PROBATE CODE.

CHAPTER 1.

THE CODE AND ITS OPERATION.

§ 8507. Title. This act shall be known as the probate code of the state of North Dakota. [R. C. 1905, § 7872; R. C. 1895, § 6160.]

§ 8508. Code establishes the law. How construed. This code establishes the law of this state upon the subjects to which it relates; and its provisions and all proceedings under it shall be liberally construed, with a view to effect its objects and promote justice. [R. C. 1905, § 7873; R. C. 1895, § 6161.]

§ 8509. Rights not affected. No right accrued or act done in any proceeding commenced before this code takes effect is in any manner impaired or injuriously affected by its provisions; but the mode of procedure shall thereafter conform as nearly as may be to its requirements. [R. C. 1905, § 7874; R. C. 1895, § 6162.]

§ 8510. Provisions, when in force. When a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute in force before this code takes effect, such provision shall remain in force and be deemed a part of this code as respects the right so affected. [R. C. 1905, § 7875; R. C. 1895, § 6163.]

§ 8511. Time, how computed. Unless otherwise specially provided, every period of time herein prescribed with reference to the commencement of a proceeding or the performance of any other act, shall be computed from the date of the event at which such period begins, although such event happened before the taking effect of this code. But this section shall not be construed so as to conflict in any manner with the provisions of the preceding section. [R. C. 1905, § 7876; R. C. 1895, § 6164.]

§ 8512. Words and phrases, how construed. Unless otherwise defined herein, words and phrases used in this code are to be construed according to the rules and definitions recognized in or prescribed by other statutes applicable thereto. [R. C. 1905, § 7877; R. C. 1895, § 6165.]

§ 8513. Signification of certain words and phrases. The following words and phrases have in this code the signification herein prescribed, except where a different signification is apparent from the context:

1. The word " case " refers to a subject matter which by the provisions of this code is cognizable in a county court, and includes every proceeding therein maintained in relation to the same matter or estate.
2. The words " county court," " county judge " and " clerk " are to be understood as referring only to the exercise of the jurisdiction and powers herein conferred.
3. The word " will " includes " codicil " and denotes a last will and testament, or an instrument purporting to be such, according to the context.
4. The phrase " person interested," when used in reference to an estate or fund, includes every person entitled either absolutely or conditionally to share in the same or the proceeds thereof, except a creditor.
5. The word " mandate " includes any process or order issuing from the court directing or prohibiting the performance of any act. [R. C. 1905, § 7878; R. C. 1895, § 6166.]

CHAPTER 2.

THE COUNTY COURT.

ARTICLE 1.— ORGANIZATION, POWERS AND DUTIES.

§ 8514. County court established. There is established in each organized county of this state a county court, which shall be a court of record, held by the county judge in the manner hereinafter prescribed. [R. C. 1905, § 7879; Const. § 110; R. C. 1895, § 6167.]

§ 8515. Terms of. The county court shall be always open for the transaction of probate business, and there shall be a regular term of the county court held at the county seat in each organized county, commencing at nine o'clock in the forenoon of the first Monday of each calendar month and continuing from day to day so long as shall be necessary. [R. C. 1905, § 7880; 1897, ch. 111, § 2; R. C. 1895, § 6168.]

§ 8516. Seal. Each county court shall have a seal upon which shall be inscribed the name of the state and county, and the words "Seal of the County Court." Such seal must be furnished by the board of county commissioners and be at least one and five-eighths of an inch in diameter, but when the court is unprovided with a seal the judge may procure one at the expense of the county, and a scroll or other device may be used as a seal until a seal can be procured. [R. C. 1905, § 7881; R. C. 1895, § 6169.]

§ 8517. Office of the judge, where. The county judge shall have an office at the county seat in rooms provided by the county, and furnished in like manner with tables, chairs, desks, cases for books and papers, books and record blanks, stationery and other articles required for the purposes of the office. [R. C. 1905, § 7882; R. C. 1895, § 6170.]

§ 8518. Office, when open. The judge shall keep his office open at all proper times during reasonable hours for the purpose of holding court and transacting business as prescribed by law. He shall safely keep the records of the court and all documents and other papers lawfully intrusted to him by virtue of his office, or in the course of any proceeding before him and deliver the same over to the persons entitled thereto or to his successor in office; but the records must be open during office hours to access and inspection by persons having any business therewith. [R. C. 1905, § 7883; R. C. 1895, § 6171.]

§ 8519. Judge not to act as attorney, when. A county judge shall not be an attorney in any civil or criminal action or other judicial proceeding, which involves or relates to an estate, or any part thereof, or other matter over which he has or may hereafter obtain jurisdiction, either for or against a surviving husband or wife, heir, devisee, executor, administrator, guardian or ward, debtor, creditor or other person, and he shall not counsel or advise as to any such action or proceeding or contemplated action or proceeding. The judges of all county courts not possessing increased jurisdiction, shall not recognize as entitled to practice in such county courts, any attorney who is a law partner or otherwise connected in business with such county judge, nor permit such law partner to make an appearance for clients, nor prosecute or defend any action or judicial proceeding in the county court, nor file any papers as attorney for any client in relation to any estate over which such county judge has jurisdiction. A willful violation of any of the foregoing

provisions of this section shall be deemed willful misconduct in office. [R. C. 1905, § 7884; R. C. 1899, § 6172; 1901, ch. 56.]

§ 8520. Clerk, how appointed. A clerk may be appointed for the county court by an order duly entered in the journal, and the appointment may be in like manner revoked by the judge at his pleasure. A clerk so appointed may until his appointment is revoked exercise the powers expressly conferred upon the clerk by the provisions of this code, but the judge shall be responsible for all his official acts, and may at all times act as his own clerk. No practicing attorney shall be appointed as clerk and no clerk shall act as attorney or as executor, administrator, guardian or appraiser in any matters before the court. [R. C. 1905, § 7885; R. C. 1895, § 6173.]

§ 8521. Clerk, powers of. A clerk may exercise concurrently with the judge the following powers:

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

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

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

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

5. He may postpone for a definite time not exceeding thirty days any hearing or other matter when the judge is absent from his office and cannot attend court; and in counties where the county courts have civil and criminal jurisdiction the duties and powers of the clerks of the county courts shall be as nearly as may be, the same as those of the clerks of the district courts. [R. C. 1905, § 7886; 1897, ch. 111, § 3; R. C. 1899, § 6174.]

§ 8522. Sheriff to execute process. The sheriff of the county must in person or by deputy attend the sittings of the county court whenever the judge shall so direct and must execute according to law or the direction of the court every process or other mandate issuing from the court. But when he is absent or unable to act in the discharge of any duty required of him by this section the judge may direct any constable of the county to act in his place. [R. C. 1905, § 7887; R. C. 1895, § 6175.]

§ 8523. Compensation of sheriff. Sheriffs and other officers shall receive for their services rendered in the county court or in the execution of its mandates the same compensation as for like service in the district court, payable by the county or by a party in like manner. [R. C. 1905, § 7888; R. C. 1895, § 6176.]

Article 2.— Jurisdiction and Powers of the County Court.

§ 8524. Jurisdiction. The county court has original jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, the sale of lands by executors, administrators and guardians, and such other probate jurisdiction as may be conferred by law. [R. C. 1905, § 7889; R. C. 1895, § 6177.]

Probate court has no jurisdiction to try title to land. Gjerstadengen v. Van Dusen, 7 N. D. 612, 76 N. W. 233; Arnegaard v. Arnegaard, 7 N. D. 475, 75 N. W. 797.

§ 8525. Powers of the court. In the exercise of its jurisdiction the county court has power:

1. To take the proof of wills, to admit wills to probate and to revoke the probate thereof.

2. To take proof of and determine heirship, and to revoke such determination.

3. To grant and revoke letters testamentary and letters of administration, and to appoint a successor in place of a person whose letters have been revoked.

4. To direct and control the conduct and settle the accounts of executors and administrators.

5. To direct the disposition of the property of decedents for the payment of their debts and funeral expenses and expenses of administration.

6. To enforce the payment of legacies and the distribution of estates of decedents and the payment or delivery by executors and administrators of money or other property in their possession belonging to the estate.

7. To appoint and remove guardians, to direct and control their conduct, settle their accounts and compel the payment and delivery by them of money or other property belonging to their wards.

8. To administer justice in all matters within its jurisdiction according to the provisions of the statutes relating thereto. [R. C. 1905, § 7890; Pro. C. 1877, § 1; R. C. 1895, § 6178.]

§ 8526. Jurisdiction in wills and administration. The county court of each county has jurisdiction to take the proof of a will and grant letters testamentary, to grant administration or to determine heirship, as the case requires:

1. When the decedent was at the time of his death a resident of that county, whether his death happened there or elsewhere.

2. When there is property of the decedent within that county which remains unadministered, he not being a resident of the state at the time of his death, in whatever place the death happened.

3. When the application was first made in that county, if the jurisdiction as defined in the preceding subdivision or in section 8527 is in two or more counties. [R. C. 1905, § 7891; Pro. C. 1877, § 7; R. C. 1895, § 6179.]

§ 8527. Appointment of a guardian. The jurisdiction to appoint a guardian is in the county court of the county in which the ward resides or in a case relating exclusively to his estate in the county where the property or some part thereof is situated. But the provisions of this chapter have no application to the appointment of a guardian for the special purpose of maintaining or defending the interests of a minor or other party in an action or proceeding in any court of competent jurisdiction. [R. C. 1905, § 7892; R. C. 1895, § 6180.]

§ 8528. County includes other territory, when. For the purposes of the two preceding sections, a county is deemed to extend to all adjoining territory situated within the same judicial district which is not embraced in or attached to any organized county. [R. C. 1905, § 7893; R. C. 1895, § 6181.]

§ 8529. Judge disqualified or absent. Who to act. When the judge of the county court having jurisdiction as defined in sections 8525 and 8526 is disqualified, is necessarily absent from the state, or is ill and unable to act, he shall request, in writing, the county judge of an adjoining county to act in his lieu and stead, and when acting pursuant to such request the county judge of such adjoining county shall possess all the powers and have the jurisdiction of the county judge for whom he acts, and the judge so requested shall attend for that purpose at such times as may be necessary. [1911, ch. 222; R. C. 1905, § 7894; R. C. 1895, § 6182.]

§ 8530. Jurisdiction, how obtained. The court obtains jurisdiction in each case by the existence of the jurisdictional facts prescribed by statute and the presentation of a petition setting forth the facts; and may thereupon obtain jurisdiction of the persons interested by their appearance or by the process of citation. [R. C. 1905, § 7895; R. C. 1895, § 6183.]

§ 8531. Jurisdiction extends over state, when. Jurisdiction once duly exercised in a case by a county court is coextensive with the state, and, except as otherwise specially prescribed by law, excludes the subsequent exercise of jurisdiction by another court over the same case, or any of its incidents; and all further proceedings to be taken in a county court in relation to the

same matter or estate must be taken in the same court. [R. C. 1905, § 7896; Pro. C. 1877, § 9; R. C. 1895, § 6184.]

Court obtains jurisdiction on existence of certain facts. Dobler v. Strobel, 9 N. D. 104, 81 N. W. 37, 81 Am. St. Rep. 530.

§ 8532. Objection to decree. Jurisdiction. Proceedings. How taken. An objection to a decree or order of a county court for an erroneous determination of any fact necessary to jurisdiction or for a defect or omission in such decree or order, or in the pleadings or other papers on which it was founded, or the finding or statement of a jurisdictional fact which actually existed or for a failure to take any intermediate proceeding prescribed by law is available only on direct application to the same court or on appeal. [R. C. 1905, § 7897; R. C. 1895, § 6185.]

§ 8533. Proceedings, how construed. The proceedings of a county court in the exercise of its jurisdiction are construed in the same manner and with like intendments, as the proceedings of courts of general jurisdiction, and to its records, orders and decrees there is accorded like force, effect and legal presumptions as to the records, orders, judgments and decrees of courts of general jurisdiction. [R. C. 1905, § 7898; Pro. C. 1877, § 2; R. C. 1895, § 6186.]

Decree of county court entitled to full faith and credit. Phillips v. Phillips, 13 S. D. 231, 83 N. W. 94; Matson v. Swenson, 5 S. D. 191, 58 N. W. 570; Joy v. Elton, 9 N. D. 428, 83 N. W. 875; Re Taber, 13 S. D. 62, 82 N. W. 398.

Probate court's order for sale of property is to be accorded same force as circuit court judgments although it does not set forth facts showing sale to be necessary. Blackman v. Mulhall, 19 S. D. 534, 104 N. W. 250.

Order of county court removing administratrix, not appealed from, is conclusively presumed to be made upon sufficient evidence. Howell v. Dinneen, 16 S. D. 618, 94 N. W. 698.

On word "decree" as being used in its common acceptation and as referring to judgment of court in matter other than action at law. Calhoun v. Bryant, 28 S. D. 266, 133 N. W. 266.

Decree of distribution of decedent's estate made by county court is of equal rank with judgment entered by courts of record. Sjoli v. Hogenson, 19 N. D. 82, 122 N. W. 1008.

§ 8534. County courts, authority and power of. The county court has authority and power in each case:

1. To issue citations, subpoenaes and other process under the seal of the court to any part of the state, and enforce obedience thereto or return thereof according to law.

2. To postpone from time to time for proper cause a hearing or other proceeding.

3. To compel the attendance of a party or other person whenever his presence is lawfully required.

4. To restrain by order an executor, administrator or guardian to whom a citation or other process has been duly issued from acting as such until the further order of the court.

5. To require by order an executor, administrator, guardian or other person subject to the jurisdiction of the court to perform any duty imposed on him by statute or by the court under the authority of the statute.

6. To maintain order and decorum during the sittings of the court; and to punish any person for a contempt of court where the district court might punish him for a similar contempt and in like manner.

7. To open, vacate or modify a decree or order of the court for fraud, mistake, newly discovered evidence or other sufficient cause.

8. To enter as of a former time a decree or order of the court for the purpose of correcting a mistake or supplying an omission.

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

10. With respect to any matter not expressly provided for in this code, to act as nearly as may be according to the code of civil procedure, and to exercise such other incidental powers as are necessary to carry into effect the powers expressly conferred. [R. C. 1905, § 7899; R. C. 1895, § 6187.]

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

§ 8535. When county judge not to act. No will shall be admitted to probate, or letters testamentary or of administration granted, before any county judge who is interested, is next of kin to the decedent or is a legatee or devisee under the will, or when he is named as executor or trustee in the will, or is a witness thereto or in any other manner interested or disqualified from acting. [R. C. 1905, § 7900; R. C. 1895, § 6188; 1905, ch. 90.]

Judge disqualified where his son is prosecuting proceeding before court as attorney upon contingent fee. Vine v. Jones, 13 S. D. 54, 82 N. W. 82.

Order made by judge who is disqualified is not void, but voidable. Re Taber, 13 S. D. 62, 82 N. W. 398.

§ 8536. County judge disqualified. Proceedings transferred, where. When a petition is filed in the county court praying for the admission to probate of a will, or for granting letters testamentary or of administration, or when proceedings are pending in the county court for the settlement of an estate, and the county judge is disqualified to act, an order must be made transferring the proceedings to the county court of an adjoining county; and the county judge ordering the transfer must transmit to the county court to which the proceedings are ordered to be transferred a certified copy of the order and all papers on file in his office in the proceedings; and thereafter the county court to which the proceedings are transferred shall exercise the same authority and jurisdiction over the estate, and all matters relating to the administration thereof as if it had original jurisdiction of the estate; provided, there shall not be any necessity for transferring such proceedings, or any of them, when a county judge of some other county qualified to act attends at the request of the county judge of the county where such proceedings are pending, to hold court, and conduct and try such proceedings; and such county judge, when so called upon to preside, shall exercise the same jurisdiction over any proceedings in the estate as is exercised in other cases under like circumstances. [R. C. 1905, § 7901; R. C. 1895, § 6189; 1905, ch. 90.]

§ 8537. Transfer not to change right to administer. Retransfer. The transfer of a proceeding from one county court to another, as provided for in the preceding section, does not affect the right of any person for letters testamentary or of administration on the estate transferred, but the same persons are entitled to letters testamentary or of administration of the estate, in the order hereinbefore provided. If, before the administration is closed of any estate so transferred as herein provided, another person is elected or appointed, and qualified as judge of the county court wherein such proceeding was originally commenced, who is not qualified to act in the settlement of the estate, and the cause for which the proceeding was transferred no longer exists, any person interested in the estate may have the proceeding returned to the county court from which it was originally transferred, by filing a petition setting forth these facts, and moving the court therefor. [R. C. 1905, § 7902; R. C. 1895, § 6190; 1905, ch. 90.]

§ 8538. When proceeding to be returned to original court. On hearing the motion, if the facts required by the preceding section to be set out in the petition are satisfactorily shown, and it further appears to the court that the convenience of the parties interested would be promoted by such change, the county judge must make an order transferring the proceeding back to the court where it was originally commenced; and the county judge of the court ordering the transfer must transmit to the county court in which the proceeding was originally commenced a certified copy of the order, and all original papers on file in his office in the proceeding; and the county court where the proceeding was originally commenced shall thereafter have jurisdiction and power to make all necessary orders and decrees to close up the administration of the estate. [R. C. 1905, § 7903; R. C. 1895, § 6191; 1905, ch. 90.]

ARTICLE 4.— RECORDS OF THE COUNTY COURT.

§ 8539. Records, what constitute. The records of each county court consist of the original papers in the cases adjudicated or pending therein, and the books prescribed in the next section. [R. C. 1905, § 7904; R. C. 1895, § 6192.]

§ 8540. Records to be kept. There shall be kept in each county court the following books of record:

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

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

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

4. There shall be appended to each docket a numerical index referring to each case by number and title, containing the number of each case progressively, its title and the number of the page on which it is docketed;

also an alphabetical index arranged with reference to the first letter of the family name in the title of each case and containing, in addition to each title, the number of the page on which the docket entries begin. When the cases are not docketed in one book, there shall be kept in a separate book a general index, both numerical and alphabetical, of similar character, referring in each instance to the book and page of the docket. The general index shall include all cases heretofore commenced in the county court or appearing on the records of the probate court conforming in relation thereto as nearly as may be to the above requirements. [R. C. 1905, § 7905; 1897, ch. 111, § 4; R. C. 1899, § 6193.]

As to recording county court decrees. Lemery v. Lemery, 15 N. D. 312, 107 N. W. 365.

§ 8541. Docket, form of. The docket prescribed by the preceding section shall be substantially in the following form:

Estate of Richard Roe.
Register.

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

Estate of Richard Roe.
Proceedings.

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

[R. C. 1905, § 7906; R. C. 1895, § 6194.]

§ 8542. Citation, how issued. Before issuing a citation, the court shall, if necessary, examine the applicant and other witnesses under oath concerning the correct name and post office address of each party to be cited and may issue a subpoena for that purpose. If he is unable after reasonable diligence to ascertain such name, the party may be designated by his relation to the decedent or otherwise, as nearly as may be. Each party and each guardian or attorney for a party who appears in any proceeding must also be required to give his own name and post office address which shall be entered in the register accordingly and be taken as true thereafter until the court is notified of a change. [R. C. 1905, § 7907; R. C. 1895, § 6195.]

§ 8543. Books to be numbered progressively. When the docket, journal or record consists of more than one book, all books of the same name shall be numbered progressively from one upwards. [R. C. 1905, § 7908; R. C. 1895, § 6196.]

§ 8544. Cases, to be numbered how. For convenience in keeping the books of record the cases in each county court shall be numbered in a single and continuing series, beginning with one or with a number exceeding by one the highest number so employed before this code takes effect. [R. C. 1905, § 7909; R. C. 1895, § 6197.]

CHAPTER 3.

PARTIES AND PROCESS.

ARTICLE 1.— GENERAL RULES OF PROCEDURE.

§ 8545. Parties in a case, who are. The general parties in a case in the county court are the person interested in the estate or other subject matter, and the executor, administrator or guardian thereof. They are likewise the parties who must be cited in each special proceeding in the case, unless the parties are specially prescribed, but for distinction the party who presents a petition in a special proceeding is known as the petitioner or claimant, and the parties to be cited are known as respondents. If a citation issues for an incidental purpose in the course of the administration, the only parties are those appearing or cited for such purpose. [R. C. 1905, § 7910; R. C. 1895, § 6198.]

§ 8546. Substitution of parties, when. When an heir or devisee dies or transfers an interest in the estate, his legal representative or successor in interest, grantee or assignee may be made a party in lieu of such heir or devisee; and when a party to a special proceeding dies or transfers his interest, while the same is pending, his legal representative or successor in interest may likewise be substituted at his own suggestion or at the request of another party. Such substitution may be made at any time by order of the court, and without notice when the facts are shown by the allegations of a pleading or affidavit. [R. C. 1905, § 7911; R. C. 1895, § 6199.]

§ 8547. Persons interested may become parties. Any other person interested in securing or preventing the relief sought in a special proceeding may, by leave of court, become a party and support or oppose the application or pray for affirmative relief consistent with the facts; but leave must not be granted unless his interest sufficiently appears; and this section shall not be construed to affect a right or interest of such person unless he so becomes a party. [R. C. 1905, § 7912; R. C. 1895, § 6200.]

§ 8548. Special proceeding, how to become a party to. When a statute provides that a person may present a petition or otherwise become a party in a special proceeding, an allegation of his interest in a pleading or affidavit is sufficient for that purpose although his interest is denied, unless he has been excluded from such interest by a decree of the court from which he has not taken an appeal. [R. C. 1905, § 7913; R. C. 1895, § 6201.]

§ 8549. Citation gives jurisdiction. Form of. The process by which the court obtains jurisdiction in each proceeding of the parties, who do not appear therein, is a citation addressed to such parties, by name or other sufficient description, informing them of the petition or other application upon which it is issued and the relief thereby claimed or the grounds of the order upon which it is issued and the direction therein given; and the time and place at which they are required to appear before the court to answer

the same with such further particulars as may be specially prescribed by statute. [R. C. 1905, § 7914; Pro. C. 1877, § 302; R. C. 1895, § 6202.]

§ 8550. Time for appearance. The time for appearance must not be more than sixty days from the date of the citation and each citation must be addressed by the style of "The State of North Dakota," and contain the signature of the judge attested by the seal of the court. [R. C. 1905, § 7915; Pro. C. 1877, § 302; R. C. 1895, § 6203.]

ARTICLE 2.— SERVICE OF CITATIONS AND OTHER PAPERS.

§ 8551. Citations and notices, how served. Citations and notices, issuing for service in any proceedings in a county court, must be served upon the parties personally or in some other mode as hereinafter prescribed. [R. C. 1905, § 7916; Pro. C. 1877, § 303; R. C. 1895, § 6204.]

§ 8552. Service on attorney or guardian, when. When a party on whom service is required has a guardian or attorney of record in the case, service must be made on the guardian or attorney and such service is deemed to be service on the party so represented; except that a citation must be served on a party represented by a guardian if more than ten years of age, as well as on the guardian. [R. C. 1905, § 7917; R. C. 1895, § 6205.]

§ 8553. Service by mail, when and how made. After a party has appeared or has been cited to appear in a case, each citation or notice subsequently issued in the same case may be served by mail upon him or upon his guardian or attorney of record as prescribed by the last section. But service by mail is not sufficient when a citation requires a party to appear in person, or issues upon an application to revoke the probate of a will or set aside a decree awarding a final settlement or distribution, or when the court directs service in some other mode. [R. C. 1905, § 7918; R. C. 1895, § 6206.]

§ 8554. Service by publication, when. Service by publication may be substituted for personal service by a direction of the court authorizing such service, in either of the following cases:

1. When the party who is required to make or procure service or his attorney files an affidavit stating that he cannot obtain personal service on a person to be served, because he is unable to ascertain where such person may be found, he having no known place of residence within the state, if the court is further satisfied upon an examination as prescribed in section 8542 that the statements of the affidavit are true.

2. When it is established in like manner or appears upon the records in the case, that the person to be served is a nonresident of this state. [R. C. 1905, § 7919; R. C. 1895, § 6207; 1905, ch. 92, § 1.]

§ 8555. Mode of service indorsed on citation or notice. Every direction for service by publication or other direction given by the court respecting the mode of service must be indorsed on the citation or notice. [R. C. 1905, § 7920; R. C. 1895, § 6208; 1905, ch. 92, § 2.]

§ 8556. Personal service, how made. Personal service within the state or elsewhere may be made and proved in the manner prescribed by the code of civil procedure for the personal service of a summons. [R. C. 1905, § 7921; R. C. 1895, § 6209.]

§ 8557. Service by publication, how made and proved. Service by publication is effected by printing and publishing the citation or notice to be served three times, once each week for three successive weeks in a newspaper, published in the county to be selected by the petitioner or his attorney, and is deemed complete on the day of the last publication and may be proved by affidavit as provided by section 7913 of the code of civil procedure. [R. C. 1905, § 7922; R. C. 1895, § 6210; 1905, ch. 92, § 3.]

§ 8558. Service by mail, how made and proved. Service by mail is effected by depositing in the post office a true copy of the citation or notice to be served, inclosed in a plain sealed envelope with the postage thereon fully

paid, directed to the person to be served at his post office address; and is proved by the affidavit of any person having knowledge of the facts, or by a statement thereof in the journal when the mailing is done by the judge. [R. C. 1905, § 7923; 1897, ch. 111, § 5; R. C. 1899, § 6211.]

§ 8559. Citation, when it must be served. Unless otherwise specially prescribed by law, a citation issued upon a petition must be served at least twenty days before the time therein specified for appearance; every other citation must be served at least five days before the time specified for appearance; and each notice which refers to a future time must be served at least five days before the time so designated. When service is made by publication such time must be computed from the date of the last publication, and when service is made by mail there must be allowed in every instance an additional period of five days computed from the date of mailing. [R. C. 1905, § 7924; Pro. C. 1877, § 305; R. C. 1895, §. 6212.]

Article 3.— Manner and Effect of Appearance.

§ 8560. Appearance, how made. In a county court every party of full age, who has not been judicially declared incompetent to manage his affairs, may appear and prosecute or defend a proceeding in any case either in person or by an attorney regularly admitted to practice in this state, except when he is required to appear or otherwise act in person, pursuant to a special provision of this code; and is held to appear in each proceeding from the time when he has been duly cited to appear. [R. C. 1905, § 7925; R. C. 1895, § 6213.]

§ 8561. Appearance by a minor, how made. When a minor or a person who has been judicially declared to be incompetent to manage his affairs is a party, he must appear and act by guardian except when he makes application for the appointment of a guardian; but if he is a respondent, the guardian cannot appear for him until he has been duly served with a citation unless the proceeding relates directly to his estate or he is a minor under ten years of age. If he has no guardian appearing for him, a special guardian must be appointed, as prescribed in the next section. [R. C. 1905, § 7926; R. C. 1895, § 6214.]

Control of guardian ad litem over action. 16 L.R.A. 507.

§ 8562. Special guardian. Qualifications. How appointed. A special guardian must be some capable and disinterested person appointed by order of the court with the written consent of the person appointed. Such appointment may be made summarily at any time upon the application of the incompetent party or a relative or friend of such party, for the purpose of commencing a proceeding or maintaining his interest in a pending proceeding; or without an application at any time after he has been duly cited to appear in any proceeding; or whenever in the course of a proceeding in which he is represented by a guardian the court has any reason to suppose that his interest requires the appointment of another guardian. A special guardian so appointed in any case is authorized to appear in the subsequent proceedings therein to which his ward is a party until the appointment is revoked. [R. C. 1905, § 7927; Pro. C. 1877, § 308; R. C. 1895, § 6215.]

§ 8563. Special guardian to qualify same as general guardian. A special guardian must not receive any money or property belonging to the ward's estate, unless he qualifies in the same manner as a general guardian; and a guardian, general or special, cannot act in any matter in which his interest is adverse to that of the ward. [R. C. 1905, § 7928; R. C. 1895, § 6216.]

§ 8564. Appearance of guardian, effect of. Subject to the foregoing restrictions and in the absence of fraud, collusion or mistake, prejudicial to the interest of the ward, the appearance in his name of his general or special guardian by leave or direction of the court in any proceeding is deemed to be the appearance of the ward, and has the same effect in that proceeding as if

he was competent to appear in person. [R. C. 1905, § 7929; Pro. C. 1877, § 311; R. C. 1895, § 6217.]

Power of guardian or guardian ad litem to enter appearance of ward. 32 L.R.A. 683.

§ 8565. Appearance, how effected. Notice of all proceedings. An appearance in any proceeding is effected by giving notice of the appearance in open court either orally or in writing or by pleading, or making application therein to the court for an order or direction of any kind. A party who appears, or is held to appear, as hereinbefore prescribed, is deemed to have knowledge of each postponement, and all other acts done in the course of the proceeding from the commencement until the final disposition thereof, without further notice, except such as is imparted by the records of the court. A party who appears as hereinbefore prescribed, may waive in writing the service of any further citation, notice or papers in the proceeding and thereafter no such citation, notice or paper need be served on him. [R. C. 1905, § 7930; R. C. 1895, §§ 6218, 6219; 1901, ch. 60.]

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

§ 8566. Special proceedings, how commenced. A special proceeding in the county court is commenced by the voluntary appearance and pleading of all the parties, or by the presentation of a petition by a competent party and the issuance of a citation to the other parties. [R. C. 1905, § 7931; 1897, ch. 111, § 6; R. C. 1899, § 6220.]

§ 8567. Proceeding by citation. Time to plead. When the proceeding is commenced by citation the respondents shall plead at the time when they are cited to appear unless the court allows further time; but a party in default may be allowed to plead at any time before the hearing is concluded on such terms as the court deems just. [R. C. 1905, § 7932; R. C. 1895, § 6221.]

§ 8568. Pleadings in a special proceeding. The pleadings in a special proceeding in the county court are the petition and the answer or cross petition of a respondent. Several parties may unite in a pleading when, as between themselves, their respective interests are not adverse. All pleadings must be filed in writing and every pleading except the answer of a special guardian must be verified as prescribed in the code of civil procedure. [R. C. 1905, § 7933; R. C. 1895, § 6222.]

§ 8569. Petition, contents of. A petition must set forth the facts which authorize the special proceeding, entitle the petitioner to relief therein and show the relation of the other parties to the estate or matter in question according to the provisions of this code which relate to that proceeding, with a prayer for the relief which the petitioner claims therein. [R. C. 1905, § 7934; R. C. 1895, § 6223.]

§ 8570. Answer, contents of. The answer may admit or deny the allegations of the petition or any material fact therein stated and allege new matter of defense to the whole or any part of the relief claimed. [R. C. 1905, § 7935; R. C. 1895, § 6224.]

§ 8571. Pleadings, requisites of. The formal requisites of a pleading are as follows:

1. The caption, which shall contain the name of the county and court and title of the case, as for example, "Estate of A. B., deceased," or "Guardianship of C. D., minor," and the names of the parties to the special proceeding, distinguishing them as petitioner and respondent, followed by a word or words descriptive of the pleading, as for example, "Petition for probate of will."
2. The statement of facts.
3. The prayer for relief; but no prayer is necessary in an answer except for the purpose of claiming affirmative relief.
4. The signature of the party or his attorney or guardian.
5. The verification. [R. C. 1905, § 7936; R. C. 1895, § 6225.]

§ 8572. Issue, how raised. An issue arises upon each of the following allegations of a pleading:

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

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

3. Upon every fact alleged in the answer except an admission of a fact alleged in the petition. [R. C. 1905, § 7937; R. C. 1895, § 6226.]

ARTICLE 5.— POSTPONEMENT, HEARING AND TRIAL.

§ 8573. Respondent, when a new citation issues. When a respondent fails to appear at the time specified in a citation the court must ascertain from the proofs of service, whether he has been duly cited to appear; and unless the service is deemed sufficient a new citation must be issued to such party or parties and the hearing must be postponed until the time therein specified. [R. C. 1905, § 7938; R. C. 1895, § 6227.]

§ 8574. Postponement, when granted or ordered. After issue is joined by the pleadings either party is entitled to a postponement for a reasonable time to procure the attendance or deposition of a witness or otherwise prepare for the trial. A reasonable postponement may also be granted at any time to allow a party to plead, or for any other meritorious cause. A postponement may also be ordered because the judge is sick or otherwise engaged, or because he desires time in which to prepare his decision. [R. C. 1905, § 7939; R. C. 1895, § 6228.]

§ 8575. Postponement, how ordered. A postponement may be ordered without a written application and an adjournment of the court from time to time in the progress of a hearing operates as a postponement without a formal hearing. Every postponement must be to a day certain; but an indefinite postponement or a failure to resume the hearing at the appointed time by reason of the absence of the judge or for other cause does not invalidate or otherwise affect any act previously done, but operates only as a postponement of the hearing until further notice. [R. C. 1905, § 7940; R. C. 1895, § 6229.]

§ 8576. Court to try issues, when. After the respondents have had an opportunity to plead the court must try the issues, hear the allegations and proofs of the respective parties, and make such decision upon the facts thereby found as justice and equity require. Every issue prescribed by section 8572 of this chapter must be tried upon the testimony of witnesses sworn and examined in open court or taken in the form of deposition according to the rules of evidence applicable in a civil action except when the same are modified by the following provisions of this article. [R. C. 1905, § 7941; R. C. 1895, § 6230.]

§ 8577. Court, powers of. The court may examine the parties and other witnesses and inquire into all the facts and circumstances as to any material fact, although no issue is joined thereon; and may also in its discretion refuse to hear the deposition of any witness residing within the state, who is competent and able to appear and give testimony in person, unless satisfied that the necessary expense or inconvenience of procuring his attendance ought not to be incurred. [R. C. 1905, § 7942; R. C. 1895, § 6231.]

§ 8578. Deposition, when taken. When it is satisfactorily shown by affidavit that a material witness within the county is so aged, sick or infirm that his attendance cannot be compelled without endangering his life or health and there is no good reason to suppose that he will be able to attend within a reasonable time to which the hearing may be postponed, the judge shall proceed to the place where the witness is and there take his testimony as in open

court; but if an interested party so requests, the testimony of such witness must be taken in the form of a deposition. [R. C. 1905, § 7943; 1897, ch. 111, § 8; R. C. 1899, § 6232.]

Article 6.— Decrees and Orders.

§ 8579. Decision in a special proceeding contains what. A decision of the county court upon the pleadings and proofs in a special proceeding shall state the material facts found by the court and award relief consistent therewith and with such directions as may be necessary or proper to give effect to the same and is a final determination of the rights of the parties so adjudicated, styled indifferently a decree or final order. [R. C. 1905, § 7944; Pro. C. 1877, § 299; R. C. 1895, § 6233.]

Probate court's order for sale of property is to be accorded same force as circuit court judgments, although it does not set forth facts showing sale to be necessary. Blackman v. Mulhall, 19 S. D. 534, 104 N. W. 250.

Findings of fact, conclusions of law and statement of relief awarded embodied in single document constitute county court decree. Lemery v. Lemery, 15 N. D. 312, 107 N. W. 365.

§ 8580. Decree, to contain what. A decree which settles an account must intelligibly refer to a statement of the account on file and contain a summary thereof as settled. [R. C. 1905, § 7945; R. C. 1895, § 6234.]

