last section with proof of its service or, if a resident without the state, on receiving the commission mentioned in the next section with proof of service, to take the deposition of the witnesses named in the order of the judge or in the commission and the taking of the same may be continued from time to time. [R. C. 1895, § 5708.]

§ 7310. **How examination made and authenticated.** The examination must be by question and answer, and if the testimony is to be taken in any other state, it must be taken upon a commission to be issued by the judge allowing the examination under the seal of the court of which he is judge and upon interrogatories to be settled in the same manner as in case of depositions

taken under commission in pending action, unless the parties expectant otherwise agree. If such parties are unknown, notice of the settlement of the interrogatories shall be published in some newspaper for such time as the judge may designate. The deposition, when completed, must be carefully read to and subscribed by the witness and shall then be authenticated and returned in the manner provided in article 7 of this chapter. The order allowing the examination and the petition on which the same was granted with proof of service of the order and notice shall be filed with the clerk to whom the deposition is directed to be returned. [R. C. 1895, § 5709.]

§ 7311. **Papers filed evidence of what.** The petition, order and papers filed as provided in the last section or a certified copy thereof are prima facie evidence of the facts stated therein to show compliance with the provisions of this article. [R. C. 1895, § 5710.]

§ 7312. **When depositions may be used.** If a trial is had between the applicant and the person named in the petition as parties expectant, or their successors in interest, or between any parties, wherein it may be material to establish the facts which such depositions prove or tend to prove, upon proof of the death or insanity of the witnesses, or that they cannot be found, or are unable by reason of age or other infirmity to give their testimony, the depositions, or certified copies thereof, may be used by either party, subject to all legal objections, which shall be taken in the manner prescribed in section 7288; but if the parties attend at the examination, no objection to the form of an interrogatory can be made at the trial, unless the same was stated at the examination. [C. Civ. P. 1877, § 507; 1895, § 5711.]

§ 7313. **Same effect as oral testimony.** The deposition so taken and read in evidence has the same effect as the oral testimony of the witness and no other and every objection to the witness or to the relevancy of any question put to him or answer given by him may be made in the same manner as if he was examined orally at the trial. [R. C. 1895, § 5712.]

§ 7314. **Costs paid by whom.** The applicant shall pay the costs of all such proceedings. [C. Civ. P. 1877, § 508; R. C. 1899, § 5713.]

Article 11.—Law of Presumptive Evidence.

§ 7315. **Duty of jury.** A presumption, unless declared by law to be conclusive, may be controverted by other evidence, direct or indirect; but unless so controverted, the jury are bound to find according to the presumption. [1897, ch. 110, § 1; R. C. 1899, § 5713a.]

§ 7316. **Presumptions deemed conclusive.** The following presumptions and no others are deemed conclusive:

1. A malicious and guilty intent from the deliberate commission of an unlawful act, for the purpose of injuring another.
2. The truth of the facts from a recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to a recital of a consideration.
3. When a party has, by his own declaration, act or commission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot in any litigation arising out of such declaration, act or commission, be permitted to falsify it.
4. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.
5. The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate.
6. The judgment or order of a court when declared by the codes of this state to be conclusive; but such judgment or order must be alleged in the pleadings, if there be an opportunity to do so; if there be no such opportunity the judgment or order may be used as evidence.

7. Any other presumption which by statute is expressly made conclusive. [1897, ch. 110, § 2; R. C. 1899, § 5713b.]

Where "A" purchases machinery with a warranty, giving his note therefor, which note is transferred before maturity to innocent purchaser, and machinery failing to comply with warranty, "A" may sue payee of note and recover amount of note, or return of note. Fahey v. Esterly, 3 N. D. 220, 55 N. W. 580.

Estoppel in pais. Estoppel against pledgee chargeable with knowledge. Estoppel binds privies as a general rule. Peabody v. Lloyds Banker, 6 N. D. 27, 68 N. W. 92.

Where both parties request directed verdict, estoppel to predicate error on withdrawal of case from jury. Mortgage Security Co. v. Elevator Co., 6 N. D. 407, 71 N. W. 130.

As to silence when there is a duty to speak, see Paulson Merc. Co. v. Seaver, 8 N. D. 215, 77 N. W. 1001.

§ 7317. Denominational presumptions. All other presumptions are satisfactory, if uncontradicted. They are denominational disputable presumptions, and may be contradicted by other evidence. The following are of that kind:

1. That a person is innocent of crime or wrong.
2. That an unlawful act was done with an unlawful intent.
3. That a person intends the ordinary consequences of his voluntary act.
4. That a person takes ordinary care of his own concern.
5. That evidence willfully suppressed would be adverse if produced.
6. That higher evidence would be adverse from inferior, being produced.
7. That money paid by one to another was due the latter.
8. That a thing delivered by one to another was due the latter.
9. That an obligation delivered up to the debtor has been paid.
10. That former rents or installments have been paid when a receipt for the latter is produced.
11. That things which a person possesses are owned by him.
12. That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership.
13. That a person in possession of an order on himself for the payment of money, or the delivery of a thing, has paid the money or delivered the thing accordingly.
14. That a person acting in a public office was regularly appointed to it.
15. That official duty has been regularly performed.
16. That a court or judge, acting as such, whether in this state or any other state or county, was acting in the lawful exercise of his lawful jurisdiction.
17. That a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties.
18. That all matters within an issue were laid before the jury and passed upon by them; and, in like manner, that all matters within a submission to arbitration were laid before the arbitrator and passed upon by him.
19. That private transactions have been fair and regular.
20. That the ordinary course of business has been followed.
21. That a promissory note or bill of exchange was given or indorsed for a sufficient consideration.
22. That an indorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill.
23. That a writing is truly dated.
24. That a letter duly directed and mailed was received in the regular course of the mail.
25. Identity of person from identity of name.
26. That a person not heard from in seven years is dead.
27. That acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact.
28. That things have happened according to the ordinary course of nature and the ordinary habits of life.
29. That persons acting as copartners have entered into a contract of copartnership.

30. That a man and woman deporting themselves as husband and wife, have entered into a lawful contract of marriage.
31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate.
32. That a thing once found to exist continues as long as is usual with things of that nature.
33. That the law has been obeyed.
34. That a document or writing more than thirty years old is genuine when the same has been since generally acted upon as genuine by persons having an interest in the question, and its custody has been satisfactorily explained.
35. That a printed and published book and statutes purporting to be printed or published by public authority, was so printed or published.
36. That a printed and published book purporting to contain reports of cases adjudged in the tribunals of the state or county where the book is published, contains correct reports of such cases.
37. That a trustee or other person whose duty it was to convey real property to a particular person, has actually conveyed to heirs, when such presumption is necessary to perfect the title of such person or his successor in interest.
38. The uninterupted use by the public of land for a burial ground for five years, with the consent of the owner, and without a reservation of his right, is presumptive evidence of his intention to dedicate it to the public for that purpose.
39. That there was a good and sufficient consideration for a written contract.
40. When two persons perish in the same calamity, such as a wreck, battle or conflagration, and it is not shown who died first, and there is no particular circumstance from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, sex, according to the following rules:
(a) If both of those who have perished were under the age of fifteen years, the older is presumed to have survived.
(b) If both were above the age of sixty, the younger is presumed to have survived.
(c) If one be under fifteen and the other above sixty, the former is presumed to have survived.
(d) If both be over fifteen and under sixty, and sexes be different, the male is presumed to have survived; if the sexes be the same, then the older.
(e) If one be under fifteen or over sixty, and the other between those ages, the latter is presumed to have survived.
41. That the foreign law will be presumed to be the common law in the absence of rebutting evidence.
42. A domicile once acquired is presumed to continue until it is shown to have been changed. [1897, ch. 110, § 3; R. C. 1899, § 5713c.]

Does not supply place of material averments of fact omitted from complaint. Swenson v. Greenland, 4 N. D. 532, 62 N. W. 603.
Chattel mortgage presumed to have been delivered on day of its date. Schweinber v. Great Western Elevator Co., 9 N. D. 113, 81 N. W. 35.
See Pine Tree Lumber Co. v. City of Fargo, 12 N. D. 360, 96 N. W. 357.

Article 12.—Subjects of Which Courts Will Take Judicial Notice.

§ 7318. Power of court. No evidence of any fact of which the court will take judicial notice need be given by the party alleging its existence, but the judge upon being called upon to take judicial notice thereof may, if he is unacquainted with such fact, refer to any person, document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling on him to take such notice produces any such document or book of reference.

Courts will take judicial notice of the following facts:

1. Official acts of the judicial department of this state and of the United States.
2. The seal of all the courts of this state and of the United States, and the signatures of the judges and clerks thereof.
3. That tribunals are established in the several states for the adjudication of controversies and the ascertainment of rights.
4. Of the external boundary lines of its jurisdiction and that an act or a crime committed at any given place within such boundaries is within such jurisdiction.
5. Of the acts of the legislature and decrees of courts fixing such jurisdiction.
6. That a court is a court of record and who are its officers.
7. Of all persons who have been appointed deputies by the clerks of such court.
8. Appellate courts will take judicial notice of inferior courts and who are their judges, and the rules thereof.
9. Of its own authority.
10. Of the time of holding the various courts of the state, of the history of the country at the time of holding court, and the seats of justice.
11. Of the commencement and duration of the terms of the supreme court, and the district courts, and all the other courts of record.
12. That the terms of court were held at the times and places prescribed by law.
13. Of all prior proceedings in the case pending.
14. That the case before the court had connection with one formerly decided by it.
15. Of the fact that a former adjudication had been reversed.
16. Of attorneys who have appeared in the case.
17. Of the pendency of another action in the same court.
18. That the facts left in issue, being facts of which the court will take judicial notice, are deemed part of the pleadings and not matters of evidence.
19. Of its own records and judgments.
20. Of the genuineness of its own records and the signatures of its officers.

[1897, ch. 65, §§ 1, 2; R. C. 1899, § 5713d.]

Introduction of the judgment docket in evidence, is not of itself tantamount to calling upon judge to take judicial notice of such judgment. Amundson v. Wilson, 11 N. D. 193, 91 N. W. 37.

Not necessary to introduce in evidence order on file in court. In re Olson's Estate, 17 S. D. 1, 94 N. W. 421.

§ 7319. Time in its relation to judicial notice. The courts will take judicial notice:

1. Of the facts stated in the almanac and the days of the week, as shown thereby.
2. Of the day of the week upon which any particular day of the month falls.
3. Of the re-occurrence of the day on which general elections are held.
4. Of the time the sun and moon rise and set on the several days of the year, and when they rose and set on a certain day.
5. The magnetic variation from the true meridian.
6. Of the unvarying occurrences of the climate and seasons.
7. Of the course of the seasons and of husbandry.
8. Of the succession of the seasons as in relation to vegetables and animals, and the general course of agricultural crops, matured so as to be severed.
9. Of what places are great marts of trade, such as New York, Chicago and St. Louis.
10. Of the distance between well known places in the United States and the ordinary time of railroad trains.

11. Of the fact that certain counties join each other.
12. That there are facilities for business, by railroad, telegraph and telephone, between two certain places.
13. Of the distance of a place from the county seat or the capital of the state.
14. Of the limits of a county, and the fact that a place proved was within such limits.
15. Of the lines of the counties, and the towns, villages and cities contained therein.
16. Of the location and distance between well known places within a county.
17. Of the places of intersection of certain streets and alleys in incorporated towns, cities and villages, and the names and numbers thereof.
18. Of the incorporation of towns, cities and villages, and the acts of the legislative assembly under which they were incorporated.
19. Of the fact that a county has adopted township organization.
20. Of the official acts of public officers.
21. Of the officers in the county in which they are holding their sittings.
22. The genuineness of signatures of public officers and those of such deputies as the law authorizes.
23. Of the time at which an officer's term of office expires.
24. Of the official acts and certificates of notaries public, made in the performance of official duty.
25. Of who are justices of the peace for the county in which the court is held, and the time at which their terms of office will expire.
26. Of the civil divisions of the state, such as cities, towns, counties and incorporated villages, and that the state is divided into eight judicial districts, and that each is a distinct organization.
27. Of the counties constituting a judicial district.
28. Of the election of state officers, held at the same time as the election of representatives in congress, and what the ballots offered at such election should contain, and of the changes made in the executive department of the state and of the United States.
29. Of the universal usage of merchants and ordinarily of a common law custom.
30. Of whatever ought to be generally known within the limits of the court's jurisdiction.
31. Of the general certainty that matter carried through the mail will, in spite of imperfection in the address, reach its proper destination.
32. Of transactions and objects which form a part of the history and geography of the country.
33. Of matters of public history affecting the whole people.
34. Of the times and such occurrences as constitute a part of the history of the state and of the United States.
35. Of the history of a country, its topography and general condition.
36. Of the boundaries of the state and the navigability of its large rivers,
37. Of the geographical position of towns in the county.
38. Of the taking and result of the census, and of the population of counties, cities and the state as shown by such census.
39. Of what is commonly known in the various manufactures and industries.
40. Of a manufactured article which has for many years been in common use throughout the country.
41. Of the business of mercantile agencies.
42. Of the inflammable character of kerosene, gin, turpentine and the like.
43. Of the explosive character of nitro-glycerine, dynamite, gun-powder and gun-cotton.

44. Of the constitution of the United States and the public laws of the state where they are exercising their functions.
45. Of the treaties between the United States and foreign countries and Indian treaties.
46. Of the public acts and proclamations carrying the treaties into effect.
47. Of the dates of the ratification of treaties and of the authority thereunder conferred upon the president of the United States.
48. Of the acts of congress for the survey of lands within the states and the dedication of a portion thereof to educational institutions of the state.
49. Of the government surveys and the legal subdivisions of public lands.
50. Of the rules and regulations of the general land office affecting the sale and disposal of public lands.
51. Of the extent and area of the government subdivisions of public lands.
52. Of the law merchant.
53. Of the custom of mutual credits in business houses.
54. Of the commercial usage to observe Sundays and the great festivities.
55. That whiskey, brandy and alcohol are intoxicating liquors.
56. That beer is a malt liquor and intoxicating.
57. Of the legislative journals and the modes by which domestic laws are authenticated.
58. Of the statute books and journals of the houses of the legislature.
59. Of the journal of each branch of the general assembly.
60. Of such contemporaneous history as led up to and probably induced the passage of a law.
61. Of the history of every statute in its progress through the legislature.
62. Of the true reading of a statute by referring to the original act on file in the office of the secretary of state.
63. Of the laws of a sister state when the printed and authenticated volumes are presented to the court for examination.
64. For the purpose of giving credit to judicial proceedings in another state, courts take notice ex officio of the local laws of the state from which they come, and when the judgment of the court in a sister state is impleaded, cognizance of the law of such a state is taken.
65. Of the circulating medium and the popular language in reference to it.
66. That under the laws of the United States the dollar is the unit of value.
67. Of the meaning of words and phrases in the English language.
68. Of such matters of common knowledge and science as may be known to all men of ordinary understanding and intelligence.
69. Of the meaning of current phrases which everybody else understands.
70. Of the meaning of initials appended to official signatures.
71. Of the meaning of initials used in the description of land.
72. Of the meaning of the abbreviations C. O. D., F. O. B., and such others as are in common use, and of the customary abbreviations of christian names.
73. Of the official signatures and seals of office of the principal officers of the government in the legislative, executive and judicial departments of this state and of the United States.
74. Of the national flag and seal of every state or sovereign recognized by the executive power of the United States.
75. Of the seals of courts of admiralty and maritime jurisdiction and of notaries public.
76. Of the laws of nature, the measure of time and the geographical divisions and political history of the world. [1897, ch. 65, §§ 3, 4, 5, 6; R. C. 1899, § 5713e.]

Will take notice of the powers of state conventions as the highest party organization. State ex rel Buttz v. Lindahl, 11 N. D. 320, 91 N. W. 950.
See Persons v. Smith, 12 N. D. 403, 97 N. W. 551.

CHAPTER 21.

MOTIONS AND ORDERS.

§ 7320. **Order defined.** Every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order. [C. Civ. P. 1877, § 509; R. C. 1899, § 5714.]

§ 7321. **Motions defined.** An application for an order is a motion. [C. Civ. P. 1877, § 510; 1893, ch. 85, § 1; R. C. 1899, § 5715.]

Specification of particular grounds of motion excludes others not mentioned. Bank v. Laughlin, 4 N. D. 391, 61 N. W. 473.

Motion for directed verdict, specification of grounds. Minnesota Thresher Mfg. Co. v. Lincoln, 4 N. D. 410, 61 N. W. 145.

Court may impose terms on denying motion. Winn v. Sanborn, 10 S. D. 642, 75 N. W. 201.

§ 7322. **Where heard.** Motions upon notice may be heard by a judge of a district court in which the action or proceeding is not pending in the cases provided by law only, either in the district in which the action or proceeding is pending or in an adjoining district; but such motions when heard by the judge of the district in which the action or proceeding is pending can be heard only in such district. [C. Civ. P. 1877, § 510; 1893, ch. 85, § 1; R. C. 1899, § 5716.]

§ 7323. **Preferred motions.** A motion to vacate or modify a provisional remedy and an appeal from an order allowing a provisional remedy shall have preference over all other motions and appeals. [C. Civ. P. 1877, § 510; 1893, ch. 85, § 1; R. C. 1899, § 5717.]

§ 7324. **Order staying proceedings. Reference to take testimony.** No order to stay proceedings for a longer time than twenty days shall be granted, except to stay proceedings under an order or judgment appealed from or upon previous notice to the adverse party. When any party intends to make or oppose a motion in any court and it shall be necessary for him to have the affidavit of any person, who shall have refused to make the same, such court may by order appoint a referee to take the affidavit or deposition of such person. Such person may be subpenaed and compelled to attend and make an affidavit before such referee the same as before a referee to whom it is referred to try an issue and the fees of such referee for such service shall be three dollars per day. [C. Civ. P. 1877, § 510; 1893, ch. 85, § 1; R. C. 1899, § 5718.]

Order for appointment of referee to take affidavit of witness. Pierle v. Berg, 7 S. D. 578, 64 N. W. 1130.

§ 7325. **Order shall describe papers on which made.** When an order of the district court is made, which under the laws regulating appeals to the supreme court is an appealable order, such order shall upon its face by apt words briefly describe the affidavits, documents, papers and evidence upon which the order is made and the judges may at their discretion refuse to sign orders not so framed and the supreme court may at its discretion dismiss any appeal from an order which is not framed substantially in accordance with the requirements of this section. [C. Civ. P. 1877, § 510; 1893, ch. 85, § 1; R. C. 1899, § 5719.]

§ 7326. **Orders without notice.** Any order of the district court made without notice to the adverse party may be vacated or modified without notice by the judge who made it or the same may be vacated or modified on notice in the manner in which other motions are made. [C. Civ. P. 1877, § 510; 1893, ch. 85, § 1; R. C. 1899, § 5720.]

§ 7327. **Service of notice.** When notice of motion is necessary it must be served eight days before the time appointed for the hearing, but the court or judge may by order to show cause prescribe a shorter time. [C. Civ. P. 1877, § 511; 1885, ch. 119, § 1; R. C. 1899, § 5721.]

Supreme court may by rule require more than six (eight in North Dakota), days notice. Smith v. Hawley, 11 S. D. 399, 78 N. W. 355.

§ 7328. **Extension of time.** The time within which any proceedings in an action must be had after its commencement, except the time within which an appeal must be taken may be enlarged upon an affidavit showing grounds therefor by a judge of the court. The affidavit or a copy thereof must be served with a copy of the order or the order may be disregarded. [C. Civ. P. 1877, § 512; R. C. 1899, § 5722.]

District judge has power to extend time in which exceptions to charge may be taken, before or after time has elapsed, but only upon good cause shown and in furtherance of justice. Lindblom v. Sonstellie, 10 N. D. 140, 86 N. W. 357.

§ 7329. **Cases, when continued.** In all suits at law or in equity pending in any court of this state at any time when the legislature is in session, it shall be a sufficient cause for a continuance of said suit to a succeeding general term of said court if it shall appear to the court by affidavit of the attorney that any party applying for such continuance, or any attorney, solicitor or counsel of such party is a member of either house of the legislature and in actual attendance on the sessions of the same at the beginning of the term that said case is set for and that the attendance of such party, attorney, solicitor or counsel in court is necessary to the fair and proper trial of such suit, and on the filing of such affidavit the court must continue such suit to the next succeeding general term of said court. Such affidavit shall be sufficient, if made at any time during the session of the legislature, and before the first day of the term of court at which said case is set for trial showing that at the time of making the same such party, attorney, solicitor or counsel is in actual attendance upon such session of the legislature. [1899, ch. 47; R. C. 1899, § 5722a.]

CHAPTER 22.

NOTICES AND FILING AND SERVICE OF PAPERS.

§ 7330. **Notices must be in writing.** Notices shall be in writing; and notices and other papers may be served on the party or attorney in the manner prescribed in the next three sections, when not otherwise provided by this code. [C. Civ. P. 1877, § 513; R. C. 1899, § 5723.]

§ 7331. **How served.** The service may be personal by delivery to the party or attorney on whom the service is required to be made; or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office by leaving the paper with his clerk therein, or with a person having charge thereof; or when there is no person in the office by leaving it between the hours of six in the morning and nine in the evening in a conspicuous place in the office; or if it is not open so as to admit of such service, then by leaving it at the attorney's residence with some person of suitable age and discretion.

2. If upon a party it may be made by leaving the paper at his residence between the hours of six in the morning and nine in the evening with some person of suitable age and discretion. [C. Civ. P. 1877, § 514; R. C. 1895, § 5724.]

Service of application to set aside decree of court properly made upon attorney of record. See Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095.

Where pleading served too late, irregularity waived by retention and non return of copy. Clyde v. Johnson, 4 N. D. 92, 58 N. W. 512.

Implied waiver by acts of attorney. Woods v. Walsh, 7 N. D. 377, 75 N. W. 707.

§ **7332. By mail, when.** Service by mail may be made when the person making the service and the person on whom it is to be made reside in different places between which there is a regular communication by mail. [C. Civ. P. 1877, § 515; R. C. 1899, § 5725.]

§ **7333. Method of.** In case of service by mail the paper must be deposited in the post office, addressed to the person on whom it is to be served at his place of residence and the postage paid. [C. Civ. P. 1877, § 516; R. C. 1899, § 5726.]

§ **7334. Same. Double time.** When the service is by mail it shall be double the time required in cases of personal service, except service of notice of trial which may be made sixteen days before the day of trial including the day of service. [C. Civ. P. 1877, § 517; R. C. 1899, § 5727.]

Service by mail dates from time of mailing. Clyde v. Johnson, 4 N. D. 92, 58 N. W. 512.

§ **7335. Personal. Eight days.** Notice of motion or other proceeding before a court or judge, when personally served, shall be given at least eight days before the time appointed therefor. [C. Civ. P. 1877, § 518; R. C. 1895, § 5728.]

§ **7336. When notice unnecessary.** When a defendant shall not have demurred or answered, service of notice or papers in the ordinary proceedings in an action need not be made upon him, unless he is imprisoned for want of bail, but shall be made upon him or his attorney if notice of appearance in the action has been given. [C. Civ. P. 1877, § 519; R. C. 1899, § 5729.]

§ **7337. Service on nonresident.** When a plaintiff, or a defendant who has demurred or answered or given notice of appearance in an action, has no attorney of record in such action, who is a resident of this state, service may be made on the clerk of the court in which the action is pending for such party, and the clerk shall thereupon forthwith enter such service in the record of the case in his register of actions, and deliver the notice and papers so served to such party on demand therefor. The provisions of section 7334 shall apply to service made on the clerk for the party. [C. Civ. P. 1877, § 520; R. C. 1899, § 5730; 1901, ch. 180.]

§ **7338. When summons and pleadings filed.** The summons and the several pleadings in an action shall be filed with the clerk within ten days after the service thereof respectively, or the adverse party on proof of the omission shall be entitled without notice to an order from a judge that the same be filed within a time to be specified in the order or be deemed abandoned. [C. Civ. P. 1877, § 521; R. C. 1899, § 5731.]

§ **7339. Service upon attorney.** When a party shall have an attorney in the action, the service of papers shall be made on the attorney instead of the party; provided, that the removal of such attorney from the state shall be deemed a withdrawal of his appearance, and terminate his relation as attorney in the action. [1897, ch. 50; R. C. 1899, § 5732.]

Service upon attorney. McKenzie v. Water Co., 6 N. D. 361, 71 N. W. 608; McKittrick v. Pardee, 8 S. D. 39, 65 N. W. 23; Hazeltine v. Browne, 9 S. D. 351, 69 N. W. 579; Houser v. Nolting, 11 S. D. 483, 78 N. W. 955.

Service of notice of appeal from justice court may be served on adverse party, instead of attorney. Richmire v. Elevator Co., 11 N. D. 453, 92 N. W. 819.

§ **7340. Certain process not included.** The provisions of this chapter shall not apply to the service of a summons, or other process, or of any paper to bring a party into contempt. [C. Civ. P. 1877, § 523; R. C. 1899, § 5733.]

CHAPTER 23.

DUTIES OF SHERIFFS AND CORONERS.

§ **7341. Service of papers.** Whenever pursuant to this code the sheriff may be required to serve or execute any summons, order or judgment, or to do any other act, he shall be bound to do so in like manner as upon process issued to him and shall be equally liable in all respects for neglect of duty; and if the sheriff is a party, the coroner shall be bound to perform the service, as he is now bound to execute process when the sheriff is a party; and the provisions of this code relating to the sheriff shall apply to coroners when the sheriff is a party. The sheriffs and coroners of the several counties in which the district courts are held shall have and exercise the same power and authority in the service of papers and the execution of writs and process of such courts in any county or place within the subdivision of which such county forms a part as they have or can exercise in their own county. [C. Civ. P. 1877, § 524; R. C. 1899, § 5734.]

CHAPTER 24.

MISCELLANEOUS PROVISIONS.

§ **7342. Copy of lost papers.** If any process, original pleadings or any other paper is lost or withheld by any person the court may authorize a copy thereof to be filed and used instead of the original. [C. Civ. P. 1877, § 525; R. C. 1899, § 5735.]

§ **7343. Undertakings, where filed.** The various undertakings required to be given by this code must be filed with the clerk of the court, unless the court expressly provides for a different disposition thereof, except that the undertakings provided for in this code for the claim and delivery of personal property shall after the justification of the sureties be delivered by the sheriff to the parties respectively for whose benefit they are taken. [C. Civ. P. 1877, § 526; R. C. 1899, § 5736.]

§ **7344. No title required to affidavits.** It shall not be necessary to entitle an affidavit in the action, but an affidavit made without a title or with a defective title shall be as valid and effectual for every purpose as if it was duly entitled, if it intelligibly refers to the action or proceeding in which it is made. [C. Civ. P. 1877, § 527; R. C. 1899, § 5737.]

§ **7345. Consolidating actions.** When two or more actions are pending at one time between the same parties and in the same court upon causes of action which might have been joined, the court may order the actions to be consolidated. [C. Civ. P. 1877, § 528; R. C. 1899, § 5738.]

Cause of action in tort may be joined with one upon contract in certain cases. See Aultman & Co. v. Ferguson, 8 N. D. 458, 66 N. W. 1081.

Different appeals from action of board in laying out highways cannot be consolidated. Williams v. Turner Township, 15 S. D. 182, 87 N. W. 968.

§ **7346. When action deemed pending.** An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied. [C. Civ. P. 1877, § 529; R. C. 1899, § 5739.]

Purchaser of the subject matter of an action after judgment and before appeal, is a purchaser pendente lite. Sykes v. Beck, 12 N. D. 242, 96 N. W. 844.

When pending. Mach v. Blanchard, 15 S. D. 432, 90 N. W. 1042; Elder v. Mining Co., 11 S. D. 595, 79 N. W. 834.

§ 7347. **Clerk's register of actions.** The clerk must keep among the records of the court a register of actions. He must enter therein the title of the action with brief notes under it from time to time of all papers filed and proceedings had therein. [C. Civ. P. 1877, § 530; R. C. 1899, § 5740.]

§ 7348. **Lost or destroyed papers.** If any process, citation, original petition or any other paper is lost or destroyed by fire or otherwise or withheld by any person the court may authorize a copy thereof to be filed and used instead of the original; and when it shall appear to the satisfaction of the judge of said court that any order of the court has been heretofore made in any proceeding, the records of said proceeding and said order having been destroyed by fire or otherwise, the court shall again make and file such order therein, and all proceedings up to and including said order shall be deemed to have been taken and made as provided by law, and said final order shall have the same effect as if the entire record of said proceedings were still in existence and on file in said action or proceeding in said court. [1899, ch. 107; R. C. 1899, § 5740a.]

CHAPTER 25.

ACTIONS IN PLACE OF SCIRE FACIAS, QUO WARRANTO AND OF INFORMATION IN THE NATURE OF QUO WARRANTO.

§ 7349. **Remedies obtainable by action instead of writ.** The remedies formerly attainable by the writ of scire facias, the writ of quo warranto and proceedings by information in the nature of quo warranto may be obtained by civil action in the district court under the provisions of this chapter and of chapter 27. [C. Civ. P. 1877, § 531; R. C. 1895, § 5741.]

Statutory method of trying title to office is in nature of quo warranto or by contest. State v. Callahan, 4 N. D. 481, 61 N. W. 1025.

Grounds of action or remedy obtainable by quo warranto proceeding not enlarged. Wishek v. Becker, 10 N. D. 63, 84 N. W. 590.

Remedy in supreme court not matter of strict right. State ex rel Walker v. McLean Co., 11 N. D. 356, 92 N. W. 385.

Supreme court will not ordinarily assume jurisdiction. State v. McLean County, 11 N. D. 356, 92 N. W. 385.

§ 7350. **Who plaintiff.** When the action is prosecuted by the attorney general, the state of North Dakota shall be plaintiff; when it is prosecuted by a private person, such person shall be the plaintiff therein and the proceedings in such action shall be the same as in an action by a private person, except as otherwise specially provided. [R. C. 1895, § 5742.]

Action to annul existence of corporation may be instituted in name of state. State v. Union Inv. Co., 7 S. D. 51, 63 N. W. 232; Dudley v. Dakota Hot Springs Co., 11 S. D. 559, 79 N. W. 839.

§ 7351. **Against usurping officer, etc.** An action may be commenced by the state, or any person who has a special interest in the action, against the parties offending in the following cases:

1. When any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authorities of this state; or,

2. When any public officer, civil or military, shall have done or suffered an act which by the provisions of law shall make a forfeiture of his office; or,

3. When any association or number of persons shall act within this state as a corporation without being duly incorporated. [C. Civ. P. 1877, § 534; R. C. 1895, § 5743.]

For action by state against person usurping office, see State v. Sheldon, 8 S. D. 525, 67 N. W. 613; State v. Finnerud, 7 S. D. 237, 64 N. W. 121; Wishek v. Becker, 10 N. D. 63, 84 N. W. 590.

§ 7352. **Security for costs from private party.** Before commencing an action under this chapter at the request of a party having an interest therein the attorney general may require as a condition of commencing the same, that satisfactory security be given to indemnify the state against costs and expenses which may be incurred therein. [C. Civ. P. 1877, § 535; R. C. 1895, § 5744.]

§ 7353. **Complaint for usurping office. Arrest of defendant.** The complaint in an action commenced against a person for usurping an office in addition to the statement of the cause of action may also set forth the name of the person rightfully entitled to the office with a statement of his right thereto; and in such case upon proof by affidavit that the defendant has received fees or emoluments belonging to the office and by means of his usurpation thereof, an order may be granted by the judge of the court for the arrest of such defendant and holding him to bail; and thereupon he shall be arrested and held to bail in the manner and with the same effect and subject to the same rights and liabilities as in other civil actions in which the defendant is subject to arrest. [C. Civ. P. 1877, § 536; R. C. 1895, § 5745.]

Proceedings against persons usurping office. Territory v. Hauxhurs, 3 Dak. 205, 14 N. W. 432; State v. Gardner, 3 S. D. 553, 54 N. W. 606.

Title to office may be tried by quo warranto. State v. Callahan, 4 N. D. 481, 61 N. W. 1025.

Action to vacate charter or annul existence of corporation. State v. Investment Co., 7 S. D. 51, 63 N. W. 232; Dudley v. Dakota Hot Springs Co., 11 S. D. 559, 79 N. W. 839; Wright v. Lee, 4 S. D. 237, 55 N. W. 931.

Officers having prima facie title to office, entitled to possession pending investigation. State v. Herried, 10 S. D. 16, 71 N. W. 319.

§ 7354. **What judgment shall include.** In every such case judgment shall be rendered upon the right of the defendant and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant as justice shall require. [C. Civ. P. 1877, § 537; R. C. 1899, § 5746.]

§ 7355. **When claimant takes office.** If judgment is rendered upon the right of the person so alleged to be entitled and the same is in favor of such person he shall be entitled after taking the oath of office and executing such official bond as may be required by law to take upon himself the execution of the office; and it shall be his duty immediately thereafter to demand of the defendant in the action all the books and papers in his custody or within his power, belonging to the office from which he shall have been excluded. [C. Civ. P. 1877, § 538; R. C. 1899, § 5747.]

§ 7356. **Refusal to deliver. Punishment.** If the defendant refuses or neglects to deliver any of the books or papers, demanded as prescribed in the last section, he is guilty of a misdemeanor; and the court, or a judge thereof, may by order put the person entitled to the office in possession thereof and of all the books and papers belonging thereto; and any party refusing to deliver the same, when ordered as aforesaid, shall be punished as for a contempt. [C. Civ. P. 1877, § 539; R. C. 1895, § 5748.]

§ 7357. **Damages for usurpation.** If judgment is rendered upon the right of the person so alleged to be entitled in favor of such person, he may recover by action the damages which he shall have sustained by reason of the usurpation by the defendant of the office from which such defendant has been excluded. [C. Civ. P. 1877, § 540; R. C. 1899, § 5749.]

§ 7358. **Joinder of several claimants.** When several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise. [C. Civ. P. 1877, § 541; R. C. 1899, § 5750.]

§ 7359. **Judgment against intruder.** When a defendant against whom such action shall have been commenced shall be adjudged guilty of usurping, intruding into or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that he be excluded from such office,

franchise or privilege and also that the plaintiff recover costs against him. The court may also in its discretion impose upon such defendant a fine not exceeding five thousand dollars, which fine when collected shall be paid into the treasury of the state to the credit of the school fund. [C. Civ. P. 1877, § 542; R. C. 1895, § 5751.]

CHAPTER 26.

ACTIONS BY THE STATE TO ANNUL PATENTS.

§ 7360. **When authorized. Duty of attorney general.** The state may bring an action to vacate or annul letters patent for lands granted by this state in either of the following cases:

1. When they were obtained by means of a fraudulent suggestion or concealment of a material fact made by or with the knowledge or consent of the person to whom they were issued.
2. When they were issued in ignorance of a material fact or through mistake.
3. When the patentee, or those claiming under him, have done or omitted an act in violation of the terms and conditions upon which the letters patent were granted, or have by any other means forfeited the interest acquired under the same.

Whenever the attorney general has good reason to believe that any act or omission specified in this section can be proved and that the person to be made defendant has no sufficient legal defense, he must commence such an action. [R. C. 1895, § 5752.]

CHAPTER 27.

ACTIONS BY AND AGAINST CORPORATIONS.

Article 1.—General Provisions.

§ 7361. **Averments as to incorporation.** In an action by or against a corporation the complaint must aver that the plaintiff or the defendant as the case may be is a corporation. If incorporated under any law of this state, that fact must be averred; if not so incorporated, an averment that it is a foreign corporation is sufficient. The complaint need not set forth or specially refer to any act or proceeding by or under which the corporation was formed. [R. C. 1895, § 5753.]

§ 7362. **When plaintiff not required to prove existence.** In an action by or against a corporation the plaintiff need not prove upon the trial the existence of the corporation, unless the answer is verified and contains an allegation, positive and not upon information and belief, that the plaintiff or the defendant, as the case may be, is not a corporation. [1885, ch. 37, § 1; R. C. 1895, § 5754.]

Proof of corporate capacity not required except when denied. First M. E. Church v. Fadden, 8 N. D. 162, 77 N. W. 615.

§ 7363. **When misnomer waived.** In actions or proceedings by or against corporations the defendant is deemed to have waived any mistake in the statement of the corporate name, unless the misnomer is pleaded in the answer or other pleading in the defendant's behalf. [R. C. 1895, § 5755.]

§ 7364. **Foreign corporation may sue, defend, etc.** A corporation created by or under the laws of any other state, territory or country or of the United States may prosecute or defend an action or proceeding in the courts of this state in the same manner as corporations created under the laws of this

state, except as otherwise specially prescribed by law. But such foreign corporation cannot maintain any action founded upon an act or upon any liability or obligation, express or implied, arising out of or made or entered into in consideration of any act which the laws of this state forbid a corporation or any association of individuals to do without express authority of law. [R. C. 1895, § 5756.]

§ 7365. **Against foreign corporation which has ceased to exist.** An action for the recovery of money may be commenced and prosecuted to judgment against a corporation created by or under the laws of any other state, territory or country, or of the United States, although such corporation may have ceased from any cause whatever to act in whole or in part as a corporation, in the same manner as though it had not ceased to act; and satisfaction of the judgment may be enforced out of any property in this state which such corporation owns or has an interest in or would own or have an interest in had the same not ceased to act as aforesaid, whether held or controlled by such corporation or by any person or agent for its use and benefit in whole or in part, or by a trustee or assignee for the creditors of such corporation appointed under or deriving his authority from the laws of any other state, territory or country, and an attachment issued in such action may be executed on any such property. [R. C. 1895, § 5757.]

Article 2.—Actions Against Officers.

§ 7366. **For what authorized.** An action may be maintained against one or more trustees, directors, managers or other officers of a corporation to procure a judgment for the following purposes or so much thereof as the case requires:

1. Compelling the defendants to account for their official conduct in the management and disposition of the funds and property committed to their charge.
2. Compelling them to pay to the corporation which they represent or to its creditors any money, and the value of any property which they have acquired to themselves or transferred to others or lost or wasted by violation of their duties, or to transfer any such property held by them to the corporation.
3. Suspending a defendant from exercising his office, when it appears that he has abused his trust.
4. Removing a defendant from his office upon proof or conviction of misconduct and directing a new election to be held by the body or board duly authorized to hold the same in order to fill the vacancy created by the removal or when there is no such body or board, or when all the members thereof are removed, directing the removal to be reported to the secretary of state, who may fill the vacancy.
5. Setting aside an alienation of property made by one or more trustees, directors, managers or other officers of a corporation, contrary to a provision of law or for a purpose foreign to the lawful business and objects of the corporation, when the alienee knew or had notice of the purpose of the alienation.
6. Restraining and preventing such alienation, when it is threatened, or when there is good reason to apprehend that it will be made. [R. C. 1895, § 5758.]

§ 7367. **Who may bring.** An action may be commenced as prescribed in the last section by the state, or, except when the action is brought for the purpose specified in subdivisions 3 and 4 of said section, by a creditor of the corporation, or a trustee, director, manager or other officer of the corporation, having a general superintendence of its concerns, or by a stockholder of the corporation upon the neglect or refusal of such officer so to do at the request of such stockholder. [R. C. 1895, § 5759.]

§ 7368. Visitorial power not divested. This article does not divest or impair any visitorial power over a corporation which is vested by a statute in a public officer or board. [R. C. 1895, § 5760.]

ARTICLE 3.—ACTIONS AGAINST INSOLVENT CORPORATIONS.

§ 7369. When action maintainable to sequestrate corporate property. Whenever a judgment shall be obtained against any corporation incorporated under the laws of this state and an execution issued thereon shall have been returned unsatisfied in whole or in part, the judgment creditor or his legal representative may maintain an action to procure a judgment sequestrating the property of a corporation and providing for a distribution thereof. [R. C. 1895, § 5761.]

§ 7370. When action to dissolve maintainable. In either of the following cases, an action to procure a judgment dissolving a corporation, created by or under the laws of this state, and forfeiting its corporate rights, privileges and franchises, may be maintained as prescribed in the next section:

1. When the corporation has remained insolvent for at least one year.
2. When it has neglected or refused for at least one year to pay and discharge its notes or other evidences of debt.
3. When it has suspended its ordinary and lawful business for at least one year.
4. If it has banking powers or power to make loans on pledges or deposits, or to make insurances, when it becomes insolvent or unable to pay its debts, or shall neglect or refuse to pay its notes or evidences of debt on demand, or has violated any provisions of the law by or under which it was incorporated or of any other law binding upon it. [R. C. 1895, § 5762.]

§ 7371. Who may commence. The action specified in the last section shall be brought by the state. And whenever a creditor or stockholder of any corporation submits to the attorney general a written statement of facts, verified by oath, showing grounds for an action under the provisions of the last section, and the attorney general omits for thirty days after such submission to commence an action specified in the last section, then, and not otherwise, such creditor or stockholder may apply to the proper court for leave to commence such an action and on obtaining leave may maintain the same accordingly. [R. C. 1895, § 5763.]

§ 7372. When injunction granted. In an action brought as prescribed in this article, the court, or a judge thereof, may upon proof of the facts authorizing the action to be maintained grant an injunction, restraining the corporation and its trustees, directors, managers and other officers from collecting or receiving any debt or demand and from paying out or in any way transferring or delivering to any person any money, property or effects of the corporation during the pendency of the action, except by express permission of the court. When the action is brought to procure the dissolution of the corporation the injunction may also restrain the corporation and its trustees, directors, managers and other officers from exercising any of its corporate rights, privileges or franchises during the pendency of the action, except by express permission of the court. The provisions of article 3 of chapter 9 of this code, relating to granting, vacating and modifying an injunction apply to an injunction granted as prescribed in this section. [R. C. 1895, § 5764.]

§ 7373. When receiver appointed. Powers of. The court may in any stage of an action under the preceding provisions of this article appoint one or more receivers to take charge of the property and effects of such corporation and to collect, sue for and recover the debts and demands that may be due and the property that may belong to such corporation, who shall in all respects possess the powers and authority conferred and be subject to all

the obligations imposed upon receivers in other cases, and in all respects be subject to the control of the court. [R. C. 1895, § 5765.]

The appointment of a receiver suspends right to exercise corporate functions, and all officers thereafter without authority to make valid transfers of corporate assets. Property of insolvent corporation passes to receiver on his appointment. Order appointing receiver not subject to collateral attack. Brynjolfson v. Osthus, 12 N. D. 43, 96 N. W. 261.

§ 7374. **Action proceeds to judgment though creditor bringing settles.** Whenever an action shall have been brought against a corporation under the provisions of this article the court shall, if the proof is sufficient, proceed to final judgment in such case, dissolving such corporation and forfeiting its corporate rights, privileges and franchises, notwithstanding such creditor may settle with such corporation; and in all such cases any creditor or the attorney general shall have the right to appear and prosecute such action. The original plaintiff shall not be liable for the costs of such further prosecution; but the creditor continuing the same, or the state, in case it is continued by the attorney general shall be liable therefor. [R. C. 1895, § 5766.]

§ 7375. **When stockholders, etc., made defendants.** In an action against a corporation upon a claim for which its stockholders, directors, trustees or other officers, or any of them, are liable by law in any event or contingency, one or more or all of the persons so liable may be made parties defendant by the original or by an amended or supplemental complaint; and their liability may be declared and enforced by the judgment in such action. [R. C. 1895, § 5767.]

§ 7376. **When made defendants after judgment against corporation.** If any creditor of a corporation whose directors, trustees or other officers or stockholders are liable for the payment of his demand desires to make them, or one or more of them, parties to the action after a judgment therein against the corporation, he may do so by filing a supplemental complaint against them founded upon such judgment. [R. C. 1895, § 5768.]

§ 7377. **Action against stockholders, etc.** Whenever any creditor of a corporation shall seek to charge the directors, trustees or other officers or stockholders thereof on account of any liability created by law, he may commence and maintain an action for that purpose in the district court and may at his election join the corporation in such action. [R. C. 1895, § 5769.]

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

§ 7378. **Procedure therein.** The court shall proceed therein as in other cases, and when necessary shall cause an account to be taken of the property and debts due to and from such corporation and appoint one or more receivers, who shall possess all the powers conferred and be subject to all the obligations imposed on receivers by the provisions of section 7373; but if upon the filing of the answer or upon the taking of such account it shall appear that the corporation is insolvent and that it has not property or effects to satisfy such creditor, the court may without appointing any receiver, proceed to ascertain the respective liabilities of such directors, trustees or other officers and stockholders and enforce the same by its judgment as in other cases. [R. C. 1895, § 5770.]

§ 7379. **Distribution of property.** Upon a final judgment being rendered in any action under this article, the court shall cause a just and fair distribution of the property of such corporation and of the proceeds thereof to be made in the order prescribed in section 7387. [R. C. 1895, § 5771.]

§ 7380. **When payments enforced against stockholders, etc.** In all cases in which the directors or other officers of a corporation, or the stockholders thereof shall have been made parties to an action in which judgment shall be rendered, if the property of such corporation shall be insufficient to discharge its debts, the court shall proceed to compel each stockholder to pay

in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as shall be necessary to satisfy the debts of the corporation. If the debts of the corporation, or any part thereof, shall still remain unsatisfied, the court shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders and adjudge the amount payable by each and enforce the judgment as in other cases. [R. C. 1895, § 5772.]

§ 7381. Suits by other creditors restrained. All creditors required to come in as parties. Whenever any action shall be commenced against any corporation, its directors, trustees or other officers, or its stockholders according to the provisions of this article the court may by injunction on the application of either party and at any stage of the proceedings restrain all proceedings by any other creditor against the defendants in such action; and whenever it shall appear necessary or proper may order notice to be published in such manner as the court shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the action within a reasonable time not less than three months from the first publication of such notice and in default thereof such creditors shall be precluded from all benefit of the judgment which shall be made in such action and from any distribution which shall be made under such judgment. [R. C. 1895, § 5773.]

It is an abuse of discretion to enjoin a creditor's action to enforce lien. Also abuse to grant an injunction restraining pending action by creditor, without first appointing a receiver to preserve the property. Marshall Wells Hardware Co. v. New Era Coal Co., 13 N. D. 396, 100 N. W. 1084.

§ 7382. Discovery compelled. In every such action the court may compel such corporation to discover any stock, property, things in action or effects alleged to belong or to have belonged to it, the transfer and disposition thereof and the consideration and all the circumstances of such distribution. Every officer, employe, agent or stockholder of such corporation and every person to whom it shall be alleged that any transfer of property or effects of such corporation has been made, or in whose possession or control the same is alleged to be, may be compelled in the discretion of the court to testify in relation thereto and to answer any questions touching the transfer or possession of such property or effects, although such answer may expose the corporation of which he is a member to a forfeiture of its corporate rights, or any of them, or may tend to criminate such witness or subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before the court on such examination; provided, that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. [C. Civ. P. 1877, § 532; R. C. 1895, § 5774.]

Article 4.—Proceedings to Annul Corporations.

§ 7383. By whom brought. An action may be brought by the state against a corporation created by or under the laws of this state for the purpose of vacating or annulling the existence of such corporation on the ground that its incorporation or the renewal thereof was procured upon some fraudulent suggestion or concealment of a material fact by the persons incorporating or by some of them, or with their knowledge and consent. [R. C. 1895, § 5775.]

§ 7384. Same. Causes for bringing. An action may be brought by the state, or by any private person in the name of the state, on leave granted therefor by the district court, upon cause shown for the purpose of annulling the existence of any corporation created by, or under the laws of this state, except a municipal corporation, whenever any such corporation shall:

1. Offend against any of the provisions of any law by, or under which it shall have been created, altered or renewed; or,

2. Violate the provisions of any law by which such corporation shall have forfeited its corporate rights, privileges, and franchises by abuse of its powers; or,

3. Whenever it shall have forfeited its privileges or franchises by failure to exercise its powers and such default has not been repaired by actually commencing active operations; or,

4. Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges or franchises; or,

5. Whenever it shall exercise franchises or privileges not conferred upon it by law. [1897, ch. 56; R. C. 1899, § 5776.]

§ 7385. **Attorney general to bring; who may, if he refuses.** Whenever the attorney general shall have reason to believe that any of the acts or omissions specified in the preceding section can be established by proof, he shall apply for leave and upon leave granted bring such action in every case of public interest and in every other case in which satisfactory security shall be given to indemnify the state against the costs and expenses which may be incurred therein. In case the attorney general on application shall refuse to bring such action leave to bring the same by a private person shall be granted only on notice to the attorney general and the proposed defendant; and the court on granting leave in such case may require the prosecutor to give adequate security to the state to indemnify it and the defendant against all taxable costs therein. [R. C. 1895, § 5777.]

§ 7386. **When notice given to corporation.** Upon the application by the attorney general to bring any such action the court may in its discretion direct notice of such application to be given to the corporation previous to the hearing and may hear the corporation in opposition thereto. [R. C. 1895, § 5778.]

§ 7387. **What judgment shall provide. Receiver. Distribution of property.** If in any such action it shall be adjudged that a corporation has forfeited its corporate rights, privileges and franchises, judgment shall be rendered that such corporation be excluded from such corporate rights, privileges and franchises and be dissolved; and thereupon the affairs of said corporation shall be wound up by and under the direction of a receiver to be appointed by the court and its property sold and converted into money; and the proceeds after paying the costs and expenses shall be distributed in the following order:

1. For the payment of taxes and debts due the United States, the state of North Dakota and any county, town or village therein.

2. For the payment of the legal and equitable liens upon the property of such corporation in the order of their priority.

3. The wages of laborers and employes accruing within six months previous to the commencement of the action.

4. For the payment of the other just debts of the corporation.

5. The residue of such moneys, if any, shall be distributed among the stockholders thereof.

When any corporation shall be adjudged to have exercised a franchise or privilege not conferred on it by law, the court may in its discretion instead of rendering a judgment as above provided in this section render a judgment that such corporation be excluded from exercising such franchise or privilege and that the plaintiff recover costs and may also, in either case in its discretion, fine such corporation in a sum not exceeding two thousand dollars to be collected and paid into the state treasury. [R. C. 1895, § 5779.]

§ 7388. **How and when receiver appointed.** If such an action is pending in the district court the receiver shall be appointed by the judgment of dissolution, or by a subsequent order founded thereon. If it shall be pending in the supreme court, then upon the entry of such judgment of dissolution the attorney general shall forthwith commence an action in the proper district

court for the appointment of such receiver and the winding up of the affairs of such corporation; and such corporation shall, notwithstanding such judgment of dissolution, be deemed to exist until a receiver shall be appointed, qualified and duly invested with the property of such corporation, but shall not be able to do any act or thing, other than to make over and transfer its assets to such receiver. [R. C. 1895, § 5780.]

§ 7389. **Application of preceding sections.** The provisions of the two preceding sections so far as they relate to the distribution of the property of the corporation and actions to appoint receivers therefor shall apply to any corporation when the law under which it exists is repealed. [R. C. 1895, § 5781.]

§ 7390. **How costs paid.** The necessary costs and disbursements, incurred in commencing and prosecuting such action by the attorney general in the name of the state, shall, when certified to by him, be audited by the state auditor and paid out of the state treasury. The receiver in such actions or the attorney general in case such moneys shall be delivered to him by such receiver shall repay to the state treasurer any money advanced by the state on account of such costs and disbursements. [R. C. 1895, § 5782.]

§ 7391. **Where judgment roll filed.** Upon the rendition of such judgment against a corporation, other than an insurance corporation, or for vacating or annulling letters patent, the attorney general shall cause a copy of the judgment roll to be forthwith filed in the office of the secretary of state. If such judgment is against an insurance corporation, a copy of the judgment roll shall be filed in the office of the commissioner of insurance. [R. C. 1895, § 5783.]

§ 7392. **Does not apply to certain corporations.** The provisions of this chapter shall not extend to corporations organized under the laws of this state for educational, charitable, religious or cemetery purposes. [R. C. 1895, § 5784.]

§ 7393. **Judgment of dissolution.** In any action now or hereafter pending against a corporation organized under the laws of the territory of Dakota, or of this state, in which a receiver has been appointed, and the property of the corporation taken into the custody of the court, if it shall appear that such corporation has abandoned and forfeited its franchise as provided in sections 4700 and 4701, the court shall not dismiss such action, but shall give judgment and distribute the property of such corporation as provided in section 7387. [R. C. 1899, § 5784a.]

CHAPTER 28.

ACTIONS TO RECOVER PENALTIES AND FORFEITURES.

§ 7394. **What forfeitures recoverable in civil action.** In all cases not otherwise specially provided for by law, when a forfeiture shall be incurred by any person and the act or omission for which the same is imposed shall not also be a misdemeanor, such forfeiture may be sued for and recovered in a civil action. When such act or omission is punishable by fine and imprisonment, or by fine or imprisonment, or is specially declared by law to be a misdemeanor, it shall be deemed a misdemeanor within the meaning of this chapter. The word forfeiture as used in this chapter shall include any penalty in money or goods, other than a fine, imposed by law as a punishment for crime. [R. C. 1895, § 5785.]

Actions to recover penalties and forfeitures, in whose name brought. State v. Messner, 9 N. D. 186, 82 N. W. 737; State v. Hogan, 8 N. D. 301, 78 N. W. 1051.

§ 7395. **By whom action brought.** Such action shall be brought as follows:

1. If the entire recovery is payable to the state by the attorney general or the state's attorney of the proper county in the name of the state.

2. If the entire recovery is payable to a public corporation the action shall be brought in the name of such corporation by its proper legal officer.

3. If the recovery is payable partly to the state or a public corporation and partly to an individual, an action may be brought by such individual or by the state or public corporation, as the case may be, or by such individual and the state or public corporation. [R. C. 1895, § 5786.]

§ 7396. **Procedure same as civil action. What complaint to allege.** The summons, pleadings and proceedings therein shall be the same as in a civil action. It shall be sufficient to allege in the complaint that the defendant is indebted to the plaintiff in the amount of the forfeiture claimed according to the provisions of the statute which imposes it, specifying the section and chapter containing such statute. And when such section imposes a forfeiture for several offenses or delinquencies, it shall specify the particular offense or delinquency for which the action is brought, with a demand for judgment for the amount of such forfeiture. In case the defendant is not a resident of the state an attachment may be issued in such action in like manner as in ordinary civil actions against nonresidents. Any such action may be brought for and the judgment therein may include as many forfeitures as the defendant may have incurred prior to its commencement. [R. C. 1895, § 5787.]

§ 7397. **Complaint for forfeited goods.** In an action brought to recover goods or other things forfeited by the provisions of any statute, it shall be sufficient to allege in the complaint, that such goods or other things have been forfeited, specifying the section and chapter containing such statute with a demand of judgment for the delivery of such goods or other things or the value thereof. [R. C. 1895, § 5788.]

§ 7398. **When for highest sum specified.** When a forfeiture is imposed, not exceeding a specific sum, or when it is not less than one sum nor more than another, the action may be brought for the highest sum specified; a judgment may be rendered for such sum as the court or jury shall assess or determine to be proportionate to the offense. [R. C. 1895, § 5789.]

§ 7399. **What judgment shall direct.** In all cases when judgment is recovered pursuant to this chapter, it shall also include the costs of the action, and it shall direct that if the same is not paid, the defendant shall be committed to the county jail of the proper county there to be imprisoned for a specified time, not exceeding six months, which period shall be fixed by the court in view of all the circumstances of the case, or until otherwise discharged pursuant to law. In such cases a commitment shall issue as in ordinary criminal actions. This section shall not prevent the enforcement of any such judgment by execution at any time within one year from its rendition. [R. C. 1895, § 5790.]

§ 7400. **Forfeitures by ordinance, etc., how recovered.** All forfeitures imposed by any by-law, ordinance or regulation of any town, city or village, or of any corporation organized under the laws of this state, when special provision is not otherwise made by law for their recovery or punishment provided for, the act or omission for which they are imposed may be sued for and recovered, pursuant to this chapter. It shall be sufficient to allege in the complaint that the defendant is indebted to the plaintiff in the amount of the forfeiture claimed, specifying the by-law, ordinance or regulation which imposes it. And when such by-law, ordinance or regulation imposes a penalty or forfeiture for several offenses or delinquencies it shall specify the particular offense or delinquency for which the action is brought with a demand for a judgment for the amount of such forfeiture. All money

collected on such judgment shall be paid to the treasurer of such town, city, village or corporation. [R. C. 1895, § 5791.]

§ 7401. **To whom moneys collected paid.** All moneys collected on account of any judgment under the provisions of this chapter, except such as are payable by law to an individual shall be paid by the officer collecting the same to the treasurer of the state, or of the county, town, city or village entitled thereto as the case may be within twenty days after its collection or receipt by him; and in case of any neglect or failure in such payment the treasurer to whom such money should be paid may sue and collect the same of such officer by action in his name of office and upon the official bond of such officer, if any he has given, with interest at the rate of twelve per cent per annum from the time it should have been so paid. [R. C. 1895, § 5792.]

§ 7402. **City, etc., treasurers to collect forfeitures from justices.** Every town, village and city treasurer shall demand of and recover from each justice of the peace or police magistrate of his town, village or city respectively all moneys received by such justice upon judgments rendered by him in actions under this chapter and every such justice shall on demand of such treasurer produce to him his docket for examination and all process and papers concerning or in such actions. In case of refusal or neglect by such justice to pay over promptly such moneys upon such demand, such treasurer shall institute an action therefor in his name of office against such justice and his sureties upon his official bond. [R. C. 1895, § 5793.]

§ 7403. **Property forfeited to state.** Whenever by the provisions of law any property, real or personal, shall be forfeited to the state, or to any officer for its use, an action for the recovery of such property alleging the ground of the forfeiture may be brought by the attorney general or by the state's attorney of the county in which the action is triable in any court having jurisdiction thereof. [C. Civ. P. 1877, § 547; R. C. 1895, § 5794.]

CHAPTER 29.

ACTION FOR THE PARTITION OF REAL PROPERTY.

§ 7404. **When may be brought.** When several co-tenants hold and are in possession of real property as partners, joint tenants or tenants in common in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein and for a sale of such property or a part thereof, if it appears that a partition cannot be made without great prejudice to the owners. [C. Civ. P. 1877, § 548: R. C. 1899, § 5795.]

§ 7405. **What complaint must show.** The interests of all persons in the property, whether such persons are known or unknown, must be set forth in the complaint specifically and particularly as far as known to the plaintiff; and if one or more of the parties or the share or quantity of interest of any of the parties is unknown to the plaintiff, or is uncertain, or contingent, or the ownership of the inheritance depends upon an executory devise, or the remainder is a contingent remainder so that such parties cannot be named, that fact must be set forth in the complaint. [C. Civ. P. 1877, § 549; R. C. 1899, § 5796.]

§ 7406. **Only lienors of record.** No person having a conveyance of, or claiming a lien on the property, or some part of it, need be made a party to the action, unless such conveyance or lien appears of record. [C. Civ. P. 1877, § 550; R. C. 1899, § 5797.]

§ 7407. **Lis pendens required.** Immediately after filing the complaint in the district court the plaintiff must record in the office of the register of deeds of the county, or of the several counties in which the property is

situated a notice of the pendency of the action, containing the names of the parties, so far as known, the object of the action and a description of the property to be affected thereby. From the time of filing such notice for record all persons shall be deemed to have notice of the pendency of the action. [C. Civ. P. 1877, § 551; R. C. 1899, § 5798.]

§ **7408. To whom summons directed.** The summons must be directed to all the joint tenants and tenants in common and all persons having an interest in or any lien of record by mortgage, judgment or otherwise upon the property or upon any particular portion thereof; and generally to all persons unknown or who have or claim any interest in the property. [C. Civ. P. 1877, § 552; R. C. 1899, § 5799.]

§ **7409. Service by publication.** When service of the summons is made by publication, the summons as published must be accompanied by a notice that the object of the action is to obtain a partition of the property, which is the subject of the action, briefly describing the same. [C. Civ. P. 1877, § 553; R. C. 1895, § 5800.]

§ **7410. Requisites of answers.** The defendants who have been personally served with the summons and a copy of the complaint, or who have appeared without such service must set forth in their answer, fully and particularly the origin, nature and extent of their respective interests in the property; and if such defendants claim a lien on the property by mortgage, judgment or otherwise they must state the original amount and date of the same, and the sum remaining due thereon; also whether the same has been secured in any other way or not; and if secured the nature and extent of such security or they are deemed to have waived their right to such lien. [C. Civ. P. 1877, § 554; R. C. 1899, § 5801.]

§ **7411. Title, proofs and judgment.** The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried and determined in such action; and when a sale of the premises is necessary the title must be ascertained by proof to the satisfaction of the court before the judgment of sale can be made; and when service of the complaint has been made by publication, like proof must be required of the right of the absent or unknown parties before such judgment is rendered; except that when there are several unknown persons, having an interest in the property, their rights may be considered together in the action as not between themselves. [C. Civ. P. 1877, § 555; R. C. 1899, § 5802.]

§ **7412. When partial partition adjudged.** Whenever from any cause it is in the opinion of the court impracticable or highly inconvenient to make a complete partition in the first instance among all the parties in interest, the court may first ascertain and determine the shares or interest respectively held by the original co-tenants and thereupon adjudge and cause a partition to be made, as if such original co-tenants were the parties and sole parties in interest and the only parties to the action and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained or allotted as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof as they may desire. [C. Civ. P. 1877, § 556; R. C. 1899, § 5803.]

§ **7413. Referee to determine outstanding liens.** If it appears to the court by the certificate of the register of deeds, or clerk of the district court, or by the sworn or verified statement of any person who may have examined or searched the records that there are outstanding liens or incumbrances of record upon such real property, or any part or portion thereof, which existed and were of record at the time of the commencement of the action and the persons holding such liens are not made parties to the action, the court must either order such persons to be made parties to the action, by an amendment or supplemental complaint, or appoint a referee to ascertain whether or not

such liens or incumbrances have been paid or, if not paid, what amount remains due thereon, and their order among the liens or incumbrances severally held by such persons and the parties to the action, and whether the amount remaining due thereon has been secured in any manner and if secured the nature and extent of the security. [C. Civ. P. 1877, § 557; R. C. 1899, § 5804.]

§ **7414. Notice to appear before referee. Service. Report.** The plaintiff must cause a notice to be served a reasonable time previous to the day for appearance before the referee, appointed as provided in the preceding section, on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place to make proof by his own affidavit or otherwise of the amount due or to become due contingently or absolutely thereon. In case such person is absent or his residence is unknown, service may be made by publication or notice to his agent under the direction of the court in such manner as may be proper. The report of the referee must thereupon be made to the court and must be confirmed, modified or set aside and a new reference ordered as the justice of the case may require. [C. Civ. P. 1877, § 558; R. C. 1899, § 5805.]

§ **7415. Sale or partition.** If it is alleged in the complaint and established by evidence, or if it appears by the evidence without such allegation in the complaint to the satisfaction of the court, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof. Otherwise upon the requisite proof being made it must order a partition according to the respective rights of the parties as ascertained by the court and appoint three referees therefor; and must designate the portion to remain undivided for the owners whose interests remain unknown or are not ascertained. [C. Civ. P. 1877, § 559; R. C. 1899, § 5806.]

§ **7416. Method and rule of partition.** In making the partition referees must divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks and may employ a surveyor with the necessary assistants to aid them. Before making partition or sale the referees may, whenever it will be for the advantage of those interested, set apart a portion of the property for a way, road or street and the portion so set apart shall not be assigned to any of the parties, or sold, but shall remain an open and public way, road or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them, their heirs or assigns, in which case it shall remain such private way. [C. Civ. P. 1877, § 560; R. C. 1899, § 5807.]

Cotenants not entitled to compensation for improvements, when. Gjerstadengen v. Hartzell, 9 N. D. 268, 83 N. W. 230.

§ **7417. Referee's report.** The referees must make a report of their proceedings, specifying therein the manner in which they executed their trust and describing the property divided and the share allotted to each party with a particular description of each share. [C. Civ. P. 1877, § 561; R. C. 1899, § 5808.]

§ **7418. Judgment on report. Effect of.** The court may confirm, change, modify or set aside the report and, if necessary, appoint new referees. Upon the report being confirmed judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive:

1. On all persons named as parties to the action and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee, or as tenants for life, or for years, or as entitled to the reversion, remainder or the inheritance of such property, or any part

thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof as tenants for years or for life.

2. On all persons interested in the property, who may be unknown, to whom notice has been given in the action for partition by publication.

3. On all other persons claiming from such parties or persons, or either of them.

And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives or assigns of such decedent as if it had been entered before his death. [C. Civ. P. 1877, § 562; R. C. 1899, § 5809.]

§ **7419. What tenants not affected.** The judgment does not affect tenants for years, less than ten, to the whole of the property which is the subject of the partition. [C. Civ. P. 1877, § 563; R. C. 1899, § 5810.]

§ **7420. Payment of expenses.** The expenses of the referees, including those of a surveyor and his assistants, when employed, must be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by the court in its discretion to the referees, must be apportioned among the different parties to the action equitably. [C. Civ. P. 1877, § 564; R. C. 1899, § 5811.]

§ **7421. Liens follow owner's share.** When the lien is on an undivided interest or estate of any of the parties, such lien, if partition is made, shall thenceforth be a charge only on the share assigned to such party; but such share must first be charged with its just proportion of the costs of the partition, in preference to such lien. [C. Civ. P. 1877, § 565; R. C. 1899, § 5812.]

§ **7422. Certain estates set off.** When a part of the property only is ordered to be sold, if there is an estate for life or years, in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold. [C. Civ. P. 1877, § 566; R. C. 1899, § 5813.]

§ **7423. How proceeds of incumbered property applied.** The proceeds of the sale of incumbered property must be applied under the direction of the court as follows:

1. To pay its just proportion of the general costs of the action.

2. To pay the costs of the reference.

3. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment.

4. The residue among the owners of the property sold, according to their respective shares therein. [C. Civ. P. 1877, § 567; R. C. 1899, § 5814.]

§ **7424. Lienor having other security.** Whenever any party to an action who holds a lien upon the property, or any part thereof, has other security for the payment of the amount of such lien the court may, in its discretion, order such security to be exhausted before distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property on account thereof. [C. Civ. P. 1877, § 568; R. C. 1899, § 5815.]

§ **7425. Distribution by referee.** The proceeds of sale and the securities taken by the referees, or any part thereof, must be distributed by them to the persons entitled thereto, whenever the court so directs. But in case no direction is given all of such proceeds and securities must be paid into court, or deposited therein, or as directed by the court. [C. Civ. P. 1877, § 569; R. C. 1899, § 5816.]

§ **7426. Part of action continued.** When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, and who are known, are paid into court the action may be continued as between such

parties for the determination of their respective claims thereto, which must be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in the controversy by pleading as in an original action. [C. Civ. P. 1877, § 570; R. C. 1899, § 5817.]

§ **7427. How sales made.** All sales of real property made by referees under this chapter must be made at public auction to the highest bidder upon notice published in the manner required for the sale of real property on execution. The notice must state the terms of sale and if the property, or any part of it, is to be sold subject to a prior estate, charge or lien, that must be stated in the notice. [C. Civ. P. 1877, § 571; R. C. 1899, § 5818.]

§ **7428. Terms of sale fixed by court.** The court must in the order for sale direct the terms of credit which may be allowed for the purchase money of any portion of the real property, of which it may direct a sale on credit and for that portion of which the purchase money is required to be invested for the benefit of unknown owners, infants and owners out of the state. [C. Civ. P. 1877, § 572; R. C. 1899, § 5819.]

§ **7429. Security for purchase money.** The referees may take separate mortgages and other securities for the whole or convenient portions of the purchase money, or such parts of the property as are directed by the court to be sold on credit for the shares of any known owner of full age in the name of such owner; and for the shares of an infant, in the name of the guardian of such infant; and for other shares, in the name of the clerk of the district court, and his successors in office. [C. Civ. P. 1877, § 573; R. C. 1899, § 5820.]

§ **7430. Estate for life or years. Compensation to.** The person entitled to a tenancy for life or years, whose estate has been sold, is entitled to receive such sum as may be deemed a reasonable satisfaction for such estate and which the person so entitled may consent to accept instead thereof by an instrument in writing filed with the clerk of the court. Upon the filing of such consent the clerk must enter the same in the minutes of the court. [C. Civ. P. 1877, § 574; R. C. 1899, § 5821.]

§ **7431. Compensation when consent not given.** If such consent is not given, filed and entered as provided in the last section at or before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale after deducting expenses will be a just and reasonable sum to be allowed on account of such estate and must order the same to be paid to such party or deposited in court for him, as the case may require. [C. Civ. P. 1877, § 575; R. C. 1899, § 5822.]

§ **7432. Same, when unknown person.** If the persons entitled to such estate for life or years are unknown, the court may provide for the protection of their rights in the same manner as far as may be as if they were known and had appeared. [C. Civ. P. 1877, § 576; R. C. 1899, § 5823.]

§ **7433. Value of future estates settled by court.** In all cases of sales when it appears that any person has a vested or contingent or future right or estate in any of the property sold, the court must ascertain and settle the proportionate value of such contingent or vested right or estate and must direct such proportion of the proceeds of the sale to be invested, secured or paid over in such manner as to protect the rights and interests of the parties. [C. Civ. P. 1877, § 577; R. C. 1899, § 5824.]

§ **7434. Terms of sale made known at time.** In all cases of sales of property the terms must be made known at the time, and if the premises consist of distinct farms or lots, they must be sold separately. [C. Civ. P. 1877, § 578; R. C. 1899, § 5825.]

§ **7435. Who cannot purchase.** Neither of the referees nor any person for the benefit of either of them can be interested in any purchase; nor can

a guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section are void. [C. Civ. P. 1877, § 579; R. C. 1899, § 5826.]

§ **7436. Report of sale.** After completing a sale of property, or any part thereof, ordered to be sold, the referees must report the same to the court with a description of the different parcels of land sold to each purchaser; the name of the purchaser, the price paid or secured, the terms and conditions of the sale and the securities, if any, taken. The report must be filed in the office of the clerk of the district court where the property is situated. [C. Civ. P. 1877, § 580; R. C. 1899, § 5827.]

§ **7437. Order to convey.** If the sale is confirmed by the court an order must be entered, directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of sale. [C. Civ. P. 1877, § 581; R. C. 1899, § 5828.]

§ **7438. Receipt of lienor, when purchaser.** When a party entitled to a share of the property or an encumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him. [C. Civ. P. 1877, § 582; R. C. 1899, § 5829.]

§ **7439. Record and bar of conveyance.** The conveyance must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who shall have been named as parties in the action; and against all such parties and persons as were unknown, if the summons was served by publication and against all persons claiming under them, or either of them, and against all persons having unrecorded deeds or liens at the commencement of the action. [C. Civ. P. 1877, § 583; R. C. 1899, § 5830.]

§ **7440. Investment of unknown owner's proceeds.** When there are proceeds of a sale belonging to an unknown owner or to a person without the state who has no legal representative within it, the same must be invested in bonds of the United States for the benefit of the persons entitled thereto. [C. Civ. P. 1877, § 584; R. C. 1899, § 5831.]

§ **7441. Securities taken in name of clerk.** When the security of the proceeds of the sale is taken, or when an investment of any proceeds is made, it must be done, except as herein otherwise provided, in the name of the clerk of the district court of the county where the papers are filed, and his successors in office, who must hold the same for the use and benefit of the parties interested, subject to the order of the court. [C. Civ. P. 1877, § 585; R. C. 1899, § 5832.]

§ **7442. When in the name of parties.** When security is taken by the referees on a sale and the parties interested in such security by an instrument in writing under their hands delivered to the referees, agree upon the shares and proportions to which they are respectively entitled, or when shares and proportions have been previously adjudged by the court, such securities must be taken in the names of and payable to the parties respectively entitled thereto, and must be delivered to such parties upon their receipts therefor. Such agreement and receipt must be returned and filed with the clerk. [C. Civ. P. 1877, § 586; R. C. 1899, § 5833.]

§ **7443. Clerk's duty.** The clerk of the district court, in whose name a security is taken, or by whom an investment is made, and his successor in office, must receive the interest and principal as it becomes due, and apply and invest the same as the court may direct; and must deposit with the county treasurer all securities taken, and keep an account in a book provided and kept for that purpose in the clerk's office, free for inspection by

all persons, of investments and money received by him thereon, and the disposition thereof. [C. Civ. P. 1877, § 587; R. C. 1899, § 5834.]

§ 7444. **Compensation for inequality.** When it appears that the partition cannot be made equal between the parties according to their respective rights, without prejudice to the rights and interests of some of them, and a partition is ordered, the court may adjudge compensation to be made by one party to another, on account of the inequality; but such compensation shall not be required to be made to others by owners unknown, nor by an infant, unless it appears that such infant has personal property sufficient for that purpose, and that his interest will be promoted thereby. And in all cases the court has power to make compensatory adjustment between the respective parties according to the ordinary principles of equity. [C. Civ. P. 1877, § 588; R. C. 1899, § 5835.

§ 7445. **To whom infant's share paid.** When the share of an infant is sold, the proceeds of the sale may be paid by the referee making the sale to his general guardian or the especial guardian appointed for him in the action, upon giving the security required by law or directed by order of court. [C. Civ. P. 1877, § 589; R. C. 1899, § 5836.]

§ 7446. **Share of insane and incompetent.** The guardian who may be entitled to the custody and management of the estate of an insane person or other person adjudged incapable of conducting his own affairs, whose interest in real property has been sold, may receive in behalf of such person his share of the proceeds of such real property from the referees, on executing, with sufficient sureties, an undertaking approved by a judge of the court, that he will faithfully discharge the trust imposed in him, and will render a true and just account to the person entitled or to his legal representative. [C. Civ. P. 1877, § 590; R. C. 1899, § 5837.]

§ 7447. **Guardian may consent to partition without action.** The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person or other person adjudged incapable of conducting his own affairs, who is interested in real property held in joint tenancy, or in common, or in any other manner, so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without action, and agree upon the share to be set off to such infant, or other person entitled, and may execute a release in his behalf to the owners of the shares of the parts, to which they may be respectively entitled, upon an order of the court. [C. Civ. P. 1877, § 591; R. C. 1899, § 5838.]

§ 7448. **Costs, fees and disbursements.** The costs of a partition including reasonable counsel fees, expended by the plaintiff or either of the defendants, for the common benefit, fees of referees and other disbursements, must be paid by the parties respectively entitled to share in the lands divided in proportion to their respective interests therein and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares and against other property held by the respective parties. When, however, litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them. [C. Civ. P. 1877, § 592; R. C. 1899, § 5839.]

§ 7449. **Single referee.** The court, with the consent of the parties, may appoint a single referee instead of three referees in the proceeding under this chapter; and the single referee, when thus appointed, has all the powers and may perform all the duties required of the three referees. [C. Civ. P. 1877, § 593; R. C. 1899, § 5840.]

§ 7450. **Abstract of title. How cost paid.** If it appears to the court that it was necessary to have made an abstract of the title to the property to be partitioned, and such abstract shall have been procured by the plaintiff, or if the plaintiff shall have failed to have the same made before the com-

mencement of the action and any of the defendants shall have had such abstract afterwards made, the cost of the abstract with interest thereon from the time the same is subject to the inspection of the respective parties must be allowed and taxed. Whenever such abstract is produced by the plaintiff before the commencement of the action he must file with his complaint a notice that an abstract of the title has been made and is subject to the inspection and use of all the parties to the action, designating therein where the abstract will be kept for inspection. But if the plaintiff shall have failed to procure such abstract before commencing the action and any defendant shall procure the same to be made, he shall as soon as he has directed it to be made file a notice thereof in the action with the clerk of the court, stating who is making the same and where it will be kept when finished. The court or the judge thereof may direct from time to time during the progress of the action who shall have the custody of the abstract. [C. Civ. P. 1877, § 594; R. C. 1899, § 5841.]