§ 8581. Order, how obtained. Every direction entered of record or given in writing by a county court and not included in a decree is styled an order. Each order must be founded on a written application, unless the court is expressly authorized to make the same at its discretion or otherwise on its own motion. Each application for an order is styled a motion, but when the facts relied on as ground of a motion do not appear of record they must be set forth by affidavit. [R. C. 1905, § 7946; R. C. 1895, § 6235.]

§ 8582. Order, contents of. An order based upon facts within the knowledge of the judge, or upon facts proven by the testimony of a witness, must contain a statement or recital of the existence or proof of the facts which authorize the order. But when an order is made upon matter of record, a reference to an affidavit, pleading or other record upon which such facts appear is sufficient. [R. C. 1905, § 7947; R. C. 1895, § 6236.]

§ 8583. Order, may be given when. An order prescribing the mode of serving a citation or appointing a special administrator or appraiser, a restraining order, an order requiring a return to be made, or an account to be rendered, or any peremptory or other order which the court is expressly authorized to make without a previous application, may be given at any time when a motion for such order is made or presented. [R. C. 1905, § 7948; R. C. 1895, § 6237.]

§ 8584. Order, persons affected to be cited. Before an order can be given upon a motion which does not come within the provisions of the last section, all persons who will be affected by the order must be cited to appear and be given an opportunity to defend against the same, but when a motion is presented in the course of a pending proceeding it is not necessary to cite any person who at the time of presentation appears or is held to appear in such proceeding. [R. C. 1905, § 7949; R. C. 1895, § 6238.]

§ 8585. Objections to an order, how taken. At any hearing upon a motion, or in pursuance of a citation issued upon an order, any objection arising upon the facts set forth in the motion or order or otherwise appearing of record may be presented either orally or in writing; but no issue of fact arises unless the respondent answers by affidavit, controverting a material fact set forth as ground of the motion or order or alleging new matter in defense, justification or excuse. When an issue is so presented it may be submitted by consent of the parties upon their respective affidavits, which shall thereupon be treated as depositions; otherwise such issue must be tried in the same manner as the issue specified in section 8572 of this chapter. [R. C. 1905, § 7950; R. C. 1895, § 6239.]

§ 8586. Costs, when awarded. Costs may be awarded in a decree or order as follows:

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

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

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

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

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

6. Except as provided in the preceding subdivision, the sum awarded as costs in favor of a party must not exceed the amount of his expenses actually and necessarily incurred in procuring the service of process and the attendance of his witnesses or their depositions, and must be determined by the court upon an itemized statement of the expenses so incurred, verified by the affidavit of the party or his attorney and presented at or before the announcement of the decision. [R. C. 1905, § 7951; R. C. 1895, § 6240.]

§ 8587. Decree or order for money, how enforced. A decree or final order, which directs the payment of a sum of money by a party personally, may be enforced by an execution against his property, issued by the judge and made returnable to the county court, and must require the officer to apply the money thereupon collected in accordance with the order or decree. In other respects the process and mode of collection shall conform to the provisions of the code of civil procedure relating thereto, a decree being for that purpose regarded as a judgment. [R. C. 1905, § 7952; R. C. 1895, § 6241.]

§ 8588. Decree or order to perform any act, how enforced. A decree or order, which requires or prohibits the performance of any act other than the payment of money by a party or other person, may be enforced by serving a certified copy of such order or decree personally on the party or person who is required thereby or by law to obey it and by punishing him for a contempt of court if he refuses or willfully neglects to obey it. A decree or order, which directs the payment or delivery of money to an executor, administrator or guardian entitled to receive it or directs the payment or delivery by an executor, administrator or guardian of money by him received by virtue of his trust, may be enforced in like manner. [R. C. 1905, § 7953; R. C. 1895, § 6242.]

§ 8589. Punishment for contempt does not bar action on bond. The punishment of a delinquent for a contempt or the levy of an execution upon his property as prescribed in the last two sections does not bar or suspend an action against him or the sureties on his bond in relation to the same matter, or otherwise affect such action as respects any sum remaining unpaid. [R. C. 1905, § 7954; R. C. 1895, § 6243.]

ARTICLE 7.— MISTAKES, OMISSIONS AND AMENDMENTS.

§ 8590. Court may amend process, when. A county court may at any time on motion of a party amend its process by correcting a mistake or supplying an omission in any respect, when the defect has not prejudiced and the amendment will not injure the party to or against whom such process was issued; and may in like manner permit a return or other intermediate proceeding to

be amended in accordance with the facts. [R. C. 1905, § 7955; R. C. 1895, § 6245.]

§ 8591. Amendments to pleadings for mistakes allowed. A county court may also on motion of a party and in furtherance of justice at any time permit such party to amend any pleading or motion by adding or striking out the name of a party or by correcting a mistake in the name of a party or a mistake in any other respect or by inserting other allegations material to the case or by conforming the allegations to the facts proved. And no decree or order shall be vacated, revoked or reversed for an omission in the findings of any material fact which actually existed or for the nonaverment of any fact in a pleading or other paper if the existence of such fact is established when the objection is taken; but the court shall amend the defect or direct an amendment as the circumstances require. [R. C. 1905, § 7956; Pro. C. 1877, § 299; R. C. 1895, § 6246.]

§ 8592. Amendment, costs allowed when. Every amendment authorized by this article may be made without prejudice to any act previously done to take effect as of the date of the original proceeding, but when an amendment is made in any proceeding after a decision is rendered costs may be awarded against a party in whose favor the amendment operates as the court shall deem just and proper. [R. C. 1905, § 7957; R. C. 1895, § 6247.]

§ 8593. Hour intended. Whenever a future day is specified in a citation, notice or order for any purpose, and no particular hour is specified the time intended shall be taken to be the hour of ten o'clock in the forenoon of the day named. [R. C. 1905, § 7958; R. C. 1895, § 6248.]

Article 8.— Rehearings.

§ 8594. Rehearing is what. A rehearing is a re-examination of the facts involved in a decree or order upon the grounds set forth in a motion or petition to open and vacate or modify the same or some part thereof. [R. C. 1905, § 7959; R. C. 1895, § 6249.]

§ 8595. Rehearing, for what causes granted. A rehearing may be granted for either of the following causes:

1. Mistake, inadvertence, surprise or excusable neglect of the party making the application.
2. Any irregularity in the service of process or any fraud or misconduct of the prevailing party or his attorney or agent, or any abuse of discretion on the part of the court, which prevented the applicant from appearing or maintaining a material issue on his part at the former hearing.
3. Newly discovered evidence material to the issue which could not with reasonable diligence have been produced at the former hearing by the party making the application.
4. The nonexistence of any fact necessary to jurisdiction. [R. C. 1905, § 7960; R. C. 1895, § 6250.]

§ 8596. Rehearing, application for. An application for a rehearing may be made by motion or petition according to the mode in which the original application was made, and the parties interested must be cited accordingly. But every application upon any ground specified in the first subdivision of the preceding section must be made within thirty days from the date of the order or decree, and every application made upon grounds specified in the second and third subdivisions must be made within one year from the date of the decree or order to which it relates. [R. C. 1905, § 7961; R. C. 1895, § 6251.]

§ 8597. Application for a rehearing, must show what. In addition to one or more of the foregoing causes every application for a rehearing must set forth each material issue which the applicant expects to maintain or designate the same by reference to his former pleading and no other issue can be tried. The causes so alleged and the issues so presented may be controverted as in other cases; and after hearing the allegations and proofs of the parties

the court shall grant or deny the application as justice and equity require. [R. C. 1905, § 7962; R. C. 1895, § 6252.]

§ 8598. Application granted. Duty of court. If the application is granted the court must make a decree or order vacating the former decree or order, or revoking so much thereof as may be necessary and awarding such further relief as the facts may justify. [R. C. 1905, § 7963; R. C. 1895, § 6253.]

ARTICLE 9.— APPEALS.

§ 8599. Appeals, who may take and from what. Any party or other person specified in the next section who deems himself aggrieved may appeal, as prescribed in this article, from a decree or from any order affecting a substantial right made by a county court to the district court of the same county. [R. C. 1905, § 7964; Pro. C. 1877, § 312; R. C. 1895, § 6254.]

Guardian of incompetent may appeal from revocation of appointment. Re Olson, 10 S. D. 648, 75 N. W. 203.

As to appeal from county court decree. Lemery v. Lemery, 15 N. D. 312, 107 N. W. 365.

Executor entitled to appeal from probate or refusal to probate will. Halde v. Schultz, 17 S. D. 465, 97 N. W. 369.

Right of administrator to appeal from default judgment. Re Carvers's Estate, 10 S. D. 609, 74 N. W. 1056.

§ 8600. Appeal, parties to. Each person who was a party to the proceeding in the county court and each other person who has or claims in the subject matter of the decree or order a right or interest which is affected by an appeal may take an appeal and all parties interested must be made parties to the appeal. [R. C. 1905, § 7965; 1897, ch. 111, § 9; R. C. 1899, § 6255.]

§ 8601. Appeal, how taken. To effect an appeal the appellant must cause a notice of the appeal to be served on each of the other parties and file such notice with the proofs of service, and an undertaking for appeal in the county court within thirty days from and after the date of the order or decree; but when the party taking an appeal files such notice and announces the filing orally in open court at the time when the decision is given no other or further service of the notice is necessary. [R. C. 1905, § 7966; Pro. C. 1877, § 315; R. C. 1895, § 6256.]

§ 8602. Appeal not effected, when. An appeal from an order which directs the payment of a fine as a punishment for a contempt is not effected, unless the amount of the fine is also deposited with the county judge within the prescribed time to abide the order of the appellate court. [R. C. 1905, § 7967; Pro. C. 1877, § 319; R. C. 1895, § 6257.]

§ 8603. Appeal by executor, administrator or guardian. An executor, administrator or guardian may appeal without filing an undertaking from a decree or order made in any proceeding in a case in which he has given an official bond; and when he appeals in that manner the bond stands in place of such undertaking. A special guardian may appeal without filing an undertaking, although he has not given bond, but the appeal will not operate as a stay unless taken from an order which grants or refuses a transfer of the case. [R. C. 1905, § 7968; Pro. C. 1877, § 331; R. C. 1895, § 6258.]

Inapplicable to appeal by administrator from decision of county court revoking probate and letters issued. Ransier v. Hyndman, 18 N. D. 197, 119 N. W. 544.

Applies only to appeals from county court; must give cost bond on appeal from justice court. Richardson v. Campbell, 9 N. D. 100, 81 N. W. 31.

Does not exempt special administrator from giving appeal bond. Re Tabor, 13 S. D. 62, 82 N. W. 398.

§ 8604. Appeal, extension of time. When the appellant seasonably and in good faith serves a notice of appeal on some of the parties, but through mistake or excusable neglect fails to obtain service on all, or in like manner omits to do any other act necessary to perfect the appeal or effect a stay, the county court upon proof of the facts by affidavit may, in its discretion, extend the time for perfecting the service or other act and permit an amendment accord-

ingly upon such terms as justice requires. [R. C. 1905, § 7969; Pro. C. 1877, § 328; R. C. 1895, § 6259.]

§ 8605. Parties to an appeal, how brought in. A party specified in section 8600, who was not served with notice by reason of the fact that his interest or claim did not appear upon the records of the county court at the time when the appeal was taken, is deemed to have been duly served from the time when he appears in the district court for any purpose connected with the appeal, or he may be brought in by order of the district court on such notice as the court shall prescribe. [R. C. 1905, § 7970; R. C. 1895, § 6260.]

§ 8606. Appeal on question of law, how perfected. For the purpose of taking an appeal on questions of law alone, the notice must contain a statement to that effect, and specify the errors in law which the appellant intends to rely on as grounds of the appeal and the time and place at which the appeal will be brought on for trial. Every other notice of appeal is sufficient which designates the party who appeals and the order or decree from which the appeal is taken and the intermediate orders if any upon which the appellant desires a review. And every appeal must be held to have been taken upon the facts and matter in law generally, unless the notice clearly indicates an intention to appeal on questions of law alone, but the appellant may by his notice restrict the appeal to any specific direction or award contained in a decree, if the issue upon which the same depends can be separately tried and determined without prejudice to any other part of the decree. [R. C. 1905, § 7971: Pro. C. 1877, § 316: R. C. 1895, § 6261.]

Notice of appeal to be filed with judge of county court. Starkweather v. Bell, 12 S. D. 146, 80 N. W. 183.

§ 8607. Specification of errors on appeal. A specification of errors must contain a reference to each particular error appearing of record in the decree or order in the proceedings on which it is founded to which the appellant objects. [R. C. 1905, § 7972; 1897, ch. 111, § 10; R. C. 1899, § 6262.]

§ 8608. Undertaking on appeal. Stay. An undertaking on appeal must be executed in favor of the appellees in such sum as the county court shall prescribe by the appellant or his agent or attorney in his name and sufficient sureties approved by the judge, to the effect that the subscribers will pay to the parties entitled thereto all costs of the appeal that shall be awarded against the appellant by direction of the district court not exceeding the sum therein stated. But the execution or enforcement of the decree or order appealed from shall not be stayed, unless the instrument contains a further undertaking to the effect that the subscribers will also pay all damages which the appellees or any of them shall sustain by reason of the appeal or a separate undertaking to that effect is executed and filed in like manner. [R. C. 1905, § 7973; Pro. C. 1877, § 317; R. C. 1895, § 6263.]

Sufficiency of appeal bond. Skinner v. Holt, 9 S. D. 427, 69 N. W. 595, 62 Am. St. Rep. 878.

§ 8609. Undertaking, amount of. The sum prescribed in an undertaking for costs must not be less than one hundred dollars. The sum prescribed in an undertaking for damages shall be such further sum as the judge deems sufficient, and to aid him in determining the same or the sufficiency of the sureties, the judge may examine the sureties and other witnesses under oath. After an appeal is perfected the district court may by order require the appellant to give a new undertaking in a larger sum or with other sureties when the sum specified in the original undertaking is deemed insufficient or a surety is found to be insolvent, has removed from the state or is of doubtful financial responsibility, and unless the order is complied with the appeal may be dismissed or the stay dissolved as the case requires. [R. C. 1905, § 7974; Pro. C. 1877, § 320; R. C. 1895, § 6264.]

§ 8610. Undertaking, obligations of. The prescribed undertaking for the payment of damages creates an obligation on the part of the principal and sureties executing the same to compensate each of the appellees for all pecuni-

ary loss and injury which he shall sustain in consequence of the appeal respecting each and every right or claim which was determined or enforced in his favor by the decree or order from which the appeal is taken so far as the same shall be affirmed or otherwise sustained by the appellate court. When the decree or order directs the appellant or another party to pay or deliver money or other property, or to perform any other act to which the stay applied, all loss and injury sustained by an appellee in consequence of its detention from the time when the direction was given or by reason of any failure on the part of the appellant or such other party to pay or deliver the same in accordance with the decision or direction of the appellate court, and in as good condition as at the time when he was directed to do so by the county court, is deemed to be sustained in consequence of the appeal. When the order directs the commitment of the appellant or another person for disobeying any order except for the payment of a fine, all loss and injury resulting from his disobedience is likewise deemed to have been suffered in consequence of the appeal. The obligation matures at the time of the decision in the appellate court, but no action can be maintained thereon until ten days thereafter. [R. C. 1905, § 7975; Pro. C. 1877, §§ 315, 319; R. C. 1895, § 6265.]

§ 8611. Appeal stays further proceedings, when. Except when there is an express provision to the contrary in this article, a perfected appeal stays the execution or enforcement of the decree or order appealed from until there has been a determination of the appeal or a dissolution of the stay in the district court; and an appeal from an order granting or refusing a transfer of the case likewise stays all further proceedings in that case. In other respects the decree or order of the county court remains unaffected until reversed or modified by direction of the appellate court. [R. C. 1905, § 7976; R. C. 1895, § 6266.]

§ 8612. Appeal does not stay probate of will or letters of administration, when. An appeal from a decree or order admitting a will to probate or granting letters testamentary, or letters of administration, does not stay the issuing of letters when, in the opinion of the county judge manifested by an entry upon the journal, the preservation of the estate requires that such letters should issue. But the letters so issued do not confer power to sell real property by virtue of any provision in a will or to stay or satisfy legacies, or to distribute the property of the decedent until the determination of the appeal. [R. C. 1905, § 7977; Pro. C. 1877, § 322; R. C. 1895, § 6267.]

Right to issue letters of administration in spite of appeal. Re Taber, 13 S. D. 62, 82 N. W. 398.

§ 8613. Appeal does not stay order for special administrator or revoke probate of will. An appeal does not stay the execution or enforcement of a decree or order which appoints a special administrator or revokes the probate of a will or suspends or removes an executor, administrator or guardian, or revokes his appointment. [R. C. 1905, § 7978; Pro. C. 1877, § 323; R. C. 1895, § 6268.]

§ 8614. Transcript on appeal, judge perfects. When an appeal is perfected, the county judge must make and certify to the district court a complete transcript of the papers and other records upon which the appeal is taken or so much thereof as may be material, together with the notice of appeal and proof of service. the undertaking and other matters of record relating to the appeal; and unless such transcript is delivered to the clerk within ten days, the district court may on motion of any party interested require and compel him to make and certify the same and may in like manner require him to amend the transcript as often as may be necessary or to certify and send up a will or other written instrument in its original form. When all the proofs upon which the court acted appear in the transcript the certificate shall so state. [R. C. 1905, § 7979; Pro. C. 1877, §§ 324, 327; R. C. 1895, § 6269.]

Trial de novo in appellate court. Green v. Sabin, 12 S. D. 496, 81 N. W. 904; Engle v. Yorks, 7 S. D. 254, 64 N. W. 132.

Separate appeals by different claimants from appointment of administrator will be considered as one case. Re McClellan, 20 S. D. 498, 107 N. W. 681.

Circuit court on appeal can try only questions presented by record in county court. Re Skelly, 21 S. D. 424, 113 N. W. 91.

§ 8615. Appeal docketed in district court, when. Upon the delivery of such transcript and payment of the clerk's fee, the appeal must be docketed in the district court and placed on the calendar of causes for trial according to the date on which it was perfected and without a notice of trial or note of issue at the next term convening, not less than ten days after the taking of the appeal, and must be disposed of accordingly during the term, unless sooner disposed of in pursuance of the provisions of the next section. [R. C. 1905, § 7980; R. C. 1895, § 6270.]

§ 8616. Appeal on questions of law. Time of hearing. When the appeal is taken upon questions of law alone, the time and place of hearing specified in the notice of appeal may be any time and place at which an issue of law may be tried in the district court, and a hearing may be had accordingly; provided, however, that such time shall not be less than ten days after the service of the notice, nor later than the first day of the term specified in the preceding section. Upon a failure to obtain a hearing a new notice of the time and place of hearing may be given as often as may be necessary, and the appeal may, notwithstanding any such notice, be brought to a hearing at any time by an appellee upon a like notice served on the appellant or his attorney of record in the county court. [R. C. 1905, § 7981; R. C. 1895, § 6271.]

§ 8617. Appeal to be dismissed, when. If the transcript is not certified to the district court on or before the second day of the term designated in section 8615 and the appellant does not make application for an order requiring the same to be certified forthwith or if the appeal has not been sooner disposed of and the appellant fails to do any act necessary in order to have the same docketed and brought upon the calendar on or before the second day of such term, any appellee may have the same so entered by order of the court upon the production of a certified copy of the decree or order appealed from and the notice of appeal, and thereupon the appeal shall be summarily dismissed with ten dollars costs to such appellee, unless the appellant satisfactorily excuses his default and forthwith pays such costs. [R. C. 1905, § 7982; R. C. 1895, § 6272.]

§ 8618. Appeal dismissed affirms decree or order. A dismissal of an appeal by order of the district court in pursuance of any provision of this article is in effect an affirmance of the decree or order appealed from. [R. C. 1905, § 7983; Pro. C. 1877, § 328; R. C. 1895, § 6273.]

§ 8619. Powers of district court on appeal. At a hearing of the district court on an appeal taken upon questions of law alone the decree or order of the county court shall be reviewed only so far as may be necessary and with a view to correct errors appearing upon the record which injuriously affect a right or claim of the appellant and are specified in the notice of appeal; but when a specification relates to a discretionary award or direction given upon facts shown by the record, the district court has the same discretion that the county court had. Each specification may be overruled or sustained according as the right of the matter appears, and the court shall give its decision accordingly, affirming or reversing the decree or order appealed from or reversing in part and affirming as to the remainder, with such directions as may be necessary or proper respecting the decree or order to be entered in the county court. [R. C. 1905, § 7984; Pro. C. 1877, § 325; R. C. 1895, § 6274.]

§ 8620. Questions of fact tried de novo. When an appeal is taken generally, all the issues must be tried and determined anew in the district court and the court must hear the allegations and proofs of the parties, and determine all questions of law and fact arising thereon according to the mode of trying similar issues originating in that court, except that an issue involved in the probate of a will and issues arising upon a petition for the allowance

of a claim or demand for money only must be tried according to the mode of trying issues to a jury if a jury is demanded. When the appeal is taken from a decree or final order, the court may before trying the issues review any intermediate order specified in the notice of appeal, which materially affected the issues and vacate the same or otherwise make such order as the county court ought to have made. And upon every appeal taken generally the court has the same power that the county court had to permit or direct a pleading to be filed or otherwise amend the issues and try the same accordingly, but in other respects, when the proofs on which the county court acted were submitted in the form of affidavits or otherwise appear of record, the appeal must be determined upon the certified transcript. [R. C. 1905, § 7985; Pro. C. 1877, § 326; R. C. 1895, § 6275.]

Trial de novo in appellate court. Green v. Sabin, 12 S. D. 496, 81 N. W. 904; Engle v. Yorks, 7 S. D. 254, 65 N. W. 132.

Does not limit manner of trial de novo to review of record of lower court. Re Peterson, 22 N. D. 480, 134 N. W. 751.

Jury trial cannot be demanded as matter of right on appeal from probate to circuit court in will contest case. Shaw v. Shaw, 28 S. D. 221, 133 N. W. 292.

Separate appeals by different claimants from appointment of administrator will be considered as one case. Re McClellan, 20 S. D. 498, 107 N. W. 681.

Circuit court on appeal can try only questions presented by record in county court. Re Skelly, 21 S. D. 424, 113 N. W. 91.

§ 8621. District court findings on appeal. A decision of the district court upon the facts must designate the issues tried and contain the material facts found by the court, or the substance of the verdict returned by the jury, as the case may be, and the direction of the court thereon affirming the decree or order from which the appeal was taken generally, or reversing the same or a distinct part thereof as justice requires and as to any or all of the parties, with specific directions respecting the decree or order to be entered in the county court. [R. C. 1905, § 7986; R. C. 1895, § 6276.]

§ 8622. Reversal of decree does not affect lawful acts. The reversal of a decree or order of the county court for any cause except for want of jurisdiction does not affect the validity of any act otherwise lawfully done in pursuance of the order or decree and in the course of the administration by an executor, administrator or guardian while the appeal is pending. [R. C. 1905, § 7987; Pro. C. 1877, § 332; R. C. 1895, § 6277.]

§ 8623. Costs, payable how. The costs of an appeal shall be settled and determined by the district court agreeably to the provisions of section 8586 of this chapter except that like fees and disbursements may be allowed as in other cases in that court. The amount of costs so allowed shall be stated in the order or decision which determines the appeal, with a direction specifying the party in whose favor and the party against whom the same shall be awarded by the county court. If the appellant is required to pay costs, the amount thereof shall be awarded by the county court jointly against him and the sureties on his undertaking as prescribed in the next section without an express direction to that effect. [R. C. 1905, § 7988; Pro. C. 1877, § 329; R. C. 1895, § 6278.]

§ 8624. Decision on appeal. Enforcement of the decree. Each order or decision of the district court which dismisses or determines an appeal and each preliminary order which affects the merits must be given in writing and filed with the clerk and by him entered of record, after which the clerk shall attach thereto the original of each paper filed by the parties in the district court, each proper certificate to that court in the original form and certify and transmit the same without delay to the county court there to become part of the record; but when a stay is granted or effected in the district court, they shall not be transmitted until the stay has expired. Each order or decision so transmitted shall be immediately entered in the journal and a decree or order as the case requires shall likewise be entered by the county court in conformity to the directions of the appellate court and be enforced in the same manner

as other decrees or orders of the county court. [R. C. 1905, § 7989; Pro. C. 1877, § 330; R. C. 1895, § 6279.]

After appeal to district court has been perfected, except that undertaking is defective, district court gains jurisdiction to order record to be remanded to county court that sufficient bond may be filed and retransmitted. Re Peterson, 22 N. D. 480, 134 N. W. 751.

ARTICLE 10.— APPROVAL OF UNDERTAKINGS AND BONDS.

§ 8625. Bonds, justification and approval of. Every surety in a bond or undertaking prescribed by this code must make affidavit in connection with the instrument to the effect that he is a resident and freeholder of this state, and is worth the sum specified in the instrument in property within the state over and above all his debts and liabilities and property exempt by law from execution. But when there are more than two sureties each may state in his affidavit a sum less than that so specified, if the total amount stated in their affidavits is double the amount of the bond or undertaking, and before approving such sureties, the court must also be satisfied of the truth of their affidavits and may require them to appear before him and examine them under oath and hear the testimony of other witnesses respecting the matters therein stated or any other fact affecting their financial responsibility. [R. C. 1905, § 7990; Pro. C. 1877, § 81; R. C. 1895, § 6280.]

§ 8626. Money deposit in lieu of sureties. In lieu of the sureties required in an undertaking for costs prescribed in this code, the party giving the same may deposit with the county judge a sum of money equal to the amount of his undertaking to be applied by the court agreeably to the provisions of the instrument in payment of any costs thereafter awarded against him, or restored to him after he is exonerated from such payment as the event shall determine. [R. C. 1905, § 7991; R. C. 1895, § 6281.]

§ 8627. Bond, approval to be indorsed. When a bond or undertaking is approved, the judge shall indorse his approval thereon and file and preserve the instrument in his office. Except when otherwise specially provided, all bonds and undertakings in anywise required by the provisions of this code shall run to the state of North Dakota as nominal payee, and an action may be brought and maintained on any such bond or undertaking by and in the name of any person injured by any violation of the provisions thereof. [R. C. 1905, § 7992; R. C. 1895, § 6282.]

CHAPTER 4.

SPECIAL PROCEEDINGS FOR THE PROBATE OF WILLS AND OTHER PURPOSES.

ARTICLE 1.— PRODUCTION AND CUSTODY OF WILL.

§ 8628. County judge opens will and gives notice. Every county judge, having the custody of a will or to whom a will is delivered, must after the death of the testator publicly open and examine such will and file the same in his office and give notice thereof to the persons interested in its provisions or deliver such will to the county judge having jurisdiction of the case. [R. C. 1905, § 7993; Civ. C. 1877, § 700; R. C. 1895, § 6283.]

§ 8629. Custodian to deliver will. Liability for failure. Every other person having the custody of a will must immediately after receiving knowledge or information of the death of the testator deliver the same to the judge of the county court having jurisdiction of the case; and if he neglects to perform that duty he shall be liable to each and every person interested in the will for all damages caused by such neglect. [R. C. 1905, § 7994; Pro. C. 1877, § 10; R. C. 1895, § 6284.]

§ 8630. Compulsory production of will, when. When a party makes affidavit that any person has possession of a will which he neglects or refuses to deliver as prescribed in the last section, the county court may cite him to appear forthwith or at any future time in its discretion, and upon his appearance may examine him under oath and compel him to make a full disclosure in relation to such will. If it appears from his examination or from the testimony of other witnesses that he has any will of the decedent in his possession or under his control, he must be ordered to deliver the same to the court, and may be committed to the jail of the county until he complies with the order. [R. C. 1905, § 7995; Pro. C. 1877, § 14; R. C. 1895, § 6285.]

§ 8631. Probate of nuncupative wills. Nuncupative wills may at any time within six months after the testamentary words are spoken by the decedent, be admitted to probate on petition and notice as provided for the probate of wills executed in writing. The petition, in addition to the jurisdictional facts, must allege that the testamentary words or the substance thereof were reduced to writing within thirty days after they were spoken, which writing must accompany the petition and be duly verified. The county court must not receive or entertain a petition for the probate of a nuncupative will until the lapse of fourteen days from the death of the testator, nor must such petition be at any time acted on, unless the testamentary words are, or their substance is reduced to writing and filed with the petition, nor until the surviving husband or wife, if any, and all other persons resident in the county and state interested in the estate, are notified, as provided for the probate of wills. Contests of the probate of nuncupative wills and appointments of executors and administrators with the will annexed of the estate devised thereby must be had, conducted and made as provided in cases of the probate of written wills; provided, that double the period allowed for the petition of revocation of the probate of a written will shall be allowed in which to petition for the revocation and annulling of a nuncupative will. [R. C. 1905, § 7996; 1897, ch. 111, § 16; R. C. 1899, § 6286.]

§ 8632. Original will, where filed. Every original will or statement of the substance or provisions of a will filed as prescribed in this chapter shall remain in the office of the county judge except when certified to the district court on appeal. [R. C. 1905, § 7997; R. C. 1895, § 6287.]

§ 8633. Will unexecuted until probated. A will, foreign or domestic, shall not be carried into effect until admitted to probate as hereinafter prescribed. [R. C. 1905, § 7998; R. C. 1895, § 6228.]

Article 2.— Special Proceedings for the Probate of a Will.

§ 8634. Wills, originals and nuncupative, when probated. A special proceeding for the probate of a will may be commenced at any time within six years after the testator's death, or if the will is not made known within that time, then within one year after its discovery. A proceeding for the probate of a nuncupative will must be commenced within six months after the testamentary words are spoken; provided, however, that a will duly proved and allowed in any of the territories or dependencies, or in any other of the United States, or the District of Columbia, or in any foreign country or state, may be admitted to probate in the county court of any county in which any testator shall have left any estate, or any estate for which any

claim is made, at any time. [R. C. 1905, § 7999; R. C. 1895, § 6289; 1903, ch. 208.]

Pendency of probate proceedings in both state and federal courts. 42 L.R.A. 460.
Right to dismiss or withdraw proceedings to probate a will or issues thereunder. 19 L.R.A.(N.S.) 121.
Effect of delay in probating will. 57 L.R.A. 253.
Probate of joint or mutual wills. 38 L.R.A. 289.

§ 8635. Petition to probate, contents of. A petition for the probate of a will shall, in addition to the facts prescribed in section 8569 of this code, give a brief description of the will referring to the same as filed or allege that it has been lost or destroyed and set forth its provisions in full, and must set forth the state and county in which the property is situated and allege its probable value distinguishing between personal and real property and the probable yearly value of the rents, profits and income of the real property, and may pray for the appointment of the executor named in the will or allege his disability or refusal to act and pray for the appointment of a testamentary administrator. Such petition may be presented by any party designated in the next section or by a creditor of the testator. [R. C. 1905, § 8000; Pro. C. 1877, §§ 11, 12, 38, 47; R. C. 1895, § 6290.]

Probate of part of will. 34 L.R.A.(N.S.) 971.
Contents of will as affecting right to probate. 34 L.R.A.(N.S.) 965.

§ 8636. Citation issues to all interested. The parties who must be cited upon the petition for the probate of a will include the surviving husband or wife, if any, all the heirs of the testator, the devisees and legatees named therein, all persons in being who would take an interest in any portion of the property under the provisions of the will and the executor or executors, trustee or trustees named therein. [R. C. 1905, § 8001; Pro. C. 1877, § 32; R. C. 1895, § 6291.]

Right to probate will on service of notice by publication. 35 L.R.A.(N.S.) 1058.

§ 8637. Service of notice to persons interested when another will exists. When there is reason to suppose that there may be another will of the testator in existence or persons interested in the estate who are not named in the petition, the court shall annex to the names of the respondents to whom the citation is addressed the words " and all other persons interested " and direct service thereof by publication in addition to the service otherwise prescribed by this code. [R. C. 1905, § 8002; Pro. C. 1877, §§ 15, 16; R. C. 1895, § 6292.]

§ 8638. Proceedings when probate of will is contested. A respondent may by his answer deny the execution of the will or the competency of the decedent to make the same or allege any facts showing that it has been revoked, or was procured by duress, menace, fraud, undue influence or other cause affecting its validity, and may at his election pray for the appointment of an administrator; or he may allege any ground of objection there may be to the appointment of the proposed executor or testamentary administrator and pray the appointment of some other person. He may also make his answer a cross petition and thereby allege the execution of another will by the decedent of earlier or later date, and pray that the same be admitted to probate instead of that proposed by the petition. A cross petition may be answered in the same manner as a petition; but if there are new parties interested in the will thereby proposed, who do not appear, they must before the trial be cited to appear as in other cases. [R. C. 1905, § 8003; Pro. C. 1877, §§ 22, 47; R. C. 1895, § 6293.]

§ 8639. Executor to accept trust. Each person named in a will as executor shall state in his pleading whether or not he is willing to accept the trust. [R. C. 1905, § 8004; Pro. C. 1877, § 13; R. C. 1895, § 6294.]

§ 8640. Probate admitted if no contest, how. The court may in its discretion grant the probate of a written will, unless the same is contested on the testimony of one only of the subscribing witnesses, if he testifies that the instrument was subscribed by the testator or was acknowledged and declared

by him to be his will as prescribed by law, and that he believes that the testator was at the time of sound mind. [R. C. 1905, § 8005; Pro. C. 1877, § 20; R. C. 1895, § 6295.]

Proof of will by one witness only. 15 Am. Dec. 127.

§ 8641. Contesting probate of will. If any one appears to contest the will, he must file written grounds of opposition to the probate thereof. and serve a copy on the petitioner and other residents of the county interested in the estate, any one or more of whom may demur thereto upon any of the grounds of demurrer allowed by law in civil actions. If the demurrer be sustained, the court must allow the contestant a reasonable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may jointly or separately answer the contestant's grounds, traversing or otherwise obviating or avoiding the objections. Any issues of facts thus raised involving:

1. The competency of the decedent to make a last will and testament.
2. The freedom of the decedent at the time of the execution of the will from duress, menace, fraud or undue influence.
3. The due execution and attestation of the will by the decedent or subscribing witness; or,
4. Any other questions substantially affecting the validity of the will must be tried and determined by the court.

On the trial the contestant is plaintiff, and the petitioner is defendant. The court, after hearing the case, must give in writing the findings of fact and conclusions of law upon the issues submitted, and upon these the court must render judgment, either admitting the will to probate or rejecting it. In either case the proofs of the subscribing witnesses must be reduced to writing. If the will be admitted to probate, the judgment, will and proofs must be recorded. If the will is contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined; and the death, absence or insanity of any of them must be satisfactorily shown to the court. If none of the subscribing witnesses resides in the county, and is present at the time appointed for proving the will, the court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and as evidence of the execution, it may admit proof of the handwriting of the testator and the subscribing witnesses or any of them. The testimony of each witness, reduced to writing and signed by him, shall be taken, kept and filed by the judge, and shall be good evidence in any subsequent contests or trials concerning the validity of the will, or of the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this state. If the court be satisfied upon the proof taken that the will was duly executed, and that the testator was at the time of the execution thereof of sound and disposing mind, and not acting under duress, menace, fraud or undue influence, a certificate of the proof and the facts so found, signed by the judge and attested by the seal of the court, must be attached to the will. The will and the certificate of the proof thereof, together with all the evidence taken, must be filed by the judge and recorded by him. [R. C. 1905, § 8006; 1897, ch. 111, § 13; R. C. 1899, § 6296.]