§ **7451. Who may make abstracts.** The abstract mentioned in the last preceding section may be made by any competent searcher of records and need not be certified by the register of deeds or other officer; but instead thereof it must be verified by the affidavit of the person making it, to the effect that he believes it to be correct; but the same may be corrected from time to time if found incorrect, under the direction of the court. [C. Civ. P. 1877, § 595; R. C. 1899, § 5842.]

§ **7452. Interest on disbursements.** Whenever during the progress of the action for partition any disbursements shall have been made under the direction of the court or the judge thereof by a party thereto, interest must be allowed thereon from the time of making such disbursements [C. Civ. P. 1877, § 596; R. C. 1899, § 5843.]

CHAPTER 30.

FORECLOSURE OF MORTGAGES, LIENS AND CONTRACTS.

Article 1.—Foreclosure by Advertisement.

§ **7453. Power of sale. Foreclosure authorized.** Every mortgage of real property containing a power of sale may upon default being made in the conditions of such mortgage be foreclosed by advertisement in the cases and manner hereinafter provided. [C. Civ P. 1877, § 597; R. C. 1895, § 5844.]

§ **7454. When proceeding enjoined.** When the mortgagee or his assignee has commenced proceedings for the foreclosure of a mortgage by advertisement and it shall be made to appear by the affidavit of the mortgagor, his agent or attorney to the satisfaction of a judge of the district court of the county where the mortgaged property is situated, that the mortgagor has a legal counterclaim or any other valid defense against the collection of the whole or any part of the amount claimed to be due on such mortgage, such judge may by an order to that effect enjoin the mortgagee or his assignee from foreclosing such mortgage by advertisement and direct that all further proceedings for the foreclosure be had in the district court properly having jurisdiction of the subject matter; and for the purpose of carrying out the provisions of this section service may be made upon the attorney or agent of the mortgagee or assignee. [1883, ch. 61, § 1; R. C. 1895, § 5845.]

Foreclosure by advertisement is "with due process of law." Robinson v. McKinney, 4 Dak. 290, 29 N. W. 658.

Certificate of sale by deputy, in own name as deputy, though irregular, is valid. Hodgdon v. Davis, 6 Dak. 21, 50 N. W. 478; Wilson v. Russell, 4 Dak. 376, 31 N. W. 645.

Power of court to enjoin foreclosure by advertisement is discretionary, and will be disturbed for abuse only. William McCann v. Mortgage Bank & Investment

Co., 3 N. D. 172, 54 N. W. 1026; James River Lodge v. Campbell, 6 S. D. 157, 60 N. W. 750; Nichols v. Tingstad, 10 N. D. 172, 86 N. W. 694.

Defendant enjoining foreclosure can plead statute of limitations in subsequent suit. Teigen v. Drake, 13 N. D. 502, 101 N. W. 893.

Procedure to enjoin foreclosure is not a special proceeding. Order granting such injunction not appealable. Tracy v. Scott, 13 N. D. 576, 101 N. W. 905.

Application by mortgagor for injunction an ex parte proceeding; counter affidavits not allowed. Commercial Bank v. Smith, 1 S. D. 28, 44 N. W. 1024.

Cannot foreclose by advertisement, in absence of express power of sale in mortgage. Grant v. Mortgage Co., 3 S. D. 390, 53 N. W. 746; Male v. Longstaff, 9 S. D. 389, 69 N. W. 577.

Death of mortgagor does not terminate power of sale. Reilly v. Phillips, 4 S. D. 604, 57 N. W. 780; Grandin v. Emmons, 10 N. D. 223, 86 N. W. 723.

§ 7455. **Mortgages. Agents and attorneys must have power of attorney to foreclose.** It shall be unlawful for any agent or attorney of any mortgagee, assignee, person or persons, firm, corporation, executor, administrator, trustee or guardian, owning or controlling any real estate mortgage to foreclose the same until he shall receive a power of attorney from such mortgagee, assignee, person or persons, firm, corporation, executor, administrator, trustee or guardian, authorizing such foreclosure, and in foreclosure proceedings by action the possession of such power of attorney shall be alleged in the complaint. [1901, ch. 132, § 1; 1903, ch. 153, § 1.]

§ 7456. **Foreclosure of real estate mortgage by agent or attorney not valid, when.** No sale of real estate upon the foreclosure made by an agent or attorney shall be valid for any purpose, unless such power of attorney shall be procured as herein provided and filed for record in the office of the register of deeds of the county wherein said real estate is located, before the day fixed or appointed to make the same; provided, that any person, firm or corporation not owning such mortgage, but controlling the same, shall, in addition to furnishing such power of attorney, furnish such agent or attorney making such foreclosure a copy of the instrument authorizing such control, and a failure to do so shall invalidate such foreclosure. [1901, ch. 132, § 2; 1903, ch. 153, § 2.]

§ 7457. **Prerequisites to right to foreclose.** To entitle a party to make such foreclosure it shall be requisite:

1. That default in a condition of such mortgage shall have occurred by which the power of sale has become operative.

2. That no action or proceedings shall have been instituted at law to recover the debt then remaining secured by such mortgage, or any part thereof; or if any action or proceeding has been instituted, that the same has been discontinued or that an execution upon the judgment rendered therein has been returned unsatisfied in whole or in part; and,

3. That the mortgage containing such power of sale has been duly recorded and, if it shall have been assigned, that all the assignments thereof have been duly recorded. [C. Civ. P. 1877, § 598; R. C. 1895, § 5846.]

An assignment of mortgage must be recorded before foreclosure can be had. Hickey v. Richards, 3 Dak. 345, 20 N. W. 428; Morris v. McKnight, 1 N. D. 266, 47 N. W. 375.

That no action to foreclose has been commenced, is an essential prerequisite. Rudolph v. Herman, 4 S. D. 283, 56 N. W. 901.

§ 7458. **Foreclosure for installments.** In case of mortgages given to secure the payment of money by installments, each of the installments mentioned in the mortgage shall be taken and deemed to be a separate and independent mortgage, and the mortgage for each of such installments may be foreclosed in the same manner and with like effect as if a separate mortgage was given for each of such installments and a redemption of any such sale shall have the like effect as if the sale for such installments had been made upon a prior independent mortgage. [C. Civ. P. 1877, § 599; R. C. 1895, § 5847.]

Notes belonging to several parties secured by same mortgage share pro rata, though due at different times. Commercial Bank v. Jackson, 7 S. D. 135, 63 N. W. 548.

§ **7459. How notice published.** Notice that the mortgage will be foreclosed by a sale of the mortgaged premises or some part thereof must be given by publishing the same six times, once in each week for six successive weeks in a newspaper of the county where the premises intended to be sold, or some part thereof, are situated, if there is one, and if not, then in some newspaper published at the seat of government. [C. Civ P. 1877, § 600: R. C. 1895, § 5848.]

Under former statute requiring notice to be published "for six successive weeks, at least once in each week," forty-two days must have elapsed between first publication and sale. Finlayson v. Peterson, 5 N. D. 587, 67 N. W. 953.

When notice is published "six times, once in each week for six successive weeks," no occasion to consider periods of time. McDonald v. Nordyke Co., 9 N. D. 290, 83 N. W. 6; Grandin v. Emmons, 10 N. D. 223, 86 N. W. 723.

Publication in paper of general circulation sufficient. Smith v. Commercial Bank, 7 S. D. 465, 64 N. W. 529; Trenery v. Mortgage Co., 11 S. D. 506, 78 N. W. 991.

§ **7460. Form of notice.** Such notice shall be in substantially the following form:

Notice is hereby given that that certain mortgage, executed and delivered by....., mortgagor, to.....,.. mortgagee, dated the.....day of....., 19..., and filed for record in the office of the register of deeds of the county of .....and state of North Dakota on the.....day of....., 19..., and recorded in book .....of.....at page..... (and assigned by said mortgagee to .....), will be foreclosed by a sale of the premises in such mortgage and hereinafter described at the front door of the court house in the county of.....and state of North Dakota at the hour of.....o'clock....m. on the.....day of....., 19..., to satisfy the amount due upon such mortgage on the day of sale. The premises described in such mortgage and which will be sold to satisfy the same are described as follows: (Here insert description.)

There will be due on such mortgage at the date of sale the sum of..... dollars. [R. C. 1895, § 5849.]

Mere inaccuracies in notice will not invalidate sale. Iowa Investment Co. v. Shepard, 8 S. D. 332, 66 N. W. 451.

§ **7461. How sale made.** The sale must be at public auction between the hours of nine o'clock in the forenoon and the setting of the sun on that day in the county in which the premises to be sold, or some part of them, are situated, and must be made by the sheriff, acting in person, or by his deputy, of the county, to the highest bidder. [C. Civ P. 1877, § 602; R. C. 1895, § 5850.]

Affidavit of sale by deputy, that sale was made by him, prima facie sufficient showing of authority to make sale. First M. E. Church v. Fadden, 8 N. D. 162, 77 N. W. 615; Wilson v. Russell, 4 Dak. 376, 31 N. W. 645.

§ **7462. Separate sale of tracts.** If the mortgaged premises consist of distinct farms, tracts or lots they must be sold separately, and no more farms, tracts or lots must be sold than shall be necessary to satisfy the amount due on such mortgage at the date of the sale and the costs and expenses allowed by law. [C. Civ. P. 1877, § 604; R. C. 1895, § 5851.]

Different phrases discussed in Thompson v. Browne, 10 S. D. 344, 73 N. W. 194; Middlesex Banking Co. v. Lester, 7 S. D. 333, 64 N. W. 168; Kirby v. Howie, 9 S. D. 471, 70 N. W. 640.

§ **7463. Mortgagee may purchase.** The mortgagee, his assigns, or their legal representatives, may fairly and in good faith purchase the premises so advertised, or any part thereof, at such sale. [C. Civ. P. 1877, § 605; R. C. 1899, § 5852.]

§ **7464. Certificate of sale. Contents. Record.** Whenever any real property shall be sold by virtue of a power of sale contained in any mortgage the

officer making the sale shall immediately give to the purchaser a certificate of sale containing:

1. A particular description of the real property sold.
2. The price bid for each distinct lot or parcel.
3. The whole price paid.
4. The costs and fees for making the sale.

Such certificate must be executed and acknowledged and may be recorded as provided in case of a certificate of sale of real property upon execution and shall have the same validity and effect. [C. Civ. P. 1877, § 606; R. C. 1895, § 5853.]

Holder of certificate has no interest by virtue of such certificate in the crop raised and harvested during year of redemption. Bank v. Swan, 2 N. D. 225, 50 N. W. 357.

Failure to file certificate of sale within ten days does not invalidate sale. Provision merely directory. Johnson v. Day, 2 N. D. 295, 50 N. W. 701; Martin v. Hawthorne, 5 N. D. 66, 63 N. W. 895.

Year of redemption commences to run on day sale is made. Trenery v. Mortgage Co., 11 S. D. 506, 78 N. W. 991; Johnson v. Day, 2 N. D. 295, 50 N. W. 701.

§ 7465. Redemption by whom. Rights. The property sold may be redeemed within one year from the day of sale in like manner and to the same effect as provided in chapter 12 of this code for redemption of real property sold upon execution so far as the same may be applicable, by:

1. The mortgagor or his successor in interest in the whole or any part of the property.

2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. Such creditor is termed a redemptioner and has all the rights of a redemptioner under that chapter. And the mortgagor and his successor in interest has all the rights of the judgment debtor and his successor in interest as provided therein. [C. Civ. P. 1877, § 607; R. C. 1899, § 5854.]

Where party in possession, with full knowledge, pays to proper officer money necessary to redeem, sale being made after lien had been fully satisfied, for sole purpose of preventing execution of deed to purchaser at foreclosure sale, payment is voluntary and cannot be recovered. That payment is made under protest unavailing, except it be duress or coercion. Wessel v. Land Co., 3 N. D. 160, 54 N. W. 922.

Redemption from previous redemptioner, how made; time for. Brooks v. O'Connor, 6 N. D. 285, 69 N. W. 692; Rudolph v. Herman, 4 S. D. 283, 56 N. W. 901.

Time of redemption limited to one year from day of sale. Nichols v. Tingstad, 10 N. D. 172, 86 N. W. 694.

§ 7466. Notice to officer. The notice of redemption required to be given to the sheriff under that chapter may in foreclosure by advertisement be given to the officer or person making the sale. [C. Civ. P. 1877, § 608; R. C. 1899, § 5855.]

§ 7467. When deed issues. Effect of. If such mortgaged premises are not redeemed it shall be the duty of the officer, or his successor in office, or other person who sold the same, or some other person appointed by the district court for that purpose to complete such sale by executing a deed of the premises so sold to the original purchaser, his heirs or assigns, or to any person who may have acquired the title and interest of such purchaser by redemption or otherwise. Such deed shall have the same force and effect as if it had been executed pursuant to a sale under a foreclosure of the mortgage by an action in which all persons having an interest in or lien upon the property subsequent to the mortgage were made parties and duly served with process. [C. Civ. P. 1877, § 609; R. C. 1895, § 5856.]

Illegal foreclosure confers no title. Purchaser acquires the rights of the mortgagee, and is subrogated thereto. Finlayson v. Peterson, 11 N. D. 45, 89 N. W. 855.

§ **7468. Disposition of surplus.** If after any such sale there remains in the hands of the officer or other person making the sale any surplus money after satisfying the mortgage on such real property sold and payment of the costs and expenses of such foreclosure and sale, such surplus shall be held by the officer or person making the sale for the period of thirty days after the sale, unless some person who had at the time of the sale an interest in or lien upon the property sold, or some part thereof, shall serve a written notice upon the person or officer making the sale of a claim to such surplus or some part thereof. If no such notice of claim is served within the period aforesaid, the officer or person making the sale shall upon the expiration of such period and upon demand pay over such surplus to the mortgagor, his legal representatives or assigns. [C. Civ. P. 1877, § 610; 1887, ch. 29, § 1; R. C. 1895, § 5857.]

Where two mortgagors, one must allege entire right to surplus to recover. Mere transfer of title after sale will give no right of action for surplus to grantee. Clyde v. Johnson, 4 N. D. 92, 58 N. W. 512; Aultman & Co. v. Siglinger, 2 S. D. 442, 50 N. W. 911; Reilly v. Phillips, 4 S. D. 604, 57 N. W. 780.

Effect of recitals in sheriff's deed. See Hannah v. Chase, 4 N. D. 351, 61 N. W. 18.

Officer selling cannot excuse himself for non-payment of surplus to mortgagor by showing it went into the hands of mortgagee. First M. E. Church v. Fadden, 8 N. D. 162, 77 N. W. 615.

§ **7469. Petition of claimant for surplus.** If the notice mentioned in the last section is served upon the officer or person making the sale within the time therein provided, such officer or person shall forthwith pay the surplus into the district court of the county in which the sale was made. Any person claiming the surplus, or any part thereof by reason of a lien upon or interest in the property as provided in the last section may at any time before an order is made, as prescribed in section 7471, file in the office of the clerk of the district court of the county where the sale took place a petition stating the nature and extent of his claim and praying for an order directing the payment to him of the surplus money, or a part thereof. [R. C. 1895, § 5858.]

§ **7470. Order directing payment. Notice of.** A person filing the petition as prescribed in the last section may after the expiration of thirty days from the day of sale apply to the district court for an order, pursuant to the prayer of his petition. Notice of the application must be served either by mail or personally upon each person who has filed a like petition and also upon the mortgagor and upon the person in actual possession of the property, if any, and also upon every person having an interest in or lien upon the property sold subsequent to the mortgage foreclosed, and whose interest or lien was at the time of the sale of record in the proper office in the county or counties in which the property sold is situated. Such notice shall be served at least eight days before the application. But if it is shown to the court by affidavit that service upon any person required to be served cannot be so made with due diligence, notice may be given to him in any manner which the court directs. [R. C. 1895, § 5859.]

§ **7471. Order for distribution.** Upon the presentation of the petition with due proof of the service of the notice of the application the court must ascertain the amount due to the petitioner and to each other person whose claim is a lien upon the surplus money and the priorities of the several liens; and the court shall thereupon make such order for the distribution of the surplus money as justice requires and the same shall be distributed accordingly. [R. C. 1895, § 5860.]

§ **7472. Affidavit of publication filed.** An affidavit made as provided in section 7294 of the publication of the notice of the sale and of any postponement must be filed for record by the officer making the sale, in the office of the register of deeds of the county in which the real property is situated, within thirty days after the sale. [C. Civ. P. 1877, § 611; R. C. 1895, § 5861.]

§ 7473. **Affidavit recorded.** Such affidavit must be recorded at length by the register of deeds of the county in which the real property is situated in a book kept for the record of mortgages and such original affidavit, the record thereof and certified copies of such record shall be prima facie evidence of the facts therein contained. [C. Civ. P. 1877, § 612; R. C. 1899, § 5862.]

§ 7474. **Note on margin of mortgage record.** A note referring to the page and book where the evidence of any sale made under a mortgage is recorded shall be made by the register in the margin of the record of such mortgage. [C. Civ. P. 1877, § 613; R. C. 1895, § 5863.]

§ 7475. **Costs and disbursements.** The party foreclosing a mortgage by advertisement shall be entitled to his costs and disbursements out of the proceeds of the sale and shall also be entitled to such attorney's fee as may be allowed by law. [C. Civ. P. 1877, § 615; 1887, c. 28, § 1; R. C. 1895, § 5864.]

Article 2.—Foreclosure by Action.

§ 7476. **Authorized.** An action may be brought in the district court for the foreclosure or satisfaction of a mortgage upon real property in accordance with the provisions of this article. [C. Civ. P. 1877, § 616; R. C. 1895, § 5865.]

Allegation of assignment of mortgage to plaintiff and that he is holder and owner of notes sufficiently shows title, although notes appear to be payable to another person. Allegation of no other proceedings necessary. Fisher v. Bouisson, 3 N. D. 493, 57 N. W. 505.

§ 7477. **Judgment includes what.** Whenever an action shall be brought for the foreclosure or satisfaction of a mortgage the court shall have power to render a judgment against the mortgagor for the amount of the mortgage debt due at the time of the rendition of such judgment and the costs of the action and to order and decree a sale of the mortgaged premises, or such part thereof as may be sufficient to pay the amount so adjudged to be due, and costs of sale, and shall have power to order and compel the delivery of the possession of the premises to the purchaser; but in no case under this article shall the possession of the premises so sold be delivered to the purchaser or person entitled thereto until after the expiration of one year from such sale; and the court may direct the issuing of an execution for the balance that may remain unsatisfied after applying the proceeds of such sale. [C. Civ. P. 1877, § 617; R. C. 1899, § 5866.]

§ 7478. **Action excludes other proceedings.** After such action shall be commenced, while the same is pending, no proceedings at law shall be had for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court. [C. Civ. P. 1877, § 618; R. C. 1899, § 5867.]

§ 7479. **When others made parties.** If the mortgage debt is secured by the obligation, or other evidence of debt, or any other person than the mortgagor, the plaintiff may make such other person a party to the action and the court may render judgment for the balance of such debt remaining unsatisfied after a sale of the mortgaged premises, as well against such other person as against the mortgagor, and may enforce such judgment as in other cases by execution or other process. [C. Civ. P. 1877, § 619; R. C. 1899, § 5868.]

In action to foreclose, owner of equity of redemption the only necessary party defendant. Carpenter v. Ingalls, 3 S. D. 49, 51 N. W. 348.

§ 7480. **What complaint shall state.** In an action for the foreclosure or satisfaction of a mortgage the complaint shall state whether any proceedings have been had at law or otherwise for the recovery of the debt secured by such mortgage, or any part thereof; and if there has, whether any and what part thereof has been collected. [C. Civ. P. 1877, § 620; R. C. 1899, § 5869.]

§ 7481. **When judgment at law obtained.** If it appears that any judgment has been obtained in an action at law for the moneys demanded by such complaint, or any part thereof, no proceedings shall be had in such case,

unless an execution against the property of the defendant in such judgment has been issued and the sheriff or other officer shall have made return that the execution is unsatisfied in whole or in part and that the defendant has no property out of which to satisfy such execution. [C. Civ. P. 1877, § 621; R. C. 1895, § 5870.]

Taking judgment for debt prior to foreclosure does not bar foreclosure. St. Paul F. & M. Ins. Co. v. Stock Co., 10 S. D. 191, 72 N. W. 460; Bennett v. Ellis, 13 S. D. 401, 83 N. W. 429; Rudolph v. Herman, 4 S. D. 283, 56 N. W. 901.

§ 7482. **Sales made by whom and where.** All sales of mortgaged premises under an order and decree of foreclosure must be made by a referee, sheriff or his deputy of the county or subdivision where the court in which the judgment is rendered is held, or other person appointed by the court for that purpose, and must be made in the county or subdivision where the premises, or some part of them, are situated and shall be made upon the like notice and in the same manner as provided by law for the sale of real property upon execution. [C. Civ. P. 1877, § 622; R. C. 1899, § 5871.]

Where debt is secured by a mortgage on several parcels and court finds mortgagee entitled to sale, court has no authority to except any part from decree of sale, though value of remainder sufficient. Baker v. Marsh, 1 N. D. 20, 44 N. W. 662.

§ 7483. **Certificate of sale. Deed and effect.** Whenever any real property shall be sold under judgment of foreclosure pursuant to the provisions of this article, the officer or other person making the sale must give to the purchaser a certificate of sale as provided by section 7464; and at the expiration of the time for the redemption of such property, if the same is not redeemed the person or officer making the sale, or his successor in office, or other officer appointed by the court must make to the purchaser, his heirs or assigns, or to any person who has acquired the title of such purchaser by redemption or otherwise a deed or deeds of such property. Such deed shall vest in the grantee all the right, title and interest of the mortgagor in and to the property sold at the time the mortgage was executed, or which was subsequently acquired by him and shall be a bar to all claim, right or equity of redemption in or to the property by the parties to such action, their heirs and personal representatives, and also against all persons claiming under them, or any of them, subsequent to the commencement of the action in which such judgment was rendered. [C. Civ. P. 1877, § 623; R. C. 1895, § 5872.]

For effect of recitals in sheriff's deed, see Hannah v. Chase, 4 N. D. 351, 61 N. W. 18; Nichols v. Tingstad, 10 N. D. 172, 86 N. W. 694; Thurber v. Miller, 11 S. D. 124, 75 N. W. 900; Wilson v. Russell, 4 Dak. 376, 31 N. W. 645.

§ 7484. **Application of proceeds.** The proceeds of every such sale must be applied to the discharge of the debt adjudged by the court to be due and of the costs; and if there is any surplus it must be brought into court for the use of the defendant or of the person entitled thereto, subject to the order of the court. [C. Civ. P. 1877, § 624; R. C. 1899, § 5873.]

§ 7485. **When surplus invested.** If such surplus, or any part thereof, shall remain in court for the term of three months without being applied for, the judge of the district court may direct the same to be put out at interest for the benefit of the defendant, his representatives or assigns, subject to the order of the court. [C. Civ. P. 1877, § 625; R. C. 1899, § 5874.]

§ 7486. **Complaint dismissed on payment of installments due.** Whenever an action shall be commenced for the foreclosure of a mortgage upon which there shall be due any interest, or any portion or installment of the principal and there shall be other portions or installments to become due subsequently, the complaint shall be dismissed upon the defendant's bringing into court at any time before decree of sale the principal and interest due with costs and disbursements. [C. Civ. P. 1877, § 626; R. C. 1899, § 5875.]

§ 7487. **When payment stays proceedings.** If at any time after judgment and before sale, the defendant shall bring into court the principal and interest

due with costs, the proceedings in such action shall be stayed; but the court may enforce the judgment by a further order upon a subsequent default in the payment of any of the installments or any part thereof, or of any interest thereafter becoming due on such mortgage. [C. Civ. P. 1877, § 627; R. C. 1895, § 5876.]

§ 7488. **Referee to view premises.** If the defendant shall not bring into court the amount due with costs or if for any other cause a judgment or decree shall be entered for the plaintiff, the court may appoint a referee to ascertain and report the situation of the mortgaged premises, or may determine the same on oral or other testimony, and if it shall appear that the same can be sold in parcels without injury to the interest of the parties, the decree must direct so much of the mortgaged premises to be sold as will be sufficient to pay the amount then due on such mortgage with costs and such judgment or decree shall remain as security for any subsequent default. [C. Civ. P. 1877, § 628; R. C. 1899, § 5877.]

§ 7489. **Successive judgments and sales.** If in the case mentioned in the preceding section there shall be any default subsequent to such judgment or decree in the payment of any portion or installment of the principal, or of any interest due upon such mortgage, the court may upon the application of the plaintiff by a further order founded upon such first judgment or decree direct a sale of so much of the mortgaged premises to be made under such decree as will be sufficient to satisfy the amount so due with costs of the application and the subsequent proceedings thereon, and the same proceedings may be had as often as a default happens. [C. Civ. P. 1877, § 629; R. C. 1899, § 5878.]

§ 7490. **Sale of whole on first default.** If in any of the foregoing cases it shall appear to the court that the mortgaged premises are so situated that a sale of the whole will be most beneficial to the parties, judgment or decree must in the first instance be entered for the sale of the whole premises accordingly. [C. Civ. P. 1877, § 630; R. C. 1899, § 5879.]

Sale of entire premises by order of court, and order to pay notes not due. See Scottish-American Mtg. Co. v. Reeve, 7 N. D. 99, 72 N. W. 1088.

§ 7491. **Rebate on undue part.** In such case the proceeds of such sale must be applied as well to the interest or portion or installment of the principal due as toward the whole or residue of the sum secured by such mortgage and not due and payable at the time of such sale, and if such residue does not bear interest, then the court may direct the same to be paid with a rebate of the legal interest for the time during which such residue shall not be due and payable, or the court may direct the balance of the proceeds of such sale after paying the sum due with costs to be put out at interest for the benefit of the plaintiff to be paid to him as the installments or portions of the principal or interest may become due and the surplus for the benefit of the defendant, his representatives or assigns, to be paid to them by order of the court. [C. Civ. P. 1877, § 631; R. C. 1895, § 5880.]

§ 7492. **Redemption.** All real property sold upon foreclosure of mortgages by order, judgment or decree of court may be redeemed at any time within one year after such sale as prescribed by section 7465 upon foreclosure by advertisement. [C. Civ. P. 1877, § 633; R. C. 1899, § 5881.]

§ 7493. **Injury to property restrained.** The court may by injunction on good cause shown restrain the party in possession from doing any act to the injury of real property during the existence of the lien or foreclosure of a mortgage thereon and until the expiration of the time allowed for redemption. [C. Civ. P. 1877, § 634; R. C. 1899, § 5882.]

Article 3.—Foreclosure of Land Contracts.

§ 7494. **Owner must give written notice to vendee or purchaser.** No owner of real estate, or owner of any equity therein, shall hereafter make or execute a contract for deed, bond for deed, or other instrument for the future

conveyance of any such real estate or equity therein, shall have the right to declare a cancellation, termination or forfeiture thereof or thereunder, except upon written notice to the vendee or purchaser, or his assigns, as hereinafter provided; and such notice shall be given to such vendee or purchaser or his assigns, notwithstanding any provision or condition in any such instrument to the contrary. [1903, ch. 204, § 1.]

§ 7495. **In case of default. Contents of notice.** Whenever any default shall have been made in the terms or conditions of any such instrument hereinafter made, and the owner or vendor shall desire to cancel or terminate the same shall, within a reasonable time after such default, cause a written notice to be served upon the vendee or purchaser, or his assigns, stating that such default occurred, and that said contract will be canceled or terminated, and shall recite in said notice the time when said cancellation or termination shall take effect, which shall not be less than thirty days after the service of such notice. [1903, ch. 204, § 2.]

§ 7496. **Notice how served.** Such notice shall be served upon the vendee or purchaser, or his assigns, in the manner now provided for the service of summons in the district court of this state, if such person to be served resides within the state. If such vendee or purchaser, or his assigns, as the case may be, resides without the state or cannot be found therein, of which fact, the return of the sheriff of the county in which said real estate is situated, that such person to be served cannot be found in his county, shall be prima facie evidence, then such notice shall be served by the publication thereof in a weekly newspaper within said county; or, if there is no weekly newspaper within said county, then in a newspaper published at the capital of this state for a period of three successive weeks. [1903, ch. 204, § 3.]

§ 7497. **Time allowed.** Such vendee or purchaser, or his assigns, shall have thirty days after the service of such notice upon him in which to perform the conditions or comply with the provisions upon which the default shall have occurred; and upon such performance, and upon making such payment, together with the costs of service of such notice, such contract or other instrument shall be reinstated and shall remain in force and effect the same as if no default had occurred therein. No provision in any contract for the purchase of land, or an interest in land, shall be construed to obviate the necessity of giving the aforesaid notice, and no contract shall terminate until such notice is given, any provision in such contract to the contrary notwithstanding. [1903, ch. 204, § 4.]

Article 4.—Foreclosure of Mortgages Upon Personal Property.

§ 7498. **Power of sale. Foreclosure authorized.** A mortgage of personal property containing a power of sale upon default being made in the conditions of such mortgage, authorizing the exercise of such power, may be foreclosed in the manner and upon the notice in this article provided. [Civ. C. 1877, § 1743; R. C. 1895, § 5883.]

Foreclosure, claims of third party. Hawk v. Konouzki, 10 N. D. 37, 84 N. W. 563.

§ 7499. **When proceedings enjoined.** When the mortgagee or his assignee has commenced foreclosure by advertisement and it shall be made to appear by the affidavit of the mortgagor, his agent or attorney, to the satisfaction of the judge of the district court of the county where the mortgaged property is situated that the mortgagee has a legal counterclaim or any other valid defense against the collection of the whole or any part of the amount claimed to be due on such mortgage, such judge may by an order to that effect enjoin the mortgagee or assignee from foreclosing such mortgage by advertisement and direct that all further proceedings for the foreclosure be had in the district court properly having jurisdiction of the subject matter; and for the purpose of carrying out the provisions of this section service may be

made upon the attorney or agent of the mortgagee or assignee. [1883, ch. 62, § 1; R. C. 1895, § 5884.]

Mortgagee may take possession and sue for property converted by third person. Sandager & Haugan v. Elevator Co., 2 N. D. 3, 48 N. W. 438; Sanford v. Elevator Co., 2 N. D. 6, 48 N. W. 434; Bank v. Elevator Co., 4 S. D. 409, 51 N. W. 77; Brewing Co. v. Elevator Co., 5 Dak. 62, 37 N. W. 763; Perry v. Beaupre, 6 Dak. 49, 50 N. W. 40.

A sale of mortgaged property will justify foreclosure before notes due. Ellstad v. Elevator Co., 6 N. D. 88, 69 N. W. 44.

Claim and delivery may be brought after demand by mortgagee, and failure to surrender by mortgagor. James v. Willson, 8 N. D. 186, 77 N. W. 603.

Except mortgages made on stocks of goods and providing power to sell in course of trade applying proceeds to mortgage, title to mortgaged property can only be acquired as to third parties by public sale. Lane v. Starr, 1 S. D. 107, 45 N. W. 212; Everett v. Buchanan, 2 Dak. 249, 6 N. W. 439.

Foreclosure does not raise presumption that property sold for enough to pay debt. Baker v. Baker, 2 S. D. 261, 49 N. W. 1064.

Cannot declare self insecure and foreclose before debt is due without cause. Humpfner v. Osborne, 2 S. D. 310, 50 N. W. 88.

Sale of part of property mortgaged does not discharge lien on property not sold. Bank v. Elevator Co., 4 S. D. 409, 57 N. W. 77.

May foreclose by action or advertisement. Bank v. Elevator Co., 4 S. D. 409, 57 N. W. 77.

Mortgagee foreclosing by action taking property and using same with mortgagor's consent, not conversion. Van Dusen v. Arnold, 5 S. D. 588, 59 N. W. 961.

§ 7500. Publication of notice of sale. Notice that the mortgage will be foreclosed by a sale of the mortgaged property shall be published once and at least six days prior to the sale in a newspaper published at the place of sale, if there is one; otherwise in any newspaper published in the county in which the sale is to be made; and if there is no newspaper published in the county, notice shall be given by posting the same in five public places in such county for at least ten days prior to the sale. If the mortgagor or his agent shall notify the mortgagee or his agent in writing at the time of the seizure of the property of his election that notice be given by posting instead of by publication, it shall be given accordingly as hereinbefore provided. [1889, ch. 26, § 4; R. C. 1895, § 5885.]

Notice may be published in either paper published in town nearest place of sale. Felker v. Grant, 10 S. D. 142, 72 N. W. 81.

§ 7501. Contents of notice. Such notice must specify:

1. The names of the mortgagor and mortgagee and of the assignee, if any.
2. The date of the mortgage.
3. The nature of the default and the amount claimed to be due thereon at the date of the notice.
4. A description of the mortgaged property, conforming substantially to that contained in the mortgage.
5. The time and place of sale.
6. The name of the party, agent or attorney foreclosing such mortgage. [1885, ch. 32, § 1; R. C. 1895, § 5886.]

§ 7502. When sale made. Postponement. All sales under this article shall be commenced between the hours of twelve o'clock noon and four o'clock in the afternoon of the day specified in the notice within thirty days after the seizure of the property, unless the sale shall be postponed. Any sale may be postponed one week by public announcement at the time of postponement when there are no bidders, or when the amount offered is grossly inadequate, or upon request of the mortgagor; provided, that when any mortgage on crops contains a stipulation to that effect, it may be foreclosed by a sale of such crop, when harvested, in any usual market therefor, at any time, in the usual manner, at the market price thereof, in such market and without the notice hereinbefore provided; and the usual and reasonable charges for such sale and for the transportation of such grain to such market, shall be deemed

proper expenses in such foreclosure. [1899, ch. 120; R. C. 1899, § 5887; 1905, ch. 61.]

Failure to publish notice of sale for twenty days does not release lien. May foreclose by action. Saving Ins. v. Miles, 76 Fed. 252; Pitts v. Baker, 11 S. D. 342, 77 N. W. 586; Edmonds v. Riley, 15 S. D. 470, 90 N. W. 139.

§ 7503. Report of sale. Within ten days after the sale of any mortgaged property as herein provided the person making the sale shall make out in writing a full report under oath of all the proceedings in such foreclosure, specifying particularly the property sold, the amount received therefor, the amount of the costs and expenses itemized and the disposition made by him of the proceeds of the sale and shall file the same in the office of the register of deeds of the county where the mortgage is filed, which report shall be received in all courts as prima facie evidence of the facts therein stated. [1889, ch. 26, § 7; R. C. 1895, § 5888.]

Failure to file report invalidates sale. Edmonds v. Riley, 15 S. D. 470, 90 N. W. 139.

§ 7504. Disposition of proceeds. Out of the proceeds arising from the sale the person making the sale shall pay:

1. The costs and expenses of foreclosure.
2. The amount of the mortgage debt to the person entitled thereto; and,
3. The balance, if any, to the owner of the mortgaged property. [1889, ch. 26, § 8; 1890, ch. 40, § 2; R. C. 1895, § 5889.]

Legal costs and expenses deducted from sale money first. DeLuce v. Root, 12 S. D. 141, 80 N. W. 181.

Junior mortgagee may recover surplus after satisfying senior mortgage by sale. Smith v. Donahoe, 13 S. D. 334, 83 N. W. 264.

§ 7505. Who may purchase at sale. The mortgagee, his assigns, or any other person may in good faith become a purchaser of the property sold. [1885, ch. 32, § 3; R. C. 1899, § 5890.]

§ 7506. Stipulation waiving provisions of article void. Any stipulation or agreement in any chattel mortgage by which any provisions of this article are waived shall be void. [1889, ch. 26, § 9; R. C. 1895, § 5891.]

§ 7507. Fees for publication of notice. The fees for the publication of notice under the provisions of this article shall in no case exceed the sum of three dollars. No greater charge shall be valid for the keeping of live stock between the date of its seizure and the date of sale or redemption than is now provided by law for the keeping of live stock when impounded. [1889, ch. 26, § 6; R. C. 1895, § 5892.]

§ 7508. Places of sale designated. The boards of county commissioners of the several counties shall at their regular quarterly meeting in April each year designate not less than five public places in their respective counties, which shall be the only market places for the sale of chattels under the provisions of this article, unless the mortgagor and mortgagee agree upon and designate in writing another place in the county as the place of sale, in which case the sale shall be made at the place so designated, which written agreement or designation shall be attached to and filed with the report of sale. Growing or harvested crops, grain in bulk, lumber, cord wood, buildings or other like articles may be sold under the provisions of this article without moving the same to one of the market places herein provided for. [1889, ch. 26, § 3; 1890, ch. 40, § 1; R. C. 1895, § 5893.]

May select places of sale at any regular meeting. Felker v. Grant, 10 S. D. 141, 72 N. W. 81.

§ 7509. How redemption from sale made. Any mortgagor of personal property, or his assignee, may redeem the same from a sale upon foreclosure of any mortgage within five days after such sale, exclusive of the day of sale, by paying or tendering to the owner of the mortgage at the time of sale, his agent or attorney, or the person making the sale, the amount for which

said property was sold with the costs of sale and interest at the rate of seven per cent per annum from the date of the sale. The mortgagor or his assignee, desiring to redeem such property shall at the time of sale give written notice to the person making the sale of his desire to make such redemption; otherwise he shall be deemed to have waived his right to do so. In case such notice is served, the person making such sale shall retain the possession of the property sold until the expiration of said five days and shall be entitled to his reasonable expenses in caring for the same. In case a part only of the property sold is redeemed the redemptioner shall pay or tender in addition to the price for which such part was sold such a proportion of the costs of sale as said price bears to the entire price of all the property sold and also the reasonable expense of caring for the property redeemed and interest. [1893, ch. 79; R. C. 1895, § 5894.]

Second mortgagee has right to redeem. Notice served in time, when. Tender for redemption should be kept good by deposit of amount required to redeem. Brown v. Smith, 13 N. D. 580, 102 N. W. 171.

§ 7510. **Misdemeanor to remove from county.** When written notice of a desire to redeem personal property as provided in the last section has been given, any person removing such property from the county in which it was sold, prior to the period herein provided for redemption without the written consent of the owner of said property at the time of sale shall be guilty of a misdemeanor. [1893, ch. 79; R. C. 1895, § 5895.]