Findings of fact, conclusions of law and statement of relief awarded, embodied in single document constitute county court decree. Lemery v. Lemery, 15 N. D. 312, 107 N. W. 365.

Certified transcript of record below must be used on appeal where proofs on which county court acted were in form of affidavits. Re Peterson, 22 N. D. 480, 134 N. W. 751.

Who may oppose probate of will. 68 Am. Dec. 447; 130 Am. St. Rep. 186.

Right of duty of pretermitted heirs to contest probate. 37 L.R.A.(N.S.) 1144.

Right of state to contest probate so as to escheat the property. 2 L.R.A.(N.S.) 643.

Validity of agreement to defeat probate. 16 L.R.A.(N.S.) 236.

Validity of contract not to contest probate. 13 L.R.A.(N.S.) 484.

Right to dismiss or withdraw proceedings to contest a will or issues thereunder. 19 L.R.A.(N.S.) 121.

Validity of agreement that costs of contesting a will shall be paid out of the estate. 2 B. R. C. 633.

Right of executor to allowance for attorneys' fees for services rendered in attempt to establish or resist attack upon will. 26 L.R.A.(N.S.) 757.

§ 8642. Absence of subscribing witness to be explained. Before the presence of a witness whose examination is required by either of the two preceding sections can be dispensed with, it must be shown by affidavit or other competent evidence to the satisfaction of the court that he is dead or disqualified or that he cannot after due diligence be found within this state or if within the state that he is so aged, sick or infirm that his presence cannot safely be required. [R. C. 1905, § 8007; R. C. 1895, § 6297.]

§ 8643. Probate of lost or destroyed wills. Whenever any will is lost or destroyed, the county court must take proof of the execution and validity thereof, and establish the same, notice to all persons interested being first given, as prescribed in regard to proofs of wills in other cases. All the testimony given must be reduced to writing, signed by the witnesses, filed and recorded. No will shall be proved as a lost or destroyed will unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses. When a lost will is established the provisions thereof must be distinctly stated and certified by the judge of the county court, under his hand and seal of the court, and the certificate must be filed and recorded as other wills are filed and recorded, and letters testamentary or of administration with the will annexed must be issued thereon in the same manner as upon wills produced and duly proved; the testimony must be reduced to writing, signed, certified and filed as in other cases, and shall have the same effect as evidence as provided in the proof of other wills. If before or during the pendency of an application to prove a lost or destroyed will, letters of administration are granted on the estate of the testator, or letters testamentary of any previous will of the testator are granted, the court may restrain the administrators or executors so appointed from any acts or proceedings which would be injurious to the legatees, or devisees claiming under the lost or destroyed will. [R. C. 1905, § 8008; 1897, ch. 111, § 15; R. C. 1899, § 6298.]

Probate of lost or destroyed will. 84 Am. Dec. 628; 110 Am. St. Rep. 445.

May the part of a lost or destroyed will which can be established, be admitted to probate where there are other portions that cannot be established. 26 L.R.A.(N.S.) 654.

Evidence to establish lost or destroyed will. 38 L.R.A. 433.

§ 8644. Evidence of the genuineness and execution of the will. Subject to the foregoing restrictions the court may admit the testimony of any competent witness respecting the execution of the will, the capacity of the testator or other material fact, and may also admit proof of the handwriting of the testator or of a subscribing witness and such other evidence as is admissible in courts of justice to establish or disprove written contracts in similar cases. The court shall also inquire particularly into all the facts and circumstances and may in its discretion require proof of the circumstances attending the delivery and possession of the instrument and shall grant the probate if satisfied upon all the proofs of the genuineness of the will, the competency and freedom of the testator to make the same and the validity of its execution. [R. C. 1905, § 8009; Pro. C. 1877, § 24; R. C. 1895, § 6299.]

Comparison of marks and spelling of disputed will. 65 L.R.A. 95.

Competency of subscribing witnesses and the effect of their testimony opposing or supporting a will. 77 Am. St. Rep. 459.

Is competency of attesting witness to a will to be determined as of time of attestation or of probate. 35 L.R.A.(N.S.) 686.

Admissibility in probate courts of copies of records of other state. 5 L.R.A.(N.S.) 348.

§ 8645. Probate of. Findings and conclusions of court. The decree shall state whether the probate was contested and if so by whom, and shall contain the findings of the court upon the testimony and grant or deny the probate accordingly with proper directions, if the probate is granted, respecting the appointment and qualification of an executor or testamentary administrator. If there is a cross petition the decree shall in like manner grant or deny the probate of the will thereby proposed or grant administration as the case requires. [R. C. 1905, § 8010; Pro. C. 1877, § 23; R. C. 1895, § 6300.]

Court, in probate contest, to render judgment either admitting the will to probate, or rejecting it. Irwin v. Lattin, 29 S. D. 1, 135 N. W. 759.

May part of a will be set aside for lack of testamentary capacity or undue influence and the remainder upheld. 41 L.R.A.(N.S.) 1126.

Who may sue or take other proceedings to set aside decree of probate. 54 L.R.A. 761.

Revocation of probate as termination of appointment of administrator c. t. a. 21 L.R.A.(N.S.) 975.

§ 8646. Certificate of probate. Upon granting the probate of a will the court must indorse on or attach to the instrument a certificate of the probate signed by the judge and attested by the seal of the court. If the will is nuncupative, such certificate shall be indorsed on or appended to the statement of the substance thereof on file. [R. C. 1905, § 8011; Pro. C. 1877, § 26; R. C. 1895, § 6301.]

§ 8647. Statement when will lost. When probate of a lost or destroyed will is granted, the provisions thereof as established by the evidence must be distinctly stated in writing and certified by the judge accordingly and filed as other wills are filed. [R. C. 1905, § 8012; Pro. C. 1877, § 40; R. C. 1895, § 6302.]

§ 8648. Will or certified statement to be recorded. The will or the certified statement of the substance or provisions thereof as the case may be and the certificate of proof must be entered at length in the record of wills. [R. C. 1905, § 8013; Pro. C. 1877, § 27; R. C. 1895, § 6303.]

§ 8649. Contesting will after probate. When a will has been admitted to probate, any person interested therein may at any time, within one year after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved, a sworn petition in writing containing his allegations, that evidence discovered since the probate of the will, the material facts of which must be set forth, shows:

1. That a will of later date than the one proved by the decedent, revoking or changing the former will, has been discovered and is offered; or,
2. That some jurisdictional fact was wanting in the former probate; or,
3. That the testator was not competent, free from duress, menace, fraud, or undue influence when the will allowed was made; or,
4. That the former will was not duly executed and attested.

Upon filing the petition, a citation must be issued to the executors of the will, or to the administrators with the will annexed, and to all the legatees and devisees mentioned in the will, and heirs residing in the state, so far as known to the petitioner, or to their guardian, if any of them are minors, or their personal representatives, if any of them are dead, requiring them to appear before the court on some day of a regular term therein specified, to show cause why the probate of the will should not be revoked. If another will be offered by the petition, it must show all that is required in the original case of a petition for the probate of a will, and like notices must be served in the same manner, and upon all the parties as required before the hearing of proof of any will originally; provided, that such notices need not be served on any persons upon whom the citation heretofore required has been served. At the time appointed for showing cause, or at any time to which the hearing is postponed, personal service of the citations having been made upon the persons named therein, and the required publications, and service of the notices having been made and all duly proved, the court must proceed

to try the issues joined in the same manner as in an original contest of a will. If upon hearing the proofs of the parties the court shall decide that the will is, for any of the reasons alleged, invalid, or that it is not proved to be the last will of the testator, the probate must be revoked and annulled; and if the court shall decide that the new will is valid, it may admit the same to probate in the same manner as originally upon the probate of a contested will. Upon the revocation being made, the powers of the executor or administrator with the will annexed must cease; but such executor or administrator shall not be liable for any act done in good faith previous to the revocation. The fees and expenses must be paid by the party contesting the validity or probate of the will, if the will in probate be confirmed. If the probate be annulled and revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court directs. [R. C. 1905, § 8014; 1897, ch. 111, § 14; R. C. 1899, § 6304.]

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

Mere probating of will is not final and conclusive as to validity and construction of instrument. Lowery v. Hawker, 22 N. D. 318, 37 L.R.A.(N.S.) 1143, 133 N. W. 918.

Power of courts of probate to revoke the probate of a will or to probate additional wills and codicils. 90 Am. Dec. 136.

Relief in equity from probate of will. 106 Am. St. Rep. 643.

§ 8650. Probate conclusive, when. A decree which grants the probate of a will is conclusive if the court had jurisdiction, unless reversed on appeal or vacated on a rehearing applied for within one year saving to minors and persons of unsound mind or otherwise incompetent a like period of one year after their respective disabilities are removed. [R. C. 1905, § 8015; Pro. C. 1877, § 37; R. C. 1895, § 6305.]

Conclusiveness of probate as res judicata. 21 L.R.A. 680.

What persons are bound by probate or refusal of probate of will. 60 Am. Dec. 353.

Effect of probate of will in another state. 20 L.R.A. 673; 48 L.R.A. 131; 6 L.R.A.(N.S.) 617, 73 Am. Dec. 53; 115 Am. St. Rep. 518.

When probate is void for want of jurisdiction. 33 Am. Dec. 239.

Collateral attack on probate where the decree or the will affirmatively shows that the will is invalid. 42 L.R.A.(N.S.) 454.

Collateral attack on probate for fraud not affecting the jurisdiction. 36 L.R.A.(N.S.) 986.

§ 8651. Letters testamentary and of administration with the will annexed, how and to whom issued. The court admitting the will to probate after the same is proved and allowed, must issue letters thereon to the persons named therein as executors, who are competent to discharge the trust, who may appear and qualify unless objection be made as provided hereinafter. No person is competent to serve as executor who at the time the will is admitted to probate is:

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

If the sole executor or all of the executors are incompetent, or renounce or fail to apply for letters, or to appear and qualify, or if there is no executor named in the will, letters of administration with the will annexed must be issued. Any person interested in a will may file objections in writing, to granting letters testamentary to persons named as executors, or to any of them; and the objections must be heard and determined by the court. A petition may, at the same time, be filed for letters of administration, with the will annexed. When an unmarried woman, appointed executrix, marries, her authority is extinguished. When a married woman is named as executrix she may be appointed and serve in every respect as a femme sole. No executor of an executor shall, as such, be authorized to administer on the estate of the first testator, but on the death of the sole or surviving executor of any last will, letters of administration with the will annexed, of the estate of the first testator, left unadministered, must be issued. Where a person

absent from the state, or a minor, is named executor, and there is another executor who accepts the trust and qualifies, the latter may have letters testamentary and administer the estate until the return of the absentee, or the majority of the minor, who may then be admitted as joint executor. If there is no other executor, letters of administration with the will annexed, must be granted; but the court may, in its discretion, revoke them on the return of the absent executor, or the arrival of the minor at the age of majority. When all the executors named are not appointed by the court, those appointed have the same authority to perform all acts and discharge the trust required by the will, as effectually for every purpose as if all were appointed and should act together; when there are two executors or administrators, the act of one alone shall be effectual, if the other is absent from the state, or laboring under any legal disability from serving, or if he has given his co-executor or co-administrator authority in writing, to act for both; and when there are more than two executors or administrators, the act of a majority of them is valid. [R. C. 1905, § 8016; 1897, ch. 111, § 17; R. C. 1899, § 6306.]

Foreign corporation as executor. 24 L.R.A. 291.

Jurisdiction and power of consuls to administer on estates. 45 L.R.A. 496; 37 L.R.A.(N.S.) 549.

§ 8652. Administrator appointed when executor dies or resigns. When an executor dies, resigns or is removed after entering upon his duties and there is no executor competent to complete the execution of the trust or when no appointment is made at the time of the probate, a testamentary administrator may be appointed in a special proceeding for that purpose. [R. C. 1905, § 8017; Pro. C. 1877, §§ 49, 104; R. C. 1895, § 6308.]

Right to carry on business under testamentary power. 40 L.R.A.(N.S.) 208.

§ 8653. Executor, duties of. It is the duty of an executor named in a will to present the same for probate, but he has no authority before letters are issued to do any other act except to preserve the assets of the estate coming into his hands and apply so much thereof as may be necessary in payment of the expenses of the testator's burial. Executors appointed by the court after duly qualifying and receiving letters have, subject to the provisions of this code, all the authority delegated by the will to the exclusion of those not appointed or failing to qualify. On the death, resignation or removal of an executor such authority devolves upon the surviving executor or executors, or if there is no surviving executor upon the succeeding testamentary administrator. [R. C. 1905, § 8018; R. C. 1895, § 6310.]

Common-law powers of executors. 78 Am. St. Rep. 171.

Right of administrator with the will annexed to carry on business under testamentary power. 40 L.R.A.(N.S.) 208.

Authority of one of several executors. 127 Am. St. Rep. 381.

Release of debt by one of several executors. 14 Am. Dec. 157.

§ 8654. Restraint of former administrator, when. While a proceeding for the probate of a will is pending or while an application for a rehearing is pending in such proceeding, if administration had previously been granted upon the estate or letters testamentary issued, the court may by order restrain the administrator or executor from doing any act detrimental to the interests of a party claiming under the proposed will or claiming adversely to the will which is contested in the application for a rehearing, as the case may be. [R. C. 1905, § 8019; Pro. C. 1877, § 41; R. C. 1895, § 6311.]

§ 8655. Letters of administration revoked. When after letters of administration on the ground of intestacy have been granted a will is admitted to probate or when after letters have been issued upon a will the probate thereof is revoked or a subsequent will is admitted to probate, the decree granting or revoking probate must revoke the former letters. [R. C. 1905, § 8020; Pro. C. 1877, § 101; R. C. 1895, § 6312.]

Revocation of probate as termination of appointment of administrator c. t. a. 29 L.R.A.(N.S.) 975.

Validity of acts done under letters afterward revoked or held invalid. 21 L.R.A. 147; 43 L.R.A.(N.S.) 634.

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

§ 8656. Administration, when granted. When a person dies leaving property within this state which he has not disposed of by will, administration of the estate may be granted as hereinafter prescribed. [R. C. 1905, § 8021; Pro. C. 1877, § 56; R. C. 1895, § 6313.]

Jurisdiction of estate of inmate of federal home or institution. 39 L.R.A.(N.S.) 586.
What assets will give jurisdiction to appoint administrator. 24 L.R.A. 684.
Appointment of administrator for sole purpose of bringing action under federal employers' liability act. 47 L.R.A.(N.S.) 78.

§ 8657. Letters of administration, who entitled to. Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

1. The surviving husband or wife, or some competent person whom he or she may request to have appointed.
2. The children.
3. The father or mother.
4. The brothers.
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate.
8. The creditors.
9. Any person legally competent.
10. The public administrator of the county wherein there is property of the decedent which remains unadministered, as general or special administrator thereof.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate. If any person entitled to administration is a minor letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court. No person is competent to serve as administrator or administratrix, who, when appointed, is:

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

A married woman must not be appointed administratrix. When an unmarried woman, appointed administratrix, marries, her authority is extinguished. [1907, ch. 116; R. C. 1905, § 8022; 1897, ch. 111, § 18; R. C. 1899, § 6315.]

Acts of administratrix are not invalidated because administrator, acting with her, was not regularly appointed. Blackman v. Mulhall, 19 S. D. 534, 104 N. W. 250.
Foreign corporation is incompetent to receive letters of administration upon estate of deceased person. Greenow v. Simonitsch, 21 N. D. 277, 130 N. W. 835.
When and how granting of letters of administration may be prevented. 46 Am. Dec. 437.
Validity of grants of administration. 79 Am. Dec. 65; 81 Am. St. Rep. 535.
Widow's right to administer on estate of her deceased husband. 93 Am. Dec. 685.
Foreign corporation as executor. 24 L.R.A. 291.
Payment or tender of debt due from estate as affecting creditor's right to letters of administration. 45 L.R.A.(N.S.) 237.

§ 8658. Time to apply for administration, when statute of limitations runs against claims against decedents. After each of the above classes in succession, a period of ten days, commencing with the death of the decedent, is allowed within which to apply for administration before a petition can be presented by any person of a subsequent class, provided, however, that a failure of a creditor to apply for letters of administration within sixty days

after creditors become entitled so to do, will not prevent the statute of limitations from running against the claims against decedents. [1911, ch. 217; R. C. 1905, § 8023; R. C. 1895, § 6316.]

§ 8659. Petition for letters of administration. Petition for letters of administration must be in writing, signed and duly verified by the applicant or his counsel, and filed with the judge or clerk of the county court, stating therein the facts essential to give the court jurisdiction of the case, and when known to the applicant, he must state the names, ages, residence and post office address of all the heirs of the decedent, and the description and value of the property. If the jurisdictional facts existed, but were not fully set forth in the petition, and are afterward proved in the course of administration, the decree or order of administration and subsequent proceedings are not void on account of such want of jurisdictional averments. When a petition for letters of administration is filed the court must by due order set a day for hearing the same, and cause due notice thereof to be given to all persons interested; the notice being served in the same manner and for the same time as required in the probate of wills. [R. C. 1905, § 8024; 1897, ch. 111, § 19; R. C. 1899, § 6317.]

§ 8660. Petition, who may contest. Any person interested may answer the petition and allege any ground of objection that may exist to the granting of administration or to the appointment of the proposed administrator; or allege his own right or claim to the administration and pray for appointment accordingly. [R. C. 1905, § 8025; Pro. C. 1877, § 65; R. C. 1895, § 6318.]

Separate appeals by different claimants from appointment of administrator will be considered as one case. Re McClellan, 20 S. D. 498, 107 N. W. 681.

Intervention by state to protect right of escheat, where application for administration has been made must be based on alleged incompetency of applicant and upon claim of right to administration. Re McClellan, 27 S. D. 109, 129 N. W. 1037, Ann. Cas. 1913C, 1029.

§ 8661. Person entitled to administration may waive right. A party entitled to the administration whether personally competent to receive the appointment or not may by his pleading nominate some other person for appointment in his place. [R. C. 1905, § 8026; Pro. C. 1877, §§ 59, 70; R. C. 1895, § 6319.]

Right of one first entitled to administration to nominate a third person, to exclusion of those next entitled thereto. 22 L.R.A.(N.S.) 1161.

§ 8662. Proof of intestacy and value of property requisite. Before granting administration the court must be satisfied, by competent testimony, of the death of the person whose estate is in question, and must require proof as to whether or not he left a will and of the time, place and circumstances of his death, his residence at the time, the character, situation and value of the property, the fact of the intestacy or any other material fact. [R. C. 1905, § 8027; 1897, ch. 111, § 11; R. C. 1899, § 6320.]

§ 8663. Preferences. Equally entitled. Power of court. Administration may be granted to an applicant or to one of several applicants according to the prescribed order of preference, without regarding any party having an equal or a better right who fails to assert his claim; and when there are several applicants of the same class the appointment may be awarded according to their relative fitness. But in every case, when the welfare of the estate manifestly so requires, an heir may be joined with the surviving husband or wife or two or more applicants of the same class may be united in the administration or the court may in its discretion appoint some suitable and discreet person who is disinterested as between the parties. [R. C. 1905, § 8028; Pro. C. 1877, §§ 57, 58, 66, 68; R. C. 1895, § 6321.]

§ 8664. Decree to fix amount of bond. A decree granting administration shall prescribe the sum in which bond shall be given and may limit the time in which the person receiving the appointment shall qualify or the time within which each of several applicants may successively qualify upon the

failure of those having precedence, to qualify and enter on the discharge of their duties. [R. C. 1905, § 8029; R. C. 1895, § 6322.]

§ 8665. Rehearing for revocation of administration. After administration has been granted to any person other than the surviving husband or wife, any party having a better right to the same, which he failed to allege in the original proceeding may for that cause alone obtain a rehearing at any time within one year for the purpose of asserting such right and if his right is established he shall receive the appointment and the former letters shall be revoked. [R. C. 1905, § 8030; Pro. C. 1877, §§ 71, 72, 73, 74; R. C. 1895, § 6323.]

Collateral impeachability of findings as to jurisdictional facts on which administration of a decedent's estate is based. 18 L.R.A. 242.

§ 8666. Authority of administrator. An administrator has only the authority prescribed by statute or conferred on him according to law by a decree or order of the county court. [R. C. 1905, § 8031; R. C. 1895, § 6324.]

ARTICLE 4.— APPOINTMENT OF SPECIAL ADMINISTRATORS.

§ 8667. Special administrators appointed, when. A special administrator shall be appointed when necessary or proper for the protection of the property or the rights of creditors or other persons interested in the estate, in either of the following cases:

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

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

3. On the application of a state's attorney or a creditor of the decedent in a special proceeding for that purpose when a person of whose estate the court has jurisdiction dies intestate and after diligent inquiry no person can be found who is entitled to succeed to his property. [R. C. 1905, § 8032; Pro. C. 1877, § 94; R. C. 1895, § 6325.]

2. Unconstitutional as depriving person of property without due process of law when applied to living person. Clapp v. Houg, 12 N. D. 600, 65 L.R.A. 757, 98 N. W. 710.

§ 8668. Administration, when no heirs known. Duty of state's attorney. In a case specified in the third subdivision of the preceding section it is the duty of the state's attorney of the county in which the jurisdiction lies to petition for administration as soon as the facts come to his knowledge. If the application is made by a creditor such state's attorney must be cited as a party. The citation must also be addressed generally to all persons interested in the estate of the deceased and published as prescribed for service in that mode. At the hearing the fact of intestacy shall be presumed unless the contrary appears. [R. C. 1905, § 8033; R. C. 1895, § 6326.]

§ 8669. Special administrator, who may be appointed. A special administrator may be any person competent to serve as administrator approved or selected by the court with due regard to the rights of parties claiming letters or otherwise interested in the estate. [R. C. 1905, § 8034; Pro. C. 1877, § 96; R. C. 1895, § 6327.]

§ 8670. Special administrator, authority and duties of. A special administrator has the same authority as a general administrator to take into his possession personal property, to secure and preserve it, to collect debts due

the estate, and to take charge of the real estate and preserve it from waste or other injury and receive the rents, profits and income thereof, and for either of those purposes he may maintain any action or special proceeding. He must also make an inventory and render an account and may sell perishable property or do any other act which he may be specially required to do by direction of the court but cannot act generally in matters pertaining to the settlement of the estate. [R. C. 1905, § 8035; Pro. C. 1877, §§ 98, 100; R. C. 1895, § 6328.]

§ 8671. Special administration ceases, when. When letters testamentary or of general administration on the estate are granted the powers of the special administrator cease and he must forthwith deliver to the executor or administrator all the property and effects of the decedent remaining in his hands. [R. C. 1905, § 8036; Pro. C. 1877, § 99; R. C. 1895, § 6331.]

ARTICLE 5.— FOREIGN WILLS AND LETTERS OF ADMINISTRATION.

§ 8672. Probate of foreign wills. Every will duly proved and allowed in any of the territories, or in any other of the United States or the District of Columbia, or in any foreign country or state, may be allowed and recorded in the county court of any county in which the testator shall have left any estate, or any estate for which claim is made. When a copy of the will and the probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters, the same must be filed, and the court or judge must appoint a time for the hearing; notice whereof must be given as provided for an original petition for the probate of a will. If, on the hearing, it appears upon the face of the record that the will has been proved, allowed and admitted to probate in any of the territories, or any other of the states of the United States, the District of Columbia, or in any foreign country or state, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate, be certified in like manner according to the facts, and recorded, and have the same force and effect as a will first admitted to probate in this state, and letters testamentary or of administration with the will annexed issued thereon. [R. C. 1905, § 8037; 1897, ch. 111, § 12; R. C. 1899, § 6332.]

Presumption as to probate of will in other state. 48 L.R.A. 136.

Jurisdiction to admit to probate will not probated at testator's domicile. 33 L.R.A.(N.S.) 658.

Ancillary probate of will at testator's domicile after probate in other jurisdiction. 1 L.R.A.(N.S.) 996.

Right of domiciliary executors and administrators, or their nominees, to ancillary letters. 48 L.R.A.(N.S.) 858.

§ 8673. Executors and administrators to qualify, how. An executor or administrator appointed under the provisions of this article must qualify in the same manner as other executors or administrators and thereafter has like powers, duties and obligations respecting the property of the decedent within this state. [R. C. 1905, § 8038; R. C. 1895, § 6339.]

Foreign corporation is incompetent to receive letters of administration upon estate of deceased person. Greenow v. Simonitsch, 21 N. D. 277, 130 N. W. 835.

§ 8674. Foreign executor or administrator to appoint agent. Every executor, administrator or guardian appointed in, but residing out of the state shall before entering upon the duties of his trust, in writing, appoint an agent residing in the county where he is appointed and shall by such writing stipulate and agree that the service of any legal process against him as such executor, administrator or guardian if made on said agent shall be of the same legal effect as if made on himself personally within the state. Such writing shall give the proper address of such agent and shall be filed in the office of the judge of the county court where such appointment is made

and the notice to creditors shall state the name and address of such agent. [R. C. 1905, § 8039; 1883, ch. 106, § 1; R. C. 1895, § 6340.]

Article 6.— Special Proceedings for Probate of Heirship.

R. C. 1905, §§ 8040–8045, were expressly repealed by section 8 of the act of 1911, constituting this article 6.

§ 8675. Petition to establish heirship. Citation. When a person dies leaving real property within the state, which he has not disposed of by will, and there are no debts of the decedent which are payable to residents of this state, after the expiration of six months from the date of his death, if no county court of this state has acquired jurisdiction of his estate for the purpose of administration, any heir or other person deriving title from or through any heir or heirs of such decedent may present to the county court of the county in which he last resided, or if he was not a resident of this state at the time of his death, to the county court of the county in which the real property, or some part thereof was situated, a petition alleging the facts which authorize the special proceeding according to the foregoing provisions with a particular description of the real property and stating the interest of the petitioner and the interest or share of each heir according to his relationship to the deceased and praying for a decree determining the right of succession to the property. Such petition shall also allege and set forth the value of the entire estate, both real and personal, of which said decedents died seized, so that the court may be able to pass upon the right of succession to the property involved in such proceeding; and said petition must also allege the value of the property described in the petition; and the allegation in such petition shall be deemed true unless the same are denied by answer filed by any person interested. Upon the presentation of such petition, citation shall be issued to all of the heirs of the decedent and all other persons interested, and such citation shall state the name of the decedent and contain a description of the land to which said proceeding relates. [1911, ch. 220, § 1; R. C. 1905, § 8040; 1893, ch. 51, § 1; R. C. 1895, § 6341.]

§ 8676. Appearance and answer to petition. Allegations to be established. At the hearing any person interested may appear and answer the petition; and this section applies to all creditors of said decedent, and any and all heirs, devisees or legatees claiming by or under said decedent whether such parties appear and answer, or permit decree by default to be taken against them. The answer of the respondents may allege any valid defense to the petition, any part of the same or any right or interest which the respondents claim in the property; the allegations of the petition must be established to the satisfaction of the court by competent testimony before the decree may be entered although no issue is joined by answer. [1911, ch. 220, § 2; R. C. 1905, § 8041; 1893, ch. 51, § 2; R. C. 1895, § 6342.]

§ 8677. Joinder of parties respondent. Unknown persons, how joined. In all such proceedings all persons appearing of record to have any estate or interest in or lien or incumbrance upon the property, and all persons in possession may be joined as respondents and all others may be joined by inserting in the title of the proceedings the following: "And all other persons unknown claiming any estate or interest in or lien or incumbrance upon the property described in the petition or against the estate of said deceased." [1911, ch. 220, § 3.]

§ 8678. Who may be proceeded against as persons unknown. Service of citation thereon. All persons having or claiming any estate or interest in or lien or incumbrance upon the property described in the petition, whether as heirs, devisees or legatees or personal representatives or creditors of the 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, clerk of the district court or the county auditor of the county in which the land is situated, to

have such claim, title or interest therein may be proceeded against as persons unknown, and the decree entered in such proceedings shall be valid against all persons affected thereby. Service of the citation in such proceeding may be had upon all such unknown persons respondents, by publication in the manner provided by law for service by publication of citation in the county courts in other probate proceedings; provided, that as to such unknown persons, respondents, the affidavit for publication shall be required to state in substance the following facts: that the interests of such unknown persons respondent, in the land described in the petition are not shown of record in the office of the register of deeds, clerk of the district court, or the county auditor of the county in which the land lies, and the affiant does not know and is unable to ascertain the names, residences and post office addresses of any of the persons who are proceeded against as unknown persons respondents; unknown corporations claiming interests are included within the word "persons" as used in this article. [1911, ch. 220, § 4.]

§ 8679. Form and conclusiveness of decree for petitioner. When the facts are established to the satisfaction of the court a decree shall be given specifying the service of citation on the respondents, and that the decedent died leaving the real property involved in the proceeding within this state which he had not disposed of by will, and that there are no debts of the decedent which are payable to residents of this state; and further specifying who are the heirs of the decedent entitled to succeed and inherit the land under the laws of succession in such cases made and provided, and what are the interest or shares of the parties to the property and declare the right of succession accordingly. Such decree shall also determine the value of the property. Such decree is conclusive upon all creditors of the decedent and upon all parties and their successors having any interest in said property, and such decree shall be final and conclusive upon all parties and their successors having any interest in said property, and such decree shall be final and conclusive upon all parties to the proceedings, including all unknown persons affected thereby and that no proceedings shall be entertained by the county court or by any court in this state for a reversal or modification or vacation of such decree or for the probate of a will or grant of administration affecting the property described in such decree unless such proceedings are commenced within six months after the date of the rendition of said decree; provided, however, that an appeal may be taken from such decree in the same manner now provided by law for appeal from a decree of the county court in other probate proceedings. [1911, ch. 220, § 5; R. C. 1905, §§ 8042, 8043; 1893, ch. 51, § 3; R. C. 1895, § 6343.]

§ 8680. Record of the decree. A certified copy of such decree may be recorded in the office of the register of deeds of each county in which the property is situated in the manner prescribed by law for recording a deed. [1911, ch. 220, § 6; R. C. 1905, § 8044; 1893, ch. 51, § 4; R. C. 1895, § 6344.]

§ 8681. Costs and county court fees. The costs of such proceedings shall be paid by such petitioner or petitioners, and the county court fees shall be determined by the court on the oath of the petitioner or petitioners, and shall be dependent on the value of the property which value shall be stated in the decree. The county court fees shall be as follows: Five dollars where the value of the estate does not exceed one thousand dollars; ten dollars where the value of the estate exceeds one thousand dollars and does not exceed three thousand dollars; fifteen dollars where the value of the property exceeds three thousand dollars. [1911, ch. 220, § 7; R. C. 1905, § 8045; 1897, ch. 111, § 20; R. C. 1899, § 6345.]

CHAPTER 5.

REQUISITES FOR QUALIFICATION.

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

§ 8682. Executor, administrator, guardian. Who competent for. No person under twenty-one years of age or other person who is incapable by law of making a contract, or has been convicted of a felony, is competent to serve as executor, administrator or guardian; and no person shall be appointed as such, who was a partner of the decedent at the time of his death, or is by the court found unfit to discharge the duties of the trust by reason of drunkenness, improvidence, mental or physical infirmity or lack of integrity. A married woman must not be appointed administratrix or guardian, nor shall the husband of the widow of a deceased man be appointed guardian of such deceased man's children; provided, however, that the court may in its discretion, upon the probate of a foreign will, issue letters testamentary to the executor named in the will. [R. C. 1905, § 8046; 1897, ch. 111, § 21; R. C. 1899, § 6346; 1901, ch. 78.]

Who may be executor or administrator. 54 Am. Dec. 518.
Requisite moral qualifications of executors. 16 L.R.A. 538.
Nonresidents as executors or administrators. 1 L.R.A.(N.S.) 341; 113 Am. St. Rep. 562.

§ 8683. Oath and bond of executor. Before letters are issued to an executor, administrator or guardian he must qualify by taking an oath and giving bond as prescribed in this article; and before letters are issued to any person who has in his possession or under his control any money or property belonging to the estate he may be required to exhibit an inventory or otherwise render a satisfactory account of his doings with such property. A failure to comply with the foregoing requirements within such time as the court allows is a relinquishment of the appointment. [R. C. 1905, § 8047; Pro. C. 1877, § 75; R. C. 1895, § 6347.]

§ 8684. Oath, form of. Where filed. Every executor, administrator or guardian must take and subscribe an oath administered by some competent officer and file the same with the county judge to the effect that he will faithfully and according to law to the best of his ability perform all the duties of his trust. [R. C. 1905, § 8048; Pro. C. 1877, § 75; R. C. 1895, § 6348.]

§ 8685. Bond. Justification. Every executor, administrator or guardian must give bond to the state of North Dakota for the benefit of all persons interested in the estate in such sum as the court prescribes, with sufficient sureties to be approved by the judge; and conditioned for the faithful discharge of all the duties of the trust imposed on him by law or by order of the court according to law. Except as otherwise specially prescribed by law the required sum must not be less than twice the aggregate value, as ascertained by the court, of the personal property and the rents, profits and income for one year of the real property belonging to the estate. Every bond must be held to be the joint and several contract of the principal and sureties executing the same, notwithstanding any express provisions therein

to the contrary; provided, however, that whenever, by partial distribution or otherwise, the assets in the hands of any executor, administrator or guardian are reduced, and it is necessary to continue the trust for a period longer than one year from the time of the appointment of such executor, administrator or guardian, the county court, in its discretion, may accept from executor, administrator or guardian, a bond for a reduced amount, in twice the aggregate value as ascertained by the court of the personal property and the rents, profits and income for one year of the real property then in the hands of such executor, administrator or guardian, and upon full accounting by such executor, administrator or guardian, the bond first given may be released as to future liability, and the bond in the reduced amount so taken, shall stand as the bond of such person; provided, however, that the release of such prior bond shall in no way discharge the obligors therein from liability by reason of any default occurring prior to such discharge. [1909, ch. 79; R. C. 1905, § 8049; Pro. C. 1877, §§ 76, 78; R. C. 1895, § 6349.]

Bond takes place of appeal bond when appeal is taken. Re Seydells Estate, 14 S. D. 115, 84 N. W. 397.

Liability of sureties on failure of administrator to account. Joy v. Elton, 9 N. D. 428, 83 N. W. 875.

Power of surety company to act as guardian without bond. 48 L.R.A. 589.

Necessity of bond to make guardian's acts valid. 33 L.R.A. 759.

Penalty as limit of liability on bond of guardian or administrator. 55 L.R.A. 392.

Effect on surety of judgment against principal. 52 L.R.A. 187; 40 L.R.A.(N.S.) 417.

Contingency of claim against sureties on guardian's bond. 58 L.R.A. 86.

Decree directing transfer of fund of guardian to himself in another fiduciary capacity as affecting liability of his sureties. 40 L.R.A.(N.S.) 1136.

Liability of sureties on guardian's bond for defalcation prior to the execution thereof. 39 L.R.A.(N.S.) 961.

Execution of bond of executor or administrator on condition that others shall sign. 45 L.R.A. 340.

Effect of delivery of bond unsigned by principal obligor. 12 L.R.A.(N.S.) 1118.

Right to sue executor or administrator, on his bond, in a state other than that of his appointment. 35 L.R.A.(N.S.) 334.

Remedy of pretermitted heirs by action on executor's bond. 37 L.R.A.(N.S.) 1147.

Decree directing transfer of fund by executor or administrator to himself in another fiduciary capacity as affecting liability of his sureties. 40 L.R.A.(N.S.) 1136.

§ 8686. Bond for sale of real estate. Whenever an executor, administrator or guardian is authorized to sell or mortgage any real estate, he must in like manner be required to give an additional bond in a sum equal to twice the probable amount to be realized upon such sale or mortgage. But such additional bond may be dispensed with by the decree authorizing such sale or mortgage, when it appears to the satisfaction of the court that the former bond of such executor, administrator or guardian is at least twice the value of the estate remaining in his hands together with the amount of such increased liability and is in all other respects sufficient. [R. C. 1905, § 8050; Pro. C. 1877, § 77; R. C. 1895, § 6350.]

Necessity of bond by guardian on sale of infant's land. 33 L.R.A. 761.

Validity of sale to surety on executor's bond. 4 L.R.A.(N.S.) 820.

§ 8687. Bond waived by will. When it is expressly provided in the will that no bond shall be required of the executor, letters testamentary may issue and sales of real estate be made and confirmed without any bond unless the court for good cause requires one to be executed; but the executor may at any time afterwards if it appears from any cause necessary or proper be required to file a bond as in other cases. [R. C. 1905, § 8051; Pro. C. 1877, § 88; R. C. 1895, § 6351.]

§ 8688. Separate bond. When two or more persons are appointed as executors, administrators or guardians, the court may require and take a separate bond from each. [R. C. 1905, § 8052; Pro. C. 1877, § 79; R. C. 1895, § 6352.]

ARTICLE 2.— FORM OF LETTERS.

§ 8689. Letters testamentary, form of. Letters testamentary may be substantially in the following form:

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

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

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

Given with the seal of said court hereto affixed the..... day of .....A. D. 19.....

(Seal.)

(Official signature of the judge.)

[R. C. 1905, § 8053; Pro. C. 1877, § 53; R. C. 1895, § 6354.]

§ 8690. Letters of testamentary administration, form of. Letters issued to a testamentary administrator may be substantially in the following form:

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

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

Now, therefore, know ye, that he, the said C. D., is authorized to enter upon the discharge of his duties as such testamentary administrator and continue therein until the revocation of these letters. (Conclude as above.) [R. C. 1905, § 8054; Pro. C. 1877, § 54; R. C. 1895, § 6355.]

§ 8691. Letters of administration, form of. Letters of administration, either general or special, may be substantially in the following form:

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

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

Now, therefore, know ye, that he, the said A. B., is authorized to enter upon the discharge of his duties as such administrator (or special administrator) and continue therein until the revocation of these letters. (Conclude as above.) [R. C. 1905, § 8055; Pro. C. 1877, § 55; R. C. 1895, § 6356.]

§ 8692. Letters of guardianship, form of. Letters of guardianship may be in the form prescribed in the last section with such variations as the facts require. [R. C. 1905, § 8056; R. C. 1895, § 6357.]

ARTICLE 3.— NEW BONDS AND SURETIES.

§ 8693. Bond becoming insufficient. Proceedings. Any creditor or other person interested in the estate may present to the county court an affidavit alleging that a surety in any bond taken as prescribed in this chapter is insufficient or has removed or is about to remove from the state or that the bond is inadequate in amount and demanding that the executor, administrator or guardian may be required to give a new bond in a larger amount or new or additional sureties as the case requires, or in default thereof that he may be removed from his office and thereupon, if there is reason to

believe that the statements of the affidavit are true, such executor, administrator or guardian may be cited to appear and show cause why the demand should not be granted. [R. C. 1905, § 8507; Pro. C. 1877, §§ 84, 85; R. C. 1895, § 6358.]

§ 8694. Judge issues citation as to insufficiency of bond. When it comes to the knowledge of the county judge that the bond of an executor, administrator or guardian is inadequate or that a surety therein is insufficient, is dead, or has removed or is about to remove from the state and no application is made, as provided in the last section, an order shall be made requiring such executor, administrator or guardian to show cause why he should not be required to give further security upon which he shall be cited as upon the application of a party. [R. C. 1905, § 8058; 1897, ch. 111, § 22; R. C. 1899, § 6359.]

§ 8695. Hearing and order. If it satisfactorily appears at the hearing that the security is inadequate or insufficient, the court must make an order requiring the executor to give new or additional sureties or a new bond in a sufficient amount as the case requires, within a reasonable time not exceeding ten days and directing that in default thereof his letters be revoked. If he fails to give such security, the court must make a supplemental order removing him and revoking his letters accordingly. [R. C. 1905, § 8059; Pro. C. 1877, §§ 86, 87; R. C. 1895, § 6360.]

§ 8696. Release of sureties on application. Any or all of the sureties in a bond taken as prescribed in this chapter may present to the county court a petition praying to be released from responsibility on account of any future breach of the condition of the bond, and thereupon the executor, administrator or guardian must be cited to appear in person and give new security. If he files in the office of the county judge a sufficient bond with new sureties to the satisfaction of the court at the time specified in the citation or thereafter within such reasonable time not exceeding ten days as the court fixes, the court must make a decree releasing the petitioner from liability upon the bond for any subsequent act or default of the principal; otherwise he must make a decree removing him and revoking his letters. [R. C. 1905, § 8060; Pro. C. 1877, §§ 90, 91, 92; R. C. 1895, § 6361.]

Article 4.— Removal, Suspension and Discharge of Executors, Administrators and Guardians.

§ 8697. Decree granting or revoking probate of will revokes former letters. When a will is admitted to probate after letters of administration have been issued or when the probate is revoked after letters have been issued, the decree granting or revoking probate shall revoke the former letters. [R. C. 1905, § 8061; R. C. 1895, § 6362.]

Revocation of probate as termination of appointment of administrator c. t. a. 29 L.R.A.(N.S.) 974.

Validity of acts done under letters afterwards revoked or held invalid. 21 L.R.A. 147; 43 L.R.A.(N.S.) 636.

§ 8698. Causes for revocation of letters. An executor, administrator or guardian may also be removed by a decree of the county court revoking his letters upon satisfactory proof of the existence of either of the following causes:

1. Any legal disability which renders him incompetent or unfit to act as such executor or administrator when the same has been incurred since his letters were issued, or was not alleged in the proceeding in which he was appointed.

2. Any wrongful act or omission on his part conducive to waste or misappropriation of the estate or affording opportunity therefor.

3. Willfully refusing or neglecting without sufficient cause to obey any lawful direction of the county court or any provision of law relating to the discharge of his duties.

4. In the case of an executor, when by the terms of the will his office ceases upon a contingency which has happened.

5. In the case of a special administrator appointed upon the estate of an absentee, when it is shown that the absentee is living and capable of resuming the management of his affairs or that an executor or administrator has been appointed upon the estate by another court having jurisdiction thereof. [R. C. 1905, § 8062; Pro. C. 1877, § 108; R. C. 1895, § 6363.]

Grounds for removal of executors or administrators. 138 Am. St. Rep. 525.

§ 8699. Removal of executor, administrator or guardian, how. A petition alleging the facts and praying for the removal of an executor, administrator or guardian pursuant to the provisions of the preceding section may be presented by a creditor or other person interested in the estate and may contain a prayer for the appointment of a successor and if the court deems the allegations sufficient a citation shall issue to the executor, administrator or guardian and all other persons who by the terms of a will or by law are entitled to any portion of the estate. [R. C. 1905, § 8063; Pro. C. 1877, § 109; R. C. 1895, § 6364.]

§ 8700. Court may remove, when. When the facts which authorize a removal come to the knowledge of the court and no application is made as above provided, the court may make an order requiring the executor, administrator or guardian to show cause why he should not be removed, upon which he shall be cited to appear; and at the hearing the court may revoke his letters as upon a petition, and upon the removal of any such executor, administrator or guardian the court shall appoint a successor. [R. C. 1905, § 8064; R. C. 1895, § 6365; 1903, ch. 25.]

Order of county court removing administratrix, not appealed from, is conclusively presumed to be made upon sufficient evidence. Howell v. Dinneen, 16 S. D. 618, 94 N. W. 698.

Power to permit executor who has qualified to resign. 13 L.R.A.(N.S.) 438.

§ 8701. Court may compel attendance. At any hearing contemplated by the two preceding sections the court may require and compel the attendance of the executor, administrator or guardian in person and examine him under oath respecting the alleged cause for his removal. [R. C. 1905, § 8065; Pro. C. 1877, § 112; R. C. 1895, § 6366.]

§ 8702. Court may enjoin and suspend powers, when. Upon issuing a citation in a proceeding for the removal of an executor, administrator or guardian or in a proceeding to require him to give new security, if he is wasting or misappropriating or alleged to be wasting or misappropriating the estate, the court may by order summarily suspend his powers or enjoin him from doing any specific act in the exercise thereof as the case requires until its final determination. [R. C. 1905, § 8066; Pro. C. 1877, § 88; 1883, ch. 106, § 2; R. C. 1895, § 6367.]

§ 8703. Final settlement of account. Discharge. An executor, administrator or guardian may at any time present to the county court a petition praying that his account may be settled and that a decree may thereupon be made revoking his letters and discharging him accordingly. The petition must set forth the facts upon which the application is founded; but the application shall not be entertained while a proceeding is pending for the removal of the executor, administrator or guardian or if in the opinion of the judge there is good cause for his removal or other sufficient cause for refusing to entertain the same. [R. C. 1905, § 8067; Pro. C. 1877, § 105; R. C. 1895, § 6368.]

Decree of distribution of decedent's estate, made by county court, is of equal rank with judgments entered by courts of record. Sjoli v. Hogenson, 19 N. D. 82, 122 N. W. 1008.

§ 8704. Proceedings pending discharge. If the court entertains such application, a citation must issue to all parties interested in the estate. At the hearing any creditor or other person interested may allege cause for denying the application or allege cause for his removal and pray relief accord-

ingly. Upon a trial of the issue if the court determines that sufficient cause exists for granting the application the petitioner must be allowed to account; and after he has fully accounted and paid over all money which is found to be due from him to the estate and delivered over all books, papers and other property of the estate in his hands as the court directs a decree shall be made discharging him and revoking his letters, otherwise such decree shall be made as justice requires. [R. C. 1905, § 8068; Pro. C. 1877, § 297; R. C. 1895, § 6369.]

§ 8705. Acts valid until letters revoked or suspended. All acts of an executor or administrator capable by law of making a contract notwithstanding any cause for removal remain as valid and effectual as if he continued lawfully to execute the duties of his trust until his letters are revoked or his powers suspended by a decree or order of the court. [R. C. 1905, § 8069; Pro. C. 1877, § 106; R. C. 1895, § 6370.

§ 8706. Procedure, when one executor dies or is removed. When one of two or more executors or administrators dies or becomes incapable of discharging the trust or when letters are revoked as to one of them, a successor to such person shall not be appointed unless such appointment is necessary in order to comply with the express provisions of a will, but the others shall proceed and complete the administration of the estate pursuant to the letters. [R. C. 1905, § 8070; Pro. C. 1877, §§ 103, 104; R. C. 1895, § 6371.]

CHAPTER 6.

SETTLEMENT OF THE ESTATES OF DECEDENTS.

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

§ 8707. Possession, power and duties of executors and administrators. The executor or administrator is entitled to possession of all the real and personal property of the decedent except the homestead and other exempt property reserved by law to the surviving husband or wife or children; and must protect the real property from waste or other injury and collect the rents and

profits thereof until ordered to surrender the same, and collect the goods, chattels and other effects of the decedent and the debts and demands of every description due to the decedent or accruing to the estate in his right, and safely keep and dispose of the same according to law. [R. C. 1905, § 8071; Pro. C. 1877, §§ 122, 210; R. C. 1895, § 6372.]

Possession of realty by administrator for administration. Kelsey v. Welch, 8 S. D. 253, 66 N. W. 390; Elder v. Mining & Milling Co., 9 S. D. 636, 70 N. W. 1060, 62 Am. St. Rep. 895.

Authorizes executor to maintain action to determine adverse claims against property. Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1029.

Executor or administrator, and not heirs, is proper party to institute action involving personal property. Mears v. Smith, 19 S. D. 79, 102 N. W. 295.

Executor of plaintiff may continue action to cancel deed without joining residuary legatees. Subera v. Jones, 20 S. D. 628, 108 N. W. 26.

Executor entitled to possession of all real and personal property of testator that decedent would have been entitled to if alive. Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1029.

On right of executor to maintain action for possession of property in same courts as testator. Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1029.

When personal representative not entitled to possession of personal assets of estate. 3 L.R.A.(N.S.) 704.

Widow's right to proceeds of insurance on deceased husband's life payable to himself or his executors or administrators. 35 L.R.A.(N.S.) 964.

What assets pass to administrator de bonis non. 40 L.R.A. 33.

Liquor license as asset. 4 L.R.A.(N.S.) 626.

Administration based on right of action for negligent killing of a person as an asset. 1 L.R.A.(N.S.) 885.

Is surplus realized on foreclosure sale of real estate after mortgagor's death to be deemed real or personal property. 19 L.R.A.(N.S.) 723.

Right of estate of one entitled by will or statute to an allowance for support and maintenance to accumulations undrawn and unexpended at the time of her death. 9 L.R.A.(N.S.) 937.

Validity of provision that money shall be payable to obligee only and not to his estate. 17 L.R.A.(N.S.) 1239.

Powers and duties of executor or administrator respecting property outside of the state. 45 Am. St. Rep. 664.

§ 8708. Unauthorized person having property of decedent. Every person having or obtaining property of a decedent without authority from the executor or administrator is liable to account for the same at its full value and shall not be allowed to retain or deduct therefrom any debt due from such decedent. [R. C. 1905, § 8072; R. C. 1895, § 6373.]

§ 8709. Embezzlement of decedent's property. Any person who embezzles, conceals or alienates any moneys, goods, chattels or effects of a decedent is liable in a civil action for double the value of such property or for the return of the property with damages to the extent of its value to be recovered by the executor or administrator for the benefit of the estate. [R. C. 1905, § 8073; Pro. C. 1877, § 124; R. C. 1895, § 6374.]

§ 8710. Lease of real estate. An executor or administrator may lease the real property under his control until ordered to surrender the same and may keep in suitable repair all houses, buildings and fixtures thereon. [R. C. 1905, § 8074; R. C. 1895, § 6376.]

§ 8711. Inventory by surviving partners. In case of the death of one partner the surviving partner or partners must make a full, true and complete inventory of the property of the copartnership with a list of all the liabilities thereof at the time of the death of the deceased partner and deliver the same to the executor or administrator of such deceased partner, or to the county court, and must give a good and sufficient bond to such executor or administrator to be approved by the county court. Such surviving partner or partners have the right to continue in possession of the effects of the partnership, pay its debts out of the same and settle its business; but must proceed thereto without delay and account with the executor or administrator and pay over such balance as may from time to time be payable to him in the right of the decedent. Upon the application of the administrator

or executor the county court may, whenever it appears necessary after citation, order such surviving partner to deliver an inventory or render an account, and may enforce the order as in other cases. [R. C. 1905, § 8075; 1897, ch. 111, § 23; R. C. 1899, § 6377.]

§ 8712. Possession from third persons, how. An executor or administrator may present to the county court an affidavit setting forth facts which tend to show that money, goods, chattels, conveyances, bonds, contracts or other writings containing evidences of a right or claim of the decedent to any property or of any demand due such decedent which should be delivered to him or included in an inventory or appraisal, is in the possession or under the control of a person who withholds or refuses to account for the same, or that a person has knowledge or information which he refuses to impart respecting such money, goods, chattels, conveyances, bonds, contracts or other writings so that the same cannot be discovered, inventoried or appraised, and praying that he may be required to appear and be examined concerning the same. If the court is satisfied that there are reasonable grounds for an investigation such person must be cited to appear in person. He may also be directed to appear forthwith and in that case the citation may be served at any time before the hearing. [R. C. 1905, § 8076; Pro. C. 1877, §§ 125, 127; R. C. 1895, § 6378.]

Summary proceedings to discover property. 115 Am. St. Rep. 208.

§ 8713. Examination of third persons as to possession. On the attendance of the person so cited he must be sworn and examined under oath and may be compelled to answer any question that may be put to him respecting any money, goods, chattels, conveyances, contracts or other writings specified in the preceding section and make a full disclosure of all the facts within his knowledge or information in relation thereto; but his answers cannot be given in evidence against him in a criminal prosecution. If his testimony tends to show that other persons have knowledge or information that will aid the executor or administrator in the discovery of property to be inventoried or appraised, they may be subpoenaed and examined in like manner. After the examination the court may hear the testimony of other witnesses. And when it appears that a person so examined has in his possession or under his control any money, goods, chattels, conveyances, contracts or other writings belonging to the estate he may be ordered and compelled to deliver the same to the executor or administrator or to produce the same for inventory and appraisement as the case requires, unless he interposes a written answer duly verified to the effect that he is the owner of the property or is entitled to possession thereof by virtue of a special property therein or by virtue of a lien under which he obtained possession in the life time of the testator. [R. C. 1905, § 8077; Pro. C. 1877, § 126; R. C. 1895, § 6379.]

Order requiring delivery of property prima facie evidence of administrator's right to recover. Bright v. Ecker, 9 S. D. 192, 68 N. W. 326; Bright v. Ecker, 9 S. D. 449, 69 N. W. 824.

Article 2.— Inventory and Appraisement of the Estate.

§ 8714. Inventory of executor or administrator, contents of. Every executor or administrator must within thirty days after his appointment make and return to the county court a true inventory and appraisement of all the real and personal property of the decedent which has come to his knowledge including a list of all bonds, mortgages, notes, book accounts and other securities or evidences of debt which appear by the books or papers of the deceased to be unsettled with a statement of the sums credited thereon if any. If no money has come to the hands of the executor or administrator, that fact must be stated in the inventory. The property inventoried shall be classed under separate heads as follows:

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

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

3. All other property not above specified. [R. C. 1905, § 8078; Pro. C. 1877, §§ 113, 116; R. C. 1895, § 6380.]

Executor entitled to possession of all real and personal property of testator that decedent would have been entitled to if alive. Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1029.

Homestead cannot be partitioned among heirs, while occupied as homestead by surviving husband, wife or minor child. Wells v. Sweeney, 16 S. D. 489, 102 Am. St. Rep. 813, 94 N. W. 394.

§ 8715. Inventory, how made. The inventory must be signed by the executor or administrator, who must take and subscribe thereon an oath before an officer authorized to administer oaths that the inventory contains a true statement of all the estate of the decedent which has come to his knowledge and possession and particularly of all money belonging to the decedent and of all just claims of the decedent against the affiant. [R. C. 1905, § 8079; Pro. C. 1877, § 119; R. C. 1895, § 6381.]

§ 8716. Executor's personal debt. A person named in a will as executor is not thereby discharged from any just claim which the testator has against him but the claim must be included in the inventory and collected or accounted for in the same manner as other claims. [R. C. 1905, § 8080; Pro. C. 1877, § 117; R. C. 1895, § 6382.]

Liability for debts due from executor or administrator to decedent. 112 Am. St. Rep. 406.

§ 8717. Inventory to contain partnership interest. The interest of the decedent in an unsettled partnership must be included in the inventory and appraised upon the statement rendered by the surviving partner or otherwise, like other property. [R. C. 1905, § 8081; R. C. 1895, § 6383.]

§ 8718. Bequest to executor. A discharge or bequest in a will of a debt or demand of the testator against an executor or other person is not valid against creditors of the testator but must be treated as a specific bequest of the amount of the debt or demand. Such demand must be included in the inventory and be collected and applied so far as necessary in payment of the creditors after which the surplus if any shall be paid as other legacies. [R. C. 1905, § 8082; Pro. C. 1877, § 118; R. C. 1895, § 6384.]

§ 8719. Decedent's life insurance. The avails of a life insurance policy or of a contract payable by any mutual aid or benevolent society, when made payable to the personal representatives of a deceased, his heirs or estate upon the death of a member of such society or of such insured shall not be subject to the debts of the decedent except by special contract, but shall be inventoried and distributed to the heirs or the heirs at law of such decedent. [R. C. 1905, § 8083; 1897, ch. 111, § 24; R. C. 1899, § 6385.]

Constitutionality of statute. Shinner v. Holt, 9 S. D. 427, 69 N. W. 595, 62 Am. St. Rep. 878.

Exemption of life insurance policy. Skinner v. Holt, 9 S. D. 427, 69 N. W. 595, 62 Am. St. Rep. 878.

Statute does not make proceeds of policies assets of estate of insured, nor does it enlarge power of county court. Finn v. Walsh, 19 N. D. 61, 121 N. W. 766.

Policy made payable to insured or his personal representatives or assigns may be willed, but is subject to statutory allowance of surviving husband or wife and minor children. Meyer v. Meyer, 25 S. D. 596, 127 N. W. 595.

§ 8720. Appraisers to be appointed. Oath. Compensation. To make the appraisement the judge must appoint three competent and disinterested persons any two of whom may act. The appointment may be made by order at any time. A notice of the appointment must be issued upon which before entering upon their duties the appraisers must each subscribe an oath administered by a competent officer to the effect that he will truly and impartially according to the best of his ability appraise the property of the decedent and

discharge all other duties required of him as such appraiser. If any portion of the property is in another county the same appraisers may serve or others may be appointed in that county. The notice and oath of the appraisers must be returned with the inventory together with a verified statement of their services and expenses. They shall be allowed a reasonable compensation for their services not exceeding the amount of their necessary expenses and two dollars a day in addition to be paid by the executor or administrator as expenses of the administration. [R. C. 1905, § 8084; Pro. C. 1877, § 114; R. C. 1895, § 6386.]

§ 8721. Appraisers, duties of. The appraisers must estimate and appraise at its actual value according to their best judgment all the property described in the inventory submitted by the executor or administrator except money and must set down in figures opposite each item the value thereof as agreed upon in dollars and cents and after completing the appraisement they must subscribe and annex thereto an affidavit to the effect that the value appearing opposite each item was entered by them or by their direction and is the true value agreed upon as their appraisement, and deliver the same to the executor or administrator or to the court. [R. C. 1905, § 8085; Pro. C. 1877, § 115; R. C. 1895, § 6387.]

§ 8722. Supplementary inventory, when made. Whenever property, which is not included in an inventory previously made in the same case, comes to the knowledge or possession of an executor or administrator, he must within one month thereafter or within such time as the court orders make a supplementary inventory and cause an appraisement thereof to be made and returned in like manner. [R. C. 1905, § 8086; Pro. C. 1877, § 121; R. C. 1895, § 6388.]

Article 3.— Possession of the Homestead and Allotment of Exempt Property.

§ 8723. Homestead exempt from debt or liability. Delivery of. Upon the death of either husband or wife the survivor, so long as he or she do not again marry, may continue to possess and occupy the whole homestead, and upon the death of both husband and wife the children may continue to possess and occupy the same until otherwise disposed of according to law. Such homestead, as defined in section 5605 of the civil code, must be ascertained and set apart as hereinafter prescribed upon the selection of the person or persons entitled to possession thereof, and shall not be subject to the payment of any debt or liability contracted by or existing against the husband or wife or either of them previous to or at the time of the death of such husband or wife. [R. C. 1905, § 8087; 1899, ch. 111, § 26; R. C. 1899, § 6389.]

Homestead to be set apart. Hesnard v. Plunkett, 6 S. D. 73, 60 N. W. 159; Morgan v. Beuthein, 10 S. D. 650, 75 N. W. 204, 65 Am. St. Rep. 733; Fore v. Fore, 2 N. D. 260, 50 N. W. 712.

As to "homestead estate" attaching only to such property as constituted decedent's homestead at time of death. Calmer v. Calmer, 15 N. D. 120, 106 N. W. 684.

§ 8724. Appraisers to value homestead. The appraisers must procure from such person or persons a description of the property claimed as a homestead and appraise the same at its value at the time of the death of the testator or intestate and shall if necessary cause the boundaries thereof to be ascertained and marked in their presence by a competent surveyor. If they find that it has been selected in such form as will materially diminish the value of any remaining part of the property, they may modify its boundaries so as to avoid such injury if it can be done without material injury to the homestead property. If they find that the property selected as a homestead exceeds in value the sum of five thousand dollars, they shall in like manner set off the homestead in such form as to exclude the excess unless they further find that the property cannot be divided without material injury. They shall make a

full report of all their proceedings and findings in relation to the homestead and annex the same to the inventory. [R. C. 1905, § 8088; R. C. 1895, § 6390.]

Homestead should be set apart. Hesnard v. Plunkett, 6 S. D. 73, 60 N. W. 159; Morgan v. Beuthein, 10 S. D. 650, 75 N. W. 204; Fore v. Fore, 2 N. D. 260, 50 N. W. 712.

§ 8725. Exempt personal property, disposition of. There shall also be set apart absolutely to the surviving wife or husband or minor children all the personal property of the testator or intestate which would be exempt from execution, if he were living, including all property absolutely exempt and other property selected by the person or persons entitled thereto to the amount in value of fifteen hundred dollars according to the appraisement and such property shall not be liable for any prior debt of the decedent except the necessary charges of his last sickness and funeral and expenses of the administration when there are no other assets available for the payment of such charges. [R. C. 1905, § 8089; Pro. C. 1877, § 135; R. C. 1895, § 6391.]

Personal property set apart becomes absolute property of surviving widow and children. Fore v. Fore, 2 N. D. 260, 50 N. W. 712.

Funeral expenses and expense of administration are not payable from statutory allowance, if there is other available property. Meyer v. Meyer, 25 S. D. 596, 127 N. W. 595.

Widow's right to year's support or allowance out of insurance money. 46 L.R.A.(N.S.) 788.

§ 8726. Return of inventory and appraisement. Objections. Hearing. Upon the return of the inventory and appraisement the court must fix a day for hearing objections thereto concerning the homestead and other exempt property and the executor or administrator must cause notice thereof to be given to all parties interested. At the hearing the court may confirm the proceedings as to the inventory and appraisement or modify the same or set them aside and order a new appraisement as justice requires. If the court finds that the homestead exceeds in value the sum of five thousand dollars and further finds that the property cannot be divided without material injury, the order setting it apart must determine the amount of such excess and the property may thereafter be subjected to the payment of debts in the same manner as other property to the extent of the excess so determined after all the other available property has been exhausted. [R. C. 1905, § 8090; R. C. 1895, § 6392.]

Extent of widow's homestead estate in decedent's property. Calmer v. Calmer, 15 N. D. 120, 106 N. W. 684.

§ 8727. Allowance for the family. If the amount so set apart is insufficient for the support of the widow and children or either and there is other estate of the decedent, the court may in its discretion order such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances during the progress of the settlement of the estate, which in case of an insolvent estate must not be longer than one year after granting letters testamentary or of administration. [R. C. 1905, § 8091; Pro. C. 1877, § 132; R. C. 1895, § 6393.]

§ 8728. Allowance is a preferred claim. Any allowance made by the court in accordance with the preceding section must be paid in preference to all other charges except funeral charges or expenses of administration and any such allowance whenever made may in the discretion of the court take effect from the death of the decedent. [R. C. 1905, § 8092; Pro. C. 1877, § 133; R. C. 1895, § 6394.]

§ 8729. Disposition of estates of small value. If, upon the return of the inventory of the estate of an intestate, it shall appear therefrom that the value of the whole estate does not exceed the sum of one thousand five hundred dollars, and if there be a surviving husband or wife or minor children of the deceased, the court or judge thereof shall by order require all persons interested to appear on a day fixed to show cause why the whole of said estate should not be assigned for the use and support of the family of the intestate. Notice thereof shall be given and proceedings had in the same manner as pro-

vided in section 8726. If, upon the hearing, the court finds that the value of the estate does not exceed the sum of one thousand five hundred dollars, it shall by a decree for that purpose, assign to the surviving husband or wife of the intestate, if there be a surviving husband or wife, if no surviving husband or wife, then to the minor children of the deceased, if there be minor children, the whole of the estate, subject to whatever mortgages, liens or incumbrances there may be upon said estate at the time of the death of the intestate, after the payment of the expenses of the last illness of the intestate, funeral expenses and expenses of administration, and the title thereof shall vest absolutely in such surviving husband or wife or minor children, subject to whatever mortgages, liens or incumbrances there may be upon said estate at the time of the death of the intestate and there must be no further proceedings in the administration unless further estate be discovered; and when it so appears that the value of the whole estate does not exceed the sum of three thousand dollars, it is in the discretion of the court to dispense with the regular proceedings or any part thereof, prescribed in chapter 6 of the probate code, and there may be had a summary administration of the estate and an order of distribution thereof at the end of six months after issuing the letters. The notice to creditors must be given to present their claims within four months after the first publication of such notice and those not so presented are barred as in other cases. [1907, ch. 115.]

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

§ 8730. Property of decedent chargeable with. All the property of the decedent except as otherwise provided for the homestead and personal property set apart for the surviving wife or husband and minor child or children shall be chargeable with the payment of the debts of the deceased, the expenses of administration and the allowance to the family, and the property, personal and real, may be sold as the court may direct in the manner hereinafter prescribed. There shall be no priority as between personal and real property for the above purposes. [R. C. 1905, § 8093; Pro. C. 1877, § 162; 1897, ch. 111, § 27; R. C. 1899, §§ 6395, 6428.]

§ 8731. Provisions of the will must be followed. If the testator makes provision by his will or designates the estate to be appropriated for the payment of his debts, the expenses of administration or allowance to the family, they must be paid according to such provision or designation out of the estate thus appropriated so far as the same is sufficient. [R. C. 1905, § 8094; Pro. C. 1877, § 193; 1897, ch. 111, § 27; R. C. 1899, §§ 6396, 6443.]

§ 8732. Provisions insufficient. Proceedings. If the provision made by the will or the estate appropriated therefor is insufficient to pay the debts, expenses of administration and the allowance to the family, that portion of the estate not devised or disposed of by will, if any, must be appropriated and disposed of for that purpose according to the provisions of article 6 of this chapter. [R. C. 1905, § 8095; Pro. C. 1877, § 195; 1897, ch. 111, § 27; R. C. 1899, §§ 6397, 6445.]

§ 8733. Property liable for debts. The estate real and personal given by will to legatees or devisees is liable for the debts, expenses of administration and allowance to the family in proportion to the value or amount of the several devises or legacies, but specific devises or legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator and there is other sufficient estate. [R. C. 1905, § 8096; Pro. C. 1877, § 196; 1897, ch. 111, § 27; R. C. 1899, §§ 6398, 6446.]

ARTICLE 5.— CLAIMS, PRESENTATION, PROOF AND ALLOWANCE.

§ 8734. Notice to creditors. Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper of the county, if there be one, if not, then in such newspaper as may be

designated by the court, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice. Such notice must be published as often as the judge shall direct, but not less than once a week for four weeks. The judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice, his successor must give notice only for the expired time allowed for such presentation. The time expressed in the notice must be six months after its first publication, when the estate exceeds in value the sum of five thousand dollars and four months when it does not. [R. C. 1905, § 8097; 1897, ch. 111, § 26; R. C. 1899, § 6399.]

Liability of estate for broker's commissions. 64 L.R.A. 554.

Liability of estate to attorney employed by personal representative. 25 L.R.A.(N.S.) 72.

Liability of estate for debts contracted and expenses incurred by personal representative in carrying on business. 40 L.R.A.(N.S.) 224.

Liability of estate for funeral expenses. 33 L.R.A. 660.

§ 8735. Court to make decree. After the notice is given, as required by the preceding section, a copy thereof, with the affidavit of due publication or of publication and posting, must be filed and upon such affidavits or other testimony to the satisfaction of the court, an order or decree showing that due notice to creditors has been given, must be made by the court and entered in the minutes and recorded. [R. C. 1905, § 8098; 1897, ch. 111, § 26; R. C. 1899, § 6400.]

§ 8736. Claim barred, when. Exemption. If a claim arising upon a contract heretofore made be not presented within the time limited in the notice, it is barred forever, except as follows: If it be not then due, or if it be contingent, it may be presented within one month after it becomes due or absolute; if it be made to appear by the affidavit of the claimant, to the satisfaction of the executor or administrator and the judge of the county court, that the claimant had no notice as provided in this chapter by reason of being out of the state, it may be presented at any time before a decree of distribution is entered; a claim for a deficiency remaining unpaid after a sale of property of the estate mortgaged or pledged must be presented within one month after such deficiency is ascertained. All claims arising upon contract hereafter made, whether the same be due, not due or contingent, must be presented within the time limited in the notice; and any claim not so presented is barred forever; provided, however, that when it is made to appear by the affidavit of the claimant as above provided, that he had no notice by reason of being out of the state, it may be presented as therein provided; provided, further, that nothing in this section nor in this article contained shall be construed to prohibit the right or limit the time of foreclosure of mortgages upon real property of decedents, whether heretofore or hereafter executed, but every such mortgage may be foreclosed within the time and in the mode prescribed by the code of civil procedure, except that no balance of the debts secured by such mortgage remaining unpaid after foreclosure shall be a claim against the estate, unless such debts were presented as required by this code. [R. C. 1905, § 8099; 1897, ch. 111, § 26; R. C. 1899, § 6401.]

Claim secured by mortgage or mechanic's lien need not be presented. Purdin v. Archer, 4 S. D. 54, 54 N. W. 1043; Fish v. DeLaray, 8 S. D. 320, 66 N. W. 465, 59 Am. St. Rep. 764.

Deficiency found after foreclosure sale must be presented. Kelsey v. Welch, 8 S. D. 255, 66 N. W. 390; Thurber v. Miller, 11 S. D. 124, 75 N. W. 900.

When limitations begin to run in action against representatives of deceased stockholder in insolvent corporations for unpaid stock subscription. 1 L.R.A.(N.S.) 913.

Effect of failure to present claim within the time allowed by the administration statute of the domicile as a bar to its allowance in the state of the ancillary administration, or vice versa. 19 L.R.A.(N.S.) 553.

Contingency of claim as affecting time for presentation. 58 L.R.A. 82.
Right of ward to file claim against estate of guardian after termination of guardianship, but before settlement of account. 26 L.R.A.(N.S.) 793.
Effect on running of limitations of appointment of temporary administrator. 38 L.R.A.(N.S.) 824.

§ 8737. Proof of claim, how made. Every claim which is due when presented to the executor or administrator must be supported by the affidavit of the claimant or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the claimant or affiant. If the claim be not due when presented, or be contingent, the particulars of such claim must be stated. When the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the estate is insolvent, no greater rate of interest shall be allowed upon any claim, after the first publication of notice to creditors, than is allowed by law on judgments obtained in the district court. [R. C. 1905, § 8100; 1897, ch. 111, § 26; R. C. 1899, § 6402.]