§ 7511. **Certificate of redemption.** Upon the payment or tender of the amount necessary to redeem, the mortgagee, or person to whom the same is paid or tendered, shall execute and deliver to the redemptioner a certificate of such redemption, particularly describing the property redeemed and the mortgage under which the same was sold, which certificate may be filed in the office of the register of deeds of the county in which the mortgage is filed and shall operate as a release of said property from the mortgage. [1893, ch. 79; R. C. 1895, § 5896.]

Article 5.—Actions to Foreclose Liens on Personal Property.

§ 7512. **Foreclosure authorized.** An action may be maintained in the district court to foreclose any lien upon personal property. [R. C. 1895, § 5897.]

§ 7513. **Warrant to seize property.** If the plaintiff is not in possession of the property, a warrant may at the time of issuing the summons, or any time before judgment, be issued by the clerk of the court in which the action is commenced, commanding the sheriff to seize and safely keep the same to abide the final judgment in the action. Such warrant may be issued upon the filing of a verified complaint with the clerk, setting forth a cause of action in favor of the plaintiff and against the defendant for the foreclosure of a lien upon the property, possession of which is sought to be obtained. The sheriff must immediately execute the warrant by seizing the property and holding the same until disposed of according to law. [R. C. 1895, § 5898.]

§ 7514. **Form of warrant.** The warrant mentioned in the last section, exclusive of the venue and title of the action, shall be in substantially the following form:

To the sheriff of the county of.....:

The plaintiff in the above entitled action having filed in my office a verified complaint, setting forth a cause of action in favor of the plaintiff and against the defendant above named for the foreclosure of a lien upon the personal property hereinafter described and having given the undertaking required by law;

Now, therefore, you are hereby commanded immediately to seize and safely keep, until disposed of according to law, the following described personal property belonging to the defendant.....situated in

the county of.....and state of North Dakota, towit: (Here insert description of property.)

Such warrant shall be attested and sealed in the same manner as a warrant of attachment. [R. C. 1895, § 5899.]

§ **7515. Undertaking.** Before issuing the warrant the clerk must require a written undertaking on the part of the plaintiff with sufficient surety to the effect, that if the defendant recovers judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of any seizure under the warrant, not exceeding the sum named in the undertaking, which must be at least the amount claimed in the complaint and in no case less than one hundred dollars. [R. C. 1895, § 5900.]

§ **7516. Judgment must state what.** In such action judgment in favor of the plaintiff must specify the amount due on the lien and direct a sale of the property to satisfy the same and the costs, by a person appointed thereby, or by an officer designated therein, in the manner provided for the sale of personal property under execution; and the application by him of the proceeds of the sale, less his fees and expenses, to the payment of the judgment and costs. It may also provide for the payment of the surplus to the owner of the chattel and for the safe-keeping of the surplus, if necessary, until it is claimed by him. If the defendant upon whom the summons is personally served is liable for the amount of the lien, or for any part thereof, judgment may be entered against him accordingly. [C. Civ. P. 1877, § 674; R. C. 1895, § 5901.]

§ **7517. Certain provisions relating to attachments applicable.** The provisions of the chapter on attachment relative to rebonding, the sale of perishable property and proceedings in case judgment is in favor of the defendant shall apply to proceedings under this article so far as the same are applicable. [R. C. 1895, § 5902.]

§ **7518. Other remedies not affected.** This article does not affect any existing right or remedy to foreclose or satisfy a lien upon personal property without action. [R. C. 1895, § 5903.]

CHAPTER 31.

ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY AND OTHER ACTIONS CONCERNING REAL ESTATE.

§ **7519. Action to determine adverse claims.** An action may be maintained by any persons having an estate or interest in or lien or incumbrance upon real property whether in or out of possession thereof, and whether said property is vacant or unoccupied against any person claiming an estate or interest in or lien or incumbrance upon the same for the purpose of determining such adverse estate, interest, lien or incumbrance. [C. Civ. P. 1877, § 635; R. C. 1895, § 5904; 1901, ch. 5.]

Actions to set aside tax deeds, levies or assessments. See Bode v. New England Investment Co., 1 N. D. 121, 45 N. W. 197; Frost v. Flick, 1 Dak. 131, 46 N. W. 508; Power v. Larabee, 2 N. D. 141, 49 N. W. 724; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; Ry. Co. v. McGinnis, 4 N. D. 494, 61 N. W. 1032; Eaton v. Bennett, 10 N. D. 346, 87 N. W. 188; Pickton v. City of Fargo, 10 N. D. 469, 88 N. W. 90.

Defendant counterclaims when he alleges ownership and asks that title be quieted in him. Power v. Bowdle, 3 N. D. 107, 54 N. W. 404; Betts v. Signor, 7 N. D. 399, 75 N. W. 781.

Defendant's title material only after plaintiff has shown right in himself superior to defendant's right. Hannah v. Chase, 4 N. D. 351, 61 N. W. 18.

Court may adjudicate upon the validity of any liens derived through or under tax sales, but liens not so derived cannot be passed upon in such an action. Word "lien" should be restricted to such liens as the court may lawfully pass upon. Liens not based on tax sales will not be adjudicated against consent of plaintiff.

Dissent indicated by demurring to answer. McHenry v. Kidder County, 8 N. D. 413, 79 N. W. 875; Roberts v. Bank, 8 N. D. 504, 79 N. W. 1049; Buxton v. Sargent, 7 N. D. 503, 75 N. W. 811; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434.

Beneficial owner of land may maintain action. Dalrymple v. Trust Co., 9 N. D. 306, 83 N. W. 245.

Section held constitutional. Eaton v. Guarantee Co., 11 N. D. 79, 88 N. W. 1029.

Complaint setting forth several tax liens states but one cause of action. Statutory form held sufficient. Stating additional facts, not demurrable. Blakemore & Kedney v. Roberts, 12 N. D. 394, 96 N. W. 1029.

Recovery, if any, had on strength of claimant's title, not on weakness of adversary. Conrad & Roll, v. Adler, 13 N. D. 199, 100 N. W. 722.

In adverse claim suit, under plaintiff's allegation that defendant holds as security only for a debt, proof that his apparent title is a passive trust is not such a variance as to constitute a failure of proof. One who receives conveyance before notice of defect but pays purchase price thereafter not a bona fide purchaser. Halloran v. Holmes & White, 13 N. D. 411, 101 N. W. 310.

No affidavit of assessor to assessment roll, not fatal to assessment or levy in an equitable action to cancel assessment and levy unless allegation that assessment is unfair, unjust or fraudulent. The omission is an illegal act, and makes void the assessment and levy in a law action. Douglas v. City of Fargo, 13 N. D. 467, 101 N. W. 919; Farrington v. New England Investment Co., 1 N. D. 102, 45 N. W. 191.

Holder of tax-sale certificate has claim of "estate or interest" within meaning of law. Clark v. Darlington, 7 S. D. 148, 63 N. W. 771.

Defendant must allege and prove facts upon which his claim is based. Frum v. Weaver, 13 S. D. 457, 83 N. W. 579; Shattuck v. Smith, 6 N. D. 56, 69 N. W. 5.

For complaint, see Bennett v. Darling, 15 S. D. 1, 86 N. W. 751; Campbell v. Trust Co., 14 S. D. 483, 85 N. W. 1015; Hale v. Grigsby, 12 S. D. 198, 80 N. W. 199; Brace v. Van Eps, 12 S. D. 191, 80 N. W. 197.

Action is purely equitable, and verdict of jury only advisory. Reichelt v. Perry, 15 S. D. 601, 91 N. W. 459; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434.

Tender necessary before injunction to restrain collection of taxes under void assessment. Complaint must show payment or tender in action to set aside tax sale and levy. Idem.

§ 7520. **Use and occupation. Waste. Pleading. Possession.** A recovery may be had in the action by any party against the defendant personally served or who has appeared or against the plaintiff for the value of the use and occupation of the premises and for the value of the property wasted or removed therefrom, in the case of a vendor holding over or a trespasser as well as in case where the relation of vendor has existed. If such recovery is desired by plaintiff he shall allege the fact, stating particularly the value of the use and occupation, the value of the property wasted or removed, and the value of the real property aside from the waste or removal, and demand appropriate relief in his complaint. A recovery of possession may also be had by the plaintiff or any defendant asking for the affirmative relief. [1901, ch. 5.]

§ 7521. **Joinder of plaintiffs.** Any two or more persons having an estate or interest in or lien or incumbrance upon real property, under a common source of title, whether holding as tenants in common, joint tenants, copartners or in severalty, may unite in an action against any person claiming an adverse estate or interest in, or lien or incumbrance thereon, for the purpose of determining such adverse claim, or establishing such common source of title, or declaring the same to be held in trust, or of removing a cloud upon the same. [C. Civ. P. 1877, § 639; R. C. 1895, § 5908; 1901, ch. 5.]

Tenant in common entitled to recover possession as against stranger. Tenants in common are not "united in interest." Mather v. Dunn, 11 S. D. 196, 76 N. W. 922.

§ 7522. **Description of property. Complaint.** In an action for the determination of adverse claims, the property must be described in the complaint with such certainty as to enable an officer upon execution to identify it. In other respects the complaint, exclusive of the venue, title, subscription and verification, may be substantially in the following form, the blanks being properly filled. The plaintiff for cause of action shows to the court that he has an estate in, interest in, lien or incumbrance upon (as the case may be)

the following described real property, situate in the above named county and state, to-wit: .....

That the defendants claimed certain estates or interests in or liens or incumbrances (as the case may be) upon the same, adverse to plaintiff. (Here allege the facts concerning use and occupation and value thereof, and any property wasted or removed and the value thereof, if pertinent.)

Wherefore, plaintiff prays. (1) That the defendants be required to set forth all their adverse claims to the property above described, and that the validity, superiority and priority thereof be determined: (2) That the same be adjudged null and void, and that they be decreed to have no estate or interest in, or lien or incumbrance upon said property: (3) That this title be quieted as to such claim, and that defendants be forever debarred and enjoined from further asserting the same: (4) That he recover possession of the premises described, (if possession is desired): (5) That he recover .....dollars as the value of the use and occupation and value of property wasted and removed therefrom: (6) That he have such other general relief as may be just, together with costs and disbursements. [C. Civ. P. 1877, § 637; R. C. 1895, § 5906; 1901, ch. 5.]

§ **7523. Joinder of defendants.** In an action to determine adverse claims all persons appearing of record to have estates or interest in, or liens or incumbrances upon the property, and all persons in possession, may be joined as defendants, and all others may be joined by inserting in the title of the action the following: "All other persons unknown claiming any estate or interest in, or lien or incumbrance upon the property described in the complaint." [1899, ch. 157; R. C. 1899, § 5907; 1901, ch. 5; 1905, ch 4.]

§ **7524. Unknown persons made parties.** All persons having or claiming an estate or interest in, or lien or incumbrance upon the property described in the complaint, whether as heirs, devisees, legatees, or personal representatives of a deceased person, or under any other title or interest, and not in possession or not appearing of record in the office of the register of deeds, the clerk of the district court or the county auditor of the county in which the land is situate to have such claim, title or interest therein, may be proceeded against as persons unknown, and any order, judgment or decree entered in the action shall be valid and binding on such unknown persons, whether of age or minors, and on those claiming under them. [1901, ch. 5; 1905, ch. 4.]

§ **7525. Service of summons upon unknown parties defendant.** Service of the summons in such action may be had upon all such unknown persons defendant by publication in the manner provided by law for service by publication upon defendants whose residences are unknown; provided, that as to such unknown persons defendant the affidavit for publication shall be required to state in substance the following facts: That the interests of such unknown persons defendant in the land described in the complaint are not shown of record in the office of the register of deeds, the clerk of the district court or the county auditor of the county in which such land lies, and the affiant does not know and is unable to ascertain the names, residences or post office addresses of any of the persons who are proceeded against as unknown persons defendant; and the affidavit or complaint shall further show that the relief sought in the action consists wholly or partly in excluding the defendants from any interest in or lien upon specific real property in this state; and where jurisdiction is sought to be obtained against unknown persons under the provisions of this section, the summons shall state where the complaint is or will be filed, and there shall be subjoined to the summons as published, a notice signed by the plaintiff's attorney containing a description of the land to which such action relates. Unknown corporations claiming interest are included within the word "persons" as used in this article. [1901, ch. 5; 1905, ch. 4.]

§ 7526. Answer. Counterclaim. In an action to determine adverse claims a defendant in his answer may deny that the plaintiff has the estate, interests, lien or incumbrance alleged in the complaint coupled with allegations setting forth fully and particularly the origin, nature and extent of his own claim to the property, and if such defendant claim a lien the original amount secured thereby and the date of the same, and the sum remaining due thereon, also whether the same has been secured in any other way or not, and if so secured, the nature and extent of such security; or he may likewise set forth his rights in the property as a counterclaim and demand affirmative relief against the plaintiff and any co-defendant; and in such case he may also set forth a counterclaim and recovery from plaintiff or a co-defendant for permanent improvements made by him or those under whom he claims, holding under color of title in good faith adversely to the plaintiff or co-defendant against whom he seeks a recovery; such counterclaim to set forth among other things the value of the land aside from the improvements thereon, and as accurately as practicable the improvements upon the land and the value thereof; and in such case he may also set forth as a counterclaim his demand for recovery of the value of the use and occupation of the premises and value of property wasted or removed therefrom, in the same manner as provided by section 7520. The answer shall be deemed served on co-defendants by filing the same in the office of the clerk of court of the county where the action is pending at any time within thirty days after the service of summons on such defendant is complete. Where affirmative relief is demanded against co-defendants the allegations constituting counterclaims shall be deemed controverted by all the parties, as upon a direct denial or avoidance, as the case may require, without further pleading. [C. Civ. P. 1877, § 641; R. C. 1899, § 5910; 1901, ch. 5.]

Erection of improvements must be in good faith. Hawke v. Deffebach, 4 Dak. 20, 22 N. W. 480; Wood v. Conrad, 2 S. D. 334, 50 N. W. 95.

Defendant sets up counterclaim when he alleges he is the owner of the land. Betts v. Signor, 7 N. D. 399, 75 N. W. 781.

Contract of purchase does not constitute color of title. Seymour v. Cleveland, 9 S. D. 94, 68 N. W. 171; Coleman v. Stalmacke, 15 S. D. 242, 88 N. W. 107.

Void tax deed fair on its face, taken in good faith, constitutes color of title. Meadows v. Osterkamp, 13 S. D. 571, 83 N. W. 624; Parker v. Vinson, 11 S. D. 381, 77 N. W. 1023; Stokes v. Allen, 15 S. D. 421, 89 N. W. 1023.

Actual possession under bona fide claim of title, sufficient for recovery of improvements. Pendo v. Beakey, 15 S. D. 344, 89 N. W. 655.

Permission to erect buildings and remove same when demanded, by third person, held not to be color. Skelly v. Warren, 17 S. D. 25, 94 N. W. 408.

§ 7527. Reply. Betterments by plaintiff. No reply shall be required on the part of plaintiff except that when he has made permanent improvements on the property in good faith while in possession under color of title, he may recover a reasonable value thereof as against the defendant recovering the property, provided a reply alleging the facts and stating particularly the value of such improvements, the value of the property, and demanding appropriate relief, be served on such defendant and filed with the clerk within twenty days after the service of his answer. [C. Civ. P. 1877, § 642; R. C. 1899, § 5911; 1901, ch. 5.]

Must show equitable grounds for recovery, if desired to avail of equitable powers of court. Skelly v. Warren, 17 S. D. 25, 94 N. W. 408.

§ 7528. Trial. Findings. Possession. Costs. The plaintiff or any defendant who has answered may bring the case on for trial by serving all other parties who have appeared with notice of trial. A defendant interposing a counterclaim, shall for purposes of trial, be deemed plaintiff, and the plaintiff and co-defendants against whom relief is sought, shall be deemed defendants as to him. The court in its decision shall find the nature and extent of the claim asserted by the various parties, and determine the validity, superiority and priority of the same. Any defendant in default for want of an answer,

or not appearing at the trial, or a plaintiff not appearing at the trial, shall be adjudged to have no estate or interest in, or lien or incumbrance upon the property; and he shall also be adjudged to pay the amount demanded against him in any counterclaim or reply for the use and occupation of the premises, property removed therefrom, and waste committed, except in the case of a defendant served by publication and not appearing. If any counterclaim for improvements has been urged against one recovering property the value of such improvements thereof and the value of the land aside from the improvements, shall be specifically found. There shall be, likewise, findings on all other counterclaims urged at the trial. If possession of the premises is demanded by the plaintiff or by any defendant asking for affirmative relief, such possession shall be awarded to the party asking for possession who has the paramount claim to the property, and he may thereupon have a writ of possession as against all other parties to the action. Costs shall be awarded to the prevailing parties against each adversary in the action by the court, except that no costs shall be allowed against the defendant not appearing. [1901, ch. 5.]

§ 7529. **Judgment. When right fails after action brought.** In an action for the recovery of real property, when a party shows a right to recover at the time when the action was commenced, but it appears that his right has terminated during the pendency of the action, the finding and judgment must be according to the fact, and he may recover whatever he may show himself entitled to up to the time that his right terminated. [1901, ch. 5.]

In action of ejectment and to recover damages for withholding, where plaintiff conveyed pending litigation, plaintiff entitled to recover damages. Dunstan v. N. P. Ry. Co., 2 N. D. 46, 49 N. W. 426.

§ 7530. **Adjustment of cross judgments.** If the decision of the court is in favor of one party for the recovery of the real property, and in favor of another for improvements, the former shall have the option for sixty days after receiving notice that the findings are filed, to obtain the value of such improvements less such sums as may be found due for use and occupation and waste; or of taking judgment against him for the value of the land aside from the improvements, as determined by the findings, and such sums as may be found due for use and occupation and waste. If said option is not exercised in writing by said party or his attorney for him, and filed with the clerk within sixty days, the other party may thereupon exercise the option for him in like manner. If the party entitled to the possession of the property received in lieu thereof a money judgment, the other party may be subrogated to all the former's rights therein, including all the relief he would otherwise be entitled to under the findings; and judgment shall thereupon be entered accordingly. But until payment is made by the party recovering the land or tender and deposit in the office of the clerk of the court in which the action is pending, no writ for the possession of the property shall be issued. [1901, ch. 5.]

§ 7531. **When defendant permitted to defend.** A defendant in an action to determine adverse claims, proceeded against by name or as an unknown party or heir, or his representative on application and sufficient cause shown at any time before trial, must be allowed to defend on such terms as may be just; and any such defendant or his representative upon good cause shown, and on such terms as may be just, may be allowed to defend after trial and within one year after the rendition of judgment therein, but not otherwise. [1901, ch. 5.]

§ 7532. **Both parties have right of entry.** The court in which an action is pending for the recovery of real property or for damages for an injury thereto, or a judge thereof, may on motion upon notice by either party for good cause shown grant an order allowing to such party the right to enter upon the property and make survey and measurement thereof and of any

tunnels, shafts or drifts thereon for the purpose of the action, even though the entry for such purpose has to be made through other lands belonging to parties to the action. [C. Civ. P. 1877, § 645; R. C. 1899, § 5914.]

§ 7533. **Order for entry. Service.** The order must describe the property and a copy thereof must be served on the owner or occupant and thereupon such party may enter upon the property with necessary surveyors and assistants and make such survey and measurement, but if any unnecessary injury is done to the property he is liable therefor. [C. Civ. P. 1877, § 646; R. C. 1899, § 5915.]

§ 7534. **Purchaser may recover for waste.** When real property has been sold on execution the purchaser thereof, or any person who may have succeeded to his interest, may after his estate becomes absolute recover damages for injury to the property by the tenant in possession after sale and before possession is delivered under the conveyances. [C. Civ. P. 1877, § 647; R. C. 1899, § 5916.]

§ 7535. **Alienation not to affect action.** An action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person either before or after the commencement of the action. [C. Civ. P. 1877, § 648; R. C. 1899, § 5917.]

§ 7536. **Mining customs govern mining claims.** In actions respecting mining claims proof must be admitted of the customs, usages or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages or regulations, when not in conflict with the laws of this state and the United States, must govern the decision of the action. [C. Civ. P. 1877, § 649; R. C. 1899, § 5918.]

§ 7537. **Claimants on public land.** Any person settled upon the public lands belonging to the United States on which settlement is not expressly prohibited by congress, or some department of the general government, may maintain an action for any injuries done the same, also an action to recover the possession thereof in the same manner as if he possessed a fee simple title to said lands. [C. Civ. P. 1877, § 650; R. C. 1899, § 5919.]

State courts have no right to try U. S. land contests. Forbes v. Driscoll, 4 Dak. 336, 31 N. W. 633.

For right of settler on public land to maintain action against trespasser, see Olson v. Huntamer, 6 S. D. 364, 61 N. W. 479; Vantongeren v. Hefferman, 5 Dak. 180, 38 N. W. 52; Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 519, 91 N. W. 352.

CHAPTER 32.

ACTION FOR NUISANCE, WASTE AND WILLFUL TRESPASS ON REAL PROPERTY.

§ 7538. **Who may bring action of nuisance.** An action may be maintained by any person whose property is injuriously affected or whose personal enjoyment is lessened by a nuisance as defined in the civil code; and by the judgment the nuisance may be enjoined or abated as well as damages recovered. [C. Civ. P. 1877, § 651; R. C. 1895, § 5920.]

§ 7539. **Waste, when actionable.** If a guardian, tenant for life or years, joint tenant or tenant in common of real property commits waste thereon, any person aggieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages, forfeiture of the estate of the party offending and eviction from the premises. [C. Civ. P. 1877, § 652; R. C. 1899, § 5921.]

§ 7540. **When and to whom judgment given.** Judgment of forfeiture and eviction shall only be given in favor of the person entitled to the reversion against the tenant in possession when the injury to the estate in reversion

shall be adjudged in the action to be equal to the value of the tenant's estate or unexpired term, or to have been done in malice. [C. Civ. P. 1877, § 653; R. C. 1899, § 5922.]

CHAPTER 33.

ACTION FOR THE SUPPORT OF MARRIED WOMEN.

§ 7541. **When maintainable.** Any married woman may maintain an action in the district court of the county in which she resides against her husband for failure on his part to provide for her support and the support of her minor children, if any, by said husband living with her. [1890, ch. 167, § 1; R. C. 1895, § 5923.]

Power of court to compel husband to support wife. Action can only be commenced by service of summons as in other cases in equity. Bauer v. Bauer, 2 N. D. 108, 49 N. W. 418.

§ 7542. **Power of court to render judgment.** If it shall appear to the court upon the trial of such action that the husband is able to support or contribute to the support of his wife and said children, if any, and that he neglects or refuses to perform his duty in that respect, the court shall have power to render such judgment as to the support by said husband of his wife and said children as shall be equitable in view of the circumstances of both parties. [1890, ch. 167, § 2; R. C. 1895, § 5924.]

§ 7543. **Practice.** The practice in such action shall conform as nearly as may be to the practice in actions for divorce. [1890, ch. 167, § 3; R. C. 1895, § 5925.]

§ 7544. **What payments by husband compelled.** The court may in its discretion require the husband to pay any money necessary to enable the plaintiff to prosecute the action and for the support of the plaintiff and her children during its pendency. [R. C. 1895, § 5926.]

§ 7545. **Security required. Receiver.** The court may require the husband to give reasonable security for making any payments required under the provisions of this chapter and may enforce the same by the appointment of a receiver or by any remedy applicable to the case. [R. C. 1895, § 5927.]

§ 7546. **Modifying or vacating judgment.** The judgment may be modified or vacated at any time upon the hearing of the parties. [1890, ch. 167, § 4; R. C. 1895, § 5928.]

CHAPTER 34.

ACTIONS AGAINST THE STATE.

§ 7547. **When authorized. Where brought. Undertaking for costs.** An action respecting the title to property, or arising upon contract may be brought in the district court against the state the same as against a private person. When such actions are not of a local nature they shall be brought in the county of Burleigh. The plaintiff at the time of commencing such action shall file an undertaking with sufficient surety to be approved by the clerk of court to the effect that he will pay any judgment for costs that may be rendered against him. [R. C. 1895, § 5929.]

Actions against the state, commencement of. Synod of Dakota v. State, 2 S. D. 366, 50 N. W. 632; Morgan v. State, 9 S. D. 230, 68 N. W. 538; Carter v. State. 8 S. D. 153, 65 N. W. 422.

A county may bring action against the state. Lyman County v. State, 9 S. D. 413, 69 N. W. 601.

Mandamus will not lie against auditor exercising discretionary power in auditing bills. Legislature has provided other remedy. Sawyer v. Mayhew, 10 S. D. 18, 71 N. W. 141.

§ 7548. **Claim presented and refused before action brought.** No action upon a claim arising upon contract for the recovery of money only can be maintained against the state until the claim has been presented to the state auditor for allowance and allowance thereof refused. The neglect or refusal of the auditor to act on such claim for a period of ten days after its presentation for allowance shall be deemed a refusal to allow the claim. [R. C. 1895, § 5930.]

§ 7549. **How judgment collected.** No execution shall issue against the state on any judgment, but whenever a final judgment against the state shall have been obtained in any action the clerk shall make and furnish to the state auditor a duly certified copy of such judgment and the auditor shall in due course draw his warrant upon the state treasurer for such amount and deliver the same to the person entitled thereto. [R. C. 1895, § 5931.]

CHAPTER 35.

CONTEMPTS.

Article 1.—Criminal Contempts.

§ 7550. **Defined.** Every court of record shall have power to punish as for a criminal contempt persons guilty of any of the following acts and no other:

1. Disorderly, contemptuous or insolent behavior committed during its sitting in its immediate view and presence and directly tending to interrupt its proceedings, or to impair the respect due to its authority.
2. Any breach of the peace, noise or other disturbance directly tending to interrupt its proceedings.
3. Willful disobedience of any process or order lawfully issued or made by it.
4. Resistance willfully offered by any person to the lawful order or process of the court.
5. The contumacious and unlawful refusal to be sworn as a witness; or after being sworn, to answer any legal and proper interrogatory.
6. The publication of a false or grossly inaccurate report of its proceedings; but no court can punish as a contempt the publication of a true, full and fair report of any trial, argument, decision or other proceeding therein. [R. C. 1895, § 5932.]

Contempt not triable by jury. Legislature can prescribe minimum punishment. Writ of error. Effect of suspending sentence. In re Markuson, 5 N. D. 180, 64 N. W. 939.

Language abusive or defamatory, but not spoken in presence or hearing of judge is not a contempt. State v. Root, 5 N. D. 487, 67 N. W. 590.

One cannot be convicted of willful resistance of a search warrant, of which he had no notice or knowledge at the time of resistance. "Order or process" must be a lawful one. State ex rel Register v. McGahey, 12 N. D. 535, 97 N. W. 865.

§ 7551. **Punishment for.** Punishment for a contempt specified in the last section may be by fine, not exceeding two hundred and fifty dollars or by imprisonment not exceeding thirty days in the jail of the county where the court is sitting, or both, in the discretion of the court. When a person is committed to jail for the nonpayment of such fine, he must be discharged at the expiration of thirty days; but when he is also committed for a definite time, the thirty days must be computed from the expiration of the definite time. [R. C. 1895, § 5933.]

Article 2.—Civil Contempts.

§ 7552. **Defined.** Every court of record has power to punish by fine and imprisonment, or either, a neglect or violation of duty or other mis-

conduct by which a right or remedy of a party to a civil action or proceeding pending in the court may be defeated, impaired, impeded or prejudiced in the following cases:

1. An attorney, counselor, clerk, sheriff, coroner or other person in any manner duly elected or appointed to perform a judicial or ministerial service, for a misbehavior in his office or trust, or for a willful neglect or violation of duty therein; or for disobedience to any lawful order or process of the court or of the judge thereof.

2. A party to an action or proceeding, for putting in fictitious bail, or a fictitious surety, or for any deceit or abuse of the process or proceedings of the court.

3. A party to an action or proceeding, an attorney, counselor or other person, for the nonpayment of a sum of money ordered by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum; or for any other disobedience to any lawful order, judgment or process of the court.

4. A person for assuming to be an attorney, or counselor or other officer of the court and acting as such without authority; for rescuing any property or person in the custody of an officer by virtue of any process or order issued by such court; for fraudulently and willfully preventing or disabling from attendance or testifying a witness or a party to an action or proceeding, or unlawfully detaining such witness or party while going to, remaining at or returning from the court where the action or proceeding is noticed for trial or hearing or is being tried or heard; or for any other unlawful interference with the proceedings therein.

5. A person subpenaed as a witness for refusing or neglecting to obey the subpena, or to attend or to be sworn, or to answer as a witness.

6. A person summoned as a juror in any court, for improperly conversing with a party to an action or proceeding to be tried at that term, or with any other person, in relation to the merits of such action or proceeding; or for receiving a communication from any person in relation to the merits of such an action or proceeding without immediately disclosing the same to the court.

7. An inferior magistrate, judge, officer or tribunal, for proceeding contrary to law in a case or matter which has been removed from his jurisdiction to the court inflicting the punishment; or for disobedience to any lawful order or process of the latter court.

8. In any other case expressly authorized by the codes or statutes of this state, or where an attachment or any other proceeding to punish for a contempt has been usually adopted and practiced in a court of record to enforce a civil remedy or to protect a right of a party to an action or proceeding in such court. [R. C. 1895, § 5934.]

Questions of fact can only be reviewed on appeal where contempt proceeding is civil in character. State ex rel Mears v. Barnes, 5 N. D. 350, 65 N. W. 688.

Payment of alimony may be enforced by contempt proceeding. Glynn v. Glynn, 8 N. D. 233, 77 N. W. 594.

Violation of an injunctional order is a civil contempt. Merchant v. Pielke, 9 N. D. 245, 83 N. W. 18.

Disobedience of an interlocutory order secured on affidavit and determining the merits before trial cannot be punished as a contempt, as order is void. Foreman v. Healey, 11 N. D. 563, 93 N. W. 866.

Article 3.—Practice in Contempts.

§ 7553. How punished when in presence of court. When the offense is committed in the immediate view and presence of the court or of the judge upon a trial or hearing it may be punished summarily. For that purpose an order must be made, stating the facts which constitute the offense and reciting that the same occurred in such immediate view and presence and plainly

and specifically prescribing the punishment to be inflicted therefor. [R. C. 1895, § 5935.]

Criminal contempt in presence of judge may be punished summarily. State v. Root, 5 N. D. 487, 67 N. W. 590; State v. Crum, 7 N. D. 299, 74 N. W. 992.

Criminal contempt not a criminal prosecution. State v. Crum, 7 N. D. 299, 74 N. W. 992.

§ 7554. **When not in presence.** When the offense is not so committed the court or judge must upon being satisfied by affidavit of the commission of the offense, either:

1. Make an order requiring the accused to show cause at a time and place therein specified why he should not be punished for the alleged offense; or,

2. Issue a warrant of attachment directed to the sheriff of any county where the accused may be found, commanding him to arrest the accused and bring him before the court or judge, either forthwith or at a time and place therein specified to answer for the alleged offense. [R. C. 1895, § 5936.]

Trial for contempt and disbarment in same action is without authority of law. State v. Root, 5 N. D. 487, 67 N. W. 590.

§ 7555. **Order to show cause. Attachment.** An order to show cause may be made in the action or proceeding in or respecting which the offense was committed, either before or after the final judgment or order therein, and is equivalent to a notice of motion; and the subsequent proceedings thereupon shall be taken in the action or proceeding as upon a motion made therein. In case an attachment is issued it shall be deemed an original special proceeding by the state as plaintiff against the accused as defendant. [R. C. 1895, § 5937.]

This is an original proceeding, and change of judges not allowed. Township v. Aasen, 10 N. D. 264, 86 N. W. 742.

§ 7556. **Papers served on accused.** A copy of the warrant and of the affidavit, or report of a referee upon which it is issued, must be served upon the accused when he is arrested by virtue thereof. [R. C. 1895, § 5938.]

§ 7557. **Indorsement on warrant of amount of undertaking required.** When a warrant of attachment is issued the court or judge may in discretion by an indorsement thereon fix a sum in which the accused may give an undertaking for his appearance to answer. [R. C. 1895, § 5939.]

§ 7558. **Duty of sheriff when undertaking not given.** If an indorsement is not made upon the warrant, or if such an indorsement is made and an undertaking is not given as prescribed in the next section, the sheriff after making the arrest must keep the accused in his custody, until the further direction of the court or judge. When from sickness or other cause the accused is physically unable to attend before the court or judge, that fact is a sufficient excuse to the sheriff for not producing him as required by the warrant. In that case the sheriff must produce him as directed by the court or judge after he becomes able to attend. The sheriff need not in any case confine the accused in prison or otherwise restrain him of his liberty except so far as is necessary in order to secure his personal attendance. [R. C. 1895, § 5940.]

§ 7559. **Accused discharged from arrest on delivering undertaking.** When an indorsement is made upon the warrant as prescribed in section 7557, the accused must be discharged from arrest upon his executing and delivering to the sheriff at any time before the return day of the warrant an undertaking to the state in the sum specified in the indorsement with sufficient surety to the effect that he will appear on the return of such attachment and abide the direction of the court. If required by the sheriff, such surety must justify in the same manner as bail upon an arrest. [R. C. 1895, § 5941.]

§ 7560. **Procedure on return of warrant.** When the accused is produced by virtue of a warrant, or appears upon the return of a warrant, or of an

order to show cause the court or judge must, unless the accused admits the offense charged, cause interrogatories to be filed, specifying the facts and circumstances of the offense charged against him. The accused must make written answer thereto under oath within such reasonable time as the court or judge allows therefor and either party may produce affidavits or other proofs contradicting or corroborating any answer. Upon the original affidavits, the answer and subsequent proofs the court or judge must determine whether the accused has committed the offense charged. [R. C. 1895, § 5942.]

Accused has right to except to jurisdiction and attack sufficiency of charge. State v. Root, 5 N. D. 487, 67 N. W. 590.

Does not govern cases under prohibition statutes. State ex rel Morrill v. Massey, 10 N. D. 154, 86 N. W. 225.

Accused entitled to have interrogatories filed "specifying the facts and circumstances of the offense charged against him." Defendant's mere silence and failure to object to proceedings on ground that none have been filed, not waiver of right. Power to fine; to be paid into public treasury; no part to moving party. When actual injury court may order offender to pay over to injured party sum sufficient to indemnify him; such sum not to be arbitrarily fixed by trial judge, but must be ascertained from evidence. Township of Noble v. Aasen, 10 N. D. 264, 86 N. W. 742.

§ 7561. Final order directing punishment. If it is determined that the accused has committed the offense charged and if it is a contempt defined in section 7552, that it was calculated to or actually did defeat, impair, impede or prejudice the rights or remedies of a party to an action or proceeding pending in the court or before the judge or a referee, the court or judge must make a final order accordingly, directing that the accused be punished by fine or imprisonment, or both, as the nature of the case requires. A warrant of commitment must issue accordingly. [R. C. 1895, § 5943.]

§ 7562. Payment to party injured instead of fine. If an actual loss or injury has been produced to any party by the misconduct alleged, the court or judge shall order a sufficient sum to be paid by the offender to such party to indemnify him and to satisfy his costs and expenses instead of imposing a fine upon the accused; and in such case the payment and acceptance of such sum shall be an absolute bar to any action by the aggrieved party to recover damages for such injury or loss. When no such actual injury or loss has been produced the fine shall not exceed two hundred and fifty dollars over and above the costs and expenses of the proceeding. A corporation may be fined as prescribed in this section. [R. C. 1895, § 5944.]

§ 7563. Imprisonment until act performed. When the misconduct proved consists of an omission to perform an act or duty, which it is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it and paid the fine imposed. In such a case the order and the warrant of commitment, if one is issued, must specify the act or duty to be performed and the sum to be paid. In every other case, when special provision is not otherwise made by law, the offender may be imprisoned for a reasonable time not exceeding six months, and until the fine, if any, is paid; and the order and the warrant of commitment, if any, must specify the amount of the fine and the duration of the imprisonment. [R. C. 1895, § 5945.]

§ 7564. Offender discharged when unable to endure imprisonment. When an offender, imprisoned as prescribed in this chapter, is unable to endure the imprisonment, or to pay the sum, or to perform the act or duty required to be paid or performed in order to entitle him to be released, the court or judge may in discretion and upon such terms as justice requires make an order directing him to be discharged from the imprisonment. [R. C. 1895, § 5946.]

§ 7565. Punishment no bar to criminal prosecution. A person punished as prescribed in this chapter may, notwithstanding, be prosecuted criminally for the same misconduct, if it is a public offense; but the court before which he is convicted must in forming its sentence take into consideration the previous punishment. [R. C. 1895, § 5947.]

§ 7566. **Failure to appear. Prosecution of undertaking.** When a person arrested by authority of a warrant of attachment has given an undertaking for his appearance as prescribed in this chapter and fails to appear on the return day of the warrant, the court may either issue another warrant or make an order directing the undertaking to be prosecuted, or both. [R. C. 1895, § 5948.]

§ 7567. **By whom prosecuted. Extent of recovery.** The order directing the undertaking to be prosecuted may in the discretion of the court or judge direct the prosecution thereof by and in the name of any party aggrieved by the misconduct of the accused. In such a case the plaintiff may recover damages to the extent of the loss or injury sustained by him by reason of the misconduct, together with the costs and expenses of prosecuting the proceedings in which the warrant was issued, not exceeding the sum specified in the undertaking. [R. C. 1895, § 5949.]

§ 7568. **When prosecuted in name of state.** If no party is aggrieved by the misconduct of the accused the court must, and in any case when the court thinks proper so to direct, it may direct the prosecution of the undertaking by the attorney general, or by the state's attorney of the county in which it was given, in the name of the state. In an action brought pursuant to such direction the state is entitled to recover the entire sum specified in the undertaking. [R. C. 1895, § 5950.]

§ 7569. **Application of proceeds.** Out of the money collected the court which directed the prosecution must direct that the person at whose instance a warrant was issued be paid such a sum as it thinks proper to satisfy the costs and expenses incurred by him and to compensate him for the loss or injury sustained by him by reason of the misconduct. The residue of the money must be paid into the treasury of the state to the credit of the school fund. [R. C. 1895, § 5950.]