Proof of claims. Sixta v. Heister, 14 S. D. 346, 85 N. W. 598.
Transcript of record below must be used on appeal where proofs on which county court acted were in form of affidavits. Re Peterson, 22 N. D. 480, 134 N. W. 751.
Verification of claim of corporation against decedent's estate may be made by treasurer. F. A. Patrick & Co. v. Austin, 20 N. D. 261, 127 N. W. 109.
Statement of claims against estates of decedents. 130 Am. St. Rep. 311.
Right of bank to set off unmatured claim against deposit of deceased debtor. 27 L.R.A.(N.S.) 812.

§ 8738. Court may allow just claims paid without affidavits. When it shall appear, upon the settlement of the accounts of any executor or administrator that debts against the deceased have been paid without the affidavit and allowance prescribed by the preceding section, and shall be proven by competent evidence to the satisfaction of the county court, that such debts were justly due, were paid in good faith, that the amount paid was a true amount of such indebtedness over and above all payments and set-offs, and that the estate is solvent, it shall be the duty of the said court to allow the said sums so paid in the settlement of said account. [R. C. 1905, § 8101; 1897, ch. 111, § 26; R. C. 1899, § 6403.]

§ 8739. Judge may present claim, how. Any judge of the county court may present a claim against the estate of a decedent for allowance to the executor or administrator thereof; and if the executor or administrator allows or rejects the claim, he must, in writing, present the same to the judge of an adjoining county who shall thereupon be substituted in the allowance and settlement of such claim as provided by article 3 of chapter 2 of this code; and the judge of the county court presenting such claim, in case of its rejection by the executor or administrator, or by the county judge, to whom the same has been transferred, has the same right to sue in a proper court for its recovery as other persons have when their claims against an estate are rejected. [R. C. 1905, § 8102; 1897, ch. 111, § 26; R. C. 1899, § 6404.]

§ 8740. Indorsement of allowance or rejection. How made. When a claim accompanied by the affidavit required in this chapter is presented to the executor or administrator, he must indorse thereon his allowance or rejection with the day and date thereof. If he allows the claim it must be presented to the county judge for his approval, who must, in the same manner, indorse upon it his allowance or rejection. If the executor or administrator, or the judge, refuses or neglects to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect is equivalent to a rejection on the tenth day; and if the presentation be made by a notary, the certificate of such notary, under seal, is prima facie evidence of such presentation and rejection. If the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of

claims, the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time. When a claim, stating the post office address of the claimant has been rejected, either by executor or administrator or county judge, whether by indorsement or by nonaction, the person to whom the claim was presented must serve notice of such rejection, said notice to be by personal service or registered mail upon the claimant. [1911, ch. 215; R. C. 1905, § 8103; 1897, ch. 111, § 26; R. C. 1899, § 6405.]

The rejection of a claim by the executor, administrator or county judge is a condition precedent to the right to sue it. In re Smith's Estate, 13 N. D. 513, 100 N. W. 890; Farwell v. Richardson, 10 N. D. 34, 84 N. W. 558.

Claim may be allowed by county judge after rejection by nonaction or indorsement before barred by statute of limitations. In re Smith's Estate, 13 N. D. 513, 100 N. W. 890.

Allowance or rejection of claims, how made; action on, when brought. Bright v. Ecker, 9 S. D. 192, 68 N. W. 326; Farwell v. Richardson, 10 N. D. 34, 84 N. W. 558; Boyd v. VonNeida, 9 N. D. 337, 83 N. W. 329.

Claim presented to administrator prior to giving notice to creditors will be deemed rejected at end of ten days after presentment where administrator neglects to allow or reject it. Singer v. Austin, 19 N. D. 546, 125 N. W. 560.

Rejected claim against estate is not record of probate court so as to entitle it to admission in action on claim as proof of its presentation and rejection, and it is inadmissible without verification of signature of administrator indorsed to rejection. Murray v. Johnson, 28 S. D. 571, 134 N. W. 206.

Retention of account by executor or administrator as rendering it an account stated. 29 L.R.A.(N.S.) 340.

§ 8741. Claims allowed entered in register, how. Every claim allowed by the executor or administrator, and approved by the judge, or a copy thereof, as hereinafter provided, must, within thirty days thereafter, be filed in the county court and be ranked among the acknowledged debts of the estate, to be paid in due course of administration. If the claim is founded on a bond, bill, note, or any other instrument, a copy of such instrument must accompany the claim, and the original instrument must be exhibited if demanded, unless it is lost or destroyed, in which case the claimant must accompany his claim by his affidavit, containing a copy or particular description of such instrument, and stating its loss or destruction. If the claim or any part thereof is secured by a mortgage or other lien which has been recorded or filed according to law in the office of the register of deeds of the county in which the land affected by it lies, it is sufficient to describe the mortgage or lien, and refer to the date of its filing and volume, and page of its record. If, in any case, the claimant has left any original voucher in the hands of the executor or administrator, or suffered the same to be filed in the court, he may withdraw the same when a copy of the same has been already, or is then, attached to his claim. A brief description of every claim filed must be entered by the judge in a register provided for that purpose, showing the name of the claimant, the amount and character of the claim, rate of interest, and date of allowance. [R. C. 1905, § 8104; 1897, ch. 111, § 26; R. C. 1899, § 6406.]

§ 8742. Claims rejected. Suit instituted. How. When a claim is rejected either by the executor or administrator, or the county judge, the holder must bring suit in the proper court, to wit: before a justice of the peace, or in district court, according to its amount, against the executor or administrator, within four months after notice of rejection of claim having been made by registered mail, if it be then due, or within three months after it becomes due, otherwise the claim is barred forever. [1911, ch. 216; R. C. 1905, § 8105; 1897, ch. 111, § 26; R. C. 1899, § 6407.]

Claims rejected by administrator need not be filed in county court. Saxton v. Musselman, 17 S. D. 35, 95 N. W. 291.

Claim rejected is barred if suit is not brought within three months after its rejection, even though no notice to present claims had ever been published. Singer v. Austin, 19 N. D. 546, 125 N. W. 560.

Failure to sue within time limited cannot be waived by administrator demurring to complaint. Mann v. Redmon, 23 N. D. 508, 137 N. W. 478.

§ 8743. Statute of limitation does not run, when. No claim must be allowed by the executor or administrator, or by the judge, which is barred by the statute of limitations. When a claim is presented to the judge for his allowance, he may, in his discretion, examine the claimant and others, on oath, and hear any legal evidence touching the validity of the claim. No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator. The time during which there shall be a vacancy in the administration, or in the office of the county judge, must not be included in any limitation herein prescribed. [R. C. 1905, § 8106; 1897, ch. 111, § 26; R. C. 1899, § 6408.]

No action on claim against estate may be commenced until rejection of claim by administrator either by operation of statute or by written rejection indorsed thereon. Murray v. Johnson, 28 S. D. 571, 134 N. W. 206.

§ 8744. Actions pending at time of death. Proceedings on. If any action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator, for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentation required. Whenever any claim is presented to an executor or administrator, or to the county judge, and he is willing to allow the same in part, he must state in his indorsement the amount he is willing to allow. If the creditor refuse to accept the amount allowed in satisfaction of his claim, he shall recover no costs in an action therefor, brought against the executor or administrator, unless he recovers a greater amount than that offered to be allowed. [R. C. 1905, § 8107; 1897, ch. 111, § 26; R. C. 1899, § 6409.]

Demand for rescission of sale of stallion and return of purchase notes is a "claim" within meaning of this section. Kline v. Gingery, 25 S. D. 16, 124 N. W. 958.

§ 8745. Judgment against estate, effect of. A judgment rendered against an executor or administrator, in the district court or before a magistrate, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator, and the judge of the county court, and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the judgment must be filed in the county court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment. [R. C. 1905, § 8108; 1897, ch. 111, § 26; R. C. 1899, § 6410.]

As to claim against decedent's estate being allowed by county judge after rejection by nonaction. Re Smith, 13 N. D. 513, 101 N. W. 890.

Injunction against judgment entered against executors or administrators on confession. 30 L.R.A. 241.

Right of executor or administrator to have judgment against decedent set aside. 54 L.R.A. 761.

Effect of foreign judgments against executor or administrator. 27 L.R.A. 101.

§ 8746. Execution, when may be issued. When any judgment has been rendered for or against the testator or intestate in his lifetime, no execution shall issue thereon after his death except:

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

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

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

hands. A judgment rendered against a decedent, dying after verdict or decision on an issue of fact, but before judgment is rendered thereon, is not a lien on the real property of the decedent, but is payable in due course of administration. [R. C. 1905, § 8109; 1897, ch. 111, § 26; R. C. 1899, § 6411.]

Power of federal court to enforce its own judgment against a decedent's estate. 12 L.R.A.(N.S.) 154.

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

Injunction in favor of, or against, executor or administrator to prevent execution sales. 30 L.R.A. 120.

§ 8747. Claims not allowed may be referred, how. If the executor or administrator doubts the correctness of any claim presented to him, he may enter into an agreement, in writing, with the claimant to refer the matter in controversy to some disinterested person, to be approved by the judge of the county court. Upon filing the agreement and approval of the judge of the county court in the office of the clerk of the district court for the county or judicial subdivision in which the letters testamentary or of administration were granted, the clerk must, either in vacation or in term, enter a minute of the order referring the matter in controversy to the person so selected or, if the parties consent, a reference may be had in the county court, and the report of the referee, if confirmed, establishes or rejects the claim, the same as if it had been allowed or rejected by the executor or administrator and the county judge. [R. C. 1905, § 8110; 1897, ch. 111, § 26; R. C. 1899, § 6412.]

Submission of disputed claims to arbitration. Unterrainer v. Seelig, 13 S. D. 148, 82 N. W. 394.

§ 8748. Referee, duty of. The referee must hear and determine the matter, and make his report thereon to the court in which his appointment is entered. The same proceedings shall be had in all respects, and the referee shall have the same powers, be entitled to the same compensation, and subject to the same control as in other cases of reference. The court may remove the referee, appoint another in his place, set aside or confirm his report, and adjudge costs, as in actions against executors or administrators and the judgment of the court thereon shall be as valid and effectual in all respects as if the same had been rendered in a suit commenced by ordinary process. [R. C. 1905, § 8111; 1897, ch. 111, § 26; R. C. 1899, § 6413.]

§ 8749. Costs allowed, how. When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause. [R. C. 1905, § 8112; 1897, ch. 111, § 26; R. C. 1899, § 6414.]

Executor is personally liable for costs when the judgment does not charge the estate therewith. McCarthy v. Speed, 16 S. D. 584, 94 N. W. 411.

§ 8750. Executor's or administrator's claims allowed, how. If the executor or administrator is a creditor of the decedent, his claim, duly authenticated by affidavits, must be presented for allowance or rejection to the judge of the county court, and its allowance by the judge is sufficient evidence of its correctness, and it must be paid as other claims, in due course of administration. If, however, the judge rejects the claim, action thereon may be had against the estate by the claimants, and summons must be served upon the judge of the county court, who may appoint an attorney at the expense of the estate to defend the action. If the claimant recover no judgment he must pay all costs, including defendant's attorney's fees. [R. C. 1905, § 8113; 1897, ch. 111, § 26; R. C. 1899, § 6415.]

§ 8751. Notice to creditors must be given. Penalty. If an executor or administrator neglects for two months after his appointment to give notice to creditors as prescribed by this chapter, the court must revoke his letters and appoint some other person in his stead, equally or next in order, entitled

to the appointment. [R. C. 1905, § 8114; 1897, ch. 111, § 26; R. C. 1899, § 6416.]

§ 8752. Statement of claims, when returned. At the same term at which he is required to return his inventory, the executor or administrator must also return a statement of all claims against the estate which have been presented to him, if so required by the court; and from term to term thereafter he must present a statement of claims subsequently presented to him. In all such statements he must designate the names of the creditors, the nature of each claim, when it became due or will become due, and whether it was allowed or rejected by him. [R. C. 1905, § 8115; 1897, ch. 111, § 26; R. C. 1899, § 6417.]

§ 8753. Interest on mortgage claims, when paid. If there be any debt of the decedent bearing interest, whether presented or not, the executor or administrator may, by order of the county court, pay the amount then accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether said claim be then due or not; and interest shall thereupon cease to accrue upon the amount so paid. This applies only to claims the payment of which is secured by a mortgage or lien upon some parts of the estate. [R. C. 1905, § 8116; 1897, ch. 111, § 26; R. C. 1899, § 6418.]

§ 8754. Estates of decedents, how settled. An executor or administrator may render a full and final account and report of his administration to the county court for a final settlement, at any time after the time limited in the notice to creditors for the presentation of claims against the estate; and if the estate is ready for distribution, the court may thereupon proceed to a settlement of such final account and the distribution and settlement of the estate; provided, that no final decree of distribution shall be entered until after the expiration of one month after the rendering and filing of such final account and report. [R. C. 1905, § 8117; 1901, ch. 72.]

Article 6.— Payment of Debts and Charges.

§ 8755. Debts, order of payment. The acknowledged debts and charges must be paid in the following order:

1. The necessary expenses of the administration.
2. The expenses of the last sickness and funeral.
3. Allowances made to the family in excess of the exempt property.
4. Debts having preference by the laws of the United States.
5. Debts which are liens upon specific property whether by judgment, mortgage or otherwise in the order of their priority.
6. All other demands against the estate. [R. C. 1905, § 8118; R. C. 1899, § 6419.]

Commercial paper given by representative as payment of debt. 35 L.R.A.(N.S.) 63.
3. Right of nonresident widow to statutory allowance. 21 L.R.A. 241.
Widow's right to exemption or allowance for support out of personal assets of estate of deceased husband, who was a nonresident. 11 L.R.A.(N.S.) 361.
Waiver of right to widow's allowance by antenuptial agreement. 25 L.R.A.(N.S.) 751.

§ 8756. Limitation as to mortgages. The preference given in the preceding section to a mortgage or other lien only extends to the proceeds of the property subject to such lien. If the proceeds of such property are insufficient to pay the demands, the part remaining unsatisfied must be classed with other demands against the estate. [R. C. 1905, § 8119; Pro. C. 1877, § 259; R. C. 1899, § 6420.]

§ 8757. Liens on realty to be paid. When any sale is made by an executor or administrator pursuant to the provisions of this chapter of land or other property that is subject to any mortgage or other lien, which is a valid claim against the estate of the decedent and has been presented and allowed, the purchase money must be applied after paying the necessary expenses of the sale, first to the payment and satisfaction of the mortgage or lien and

the residue if any in due course of administration. The application of the purchase money to the satisfaction of the mortgage or lien must be made without delay, and the property is subject to such mortgage or lien until the purchase money has been actually so applied. The purchase money or so much thereof as may be sufficient to pay such mortgage or lien with interest and any lawful costs and charges thereon may be paid into the county court, and thereupon the lien must cease and the purchase money must be paid over by the judge without delay in payment of the expenses of the sale and in satisfaction of the debt to secure which the mortgage or other lien was taken and the surplus, if any, must be returned to the executor or administrator. [R. C. 1905, § 8120; Pro. C. 1877, § 202; R. C. 1899, § 6421.]

§ 8758. Creditors equal within classes. If the estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim; and no creditor of any class shall receive any payment until all those of the preceding class are fully paid and no preference shall be given in the payment of a debt over other debts of the same class except those specified in the fifth class. [R. C. 1905, § 8121; Pro. C. 1877, § 260; R. C. 1899, § 6422.]

§ 8759. Certain expenses, taxes and liens, paid when. The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses and the expenses of the last sickness and the allowance made to the family of the decedent. He may pay or retain in his hands the necessary expenses of administration but he is not obliged to pay any other debt or any legacy until as prescribed in this article the payment has been ordered by the court. If satisfied that it will be for the benefit of the estate, the county court may by order authorize or direct the executor or administrator on the application of any person interested, to pay taxes and demands maturing upon any debt secured by a mortgage, pledge or other lien existing on the property of the decedent or upon a contract for the purchase of real property whenever there are sufficient funds properly applicable thereto, although such demand has not been presented and allowed. But the provisions of this section shall not relieve the executor or administrator from responsibility for all injury or loss resulting from any misapplication of the money in his hands. [R. C. 1905, § 8122; Pro. C. 1877, § 261; R. C. 1899, § 6423.]

§ 8760. Decree for payment of debts. Upon the settlement of the account of an executor or administrator at the expiration of the time allowed for presenting claims if there are debts or charges remaining unpaid, the court must make such decree for the payment thereof as the circumstances of the estate require, unless it appears that there are no more assets available for that purpose. If the assets are ready for distribution to the creditors the court shall make a peremptory decree for payment after declaring a dividend if necessary. If there are other assets available which are not ready for such distribution, the executor or administrator must be directed to take the necessary steps to convert them into money for that purpose, as speedily as possible without material injury to the estate, and if the estate is solvent, a partial dividend may be declared. The court must proceed in like manner at each subsequent settlement until the debts are paid. [R. C. 1905, § 8123; Pro. C. 1877, § 262; R. C. 1899, § 6424.]

§ 8761. Contingent claim pending. Proceedings. At the time of such settlement, each person having a contingent claim pending which cannot be proved as a debt must be required to produce proof of the liability of the decedent by a previous notice given as prescribed in this chapter. If it appears upon such proof that there is reason to believe that the liability will become absolute, the court may order the executor or administrator to retain in his hands sufficient assets to pay the same in that event or, if the estate is insolvent, sufficient to pay a proportion equal to the dividends of other

creditors, or if a final distribution is made, the court may require the persons to whom the estate is distributed to give bond with sufficient sureties for the payment of such sum as may be found due by the county court in case the liability shall thereafter become absolute and upon proof of such amount the claimant may be authorized to bring an action on the bond for its recovery. [R. C. 1905, § 8124; Pro. C. 1877, § 263; R. C. 1899, § 6425.]

§ 8762. Legacies and distribution of estate. If the whole of the debts have been paid by the first distribution, the court must direct the payment of legacies and the distribution of the estate among the heirs, legatees or other persons entitled as provided in article 11 of this chapter, but if there are debts remaining unpaid, or, if for other reasons the estate is not in a proper condition to be closed, the court must give such extension of time as may be reasonable for a final settlement of the estate. [R. C. 1905, § 8125; Pro. C. 1877, § 266; R. C. 1895, § 6426.]

§ 8763. Liability of executor or administrator on failure to give notice to creditors. When the accounts of the administrator or executor have been settled and an order made for the payment of the debts and distribution of the estate, no creditor whose claim was not included in the order for payment has any right to call upon the creditors, who have been paid or upon the heirs, devisees or legatees to contribute to the payment of his claim; but if the executor or administrator has failed to give the notice to creditors as required by this chapter such creditor may recover on the bond of the executor or administrator the amount of his claim, or such part thereof as he would have been entitled to had it been allowed. [R. C. 1905, § 8126; Pro. C. 1877, § 265; R. C. 1895, § 6427.]

Article 7.— Sales by Executors and Administrators.

§ 8764. Sale of property of decedent, how made. No sale of any property of an estate of a decedent is valid unless made under order of the county court, except as otherwise hereinafter provided. All sales must be reported under oath, and confirmed by the county court, before the title to the property sold passes. All petitions for orders of sale must be in writing, setting forth the facts showing the sale to be necessary, and upon the hearing, any person interested in the estate may file his written objections, which must be heard and determined. A failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing the necessity be stated in the order directing the sale. [R. C. 1905, § 8127; 1897, ch. 111, § 27; R. C. 1899, § 6428.]

Sale by executor or administrator as violation of covenant in lease against assignment or sale. 14 L.R.A.(N.S.) 1204.

§ 8765. Sale of property, insolvent estate. When it appears to the court that the estate is insolvent, or that it will require a sale of all property of the estate, of every character, chargeable therewith, to pay the family allowance, expenses of administration, and debts, there need be but one petition filed, but one order of sale made, and but one sale had, except in cases of perishable property, which may be sold as provided in the next section. The county court, when a petition for the sale of any property, for any of the purposes herein named, is presented, must inquire fully into the probable amount required to make all such payments, and if there be no more estate chargeable therewith than sufficient to pay the same, may require but one proceeding for the sale of the entire available estate. In such case the petition must set forth all the facts hereinafter required. [R. C. 1905, § 8128; 1897, ch. 111, § 27; R. C. 1899, § 6429.]

§ 8766. Perishable property, sold when. At any time after receiving letters, the executor, administrator or special administrator may apply to the county judge and obtain an order to sell perishable and other personal prop-

erty likely to depreciate in value, or which will incur loss or expense by being kept, and so much other personal property as may be necessary to pay the allowance made to the family of the decedent. The order for the sale may be made without notice; but the executor, administrator or special administrator is responsible for the property, unless, after making a sworn return, and on a proper showing, the court shall approve the sale. [R. C. 1905, § 8129; 1897, ch. 111, § 27; R. C. 1899, § 6430.]

§ 8767. Sale of personal property, how made. If claims against the estate have been allowed, and a sale of property is necessary for their payment, or the expenses of administration, or for the payment of legacies, the executor or administrator may apply for an order to sell so much of the personal property as may be necessary therefor. Upon filing his petition, notice of at least five days must be given of the hearing of the application. He may also make a similar application, either in vacation or in term, from time to time, so long as any personal property remains in his hands, and sale thereof is necessary. If it appear for the best interests of the estate, he may at any time after filing the inventory, in like manner and after giving like notice apply for and obtain an order to sell the whole of the personal property belonging to the estate, remaining and not set apart whether necessary to pay debts or not. [R. C. 1905, § 8130; 1897, ch. 111, § 27; R. C. 1899, § 6431.]

§ 8768. Partnership property sold, how. Partnership interest or interests belonging to any estate by virtue of any partnership formerly existing, interest in personal property pledged, and choses in action, may be sold in the same manner as other personal property, when it appears to be for the best interests of the estate. Before confirming the sale of any partnership interest, whether made to the surviving partner or to any other person, the judge must carefully inquire into the condition of the partnership affairs and must examine the surviving partner, if in the county and able to be present in court. [R. C. 1905, § 8131; 1897, ch. 111, § 27; R. C. 1899, § 6432.]

§ 8769. Sales of personal property for best interests of estate, how made. If it appears that a sale is necessary for the payment of debts or the family allowance, or for the best interests of the estate and the persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance, the court must order it to be made. In making orders and sales for the payment of debts or family allowance, such articles as are not necessary for the support and sustenance of the family of the decedent, or are not specially bequeathed, must be first sold, and the court must so direct. [R. C. 1905, § 8132; 1897, ch. 111, § 27; R. C. 1899, § 6433.]

§ 8770. Notice of sale of personal property. The sale of personal property must be made at public auction, and after public notice given for at least fifteen days, by notices posted in three public places in the county, or by publication in a newspaper, or both, containing the time and place of sale, and a brief description of the property to be sold, unless for good reasons shown, the court orders a private sale or a shorter notice. Public sales of such property must be made at the court house door, or at the residence of the decedent or at some other public place, but no sale shall be made of any personal property which is not present at the time of sale, unless the court otherwise orders. [R. C. 1905, § 8133; 1897, ch. 111, § 27; R. C. 1899, § 6434.]

§ 8771. Real estate sold, when and how. When a sale of property of the estate is necessary to pay the allowance of the family or the debts outstanding against a decedent, or the debts, expenses or charges of administration or legacies, or when such sale is for the best interests of the estate and the persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance, the executor or administrator may also sell any real estate as well as personal property of the estate in his hands and chargeable for that purpose upon the order of the county court; and

an application for the sale of real property may also embrace the sale of personal property. To obtain an order for the sale of real property the executor or administrator must present a verified petition to the county court, setting forth the amount of personal property that has come into his hands as assets, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or determined; the amount due upon the family allowance, or that will be due after the same has been in force for one year; the debts, expenses and charges of administration already approved, and an estimate of what will or may accrue during the administration; the facts showing the sale to be for the best interests of the estate, if the application is made upon that ground; a general description of all the real property, except the homestead, of which the decedent died seized, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof; the names of the legatees and devisees, and the heirs of the decedent, so far as known to the petitioner. If any of the matters herein enumerated cannot be ascertained, it must be so stated in the petition; but a failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing such necessity is stated in the decree. If it appears to the court from such petition that it is necessary to sell the whole or some part of such real estate, for the purposes and reasons mentioned in this section, or any of them, or that such sale is for the best interests of the estate, such petition must be filed and an order thereupon made directing all persons interested in the estate to appear before the court at a time and place specified, not less than four, and not more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell so much of the real estate of the decedent as is necessary, or for the best interests of the estate. [R. C. 1905, § 8134; 1897, ch. 111, § 27; R. C. 1899, § 6435; 1901, ch. 79.]

Sufficiency of order to show cause why sale should not be ordered. **Blackman v. Mulhall**, 19 S. D. 534, 104 N. W. 250.

Probate court's order for sale of property is to be accorded same force as circuit court judgments although it does not set forth facts showing sale to be necessary. **Blackman v. Mulhall**, 19 S. D. 534, 104 N. W. 250.

§ 8772. Proceedings when necessary to sell only part of real estate. A copy of the order to show cause must be personally served on all persons interested in the estate, any general or special guardian of a minor, insane or incompetent person so interested, and any legatee or devisee, or heir of the decedent, provided they are residents of the county, at least ten days before the time appointed for hearing the petition, or be published four successive weeks in such newspaper of the county as the court or judge may direct. If all persons interested in the estate join in the petition for the sale, or signify in writing their assent thereto the notice may be dispensed with and the hearing may be had at any time. The county court, at the time and place appointed in such order, or at such other time to which the hearing may be postponed, upon satisfactory proof of personal service or publication of a copy of the order, by affidavit or otherwise if the consent in writing to such sale by all parties interested is not filed, must proceed to hear the petition and hear and examine the allegations and proof of the petitioners, and of persons interested in the estate who may oppose the application. All claims against the decedent not before presented, if the period of presentation has not elapsed, may be presented and passed upon after hearing. The executor, administrator and witnesses may be examined on oath by either party, and process to compel them to attend and testify may be issued by the judge of the county court in the same manner and with like effect as in other cases. If it appears necessary to sell part of the real estate and that by a sale thereof the residue of the estate, real or personal, or some specific

part thereof, would be greatly injured or diminished in value, or subjected to expense, or rendered unprofitable, or that after such sale the residue would be so small in quantity or value, or would be of such a character with reference to its future disposition among the heirs or devisees, as clearly to render it for the best interests of all concerned that the same should be sold, the court may authorize the sale of the whole estate, or any part thereof necessary for the best interests of all concerned. If the court be satisfied, after a full hearing upon the petition and an examination of the proofs and allegations of the parties interested, that a sale of the whole or some portion of the real estate is necessary, for any of the causes mentioned in this article, or if such sale be assented to by all the persons interested, an order must be made to sell the whole or so much and such parts of the real estate described in the petition as the court shall judge necessary or beneficial. The order of sale must describe the lands to be sold and the terms of sale, which may be for cash, or may be for one-third cash and the balance on a credit not exceeding two years, payable in gross or in installments within that time, with interest, as the court may direct. The land may be sold in one parcel or in subdivisions, as the executor or administrator shall judge most beneficial to the estate, unless the court otherwise specially directs. If it appears that any part of such real estate has been devised and not charged in such devise with the payment of debts or legacies, the court must order the remainder to be sold before that so devised. Every such sale must be ordered to be made at public auction, unless in the opinion of the court it would benefit the estate to sell the whole or some part of such real estate at private sale; the court may if the same is asked for in the petition order or direct such real estate or any part thereof, to be sold at either public or private sale, as the executor or administrator shall deem to be most beneficial for the estate. If the executor or administrator neglects or refuses to make a sale under the order and as directed therein, he may be compelled to sell, by the order of the court, made on motion, after due notice, by any party interested. [R. C. 1905, § 8135; 1897, ch. 111, § 27; R. C. 1899, § 6436.]

Failure to publish notice for twenty-eight days will not render proceedings void. Blackman v. Mulhall, 19 S. D. 534, 104 N. W. 250.

§ 8773. On failure of administrator to apply for sale, other interested party may. If the executor or administrator neglects to apply for any order of sale when it is necessary, any person may make application therefor in the same manner as the executor or administrator, and notice thereof must be given to the executor or administrator, before the hearing. The petition of such applicant must contain as many of the matters required for the petition of the executor or administrator as he can ascertain, and the decree of sale must fix the period of time within which the executor or administrator must make the sale. [R. C. 1905, § 8136; 1897, ch. 111, § 27; R. C. 1899, § 6437.]

§ 8774. Sale when ordered, how advertised and made. When a sale is ordered and is to be made at public auction notice of the time and place of sale must be posted in three of the most public places in the county in which the land is situated and published in a newspaper, if there be one printed in the same county, but if none, then in such paper as the court may direct, four times, once each week successively, next before the sale. The lands and tenements to be sold must be described with common certainty in the notice. Sales at public auction must be made in the county where the land is situated; but when the land is situated in two or more counties, it may be sold in either. The sale must be made between the hours of nine o'clock in the morning and five o'clock in the afternoon of the same day, and must be made on the day named in the notice of sale, unless the same is postponed. If at the time appointed for the sale the executor or administrator deems it for the best interests of the estate that the sale be postponed he may postpone it from time to time not exceeding in all three months. In case of a

postponement, notice thereof must be given by a public declaration at the time and place first appointed for the sale, and if the postponement is for more than one day further notice must be given by posting notices in three or more public places in the county where the land is situated or by publishing the same, or both, as the time and circumstances will admit. When a sale of real estate is ordered to be made at private sale, notice of the same must be posted in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county, if none, then in such paper as the court may direct, for three successive weeks next before the day on or after which the sale is to be made, in which the lands and tenements to be sold must be described with common certainty. The notice must state a day on or after which the sale will be made, and a place where the offers will be received. The day last referred to must be at least twenty-two days from the first publication of notice, and the sale must not be made before that day, but must be made within six months thereafter. The bids or offers must be in writing, and may be left at the place designated in the notice, or delivered to the executor or administrator personally, or may be filed with the judge of the county court, to whom the return of sale must be made. If it is shown that it will be for the best interests of the estate, the court may, by an order, shorten the time of notice, which shall not, however, be less than one week, and may provide that the sale may be made on or after a day less than twenty-one but not less than eight days from the first publication of the notice, in which case the notice of sale and the sale may be made to correspond with such order. [R. C. 1905, § 8137; 1897, ch. 111, § 27; R. C. 1899, § 6438.]

§ 8775. Private sale, confirmation, duty of administrator as to. No sale of real estate at private sale shall be confirmed by the court unless the sum offered is at least ninety per cent of the appraised value thereof, nor unless such real estate has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or too low, appraisers must be appointed, and they must make an appraisement thereof, in the same manner as in case of an original appraisement of an estate. This may be done at any time before the sale or the confirmation thereof. The executor or administrator must when a sale is made upon a credit, take the notes of the purchaser for the purchase money with a mortgage on the property to secure their payment. The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the county court, which must be filed at any time subsequent to the sale either in term or vacation. If the sale be made at public auction, and the return is made and filed on or before the first day of the next term thereafter, no notice is required of such return or of the hearing thereof, but the hearing may be had on the first day of the term, or any subsequent day to which the same may be postponed. If the sale be not made at public auction, or if made at public auction a hearing upon the return of proceedings be asked for in return, or is brought on for a hearing upon a day before the first day of the next term thereafter, or upon any other day than the first day of the next term after such sale, the court or judge must fix the day for the hearing, of which notice of at least ten days must be given by the judge, by notices posted in at least three public places in the county, and personally served upon all persons interested in said estate residing within the county, at least five days prior to said day of hearing, and if deemed necessary by publication in a newspaper published within the county as the court may deem best, and must briefly indicate the lands sold, the sum for which they were sold, and must refer to the return for further particulars. Upon the hearing the court must examine the return and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent,

exclusive of the expenses of a new sale, may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place; if an offer of ten per cent more than the amount named in the return be made to the court in writing by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person or to order a new sale. [R. C. 1905, § 8138; 1897, ch. 111, § 27; R. C. 1899, § 6439.]

§ 8776. Objections to confirmation of sale, how made. When a return of the sale is made and filed, any person interested in the estate may file written objections to the confirmation thereof, and may be heard thereon when the return is heard by the court or judge and may produce witnesses in support of his objection. [R. C. 1905, § 8139; 1897, ch. 111, § 27; R. C. 1899, § 6440.]

When sales void because in excess of order of sale. 37 Am. Dec. 65.

§ 8777. Court orders sale confirmed, when. If it appears to the court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the increased bid mentioned heretofore be made and accepted by the court, the court must make an order confirming the sale and directing conveyances to be executed. The sale from that time is confirmed and valid, and a certified copy of the order confirming it and directing conveyances to be executed must be recorded in the office of the register of deeds of the county within which the land sold is situated. [R. C. 1905, § 8140; 1897, ch. 111, § 27; R. C. 1899, § 6441.]

§ 8778. Resale, when. If, after the confirmation, the purchaser neglects or refuses to comply with the terms of sale, the court may on motion of the executor or administrator, and after notice to the purchaser, order a resale to be made of the property. If the amount realized on such resale does not cover the bid and the expenses of the previous sale, such purchaser is liable for the deficiency to the estate. [R. C. 1905, § 8141; 1897, ch. 111, § 27; R. C. 1899, § 6441.]

§ 8779. Conveyance of land sold, how made; when. Conveyances must thereupon be executed to the purchaser by the executor or administrator, and they must refer to the orders of the county court authorizing and confirming the sale of the property of the estate, and directing conveyances thereof to be executed, and to the record of the order of confirmation in the office of the register of deeds, by the date, volume and page of the record, and such reference shall have the same effect as if the orders were at large inserted in the conveyance. Conveyances so made convey all the right, title, interest and estate of the decedent, in the premises, at the time of his death: if prior to the sale, by operation of law or otherwise, the estate has acquired any right, title or interest in the premises other than, or in addition to, that of the decedent at the time of his death, such right, title or interest also passes by such conveyance. [R. C. 1905, § 8142; 1897, ch. 111, § 27; R. C. 1899, § 6442.]

§ 8780. Order of confirmation, to show what. Before any order is entered confirming the sale, it must be proved to the satisfaction of the court that notice was given of the sale as prescribed, and the order of confirmation must show that such proof was made. [R. C. 1905, § 8143; 1897, ch. 111, § 27; R. C. 1899, § 6442.]

§ 8781. When will provides for sale, order not necessary. When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without the order of the county court, and at either public or private sale, and with or without notice, as the executor may determine, but the executor must make return of such sales as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions

must be observed. In either case no title passes unless the sale is confirmed by the court. [R. C. 1905, § 8144; 1897, ch. 111, § 27; R. C. 1899, § 6444.]

Executing power of sale under will after discharge of executor. 2 L.R.A.(N.S.) 623.

§ 8782. Proportionate liability for debts. When an estate given by will has been sold for the payment of debts or expenses, all the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been taken therefor, and the county court, when distribution is made, must, by decree for that purpose, settle the amount of the several liabilities, and decree the amount each person shall contribute, and reserve the same from their distributive shares respectively, for the purpose of paying such contributions. [R. C. 1905, § 8145; 1897, ch. 111, § 27; R. C. 1899, § 6446.]

§ 8783. Contracts for purchase of lands, how disposed of. If a decedent, at the time of his death, was possessed of a contract for the purchase of land, his interests in such land and under such contracts may be sold on the application of his executor or administrator, in the same manner as if he had died seized of such land, and the same proceedings may be had for that purpose as are prescribed herein for the sale of the lands of which he died seized, except as hereinafter provided. [R. C. 1905, § 8146; 1897, ch. 111, § 27; R. C. 1899, § 6447.]

§ 8784. Sale of contract, how made. The sale must be made subject to all payments that may hereafter become due on such contracts, and if there are any such, the sale must be confirmed by the county court until the purchasers execute a bond to the executor or administrator, for the benefit and indemnity of himself and of the persons entitled to the interest of the decedent in the lands so contracted for, in double the whole amount of payments thereafter to become due on such contract, with such sureties as the county judge shall approve. The bond must be conditioned that the purchaser will make all payments for such lands that become due after the date of the sale, and will fully indemnify the executor or administrator and the persons so entitled against all demands, costs, charges and expenses by reason of any covenant or agreement contained in such contract. [R. C. 1905, § 8147; 1897, ch. 111, § 27; R. C. 1899, § 6448.]

§ 8785. Assignment of contract after sale. Upon the confirmation of the sale, the executor or administrator must execute to the purchaser an assignment of the contract, which vests in the purchaser, his heirs and assigns, all the right, title and interest of the estate, or of the persons entitled to the interest of the decedent in the lands sold at the time of the sale, and the purchaser has the same rights and remedies against the vendor of such lands as the decedent would have had if he were living. [R. C. 1905, § 8148; 1897, ch. 111, § 27; R. C. 1899, § 6449.]

§ 8786. Sale of mortgaged land. Money, how applied. When any sale is made by an executor or administrator or guardian pursuant to the provisions of this chapter, of land subject to any mortgage or lien, which is a valid claim against the estate of the decedent, and has been presented and allowed, the purchase money must be applied, after paying the necessary expenses of the sale, first to the payment and satisfaction of the mortgage or lien, and the residue, if any, in due course of administration. The application of the purchase money to the satisfaction of the mortgage or lien must be made without delay, and the land is subject to such mortgage or lien until the purchase money has been actually so applied. No claim against any estate which has been presented and allowed is affected by the statute of limitations, pending the proceedings of the settlement of the estate. The purchase money, or so much thereof as may be sufficient to pay such mortgage or lien, with interest and any lawful costs and charges thereon, may be paid into the county court, to be received by the judge thereof, whereupon the mortgage or lien upon the land must cease, and the purchase money must be paid over

by the judge without delay, in payment of the expenses of the sale and in satisfaction of the debt, to secure which the mortgage or other lien was taken, and the surplus, if any, at once returned to the executor, administrator or guardian, unless for good cause shown after notice to the executor or administrator, the judge otherwise directs; provided, nevertheless, that land upon which there is an existing and valid mortgage or other lien may be sold subject to such mortgage or lien without the payment of the amount of such mortgage or lien whenever in the discretion of the county court it shall appear to be to the best interest of the estate to sell such land subject to such existing mortgage or lien. [1907, ch. 114; R. C. 1905, § 8149; 1897, ch. 111, § 27; R. C. 1899, § 6450.]

§ 8787. Who may purchase incumbered real estate. Penalty for misconduct. At any sale under order of the county court of lands upon which there is a mortgage or lien the holder thereof may become the purchaser, and his receipt for the amount due him from the proceeds of the sale is a payment pro tanto. If the amount for which he purchased the property is sufficient to defray the expenses and discharge his mortgage or lien, he must pay to the judge a sufficient sum to pay such expenses. If there is any neglect or misconduct in the proceedings of the executor or administrator in relation to any sale by which any person interested in the estate suffer damage, the party aggrieved may recover the same in an action upon the bond of the executor or administrator or otherwise. Any executor or administrator who fraudulently sells any real estate of a decedent, contrary to or otherwise than under the provisions of this article, is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein. [R. C. 1905, § 8150; 1897, ch. 111, § 27; R. C. 1899, § 6451.]

§ 8788. Actions for recovery of estate, commenced when. No action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the sale. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud or other grounds upon which the action is based. This shall not apply to minors, or others under any legal disability to sue at the time when the right of action first accrues; but all such persons may commence an action at any time within three years after the removal of the disability. [R. C. 1905, § 8151; 1897, ch. 111, § 27; R. C. 1899, § 6452.]

§ 8789. Administrator to account for property sold, when. May not purchase. When a sale has been made by an executor or administrator, of any property of the estate, real or personal, he must return to the county court, at its next term thereafter, an account of sales, verified by his affidavit. If he neglects to make such return he may be punished by attachment, or his letters may be revoked, one day's notice having been first given him to appear and show cause why such attachment should not issue or such revocation should not be made. No executor or administrator must, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale. [R. C. 1905, § 8152; 1897, ch. 111, § 27; R. C. 1899, § 6453.]

§ 8790. Mortgaging real estate of deceased persons. When it is shown to the satisfaction of the court at a hearing upon an application for the sale of real estate or upon a petition praying that the same may be mortgaged as provided in the next section, after all the parties interested have been duly cited to appear, not less than ten nor more than thirty days from the date of filing such petition, which notice shall be given to all parties in interest in such manner as the court shall direct, that it will be for the benefit of the estate, the county court may direct an executor, administrator or guardian to mortgage any real estate of a decedent or of a minor or incompetent

person for the purpose of paying an existing lien or mortgage on the property or for any other purpose for which a sale may be ordered, or it may authorize him to make a renewal of an existing mortgage, but the homestead shall not be mortgaged without the consent of the person entitled thereto. [R. C. 1905, § 8153; 1899, ch. 110, § 1; R. C. 1899, § 6454.]

§ 8791. Petition must specify. A petition for the purpose specified in the preceding section must specify the amount of money necessary to be raised, and the purpose for which the same is required with such further particulars as are required in a petition for the sale of real property. The decree must fix the amount for which the mortgage may be given and the rate of interest that may be paid thereon, and may order the whole or any part of the money so secured to be paid from time to time out of the income of the mortgaged property. The mortgage or other contract executed by the executor, administrator or guardian in pursuance thereof may be approved upon his report in the same manner as a sale made at public auction. [1913, ch. 130; R. C. 1905, § 8154; 1899, ch. 110, § 2; R. C. 1899, § 6455.]

ARTICLE 8.—SPECIFIC PERFORMANCE.

§ 8792. Legal representative to convey real estate of decedent. When a person who is bound by contract in writing to convey any real estate dies before making the conveyance, the county court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto in all cases when the decedent, if living, might be compelled to make such conveyance; and when such real estate or the interest therein of the decedent shall have passed by inheritance or devise to any minor, the county court may make a decree authorizing and directing the guardian of such minor to convey such real estate to the person entitled thereto, in all cases when the decedent, if living, might be compelled to make such conveyance. [R. C. 1905, § 8155; R. C. 1895, § 6456; 1905, ch. 116.]

Enforcement against estate of decedent of contract to pay money or give property. 14 L.R.A. 862.

Specific performance of contract to leave property in consideration of services or support. 44 L.R.A.(N.S.) 743.

——of contract to leave property to child in consideration of his living with promisor. 44 L.R.A.(N.S.) 756.

Enforceability of contract to give child share of estate in consideration of the surrender of the child to promisor, as affected by noncompliance with the statute prescribing mode of adoption. 46 L.R.A.(N.S.) 1134.

§ 8793. Petition for such conveyance, contents of and decree. On the presentation of a verified petition by any person claiming to be entitled to such conveyance from an executor or administrator, setting forth the facts upon which the claim is predicated, all persons interested in the estate must be cited as in other cases. If after a full hearing and examination of the facts and circumstances of the claim, the court is satisfied that the petitioner is entitled to a conveyance of the real estate described in the petition, a decree must be made authorizing and directing the executor or administrator to execute a conveyance thereof to the petitioner, and such conveyance must be executed accordingly. [R. C. 1905, § 8156; Pro. C. 1877, §§ 222, 224; R. C. 1899, § 6457.]

§ 8794. Effect of such conveyance. Every conveyance made in pursuance of a decree of the court as provided in this chapter and approved by the judge shall pass the title to the estate contracted for as fully as if the contracting party himself was still living and executed the conveyance. [R. C. 1905, § 8157; Pro. C. 1877, § 227; R. C. 1899, § 6458.]

§ 8795. Certain sales under this article validated. That all sales of real estate made by any administrator or executor, where his testator or intestate had contracted in writing for the sale thereof in his lifetime, and conveyance of which has been made pursuant to a decree of any county court of this state as provided by article 8 of chapter 6 of the Probate Code of North Dakota,

in estates which are closed and such administrator or executor has been discharged, and which conveyances have been otherwise legally made but have not been approved by the judges of the county courts wherein such conveyances were had, pursuant to section 8157 of the Revised Codes of North Dakota, of the revision of 1905 [section 8794 herein], are hereby declared valid and of the same effect as if an order or judgment of approval had been made by the county judge of the court in which such proceedings were had. [1911, ch. 214.]

§ 8796. Dismissal and appeal. If upon the hearing in the county court, the right of the petitioner to have a specific performance of the contract is found to be doubtful the court must dismiss the petition without prejudice to the rights of the petitioner, who may thereafter proceed in the district court to enforce a specific performance thereof. [R. C. 1905, § 8158; Pro. C. 1877, § 226; R. C. 1899, § 6459.]

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

§ 8797. Action for possession of real estate maintained, by whom. The heirs or devisees may themselves or jointly with the executor or administrator maintain an action for the possession of the real estate or for the purpose of quieting title to the same against any one except the executor or administrator. For the purpose of bringing suits to quiet title or for partition of such estate the possession of the executor or administrator is the possession of the heirs or devisees. Such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator for the purposes of administration as provided in this code. [R. C. 1905, § 8159; Pro. C. 1877, § 210; R. C. 1899, § 6460.]

Executors and administrators may maintain actions to quiet title. Blakemore & Kidney v. Roberts, 12 N. D. 394, 96 N. W. 1029.

Executor or administrator as real party in interest by whom action must be brought. 64 L.R.A. 611.

Who may sue or take other proceedings to set aside judgment affecting decedent's estate. 54 L.R.A. 761.

§ 8798. Actions by and against executors and administrators. Except as otherwise prescribed in the next section, actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts may be maintained by and against executors and administrators in all cases and in the same courts in which the same might have been maintained by or against their respective testators or intestates. [R. C. 1905, § 8160; Pro. C. 1877, § 211; R. C. 1899, § 6461.]

Is an administrator or executor in such privity with a legatee, distributee or creditor, that he may assert a personal defense of the latter to a claim against the estate. 8 L.R.A.(N.S.) 212.

Right of domestic representative to maintain action for death of decedent under a statute of another state which provides that the action shall be brought by the personal representative. 18 L.R.A.(N.S.) 1252.

Right of executor or administrator to appeal as party aggrieved. 13 L.R.A. 745.

Injunction against suit against estate in other jurisdiction. 21 L.R.A. 73.

§ 8799. Action for the recovery of money. No action for the recovery of money only shall be brought in any of the courts of this state against any executor, administrator or guardian upon any claim or demand which may be presented to the county court except as provided in this chapter. [R. C. 1905, § 8161; R. C. 1899, § 6462.]

Executor of plaintiff may continue action to cancel deed without joining residuary legatees. Subera v. Jones, 20 S. D. 628, 108 N. W. 26.

Executor entitled to possession of all real and personal property of testator that decedent would have been entitled to if alive. Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1029.

On right of executor to maintain action for possession of property in same courts as testator. Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1029.

Action for tort dies with tort-feasor as at common law. Willard v. Mohn, 24 N. D. 386, 139 N. W. 981; Willard v. Mohn, 24 N. D. 390, 139 N. W. 979.

§ 8800. Action for waste, trespass and conversion. Executors and administrators may maintain actions against any person who has wasted, destroyed, taken, carried away or converted to his own use the goods of their testator or intestate in his lifetime. They may also maintain actions for trespass committed on the real estate of the decedent in his lifetime. If any person before the granting of letters testamentary or of administration embezzles or alienates any of the moneys, goods, chattels or effects of a decedent, he is chargeable therewith, and liable to an action by the executor or administrator of the estate, for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate. If any executor, administrator or other person interested in the estate of a decedent, complains to the county court, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away or disposed of moneys, goods or chattels of the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts or other writings which contain evidences of, or tend to disclose the right, title, interest or claim, of the decedent to any real or personal estate, or any claim or demand, or any lost will, the judge may cite such person to appear before the county court, and may examine him on oath upon the matter of such complaint, if he can be found in the state. But if cited from another county, and he appears and is found innocent, his necessary expenses must be allowed him out of the estate. If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him touching the matters of the complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court or is discharged according to law. If, upon such examination, it appears that he has concealed, embezzled, smuggled, conveyed away or disposed of any moneys, goods or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts or other writings tending to disclose the right, title, interest or claim of the decedent to any real or personal estate, claim or demand, or any lost will of the decedent, the county court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with, or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the county court. The order for such disclosure made upon such examination is prima facie evidence of the right of such administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the district court or jury, or for return of the property and damages in addition thereto, equal to the value of such property; in addition to the examination of the party, witnesses may be produced and examined on either side. The county judge, upon complaint, on oath, of any executor or administrator, may cite any person who has been intrusted with any part of the estate of the decedent, to appear before such court and require him to render a full account, on oath, of any moneys, goods, chattels, bonds, accounts or other property or papers belonging to the estate, which have come to his possession in trust for the executor or administrator, and of proceedings thereon; and if the person so cited refuses to appear and render such account, the court may proceed against him as provided herein. [R. C. 1905, § 8162; 1897, ch. 111, § 29; R. C. 1899, § 6463.]

Right to sue on behalf of estate for injury from damming back water of stream. 59 L.R.A. 903.

§ 8801. Executor or administrator may maintain necessary action. An executor or administrator may under the direction of the county court maintain any action which may be necessary to enforce his right to the possession of the property and effects of the decedent, collect all demands due the

estate and secure an accounting or settlement of any partnership existing between the decedent at or prior to his death and any other person. He may also prosecute to final judgment any action commenced by the decedent, or by a special administrator, or other administrator previously appointed in the same case. [R. C. 1905, § 8163; R. C. 1899, § 6464.]

Right of next of kin to maintain action in interest of estate. 22 L.R.A.(N.S.) 454.

§ 8802. Action against predecessor. An executor or administrator may, in his own name for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor, or of any former administrator of the same estate. [R. C. 1905, § 8164; Pro. C. 1877, § 215; R. C. 1899, § 6465.]

§ 8803. Successive recoveries on the bond. The bond shall not be void upon the first recovery but may be sued and recovered upon from time to time by any person aggrieved in his own name until the whole penalty is exhausted. [R. C. 1905, § 8165; Pro. C. 1877, § 80; R. C. 1899, § 6466.]

§ 8804. Fraudulent sale. Liability of executor. Any executor or administrator who fraudulently sells any real estate of a decedent, contrary to or otherwise than under the provisions of this chapter, is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein. [R. C. 1905, § 8166; Pro. C. 1877, § 205; R. C. 1899, § 6467.]

§ 8805. Order required before action on bond. Before an action can be maintained on the bond of an executor whose letters have not been revoked, the party aggrieved must first obtain an order of the county court, authorizing him to bring the action, and before authority is given to bring an action upon the bond of a deceased executor or administrator whose account is unsettled, his sureties must be cited and have an opportunity to apply for and obtain a settlement of such account. [R. C. 1905, § 8167; R. C. 1899, § 6468.]

§ 8806. Action pending at death of decedent. If an action pending against the decedent at the time of his death is prosecuted to judgment against his representatives or successors in interest, the judgment does not become a lien but is payable in the course of administration. [R. C. 1905, § 8168; Pro. C. 1877, § 150; R. C. 1899, § 6469.]

§ 8807. Judgments before death, how collected. When any judgment has been rendered for or against the testator or intestate in his lifetime or against his representative or successor in interest, no execution shall issue thereon after his death, except:

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

2. In case of the death of the judgment debtor, if the judgment is for the recovery of real or personal property or the enforcement of a lien thereon. If the execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof and the officer making the sale must account to the executor or administrator for any surplus in his hands. [R. C. 1905, § 8169; Pro. C. 1877, § 153; R. C. 1899, § 6470.]

Before amendment of this section, no execution could issue after death of judgment debtor. Yankton Sav. Bank v. Gutterson, 15 S. D. 486, 90 N. W. 144.

§ 8808. Death after verdict. Judgment not a lien. A judgment rendered against a decedent, dying after verdict or decision on an issue of fact but before judgment is rendered thereon, is not a lien on the real property of the decedent but is payable in due course of administration. [R. C. 1905, § 8170; Pro. C. 1877, § 154; R. C. 1899, § 6471.]

§ 8809. Actions to recover real estate or set aside decree, when begun. No action for the recovery of any estate, sold by an executor or administrator or otherwise disposed of under the provisions of this chapter, can be main-

tained by any heir or other person claiming under the decedent unless it is commenced within three years next after the sale. An action to set aside a decree directing or confirming a sale or otherwise disposing of such property may be instituted and maintained at any time within three years from the discovery of the fraud or other ground upon which the action is based. [R. C. 1905, § 8171; Pro. C. 1877, § 206; R. C. 1899, § 6472.]

§ 8810. Minors may begin such action, when. The preceding section shall not apply to minors or others under any legal disability to sue at the time when the right of action first accrues; but all such persons may commence an action at any time within three years after the removal of the disability. [R. C. 1905, § 8172; Pro. C. 1877, § 207; R. C. 1899, § 6473.]

§ 8811. Recovery of fraudulent conveyances. When there is a deficiency of assets in the hands of an executor or administrator and when the decedent in his lifetime has conveyed any real estate or any rights or interests therein, with intent to defraud his creditors or to avoid any right, debt or duty of any person or has so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same, and may recover for the benefit of the creditors all such real estate so fraudulently conveyed, and may also for the benefit of the creditor sue and recover all goods, chattels, rights or credits which have been so conveyed by the decedent in his lifetime whatever may have been the manner of such fraudulent conveyance. [R. C. 1905, § 8173; Pro. C. 1877, § 218; R. C. 1899, § 6474.]

§ 8812. Creditors to require action to recover. No executor or administrator is bound to sue for such estate as mentioned in the preceding section for the benefit of the creditors, unless on application of creditors, who must pay such part of the costs and expenses of the suit or give such security therefor to the executor or administrator as the judge shall direct. [R. C. 1905, § 8174; Pro. C. 1877, § 219; R. C. 1899, § 6475.]

§ 8813. Sale of such real estate after recovery. All real estate so recovered must be sold for the payment of debts in the same manner as if the decedent had died seized thereof, upon obtaining an order therefor from the county court, and the proceeds of all goods, chattels, rights and credits so recovered must be appropriated in payment of the debts of the decedent in the same manner as other property in the hands of the executor or administrator. [R. C. 1905, § 8175; Pro. C. 1877, § 220; R. C. 1899, § 6476.]

§ 8814. Compounding debts. Whenever a debtor of a decedent is unable to pay all his debts, the executor or administrator with the approbation of the county judge may compound with him and give him a discharge upon receiving a fair and just dividend of his effects. A compromise may also be authorized when it appears to be just and for the interest of the estate. [R. C. 1905, § 8176; Pro. C. 1877, § 217; R. C. 1899, § 6477.]

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

§ 8815. Executor or administrator not liable for debts of decedent. Exception. No executor or administrator is chargeable upon any special promise to answer damages or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose or some memorandum or note thereof is in writing and signed by such executor or administrator or by some other person by him thereunto specially authorized. [R. C. 1905, § 8177; Pro. C. 1877, § 232; R. C. 1899, § 6478.]

§ 8816. Executor or administrator chargeable with whole estate. Every executor and administrator is chargeable in his account with the whole of the estate of the decedent, which may come into his possession, at the value of the appraisement contained in the inventory except as provided in the

following sections, and with all the interest, profit and income of such estate. [R. C. 1905, § 8178; Pro. C. 1877, § 233; R. C. 1899, § 6479.]

Administrator cannot evade accounting upon ground of nullity of appointment. Dobler v. Strobel, 9 N. D. 104, 81 N. W. 37, 81 Am. St. Rep. 530.

§ 8817. Make neither profit nor loss. He shall not make profit by the increase nor suffer loss by the decrease or destruction without his fault of any part of the estate. He must account for the excess when he sells any part of the estate for more than the appraisement and if any part is sold for less than the appraisement, he is not responsible for the loss if the sale has been justly made. [R. C. 1905, § 8179; Pro. C. 1877, § 234; R. C. 1899, § 6480.]

§ 8818. Uncollected debts, not chargeable with. No executor or administrator is accountable for any debts due to the decedent if it appears that they remain uncollected without his fault. [R. C. 1905, § 8180; Pro. C. 1877, § 235; R. C. 1899, § 6481.]

§ 8819. Not to purchase claims against estate. No administrator or executor shall purchase any claim against the estate he represents; and if he pays any claim for less than its nominal value, he is only entitled to charge in his account the amount he actually paid. [R. C. 1905, § 8181; Pro. C. 1877, § 237; R. C. 1899, § 6482.]

Surety on administrator's bond may purchase claims against estate. Luther v. Hunter, 7 N. D. 544, 75 N. W. 916.

§ 8820. Liable for money received before administration. An executor or administrator is liable on his bond for money or other personal property of the estate which was in his hands or under his control when his letters were issued in whatever capacity it was received by him or came under his control. [R. C. 1905, § 8182; R. C. 1899, § 6483.]

§ 8821. Expenses and necessary fees allowed. Commissions. He shall be allowed all necessary expenses in the care, management and settlement of the estate, and for his services such fees as are provided in this chapter; but when the decedent by his will makes some other provision for the compensation of his executor that shall be full compensation for his services unless by a written instrument filed in the county court, he renounces all claims for compensation provided by the will. [R. C. 1905, § 8183; Pro. C. 1877, § 236; R. C. 1899, § 6485.]

Agreement of executor or administrator to relinquish compensation, whether and when enforceable. 48 Am. Rep. 332.

§ 8822. When no provision in will, commissions allowed. When no compensation is provided by the will or the executor renounces all claim thereto, he must be allowed commissions on the amount of the whole estate accounted for by him, excluding all property not ranked as assets, as follows: For the first one thousand dollars, at the rate of five per cent; for all above that sum and not exceeding five thousand dollars, at the rate of two per cent; for all above that sum at the rate of one per cent; and the same commissions shall be allowed administrators. In all cases such further allowance may be made as the county court may deem just and reasonable for any extraordinary service. The total amount of such allowance must not exceed the amount of commissions allowed by this section. [1909, ch. 118; R. C. 1905, § 8184; Pro. C. 1877, §§ 236, 238; R. C. 1899, § 6485.]

Allowance, to assignee for benefit of creditors, of commission and extra compensation to the same amount, is permissible. Woodcock v. Reilly, 16 S. D. 198, 92 N. W. 10.

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

§ 8823. Must account after six months. At the expiration of six months after letters testamentary or of administration are issued, and thereafter at any time when required by the court, either upon its own motion or upon the application of any person interested in the estate, the executor or administrator must tender for the information of the court, an exhibit under

oath, showing the amount of money received and expended by him, the amount of all claims against the estate and the names of the claimants, and all other matters necessary to show the condition of its affairs. [R. C. 1905, § 8185; 1897, ch. 111, § 28; R. C. 1899, § 6486.]

§ 8824. Citation issued in case of failure. If the executor or administrator fail to render an exhibit at the expiration of six months after letters are issued, the judge of the county court must issue a citation requiring him to appear and render it. [R. C. 1905, § 8186; 1897, ch. 111, § 28; R. C. 1899, § 6487.]

§ 8825. May require exhibit. Any person interested in the estate may at any time before the final settlement of accounts, present his petition to the county judge, praying that the executor or administrator be required to appear and render such exhibit, setting forth the facts showing that it is necessary and proper that such an exhibit should be made. [R. C. 1905, § 8187; 1897, ch. 111, § 28; R. C. 1899, § 6488.]

§ 8826. Judge requires administrator to appear, when. If the judge be satisfied, either from the oath of the applicant or from any other testimony offered, that the facts alleged are true, and considers the showing of the applicant sufficient, he must issue a citation to the executor or administrator, requiring him to appear at some day named in the citation, which must be during a term of the court, and render an exhibit as prayed for. [R. C. 1905, § 8188; 1897, ch. 111, § 28; R. C. 1899, § 6489.]

§ 8827. Judge may revoke letters, when. When an exhibit is rendered by an executor or administrator, any person interested may appear and, by objections in writing, contest any account or statement therein contained. The court may examine the executor or administrator, and if he has been guilty of neglect, or has wasted, embezzled or mismanaged the estate, his letters must be revoked. [R. C. 1905, § 8189; 1897, ch. 111, § 28; R. C. 1899, § 6490.]

§ 8828. Penalty for refusal to report. If any executor or administrator neglects or refuses to appear and render an exhibit, after having been duly cited, an attachment may be issued against him and such exhibit enforced, or his letters may be revoked in the discretion of the court. [R. C. 1905, § 8190; 1897, ch. 111, § 28; R. C. 1899, § 6491.]

§ 8829. Report at expiration of year. Every executor or administrator must render a full account and a report of his administration at the expiration of one year from the time of his appointment. If he fails to present his account, the court must compel the rendering of the account by attachment, and any person interested in the estate may apply for and obtain an attachment, but no attachment must issue unless a citation has been first issued, served and returned requiring the executor or administrator to appear and show cause why an attachment should not issue. Every account rendered must exhibit not only the debts which have been paid, but also a statement of all the debts which have been duly presented and allowed during the period embraced in the account. When the authority of an executor or administrator ceases or is revoked for any reason, he may be cited to account before the county court at the instance of the person succeeding to the administration of the same estate, in like manner as he might have been cited by any person interested in the estate during the time he was executor or administrator. [R. C. 1905, § 8191; 1897, ch. 111, § 28; R. C. 1899, § 6492.]

Effect of annual settlements of executor or administrator as res judicata. 86 Am. Dec. 143.

Right of administrator de bonis non to require predecessor to account. 40 L.R.A. 73.

Methods of compelling accounting by deceased executor or administrator. 8 Am. St. Rep. 684.

§ 8830. Letters must be revoked, when. If the executor or administrator resides out of the county, or absconds, or conceals himself, so that the citations cannot be personally served, and neglects to render an account within thirty

days after the time prescribed in this article, or if he neglects to render an account within thirty days after being committed where the attachment has been executed, his letters must be revoked. [R. C. 1905, § 8192; 1897, ch. 111, § 28; R. C. 1899, § 6493.]

§ 8831. Files and vouchers accompany account. In rendering an account the executor or administrator must produce and file vouchers for all charges, debts, claims and expenses which he has paid, which must remain in the court; and he may be examined on oath touching such payments, and also touching such property and effects of the decedent, and the disposition thereof. When any voucher is required for other purposes it may be withdrawn on leaving a certified copy on file; if a voucher is lost, or for other good reason cannot be produced on the settlement, the payment may be proved by the oath of any competent witness. [R. C. 1905, § 8193; 1897, ch. 111, § 28; R. C. 1899, § 6494.]

§ 8832. Account not accompanied by vouchers allowed, when. On the settlement of his account he may be allowed any item of expenditure not exceeding fifteen dollars, for which no voucher is produced, if such item be supported by his own uncontradicted oath reduced to writing and certified by the judge, positive to the fact of payment, specifying when, where and to whom it was made; but such allowances in the whole must not exceed three hundred dollars against any one estate, nor over ten per cent of the inventory appraised value of any estate under three thousand dollars. [R. C. 1905, § 8194; 1897, ch. 111, § 28; R. C. 1899, § 6495.]

§ 8833. Judge appoint day for settlement. When any account is rendered for settlement the judge must appoint a day for the settlement thereof; the judge must thereupon give notice thereof by citation to all persons interested in said estate residing within the county to be served at least ten days prior to the day of hearing, and by causing notices to be posted ten days prior to the day of hearing in at least three public places in the county, setting forth the name of the estate, the executor or administrator and the day appointed for the settlement of the account, which must be on some day of a term of the court. The court may order such further notice to be given as may be proper. [R. C. 1905, § 8195; 1897, ch. 111, § 28; R. C. 1899, § 6496.]

§ 8834. Notice of final settlement, what to contain. If such account be for a final settlement, and the estate be ready for distribution, the notice of the settlement must state these facts, and must be served, published or waived in the same manner as provided for hearing petitions for sales of real property and interests therein; and on confirmation of the final account, distribution and partition of the estate to all entitled thereto, may be immediately had without further notice or proceedings. If from any cause the hearing of the account, or the partition and distribution be postponed, the order postponing the same to a day certain is notice to all persons interested therein. [R. C. 1905, § 8196; 1897, ch. 111, § 28; R. C. 1899, § 6497.]

Decree of distribution of decedent's estate made by county court is of equal rank with judgments entered by courts of record. Sjoli v. Hogenson, 19 N. D. 82, 122 N. W. 1008.

Remedy of distributee as to accounting of which he had no notice and on which he did not appear. 63 L.R.A. 95.

§ 8835. Who may appear at final settlement. On the day appointed, or any subsequent day to which the hearing may be postponed by the court, any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same. [R. C. 1905, § 8197; 1897, ch. 111, § 28; R. C. 1899, § 6498.]

Right of executor or administrator or his representatives to object to account of coexecutor or coadministrator. 22 L.R.A.(N.S.) 1119.

Right of court to surcharge account of executor, administrator, guardian or receiver in the absence of any objection to the account, or upon an objection by amicus curiæ. 18 L.R.A.(N.S.) 284.

§ 8836. Postponement had, when. All matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making a decree of sale may be contested by the heirs for cause shown. The hearing and allegations of the respective parties may be postponed from time to time, when necessary, and the court may appoint one or more referees to examine the accounts and make report thereon, subject to confirmation; and may allow a reasonable compensation to the referees, to be paid out of the estate of the decedent. [R. C. 1905, § 8198; 1897, ch. 111, § 28; R. C. 1899, § 6499.]

§ 8837. Settlement of account on appeal conclusive. The settlement of the account and the allowance thereof by the court, or upon appeal, is conclusive evidence against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, their right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator, either individually or upon his bond, at any time before final settlement; and in any action brought by any such person, the allowance and settlement of such account is prima facie evidence of its correctness. [R. C. 1905, § 8199; 1897, ch. 111, § 28; R. C. 1899, § 6500.]

Decree of distribution of decedent's estate made by county court is of equal rank with judgments entered by courts of record. Sjoli v. Hogenson, 19 N. D. 82, 122 N. W. 1008.

Decree allowing final report of executor is conclusive, except where right of appeal is allowed or relief in another court permitted, or where persons to whom decree is made are under legal disability. Re Nelson, 26 S. D. 615, 129 N. W. 113.

§ 8838. Must not be allowed until proved. The account must not be allowed by the court until it is first proved that notice has been given as required by this article, and the decree must show that such proof was made to the satisfaction of the court, and is conclusive evidence of the fact. [R. C. 1905, § 8200; 1897, ch. 111, § 28; R. C. 1899, § 6501.]

§ 8839. Court directs manner of sale, when. Whenever it appears to the court on any hearing of an application for the sale of real property, that it would be for the interest of the estate that personal property of the estate, or some part of such property, should be first sold, the court may decree the sale of such personal property, or any part of it, and the sale thereof shall be conducted in the same manner as if the application had been made for the sale of such personal property in the first instance. [R. C. 1905, § 8201; 1897, ch. 111, § 28; R. C. 1899, § 6502.]

§ 8840. Moneys invested for benefit of estate, when. Pending the settlement of any estate on the petition of any party interested therein, the county court may order any moneys in the hands of the executor or administrator to be invested for the benefit of the estate. Such order can only be made after publication of notice of the petition in some newspaper to be designated by the judge. [R. C. 1905, § 8202; 1897, ch. 111, § 28; R. C. 1899, § 6503.]

Article 12.—Partial Distribution Before Final Settlement.

§ 8841. Petition for legacy or share. At any time after the lapse of the time limited for filing claims, any heir, devisee or legatee may present his petition to the court for the legacy or share of the estate to which he is entitled, to be given to him upon his giving bond for the payment of his proportion of the debts of the estate. [R. C. 1905, § 8203; Pro. C. 1877, § 269; R. C. 1899, § 6504.]

§ 8842. Notice to parties interested. All parties interested in the estate must be cited as in other cases. [R. C. 1905, § 8204; Pro. C. 1877, § 270; R. C. 1895, § 6505.]

§ 8843. Petition, who may resist. The executor or administrator, or any creditor or other person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee or legatee may

make a similar application for himself. [R. C. 1905, § 8205; Pro. C. 1877, § 271; R. C. 1899, § 6506.]

§ 8844. Petition may be allowed, when. If at the hearing it appears that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court must make an order in conformity with the prayer of the applicant, requiring:

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

2. The executor or administrator to deliver to the heir, legatee or devisee the whole portion of the estate to which he may be entitled, or only a part thereof designating it. If in the execution of the order, a partition is necessary between two or more of the parties interested, it must be made in the manner hereinafter prescribed, the costs of these proceedings to be paid by the applicant, or if there is more than one, to be apportioned equally among them. [R. C. 1905, § 8206; Pro. C. 1877, § 272; R. C. 1899, § 6507.]

§ 8845. Assessment against legatee or devisee. When any bond has been executed and delivered under the provisions of the preceding section, and it is necessary for the settlement of the estate to require the payment of any part of the money thereby secured, the executor or administrator must apply to the court for an order requiring the payment, and have a citation issued and served on the party bound, requiring him to appear and show cause why the order should not be made. At the hearing the court if satisfied of the necessity of such payment must make an order designating the amount and giving a time within which it must be paid. If the money is not paid within the time allowed, an action may be maintained by the executor or administrator on the bond. [R. C. 1905, § 8207; Pro. C. 1877, § 273; R. C. 1899, § 6508.]

Article 13.— Distribution of the Estate Upon Final Settlement.

§ 8846. Court distributes estate. Deceased heir. Upon the final settlement of the accounts of the executor or administrator or at any subsequent time, upon the petition of the executor or administrator, or of any heir, legatee or devisee, the court must proceed to distribute the residue of the estate in the hands of the executor or administrator among the persons who by law are entitled thereto; and if the decedent has left a surviving child and the issue of other children, and any of them before the close of administration have died while under age and not having been married, no administration on such deceased child's estate is necessary, but all the estate which such deceased child was entitled to by inheritance, must without administration be distributed to the other heirs at law. A statement of any receipts and disbursements of the executor or administrator since the rendition of his final accounts must be reported and filed at the time of making such distribution and a settlement thereof together with an estimate of the expenses of closing the estate must be made by the court and included in the order or decree; or the court or judge may order notice of the settlement of such supplementary account and refer the same as in other cases of the settlement of accounts. [R. C. 1905, § 8208: Pro. C. 1877, § 274; R. C. 1899, § 6509.]

§ 8847. Petition for distribution may be controverted. Any respondent may by his answer controvert the allegations of the petition and claim any share or interest which he believes himself entitled to receive and pray for partition. The issues so joined shall be tried and determined by the court as in other cases. [R. C. 1905, § 8209; R. C. 1895, § 6510.]

§ 8848. Taxes paid before decree. Before any decree of distribution of an estate is made, the county court must be satisfied by the oath of the executor or administrator, or otherwise, that all state, county, school and municipal taxes legally levied upon personal property of the estate have been fully paid. [R. C. 1905, § 8210; Pro. C. 1877, § 278; R. C. 1899, § 6511.]