§ 7570. **When sheriff liable for insufficient surety.** After the return of an execution unsatisfied, issued upon a judgment, rendered in an action upon the undertaking, an action to recover the amount of the judgment may be maintained against the sheriff, when it appears that at the time when the undertaking was given, the surety was insufficient and the sheriff had reasonable grounds to doubt his sufficiency. Such an action may be maintained by the plaintiff in whose favor the judgment was recovered. If the state was plaintiff the action must be prosecuted by the attorney general or the state's attorney; and any money collected therein must be disposed of as prescribed in the last section. [R. C. 1895, § 5951.]

§ 7571. **Procedure to punish contempt before referee.** The commission of any of the offenses, which constitute contempt of court, upon the trial of an action or issue by a referee appointed by the court shall be deemed a contempt of the court appointing such referee and the same may be punished by the court in like manner and upon the same proceedings as in this chapter provided, except that the offense may be presented to the court by a report of the referee instead of by affidavit. [R. C. 1895, § 5952.]

§ 7572. **How contempts of officers, etc., punished.** When a witness fails to attend for examination when duly required so to do before a notary public or any other officer, board or tribunal authorized by law to require his attendance for examination, or refuses to be sworn, or to answer as a witness, such notary public, officer, board or tribunal shall certify such fact to the judge of the district court of the judicial district in which the witness resides or may be, who must thereupon by order require such witness to attend before him at a time and place to be specified in such order for examination. Upon the return day of such order the examination of the witness shall be conducted before the judge and for the failure of the witness to attend or his refusal to do any act required of him by law he may be punished as

for a contempt upon the same proceedings as are in this chapter provided. [R. C. 1895, § 5953.]

Refusal to testify before the state examiner, not contempt, when. In re Camp, 7 N. D. 69, 72 N. W. 912.

§ 7573. How appeals taken to the supreme court. Appeals may be taken to the supreme court from any final order adjudging the accused guilty of contempt and upon such appeal the supreme court may review all the proceedings had and affidavits and other proof introduced by or against the accused. For the purpose of reviewing questions as to the sufficiency of the evidence a statement of the case may be prepared and settled within the time and in the manner provided in article 8 of chapter 11 of this code. Such appeal shall be taken, except as in this section otherwise provided, in the manner prescribed in chapter 15 of this code.

To render such appeal effectual:

1. If the appellant has been adjudged guilty of a criminal contempt, an undertaking must be executed to the state of North Dakota on the part of the appellant in the sum of five hundred dollars by at least two sureties to the effect that if the order appealed from, or any part thereof, is affirmed or the appeal is dismissed, the appellant will pay the amount directed to be paid by such order, or the part of such amount as to which the order is affirmed and if such order also directs that appellant be imprisoned, that he will surrender himself in execution of the order and pay the costs adjudged against him on such appeal; or,

2. If, of a civil contempt, a like undertaking must be executed in double the amount of the fine imposed and in no case less than two hundred and fifty dollars to the same effect as prescribed in subdivision 1 of this section; or,

3. If the appellant does not desire a stay of the execution of the order appealed from, a like undertaking must be executed in the sum of two hundred and fifty dollars to the effect that appellant will pay the costs of the appeal if the judgment is affirmed wholly, or in part, or the appeal is dismissed.

Unless the undertaking provided for in subdivision 1 or 2 of this section, as the case may require, is executed on the part of the appellant the execution of the order appealed from shall not be stayed. [R. C. 1895, § 5954.]

Any final order which adjudges defendant guilty is appealable. State ex rel Morrill v. Massey, 10 N. D. 154, 86 N. W. 225.

Appeals in contempt cases, how governed. Township of Noble v. Aasen, 10 N. D. 264, 86 N. W. 742.

CHAPTER 36.

EMINENT DOMAIN.

§ 7574. Defined. How exercised. Eminent domain is the right to take private property for public use. Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner. And in case such property is so taken by a person, firm or private corporation no benefit to accrue from the proposed improvement shall be allowed in ascertaining the compensation to be made therefor. Such compensation shall in all cases be ascertained by a jury, unless a jury is waived. The right of eminent domain may be exercised in the manner provided in this chapter. [Const. § 14; R. C. 1895, § 5955.]

Action to condemn property should be brought in name of corporation. Compensation. Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570; Township of Noble v. Aasen, 8 N. D. 77, 76 N. W. 990.

Does not apply to township and other quasi corporations. Town of Dell Rapids v. Irving, 7 S. D. 310, 64 N. W. 149.

City must have damages determined by jury before changing street grade. Searle v. City of Lead, 10 S. D. 312, 73 N. W. 101.

Amount of compensation the only issue to be tried. Board of Education v. Prior, 11 S. D. 292, 77 N. W. 106.

§ 7575. **Exercised for what public uses.** Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

1. All public uses authorized by the government of the United States.
2. Public buildings and grounds for the use of the state and all other public uses authorized by the legislative assembly of this state.
3. Public buildings and grounds for the use of any county, incorporated city, village, town or school district; canals, aqueducts, flumes, ditches or pipes for conducting water for the use of the inhabitants of any county, incorporated city, village or town; or for draining any county, incorporated city, village or town; raising the banks of streams, removing obstructions therefrom and widening, deepening or straightening their channels; roads, streets and alleys and all other public uses for the benefit of any county, incorporated city, village or town, or the inhabitants thereof which may be authorized by the legislative assembly; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized.
4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, by-roads, plank and turnpike roads, railroads and street railways; canals, ditches, flumes, aqueducts and pipes for public transportation, supplying mines and for irrigating purposes, draining and reclaiming lands.
5. Roads, tunnels, ditches, flumes, pipes and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from mines; also milldams.
6. By-roads leading from highways to residences and farms.
7. Telegraph and telephone lines.
8. Sewerage of any incorporated city, or of any village or town, whether incorporated or unincorporated, or of any settlement consisting of not less than ten families, or of any public buildings belonging to the state, or to any college or university.
9. Cemeteries and public parks. [R. C. 1895, § 5956.]

§ 7576. **What estate subject to be taken.** The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby, or for an outlet for a flow or a place for the deposit of debris or tailings of a mine.
2. An easement, when taken for any other use.
3. The right of entry upon and occupation of lands and the right to take therefrom such earth, gravel, stones, trees and timber as may be necessary for a public use. [R. C. 1895, § 5957.]

§ 7577. **What property may be taken.** The private property which may be taken under this chapter includes:

1. All real property belonging to any person.
2. Lands belonging to this state; or to any county, incorporated city, village or town not appropriated to some public use.
3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated; and whenever a right of way shall have been taken and the person, firm or corporation taking such right of way shall fail or neglect for five years to use the same for the purpose to which it had been appropriated, the attempt by another person, firm or corporation to appropriate such right of way shall be considered a more necessary public use.

4. Franchises for toll roads, toll bridges, ferries and all other franchises; but such franchises shall not be taken unless for free highways, railroads or other more necessary public use.

5. All rights of way for any and all the purposes mentioned in section 7575 and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed or intersected by any other right of way or improvement or structure thereon. They shall also be subject to a limited use in common with the owner thereof when necessary; but such uses, crossings, intersections and connections shall be made in the manner most compatible with the greatest public benefit and the least private injury.

6. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law. [R. C. 1895, § 5958; 1901, ch. 75.]

Right of riparian owner to have a natural stream flow over his land is subject to condemnation. Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570.

§ 7578. What must appear before property taken. Before property can be taken it must appear:

1. That the use to which it is to be applied is a use authorized by law.
2. That the taking is necessary to such use.
3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use. [R. C. 1895, § 5959.]

§ 7579. Entry for making surveys, etc. In all cases when land is required for public use the person or corporation, or his or its agents, in charge of such use may survey and locate the same; but it must be located in the manner which will be compatible with the greatest public benefit and the least private injury and subject to the provisions of section 7594. Whoever may be in charge of such public use may enter upon the land and make examinations, surveys and maps thereof, and such entry shall constitute no cause of action in favor of the owner of the land except for injuries resulting from negligence, wantonness or malice. [R. C. 1895, § 5960.]

§ 7580. Proceedings by civil actions. All proceedings under this chapter must be prosecuted by civil action brought in the district court of the county in which the property or some part thereof is situated. [R. C. 1895, § 5961; 1901, ch. 74.]

§ 7581. Form of summons. When served. The summons shall be in the form prescribed by section 6834, except that the defendant shall be required to serve his answer to the complaint within fifteen days after the service of summons upon him. In all cases in which personal service is made upon the defendant, a copy of the complaint shall be attached to and served with the summons. [1901, ch. 74.]

§ 7582. Service by publication. Service of the summons by publication may be made by publishing the same two times, once in each week for two successive weeks in a newspaper published in the county in which the action is pending, if a newspaper is published in said county, and if no newspaper is published in such county, then in a newspaper published at the seat of government of this state. [1901, ch. 74.]

§ 7583. Service by mail. A copy of the summons and complaint must within two days after the first publication of the summons be deposited in some post office in this state, postage prepaid, and directed to the defendant, to be served at his place of residence, unless the affidavit for publication states that the residence of the defendant is unknown. [1901, ch. 74.]

§ 7584. Service complete, when. Service by publication is complete upon the expiration of fourteen days after the first publication of the summons, or in case of personal service of the summons and complaint upon the defendant out of the state, upon the expiration of ten days after the date of such service. [1901, ch. 74.]

§ 7585. **Filed with clerk, when.** Note of issue herein shall be filed with the clerk four days before the date fixed for the trial of the action. [1901, ch. 74.]

§ 7586. **May demand a jury, when.** Whenever in an action brought under the provisions of this chapter, an issue for the jury is formed whereby it appears that the attendance of a jury will be necessary to assess the damages in such action as provided by law, the plaintiff therein may apply to the judge of the district court where the same is pending for an order requiring a jury to be summoned to assess the damages in such action, as provided by law. Thereupon the judge shall forthwith issue an order to the clerk of said court requiring a jury to be summoned, and in such order shall specify the number of jurors to be drawn, the place where they are to appear, and the time when they shall come, which shall not be less than eight days nor more than thirty days from the date thereof. Thereupon the clerk shall proceed to draw the number of jurors required by such order, in accordance with law, relating to the drawing of petit jurors. [1901, ch. 74.]

§ 7587. **Fees. Issue of venire.** After the names have been so drawn, the sheriff of said county shall forthwith certify to the clerk his legal fees for the service of the venire upon the jurymen who have been drawn, which fees shall be those provided by law to be paid to him for the summoning of a jury under a special venire; whereupon the clerk shall forthwith notify the plaintiff of the amount of said fees, and upon the payment thereof to the clerk, to be paid by him to the sheriff, said clerk shall issue the venire forthwith, and the same shall forthwith be served by the sheriff; the plaintiff shall give sufficient surety to be approved by the clerk of said court for the payment of all jury fees and mileage; provided, however, such payment shall not be required to be made if the plaintiff be either the state of North Dakota, or any city, municipality, town, village, school district or other political subdivision, in all of which cases the sheriff's fees for summoning the jury shall be paid by the county as provided by law. [1901, ch. 74.]

§ 7588. **Notice to defendant.** Within one day after entry of the order for summoning the jury, the plaintiff shall serve notice of trial upon the opposite party, or parties, to such issue, specifying as the date of trial of said cause, the time fixed by such order for the meeting of such jury. [1901, ch. 74.]

§ 7589. **Special term of court.** The court shall sit at a special term to hear the case according to the law and practice of the court, and shall have the same power to complete the jury as is provided by law, and the pay of such jurymen and the penalty for failure or refusal to appear shall be the same as now provided by sections 2614 and 532. [1901, ch. 74.]

§ 7590. **Can try at an adjourned term.** Nothing herein contained shall prevent the trial of such case at any general, or special, or adjourned term of district court, held, or called in the county in which such action is, or may be pending, and such action may be tried at any such term; provided, if issue be not joined prior to the commencement of said regular, special or adjourned term, the plaintiff may nevertheless require said cause to be tried on such day thereof as the court may order; but plaintiff shall serve upon the opposite party, or parties, a seven days' notice of trial, specifying the date of trial, as fixed by order of the court. [1901, ch. 74.]

§ 7591. **Method of procedure unchanged.** The provisions of this article shall not be held or construed to alter or change the method of procedure in any action, or actions, save those brought under this chapter. [1901, ch. 74.]

§ 7592. **What complaint must contain.** The complaint must contain:

1. The name of the corporation, association, commission or person in charge of the public use for which the property is sought, who must be styled plaintiff.

2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants.

3. A statement of the right of the plaintiff.

4. If a right of way is sought, the complaint must show the location, general route and termini and must be accompanied with a map thereof so far as the same is involved in the action or proceeding.

5. A description of each piece of land sought to be taken and whether the same includes the whole or only a part of an entire parcel or tract. All parcels lying in the county and required for the same public use may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of parties. [R. C. 1895, § 5962.]

§ 7593. **Who may defend.** All persons in occupation of, or having or claiming an interest in any of the property described in the complaint or in the damages for the taking thereof, though not named, may appear, plead and defend, each in respect to his own property or interest, or that claimed by him in like manner as if named in the complaint. [R. C. 1895, § 5963.]

§ 7594. **Power of court.** The court shall have power:

1. To regulate and determine the place and manner of making connections and crossings, or of enjoying the common use mentioned in the fifth subdivision of section 7577.

2. To hear and determine all adverse or conflicting claims to the property sought to be condemned and to the damages therefor.

3. To determine the respective rights of different parties seeking condemnation of the same property. [R. C. 1895, § 5964.]

§ 7595. **Assessment of damages.** The jury, or court or referee, if a jury is waived, must hear such legal testimony as may be offered by any of the parties to the proceedings and thereupon must ascertain and assess:

1. The value of the property sought to be condemned and all improvements thereon pertaining to the realty and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate and interest therein shall be separately assessed.

2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff.

3. If the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages.

4. If the property is taken or damaged by the state or a public corporation, separately, how much the portion not sought to be condemned and each estate or interest therein will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed under subdivisions 2 and 3, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed the former shall be deducted from the latter and the remainder shall be the only damages allowed in addition to the value of the portion taken.

5. As far as practicable compensation must be assessed separately for property actually taken and for damages to that which is not taken. [R. C. 1895, § 5965.]

§ 7596. **When right to damages accrues.** For the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the date of the trial and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to the property not actually taken, but injuriously affected, in all

cases when such damages are allowed as provided in section 7595. No improvements put upon the property subsequent to the date of the service of the summons shall be included in the assessment of compensation or damages. [R. C. 1895, § 5966.]

§ 7597. **When title defective.** If the title acquired is found to be defective from any cause the plaintiff may again institute proceedings to acquire the same as in this chapter prescribed. [R. C. 1895, § 5967.]

§ 7598. **When judgment paid.** The plaintiff must within thirty days after final judgment pay the sum of money assessed. [R. C. 1895, § 5968.]

§ 7599. **Payment or deposit. Proceedings annulled.** Payment may be made to the defendant entitled thereto, or the money may be deposited in court for the defendant, and be distributed to those entitled thereto. If the money is not so paid or deposited, the defendant may have execution as in civil actions, unless execution is stayed by order of the court pending a motion for a new trial or on appeal; and if the money cannot be made on execution, the court upon a showing to that effect must set aside and annul the entire proceedings. [R. C. 1895, § 5969.]

§ 7600. **Final order. Filing.** When payments have been made as required in the last two sections the court must make a final order of condemnation, which must describe the property condemned and the purposes of such condemnation. A copy of the order must be filed in the office of the register of deeds of the county and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified. [R. C. 1895, § 5970.]

§ 7601. **When possession taken. How money paid defendant. Acceptance, abandonment of defenses.** At any time after the entry of judgment, whenever the plaintiff shall have paid to the defendant, or into court for the defendant, the full amount of the judgment, the district court in which the proceeding was tried may upon notice of not less than three days authorize the plaintiff to take possession of and use the property during the pendency of and until the final conclusion of the litigation and may, if necessary, stay all actions and proceedings against the plaintiff on account thereof. The defendant, who is entitled to the money paid into court for him upon judgment, shall be entitled to demand and receive the same at any time thereafter upon obtaining an order therefor from the court. It shall be the duty of the court, or a judge thereof, upon application being made by such defendant to order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor and an abandonment of all defenses to the action or proceeding except as to the amount of damages that he may be entitled to in the event that a new trial shall be granted. A payment to a defendant as aforesaid shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation. The payment of the money into court as hereinbefore provided for shall not discharge the plaintiff from liability to keep the said fund full and without diminution; but such money shall be and remain as to all accident, defalcations or other contingencies as between the parties to the proceedings at the risk of the plaintiff, and shall so remain until the amount of the compensation or damages is finally settled by judicial determination and until the court awards the money, or such part thereof as shall be determined upon, to the defendant, and until he is authorized or required by order of court to take it. If for any reason the money shall at any time be lost, or otherwise abstracted or withdrawn, through no fault of the defendant, the court shall require the plaintiff to make and keep the sum good at all times until the litigation is finally brought to an end, and until paid over or made payable to the defendant by order of the court, as above provided; and until such time or times the clerk of court shall be deemed to be the cus-

todian of the money and shall be liable to the plaintiff upon his official bond for the same, or any part thereof, in case it is for any reason lost, or otherwise abstracted or withdrawn. The court may order the money to be deposited in the state treasury and in such case it shall be the duty of the state treasurer to receive all such moneys, duly receipt for and safely keep the same in a special fund to be entered on his books as a condemnation fund for such purpose, and for such duty he shall be liable to the plaintiff upon his official bond. The state treasurer shall pay out such money so deposited in such manner and at such times as the court or judge thereof may by order direct. In all cases when a new trial has been granted upon the application of the defendant and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him. [R. C. 1895, § 5971.]

§ 7602. Rules of practice. Except as otherwise provided in this chapter the provisions of this code relative to civil actions are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter. [R. C. 1895, § 5972.]

§ 7603. New trials and appeals. The provisions of this code relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this chapter apply to the proceedings mentioned in this chapter; provided, that upon the payment of the damages assessed the plaintiff shall be entitled to enter into, improve and hold possession of the property sought to be condemned as provided in section 7601 and devote the same to the public use in question; and no motion for a new trial or appeal shall after such payment in any manner retard the contemplated improvement. Any money which shall have been deposited, as provided in section 7601, shall be applied to the payment of the recovery upon a new trial and the remainder, if there is any, shall be returned to the plaintiff. [R. C. 1895, § 5973.]

CHAPTER 37.

IRRIGATION.

ARTICLE 1.—IRRIGATION CODE.

§ 7604. Waters of the state, public waters. All waters within the limits of the state from all sources of water supply belong to the public and, except as to navigable waters, are subject to appropriation for beneficial use. [1905, ch. 34, § 1.]

§ 7605. Beneficial use. Appurtenances. Priority. Beneficial use shall be the basis, the measure, and the limit of the right to use of water, and all waters appropriated for irrigation purposes shall be appurtenant to specified lands owned by the person claiming the right to use the water, so long as the water can be beneficially used thereon. Priority in time shall give the better right. In all cases of claims to the use of water initiated prior to the taking effect of this article, the right shall relate back to the initiation of the claim, upon the diligent prosecution to completion of the necessary surveys and construction for the application of the water to a beneficial use. All claims to the use of water initiated after the taking effect of this article shall relate back to the date of receipt of an application therefor in the office of the state engineer, subject to compliance with the provisions of this article, and the rules and regulations established thereunder. [1905, ch. 34, § 2.]

§ 7606. **Eminent domain.** The United States, the state, or any person, corporation or association may exercise the right of eminent domain to acquire for a public use any property or rights now or hereafter existing when found necessary for the application of water to beneficial uses, including the right to enlarge existing structures and use the same in common with the former owner. Any canal right of way so acquired shall be so located as to do the least damage to private or public property, consistent with proper and economical engineering construction. Such property or rights may be acquired in the manner provided by law for the taking of private property for public uses. [1905, ch. 34, § 3.]

§ 7607. **Reclaiming waters.** Water turned into any natural or artificial water course by any party entitled to the use of such water may be reclaimed below and diverted therefrom by such party, subject to existing rights, due allowance for losses being made, as determined by the state engineer. [1905, ch. 34, § 4.]

§ 7608. **State engineer. Appointment, duties, powers, qualifications and salary.** There shall be a state engineer, who shall be a technically qualified and experienced hydraulic engineer, to be appointed by the governor and such appointment confirmed by the senate. He shall hold office for the term of four years from and after his appointment, or until his successor shall have been appointed and shall have qualified. He shall have general supervision of the waters of the state and of the measurement and appropriation thereof, and shall receive a salary of two thousand five hundred dollars per annum and actual and necessary traveling expenses while away from his office in the discharge of official duties. He shall not engage in private practice. [1905, ch. 34, § 5.]

§ 7609. **Assistant state engineer and expenses of state engineer's office.** The state engineer shall have power to appoint from time to time, during the season of the year when field work is practicable, one or more assistant state engineers at a salary not to exceed one thousand eight hundred dollars per annum and actual and necessary traveling expenses while away from the office in the discharge of official duties. The state engineer may employ other and additional assistants and purchase materials and supplies for the proper conduct and maintenance of his office and department, in pursuance of appropriations as made from time to time for such purposes. The salaries and expenses of the office of the state engineer shall be paid at the same time and in the same manner as those of other officers of the state. The office of the state engineer shall be located at the seat of government. [1905, ch. 34, § 6.]

§ 7610. **Oath and bond of state engineer and assistant state engineer.** Before entering upon the duties of his office, the state engineer shall take and subscribe an oath of office and give bond with good and sufficient sureties to be approved by the governor, in the sum of five thousand dollars for the faithful performance of his duties, which oath of office and bond shall, upon approval, be filed in the office of the secretary of state. The assistant state engineer shall also take and subscribe an oath for the faithful discharge of his duties, which oath shall be filed with the secretary of state together with his appointment by the state engineer. [1905, ch. 34, § 7.]

§ 7611. **Auditing of claims.** All claims for services rendered, expenses incurred, or materials or supplies furnished under direction of the state engineer and which are payable from the funds appropriated for the prosecution of the work under his direction and supervision, shall be approved by the state engineer and properly vouchered and filed in the office of the state auditor, who shall, if he finds the same to have been incurred in accordance with law, audit and allow such claims and issue his warrant on the state treasurer in payment thereof. [1905, ch. 34, § 8.]

§ 7612. **State engineer's report.** The state engineer shall prepare and deliver to the governor, on or before September thirtieth of the year preceding the regular session of the legislature, and at other times when required by the governor, a full report of his office, including a detailed statement of the expenditures thereof, with such recommendations for legislation as he may deem advisable. [1905, ch. 34, § 9.]

§ 7613. **Fees of state engineer.** The state engineer shall receive the following fees, to be collected in advance and to be paid by him into the general fund of the state treasury on the last day of March, June, September and December of each year:

For filing and examining an application for permit to appropriate water, map and field notes of the same, five dollars.

For recording any permit, certificate of construction or license issued or any other water right instrument, one dollar for the first hundred words and fifteen cents for each additional hundred words or fraction thereof.

For filing any other paper, one dollar.

For issuing certificates of construction, or license to appropriate water, one dollar each.

For making copy of any document recorded or filed in his office, fifteen cents for each hundred words or fraction thereof.

For blue print copy of any map or drawing, ten cents per square foot or fraction thereof: for other copies of drawings, actual cost of the work.

For certifying to such copies, one dollar for each certificate.

For examining and approving in connection with water right applications, plans and specifications for any dam, not exceeding ten feet in extreme height from the foundation, ten dollars; for a dam higher than ten feet and not exceeding thirty feet, twenty dollars; for a dam higher than thirty feet and not exceeding fifty feet, thirty dollars; for a dam higher than fifty feet, fifty dollars; or for a canal or other water conduit of an estimated capacity exceeding fifty and not more than one hundred cubic feet per second, twenty dollars; for an estimated capacity exceeding one hundred cubic feet per second, thirty dollars.

For inspecting dam sites and construction work when required by law, or when necessary in the judgment of the state engineer, ten dollars per day and actual and necessary traveling expenses. The fees for any inspection deemed necessary by the state engineer and not paid on demand shall be a lien on any land or other property of the owner of the works, and may be recovered by the state engineer in any court of competent jurisdiction.

Rating ditches or inspecting plans and specifications of works for the diversion, storage and carriage of water, at the request of private parties, not in connection with an application for right to appropriate water, actual cost and expenses; and the state engineer shall attach his approval to such plans and specifications if found satisfactory.

For such other work as may be required of his office, the fees provided by law.

In ascertaining actual cost of any work, as the term is used in this section, the salary of any salaried officer for the time employed shall be included. [1905, ch. 34, § 10.]

§ 7614. **Records of state engineer.** The records of the office of the state engineer are public records, shall remain on file in his office, and shall be open to the inspection of the public at all times during business hours. Such records shall show in full all permits, certificates of completion of construction, and licenses issued, together with all action thereon, and all action or decisions of the state engineer affecting any rights or claims to appropriate water. Certified copies of any records or papers on file in the office of the state engineer shall be evidence equally with the originals thereof; and when

introduced as evidence shall be held as of the same validity as the originals. [1905, ch. 34, § 11.]

§ 7615. **Rules and regulations.** The state engineer shall make all necessary general rules and regulations to carry into effect the duties devolving upon his office, and may change the same from time to time in his discretion. All such rules and regulations relating to applications for permits to appropriate water, for the inspection of works, for the issuance of license, and for the determination of rights to the use of water shall be modified by the state engineer, if required by a vote of the board of water commissioners hereinafter established, at least three of the four water commissioners voting in favor of such modifications. [1905, ch. 34, § 12.]

§ 7616. **Appeal to board of water commissioners.** Such modification of the rules and regulations of the state engineer shall be voted upon by the board of water commissioners only on appeal from a decision of the state engineer. [1905, ch. 34, § 13.]

Article 2.—Determination of Water Rights.

§ 7617. **Hydrographic surveys and co-operation.** The state engineer shall make hydrographic surveys and investigations of each stream system and source of water supply in the state, beginning with those most used for irrigation, obtaining and recording all available data for the determination, development and adjudication of the water supply of the state. He shall be authorized to co-operate with the agencies of the federal government engaged in similar surveys and investigations, and in the construction of works for the development and use of the water supply of the state, expending for such purposes any money available for the work of his office, and may accept and use, in connection with the operation of his department the results of the work of the agencies of the government. [1905, ch. 34, § 14.]

§ 7618. **Suit for adjudication of water rights.** Upon the completion of such hydrographic survey of any stream system, the state engineer shall deliver a copy thereof, together with copies of all data necessary for the determination of all rights to the use of the waters of such system, to the attorney general of the state, who shall within sixty days thereafter enter suit on behalf of the state for the determination of all rights to the use of such water, and shall diligently prosecute the same to a final adjudication; provided, that if suit for the adjudication of such rights shall have been begun by private parties, the attorney general shall not be required to bring suit; provided, however, that the attorney general shall intervene in any suit for the adjudication of rights to the use of water on behalf of the state if notified by the state engineer that in his opinion the public interest requires such action. [1905, ch. 34, § 15.]

§ 7619. **Parties and costs of suits.** In any suit for the determination of a right to the use of the waters of any stream system, all who claim the right to use such waters shall be made parties. When any suit has been filed, the court shall, by its order duly entered, direct the state engineer to make or furnish a complete hydrographic survey of such stream system as hereinbefore provided, in order to obtain all data necessary to the determination of the rights involved. The cost of such suit, including the costs on behalf of the state, and of such surveys, shall be charged against each of the private parties thereto in proportion to the amount of the water right allotted. [1905, ch. 34, § 16.]

§ 7620. **Fund for hydrographic surveys.** For the purpose of advancing the money required for any surveys so ordered by the court, there is hereby appropriated and set apart from any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of two thousand dollars, to be known as the hydrographic survey fund, which shall be a permanent

fund and which shall be used only for the payment of the expenses of such surveys; and all claims for services rendered, expenses incurred or materials or supplies furnished under the direction of the state engineer in the prosecution of said work shall be approved by the state engineer and properly vouchered and filed in the office of the state auditor, who shall, if he finds the same to have been incurred in accordance with law, audit and allow such claims and issue his warrants against the hydrographic survey fund on the state treasurer, in payment thereof. The amounts paid by the parties to said suits, on account of such surveys, shall be paid to the state treasurer, who shall credit the same to such fund, which shall continue to be available for advancing the expenses of such surveys, as ordered by the court from time to time. [1905, ch. 34, § 17.]

§ 7621. **Filing of decree adjudicating water rights.** Upon the adjudication of the rights to the use of the waters of a stream system, two certified copies of the decree shall be prepared by the clerk of the court, at the cost of the parties. One copy shall be filed in the office of the state engineer, and the other in the office of the water commissioner of the water division in which the stream system is situated. Such decree shall in every case declare, as to the water right adjudged to each party the priority, amount, purpose, place of use, and, as to water used for irrigation, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority. [1905, ch. 34, § 18.]

Article 3.—Appropriation of Water.

§ 7622. **Application for water right.** Any person, association or corporation hereafter intending to acquire the right to the beneficial use of any waters, shall, before commencing any construction for such purpose, or before taking the same from any constructed works, make an application to the state engineer for a permit to appropriate, in the form required by the rules and regulations established by him. Such rules and regulations shall, in addition to providing the form and manner of preparing and presenting the application, require the applicant to state all the data necessary for the proper description and limitation of the right applied for, as to the amount of water and periods of annual use, together with such information, maps, field notes, plans and specifications as may be necessary to show the method and practicability of the construction and the ability of the applicant to complete the same. All such maps, field notes, plans and specifications shall be made from actual surveys and measurements, and shall be retained in the office of the state engineer after the approval of the application. The state engineer may require additional information not provided for in the general rules and regulations, in any case involving the diversion of five hundred cubic feet of water per second, or more, or the construction of a dam more than thirty feet high from the foundation. The owners of works proposing to store or carry water in excess of their needs for beneficial use, may make application for such excess, and shall be held as trustees of such right for the parties applying the water to a beneficial use; and shall be required to furnish the water for such parties at reasonable rates for storage, or carriage, or both, as the case may be. [1905, ch. 34, § 19.]

§ 7623. **Filing and correction of application.** The date of receipt of such application in the state engineer's office shall be indorsed thereon and noted in his records. If the application is defective as to form, or unsatisfactory as to feasibility or safety of plan, or as to the showing of the ability of the applicant to carry the construction to completion, it shall be returned with a statement of the corrections, amendments or changes required within thirty days after its receipt, and sixty days shall be allowed for the refiling thereof. If refiled, corrected as required within such time, the application

shall, upon being accepted, take priority as of date of its original filing, subject to compliance with the further provisions of the law and the regulations thereunder. Any corrected application filed after the time allowed shall be treated in all respects as an original application received on the date of its refiling; provided, that the plans of the construction may be amended, with the approval of the state engineer, at any time; but no such change shall authorize any extension of time for construction beyond five years from the date of the permit, except as provided in section 7633; provided, further, that a change in the proposed point of diversion of water from a stream shall be subject to the approval of the state engineer, and shall not be allowed to the detriment of the rights of others having valid claims to the use of water from said stream. [1905, ch. 34, § 20.]

§ 7624. **Publication of notice.** Upon the filing of an application which complies with the provisions of this article and the rules and regulations established thereunder, the state engineer shall instruct the applicant to publish notice thereof, in a form prescribed by him, in some newspaper of general circulation in the stream system, once a week for four consecutive weeks. Such notice shall give all essential facts as to the proposed appropriation, among them the places of appropriation and of use, amount of water, the purpose for which it is to be used, name and address of the applicant and the time when the application will be taken up by the state engineer for consideration. Proof of publication, as required, shall be filed with the state engineer within sixty days from the date of his instructions to make publication. In case of failure to file satisfactory proof of publication in accordance with the rules and regulations applicable thereto, within the time required, the application shall thereafter be treated as an original application filed on the date of receipt of proofs of publication in proper form. [1905, ch. 34, § 21.]

§ 7625. **Approval of application.** Upon the receipt of the proofs of publication, the state engineer shall determine from the evidence presented by the parties interested, from such surveys of the water supply as may be available, and from the records, whether there is unappropriated water available for the benefit of the applicant. If so, he shall indorse his approval on the application, which shall thereupon become a permit to appropriate water, and shall state in such approval the time within which the construction shall be completed, not exceeding five years from the date of approval, and the time within which the water shall be applied to a beneficial use, not exceeding four years in addition thereto. [1905, ch. 34, § 22.]

§ 7626. **Rejection and appeal.** If, in the opinion of the state engineer, there is no unappropriated water available, he shall reject such application. He shall decline to order the publication of notice of any application which does not comply with the requirements of the law and the rules and regulations thereunder. He may also refuse to consider or approve an application or to order the publication of notice thereof if, in his opinion, the approval thereof would be contrary to the public interest. Any applicant may appeal from such decision of the state engineer, or from any other decision by him which denies a substantial right, within sixty days from the date thereof, to the district court of the county in which the proposed place of diversion or storage is situated. In the absence of such appeal, the decision of the state engineer shall be final. [1905, ch. 34, § 23.]

§ 7627. **Prosecution of work.** The construction of the works shall be diligently prosecuted to completion, and if one-fifth of the work shall not be completed within one-half of the time allowed, the state engineer may accept and approve, as herein provided, an application for the use of all or any of the waters included in the permit issued to the prior applicant and the right to use such waters under the former permit shall thereupon be forfeited;

provided, that the state engineer shall allow an extension of time on request of the prior applicant, equal to the time during which work was prevented by the operation of law, beyond the power of the said applicant to avoid. [1905, ch. 34, § 24.]

§ 7628. **Completion of work.** On the date set for the completion of the work, or prior thereto, upon notice from the owner that the work has been completed, the state engineer shall cause the work to be inspected, after due notice to the owner of the permit. Such inspection shall be thorough and complete, in order to determine the actual capacity of the work, their safety and efficiency. If not properly and safely constructed the state engineer may require the necessary changes to be made within a reasonable time, not to exceed six months, and shall not issue his certificate of completion until such changes are made. Failure to make such changes shall cause the postponement of the priority under the permit for such time as may elapse from the date for completing such changes until made to the satisfaction of the state engineer, and applications subsequent in time shall have the benefit of such postponement of priority; provided, that for works involving the diversion of not exceeding twenty cubic feet of water per second or a dam not exceeding ten feet in the extreme height from the foundation, the state engineer may, in his discretion, accept the report of an inspection by a reputable hydraulic engineer. [1905, ch. 34, § 25.]

§ 7629. **Certificate of completion.** When the works are found in satisfactory condition, after inspection, the state engineer shall issue his certificate of construction, setting forth the actual capacity of the works and such limitations upon the water right as shall be warranted by the condition of the works, but in no manner extending the rights described in the permit. [1905, ch. 34, § 26.]

§ 7630. **Inspection of works.** If the state engineer shall, in the course of his duties, find that any works used for the storage, diversion or carriage of water are unsafe and a menace to life or property, he shall at once notify the owner or his agent, specifying the changes necessary, and allowing a reasonable time for putting the works in safe condition, not exceeding three months. Upon the request of any party, accompanied by the estimated cost of inspection, the state engineer shall cause any alleged unsafe works to be inspected. If they shall be found unsafe by the state engineer, the money deposited by such party shall be refunded, and the fees for inspection shall be paid by the owner of such works; and, if not paid by him within thirty days after the decision of the state engineer, shall be a lien against any property of such owner, to be recovered by suit instituted by the district attorney of the county at the request of the state engineer. The state engineer may, when in his opinion necessary, inspect any works under construction for the storage, diversion or carriage of water, and require any changes necessary to secure their safety; and the fees for such inspection shall be a lien on any property of the owner and shall be subject to collection as provided herein; provided, that any works constructed by the United States, or by its duly authorized agencies, shall not be subject to such inspection while under the supervision of officers of the United States. [1905, ch. 34, § 27.]

§ 7631. **Use of unsafe works.** The use of works for the storage, diversion or carriage of water, at any time after an inspection thereof by the state engineer and receipt of notice from him that the same are unsafe for the purpose for which they are used, until the receipt of notice from him that in his opinion they have been made safe, shall be a misdemeanor, and it shall be the duty of the state engineer to give prompt notice to the district attorney of the county in which such works are located in case of such violation. The district attorney shall at once proceed against the owner, and all parties responsible therefor. [1905, ch. 34, § 28.]

§ 7632. **Application to beneficial use.** On or before the date set for the application of the water to a beneficial use, the state engineer shall cause the works to be inspected, after due notice to the owner of the permit. Upon the completion of such inspection, the state engineer shall issue a license to appropriate water to the extent and under the conditions of the actual application thereof to a beneficial use, but in no manner extending rights described in the permit; provided, that the inspection to determine the amount of water applied to a beneficial use shall be made at the same time as that of the constructed work, if requested by the owner, and if such action is deemed proper by the state engineer. [1905, ch. 34, § 29.]

§ 7633. **Extension of time.** The state engineer shall have power to extend the time for the completion of construction, or for application to beneficial use, for three years and two years, respectively, but only on account of delays due to physical or engineering difficulties which could not have been reasonably anticipated, or by operation of law beyond the power of applicant to avoid. [1905, ch. 34, § 30.]

§ 7634. **Assignment of permit or license.** Any permit or license to appropriate water may be assigned, but no such assignment shall be binding, except upon the parties thereto, unless filed for record in the office of the state engineer. The evidence of the right to use water from any works constructed by the United States, or its duly authorized agencies, shall in like manner be filed in the office of the state engineer, upon assignment; provided, that no right to appropriate water for irrigation purposes shall be assigned, or the ownership thereof in any wise transferred, apart from the land to which it is appurtenant, except in the manner specially provided by law; provided, further, that the transfer of title to land in any manner whatsoever shall carry with it all rights to the use of water appurtenant thereto for irrigation purposes. [1905, ch. 34, § 31.]

§ 7635. **Transfer of water records.** It shall be the duty of the county register of deeds and the county auditor of each county in the state within thirty days after the taking effect of this chapter, to prepare and forward by express or registered mail at the expense of the county, to the office of the state engineer, a transcript of all records relating to water rights; provided, that they may forward any original records in their offices which have been duly recorded. The state engineer shall classify and arrange such records to conform to stream systems, and shall send copies thereof relating to each water division to the water commissioner thereof. He shall likewise forward to the water commissioner copies of all records, permits and licenses to appropriate water relating to his division, and shall advise him of all acts and decisions of the state engineer's office affecting the apportionment of waters in his division. [1905, ch. 34, § 32.]

§ 7636. **Referee in water suits.** In any water suit the court may appoint a referee or referees, not exceeding three, to take testimony and report upon the rights of the parties, as in other equity cases. [1905, ch. 34, § 33.]

§ 7637. **Attorney general and state's attorney advisers of state engineer.** The attorney general, and the state's attorney of the county in which legal questions arise, shall be the legal advisers of the state engineer, and shall perform any and all legal duties necessary in connection with his work, without other compensation than their salaries as fixed by law, except when otherwise provided. [1905, ch. 34, § 34.]

§ 7638. **Charge for carrying and delivering water.** The owner or owners of any works for the storage, diversion or carriage of water, which contain water in excess of their needs for irrigation or other beneficial use for which it has been appropriated, shall be required to deliver such surplus, at reasonable rates for storage, or carriage, or both, as the case may be, to the parties entitled to the use of the water for beneficial purposes. In case of the refusal

of such owner or owners to deliver any such surplus water at reasonable rates as determined by the state engineer, they may be compelled to do so by the district court for the county in which the surplus water is to be used. [1905, ch. 34, § 35.]

§ 7639. Appropriation of water by the United States. Whenever the proper officers of the United States, authorized by law to construct works for the utilization of waters within the state, shall notify the state engineer that the United States intends to utilize certain specified waters, the waters so described, and unappropriated at the date of such notice, shall not be subject to further appropriation under the laws of this state for a period of three years from the date of said notice, at which time the proper officers of the United States shall file plans for the proposed work in the office of the state engineer for his information, and no adverse claim to the use of the waters required in connection with such plans, initiated subsequent to the date of such notice, shall be recognized under the laws of this state, except as to such amount of the water described in such notice as may be formally released in writing by an officer of the United States, thereunto duly authorized; provided, that in case of failure to file plans of the proposed work within three years, as herein required, the waters specified in the notice given by the United States to the state engineer shall become public waters, subject to general appropriations. [1905, ch. 34, § 36.]

Article 4.—Water Commissioners.

§ 7640. Water divisions. The state shall be divided into water divisions, as follows:

Water division No. 1 shall consist of all that portion of the state west and south of the Missouri river.

Water division No. 2 shall consist of all lands within the state drained by the Mouse river and its tributaries, and of all lands within the state north and east of the Missouri river drained by the Missouri river and its tributaries from the boundary of the state of Montana as far down as Fort Berthold.

Water division No. 3 shall consist of all lands within the state east of the Missouri river drained by the Missouri river and its tributaries below Fort Berthold, and of all lands within the state drained by the James or Dakota river and its tributaries.

Water division No. 4 shall consist of all lands within the state drained by the Red river and its tributaries, except the Mouse river, as hereinbefore specified, and all the lands within the state drained into Devils lake. [1905, ch. 34, § 37.]

§ 7641. Water commissioners. The governor may nominate and by and with the advice and consent of the senate appoint a water commissioner for each water division, as hereinbefore established, to serve for the term of six years, or until his successor shall have qualified, and shall be subject to removal by the governor; provided, the water commissioners first appointed after the taking effect of this chapter shall serve for the terms specified as follows: Water division No. 1, six years; water division No. 2, four years; water division No. 3, two years; water division No. 4, six years; provided, further, that during any temporary or permanent vacancy in the office of water commissioner, the powers and duties of such water comissioner shall devolve on the state engineer. [1905, ch. 34, § 38.]

§ 7642. Duties of water commissioners. Each water commissioner shall have the supervision of the apportionment of water in his division, according to the licenses issued by the state engineer and the adjudications of the courts. Each commissioner shall have the custody of the records relating to his division, which shall be public records, and shall be transmitted to his successor in office. Each water commissioner, before entering upon the duties

of his office, shall take and subscribe an oath of office and give a bond with good and sufficient sureties, to be approved by the supreme court, in the sum of two thousand dollars, for the faithful performance of the duties of this office, which oath and bond shall, upon approval, be filed in the office of the secretary of state. [1905, ch. 34, § 39.]

§ **7643. Board of water commissioners.** The water commissioners of all the water divisions, together with the state engineer, who shall be president thereof, shall constitute the board of water commissioners, which shall have general supervision of the apportionment of the waters of the state. The board shall adopt general rules and regulations to govern its proceedings and the operations in the various divisions. The state engineer shall have a vote on all matters coming before the board, except appeals, authorized by law, from his acts as the state engineer. The board shall meet on the first Monday in March of each year, at the office of the state engineer, and at such other times and places as may be agreed upon by a majority of its members, whereupon the state engineer shall give notice of such meeting to all members. [1905, ch. 34, § 40.]

§ **7644. Pay of water commissioners.** The water commissioners shall be paid from the state treasury out of the moneys appropriated for such purposes at the rate of ten dollars per day for the time actually engaged in official duties, not exceeding two hundred days in any one year, and shall also be paid actual and necessary traveling expenses while away from their homes on official business. [1905, ch. 34, § 41.]

§ **7645. Water districts.** The state engineer shall, from time to time, as may be necessary for the economical and satisfactory apportionment of the water, divide each water division in conformity with drainage areas, into water districts to be designated by names, and to comprise as far as possible one or more distinct stream systems in each district. The districts may be changed from time to time as may in his opinion be necessary for the economical and satisfactory apportionment of the water. [1905, ch. 34, § 42.]

§ **7646. Water masters.** The water commissioners of each division shall appoint, subject to the approval of the state engineer, a water master for each district in his division, who may be removed by the commissioner, or by a majority of the board of water commissioners. The water master shall have immediate charge of the apportionment of the waters in his district under the general supervision of the water commissioner, and he shall so apportion, regulate and control the waters of the district as will prevent waste. [1905, ch. 34, § 43.]

§ **7647. Appeals to state engineer.** Any person may appeal from the acts or decisions of the water master and water commissioner, to the state engineer, who shall promptly and at a stated time and place, to be fixed by him, upon due notice to the parties, hear and determine the matter in dispute, and his decision shall be final, unless an appeal is taken to the courts within thirty days. [1905, ch. 34, § 44.]

§ **7648. Pay to water masters.** The water master shall be allowed pay at the rate of four dollars per day and actual and necessary expenses in the performance of his duties. He may employ assistants in cases of emergency, upon the specific authority of and at rates of pay as authorized by the water commissioner, such employment to continue only during the existence of the emergency. The water masters and assistants employed by him shall be paid by the county, upon accounts approved by the water commissioner. If the district is in more than one county, each county shall pay its proportionate part of each account rendered. The accounts of the water master shall in all cases specify the distribution of the amounts charged, based upon the amount of work performed as to each ditch and water right, showing the charges to be allotted to each owner. The amounts paid by the counties shall be a lien upon the property of the water users and ditch owners, in

accordance with the distribution thereof, as shown by the accounts of the water master, and shall be collected in the manner provided by law for the collection of taxes. [1905 ch. 34, § 45.]

§ **7649. Reports of water masters.** Each water master shall report to the water commissioner, as often as may be deemed necessary by the commissioner, as to the amount of water needed to supply the requirements of his district, the amount available, the works which are without their proper supply, the supply required during the period preceding his next regular report, and such other information as the commissioner may require. These reports shall, at the end of each irrigation season, be filed in the office of the state engineer. The water commissioner shall give directions for correcting any errors of apportionment in his division that may be shown by such reports. [1905, ch. 34, § 46.]

Article 5.—Miscellaneous Provisions.

§ **7650. Units of measurement.** The standard of measurement of the flow of water shall be the cubic foot per second of time; the standard of measurement of the volume of water shall be the acre-foot, being the amount of water upon an acre covered one foot deep, equivalent to forty-three thousand five hundred sixty cubic feet. The miner's inch shall be regarded as one-fiftieth of a cubic foot per second in all cases, except when some other equivalent of the cubic foot per second has been specially stated by contract, or has been established by actual measurement or use. [1905, ch. 34, § 47.]

§ **7651. Abandonment.** When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of three years, such unused water shall revert to the public and shall be regarded as unappropriated public water. [1905, ch. 34, § 48.]

§ **7652. Amount of water for irrigation.** In the issuance of permits to appropriate water for irrigation or in the adjudication of the rights to the use of water for such purpose, the amount allowed shall not be in excess of the rate of one cubic foot of water per second for each eighty acres, or the equivalent thereof, delivered on the land, for a specified time in each year. [1905, ch. 34, § 49.]

§ **7653. Water appurtenant to land for irrigation purposes.** All water used in this state for irrigation purposes shall remain appurtenant to the land upon which it is used; provided, that if for any reason it should at any time become impracticable to beneficially or economically use water for the irrigation of any land to which the right of use of the same is appurtenant, said right may be severed from said land, and simultaneously transferred, and become appurtenant to other land, without losing priority of right theretofore established, if such change can be made without detriment to existing rights, on the approval of an application of the owner to the state engineer. Before the approval of such application the applicant must give notice thereof by publication once a week for four weeks in a newspaper of general circulation in the stream system in which the tracts of land are located, in the form required by the state engineer. Upon the receipt of the proofs of publication, the state engineer shall render his decision thereon in writing, which shall be final, unless some party interested in the same source of water supply shall within sixty days, bring appropriate action in the district court of the county in which the land is located for a review of such decision. If the owner of the land to which water has become appurtenant abandons the use of such waters upon such land, said waters shall become public waters, subject to general appropriation. [1905, ch. 34, § 50.]

§ **7654. Change of use or place of diversion.** Any appropriator of water may use the same for other than the purpose for which it was appropriated,

or may change the place of diversion, storage or use, in the manner, and under the conditions, prescribed in section 7653. [1905, ch. 34, § 51.]

§ 7655. **Measuring devices.** Every ditch owner shall construct and maintain a substantial headgate at the point where the water is diverted, and shall construct a measuring device, of a design approved by the state engineer, at the most practicable point or points for measuring and apportioning the water as determined by the state engineer. The state engineer may order the construction of such device by the ditch owner, and if not completed within twenty days thereafter, the water commissioner shall, upon instruction from the state engineer, refuse to deliver water to such owner. The taking the water by such ditch owner until the construction of such device and the approval thereof by the state engineer shall be a misdemeanor. Such devices shall be so arranged that they can be locked in place, and when locked by the water master or his authorized agent, for the measurement or apportionment of water, it shall be a misdemeanor to interfere with, disturb or change the same, and the use of water through such device after having been interfered with, disturbed or changed, shall be prima facie evidence of the guilt of the person benefited by such interference, disturbance or change. [1905, ch. 34, § 52.]

§ 7656. **Unlawful interference with rights to use water.** Any person, association or corporation interfering with or injuring or destroying any dam, headgate, weir, bench-mark or other appliance for the diversion, storage, apportionment or measurement of water, or for any hydrographic surveys, or who shall interfere with any person or persons engaged in the discharge of duties connected therewith, shall be guilty of a misdemeanor, and shall also be liable for the injury or damage resulting from such unlawful act. The water master or any authorized assistant within his district, shall have power to arrest any person offending against the provisions of this section, and deliver him to the nearest peace officer of the county. It shall be the the duty of the person making the arrest to make complaint at once before the court having jurisdiction thereof. The state engineer, the water commissioners, the water masters and their authorized assistants and agents, may enter upon private property for the performance of their respective duties, doing no unnecessary injury thereto. [1905, ch. 34, § 53.]

§ 7657. **Unlawful use of water, and waste.** The unauthorized use of water to which another person is entitled, or the willful waste of water to the detriment of another, shall be a misdemeanor. It shall also be a misdemeanor to begin or carry on any construction of works for storing or carrying water until after the issuance of permit to appropriate such waters, except in the case of construction carried on under the authority of the United States. [1905, ch. 34, § 54.]

§ 7658. **Bridges over ditches or canals.** The owner or owners of any ditch, canal or other structure for storing or carrying water, shall construct and maintain a substantial bridge where the same crosses any highway or publicly traveled road, not less than fourteen feet wide; or reconstruct the road in a substantial manner and in a convenient location for public travel. Any violation of the provisions of this section shall be a misdemeanor. The county commissioners shall be authorized to construct such bridge or road, if not built by the owner of the work within three days after the obstruction of the road, and may recover the expense thereof and costs in a civil suit, unless the same shall be paid by the owner of the works within ten days after demand therefor. The county commissioners may make reasonable requirements as to the size and character of such bridges along public highways, or for the necessary reconstruction of roads, and upon failure to comply therewith, may do the necessary work and collect the expense thereof and costs as hereinbefore provided. After the construction of such bridge or road as part of a public

highway, the same shall be maintained by the county commissioners. [1905, ch. 34, § 55.]

§ 7659. **Obstructing works.** Whenever any appropriator of water has the right of way for the storage, diversion or carriage of water, it shall be unlawful to place or maintain any obstruction that shall interfere with the use of the works, or prevent convenient access thereto. Any violation of the provisions of this section shall be a misdemeanor. [1905, ch. 34, § 56.]

§ 7660. **Penalty for misdemeanors under this article.** All violations of the provisions of this article declared herein to be misdemeanors, shall be punished by a fine not exceeding two hundred fifty dollars, nor less than twenty dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment; any justice court of the county in which such misdemeanor has been committed shall have jurisdiction thereof. [1905, ch. 34, § 57.]

§ 7661. **Liens on land.** All liens on land, provided for in this article, shall be superior in right to all mortgages or other incumbrances placed upon the land and the water appurtenant thereto or used in connection therewith, after the taking effect of this chapter. [1905, ch. 34, § 58.]

§ 7662. **Seepage water.** In the case of seepage water from any constructed works, any party desiring to use the same shall make application to the state engineer, as in the case of unappropriated water, and such party shall pay the owner of such works reasonable charge for the storage or carriage of such water in such works; provided, that the appearance of such seepage water can be traced beyond reasonable doubt to the storage or carriage of water in such works. The state engineer shall not issue a permit to appropriate such seepage waters until an agreement for the payment of such charges shall have been entered into by the said parties. [1905, ch. 34, § 59.]

§ 7663. **Right of way over state lands.** There is hereby granted over all the lands now or hereafter belonging to the state, a right of way for ditches or canals and for tunnels, tramways and telephone and electrical transmission lines, constructed by authority of the United States. All conveyances of state lands hereafter made shall contain a reservation of such right of way. [1905, ch. 34, § 60.]

§ 7664. **Disposition of state lands.** No lands belonging to the state, within the areas to be irrigated from works constructed or controlled by the United States, or its duly authorized agencies, shall hereafter be sold except in conformity with the classification of farm units by the United States, and the title to such lands shall not pass from the state, until the applicant therefor shall have fully complied with the provisions of the laws of the United States and the regulations thereunder concerning the acquisition of the right to use water from such works and shall produce the evidence thereof duly issued. After the withdrawal of lands by the United States for any irrigation project, no application for the purchase of state lands within the limits of such withdrawal shall be accepted, except upon the conditions prescribed in this section. Any state lands needed by the United States for irrigation works shall be sold to the United States at the lowest price authorized by law. [1905, ch. 34, § 61.]

§ 7665. **Appropriations.** There is hereby appropriated out of any moneys in the general fund of the state treasury not otherwise appropriated the sum of six thousand dollars annually, or so much thereof as may be necessary, for the payment of the salaries and expenses of the state engineer and assistant state engineers, and the services of assistants and expenses of the office and department of the state engineer, as provided by this article. All claims for services rendered and expenses incurred and materials and supplies furnished under the provisions of this article shall be audited by the state auditor for payment by the state treasurer in accordance with the provisions

of the general statutes relating to the auditing of claims against the state. [1905, ch. 34, § 62.]

§ 7666. Duty of state engineer or assistant to co-operate with county commissioners when requested. Whenever requested so to do by any of the boards of commissioners of any of the counties of this state, it is hereby made the duty of the state engineer, either by himself, or by any authorized assistant engineer, to co-operate with said county commissioners in the engineering work required to lay out, establish and construct any drain to be used by any county or counties or portions of the same for the purpose of diverting flood waters, lakes, water courses, and in general to aid and assist the counties of this state in making preliminary surveys and establishing systems of drainage. [1905, ch. 34, § 63.]

Article 6.—Water Users' Associations.

§ 7667. State or municipalities may join water users' associations. Fee for recording articles by register of deeds. The state of North Dakota may, through the board of university and school lands, and the counties, townships, cities, towns and villages of the state, through their corporate authorities, join water users' associations. The register of deeds is hereby authorized to accept from water users' associations organized in conformity with the requirements of the United States under the reclamation act, books containing printed copies of their articles of incorporation and forms of subscription to stock, and to use such books for recording the stock subscriptions of such association; and the charges for the recording thereof shall be made on the basis of the number of words actually written therein. [1905, ch. 193, § 1.]

§ 7668. Right of way granted. A right of way is hereby granted to all duly incorporated water users' associations by and with the consent of the state board of university and school lands, to construct over and across all state, school and institution lands, flumes, ditches and canals for irrigation purposes and to construct on such lands reservoirs for the storage of water for irrigation purposes. [1905, ch. 193, § 2.]

Article 7.—Establishment and Maintenance of Dams.

§ 7669. Dams for mills or irrigating purposes. When any person may be desirous of erecting and maintaining a dam upon his own land, across any water course not navigable, and shall deem it necessary to raise the water by means of such dam, or occupy ground for mill yard, or for irrigation purposes, so as to damage by overflowing or otherwise, real estate not owned by him, nor damaged by consent, he may obtain the right to erect and maintain said dam by proceedings as in this article provided; provided, that all dams erected under the provisions of this article shall be constructed with such sluiceways as will allow fish to ascend any stream so dammed. [1899, ch. 71, § 1; R. C. 1899, § 5973a.]

§ 7670. Shall petition the court. He shall present to the judge of any court of record in which jury trials are had in the county, or, if there be no such court in the county, then in the district in which said dam or any part thereof is to be located, a petition naming each person known to be affected or damaged, setting forth the place as near as may be, where said dam is to be located, the height to which it will be raised, the purposes to which the water power will be applied, and such other facts as may be necessary to show the object of the petition. [1899, ch. 71, § 2; R. C. 1899, § 5973b.]

§ 7671. Commissioners. Upon the presentation of such petition, the judge shall appoint three disinterested residents of the county in which said dam or a part of it is to be erected, commissioners to meet at the place of its proposed erection, on a day specified by such judge, and to inquire, touching the matters contained in said petition, and the judge shall fix the fees of said commissioners. Before entering upon their duties the commissioners shall

severally take and subscribe an oath before some person qualified to administer oaths, faithfully and impartially to discharge the duties of their appointment. [1899, ch. 71, §§ 3, 4; R. C. 1899, § 5973c.]

§ **7672. Notice of meeting.** At the request of the petitioners the commissioners shall give, or cause to be given, notice of the time, place and object of their meeting to every person named by said petitioner. At least thirty days' notice shall be given in all cases, which shall be served in the manner prescribed by law for the service of summons in the district court, and such notice shall be published for at least four successive weeks in a newspaper in the county nearest the location of the proposed dam. [1899, ch. 71, §§ 5, 6; R. C. 1899, § 5973d.]

§ **7673. Preliminary survey.** The commissioners shall meet at the time and place specified in the notice, and shall cause a preliminary survey to be made, and shall proceed to examine the point at which said dam is proposed to be erected, and the lands and real estate above and below which will probably be injured by the erection of said dam; shall hear the allegations and testimony of all parties interested, and shall proceed to make a separate assessment of damages which will result to any person by the erection of said dam for mill or irrigation purposes and its maintenance. [1899, ch. 71, § 7; R. C. 1899, § 5973e.]

§ **7674. Report of proceedings.** Within thirty days after completing their examination, the commissioners shall file the petition, their appointment, jurats (oaths), and a report of their proceedings, in the office of the clerk of the court in section 7669 mentioned, and shall give notice of the filing of said report as of their meeting, to all persons named in the petition, or that may be shown to be damaged by the preliminary survey. [1899, ch. 71, § 8; R. C. 1899, § 5973f.]

§ **7675. Payment of damages.** Upon the filing of said report the petitioners may make payment of the damages assessed to the parties entitled to the same in the following manner, to wit:

1. To parties laboring under no disability.
2. To guardians of infants, husbands or trustees of femmes covert.
3. To guardians or conservators of insane persons.

And receipt for such payment filed in the office of the clerk aforesaid shall estop the parties receipting from all further claim or proceeding in the premises. Payments to parties in the state, but not in the county or counties where said dam or a part of it is to be erected, as well as to the infants who have no guardians, and insane persons who have no guardians or conservators, and payments to parties residing out of the state, and to persons whose names are unknown and to persons who shall refuse to receive the payments when tendered, shall be made by depositing the money with the treasurer of the county or counties aforesaid, who shall pay out the same upon the order of the commissioners or court, take receipts for all payments, and file the same with the order, in the office of the clerk of the court aforesaid, and such deposit shall have the same effect as the first mentioned receipts unless an appeal be taken by the party entitled thereto. [1899, ch. 71, § 9; R. C. 1899, § 5973g.]

§ **7676. Appeal. Bond.** Appeals from the assessment made by the commissioners may be taken and prosecuted in the court aforesaid by any party interested, the petitioner excepted, not under legal disability, by husbands or trustees of femmes covert, guardians of infants, guardians or trustees of insane persons, and in cases where infants or insane persons have no guardians or conservators, appeals may be taken by the friends of such persons and a written notice of such appeal be served upon the appellee, as a summons in ordinary civil actions; provided, that no appeal shall be taken after the expiration of thirty days from the time of the notification of the filing of the report aforesaid. The erection of said dam shall not be hindered, delayed or prevented by the prosecution of any appeal; provided, the peti-

tioner shall execute and file with the clerk of the court in which the appeal is pending a bond to be approved by said clerk with surety or sureties, conditioned that the person executing the same shall pay whatever amount is required by the judgment of the court, and abide any rule or order of the court in relation to the matter in controversy. [1899, ch. 71, §§ 10, 11; R. C. 1899, § 5973h.]

§ **7677. Bond approved by clerk.** The appellant shall file with the clerk aforesaid a bond with surety, to be approved by said clerk, in double the amount of the assessment appealed from, payable to the people of the state, for the use of all persons interested, in the condition in which bond the proceedings appealed from shall be recited, with condition for the due and speedy prosecution of the appeal, and that he or they will satisfy the judgment that may be rendered in the premises and pay the costs of the appeal, if adjudged to do so by the court in reference to the matter in controversy. [1899, ch. 71, § 12; R. C. 1899, § 5973i.]

§ **7678. When submitted to jury.** Appeal shall bring before the court the propriety of the amount of damages reported by the commissioners in respect to the parties to the appeal, and unless the parties otherwise agree, the matter shall be submitted to and tried by a jury the same as other appeal cases, and the court or jury, as the case may be, shall assess the damages aforesaid, making the verdict conform to the question and facts in the case. [1899, ch. 71, § 13; R. C. 1899, § 5973j.]

§ **7679. Exemplary damages.** No exemplary or vindictive damages shall be allowed by the commissioners, court or jury. [1899, ch. 71, § 14; R. C. 1899, § 5973k.]

§ **7680. Judgments.** Upon verdicts rendered by juries, or an assessment by the court, judgment shall be entered, declaring that upon payment of the damages assessed by the court or jury, as the case may be, and costs, if any, the right to erect and maintain the dam aforesaid, according to the petition, shall, as against the parties interested in such verdict be and remain in the petitioner, his heirs and assigns forever, subject to be lost as hereinafter provided, and payments of such judgments made as payments of assessments, by the commissioners as hereinbefore provided. [1899, ch. 71, § 15; R. C. 1899, § 5973l.]

§ **7681. Water power shall not be injured. Action for damages.** No dam shall be erected or maintained under the provisions of this article to the injury of any water power previously improved. No action for damages, occasioned by the erection and maintenance of such dam shall be hereafter sustained unless such action be brought within two years after the erection of said dam; provided, that such limitation shall not run against and apply to persons living on and holding government land under the pre-emption laws, until a patent for the land damaged or overflown shall have been issued. [1899, ch. 71, §§ 16, 17; R. C. 1899, § 5973m.]

§ **7682. Who may maintain dam.** Any person may obtain a right to maintain or raise a dam heretofore erected upon his own land, across any water course not navigable, by complying with the provisions of this article, adapting his petition to the nature of the case. [1899, ch. 71, § 18; R. C. 1899, § 5973n.]

§ **7683. May suspend suit. Costs.** Upon the evidence of the commencement of proceedings, as provided in sections 7670 and 7682, the court before which any suit for damages occasioned by such dam shall be instituted after the commencement aforesaid, shall have power to suspend any such suit until the result of such proceedings shall be known. The cost of all proceedings under this article, except such as arise or grow out of appeals, shall be paid by the petitioner, and costs of appeals shall be paid as the court may direct. [1899, ch. 71, §§ 19, 20; R. C. 1899, § 5973o.]

§ **7684. Surveys and examinations.** For the purpose of making surveys and examinations relating to any proceedings under the provisions of this article, it shall be lawful to enter upon any land, doing no unnecessary injury. [1899, ch. 71, § 21; R. C. 1899, § 5973p.]

§ **7685. When construction must commence.** Any person having obtained right to erect and maintain, or to maintain or raise any dam, under the provisions of this chapter, who shall not within one year thereafter begin to build said dam, and finish the same and apply the water power thereby created to the purposes stated in his petition within three years; or in case the said dam shall be destroyed, shall not begin to rebuild in one year after such destruction, and finish in three years, or in case of a mill dam shall fail to keep such mills in operation for one year at any one time, shall forfeit all rights acquired by virtue of the provisions of this article unless at the time of such destruction the owner be an infant, or otherwise disabled in law, in which case the same time shall be allowed after the removal of such disability; provided, however, where the water, backed up by any dam belonging to any mill owner or machinery, is about to break through or over the banks of the stream or race, or to wash a channel so as to turn the water of such stream or race, or any part thereof, out of its ordinary channel, whereby such mill or machinery will be injured or affected, the owner or occupier of such mill or machinery, if he does not own such banks or the lands lying contiguous thereto, may, if necessary, enter thereon and erect and keep in repair such embankments and other works as shall be necessary to prevent such water from breaking through or over the banks of such stream or race, or washing a channel as aforesaid, such owner or occupier committing thereon no unnecessary waste or damage, and being liable to pay any damages which the owner of the land may actually sustain by the erection and repair aforesaid; provided, further, that if any person shall injure, destroy or remove any such embankment or other works, the owner or occupier of such mill or machinery, or in case the said dam is for purposes of irrigation, the owner thereof may recover of such person all damages he may sustain by reason of such injury, destruction or removal. [1899, ch. 71, § 22; R. C. 1899, § 5973q.]

CHAPTER 38.

DEATH BY WRONGFUL ACT.

§ **7686. When action for maintainable.** Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation or company which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. [R. C. 1895, § 5974.]

§ **7687. Measure of recovery.** In such actions the jury shall give such damages as they think proportionate to the injury resulting from the death to the persons entitled to the recovery. [R. C. 1895, § 5975.]

Allegation of damages unnecessary. Haug v. Ry. Co., 8 N. D. 23, 77 N. W. 97.
The only damages recoverable under this section are such as estate has sustained. (Before amendment by North Dakota.) Belding v. Ry. Co., 3 S. D. 369, 53 N. W. 750.

§ **7688. Who may bring action.** The action shall be brought by the following persons in the order named:

1. The surviving husband or wife, if any.
2. The surviving children, if any.
3. The personal representative.

If any person entitled to bring the action refuses or neglects so to do for a period of thirty days after demand of the person next in order, such person may bring the same. [R. C. 1895, § 5976.]

Action must be brought by parties in order named in statute. Belding v. Ry. Co., 3 S. D. 369, 53 N. W. 750.

Recovery by son for death of father. Smith v. Ry. Co., 6 S. D. 583, 62 N. W. 967.

§ **7689. Recovery exempt from decedent's debts.** The amount recovered shall not be liable for the debts of the decedent, but shall inure to the exclusive benefit of his heirs at law in such shares as the judge before whom the case is tried shall fix in the order for judgment, and for the purpose of determining such shares the judge may after the trial make any investigation which he deems necessary. [R. C. 1895, § 5977.]

The word "heir" construed to mean "child." Lintz v. Mining Co., 13 S. D. 489, 83 N. W. 570.

§ **7690. Action not abated by death.** The action shall not abate by the death of either party to the record. If the plaintiff dies pending the action the person next in order, entitled to bring the action, shall by order of the court be made plaintiff therein. [R. C. 1895, § 5978.]

§ **7691. Compromise of action.** The person entitled to bring the action may compromise the same, or the right thereto, and such compromise shall be binding upon all persons authorized to bring the action or to share in the recovery. [R. C. 1895, § 5979.]

CHAPTER 39.

ARBITRATION.

§ **7692. When authorized.** Persons capable of contracting may submit to the decision of one or more arbitrators any controversy which might be the subject of a civil action between them, except the question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property. [R. C. 1895, § 5980.]

§ **7693. Submission in writing.** The submission to arbitration must be in writing and acknowledged by the parties thereto in the same manner as a conveyance of real property and may fix the time on or before which the award shall be made and provide that judgment may be entered upon the award by the district court in and for a specified county. [R. C. 1895, § 5981.]

§ **7694. Powers of arbitrators.** Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties and to make the award thereon. All the arbitrators must meet and act together during the investigation; but when met a majority may determine any question. [R. C. 1895, § 5982.]

Refusal to consider evidence offered may vitiate award. Caldwell v. Brooks Elevator Co., 10 N. D. 575, 88 N. W. 700.

§ **7695. Oath of.** Before acting the arbitrators must be sworn before an officer authorized to administer oaths faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy and to make a just award according to their understanding. [R. C. 1895, § 5983.]

For oath of arbitrators, award and its enforcement, see Caldwell v. Elevator Co., 10 N. D. 575, 88 N. W. 700.

§ **7696. Attendance of witnesses compelled.** Witnesses may be compelled to appear before such arbitrators by subpena to be issued by any justice of

the peace, in the same manner and with like effect, and subject to the same penalties for disobedience, as in cases of trials before justices of the peace. [R. C. 1895, § 5984.]

§ **7697. How award executed. When filed.** The award must be in writing signed by the arbitrators or a majority of them and acknowledged in the same manner as a conveyance of real property. If the submission provides for the entry of judgment upon the award, the arbitrators shall file the submission together with their award in the office of the clerk of the district court of the county specified in the submission and notify each of the parties to the arbitration thereof in writing. If the submission does not provide for the entry of judgment upon the award the arbitrators shall deliver a copy of the award to each of the parties to the arbitration. [R. C. 1895, § 5985.]

§ **7698. Motion to affirm award.** Any party to the submission at any time within one year after the award is filed, and upon eight days' notice to the adverse party may move the court designated in the submission to affirm the award and the same shall be affirmed accordingly, unless a motion is made to modify or vacate the award in which case the latter motion shall first be disposed of. [R. C. 1895, § 5986.]

§ **7699. To vacate. Grounds.** Any party to such submission may move the court designated therein to vacate the same upon either of the following grounds:

1. That such award was procured by corruption, fraud or other undue means.
2. That there was evident partiality or corruption in the arbitrators, or either of them.
3. That the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or refusing to hear any evidence pertinent and material to the controversy, or for any other misbehavior of such arbitrators by which the rights of any party shall have been prejudiced.
4. That the arbitrators exceeded their powers, or that they so imperfectly executed them, that a mutual, final and definite award on the subject matter submitted was not made. [R. C. 1895, § 5987.]

§ **7700. To modify. Grounds.** Any party to such submission may also move the court designated therein, to modify or correct such award in the following cases:

1. When there is evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in such award.
2. When the arbitrators shall have awarded upon some matter not submitted to them, not affecting the merits of the decision upon the matters submitted.
3. When the award shall be imperfect in some matter of form not affecting the merits of the controversy and when, if it had been a verdict, such defect could have been amended or disregarded by the court according to the provisions of law. [R. C. 1895, § 5988.]

§ **7701. Power of court on such motions.** On such application the court may vacate such award in any of the cases hereinbefore specified, and if the time within which such award shall have been required to be made by the submission, has not expired, may in their discretion direct a rehearing by the arbitrators; and in the cases herein specified the court may modify and correct such award, so as to effect the intent thereof and promote justice between the parties. [R. C. 1895, § 5989.]

§ **7702. Judgment. Costs.** Upon such award being affirmed or modified the court shall render judgment in favor of the party to whom any sum of money or damages shall have been awarded, that he recover the same; and if the award shall have ordered any act to be done by either party, judgment shall be entered, that such act be done according to such order. The costs of the proceedings shall be taxed as in actions, and if no provision for the fees

and expenses of the arbitrators shall have been made in the submission, the court shall make the same allowance as is provided by law for referees; but no costs shall be taxed for any other services or expenses prior to such application. [R. C. 1895, § 5990.]

§ 7703. **How judgment entered.** The judgment of the court on such award shall be entered in the judgment book at length as other judgments of said court and the clerk of the court shall immediately after the entry of such judgment attach to the submission the award of the arbitrators and a copy of the judgment of the court and the same shall constitute the judgment roll. [R. C. 1895, § 5991.]

§ 7704. **Subject to same provisions as other judgments.** Such judgment roll shall be filed and judgment docketed as in other cases, shall have the same force and effect in all respects, be subject to all the provisions of law in relation to judgments in actions and may in like manner be reviewed by the supreme court on appeal; and execution shall issue thereupon against the property or person of any party against whom a recovery shall be had in all respects as upon other judgments. [R. C. 1895, § 5992.]

§ 7705. **Record on appeal. Power of supreme court.** When an appeal shall be taken from such judgment, the original affidavits upon which any application in relation to such award was founded and all other affidavits and papers relating to such application shall be annexed to, form a part of and be transmitted with the record of the judgment, unless the court shall order copies thereof to be returned; and the supreme court shall reverse, modify, amend or affirm such judgment according to justice. [R. C. 1895, § 5993.]

§ 7706. **How judgment enforced.** When by such judgment any party shall be required to perform any act other than the payment of money, the court rendering such judgment shall enforce the same in the manner provided for enforcing judgments of a similar nature in other cases. [R. C. 1895, § 5994.]

§ 7707. **Costs on setting aside.** If upon application made pursuant to the foregoing provisions the court shall vacate and set aside any such award, costs shall be awarded to the prevailing party; and judgment may be rendered therefor and enforced by execution. [R. C. 1895, § 5995.]

§ 7708. **Appeal from an order vacating.** Upon any such order vacating an award the party aggrieved may appeal to the supreme court, on which appeal the submission and award and all affidavits and papers used on such application shall be transmitted to the supreme court, unless the court shall order copies thereof returned; and the court shall proceed to affirm or reverse such order as shall be just. [R. C. 1895, § 5996.]

§ 7709. **Procedure when reversed.** If such order is reversed the proceedings shall be remitted to the court from which they were removed to proceed thereon; or the supreme court may modify or affirm the award in the same manner and with like effect, as if the application for that purpose had been originally made to such court. [R. C. 1895, § 5997.]

§ 7710. **Action upon award not affected.** Nothing in this chapter shall be construed to impair or affect any action upon an award or upon any bond or other engagement to abide by an award. [R. C. 1895, § 5998.]

§ 7711. **Liability for costs when submission revoked.** Whenever any submission to arbitration shall be revoked by a party thereto before the publication of an award, the party so revoking shall be liable to an action by the adverse party to recover all costs and expenses incurred and damages which he may have sustained in preparing for such arbitration; but neither party shall have power to revoke the powers of the arbitrators after the cause shall have been finally submitted to them upon a hearing of the parties for their decision. [R. C. 1895, § 5999.]

§ 7712. **Same when submission in bond.** If the submission so revoked was contained in the condition of any bond, the obligee in such bond shall be

entitled to prosecute the same in such manner as other bonds with condition other than for the payment of money and to assign such revocation as a breach thereof; and for such breach he shall recover as damages the costs and expenses incurred and the damages sustained by him in preparing for such arbitration. [R. C. 1895, § 6000.]

CHAPTER 40.

INSOLVENCY.

Article 1.—General Provisions.

§ 7713. How debtor discharged. Insolvent debtors residing in this state may be discharged from their debts in the manner prescribed in and upon compliance with the provisions of this chapter. [R. C. 1895, § 6001.]

For compilation of authorities on question of insolvency, see note at end of Elton v. O'Conner, 6 N. D. 1.

§ 7714. What deemed commencement of proceedings. The filing of the petition for an adjudication in insolvency, either by the debtor in his own behalf, or by any creditor against the debtor, shall be deemed the commencement of proceedings in insolvency. [R. C. 1895, § 6002.]

§ 7715. Deemed matters of record. Record not required. The proceedings in all cases of insolvency shall be deemed matters of record, but the same shall not be required to be recorded at length, but shall be carefully filed, copied and numbered in the office of the clerk of the court, and a docket only, or short memorandum thereof, copied in books provided for that purpose, which shall be open to public inspection. Copies of such records duly certified under the seal of the court shall in all cases be presumptive evidence of the facts therein stated. [R. C. 1895, § 6003.]

Article 2.—Voluntary Insolvency.

§ 7716. When authorized. Petition. Any person residing in this state and owing debts provable in insolvency to the amount of at least five hundred dollars may apply by petition to the district court of the county in which he resides, or of the county to which the county in which he resides is attached for judicial purposes, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, except such as is by law exempt from execution, and his desire to obtain a discharge from his debts and shall annex to his petition a schedule and affidavit in compliance with the next two sections. The filing of such petition shall be an act of insolvency and such petitioner shall be adjudged an insolvent. [R. C. 1895, § 6004.]