§ 8849. Decree of distribution, to show what. In the decree the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for and recover their respective shares from the executor or administrator or any person having the same in possession. Or the court may order a partition and after such further proceedings as may be necessary under the following sections shall make a further decree assigning to each party his separate share and confirming the distribution accordingly. [R. C. 1905, § 8211; Pro. C. 1877, § 275; R. C. 1895, § 6512.]

Decree of distribution of decedent's estate made by county court is of equal rank with judgments entered by courts of record. Sjoli v. Hogenson, 19 N. D. 82, 122 N. W. 1008.

Decree of final distribution in probate court can be given only such force and effect as is defined and limited by its express terms. Re McClellan, 27 S. D. 109, 129 N. W. 1037, Ann. Cas. 1913C, 1029.

§ 8850. Advancements made. Final decree binding on all. All questions as to advancements made or alleged to have been made by the decedent to his heirs may be heard and determined by the county court, and must be specified in the decree assigning and distributing the estate; and the final judgment or decree of the court or in case of an appeal, of the district court or supreme court, is binding on all parties interested in the estate. [R. C. 1905, § 8212; Pro. C. 1877, § 290; R. C. 1895, § 6513.]

§ 8851. Residue of estate assigned. Partition not required. When the county court makes a decree assigning the residue of any estate to two or more persons entitled to the same, it is not necessary to make partition or distribution thereof, unless the parties to whom the assignment is decreed or some of them request that such partition be made. [R. C. 1905, § 8213; Pro. C. 1877, § 289; R. C. 1899, § 6514.]

§ 8852. Partition may be made. Partition or distribution of the real estate may be made as provided in this chapter although some of the original heirs, legatees or devisees may have conveyed their share to other persons, and such shares must be assigned to the persons holding the same in the same manner as they otherwise would have been to such heirs, legatees or devisees. [R. C. 1905, § 8214; Pro. C. 1877, § 282; R. C. 1899; § 6515.]

§ 8853. Shares set apart, how. When both distribution and partition are made, the several shares in the real and personal estate must be set out to each individual in proportion to his right by metes and bounds or description, so that the same can be easily distinguished, unless two or more of the parties interested consent to have their shares set out so as to be held by them in common and undivided. [R. C. 1905, § 8215; Pro. C. 1877, § 283; R. C. 1899, § 6516.]

Article 14.— Proceedings for Partition.

§ 8854. Partition made by three commissioners. To make the partition the court must appoint three commissioners, who must be disinterested persons and must be sworn to the faithful discharge of their duties and shall receive the same compensation as appraisers. A certified copy of their appointment and of the order or decree assigning and distributing the estate must be issued to them as their warrant and their oaths must be indorsed thereon. Upon consent of the parties or when the court deems it proper and just, it is sufficient to appoint one commissioner only, who has the same authority, and is governed by the same rules as if three were appointed. [R. C. 1905, § 8216; Pro. C. 1877, § 279; R. C. 1895, § 6517.]

§ 8855. Real estate in different counties, division when. If the real estate is in different counties, the county court may if deemed proper appoint commissioners for all, or different commissioners for each county. The whole estate whether in one or more counties shall be divided among the heirs, devisees or legatees as if it was all in one county, and the commissioners must, unless otherwise directed by the court, make division of such real estate wherever situated within this state. [R. C. 1905, § 8217; Pro. C. 1877, § 281; R. C. 1899, § 6518.]

§ 8856. Notice to all parties before partition. Before any partition is made or any estate is divided as provided in this chapter, notice must be given to all persons interested in the partition, their guardians, agents or attorneys, by the commissioners, of the time and place when and where they shall proceed to make partition. The commissioners may take testimony, order surveys and take such other steps as may be necessary to enable them to form a judgment upon the matters before them. [R. C. 1905, § 8218; Pro. C. 1877, § 287; R. C. 1899, § 6519.]

§ 8857. Court may assign the whole estate, when. Conditions. When the real estate cannot be divided without prejudice or inconvenience to the owners, the county court may assign the whole to one or more of the parties entitled to shares therein, who will accept it, always preferring the males to the female, and among children preferring the elder to the younger. The parties accepting the whole must pay to the other parties interested their just proportion of the true value thereof or secure the same to their satisfaction; or in case of the minority of such party, then to the satisfaction of his guardian, and the true value of the estate must be ascertained and reported by the commissioners. When the commissioners appointed to make partition are of the opinion that the real estate cannot be divided without prejudice or inconvenience to the owners, they must so report to the court and recommend that the whole be assigned as herein provided and must find and report the true value of such real estate. On filing the report of the commissioners and on making or securing the payment as before provided, the court, if it appears just and proper, must confirm the report and thereupon the assignment is complete and the title to the whole of such real estate vests in the person to whom the same is so assigned. [R. C. 1905, § 8219; Pro. C. 1877, § 284; R. C. 1899, § 6520.]

§ 8858. Whole to one person. Others to be paid. When any tract of land or tenement is of greater value than any one's share in the estate to be divided and cannot be divided without injury to the same, it may be set off by the commissioners appointed to make partition to any of the parties who will accept it, giving preference as prescribed in the preceding section. The party accepting must pay or secure to the others such sum as the commissioners shall award to make the partition equal, and the commissioners must make their award accordingly; but such partition must not be confirmed by the court until the sums awarded are paid to the parties entitled to the same or secured to their satisfaction. [R. C. 1905, § 8220; Pro. C. 1877, § 285; R. C. 1899, § 6521.]

§ 8859. Report by commissioners. The commissioners must report their proceedings and the partition agreed upon by them to the county court in writing, and the court may for sufficient reasons set aside the report and commit the same to the same commissioners or appoint others. [R. C. 1905, § 8221; Pro. C. 1877, § 288; R. C. 1899, § 6522.]

§ 8860. Sale of whole estate. When it appears to the court from the commissioners' report, that it cannot be otherwise fairly divided and should be sold, the court may order the sale of the whole or any part of the estate, real or personal, by the executor or administrator, or by a commission appointed for that purpose and the proceeds distributed. The sale must be conducted, reported and confirmed in the same manner and under the same

requirements as provided in article 7 of this chapter. [R. C. 1905, § 8222; Pro. C. 1877, § 286; R. C. 1899, § 6523.]

ARTICLE 15.—DISTRIBUTION OF ESTATES OF DECEASED NONRESIDENTS.

§ 8861. Delivery to executor of foreign will. Upon application for distribution after final settlement of the accounts of administration, if the decedent was a nonresident of the state, leaving a will which has been duly proved or allowed in the state, territory or district of his residence, and an authenticated copy thereof has been admitted to probate in this state, and it is necessary in order that the estate or any part thereof may be distributed according to the will, that the estate in this state should be delivered to the executor or administrator in the state or place of his residence, the court may order such delivery to be made and if necessary order a sale of the real estate and a like delivery of the proceeds. The delivery in accordance with the order of the court is a full discharge of the executor or administrator with the will annexed in this state in relation to all property embraced in such order. Sales of real estate ordered by virtue of this section must be made in the same manner as other sales of real estate of decedents by order of the county court. [R. C. 1905, § 8223; Pro. C. 1877, § 276; R. C. 1899, § 6524.]

§ 8862. Testamentary disposition regulated by law. The validity and effect of a testamentary disposition of real property situated within the state, or of an interest in real property so situated, which would descend to an heir of an intestate and the manner in which such property or such an interest descends, when it is not disposed of by will, are regulated by the laws of this state without regard to the residence of the decedent. Except when special provision is otherwise made by law, the validity and effect of a testamentary disposition of any other property situated within the state and the ownership and disposition of such property, when it is not disposed of by will, are regulated by the laws of the state or country of which the decedent was a resident at the time of his death. [R. C. 1905, § 8224; R. C. 1895, § 6525.]

§ 8863. Residue of personal estate, how disposed of. Upon the settlement of such estate and after the payment of all debts for which the same is liable in this state, the residue of the personal estate may be distributed and disposed of in manner aforesaid by the county court; or in the discretion of the court, it may be transmitted to the executor or administrator, if any, in the state or country where the deceased had his domicile, to be there disposed of according to the laws thereof. [R. C. 1905, § 8225; R. C. 1895, § 6526.]

§ 8864. Estate insolvent, creditors to share equally. If such person dies insolvent, his estate found in this state shall, as far as practicable, be so disposed of that all his creditors here and elsewhere may receive each an equal share in proportion to their respective debts. [R. C. 1905, § 8226; R. C. 1895, § 6527.]

§ 8865. Creditors to be paid before transmission to foreign executor. To this end his estate shall not be transmitted to the foreign executor or administrator until all the creditors who are citizens of this state have received their just proportions; and no creditor who is not a citizen of this state shall be paid out of the assets found here until all those who are citizens have received their just proportions as provided in the preceding section. [R. C. 1905, § 8227; R. C. 1895, § 6528.]

§ 8866. Residue may be transmitted, when. If there is any residue after such payment to the citizens of this state, it may be paid to any other creditors who have duly proved their debts here, in proportion to the amount due to each of them, but no one shall receive more than would be due to him if the whole estate was divided ratably among all the creditors as before provided. The balance may be transmitted to the foreign executor or administrator, or if there is none, it shall after the expiration of one year from

the appointment of the administrator be distributed ratably among all creditors both citizens and others, who have proved their debts in this state. [R. C. 1905, § 8228; R. C. 1895, § 6529.]

ARTICLE 16.— DISPOSITION OF UNCLAIMED SHARES.

§ 8867. Agent to take care of property for nonresidents. When any estate is assigned or distributed by a decree of the court to any person residing out of and having no agent in this state and it is necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose and authorize him to take charge of such estate as well as to act for such absent person in the distribution. [R. C. 1905, § 8229; Pro. C. 1877, § 291; R. C. 1899, § 6530.]

§ 8868. Agent to give bond. The agent must first give a bond to be approved by the county judge, conditioned that he shall faithfully manage and account for the estate. The court appointing such agent may allow a reasonable sum out of the profits of the estate for his services and expenses. [R. C. 1905, § 8230; Pro. C. 1877, § 292; R. C. 1899, § 6531.]

§ 8869. Sale of property, when unclaimed for a year. When personal property remains in the hands of the agent unclaimed for a year, and it appears to the court that it is for the benefit of those interested, it shall be sold under the order of the court, and the proceeds, after deducting the expenses of the sale allowed by the court, must be paid into the state treasury. When the payment is made, the agent must take from the treasurer duplicate receipts, one of which he must file in the office of the state auditor and the other in the county court; provided, however, that if such unclaimed share or shares in any estate heretofore or hereafter pending in such county court shall consist exclusively of money, in that event it shall be unnecessary to appoint any agent for the person or persons entitled to such share or shares or to order any sale thereof, but the administrator, executor or other representative of such estate may, if such money has remained in his hands unclaimed for one year, pay such money into the state treasury in the same manner as hereinbefore provided, and the receipt of the state treasurer shall entitle such administrator, executor or other representative of such estate to his final discharge, so far as such share or shares are concerned. [1911, ch. 224; R. C. 1905, § 8231; Pro. C. 1877, § 293; R. C. 1899, § 6532.]

§ 8870. Agent to render an annual account. The agent must render to the county court appointing him, annually, an account showing:

1. The value and character of the property received by him, what portion thereof is still on hand, what sold and for what.
2. The income derived therefrom.
3. The taxes and assessments imposed thereon, for what, and whether paid or unpaid.
4. Expenses incurred in the care, protection and management thereof, and whether paid or unpaid. When filed, the county court may examine witnesses and take proofs in regard to the account; and if satisfied from such accounts and proofs that it will be for the benefit and advantage of the persons interested therein, the court may by order direct a sale to be made of the whole or such parts of the real or personal property as shall appear to be proper and the purchase money to be deposited in the state treasury to be receipted for and the receipts filed as in like cases before provided. [R. C. 1905, § 8232; Pro. C. 1877, § 294; R. C. 1899, § 6533.]

§ 8871. Liability of agent on bond. The agent is liable on his bond for the care and preservation of the estate while in his hands and for the payment of the proceeds of the sale as required in the preceding sections, and may be sued thereon by any person interested. [R. C. 1905, § 8233; Pro. C. 1877, § 295; R. C. 1899, § 6534.]

§ 8872. Claimant for property. When any person appears and claims the money paid into the treasury, the county court making the distribution must inquire into such claim, and being first satisfied of his right thereto, must grant him a certificate to that effect under its seal: and upon the presentation of the certificate to him, the state auditor must draw a warrant on the treasury for the amount. [R. C. 1905, § 8234; Pro. C. 1877, § 296; R. C. 1899, § 6535.]

§ 8873. Property discovered after final settlement. The final settlement of an estate as hereinbefore provided, shall not prevent a subsequent issue of letters testamentary or of administration or of administration with the will annexed if other property of the estate is discovered, or if it becomes necessary or proper for any cause that letters should be again issued. [R. C. 1905, § 8235; Pro. C. 1877, § 298; R. C. 1899, § 6536.]

CHAPTER 7.

OF GUARDIAN AND WARD.

ARTICLE 1.— GUARDIANS AND MINORS.

§ 8874. Guardians of persons and estates. The county court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates of either or both of them, of minors who have no guardian legally appointed by the will or deed, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county. Such appointment may be made on the petition of a relative or other person in behalf of such minor after the person having the custody of such minor, and such of his relatives as the court shall deem proper, have been cited to appear. [R. C. 1905, § 8236; Pro. C. 1877, § 333; R. C. 1899, § 6537.]

§ 8875. Minor may nominate, when. If the minor is under the age of fourteen years, the judge may nominate and appoint his guardian. If he is above the age of fourteen years, he may nominate his own guardian, who, if approved by the judge, must be appointed accordingly. [R. C. 1905, § 8237; Pro. C. 1877, § 334; R. C. 1899, § 6538.]

§ 8876. Judge may appoint, when. If the guardian nominated by the minor is not approved by the judge, or if the minor resides out of the state, or if, after being duly cited by the judge, he neglects for ten days to nominate a suitable person, the judge may nominate and appoint the guardian in the same manner as if the minor was under the age of fourteen years. [R. C. 1905, § 8238; Pro. C. 1877, § 335; R. C. 1899, § 6539.]

§ 8877. Minor may appoint, when. When a guardian has been appointed by the court for a minor under the age of fourteen years, the minor, at any time after he has attained that age, may appoint his own guardian subject to the approval of the judge. [R. C. 1905, § 8239; Pro. C. 1877, § 336; R. C. 1899, § 6540.]

§ 8878. Father or mother entitled to guardianship. The father of a minor if living, and in case of his decease, the mother while she remains unmarried, being themselves respectively competent to transact their own business and not otherwise unsuitable, are entitled to the guardianship of the minor. [R. C. 1905, § 8240; Pro. C. 1877, § 337; R. C. 1899, § 6541.]

Right of mother or reputed father to guardianship of illegitimate child. 65 L.R.A. 695.

§ 8879. Guardian has custody of minor. If the minor has no father or mother living competent to have the custody and care of his education the guardian appointed shall have the same. [R. C. 1905, § 8241; Pro. C. 1877, § 338; R. C. 1899, § 6542.]

Right of mother or reputed father to custody or control of illegitimate child as against its guardian. 65 L.R.A. 689.

Right of guardian to remove infant from the state. 58 L.R.A. 931.

§ 8880. Guardian retains custody until majority. Every guardian so appointed shall have the custody and care of the education of the minor and the care and management of his estate until such minor arrives at the age of majority, or marries, or until the guardian is legally discharged. [R. C. 1905, § 8242; Pro. C. 1877, § 339; R. C. 1899, § 6543.]

§ 8881. Guardian to give bond. Before the order appointing any person guardian under this chapter takes effect and before letters issue, the judge must require such person to give bond with sufficient sureties, and otherwise qualify as prescribed in chapter 5 of this code. [R. C. 1905, § 8243; Pro. C. 1877, § 340; R. C. 1899, § 6544.]

Guardian's bond stands in lieu of original estate until fully accounted for. Shepard v. Hanson, 9 N. D. 249, 83 N. W. 20.

Necessity of bond by testamentary guardian to make his acts valid. 33 L.R.A. 760.

Power of surety company to act as guardian without bond. 48 L.R.A. 589.

§ 8882. Conditions inserted as to care, treatment and education. When any person is appointed guardian of a minor, the county judge may, with the consent of such person, insert in the order of appointment conditions not otherwise obligatory, providing for the care, treatment, education and welfare of the minor. The performance of such condition is a part of the duties of the guardian, for the faithful performance of which he and the sureties on his bond are responsible. [R. C. 1905, § 8244; Pro. C. 1877, § 341; R. C. 1899, § 6545.]

§ 8883. Extra expenses of minor, how paid. If any minor, having a father living, has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed out of the income of his own property in whole or in part, as judged reasonable, and must be directed by the county court; and the charges therefor may be allowed accordingly in the settlement of the accounts of his guardian. [R. C. 1905, § 8245; Pro. C. 1877, § 343; R. C. 1899, § 6546.]

§ 8884. Testamentary guardians, duties of. Every testamentary guardian must give bond and qualify, and has the same powers and must perform the same duties with regard to the person and estate of his ward, as guardians appointed by the county court, except so far as their powers and duties are legally modified, enlarged or changed by the will by which such guardian was appointed. [R. C. 1905, § 8246; Pro. C. 1877, § 344; R. C. 1899, § 6547.]

Testamentary guardians and their powers. 29 Am. Dec. 712.

§ 8885. Guardian ad litem. Nothing contained in this chapter affects or impairs the power of any court to appoint a guardian to defend the interests of any minor interested in any suit or matter pending therein. [R. C. 1905, § 8247; Pro. C. 1877, § 315; R. C. 1899, § 6548.]

Rights, powers and duties of guardians ad litem. 97 Am. St. Rep. 995.

Power of guardian ad litem to enter appearance. 32 L.R.A. 683.

Control of guardian ad litem or next friend over action. 16 L.R.A. 507.

Right of parent, guardian or next friend to compromise infant's cause of action for personal injuries. 21 L.R.A.(N.S.) 338.

Right of next friend to receive payment of, and satisfy, judgment recovered in behalf of infant. 11 L.R.A.(N.S.) 913.

Effect of fact that guardian ad litem appointed in proceedings for sale of infant's land was interested in the purchase. 26 L.R.A.(N.S.) 558.

ARTICLE 2.— GUARDIANS OF INSANE AND INCOMPETENT.

§ 8886. Petition for guardian for insane. When it is represented to the county court upon verified petition of any relative or friend, that any person is of unsound mind or from any cause mentally incompetent to manage his property, the judge must cause such person to be cited as in other cases, except that the time of service may be the same as upon a motion. [R. C. 1905, § 8248; Pro. C. 1877, § 346; R. C. 1899, § 6549.]

Notice issued by clerk under seal of court is sufficient. Matson v. Swenson, 5 S. D. 191, 58 N. W. 570.

§ 8887. Guardian appointed, when. If after a full hearing and examination upon such petition, it appears to the court that the person in question is incapable of taking care of himself and managing his property, he must appoint a guardian of his person and estate with the powers and duties in this chapter specified. [R. C. 1905, § 8249; Pro. C. 1877, § 347; R. C. 1899, § 6550.]

§ 8888. Powers of guardian and bond. Every guardian appointed as provided in the preceding section has the care and custody of the person of his ward and the management of all his estate until such guardian is legally discharged; and he must give bond in like manner and with like conditions as before prescribed with respect to the guardian of a minor. [R. C. 1905, § 8250; Pro. C. 1877, § 348; R. C. 1899, § 6551.]

Common-law powers of guardians. 89 Am. St. Rep. 257.

§ 8889. Proceedings to declare restoration of insane. Any person who has been declared to be of unsound mind or the guardian of any relative of such person within the third degree, or any friend may apply by petition to the county court of the county, in which he was so declared, to have the fact of his restoration to capacity judicially determined. The petition shall be verified and shall state that such person is then sane. Upon receiving the petition the judge must appoint a day for the hearing and cause a citation to be issued to the guardian of the petitioner, if there is a guardian, and to his or her husband or wife, if there is one, and to his or her father or mother if living in the county. On the trial the guardian or relative of the petitioner and in the discretion of the judge, any other person, may contest the right of the petitioner to the relief demanded. Witnesses may be required to appear and testify, as in other cases, and may be called and examined by the judge on his own motion. If it is found that the petitioner is of sound mind and capable of taking care of himself and property, his restoration to capacity shall be adjudged and the guardianship of such person if such person is not a minor shall cease. [R. C. 1905, § 8251; Pro. C. 1877, § 349; R. C. 1899, § 6552.]

§ 8890. Habitual drunkards. When it is represented to the county court upon verified petition of any relative or friend that any person is an habitual drunkard or spendthrift or from any cause mentally or otherwise incompetent to manage his property, the judge must cause such person to be cited as in other cases, except that the time of service may be the same as upon a motion, and all the provisions of this chapter where applicable shall apply in the appointment of said conservator and to his powers and duties. [R. C. 1905, § 8252; 1899, ch. 65; R. C. 1899, § 6552a.]

ARTICLE 3.— THE POWERS AND DUTIES OF GUARDIANS.

§ 8891. Payment of debts. Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, must pay all just debts due from the ward out of his personal estate and income of his real estate if sufficient; if not, then out of his real estate, upon obtaining an order for the sale thereof and disposing of the same in the manner provided by law for the sale of real estate of decedents. [R. C. 1905, § 8253; Pro. C. 1877, § 350; R. C. 1899, § 6553.]

§ 8892. Collect accounts and appear in legal proceedings. Every guardian must settle all accounts of the ward and demand, sue for and receive all debts due to him, or may with the approbation of the county court compound the same and give discharges to the debtors on receiving a fair and just dividend of his estate and effects; and he must appear for and represent his ward in all legal suits and proceedings unless a special guardian is appointed for that purpose. [R. C. 1905, § 8254; Pro. C. 1877, § 351; R. C. 1899, § 6554.]

§ 8893. Rules for management of estate of ward. Every guardian must manage the estate of his ward frugally and without waste and apply the income and profits thereof as far as may be necessary for the comfortable and suitable maintenance and support of the ward and his family if there is any; and if such income and profits are insufficient for that purpose, the guardian may sell the real estate upon obtaining a decree of the county court therefor and must apply the proceeds of such sale as far as may be necessary to the maintenance and support of the ward and his family if there is any. [R. C. 1905, § 8255; Pro. C. 1877, § 352; R. C. 1899, § 6555.]

§ 8894. Maintenance and support of ward. When a guardian has advanced, for the necessary maintenance, support and education of his ward, an amount not disproportionate to the value of his estate or his condition of life, and the same is made to appear to the satisfaction of the court by proper vouchers and proofs, the guardian must be allowed credit therefor in his settlement. Whenever a guardian fails, neglects or refuses to furnish suitable and necessary maintenance, support or education for his ward, the court may order him to do so and enforce such order by proper process. Whenever any third person at his request supplies a ward with suitable and necessary maintenance, support or education, and it is shown to have been done after refusal or neglect of the guardian to supply the same, the court may direct the guardian to pay therefor out of the estate and enforce such payment by due process. [R. C. 1905, § 8256; Pro. C. 1877, § 353; R. C. 1899, § 6556.]

§ 8895. Inventory and account of ward's estate. Every guardian must return to the county court an inventory of the estate of his ward within three months after his appointment, and annually thereafter; when the value of the estate exceeds the sum of twenty thousand dollars, semi-annual returns must be made to the court. The court may upon application made for that purpose by any person compel the guardian to render an account of the estate. The inventories and accounts so to be returned or rendered must be sworn to by the guardian. All the estate of the ward described in the first inventory must be appraised by appraisers appointed, sworn and acting in the manner provided for regulating the settlement of the estates of decedents. Whenever any other property of the estate of any ward is discovered not included in the inventory of the estate already returned and whenever any other property has been succeeded to or acquired by any ward or for his benefit, the like proceedings must be had for the return and appraisement thereof that are herein provided in relation to the first inventory and return. [R. C. 1905, § 8257; Pro. C. 1877, § 355; R. C. 1899, § 6557.]

§ 8896. Settlement at end of year. The guardian must upon the expiration of a year from the time of his appointment and as often thereafter as he may be required, present his accounts to the county court for settlement and allowance. [R. C. 1905, § 8258; Pro. C. 1877, § 356; R. C. 1899, § 6558.]

Method of compelling settlement of accounts by deceased guardian. 8 Am. St. Rep. 684.

§ 8897. Account by one of joint guardians. When an account is rendered by two or more joint guardians, the court may in its discretion allow the same upon oath of any of them. [R. C. 1905, § 8259; Pro. C. 1877, § 357; R. C. 1899, § 6559.]

§ 8898. Expenses and pay of guardians. Every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust and he must also have compensation for his services as the court in which his accounts are settled deems just and reasonable. [R. C. 1905, § 8260; Pro. C. 1877, § 358; R. C. 1899, § 6560.]

Allowance, to assignee for benefit of creditors, of commission and extra compensation to the same amount is permissible. Woodcock v. Reilly, 16 S. D. 198, 92 N. W. 10.

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

§ 8899. Sale of property may be made, when. When the income of an estate under guardianship is not sufficient to maintain the ward and his family, or to maintain and educate the ward when a minor, his guardian may sell his real or personal estate for that purpose upon obtaining a decree therefor. [R. C. 1905, § 8261; Pro. C. 1877, § 359; R. C. 1899, § 6561.]

A guardian cannot sell ward's realty unless authorized. Washabaugh v. Hall, 4 S. D. 168, 56 N. W. 82.

Guardian contracting without authority binds himself only. Shepard v. Hanson, 9 N. D. 249, 83 N. W. 20.

§ 8900. Sale of property for investment. When it appears to the satisfaction of the court upon the petition of the guardian, that for the benefit of his ward his real estate or some part thereof should be sold, and the proceeds put out at interest, or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his guardian may sell the same for such purpose upon obtaining a decree therefor. [R. C. 1905, § 8262; Pro. C. 1877, § 360; R. C. 1899, § 6562.]

§ 8901. Proceeds of sale, how applied. If the estate is sold for the purposes mentioned in this article, the guardian must apply the proceeds of the sale to such purposes as far as necessary, and put out the residue, if any, on interest or invest it in the best manner in his power until the capital is wanted for the maintenance of the ward and his family, or the education of his children, or for the education of the ward when a minor, in which case the capital may be used for that purpose as far as may be necessary in like manner as if it had been personal estate of the ward. [R. C. 1905, § 8263; Pro. C. 1877, § 361; R. C. 1899, § 6563.]

§ 8902. Investment, how made. If the estate is sold for the purpose of putting out or investing the proceeds, the guardian must make the investment according to his best judgment or in pursuance of any order that may be made by the county court. [R. C. 1905, § 8264; Pro. C. 1877, § 362; R. C. 1899, § 6564.]

Personal liability of guardian for losses from investment. 44 L.R.A.(N.S.) 873.

§ 8903. Petition for sale. To obtain a decree for such sale, the guardian must present to the county court of the county, in which he was appointed, a petition therefor setting forth the condition of the estate of his ward and the facts and circumstances on which the petition is founded tending to show the necessity or expediency of a sale. [R. C. 1905, § 8265; Pro. C. 1877, § 363; R. C. 1899, § 6565.]

§ 8904. Hearing and order of sale. If it appears to the court from the petition that it is necessary or would be beneficial to the ward that the real estate or some part of it should be sold or that the real and personal estate should be sold, the court or judge must thereupon issue a citation to the next of kin of the ward and all persons interested in the estate to appear before the court and answer thereto. [R. C. 1905, § 8266; Pro. C. 1877, § 364; R. C. 1895, § 6566.]

§ 8905. Court to hear proofs. The county court, at the time and place appointed or such other time to which the hearing is postponed upon proof of the service of the citation, must hear and examine the proofs and allega-

tions of the petitioner and of the next of kin and all other persons interested in the estate who oppose the application. [R. C. 1905, § 8267; Pro. C. 1877, § 366; R. C. 1899, § 6567.]

§ 8906. Guardian and witnesses. On the hearing the guardian may be examined on oath and witnesses may be produced and examined by either party. [R. C. 1905, § 8268; Pro. C. 1877, § 367; R. C. 1899, § 6568.]

§ 8907. Order of sale, to state what. If after a full examination it appears necessary or for the benefit of the ward that his real estate or some part thereof should be sold, the court may make a decree directing such sale, specifying therein the causes or reasons why the sale is necessary or beneficial and may, if the same has been prayed for in the petition, order such sale to be made either at public or private sale. [R. C. 1905, § 8269; Pro. C. 1877, § 369; R. C. 1899, § 6569.]

§ 8908. Bond to be given before sale. Every guardian authorized to sell real estate must before the sale give bond with sufficient sureties, to be approved by the judge, with condition to sell the same in the manner and to account for the proceeds of the sale as provided for in this chapter and chapter 5 of this code. [R. C. 1905, § 8270; Pro. C. 1877, § 370; R. C. 1895, § 6570.]

§ 8909. Law of estates governs guardians unless otherwise declared. All proceedings under petitions of guardians for sales of property of their wards, giving notice and the hearing of such petitions, granting and refusing an order of sale, directing the sale to be made at public or private sale, reselling the same property, return of sale and application for confirmation thereof, notice and hearing of such application, making orders, rejecting or confirming sales and reports of sales, ordering and making conveyances of property sold, accounting and the settlement of accounts, must be had and made as provided and required by the provisions of law concerning the estates of decedents unless otherwise specially provided in this chapter. [R. C. 1905, § 8271; Pro. C. 1877, § 371; R. C. 1899, § 6571.]

§ 8910. Order in force one year. No decree granted in pursuance of this article continues in force more than one year after granting the same without sale being had. [R. C. 1905, § 8272; Pro. C. 1877, § 372; R. C. 1899, § 6572.]

§ 8911. Terms of sale. Security. All sales of real estate of wards must be for cash or for part cash and part deferred payments not to exceed three years, bearing date from date of sale as in the discretion of the judge is most beneficial to the ward. Guardians making sales must demand and receive from the purchaser a bond and mortgage on the real estate sold with such additional security as the judge deems necessary and sufficient to secure the faithful payment of the deferred payments and the interest thereon. [R. C. 1905, § 8273; Pro. C. 1877, § 373; R. C. 1899, § 6573.]

§ 8912. Order to invest proceeds. The county court, on the application of a guardian or any person interested in the estate of any ward after such notice to persons interested therein as the judge shall direct, may authorize and require the guardian to invest the proceeds of sales and any other of his ward's money in his hands in real estate or in any other manner most to the interest of all concerned therein; and the court may make such other orders and give such directions as are needful for the management, investment and disposition of the estate and effects as the circumstances require. [R. C. 1905, § 8274; Pro. C. 1877, § 374; R. C. 1899, § 6574.]

Article 5.— Guardians for Nonresident Wards.

§ 8913. Guardian for nonresident ward. When a person liable to be put under guardianship according to the provisions of this chapter resides without this state and has estate therein, any friend of such person or any one interested in his estate in expectancy or otherwise may present a petition to

the county judge of any county in which there is any estate of such absent person for the appointment of a guardian, and if after a citation to all interested and a full hearing and examination it appears proper, a guardian for such absent person may be appointed. [R. C. 1905, § 8275; Pro. C. 1877, § 375; R. C. 1895, § 6575.]

§ 8914. Power same as in other cases. Every guardian appointed under the preceding section has the same powers and performs the same duties with respect to the estate of the ward found within the state and with respect to the person of the ward, if he shall cease to reside therein, as are prescribed with respect to any other guardian appointed under this chapter. [R. C. 1905, § 8276; Pro. C. 1877, § 376; R. C. 1899, § 6576.]

§ 8915. Guardian must give bond. Every such guardian must give bond in the like manner and with the like conditions as hereinbefore provided for other guardians except that the provisions respecting the inventory, the disposal of the estate and effects and accounts to be rendered by the guardian must be confined to such estate and effects as come to his hands in this state. [R. C. 1905, § 8277; Pro. C. 1877, § 377; R. C. 1899, § 6577.]

§ 8916. Removal of property. When the guardian and ward are both nonresidents and the ward is entitled to property in this state, which may be removed to another territory, state or foreign country without conflict with any restriction or limitation thereupon or impairing the right of the ward thereto, such property may be removed to the territory, state or foreign country of the residence of the ward upon the application of the guardian to the judge of the county court in which the estate of the ward or the principal part thereof is situated. [R. C. 1905, § 8278; Pro. C. 1877, § 379; R. C. 1899, § 6578.]

§ 8917. Application for removal, contents. The application must be made by petition and citation must issue to the resident executor, administrator or guardian if there is such, and upon such application the nonresident guardian must produce and file a certificate under the hand of the clerk, judge, surrogate or other authorized officer and the seal of the court from which his appointment was derived, showing:

1. A transcript of the record of his appointment.
2. That he has entered upon the discharge of his duties.
3. That he is entitled by the laws of the territory, state or country of his appointment to the possession of the estate of the ward; or must produce and file a certificate under the hand and seal of the clerk, judge, surrogate or other authorized officer of the court having jurisdiction in the country of his residence of the estates of persons under guardianship or of the highest court of such territory, state or country, that by the laws of such country the applicant is entitled to the custody of the estate of his ward without the appointment of any court. Upon such application unless good cause to the contrary is shown, the county court must make an order granting to such guardian leave to take and remove the property of his ward to the territory, state or place of his residence, which is authority to him to sue for and receive the same in his own name for the use and benefit of his ward. [R. C. 1905, § 8279; Pro. C. 1877, § 380; R. C. 1899, § 6579.]

§ 8918. Effect of order for removal. Such order is a discharge of the executor, administrator, local guardian or other person in whose possession the property may be at the time the order is made on filing with the county court the receipt therefor of the foreign guardian of such absent ward. [R. C. 1905, § 8280; Pro. C. 1877, § 381; R. C. 1899, § 6580.]

Article 6.— General and Miscellaneous Provisions.

§ 8919. **Concealment or embezzlement of ward's property.** Upon a complaint made to him by any guardian, ward, creditor or other person inter-

ested in the estate or having a prospective interest therein as heir or otherwise against any one suspected of having concealed or conveyed away any of the money, goods, effects or any instrument in writing belonging to the ward or to his estate, the county court may cite such suspected person to appear before it and may examine and proceed with him on such charge in the manner provided by law with respect to persons suspected of and charged with concealing or embezzling the effects of a decedent. [R. C. 1905, § 8281; Pro. C. 1877, § 382; R. C. 1899, § 6581.]

§ 8920. Marriage of minor terminates guardianship. The marriage of a minor ward terminates the guardianship; and the guardian of an insane or other person may be discharged by the judge of the county court when it appears to him on the application of the ward or otherwise that the guardianship is no longer necessary. [R. C. 1905, § 8282; Pro. C. 1877, § 384; R. C. 1899, § 6582.]

§ 8921. Bonds must be preserved. Every bond given by a guardian must be filed and preserved in the office of the county judge; and in case of a breach of a condition thereof, may be prosecuted for the use and benefit of the ward or of any person interested in the estate. [R. C. 1905, § 8283; Pro. C. 1877, § 386; R. C. 1899, § 6583.]

§ 8922. Action against sureties. Three years' limitation. No action can be maintained against the sureties on any bond given by a guardian unless commenced within three years from the discharge or removal of the guardian; but if at the time of such discharge the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed. [R. C. 1905, § 8284; Pro. C. 1877, § 387; R. C. 1899, § 6584.]