§ 7717. Schedule. Contents. Such schedule must contain:

1. A true and complete list of all his creditors.
2. The place of residence of such creditors, if known to the debtor; and if not known, that fact shall be stated.
3. The sum owing to each creditor and the nature of each demand, whether arising on written security, on account or otherwise.
4. The true cause and consideration of such indebtedness in each case and the place where such indebtedness accrued.
5. A statement of any existing judgment, mortgage or collateral or other security for the payment of such debts.
6. A full and true inventory of all the estate, both real and personal, and of all choses in action, debts due and moneys in the hands of such debtor, whether the property is claimed as exempt or not, of the incumbrances existing thereon and of all the books, vouchers and securities relating thereto.

[R. C. 1895, § 6005.]

§ 7718. Affidavit to petition. An affidavit in the following form shall be annexed to such petition and schedule and shall be sworn to and subscribed by the debtor:

I, ..., do swear (or affirm as the case may be) that the schedule, which is annexed to my petition and herewith delivered, is in all respects just, true and complete and that I have not at any time or in any manner whatever disposed of or made over any part of my estate for the future benefit of myself or family, or in order to defraud any of my creditors; and that I have in no instance created or acknowledged a debt for a greater sum than I honestly or truly owed and that I have not paid, secured to be paid or in any way compounded with any of my creditors with a view fraudulently to obtain the prayer of my petition. [R. C. 1895, § 6006.]

§ 7719. **Notice to creditors.** Upon the filing of such petition, schedule and affidavit the court shall make an order directing that notice be given to all the creditors whose names are contained in the schedule filed with the debtor's petition, or are afterwards furnished by the debtor. The contents of such notice and the manner of serving the same are prescribed in article 4 of this chapter. [R. C. 1895, § 6007.]

§ 7720. **Amendment of schedule.** Every person voluntarily petitioning under the provisions of this chapter to be adjudged an insolvent shall be at liberty from time to time upon oath to amend and correct his schedule so that the same shall conform to the facts. [R. C. 1895, § 6008.]

Article 3.—Involuntary Insolvency.

§ 7721. **When proceedings authorized.** Any person residing in this state and owing debts provable in insolvency to the amount of at least five hundred dollars:

1. Who departs from this state with intent to defraud his creditors or, being absent, remains absent with such intent; or,
2. Who conceals himself to avoid the service of legal process in any action for the recovery of a debt or demand provable in insolvency; or,
3. Who conceals any of his property to avoid its being seized on legal process; or,
4. Who makes any assignment, gift, sale, conveyance or transfer of his property, rights or credits either within this state or elsewhere with intent to delay, defraud or hinder his creditors; or,
5. Who, being insolvent or in contemplation of insolvency, makes any payments, gift, grant, sale, conveyance or transfer of property, rights or credits, or procures or suffers a judgment against himself or procures or suffers his property to be taken on legal process with intent to give preference to one or more of his creditors or to any person or persons who are or may be liable for him as indorsers, sureties or otherwise, or with the intent by such disposition of his property to defeat or delay the operation of this chapter; or,
6. Who, being insolvent, has suffered execution for five hundred dollars or more to be returned unsatisfied or, being a merchant or tradesman, has suspended and not resumed payment of commercial paper for thirty days for five hundred dollars or more, unless the party or parties holding such paper have in writing waived the right to proceed under this subdivision, shall be deemed to have committed an act of insolvency and shall become liable to be adjudged an insolvent. [R. C. 1895, § 6009.]

§ 7722. **Petition. Amendment.** Proceedings in insolvency may be instituted by the filing of a verified petition of one or more creditors, the aggregate of whose provable debts amounts to at least four hundred dollars, against any debtor residing in this state owing debts to the amount of at least five hundred dollars, who has committed an act of insolvency as defined in section 7721, provided such petition is brought within six months after the parties in interest shall have had an opportunity to be advised of the fact that an act of insolvency has been committed. The petition may from time to time be amended and corrected by leave of the court before which the proceedings are pending, so that the same shall conform to the facts. [R. C. 1895, § 6010.]

§ 7723. **Undertaking.** The petition shall be accompanied by an undertaking with sufficient surety, to be approved by the clerk of the court, in the sum of at least five hundred dollars, conditioned that if the debtor shall not be declared an insolvent, the petitioner will pay all costs and damages, including a reasonable attorney's fee, that the debtor may sustain by reason of the filing of the petition. The court may upon motion direct the filing of an additional undertaking with sufficient surety when deemed necessary. [R. C. 1895, § 6011.]

§ 7724. **Order to debtor to show cause. Injunction.** Upon the filing of the petition authorized by the preceding section, if it appears therefrom that sufficient grounds exist, the court shall make an order requiring the debtor to show cause at a time and place to be specified in the order why the prayer of the petition should not be granted. The court may also by injunction restrain the debtor and any other person in the meantime from making any transfer or disposition of any part of the debtor's property and from any interference therewith. [R. C. 1895, § 6012.]

§ 7725. **When property seized and debtor arrested.** At the time of the filing of the petition in insolvency either by the debtor or a creditor, or at any time thereafter, if it shall appear that there is probable cause for believing that the debtor is about to leave the state, or to remove or conceal his property or any evidence of his property, or to make any fraudulent conveyance or disposition thereof, or that the best interests of the estate demand such action, the court may issue a warrant to the sheriff, commanding him to arrest and safely keep the alleged debtor, unless he shall give an undertaking to the satisfaction of the court for his appearance from time to time as required by the court until its decision upon the petition or until its further order, and forthwith to take possession provisionally of all the property of the debtor and safely keep the same until the further order of the court, or to take possession of the property as aforesaid without arresting the debtor. [R. C. 1895, § 6013.]

Arrest cannot be made for things already done by debtor, but only for what is about to be done. Affidavit based on information and belief insufficient. Kaeppler v. Red River Valley National Bank, 8 N. D. 406, 79 N. W. 869.

§ 7726. **Service on debtor.** A copy of the petition and order to show cause shall be served on the debtor. The service shall be made in the same manner as is prescribed for the personal service of a summons or, if such service cannot conveniently be made, in such manner as the court may by order direct. No further proceedings, unless the debtor appears and consents thereto, shall be had until proof has been made of the service of the order and petition; and if such proof is not given on the return day of such order, the proceedings shall be adjourned and an order made that such order and petition be forthwith served. [R. C. 1895, § 6014.]

§ 7727. **Proceedings continued by another creditor.** If the petitioning creditor does not appear and proceed on the return day or adjourned day, the court may upon the petition of another creditor to the required amount proceed to adjudicate on such petition without requiring a new service of the order and petition. [R. C. 1895, § 6015.]

§ 7728. **Answer of debtor. How issues tried.** On such return day or adjourned day, if the order and petition have been duly served or service thereof is waived by the appearance of the debtor, the debtor may answer the petition. Such answer shall contain a specific denial of the material allegations of the petition controverted by him and shall be verified in the same manner as pleadings in civil actions. The court shall proceed immediately to try the issues so raised without a jury, unless the debtor at the time of filing his answer demands in writing a trial by jury. Upon a hearing before the court affidavits or other proof may be used as evidence. [R. C. 1895, § 6016.]

§ 7729. **Procedure on demand for jury.** If the debtor demands a trial by jury, the court may adjourn the proceedings to the next term of the district court at which a jury will be in attendance; or may by order direct that eighteen jurors be drawn in the same manner as petit jurors are drawn, from the jury list of the last preceding term of the district court, and that the jurors so drawn be summoned by the sheriff to attend upon the court at a time to be fixed in the order. At the time so fixed a jury of twelve shall be drawn from the persons so summoned in the same manner as jurors are drawn for the trial of civil actions and the provisions of law relating to the selecting, summoning and drawing of jurors shall be applicable to such proceedings. The issues raised by the petition and answer shall be tried in the same manner as issues in civil actions. [R. C. 1895, § 6017.]

§ 7730. **When proceedings dismissed.** If upon such hearing or trial the debtor proves to the satisfaction of the court or jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens on his property, in case the existence of such liens was the sole ground of the proceeding, the proceedings shall be dismissed and judgment shall be entered in favor of the debtor against the petitioner for costs. [R. C. 1895, § 6018.]

§ 7731. **When debtor adjudged insolvent.** If upon the hearing or trial the facts set forth in the petition are found to be true or, if upon default made by the debtor to appear pursuant to the order, due proof of service thereof is made, the court shall adjudge the debtor to be an insolvent. [R. C. 1895, § 6019.]

§ 7732. **Order requiring schedule, amendment of.** The court shall thereupon make an order requiring the insolvent forthwith, or within such number of days not exceeding ten after the date of the order or notice thereof, as shall by the order be prescribed, to make and deliver or transmit by mail, postage paid, to the clerk of the court a schedule as required by section 7717 and verified by the oath of the debtor. Such debtor shall be allowed from time to time, upon oath, to amend or correct his schedule of creditors and property so that the same shall conform to the facts. If the insolvent is absent or cannot be found in this state, such schedule shall be prepared by some person to be appointed by the court for that purpose according to the best information he can obtain. [1897, ch. 93; R. C. 1899, § 6020.]

§ 7733. **How copy of the adjudication served.** If the debtor has failed to appear in person or by attorney, a copy of the adjudication shall be forthwith served on him in the manner provided for the service of the order to show cause. [R. C. 1895, § 6021.]

Article 4.—Proceedings to Realize the Estate for Creditors.

§ 7734. **Notice of insolvency.** Upon an adjudication that a debtor is an insolvent either upon his own petition or upon the petition of his creditors a notice shall forthwith be given by the clerk of the district court substantially as follows:

NOTICE OF INSOLVENCY.

Notice is hereby given that an adjudication of insolvency has been made against.....; and that the payment of any debts and the delivery of any property belonging to such debtor to him, or for his use, and the transfer of any property by him are forbidden by law.

.....
Clerk of the district court in and for the
county of....., North Dakota.

[R. C. 1895, § 6022.]

§ 7735. **Notice of election of assignee.** At the same time the clerk of the district court shall give notice of a meeting of the creditors to choose an assignee, the time for which shall be fixed by order of the court, which notice shall be in the following form:

ELECTION OF ASSIGNEE.

Notice is hereby given that a meeting of the creditors of....., who has been adjudged an insolvent, will be held at the court house in the city of.....in the county of.....in the state of North Dakota, at.....o'clock....m. on the.....day of .....19....for the purpose of choosing one or more assignees of the estate of said insolvent.

.....
Clerk of the district court in and for the county of....., North Dakota.

[R. C. 1895, § 6023.]

§ **7736. Manner of serving foregoing notices.** The notices mentioned in the last two sections shall be published four times, once in each week for four successive weeks, in a newspaper published in the county in which the adjudication is made, if there is one, and if not, then in a newspaper published at the seat of government. A copy of the notice of election of an assignee shall also be forthwith served personally or by mail on each creditor named in the schedule, if such creditor's residence or post office address is given in the schedule. The expense of the clerk in giving such notices shall be paid by the assignee out of the estate. [R. C. 1895, § 6024.]

§ **7737. Choosing assignee before time fixed.** At any time after an adjudication in insolvency the creditors named in the schedule and any other creditors, who may appear, may choose an assignee in the manner herein provided without waiting for the expiration of the time fixed in the notice and thereupon publication of the notice must be discontinued. [R. C. 1895, § 6025.]

§ **7738. Meeting of creditors.** At the meeting of the creditors the judge of the court shall preside, and the clerk of the court shall attend and keep a minute of the deliberations of the creditors and of the election of an assignee and enter the same upon his records; if it appears that the notice to creditors has not been given as required by law, the meeting shall forthwith be adjourned and a new notice be given as required unless all the creditors have appeared as hereinbefore provided. [R. C. 1895, § 6026.]

§ **7739. Creditor may act by attorney.** Any creditor may act at all meetings and proceedings in insolvency by his attorney the same as though personally present. [R. C. 1895, § 6027.]

§ **7740. Time and method of electing assignee.** The creditors shall at the first meeting held after due notice or appearance choose one or more assignees of the property of the debtor; the choice to be made by the greater part in value of the creditors, who have proved their debts and are present or represented at such meeting. If no choice is made by the creditors at the meeting, the court shall appoint one or more assignees. If an assignee so chosen or appointed fails within five days to express in writing his acceptance of the trust, the court may fill the vacancy. [R. C. 1895, § 6028.]

§ **7741. Who may vote or be assignee.** No person who has received any preference contrary to the provisions of this chapter shall vote for or be eligible as assignee; but no title to property, real or personal, sold, transferred or conveyed by an assignee shall be affected or impaired by reason of his ineligibility. [R. C. 1895, § 6029.]

§ **7742. Undertaking of assignee. Failure to give.** The assignee shall give a good and sufficient undertaking in such sum as the court directs to the state of North Dakota, conditioned for the faithful performance and discharge of his duties, which undertaking shall be approved by the clerk of the court and filed with the record of the case, and shall inure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party. If the assignee fails to give the undertaking within ten days after notice of his appointment, the court shall remove him

and a new assignee shall be chosen by the creditors at a meeting called for that purpose upon notice to the creditors as hereinbefore provided. [R. C. 1895, § 6030.]

§ 7743. **Grounds for removing assignee.** The court may after hearing upon not less than three days' notice to the assignee remove him, if it appears upon the complaint of any person interested in the estate, that the assignee has fraudulently received, concealed, embezzled or conveyed any of the money, goods, effects or property of the debtor or has been interested in any action in relation to the said estate for the purpose of securing to himself a preference or priority over the other creditors, or has in his possession or control any portion of the estate with intent to appropriate the same unlawfully to his own use, or has been guilty of any fraudulent act in relation to the same. [R. C. 1895, § 6031.]

§ 7744. **Same.** The court may also remove an assignee, who, having removed from the state, unreasonably refuses and neglects to obey any lawful order of the court or to settle his accounts or otherwise to discharge his duties. [R. C. 1895, § 6032.]

§ 7745. **Assignee may resign.** An assignee may with the consent of the court resign his trust and be discharged therefrom. [R. C. 1895, § 6033.]

§ 7746. **How vacancies filled.** Vacancies caused by death or otherwise in the office of assignee shall be filled by the creditors in the same manner as in the original choice of an assignee at a regular meeting or at a meeting called for the purpose with such notice thereof in writing to all known creditors as the court shall direct. [R. C. 1895, § 6034.]

§ 7747. **From what resignation no release.** The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust and the transmission thereof to his successor, nor affect his liability or that of the sureties on his undertaking. [R. C. 1895, § 6035.]

§ 7748. **Clerk to execute assignment. Levy dissolved.** As soon as an assignee is appointed and qualified the clerk of the court shall by an instrument under his hand and the seal of the court assign and convey to the assignee all the property, real and personal, of the debtor with all his deeds, books and papers relating thereto, except such property as is by law exempt from execution, and such assignment shall relate back to the commencement of the proceedings in insolvency and by operation of law shall vest the title to all such property, both real and personal, in the assignee, although the same is then held under any process as the property of the debtor and shall dissolve any levy made under such process within sixty days next preceding the commencement of the insolvency proceedings. Such assignment shall be approved by the court as to its form and manner of execution and shall be recorded in the office of the register of deeds of every county in which any real estate conveyed thereby is situated. [R. C. 1895, § 6036.]

Title vests in assignee as of the time proceedings commenced, and annuls levies subsequent to proceedings. Elton v. O'Connor, 6 N. D. 1, 68 N. W. 84.

Note:—See also note to this case.

§ 7749. **Debtor's exemptions.** The debtor shall be allowed such exemptions as are provided for by law and shall be permitted to use and occupy his homestead, household furniture and absolute exemptions until his homestead and exemptions shall have been selected in the manner hereinafter prescribed. Insurances upon the life of a debtor do not pass to the assignee by the assignment, unless the debtor by an instrument in writing shall expressly consent thereto. No property held by the insolvent in trust shall pass by the assignment. [R. C. 1895, § 6037.]

Insolvent entitled to exemptions against creditor for property obtained by false pretenses. Such claim is not discharged by insolvency proceeding; the creditor can share in the dividend and thereafter bring action for balance due and on judgment so obtained, may on execution, exhaust debtor's exemption. In re Kaeppler, 7 N. D. 435, 75 N. W. 789.

§ 7750. **Assignee may redeem and tender performance.** The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, pledge or lien upon any property of the debtor, whenever payable, and to tender due performance of the conditions thereof or to sell the same subject to such mortgage, lien or other incumbrance. [R. C. 1895, § 6038.]

§ 7751. **Authority of assignee as to actions.** The assignee shall have like remedy to recover all the property, debts and effects in his own name as the debtor would have had if no assignment had been made; if at the time of the assignment an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be permitted to prosecute the action in his own name in like manner and with like effect as if it had been originally commenced by him. No action pending in the name of the assignee shall be abated by his death or removal; but on motion of a surviving, remaining or new assignee, as the case may be, he shall be permitted to prosecute the action in like manner and with like effect as if it had been originally commenced by him. In actions prosecuted by the assignee the assignment made as hereinbefore provided shall be conclusive evidence of his authority. [R. C. 1895, § 6039.]

§ 7752. **Embezzlement by third person.** If any person before the assignment is made, having notice of the commencement of proceedings in insolvency, embezzles or disposes of any of the moneys, goods, chattels or effects of the insolvent, he is chargeable therewith and liable to an action by the assignee for double the value of the property so embezzled or disposed of, to be recovered for the benefit of the estate. [R. C. 1895, § 6040.]

§ 7753. **Remedies to obtain property embezzled, etc.** The same penalties, forfeitures and proceedings by citation, examination and commitment shall be maintainable on the part of the assignee in the district court against persons suspected of having concealed, embezzled, conveyed away or disposed of any property of the debtor, or of having possession or knowledge of any deeds, conveyances, bonds, contracts or other writings which relate to any interest of the debtor in any real or personal estate as provided in case of the estates of deceased persons in sections 8076 and 8077 of the probate code. [R. C. 1895, § 6041.]

§ 7754. **When assigned claims no defense to action by assignee.** Drafts, bills of exchange, promissory notes, claims, demands and causes of action, which within six months before the filing of the petition by or against a debtor are assigned, transferred, conveyed or delivered to any person indebted or liable to the debtor, shall not be set off or pleadable in any action by the assignee to recover such debt or liability; but the assignee may recover the same, notwithstanding such draft, bill of exchange, promissory note, claim, demand or cause of action, if the person to whom the same are so assigned, transferred, conveyed or delivered has at the time of such assignment, transfer, conveyance or delivery reasonable cause to believe the debtor insolvent. [R. C. 1895, § 6042.]

§ 7755. **Notice of appointment of assignee.** The assignee shall immediately give notice of his appointment by publishing notice thereof three times, once in each week for three successive weeks in such newspaper as shall for that purpose be designated by the court. [R. C. 1895, § 6043.]

§ 7756. **Inventory of estate.** The assignee shall immediately make and return upon oath into court a true and complete inventory of all the property of the debtor, real and personal, whether claimed as exempt or not, and of all debts due to the debtor or any other person for his use, of all his rights of action for property, real or personal, and all his rights of redeeming property, which the assignment vests in such assignee and which have come to his possession or knowledge; and the property comprised in such inventory

shall be appraised in the same manner as the estates of deceased persons are required by law to be appraised, and the district court shall make all orders necessary for that purpose, and such appraisement shall be made and filed with the clerk of the district court within five days after the appointment of the appraisers, or such further time as the court may allow. As soon as the inventory and appraisement are filed the assignee shall serve written notice of the filing of the same upon the debtor or other person authorized by law to select the homstead and exemptions and require him within ten days from the date upon which such notice is served to select his homestead and exemptions at the value fixed in the appraisement. [R. C. 1895, § 6044.]

Assignor's property not in custody of law. State ex rel Bank of Enderlin v. Rose, 4 N. D. 319, 58 N. W. 514.

§ 7757. **Property accounted for at appraised value.** The assignee shall account for all the property and effects of the debtor that vest in him by the assignment at the appraisement, except as herein provided. He shall make no profit by the increase and sustain no loss by the decrease or destruction without his fault of any of the assigned property; if he sells any thereof for more than the appraised value, he shall account for the excess and, if he sells for less, he shall be allowed for the loss, if it appears to the court that the sale was expedient and for the interest of all concerned in the property; and in either case the assignee shall exhibit to the court a true account of sales and shall sell the property at public auction, unless the court for sufficient cause upon petition therefor filed, otherwise orders. [R. C. 1895, § 6045.]

§ 7758. **Selection of exemptions.** The debtor or other person authorized by law shall, within ten days after written notice of the filing of the report of the appraisers provided for in section 7756 is served, select his homestead and exemptions to the amount allowed by law. In making the appraisement of such exemptions the debtor, his agent or attorney must select one person, and the assignee or his attorney another person, and these two so selected, a third person, who must all be disinterested citizens of the county where the insolvent resides, and not related to either party nearer than the fourth degree. If the two fail to agree upon the third person, the clerk of the district court must select the third person; and in like manner if either the insolvent or assignee fail or refuse upon notice to select a person to act as one of the appraisers, the clerk of the court must select one for them. The three appraisers so selected must take and subscribe an oath before the clerk of the court or other officer, to be attached to the inventory of appraisement, that they will truly, honestly and impartially appraise the exemptions to be selected. The property must be appraised at the actual value of the articles at the places at which they are situated as nearly as can be determined, and must be set down in an inventory by articles or lots, when definitely descriptive, with the value opposite. Upon the selection of the homestead and exemptions as above provided, a report and inventory of the same shall be presented to the district court by the insolvent or the assignee, and the court, if satisfied that the debtor or other person claiming the same as exempt is entitled thereto, shall make an order setting apart such homestead and exemptions to the debtor or other person claiming the same. [1897, ch. 93; R. C. 1899, § 6046.]

§ 7759. **Assignee to convert property into money. Powers.** The assignee in such assignment shall forthwith under the order of the court convert the property assigned into money and shall have power to make all necessary transfers and conveyances for that purpose, and he shall distribute the funds of the estate among the several creditors of such debtor in the manner hereinafter provided and the court may also make all necessary orders for the payment out of the proceeds of such assigned property of all fees and expenses including compensation to such assignee for his service. [R. C. 1895, § 6047.]

§ 7760. **Money deposited; property kept distinct.** The assignee shall as soon as may be after receiving any money belonging to the estate deposit the same in some bank in his name as assignee, or otherwise keep it distinct and apart from all other money in his possession, and shall as far as practicable keep all property and effects belonging to the debtor separate and apart from all other goods in his possession, or designated by appropriate marks so that they may be easily and clearly distinguished and may not be exposed or liable to be taken as his property or for the payment of his debts. [R. C. 1895, § 6048.]

§ 7761. **Investments when distribution delayed.** When it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the court or may authorize the same to be deposited in any bank in this state upon such interest as the bank may contract with the assignee to pay thereon. [R. C. 1895, § 6049.]

§ 7762. **Disbursements of assignee. Compensation.** The assignee shall be allowed and may retain out of the money in his hands all the necessary disbursements made by him in the discharge of his duty and in the absence of any order of the court to the contrary is entitled to receive the same commissions as are allowed by law to executors, but he cannot receive more and may by order of the court be restricted to a less amount. [R. C. 1895, § 6050.]

§ 7763. **Assignee may arbitrate.** The assignee may under the direction of the court submit any controversy arising in the settlement of demands against the estate or of the debts due to it to the determination of arbitrators to be chosen by him and the other party to the controversy; and may under such directions compound and settle any such controversy by agreement with the other party as he thinks proper and most for the interest of the creditors. [R. C. 1895, § 6051.]

§ 7764. **Sale of perishable property if title in dispute.** When it appears to the satisfaction of the court that the title to any portion of an estate which has come into the possession of the assignee is in dispute, and that the property is of a perishable nature or liable to deteriorate in value it may on the petition of the assignee and after such notice to the claimant, his agent or attorney, as the court deems reasonable, order it to be sold by the assignee or under his direction, who shall hold the funds received in place of the property disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any action or controversy between the parties. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the sale. [R. C. 1895, § 6052.]

Article 5.—Claims Against the Estate.

§ 7765. **What provable against estate.** All debts due and payable from the insolvent at the time of the commencement of the proceedings in insolvency and all debts then existing, but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the insolvent. All demands against the insolvent for or on account of any personal property wrongfully taken, converted or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld with interest. When the insolvent is liable for unliquidated damages arising out of any contract or promise on account of any personal property wrongfully taken, converted or withheld, the court may cause such damages to be assessed in such mode as it may deem best and the sum so assessed may be proved against the estate. [R. C. 1895, § 6053.]

§ 7766. **Contingent claims.** In all cases of contingent debts and contingent liabilities contracted by the insolvent and not herein otherwise pro-

vided for, the creditor may make claim therefor and have his claim allowed, with the right to share in the dividend, if the contingency happens before the order for final dividend; or he may at any time apply to the court to have the present value of the debt or other liability ascertained or liquidated, which shall then be done in such manner as the court shall order and he shall be allowed to prove for the amount so ascertained. [R. C. 1895, § 6054.]

§ 7767. **Claim proved after liability absolute.** When the insolvent is bound as a drawer, indorser, surety, bail or guarantor upon any bill, bond, note or any other contract, or for any debt of another person, but his liability does not become absolute until after the adjudication of insolvency, the creditor may prove the same after such liability becomes fixed and before the final dividend is declared. [R. C. 1895, § 6055.]

§ 7768. **Proof of claim of surety, etc.** Any person liable as bail, surety, guarantor or otherwise for the insolvent, who shall have paid the debt, or any part thereof in discharge of the whole, shall be entitled to prove such debt to the extent of his payment in respect thereof or to stand in the place of the creditor if the creditor has proved the same, although such payment shall have been made after the proceedings in insolvency were commenced. And any person so liable for the insolvent and who has not paid the whole of such debt, but is still liable for the same or any part thereof, may, if the creditor fails or omits to prove such debt, prove the same either in the name of the creditor or otherwise as the court shall direct. [R. C. 1895, § 6056.]

§ 7769. **Claims for rent.** When the insolvent is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the insolvency as if the same grew due from day to day and not at such fixed and stated periods. [R. C. 1895, § 6057.]

§ 7770. **No other claims allowed.** No debts other than those specified in the five preceding sections shall be proved or allowed against the estate. [R. C. 1895, § 6058.]

§ 7771. **Mutual debts.** If it appears that there has been mutual credit given by the debtor and any other person or mutual debts between them, the account between them shall be stated and one debt set off against the other and the balance shall be allowed or paid, as the case may be, but no set-off or counterclaim shall be allowed of a claim in its nature not provable against the estate. [R. C. 1895, § 6059.]

§ 7772. **Claims secured by lien, etc.** When a creditor has a mortgage or pledge of real or personal property of the debtor or a lien thereon for securing the payment of a debt claimed by him, the property so held as security shall, if he requires it, be sold and the proceeds applied towards the payment of his debt, and he shall be admitted as a creditor for the residue. The sale shall be made in such manner as the court orders and the creditor and assignee respectively shall execute all deeds and papers necessary or proper for effecting the conveyance. If the creditor does not require such sale and join in effecting the conveyance, he may release and deliver up to the assignee the property held as security and be admitted as a creditor for the whole of his debt. If the property is not so sold, or released and delivered up, the creditor shall not be allowed to prove any part of his debt. [R. C. 1895, § 6060.]

§ 7773. **When preference bars claim.** No person who shall have accepted any preference, having any reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this chapter, shall prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend thereon until he shall first have surrendered to the assignee all property, money, benefit or advantages received by him under such preference. [R. C. 1895, § 6061.]

§ 7774. **Oath of claimant.** No debt shall be proved or allowed unless the creditor, or his agent or attorney having knowledge of the facts, makes oath in substance as follows:

I, ..., do swear (or affirm as the case may be) that ....., by (or against) whom proceedings in insolvency have been instituted, at and before the date of such proceedings was, and still is justly and truly indebted to me in the sum of.....dollars, for which sum, or any part thereof, I have not, nor has any other person, to my use to my knowledge or belief received any security or satisfaction whatever beyond what has been disposed of agreeably to law. And I do further swear (or affirm as the case may be) that such claim was not procured by me for the purpose of influencing the proceedings in this case, and that I have not directly or indirectly made or entered into any bargain, arrangement or agreement, express or implied, to sell, transfer or dispose of my claim, or any part thereof, against such debtor, nor have I directly or indirectly received or taken, or made or entered into any bargain, arrangement or agreement, express or implied, to take or receive directly or indirectly any money, property or consideration whatsoever to myself, or to any person or persons to my use or benefit, under or with any understanding or agreement, express or implied, whereby the debtor's discharge is or shall be in any way affected, influenced or controlled, or whereby the proceedings in this case are or shall be affected, influenced or controlled.

In case the above oath is made by an agent or attorney the court may require such further proof of the truth of the statements therein as it deems expedient. [R. C. 1895, § 6062.]

§ 7775. **Examination of witnesses as to claims.** The court may on the application of the assignee, of any creditor or of the debtor examine upon oath any person who has made proof of a claim and may summon any person to give evidence concerning such proof and may alter or expunge such claim when the evidence shows that it is founded in whole or in part in fraud, illegality or mistake. [R. C. 1895, § 6063.]

§ 7776. **Examination of debtor.** The court may on application of the assignee or of any creditor, or without any application, at all times require the insolvent upon reasonable notice to attend and submit to an examination on oath upon all matters relating to the disposal or condition of his property, to his trade and dealings with others, his accounts concerning the same, any debts due to or claimed from him and any other matters concerning his property and estate and the due settlement thereof according to law Such examination shall be in writing and shall be signed by the insolvent and filed with the other proceedings. [R. C. 1895, § 6064.]

§ 7777. **Allowance by assignee, notice of.** The assignee shall allow all debts duly proved and shall, when a claim is presented to him and the same is allowed or rejected, give notice personally or by mail to the creditor, or his agent or attorney, presenting the same, as to his action thereon. [R. C. 1895, § 6065.]

§ 7778. **Appeal from rejection.** A creditor whose claim is wholly or in part rejected may within thirty days after notice of such rejection appeal from the decision of the assignee to the district court. Such appeal shall be placed upon the calendar for trial at the term of the district court which shall be first held within the county after the taking of such appeal. [R. C. 1895, § 6066.]

§ 7779. **How taken and heard.** Upon taking the appeal a creditor shall file in the office of the clerk of the district court a statement in writing of his claim, setting forth the same substantially as in a complaint in a civil action, and the assignee shall plead thereto in like manner and the practice in such cause shall be the same as in a civil action commenced and prosecuted in the usual manner, except that no execution shall be awarded against the

assignee for the amount of a debt found due to the creditor. The party prevailing in the action shall be entitled to costs against the adverse party to be taxed as in other actions. If recovered against the assignee they shall be allowed out of the estate. [R. C. 1895, § 6067.]

Article 6.—Dividends.

§ 7780. **First dividend.** At the expiration of three months from the appointment of the assignee in any case, or as much earlier as the court may direct, the assignee shall exhibit to the court and to the creditors and file just and true accounts of all his receipts and payments verified by his oath, and a statement of the property outstanding specifying the cause of its outstanding; also what debts or claims are yet undetermined and stating what sum remains in his possession; and thereupon a dividend shall be made, unless for cause the court shall otherwise order. Thereafter further accounts, statements and dividends shall be made in like manner as often as occasion requires. [R. C. 1895, § 6068.]

§ 7781. **When preferred claims paid.** At any time after the assignment on the request of the assignee or a creditor and upon such notice to the creditors and assignee as the court shall think proper the court may in its discretion order the payment in whole or in part of claims entitled to priority or preference. [R. C. 1895, § 6069.]

§ 7782. **Order of priority among claims.** The following claims shall be entitled to priority and to be first paid in full in their order:

1. All debts due to the United States and all debts due to and taxes assessed by this state or any county, city or town therein.
2. All debts owing for the wages of servants, laborers, mechanics and clerks for labor performed within one year next preceding the commencement of proceedings in insolvency.
3. All debts due to physicians for medical attendance on the debtor or his family rendered within six months prior to the commencement of proceedings in insolvency to an amount not exceeding fifty dollars.
4. All debts due to persons, who by the law of the United States or of this state, are or may be entitled to a priority or preference in like manner as if this chapter had not been enacted.
5. Legal fees, costs and expenses of suit and for the custody of property attached and the costs of such attachment, when the attachment has been dissolved by bond given by the defendant, if the claim upon which the action was commenced is proved against the estate of the debtor. [R. C. 1895, § 6070.]

§ 7783. **Reservation for distant creditors.** If at the time of ordering the dividend it appears probable that there are just claims against the estate which by reason of the distant residence of a creditor or from other sufficient reason have not been proved, the court in ordering the dividend shall leave in the hands of the assignee a sum sufficient to pay every such absent creditor a proportion equal to what shall be then paid to the other creditors, which sum shall remain thus unappropriated in the hands of the assignee until the final dividend is declared or until the court orders its distribution. [R. C. 1895, § 6071.]

§ 7784. **Second dividend.** The assignee shall at such time as the court directs within eighteen months after the appointment of the assignee make a second dividend of the estate, if the same was not wholly distributed upon the first dividend, and any balance in the hands of the assignee shall by order of the court be divided among the creditors who have proved their debts in proportion thereto. [R. C. 1895, § 6072.]

§ 7785. **Sale of debts not easily collectible.** If at any time before the final dividend there remains in the hands of the assignee any outstanding debts or other property due or belonging to the estate, which cannot in the

opinion of the judge be collected and received by the assignee without unreasonable or inconvenient delay, the assignee may under the direction of the judge sell and assign such debts or other property in such manner as the court shall order. [R. C. 1895, § 6073.]

§ 7786. **When second dividend final.** The second dividend shall be final, unless an action relating to the estate is then pending, or part of the estate is outstanding, or unless some other property of the debtor afterwards comes to the hands of the assignee; in which cases another dividend shall be made by order of the court. [R. C. 1895, § 6074.]

§ 7787. **Prior dividends not disturbed.** No creditor whose debt is proved at the time of the second or any subsequent dividend shall disturb a prior dividend, but he shall be paid so far only as the funds remaining unappropriated in the hands of the assignee are sufficient therefor. [R. C. 1895, § 6075.]

§ 7788. **Final dividend. Application by assignee for discharge.** Preparatory to the final account and dividend the assignee shall submit his account to the court and file the same and shall at the time of filing accompany the same with an affidavit that notice by mail has been given to all creditors who have proved their claims, that he will apply for the settlement of his account and for a discharge from all liability as assignee at a time specified in such notice, which time shall be not less than ten nor more than twenty days from such filing. At the hearing the court shall audit the account and any person interested may appear and file exceptions in writing and contest the same. The court thereupon shall settle the account, order a dividend of any portion of the estate remaining undistributed and shall discharge the assignee, subject to compliance with the order of the court, from all liability as assignee to any creditor of the insolvent. [R. C. 1895, § 6076.]

Article 7.—Discharge of the Insolvent.

§ 7789. **Duty of debtor as to property.** The debtor shall upon demand deliver to the assignee all the commercial or account books he may have kept and all vouchers, notes, bonds, bills, securities or other evidences of debt, or writings in any manner relating to or having any bearing upon or connection with the property of such debtor; and he shall at the expense of the estate make and execute such deeds and writings and indorse such bills, notes and other negotiable paper, draw such checks and orders for moneys deposited in bank or elsewhere and do all such other lawful acts and things as the assignee at any time reasonably requires and as are necessary or useful for confirming the assignment and enabling the assignee to demand, recover and receive all the estate and property so assigned, especially any part thereof which is without this state. [R. C. 1895, § 6077.]

§ 7790. **Refusal to execute instrument contempt.** If the debtor refuses or unreasonably neglects to execute an instrument when lawfully required pursuant to an order of the court, or disobeys any lawful order or judgment, he may be proceeded against as for a contempt of court. [R. C. 1895, § 6078.]

§ 7791. **When insolvent may apply for discharge.** At any time after the expiration of six months from the adjudication of insolvency, or if no debts have been proved against the insolvent or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, the insolvent may apply to the court for a discharge from his debts. [R. C. 1895, § 6079.]

§ 7792. **Notice of application to creditors.** Upon application for the discharge being made, the court shall order notice to be given by the assignee by mail to all creditors who have proved their claims and by publication in such manner and for such length of time as the court may direct to appear on a day appointed for that purpose and show cause why a discharge should not be granted to the debtor. [R. C. 1895, § 6080.]

§ 7793. **When not granted.** No discharge shall be granted, or, if granted, shall be valid in any of the following cases:

1. If such debtor has willfully sworn falsely in his affidavit annexed to his petition or schedule, or upon any examination in the course of the proceedings in insolvency in relation to any material fact.

2. If after the presentation of the petition in insolvency, he shall sell or in any way transfer or assign any of his property or collect any debt due him and shall not give a just and true account thereof on the hearing of his application, and shall not also pay over to the assignee all money so collected or the value of the property so assigned.

3. If he shall secrete any part of his estate or any books or writings relative thereto with intent to defraud creditors.

4. If he shall fraudulently conceal the names of any of his creditors or the amount of any sum due to any of them.

5. If he shall pay or consent to the payment of any portion of the debt of any of his creditors, or shall grant or consent to the granting of any gift or reward to any such creditor upon any express or implied contract or trust that the creditors so paid or rewarded should abstain or desist from opposing the discharge of such insolvent.

6. If he shall be guilty of any fraud whatever contrary to the true intent of this chapter. [1877, ch. 93; R. C. 1895, § 6081.]

§ 7794. **Method of opposing.** Any creditor opposing the discharge of an insolvent may file a specification in writing of the grounds of his opposition and the court may in its discretion order any question of fact so presented to be tried at the next term of the district court thereafter. [R. C. 1895, § 6082.]

§ 7795. **Oath of insolvent.** Before any discharge is granted the insolvent must take and subscribe an oath to the effect that he has not done, suffered or been privy to any act, matter or thing specified as a ground for withholding such discharge or as rendering it voidable if granted. [R. C. 1895, § 6083.]

§ 7796. **When granted. Certificate of.** The court shall, if it satisfactorily appears that the creditor has made a full disclosure and delivery of all his estate as herein required and that he has in all things conformed himself to the directions and requirements of this chapter, grant him a certificate which shall state all fiduciary debts specially exempt from discharge and be in substance as follows:

State of North Dakota,} In District Court,
County of .....,} ss. .....Judicial District.

To all to whom these presents shall come, I,....., judge of the district court of the.....judicial district for the said county of....., send greeting:

Whereas, it has been made to appear to me that ..... of .....in the said county of....., whose estate has been assigned for the benefit of his creditors according to law, has made a full disclosure and delivery of all his estate and that he has in all things conformed himself to the requirements of law in that behalf made and provided, I do accordingly certify that said ..... is absolutely and wholly discharged from all his debts which have been or shall be proved against his estate assigned as aforesaid, and from all his debts which are provable against his estate and which are found on any contract made by him within this state or to be performed within the same and made subsequent to (date of taking effect of this article), and from all debts which are provable as aforesaid and which are founded on any contract made by him since that date and due to any persons who were resident within this state on the .....day of.....last, being the day of the first publication of the notice requiring creditors to show cause, and from all demands against him for or on account of any personal property wrongfully obtained,

taken or withheld by him; and I do further certify that said..... is forever exempted and discharged from arrest or imprisonment in any action or upon any proceeding in favor of any such person, arising within the time aforesaid, for or on account of any debt or demand whatever which might have been proved against his estate assigned as aforesaid.

Given under my hand and the seal of said court this..... day of.....in the year..... [R. C. 1895, § 6084.]

§ 7797. From what debts discharged. How discharge pleaded. The debtor shall thereupon, except as provided in the next section, be absolutely and wholly discharged from debts proved against his estate and from all debts provable under this chapter and founded on any contract made by him subsequently to the taking effect of this article and while a resident of this state, to be performed within the same, or due to any person residing therein at the time of the first publication of the notice requiring creditors to show cause and from all demands against him for or on account of any personal property wrongfully obtained, taken or withheld by him. Such discharge may be pleaded by a simple averment that on the day of its date it was granted to the debtor, setting forth a copy of the same, as a full and complete bar to all actions commenced on such debt or demands. The certificate shall be conclusive evidence of the fact and regularity of such discharge. [R. C. 1895, § 6085.

Proof of claim and receipt of dividends do not waive right to insist that discharge impairs obligation of contract unless full payment is made. See note at end of decision in N. D. Report. Elton v. O'Connor, 6 N. D. 1, 68 N. W. 84.

§ 7798. From what not discharged. No debt created by the debtor's defalcation as a public officer, executor, administrator, guardian, receiver, trustee or assignee of an insolvent estate, or by the fraud or embezzlement of the debtor, or claim for goods attached or taken on execution by the debtor as an officer, or for misfeasance in office shall be discharged under this chapter, but the dividend declared thereon shall be payment of so much of said debt or claim. A claim for necessaries furnished to the debtor or his family shall not be so discharged unless the claim is proved against his estate. [R. C. 1895, § 6086.]

§ 7799. Does not release persons liable with debtor. A discharge shall not release or discharge a person liable for or with the debtor for the same debt as a partner, joint contractor, indorser, surety or otherwise. [R. C. 1895, § 6087.]

§ 7800. Discharge of debtor once insolvent. A discharge shall not be granted to a debtor a second time insolvent whose assets do not pay fifty per cent of the claims proved against the estate, unless the assent in writing of three-fourths in value of his creditors who have proved their claims is filed in the case at or before the time of the hearing of the application for discharge. No discharge shall be granted to a debtor a third time insolvent; except that a debtor who has paid all debts owing by him at the time of his previous insolvency or who has been voluntarily released therefrom by his creditors shall be entitled to a discharge in the same manner and with the same effect as if he had not been previously insolvent. [R. C. 1895, § 6088.]

§ 7801. What preferences void. Recovery. If a person, being insolvent or in contemplation of insolvency, within sixty days before the filing of the petition by him, with the view of giving a preference to any creditor or person who has a claim against him or is under liability for him, procures any part of his property to be attached or seized upon execution or makes any payment, pledge, assignment, transfer or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, with the intent and for the purpose of defrauding creditors, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, having reasonable cause to believe that such person is insolvent or

in contemplation of insolvency, or that such payment, pledge, assignment, transfer or conveyance is made in fraud of the rights of creditors, the same shall be void; and the assignee may recover the property or the value of it from the person so receiving it or so benefited, but any transfer of property made, money paid, or security given in good faith for the purpose of paying or securing a bona fide indebtedness shall be valid, whether such transfer was made, money paid, or security given before or after the taking effect of this article. [1897, ch. 93; R. C. 1899, § 6089.]

§ 7802. **When payment or security void. Judgments.** Any payment by the insolvent of a pre-existing debt or any pledge, assignment, transfer or conveyance of any part of his property to secure the payment of the same, either directly or indirectly, absolutely or conditionally, made with the intent and for the purpose of defrauding his creditors, and made within thirty days before the filing of the petition by the insolvent, shall be void, and the assignee may recover the property, or the value of it, from the person receiving it, or to be benefited thereby. No judgment rendered in an action which has not been pending for more than six months before the filing of the petition by the insolvent and not docketed until within thirty days before the filing of such petition shall be a lien upon the whole property of the insolvent. [1897, ch. 93; R. C. 1899, § 6090.]

§ 7803. **Judgment, when final. New trial.** The judgment of the district court granting or refusing the application of the insolvent for a discharge from his debts, as mentioned in section 7796, shall be final and shall not be subject to an attack on any proposition by or against the insolvent unless a new trial is granted or an appeal to the supreme court from such judgment procured within thirty days, or such further time as the court shall allow, not exceeding sixty days, after the entry of such judgment in the office of the clerk of the district court of the county wherein such insolvent resided at the commencement of the insolvency proceedings. [1897, ch. 93; R. C. 1899, § 6091.]

§ 7804. **Appeals.** Appeals may be taken to the supreme court by such insolvent from an adjudication of insolvency or an adjudication refusing a discharge of his debts, or from an order granting a new trial, vacating his discharge, or by any creditor opposing such discharge, from any order granting a new trial, or an order in favor of the insolvent, upon a new trial of the application for a discharge; which appeal shall be taken as ordinary appeals in civil actions. [1897, ch. 93; R. C. 1899, § 6092.]

Article 8.—Proceedings Peculiar to Partnerships.

§ 7805. **Petition and procedure.** Two or more persons who are partners in business may be adjudged insolvent either on the petition of such partners or any of them, or on the petition of one or more creditors holding debts provable against the firm amounting to at least four hundred dollars. The same proceedings shall be had therein as in the case of an individual except as hereinafter provided, and in such proceedings an assignee may be appointed who shall take possession of all property of the firm and also of the separate property of each of the general partners. If the petition is made by one or more, but not by all of the partners, ten days' notice of the time and place of the hearing of the petition shall be given to the other partners, if within the United States. All the creditors of the firm and the separate creditors of each partner may prove their respective debts. [R. C. 1895, § 6093.]

§ 7806. **By whom assignee chosen. How partnership and individual property applied.** The assignee shall be chosen by the creditors of the partnership. He shall keep separate accounts of the property of the partnership and the separate estate of each member thereof; and after deducting out of the whole amount received by him the whole of the expenses and disbursements,

the net proceeds of the partnership property shall be appropriated to pay the creditors of the partnership and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. If there is any balance of the separate estate of any partner after payment of his separate debts, such balance shall be added to the partnership estate for the payment of the partnership creditors; if there is any balance of the partnership estate after payment of the partnership debts, such balance shall be appropriated to and divided among the separate estates of the several partners according to their respective right and interest therein, and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts. [R. C. 1895, § 6094.]

§ 7807. **Rule governing discharge.** The certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone. If such partners reside in different judicial districts, the court in which the petition is first filed shall retain exclusive jurisdiction over the case. [R. C. 1895, § 6095.]

CHAPTER 41.

SPECIAL PROCEEDINGS OF A CIVIL NATURE.

Article 1.—Preliminary Provisions.

§ 7808. **Parties to.** When a special proceeding is prosecuted by one having a special interest in the proceeding, it shall not be necessary for the state to be joined as plaintiff therein, but the person prosecuting the same shall be known as the plaintiff and the adverse party as the defendant. [C. Civ. P. 1877, § 683; R. C. 1895, § 6096.]

A special proceeding to enforce a right where the state as such is concerned should be had in the name of the "State ex rel,————." State ex rel Hail Association v. Carey, 2 N. D. 36, 49 N. W. 164.

The following decisions have been made in South Dakota:

Beneficially interested party should be named as plaintiff, and proceeding should be in the name of state. State ex rel Smith v. Lawrence, 2 S. D. 185, 49 N. W. 7; Howard v. City of Huron, 5 S. D. 539, 59 N. W. 833; Territory v. Cole, 3 Dak. 301, 19 N. W. 418.

§ 7809. **Judgment in defined. Motion and order.** A judgment in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and an order in a civil action are applicable to similar acts in a special proceeding. [C. Civ. P. 1877, § 684; R. C. 1895, § 6097.]

Article 2.—Writ of Certiorari.

§ 7810. **When and by whom granted.** A writ of certiorari may be granted by the supreme and district courts, when inferior courts, officers, boards or tribunals have exceeded their jurisdiction and there is no appeal, nor, in the judgment of the court, any other plain, speedy and adequate remedy. [C. Civ. P. 1877, § 685; R. C. 1895, § 6098.]

As to adequate remedy. Supreme court has power to order restitution of every thing taken on void writ, and in such a case judgment on certiorari is entered in supreme court. State ex rel Bank v. Rose, 4 N. D. 319, 58 N. W. 514.

Not a proper remedy to correct an error of law. Remedy is by appeal. Lewis v. Gallup, 5 N. D. 384, 67 N. W. 137.

An order depleting the salary of state's attorney not being appealable and no other remedy being afforded in regular course which is plain, speedy and adequate, certiorari is proper. State ex rel Clyde v. Lauder, 11 N. D. 136, 90 N. W. 564.

Not a remedy to annul a tax or avoid its payment in supreme court. Rule in supreme court is, to issue writ only as a prerogative writ—not to enforce a private right, not redress a private wrong. Elevator Co. v. White, 11 N. D. 534, 90 N. W. 12.

Supreme court may issue. State ex rel Dollard v. Board of Commissioners, 1 S. D. 292, 46 N. W. 1127.

Office of the writ of certiorari confined to questions touching jurisdiction of inferior courts, officers, boards and tribunals. State ex rel Express Co v. Board of Assessment, 3 S. D. 338, 53 N. W. 192.

Will not lie where law affords plain, speedy, and adequate remedy. Perrott v. Owen, 7 S. D. 454, 64 N. W. 526; American Savings & Loan Association v. Campbell, 8 S. D. 170, 65 N. W. 815; Sioux Falls National Bank v. McKee, 3 S. D. 1, 50 N. W. 1057; Champion v. Board of Commissioners, 5 Dak. 416, 41 N. W. 739.

§ 7811. **How application made.** The application must be made on affidavit by the party beneficially interested, and the court may require a notice of the application to be given to the adverse party or may grant an order to show cause why it should not be allowed or may grant the writ without notice. [C. Civ. P. 1877, § 686; R. C. 1899, § 6099.]

Plaintiff in an attachment suit, is person "beneficially interested." State ex rel Bank v. Rose, 4 N. D. 319, 58 N. W. 514.

Application for a writ to review an order of a district judge directing the destruction of certain gambling devices, etc., which shows that the applicant has transferred his entire interest and has no interest at time of application, is not made by "the party beneficially interested," within the meaning of this section. Sanderson v. Winchester, 10 N. D. 85, 85 N. W. 988.

§ 7812. **To whom directed.** The writ may be directed to the inferior court, tribunal, board or officer, or to any other person having the custody of the records or proceedings to be certified. [C. Civ. P. 1877, § 687; R. C. 1899, § 6100.]

Cannot be directed to ex-official after he has parted with record sought to be reviewed. In re Dance, 2 N. D. 184, 49 N. W. 733.

How directed, and to whom. Van den Bos v. Board of Commissioners, 11 S. D. 190, 76 N. W. 935.

§ 7813. **Requisites of writ.** The writ of certiorari shall command the party to whom it is directed to certify fully to the court issuing the writ at a specified time and place, and annex to the writ a transcript of the record and proceedings, describing or referring to them with convenient certainty, and a statement of other matter specified in and required by the writ, that the same may be reviewed by the court, and requiring the party in the meantime to desist from further proceedings in the matter to be reviewed. [C. Civ. P. 1877, § 688; R. C. 1895, § 6101.]

§ 7814. **To officer whose term has expired.** A writ of certiorari may be issued to and a return to a writ of certiorari may be made by an officer, whose term of office has expired. Such an officer may be punished for a failure to make a return to the writ as required thereby, or to make a further return as required by an order for that purpose. [R. C. 1895, § 6102.]

§ 7815. **Stay of proceedings.** If a stay of proceedings is not intended, the words requiring the stay must be omitted from the writ; these words may be inserted or omitted in the sound discretion of the court, but if omitted, the power of the inferior court or officer is not suspended or the proceedings stayed. [C. Civ. P. 1877, § 689; R. C. 1899, § 6103.]

§ 7816. **Other proofs permitted if officer dies, etc.** If the officer or other person whose duty it is to make a return dies, absconds or moves from the state, or becomes insane after the writ is issued and before making a return or after making an insufficient return, and it appears that there is no other officer or person from whom a sufficient return can be procured by means of a new writ, the court may in its discretion permit affidavits or other written proofs relative to the matters not sufficiently returned to be produced and may hear the case accordingly. The court may also in its discretion permit either party to produce affidavits or other written proofs relative to any alleged error of fact or any other question of fact, which is essential to the jurisdiction of the body or officer to make the determination to be reviewed, when the facts in relation thereto are not sufficiently stated in

the return and the court is satisfied that they cannot be made to appear by means of an order for a further return. [C. Civ. P. 1877, § 689; R. C. 1895, § 6104.]

§ **7817. How served.** The writ must be served in the same manner as a summons in a civil action except when otherwise expressly directed by the court. [C. Civ. P. 1877, § 690; R. C. 1899, § 6105.]

§ **7818. Extent of review.** The review upon this writ cannot be extended further than to determine whether the inferior court, tribunal, board or officer has regularly pursued the authority of such court, tribunal, board or officer. [C. Civ. P. 1877, § 691; R. C. 1899, § 6106.]

§ **7819. Return of writ and hearing.** If the return to the writ is defective the court may order a further return to be made. Any record made by the inferior court, officer, board or tribunal may be impeached by the return to the writ, or in the cases mentioned in section 7816 by affidavits or other written proof. Upon the final hearing the court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment either affirming, or annulling, or modifying the proceedings below. [C. Civ. P. 1877, § 692; R. C. 1895, § 6107.]

§ **7820. Judgment sent below.** A copy of the judgment signed by the clerk must be transmitted to the inferior court, tribunal, board or officer, having custody of the record or proceedings certified up. [C. Civ. P. 1877, § 693; R. C. 1899, § 6108.]

§ **7821. Judgment roll.** A copy of the judgment signed by the clerk, entered upon or attached to the writ and return, constitutes the judgment roll. [C. Civ. P. 1877, § 694; R. C. 1899, § 6109.]

Article 3.—Writ of Mandamus.

§ **7822. By and to whom issued.** The writ of mandamus may be issued by the supreme and district courts to any inferior tribunal, corporation, board or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person. [C. Civ. P. 1877, § 695; R. C. 1899, § 6110.]

Supreme court has original jurisdiction to issue to lower courts and officers. State v. Nelson County, 1 N. D. 88, 45 N. W. 33; City of Huron v. Campbell, 3 S. D. 309, 53 N. W. 182; Everitt v. Board of Commissioners, 1 S. D. 365, 47 N. W. 296; State ex rel R. R. Co. v. District Judge, 3 N. D. 43, 53 N. W. 433; Vine v. Jones, 13 S. D. 54, 82 N. W. 82.

Where state or a large number of persons are concerned, should be applied for by attorney general in name of state. State ex rel Hail Association v. Carey, 2 N. D. 36, 49 N. W. 164.

County official may compel commissioners to provide office. Cleary v. Eddy County, 2 N. D. 397, 51 N. W. 586; State ex rel Casper v. Porter, 15 S. D. 387, 89 N. W. 1012.

Alternative writ was quashed because it appeared that motion for new trial which it directed judge to decide was not pending before him for decision. State ex rel R. R. Co. v. District Judge, 3 N. D. 43, 53 N. W. 433.

Prevailing rule of law is title to office will not be tried by mandamus. State ex rel Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025.

Supreme court may by mandamus direct district courts to settle statement of case. Kaeppler v. Pollock, 8 N. D. 59, 76 N. W. 987.

For review of mandamus proceedings, see Mooney v. Donovan, 9 N. D. 93, 81 N. W. 50.

Will only issue when right of relator is clear. Bailey v. Lawrence County, 2 S. D. 533, 51 N. W. 331; Howard v. City of Huron, 6 S. D. 180, 60 N. W. 803; State ex rel S. & L. Co. v. Getchell, 3 N. D. 243, 55 N. W. 585.

Order of judge granting peremptory writ, not appealable until decision of case. Holden v. Haserodt, 3 S. D. 4, 51 N. W. 340; Territory v. Shearer, 2 Dak. 332, 8 N. W. 135; Evans v. Bradley, 4 S. D. 83, 55 N. W. 721.

Final determination is a judgment. Hardy v. Purington, 6 S. D. 382, 61 N. W. 158; State ex rel McGregor v. Young, 6 S. D. 406, 61 N. W. 165.

Real party in interest should be named as party plaintiff. Heintz v. Moulton, 7 S. D. 272, 64 N. W. 135; Howard v. City of Huron, 5 S. D. 539, 59 N. W. 833; Smith v. Lawrence, 2 S. D. 185, 49 N. W. 7; Territory v. Cole, 3 Dak. 301, 19 N. W. 418.

Not issue to compel officer to act in violation of restraining order. Wilmarth v. Ritschlag, 9 S. D. 172, 68 N. W. 312.

§ **7823. When issued.** The writ must be issued in all cases when there is not a plain, speedy and adequate remedy in the ordinary course of law. It must be issued upon affidavit upon the application of the party beneficially interested. [C. Civ. P. 1877, § 696; R. C. 1899, § 6111.]

Mandamus will not lie to control official discretion. Oliver v. Wilson, 8 N. D. 590, 80 N. W. 757; State ex rel Wiles v. Albright, 11 N. D. 22, 88 N. W. 729; Sawyer v. Mahew, 10 S. D. 18, 71 N. W. 141.

A judicial determination will not be reviewed by mandamus. State ex rel Attorney General v. District Court, 13 N. D. 211, 100 N. W. 248.

§ **7824. Alternative or peremptory.** The writ may be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed and command such party immediately upon the receipt of the writ, or at some other specified time, to do the act required to be performed or to show cause before the court at a specified time and place why he has not done so. The peremptory writ must be in similar form except that the words requiring the party to show cause why he has not obeyed the command must be omitted and a return day inserted. [C. Civ. P. 1877, § 697; R. C. 1899, § 6112.]

§ **7825. When each may issue.** When the application to the court is made without notice to the adverse party and the writ is allowed, the alternative writ must be first issued; but if the application is upon due notice and the writ is allowed, the peremptory writ may be issued in the first instance. The notice of the application, when given, must be at least ten days. The writ cannot be granted by default. The case must be heard by the court whether the adverse party appears or not. [C. Civ. P. 1877, § 698; R. C. 1899, § 6113.]

§ **7826. Answer.** On the return of the alternative writ, or the day on which the application for the writ is noticed, the party on whom the writ or notice has been served may show cause by answer under oath made in the same manner as an answer to a complaint in a civil action. [C. Civ. P. 1877, § 699; R. C. 1899, § 6114.]

§ **7827. Jury may assess damages.** If an answer is made which raises a question as to a matter of fact essential to the determination of the motion and affecting the substantial rights of the parties and upon the supposed truth of which allegation the application for the writ is based, the court may in its discretion order the question to be tried before a jury, and postpone the argument until such trial can be had and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial and the county or subdivision must be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained in case they find for him. [C. Civ. P. 1877, § 700; R. C. 1899, § 6115.]

§ **7828. Latitude of proof.** On the trial the applicant is not precluded by the answer from any valid objection to its sufficiency and may countervail it by proof either in direct denial or by way of avoidance. [C. Civ. P. 1877, § 701; R. C. 1899, § 6116.]

§ **7829. New trial, where motion made.** The motion for new trial must be made in the court in which the issue of fact is tried. [C. Civ. P. 1877, § 702; R. C. 1895, § 6117.]

§ **7830. Transmission of verdict.** If no notice of a motion for a new trial is given or, if given, the motion is denied, the clerk within five days after rendition of the verdict or denial of the motion must transmit to the

court in which the application for the writ is pending a certified copy of the verdict attached to the order of trial, after which either party may bring on the argument of the application upon reasonable notice to the adverse party. [C. Civ. P. 1877, § 703; R. C. 1899, § 6118.]

§ **7831. Hearing.** If no answer is made, the case must be heard on the papers of the applicant. If the answer raises only questions of law or puts in issue only immaterial statements not affecting the substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the case. [C. Civ. P. 1877, § 704; R. C. 1899, § 6119.]

§ **7832. Damages. Peremptory writ.** If judgment is given for the applicant, he may recover damages which he has sustained as found by the jury, or as may be determined by the court, or referee upon a reference to be ordered, together with costs; and for such damages and costs execution may issue; and a peremptory mandamus must also be awarded without delay. [C. Civ. P. 1877, § 705; R. C. 1899, § 6120.]

§ **7833. How writ served.** The writ must be served in the same manner as summons in a civil action except when otherwise expressly directed by order of the court. Service upon a majority of the members of any board or body is service upon the board or body whether at the time of the service the board was in session or not. [C. Civ. P. 1877, § 706; R. C. 1899, § 6121.]

§ **7834. Disobedience. Punishment.** When a peremptory mandamus has been issued and directed to any inferior tribunal, corporation, board or person, if it appears to the court that any member of such tribunal, corporation, board or such person upon whom the writ has been personally served has without just excuse refused or neglected to obey the same the court may upon motion impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience the court may order the party to be imprisoned until the writ is obeyed and may make any orders necessary and proper for the complete enforcement of the writ. [C. Civ. P. 1877, § 707; R. C. 1899, § 6122.]

Article 4.—Writ of Prohibition.

§ **7835. Definition of.** The writ of prohibition is the counterpart of the writ of mandamus. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. [C. Civ. P. 1877, § 708; R. C. 1899, § 6123.]

§ **7836. By whom and when issued.** It may be issued by the supreme and district courts to an inferior tribunal, or to a corporation, board or person in all cases, when there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit on the application of the person beneficially interested. [C. Civ. P. 1877, § 709; R. C. 1899, § 6124.]

§ **7837. Alternative or peremptory.** The writ must be alternative or peremptory. The alternative writ must state generally the allegations against the party to whom it is directed, and command such party to desist or refrain from further proceedings in the action or matter specified therein, until the further order of the court from which it is issued, and to show cause before such court at a specified time and place why such party should not be absolutely restrained from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he should not be absolutely restrained, etc., must be omitted and a return day inserted. [C. Civ. P. 1877, § 710; R. C. 1899, § 6125.]

§ **7838. Other laws applicable.** The provisions for the proceeding under the writ of mandamus, except the first three sections thereof, apply to this proceeding.]C. Civ. P. 1877, § 711; R. C. 1899, § 6126.]

ARTICLE 5.—MISCELLANEOUS PROVISIONS.

§ 7839. **What writs issue in vacation.** Writs of certiorari, mandamus and prohibition may be issued by a judge of the district court in vacation, and when issued by a judge of the district court may be made returnable and a hearing thereon be had in vacation. [C. Civ. P. 1877, § 712; R. C. 1895, § 6127.]

§ 7840. **Rules of practice.** Except as otherwise provided in this chapter, the provisions of chapters 3 to 35 of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter. [C. Civ. P. 1877, § 713; R. C. 1899, § 6128.]

Statute of limitations applies to mandamus proceedings the same as other actions. Coler v. Sterling, 15 S. D. 415, 89 N. W. 1022.

§ 7841. **New trials and appeals.** The provisons of chapters 11 and 15 relative to new trials and appeals, except in so far as they are inconsistent herewith, apply to the proceedings mentioned in this chapter. [C. Civ. P. 1877, § 714; R. C. 1899, § 6129.]

CHAPTER 42.

SUMMARY PROCEEDINGS.

ARTICLE 1.—CONFESSION OF JUDGMENT WITHOUT ACTION.

§ 7842. **For what confessed.** A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter. [C. Civ. P. 1877, § 715; R. C. 1899, § 6130.]

§ 7843. **Verified statement. Contents.** A statement in writing must be made, signed by the defendant and verified by his oath, to the following effect:

1. It must state the amount for which judgment may be entered and authorize the entry of judgment therefor.

2. If the judgment to be confessed is for money due or to become due, it must state concisely the facts out of which the debt arose, and must show that the sum confessed therefor is justly due or to become due.

3. If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability and must show that the sum confessed therefor does not exceed the amount of such liability. [C. Civ. P. 1877, § 716; R. C. 1899, § 6131.]

§ 7844. **Procedure in court. Execution.** The statement must be presented to the district court or a judge thereof and, if the same is found sufficient, the court or judge shall make an order that judgment be entered by the clerk, whereupon the statement and order may be filed in the office of the clerk, who shall enter in the judgment book a judgment for the amount confessed, with costs. The statement and affidavit with the judgment shall thenceforth become the judgment roll. Execution may be issued and enforced in the same manner as upon judgments in other cases in such courts. When the debt for which the judgment is recovered is not all due, or is payable in installments and the installments are not all due, the execution may issue upon such judgment for the collection of such installments as have become due, and shall be in the usual form, but shall have indorsed thereon by the attorney or person issuing the same a direction to the sheriff to collect the amount due on such judgment with interest and costs, which amount shall be stated with interest thereon and the costs of said judgment.

Notwithstanding the issue and collection of such execution, the judgment shall remain as security for the installments thereafter to become due, and whenever any further installments become due, execution may in like manner be issued for the collection and enforcement of the same. [C. Civ. P. 1877, § 717; R. C. 1895, § 6132.]

ARTICLE 2.—SUBMITTING A CONTROVERSY WITHOUT ACTION.

§ **7845. Requisites of the case.** Parties to a question in difference, which might be the subject of a civil action, may without action agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real and the proceeding in good faith to determine the rights of the parties. The court shall thereupon hear and determine the case and render judgment thereon, as if an action were pending. [C. Civ. P. 1877, § 718; R. C. 1899, § 6133.]

Agreed statement of facts in ordinary action not within this section. Sweet v. Myers, 3 S. D. 324, 53 N. W. 187; Ramsdell v. Duxberry, 14 S. D. 222, 85 N. W. 221.
Proceeding under this section, not an action. Ayers & Co. v. Sunback, 5 S. D. 31, 58 N. W. 4.

§ **7846. Entry of judgment. Judgment roll.** Judgment shall be entered in the judgment book as in other cases, but without costs for any proceeding prior to trial. The case, the submission and a copy of the judgment shall constitute the judgment roll. [C. Civ. P. 1877, § 719; R. C. 1899, § 6134.]

§ **7847. Judgment enforceable as other judgments.** The judgment may be enforced in the same manner as if it had been rendered in an action and shall be subject to appeal in like manner. [C. Civ. P. 1877, § 720; R. C. 1899, § 6135.]

ARTICLE 3.—RELIEF OF PERSONS CONFINED IN JAIL ON CIVIL PROCESS.

§ **7848. Discharge authorized.** Every person confined in jail on execution issued on judgment recovered in a civil action shall be discharged therefrom at the end of ten days from his first confinement therein upon the conditions hereinafter specified. [C. Civ. P. 1877, § 721; R. C. 1899, § 6136.]

§ **7849. Notice of application.** Such person must cause notice in writing to be given to the plaintiff or his attorney when and where he will apply to the judge of the district court of the county in which he is confined for the purpose of obtaining a discharge from his imprisonment. [C. Civ. P. 1877, § 722; R. C. 1895, § 6137.]

§ **7850. How served.** Such notice must be served by delivering to and leaving with the plaintiff or his attorney in the action a copy thereof, if they, or either of them, reside in this state; otherwise notice may be served by mail. The notice shall be served a sufficient time before the time specified therein for the hearing of the application to allow the person upon whom it is served time to attend by the usual route of travel and one day for preparation. [C. Civ. P. 1877, § 723; R. C. 1895, § 6138.]

§ **7851. Hearing.** At the time and place specified in the notice such person must be taken under the custody of the sheriff before such district judge and examined on oath concerning his property and effects and the disposal thereof and his ability to pay the judgment for which he is committed; and such district judge shall also hear any other legal and pertinent evidence that may be produced by the debtor or creditor; and such examination must at the election of the creditor be reduced to writing and subscribed and sworn to by the debtor and other witnesses. [C. Civ. P. 1877, § 724; R. C. 1899, § 6139.]

§ **7852. Oath of prisoner.** If upon such examination the judge before whom the same is had shall be satisfied that the prisoner is entitled to his discharge, he shall administer to him the following oath:

I,....., do solemnly swear (or affirm) that I have not any estate, real or personal, to the amount of ten dollars, except such as is by law exempt from levy and sale on execution, and that I have not any other estate, nor have I conveyed, concealed or in any way disposed of any of my property, real or personal, with design to secure the same to my use, to hinder, or delay, or defraud my creditors. So help me God.

(Signed A. B.)

[C. Civ. P. 1877, § 725; R. C. 1899, § 6140.]

§ **7853. Certificate of discharge.** After administering the oath the judge must make a certificate under his hand as follows:

To the sheriff of the county of .....: I do hereby certify that ....., confined in your jail upon an execution at the suit of .....is entitled to be discharged from imprisonment, if he is imprisoned for no other cause. [C. Civ. P. 1877, § 726; R. C. 1895, § 6141.]

§ **7854. Forever exempt.** The jailer upon receiving such certificate must forthwith discharge the prisoner, if he is imprisoned for no other cause. The prisoner after being so discharged shall be forever exempt from arrest or imprisonment for the same debt, unless he shall be convicted of having sworn falsely upon his examination or in taking the oath herein prescribed. [C. Civ. P. 1877, § 727; R. C. 1895, § 6142.]

§ **7855. Judgment remains against estate.** The judgment against any prisoner who is discharged as herein provided for, shall remain in full force against the estate which may then or at any time after belong to him. And the plaintiff may take out a new execution against the goods and estate of the debtor in like manner and with like effect as if he had never been committed in execution. [C. Civ. P. 1877, § 728; R. C. 1899, § 6143.]

§ **7856. Prison costs.** If the debtor shall undertake to satisfy the execution, he shall not be entitled to his discharge from imprisonment until he has paid all the charges for his commitment and support in prison in addition to the sum due on the execution and the costs and charges thereon. [C. Civ. P. 1877, § 729; R. C. 1899, § 6144.]

§ **7857. Discharge by plaintiff.** The prisoner may at any time be discharged upon the order of the plaintiff in the action; and, when so discharged, such debtor shall not thereafter be liable to imprisonment again for the same cause of action. [C. Civ. P. 1877, § 730; R. C. 1899, § 6145.]

§ **7858. Creditor to advance prison costs.** Whenever a debtor is committed to jail on execution in a civil action, the creditor or some one in his behalf must from time to time advance to the sheriff or jailer sufficient money to pay for the support of such prisoner; and in case such creditor shall neglect or refuse so to advance the money for such prisoner's support upon the sheriff's or jailer's demand, the jailer must, at the expiration of twenty-four hours after such demand, discharge such prisoner from custody, and such discharge shall have the same effect as a discharge by order of the creditor. [C. Civ. P. 1877, § 731; R. C. 1899, § 6146.]

§ **7859. May apply every ten days for discharge.** If such judge does not discharge the prisoner, he may apply for his discharge at the end of every succeeding ten days in the same manner as above provided, and the same proceedings must thereupon be had. [C. Civ. P. 1877, § 732; R. C. 1895, § 6147.]

§ **7860. Appeal.** Either party may appeal to the supreme court from the order of the district judge granting or refusing a discharge from imprisonment under these provisions in the same manner as from an order granting, refusing, continuing or modifying a provisional remedy. [C. Civ. P. 1877, § 733; R. C. 1899, § 6148.]

CHAPTER 43.

CHANGE OF NAMES OF PERSONS AND PLACES.

§ 7861. **Court authorized to change.** The district court shall have the authority to change the names of persons, towns, villages and cities within this state. [C. Civ. P. 1877, § 734; R. C. 1899, § 6149.]

§ 7862. **Petition. Contents.** Any person desiring to change his or her name may file a petition in the district court of the county or subdivision in which such person may be a resident, setting forth:

1. That the petitioner has been a bona fide citizen of such county or subdivision for at least six months prior to the filing of the petition.
2. The cause for which the change of the petitioner's name is sought.
3. The name asked for.

And it shall be the duty of the judge of the district court at any term thereof after the filing of such petition, upon being duly satisfied by proof in open court of the truth of the allegations set forth in the petition and that there exists proper and reasonable cause for changing the name of the petitioner and that thirty days' previous notice of the intended application has been given in some newspaper printed in such district, to order and direct a change of the name of such petitioner and to direct that such order be entered by the clerk in the journal of the court. [C. Civ. P. 1877, § 735; R. C. 1899, § 6150.]

§ 7863. **Town, village or city. Petition.** Whenever it may be desirable to change the name of any town, village or city in any county of the state, a petition for that purpose may in like manner be filed in the district court of the county or subdivision in which such town, village or city is situated, setting forth the cause why such change of name is desirable and the name asked to be substituted, and the court on being satisfied by proof that the prayer of the petitioners is just, proper and reasonable, and that notice as in case of the change of names of persons provided for in the preceding section has been given and that two-thirds of the legal voters of such town, village or city desire such change of name and that there is no other town, village or city in the state of the name asked for, may order and direct such change of name and direct the clerk to enter such order upon the journal of the court. [C. Civ. P. 1877, § 736; R. C. 1899, § 6151.]

§ 7864. **Costs. Not to affect rights or pending actions.** All proceedings under this chapter shall be at the cost of the petitioner or petitioners and judgment may be entered against him or them for costs as in other civil actions; provided, always, that any change of name under the provisions of this chapter shall in no manner affect or alter any action or legal proceeding then pending, or any right, title or interest whatsoever. [C. Civ. P. 1877, § 737; R. C. 1899, § 6152.]

CHAPTER 44.

TRESPASS OF ANIMALS.

§ 7865. **Liability of owner for.** Any person owning or having in his charge or possession any horses, mules, cattle, goats, sheep or swine, which shall trespass upon the lands of another, whether fenced or not fenced, shall be liable to the party injured for all damages sustained by him by reason of such trespassing, to be recovered in a civil action in the

county in which such damages occurred, and the proceedings shall be the same in all respects as in other civil actions except as herein modified; provided, that no property shall be exempt from execution issued upon judgments obtained under this chapter except absolute exemptions; and provided, further, that the party claiming damages under the provisions of this chapter shall bring an action to recover the same within sixty days after the infliction of such damages. [1899, ch. 162; R. C. 1899, § 6153; 1901, ch. 197.]

Every man bound to keep his stock on his own premises. Bostwick v. Ry. Co., 2 N. D. 440, 51 N. W. 781; Tanderup v. Hansen, 5 S. D. 164, 58 N. W. 578.
Stock may roam at large, when. Ely v. Rosholt, 11 N. D. 559, 93 N. W. 864.

§ 7866. **Owner defined.** Any person occupying or cultivating lands shall be considered the owner thereof in any action under the provisions of the last section. [C. Civ. P. 1877, § 748; 1899, § 6154.]

§ 7867. **Notice of damages.** The party sustaining damages from the trespass of animals before commencing an action therefor shall, if he knows to whom such animals belong, notify him or the person having them in charge of such damage and the probable amount thereof. [C. Civ. P. 1877, § 749; R. C. 1899, § 6155.]

§ 7868. **Custody until damages paid Notice to owner where known.** The person suffering damages as aforesaid may keep such offending animals in custody until the damages and costs are paid or until good and sufficient security is given therefor, such security to be approved by a justice of the peace in and for said township or county as provided for in cases of bond in arrest and bail. Notice of the giving of such security must be given the person holding such stock at least one day before the approval of such security with the day and hour when such security will be submitted to such justice for approval. When such security is approved as herein provided, said justice shall issue an order directly to the person holding such stock to forthwith deliver such stock to the party entitled thereto, and the official receiving such order shall take such stock and deliver the same to the person entitled thereto. The costs may be charged as part of the costs in the action to determine the rights of the parties regarding such stock and whenever any animals are restrained under this chapter, the person restraining the same shall forthwith notify the owner or person, in whose custody the animals were at the time the trespass was committed, of their seizure, if he knows such owner or person. [1899, ch. 161; R. C. 1899, § 6156.]

§ 7869. **Trial. Judgment lien on animals.** Upon the trial of an action under the provisions of section 7865 the plaintiff shall prove the amount of damage sustained, and, if he has kept in custody the animals committing such damage, the amount of expense incurred therefor. And any judgment rendered in the action against the defendant shall be a lien upon the animals and they may be sold and the proceeds applied to the satisfaction of the judgment as in other cases of sale of personal property on execution; but if it shall appear upon the trial that no damage was sustained, judgment shall be rendered against the plaintiff for costs and for any damages sustained by defendant. [C. Civ. P. 1877, § 751; R. C. 1895, § 6157.]

§ 7870. **Service on unknown owner.** If upon the trial it appears that the defendant is not the owner or person in charge of the offending animals, the action shall be dismissed as to him and may proceed as against a defendant whose name is unknown. If at the commencement of the action the plaintiff does not know the name of the owner, or keeper of such offending animals, he may bring an action against a defendant unknown. In such case service shall be made by publishing a copy of the summons with a notice stating the nature of the action, in a newspaper, if there is one published in the county, and, if not, by posting copies of the summons and notice in three public places within the county, in either case not less than ten days previous to the day of trial. [C. Civ. P. 1877, § 752; R. C. 1895, § 6158.]

§ **7871. Sale. Disposition of surplus.** After judgment shall have been rendered against the defendant unknown as aforesaid, the offending animals shall be sold, and after the judgment and costs have been satisfied, if there is any surplus, it shall be placed in the hands of the county treasurer for the benefit of the owner, and if the owner does not appear and claim the same within one year from the day of sale, it shall be paid into the school fund of said county. [C. Civ. P. 1877, § 753; R. C. 1895, § 6159.]