Liability of sureties on general bond of guardian, executor or administrator, as affected by a special bond. 43 L.R.A.(N.S.) 308.

Limitation of actions or suits to compel guardian to account or to recover on his bond. 47 L.R.A.(N.S.) 451.

§ 8923. Action for recovery of an estate. Limitation. No action for the recovery of any estate sold by a guardian can be maintained by the ward or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship or when a legal disability to sue exists by reason of minority or otherwise at the time when the cause of action accrues within three years next after the removal thereof. [R. C. 1905, § 8285; Pro. C. 1877, § 388; R. C. 1899, § 6585.]

Right of ward to maintain action at law against guardian for guardianship funds, after termination of guardianship, but before settlement of account. 26 L.R.A.(N.S.) 789.

§ 8924. More than one guardian, when. The court in its discretion may appoint more than one guardian of any person subject to guardianship, who must give bond and be governed and be liable in all respects as a sole guardian. [R. C. 1905, § 8286; Pro. C. 1877, § 389; R. C. 1899, § 6586.]

§ 8925. Bonds run to the state. Except when otherwise specially provided by this code all bonds and undertakings in anywise required by the provisions of this code shall run to the state of North Dakota as nominal payee and an action may be brought and maintained on any such bond or undertaking by and in the name of any person injured by any violation of the provisions thereof. [R. C. 1905, § 8287; R. C. 1895, § 6587.]

CHAPTER 8.

INCREASED JURISDICTION OF COUNTY COURT.

§ 8926. May have increased jurisdiction, how. Whenever the board of county commissioners of any county shall be presented with a petition signed by at least twenty per cent of the qualified voters and taxpayers of said county, praying for the submission to the voters of the county of the question whether the county court of said county shall have increased jurisdiction, and in counties having such increased jurisdiction whether the same shall be abolished, it shall be the duty of said board to cause the same to be submitted to the voters of the county at the next general election; provided, that said board may in its discretion call a special election to determine said question. Notice of said special election shall be given by publishing a notice of the same, stating the object of said election, in three newspapers in the county once each week for three successive weeks; provided, that the last publication shall be at least ten days, and not more than fifteen days, immediately preceding said election. In case there are not three newspapers published in the county, then said notice shall be published in such newspapers as are situated in said county and in not more than the three nearest newspapers published in adjoining counties. The petition presented to the board of county commissioners, as provided in this chapter, must show the population of said county to be at least two thousand, that the petitioners are qualified voters and taxpayers of said county and must be verified by at least three of the petitioners showing these facts; provided, further, that a majority of the highest number of votes cast at such election on any proposition whatever, shall be necessary to carry such question of increased jurisdiction or abolishing same; and provided, further, that an election for the purpose of abolishing such increased jurisdiction of the county court shall not be held oftener than once in six years. [1909, ch. 78, § 1; R. C. 1905, § 8288; Const. § 111; 1903, ch. 60.]

§ 8927. When decreased jurisdiction becomes operative. Whenever an election shall have been held under section 8926, and the result thereof shall be that said county courts of increased jurisdiction shall be reduced to that of courts of probate procedure as specified in section 8524, then said reduction shall take place at the expiration of the term for which the then presiding judge is elected. [1909, ch. 78, § 2.]

§ 8928. Duty of district court. Whenever there shall have been a reduction in the powers of the county court of increased jurisdiction, any cases left untried or any unfinished business upon the calendar of the court and not properly triable in the probate court shall be continued over and placed upon the calendar of the district court of the judicial district in which said county is situated, without prejudice thereto, and such transfer shall in all things operate the same as if said causes had been originally filed in said district court, and the court on its own motion shall direct and authorize said actions to be entitled in the district court.

In any county wherein there shall have been such reduction in the powers of the county court of increased jurisdiction, the clerk of the district court of such county shall have the care and custody of all the records of the said county court which relates to actions and proceedings within its civil and criminal jurisdiction. And any judgment of which has been rendered in said county court shall, on demand of a party in whose favor it has been rendered, and upon the payment of one dollar, be by the clerk of the district court of the said county entered in the judgment book and upon the judgment docket, and from the time of docketing thereof it becomes a judgment in the district court for the purpose of execution, and a lien upon real property owned by the debtor to the same extent as judgments originally entered in the district courts. [1913, ch. 125; 1909, ch. 78, § 3.]

CHAPTER 9.

PRACTICE IN COUNTY COURTS WITH INCREASED JURISDICTION.

Section 47 of the act of 1909, which, with amendments thereof, constitutes this chapter, expressly repeals R. C. 1905, §§ 8289–8319, and Laws 1907, ch. 68, the latter chapter consisting of amendments of R. C. 1905, §§ 8289, 8292, 8304, 8311, 8316 and 8318.

§ 8929. Jurisdiction. The county court shall have concurrent jurisdiction with the district court in all civil actions where the amount in controversy does not exceed one thousand dollars and in all criminal actions below the grade of felony. [1909, ch. 80, § 1.]

Section 111 of state constitution does not invest county courts of increased jurisdiction with equity powers. Mead v. First Nat. Bank, 24 N. D. 12, 138 N. W. 365.

§ 8930. General provisions to apply. The general provisions of law which may at any time be in force relating to the district courts and to civil and criminal proceedings therein shall also relate to the county courts having increased jurisdiction, and the rules of practice of district courts shall be in force in said county courts unless inapplicable and except as herein otherwise provided. [1909, ch. 80, § 2; 1907, ch. 68, § 1; R. C. 1905, § 8289; 1895, ch. 43, § 1; R. C. 1899, § 6588.]

Provisions of statute applicable in district courts also relate to county courts having increased jurisdiction, unless otherwise provided by statute. State v. Fleming, 20 N. D. 105, 126 N. W. 565.

§ 8931. Provisional remedies to be granted. In all actions in county courts having increased jurisdiction in this state the proper parties shall be entitled to the benefit of the provisional remedies of arrest and bail, claim and delivery of personal property, attachment, garnishment and deposit, and, except as otherwise provided in this act, the procedure in such remedies shall be the same as provided for in chapter nine of the code of civil procedure of the revised codes of 1905 [sections 7487–7596 herein], the powers therein given and duties imposed on sheriffs being hereby extended to constables, and the powers hereby given and the duties imposed on clerks of the district court are hereby extended to clerks of the county court, and the powers therein given and the duties imposed on a judge of the district court are hereby extended to a judge of a county court having increased jurisdiction. [1909, ch. 80, § 3; 1907, ch. 68, § 1.]

Section 111 of state constitution does not invest county courts of increased jurisdiction with equity powers. Mead v. First Nat. Bank, 24 N. D. 12, 138 N. W. 365.

§ 8932. Concurrent jurisdiction on appeal. Such county courts shall have concurrent jurisdiction with the district courts in appeals from all final judgments of justices of the peace, police, city or township justices, and the proceedings on such appeals shall be the same as now or may hereafter be provided for appeals from judgments of justices of the peace to district courts. [1909, ch. 80, § 4; R. C. 1905, § 8293; 1895, ch. 43, § 5; R. C. 1899, § 6592.]

§ 8933–8934. Power of county judge. The county judge also possesses the same power and authority in any action or proceeding which can be lawfully instituted before him, out of court, which a judge of the district court possesses in a like action or proceeding, instituted before him in like manner. In all civil actions tried to the court without a jury or wherein a trial by jury is waived, the judge of such county court, upon consent of all parties to the action, may hear testimony and take evidence in any part of his county. [1909, ch. 80, § 5.]

§ 8935. Calendar. The county judge shall, on the first day of each term, or as soon thereafter as may be, prepare a calendar of the causes standing for trial at such term, placing the causes upon such calendar in the order in which the same are numbered on the docket and setting the causes for trial upon convenient days during such term; provided, that no case shall

be set for trial upon the first day of said term without the consent of all parties thereto. [1909, ch. 80, § 6; R. C. 1905, § 8291; 1895, ch. 43, § 3; R. C. 1899, § 6590.]

§ 8936. Continued cases. When for any cause the county judge fails to attend at the commencement of any regular term or at the time to which any cause is assigned for trial or at the time to which any cause may be continued, the parties shall not be obliged to wait more than one hour, and if he does not attend within the hour and no other disposition of the case is made by the judge, the parties in attendance shall be required to attend at nine o'clock a. m. of the following day, and if such judge shall not attend at that time, the cause shall stand continued until the first day of the next regular term. [1909, ch. 80, § 7; R. C. 1905, § 8299; 1895, ch. 43, § 11; R. C. 1899, § 6598.]

§ 8937. Adjournment. The time for which any civil action may be adjourned shall be regulated by the county judge in the exercise of a reasonable discretion; provided, that such action cannot be adjourned over more than three regular terms of such court upon the application of either party without the consent of the other. In criminal actions, if the defendant has been committed to jail, he must be tried at the first jury term of such court held after such commitment. If the defendant in a criminal action has given bail for his appearance his trial must not be postponed longer than until the third term after such bail is given. [1909, ch. 80, § 8; R. C. 1905, § 8300; 1895, ch. 43, § 12; R. C. 1899, § 6599.]

Person not committed to jail cannot demand dismissal of action for want of prosecution until third term after he is bound over. State v. Fleming, 20 N. D. 105, 126 N. W. 565.

§ 8938. Terms of court. The regular term of the county court shall be held at the county seat, commencing on the first Tuesday of each calendar month, for the trial of such civil and criminal cases as may be brought before such court, and a jury shall be called at any regular term when there is one or more criminal cases in which the defendant is confined in jail and demands a trial ten days before the opening of such term or five or more civil cases in which a jury trial is so demanded for trial. [1913, ch. 138; 1909, ch. 80, § 9; R. C. 1905, § 8290; 1895, ch. 32, § 2; R. C. 1899, § 6589.]

§ 8939. Manner of selecting jury. Jurors in the county court having increased jurisdiction shall be selected in the same manner and by the same officers and from the same jury list as if the jurors were to be selected for the district court and all of the laws relating to the selection of jurors in the district court are hereby made applicable to the selection of jurors in the county court, and each party shall be entitled to the same number of challenges as are now or may hereafter be allowed in the district court in like actions. [1909, ch. 80, § 10; 1907, ch. 68, § 3; R. C. 1905, § 8295; 1895, ch. 43, § 7; R. C. 1899, § 6594.]

Jury need not be summoned upon return of justice, on preliminary examination, where defendant is out on bail. State v. Fleming, 20 N. D. 105, 126 N. W. 565.

§ 8940. Jury may be required to attend subsequent terms. Any jury so summoned may at the discretion of the judge of such county court be required to attend at any subsequent adjourned or regular term of such court not exceeding in all one calendar year. Jurors shall attend without service of venire or summons upon receipt of a notice from the clerk of such court stating the date on which his appearance is required, which notice may be served by registered mail. [1909, ch. 80, § 11.]

§ 8941. Bailiff. The judge of the county court may appoint one or more competent persons as bailiffs of the court, who shall hold such office at the pleasure of the judge. Such bailiff shall have the same powers as a constable, and shall receive for his services the same fees as are prescribed for constables. [1909, ch. 80, § 12; R. C. 1905, § 8301; 1895, ch. 43, § 13; R. C. 1899, § 6600.]

§ 8942. Process, by whom served and compensation. All writs and processes in county courts may be served by a constable as well as a sheriff, and when served by a constable he shall be entitled to the same fees as the sheriff receives for like service. [1909, ch. 80, § 13; 1907, ch. 68, § 7; R. C. 1905, § 8318; 1895, ch. 43, § 29; R. C. 1899, § 6616.]

§ 8943. Judgment lien. Abstract. The clerk of the county court, on the demand of a party in whose favor a judgment shall have been rendered in that court, must give a certified abstract thereof, in substantially the form prescribed by section 9109 of the justice's code, which abstract 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 the clerk of such district court must thereupon enter 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 the 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 same effect in every respect as if the judgment had been rendered in the district court where such judgment is filed. No execution shall issue out of the county court upon any judgment upon which an abstract has been issued and filed in the district court of that county. [1909, ch. 80, § 14; R. C. 1905, § 8313; 1895, ch. 43, § 25; R. C. 1899, § 6612.]

§ 8944. Requisites of summons. The summons must contain the title of the action, specifying the court in which the action is brought, the name of the parties to the action, 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. The summons shall be substantially in the following form, the blanks being properly filled:

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

In County Court.

A. B. .....Plaintiff.

vs.

C. D. .....Defendant.

Summons.

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 ten 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..... [1909, ch. 80, § 15; R. C. 1905, § 8309; 1895, ch. 43, § 21; R. C. 1899, § 6608; 1905, ch. 94.]

§ 8945. Filing and service of pleadings. 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 county court in the county in which action is commenced, and if the defendant within ten 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 ten days thereafter be served accordingly, and after such service the defendant has ten 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 ten days after the date of such summons the action will be deemed discontinued. [1911, ch. 219,

§ 1; 1907, ch. 68, § 5; R. C. 1905, §§ 8310, 8311; 1895, ch. 43, §§ 22, 23; R. C. 1899, §§ 6609, 6610.]

§ 8946. Service by publication. The summons in a civil action may be served by publication thereof, and the practice with respect to such service shall be the same as provided in the code of civil procedure for service of summons by publication, except as provided in the next succeeding section of this chapter. [1909, ch. 80, § 17.]

§ 8947. Publication. Mailing complaint. Service of the summons by publication shall be made by publishing the same three times, once in each week for three successive weeks, in a newspaper published in the county in which the action is pending, and if no newspaper is published in such county, then in a newspaper published at the seat of government of this state. The first publication of the summons must be made within twenty days after the filing of the affidavit for publication, and 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 mailed by registered letter, in which case the return of registry receipt of the post office department shall be prima facie evidence of its mailing and its receipt by the defendant to whom it is mailed. [1909, ch. 80, § 18.]

§ 8948. Service outside of the state. After the filing of the affidavit for publication and the complaint in any civil action personal service of the summons and complaint upon the defendant outside of the state, if made within twenty days after the filing of such affidavit, shall be equivalent to and have the same force and effect as the publication and mailing thereof hereinbefore provided for. [1909, ch. 80, § 19.]

§ 8949. When service complete. Service by publication is complete upon the expiration of twenty-one days after the first publication of the summons, or in case of personal service of the summons and complaint upon the defendant outside of the state, upon the expiration of ten days after the date of such service. [1909, ch. 80, § 20.]

§ 8950. Process may be served in any county. A county court having increased jurisdiction has power in any civil action within its jurisdiction to send its process into any county of the state for service or execution, and to enforce obedience thereto with like power and authority as the district court; and all writs, summons and other process may be executed and served in any county of this state, except that no execution upon any judgment in a civil action shall issue out of any county court after an abstract of such judgment has been filed in the district court of the county where the judgment was rendered. [1909, ch. 80, § 21; R. C. 1905, § 8298; 1895, ch. 43, § 10; R. C. 1899, § 6597.]

§ 8951. Time of trial notice. At any time after issue joined, and at least ten days prior to the first day of a term, either party may give notice of trial. The party giving 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 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 the adverse party — may bring the issue to trial. [1911, ch. 219, § 2; 1909, ch. 80, § 22; R. C. 1905, § 8312; 1895, ch. 43, § 24; R. C. 1899, § 6611.]

§ 8952. Garnishment summons. In all garnishment proceedings the plaintiff shall attach to his affidavit for garnishment a garnishment summons, which shall be substantially in the following form:

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

In County Court.

A. B.....Plaintiff.

vs.

C. D.....Defendant, and
E. F.....Garnishee.

The state of North Dakota to said garnishee:

You are hereby summoned, pursuant to the annexed affidavit, as a garnishee of the defendant, C. D., and required within ten 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.

Dated.....

L. M., Plaintiff's Attorney.

P. O. address.....County, N. D. [1909, ch. 80, § 23.]

§ 8953. Answer of garnishee. The affidavit or answer of the garnishee must be served upon the attorney for the plaintiff within ten days after service of the garnishment summons, and such answer must be filed in the office of the clerk of the county court the same as other pleadings in a civil action. [1909, ch. 80, § 24.]

§ 8954. Place of trial of civil action. The place of trial of all civil actions shall be governed by chapter six of the code of civil procedure of the 1905 revised codes of the state of North Dakota [sections 7415–7419 herein], and an action may be commenced in the county court of any county in the state, subject to removal for cause. If the county designated for that purpose in the summons and 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 convenience of witnesses and the ends of justice would be promoted by the change; provided, however, that if the county to which a change of venue is demanded or ordered as hereinabove provided, does not have a county court with increased jurisdiction, in that event a change of venue shall be granted and had to the district court of the proper county, and said action shall be tried and determined in such district court as if the same had originally been commenced in such district court, but costs shall be taxed and allowed as in a county court having increased jurisdiction. [1909, ch. 80, § 25.]

§ 8955. Prejudice of judge. Affidavit. Procedure. Whenever the defendant in a criminal action shall, before the opening of any term in which the case appears upon the calendar for trial, file his affidavit stating that he has good reason to believe and does believe that he cannot have a fair and impartial trial of such action on account of the bias or prejudice of

the judge of the county court in which said action is pending, the court shall thereafter proceed in said action, as follows:

1. The court may request, arrange and procure the judge of another county having a county court with increased jurisdiction, to preside at said trial in the county in which the action is pending. A change upon the ground in this section provided for must be asked at the time hereinafter provided and not more than one change can be granted therefor; but if a trial has been had without a verdict, a change for the cause provided for in this section may be had if asked for at the term at which said trial was had and before another trial of the action is begun; provided, that the county judge before whom said affidavit is filed may in his discretion in lieu thereof certify all proceedings to the district court.

2. The actual expenses of a county judge, procured under the provisions of this section, while traveling to and from the county to which he has been called and during the trial of the cause shall be paid by the county in which the action was pending.

3. When either party to a civil action pending in any of the county courts having increased jurisdiction in this state shall after issue is 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 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 county (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 county judge of some other county of the state having a county court of increased jurisdiction to preside at such trial in the county 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 county 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; and provided, that the county judge before whom said affidavit is filed may in his discretion in lieu thereof certify all proceedings to the district court. A failure to file the affidavit of prejudice hereinbefore mentioned within the time before specified in any criminal or civil action shall constitute a waiver of all objections to the trial of such action by the presiding judge of such county court. [1909, ch. 80, § 26.]

Affidavit for certification of case to district court on ground of prejudice of judge must state facts and not merely conclusions. Waterloo Gasoline Engine Co. v. O'Neill, 19 N. D. 784, 124 N. W. 951.

§ 8956. Jury trial to be demanded. In all civil actions wherein there are issues of fact triable to a jury, either party may demand a jury trial, but such demand must be made in writing and filed in the office of the clerk of the county court, on or before the first day of the term at which said cause may be tried. A failure to file such demand shall be deemed an express waiver of the right to a jury trial in such action. [1909, ch. 80, § 27; R. C. 1905, § 8304; 1895, ch. 43, § 16; R. C. 1899, § 6603.]

§ 8957. Costs. When the prevailing party in a civil action has appeared therein by an attorney duly authorized to practice in the courts of this state, there shall be allowed for his reimbursement and taxed as a part of the costs, the same sums as provided by section 8445 of the revised codes of 1905 [section 9108 herein] in like cases; and in all cases there shall be allowed such other costs as are provided in the code of civil procedure. [1909, ch. 80, § 28.]

§ 8958. Fees of clerks. Clerks of county courts having increased jurisdiction shall collect for their services in all civil and criminal proceedings the

same fees as provided for in the fee bill for the clerk of the district court, except as follows: Clerks of county courts shall collect for all default judgments in civil actions, including all fees prior to execution, the sum of one dollar and fifty cents and no more, and for a certified abstract or transcript of any judgment in any civil action, the sum of fifty cents and no more. The clerk of the county court shall require a deposit of three dollars at the time of the filing in this court of any civil action and may thereafter require from time to time additional deposits to cover his fees as they may accumulate, and upon the entry of judgment in any such action, the clerk of such court shall refund to the proper party, the amount of all such deposits in excess of his legal fees accrued in said action. [1909, ch. 80, § 29; R. C. 1905, § 8314; 1897, ch. 42; R. C. 1899, § 6613.]

§ 8959. New trials. The county court shall have authority to grant new trials, judgments notwithstanding the verdict, to vacate and set aside verdicts, affirm, modify or set aside judgments in actions tried in such court in the same manner and pursuant to the same statutes, rules and regulations now prescribed by law for the district courts, and a statement of the case may be prepared and settled in the manner prescribed in the code of civil procedure. [1909, ch. 80, § 30; R. C. 1905, § 8296; 1895, ch. 43, § 8; R. C. 1899, § 6595.]

§ 8960. Appeals from county court. In all actions brought under the provisions of this chapter an appeal may be taken to the supreme court of the state in the same manner and pursuant to the same rules as appeals from the district court. [1909, ch. 80, § 31; R. C. 1905, § 8292; 1895, ch. 43, § 4; R. C. 1899, § 6591.]

Appeal from judgment of county court; entry of judgment. Field v. Elevator Co., 5 N. D. 400, 67 N. W. 147; Field v. Elevator Co., 6 N. D. 424, 71 N. W. 135, 66 Am. St. Rep. 611.

Amendatory act of 1907 does not operate to oust district court of jurisdiction acquired by it over appeals previously taken and perfected. Jenson v. Frazer, 21 N. D. 267, 130 N. W. 832.

§ 8961. Defendant bound over to. In any criminal action or proceeding for any criminal offense of which the county court has jurisdiction, any justice of the peace or other examining magistrate having jurisdiction must admit to bail, bind over or commit for trial the accused to the county court of such county and the information shall be filed in such county court. If any person accused of a criminal offense is so bailed, bound over or committed for trial to the county court for a crime of which such court has not jurisdiction, such proceedings shall not abate and such county court shall not lose jurisdiction of such person and proceedings, but shall certify the same to the district court of such county and such proceedings shall thereupon be tried in the district court with the same force and effect as if such action or proceeding had been originally commenced therein. If an examining magistrate shall at any time bind over a defendant to the district court for an offense of which the county court has jurisdiction or if it shall appear by evidence or otherwise at any time to the judge of the district court that the offense with which the defendant is or should be charged is triable in the county court, the judge of the district court may certify such cause and all proceedings relative to any person accused of such offense to the county court of such county for trial, determination and adjudication, and thereupon the same and all the papers and files therein shall be transferred by the clerk of the district court to the county court without any further order or certificate and such shall thereupon be tried in the county court with the same force and effect as if said cause had originally been commenced therein. [1909, ch. 80, § 32; R. C. 1905, § 8303; 1895, ch. 43, § 15; R. C. 1899, § 6602.]

§ 8962. Warrant of arrest. The county court in term time or the judge in vacation may issue warrants of arrest for persons against whom an information has been filed, shall fix the amount of bail to be required of the

accused and the clerk shall indorse the same upon the warrant except when the warrant is issued in term time, when the same may be returnable forthwith and it shall not then be necessary to fix the amount of bail until the accused is brought into court. [1909, ch. 80, § 33; R. C. 1905, § 8305; 1895, ch. 43, § 17; R. C. 1899, § 6604.]

Criminal complaint alleging facts set forth in information, sworn to positively, filed before issuing of warrant, was, together with information, sufficient to show probable cause for issuing of warrant. State v. Gottlieb, 21 N. D. 179, 129 N. W. 460.

§ 8963. Receive plea and pass judgment. The court may receive the plea of guilty and pass judgment in term time or vacation. If the accused waives a jury he may be tried by the court without a jury in term time upon notice being given first to the state's attorney. [1909, ch. 80, § 34; R. C. 1905, § 8306; 1895, ch. 43, § 18; R. C. 1899, § 6605.]

§ 8964. Preliminary examination. No preliminary examination shall be necessary before trial in criminal actions in the county court. The judge of a county court having increased jurisdiction may act as a committing magistrate, and hold preliminary examinations in any part of his county. [1909, ch. 80, § 35; R. C. 1905, § 8307; 1895, ch. 43, § 19; R. C. 1899, § 6606.]

Constitution confers no right to preliminary examination. State v. Gottlieb, 21 N. D. 179, 129 N. W. 460.

§ 8965. Assignment of counsel. In all criminal cases triable in the county court when it is satisfactorily shown to the court that the defendant has no means and is unable to employ counsel, the court shall in such cases assign counsel for the defense and allow and direct to be paid by the county in which said court is held a reasonable and just compensation to the attorney or attorneys assigned for such services as they may render; provided, however, that such compensation shall not exceed twenty-five dollars in any one case. [1909, ch. 80, § 36; R. C. 1905, § 8308; 1895, ch. 43, § 20; R. C. 1899, § 6607.]

§ 8966. Jury trial. In all criminal actions the defendant shall be entitled to a trial by jury, and when the defendant is arraigned he shall be informed by the court of his right to trial by jury and if he waives his right to a jury trial an entry to that effect shall be made on the court minutes and the defendant shall be tried to the court. [1909, ch. 80, § 37; R. C. 1905, § 8304; 1895, ch. 43, § 16; R. C. 1899, § 6603.]

On right to waive trial by jury in county court in assault case. State v. Fleming, 20 N. D. 105, 126 N. W. 565.

§ 8967. Jury in criminal action, how composed. The jury in all criminal cases shall be composed of twelve residents of the county having the qualifications of jurors, and the jurors above mentioned shall be selected, summoned and impaneled as hereinabove specified; provided, that each party shall be entitled to the same number of challenges as is now or may hereafter be allowed in the district court in like actions. [1909, ch. 80, § 38; 1907, ch. 68, § 3; R. C. 1905, § 8295; 1895, ch. 43, § 7; R. C. 1899, § 6594.]

§ 8968. New trials in criminal actions. In all criminal actions or proceedings brought in the county court having increased jurisdiction, the county court shall have authority to grant new trials, vacate and set aside verdicts and entertain motions in arrest of judgments in the same manner and pursuant to the same statutes, rules and regulations now prescribed by law for the district courts, and a statement of the case may be prepared and settled in the same manner prescribed in the code of criminal procedure. [1909, ch. 80, § 39; R. C. 1905, § 8302; 1895, ch. 43, § 14; R. C. 1899, § 6601.]

§ 8969. Appeals from county court in criminal actions. In all criminal actions brought in a county court having increased jurisdiction, an appeal may be taken to the supreme court in the same manner and pursuant to the same rules as appeals from the district court to the supreme court. [1909, ch. 80, § 40; R. C. 1905, § 8292; 1895, ch. 43, § 4; R. C. 1899, § 6591.]

§ 8970. Clerk of district court ex-officio clerk of county court. In all counties having county courts with increased jurisdiction the clerk of the

district court shall be the clerk of the county court in the same county. Such clerks of the district court and their deputies shall perform all the duties of clerks of such courts, in all actions and proceedings commenced in the county court by virtue of its increased jurisdiction, in the same manner as they are required to perform the duties of clerks of the district court, so far as the provisions of the law relating to that subject are applicable, and may demand, receive and retain the fees provided for clerks of district courts, except as herein otherwise provided, and the fees so paid shall be retained by the clerk of the district court as and for compensation for the services rendered by him as the clerk of such county court; provided, however, that they shall be entitled to receive no per diem for attendance on court, nor salary from the county on account of services performed in said court. The judge of the county court having increased jurisdiction in counties having a population of not less than fifteen thousand, shall have power to appoint a clerk of such court, whose duties and powers shall be as nearly as may be the same as those of the clerks of the district courts. Such clerk shall hold his office during the pleasure of the judge appointing him; and in counties having a population of less than eighteen thousand, the salary of such clerk shall be twelve hundred dollars per year, and in counties having a population of more than eighteen thousand such clerk shall receive a salary of fifteen hundred dollars per year, such salary to be paid by the county monthly in the same manner as the salaries of other county officers are paid. He shall charge and receive for acts performed by him the same fees and commissions as are now allowed by law to clerks of district courts, except as modified by the provisions of this act. He shall keep a true account of all commissions and fees received by him in a book of record, to be kept for that purpose, and on the first day of each calendar month, shall pay all such fees and commissions to the treasurer of the county. [1909, ch. 80, § 41; R. C. 1905, § 8314; 1897, ch. 42; R. C. 1899, § 6613.]

§ 8971. Custody of records. The judge of the county court shall have the care and custody of all records of the court which relate to actions or proceedings within its civil and criminal jurisdiction and shall be responsible for all acts of any clerk of such court who may be appointed by such judge, and for all fees collected by such appointee; and the judge of such court may require such clerk to give him a bond conditioned for the faithful performance of all his duties as such clerk, and for the accounting and for payment to the county treasurer of all fees and other moneys collected by him by virtue of his office. [1909, ch. 80, § 42.]

§ 8972. Population, how determined. For the purpose of ascertaining the amount of compensation to be paid to the judges and clerks of the county courts, the county auditor shall determine the population of his county from the latest census of such population taken either by state or federal authority. [1909, ch. 80, § 43; R. C. 1905, § 8315; 1895, ch. 43, § 27; R. C. 1899, § 6614.]

§ 8973. Salary of judge. As compensation for their services under this chapter, there shall be allowed and paid to the judges of county courts having civil and criminal jurisdiction in addition to the salary provided for such judges of county courts, in counties not having increased jurisdiction, the sum of one hundred dollars for each one thousand inhabitants or fraction thereof; provided, that in no case shall the compensation for all services of the county judge exceed the sum of two thousand five hundred dollars, and said sum shall cover all services under the prohibition law. [1909, ch. 80, § 44; 1907, ch. 68, § 6; R. C. 1905, § 8316; 1899, ch. 62; R. C. 1899, § 6615; 1903, ch. 76; 1905, ch. 76.]

Maximum salary of county judges in counties having increased jurisdiction is limited to two thousand five hundred dollars. State ex rel. Davis v. Fabrick, 18 N. D. 402, 121 N. W. 65.

§ 8974. Judge shall not act as attorney. It shall be unlawful for any judge of a county court in counties in which said courts have been or shall or may

be given increased jurisdiction, to act as attorney or counsellor at law during the period of his incumbency in this office. Any such judge who shall willfully violate the provisions of this section shall be subject to removal from office. [1909, ch. 80, § 45; R. C. 1905, § 8317; 1897, ch. 60; R. C. 1899, § 6615a.]

§ 8975. Court stenographer. The judge of any county court having civil or criminal jurisdiction is authorized in his discretion to appoint a court stenographer of such court. Such stenographer shall qualify in the same manner and his duties and compensation shall be the same as the court stenographer of a district court. Such compensation shall be paid in the same manner as that of the court stenographer of the district court; provided, that such court stenographer shall not be appointed in any county having less than eight thousand inhabitants, unless the board of county commissioners shall first authorize such appointment. [1909, ch. 80, § 46; R. C. 1905, § 8319; 1895, ch. 43, § 30; R. C. 1899, § 6617.]

CHAPTER 10.

TAXATION OF INHERITANCES, DEVISES, BEQUESTS, LEGACIES AND GIFTS.

§ 8976. Tax transfers, exceptions. A tax shall be and is hereby imposed upon the transfer of any property or any interest therein or income therefrom in trust or otherwise, to any person, association or corporation not hereinafter exempt, in the following cases:

1. When the transfer is by will or by the interstate [intestate] laws of this state from any person dying possessed of the property while a resident of the state.

2. When the transfer is by will or interstate [intestate] law, of property within this state or within its jurisdiction whether the ownership of or interest in such property be evidenced by certificate of stock or bonds of foreign or of domestic corporations and the decedent was a nonresident of the state at the time of his death.

3. When the transfer is of property made by a resident or by a nonresident when such nonresident's property is within this state or within its jurisdiction by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.

Provided, however, that no tax shall be imposed upon any tangible personal property of a resident decedent when such property is located without this state, and when the transfer of such property is subject to inheritance or transfer tax in the state where located and which tax has actually been paid; provided, further, that such property is not without this state temporarily nor for the sole purpose of deposit or safe keeping; and providing the laws of the state where such property is located allow a like exemption in relation to such property left by a resident of that state and located in this state. [1913, ch. 185, § 1.]

Nature of inheritance tax. 33 L.R.A.(N.S.) 606.

Is the right to take property by will or inheritance a natural or statutory right. 9 L.R.A.(N.S.) 121.

Retrospective operation of succession tax. 44 L.R.A.(N.S.) 420.

Power to impose succession tax retrospectively. 8 L.R.A.(N.S.) 1180.

1. Is money set aside under will, or otherwise, for purposes of caring for grave, erection of tomb or monument, subject to inheritance tax. 23 L.R.A.(N.S.) 474.

Inheritance or succession tax on money or property of estate, which has been lost or misappropriated since decedent's death. 32 L.R.A.(N.S.) 1167.

Succession tax on property covered by power of appointment. 33 L.R.A.(N.S.) 236.

2. Physical presence or absence of personal property, or evidence thereof, within state as affecting liability to tax. 46 L.R.A.(N.S.) 1167.

Liability of insurance policy issued by a domestic corporation upon the life of a nonresident to a local transfer tax. 10 L.R.A.(N.S.) 1089.

3. Succession tax on conveyance to take effect after grantor's death. 38 L.R.A.(N.S.) 1141.

——on gift in contemplation of death. 18 L.R.A.(N.S.) 458.

Applicability of succession tax to property conveyed, or agreed to be conveyed, in consideration of support of grantor during his life. 18 L.R.A.(N.S.) 226.

§ 8977. Rates and exemptions. Upon the transfer of property in any manner hereinbefore described of the value of one hundred thousand dollars ($100,000.00) or less the rate of tax on all sums above the first twenty thousand dollars ($20,000.00) where the same shall pass to or for the use of the husband or wife and on all sums above the first ten thousand dollars ($10,000.00) where the same shall pass to or for the use of the father, mother, lineal descendant, adopted child, or lineal descendant of an adopted child shall be one per centum; and on all sums above the value of one hundred thousand dollars up to two hundred and fifty thousand dollars ($250,000.00) so transferred to any such person, the rate shall be two per centum and on all sums above two hundred and fifty thousand dollars ($250,000.00) up to five hundred thousand dollars ($500,000.00) the rate shall be two and one-half per centum, and on all sums above five hundred thousand dollars ($500,000.00) the rate shall be three per centum.

Upon the transfer of property in any manner hereinbefore described of the value of twenty-five thousand dollars ($25,000.00) or less on all sums above the first five hundred dollars ($500.00) where the same shall pass to or for the use of a brother or a sister of the decedent, a wife or widow of a son or the husband of a daughter of the decedent, the rate of taxation shall be one and one-half per centum; and on all sums above twenty-five thousand dollars ($25,000.00) up to fifty thousand dollars ($50,000.00), where the same shall pass to any such person the rate shall be two and one-fourth per centum and on all sums above fifty thousand dollars ($50,000.00) up to one hundred thousand dollars ($100,000.00) three per centum; and on all sums above one hundred thousand dollars ($100,000.00) up to five hundred thousand dollars ($500,000.00), three and three-fourths per centum and all sums above five hundred thousand dollars ($500,000.00), four and one-half per centum.

Upon the transfer of property in any manner hereinbefore described of the value of twenty-five thousand dollars ($25,000.00) or less where the same shall pass to or for the use of any person who shall be the brother or sister of the father or mother or a descendant of the brother or sister of the father or mother or the descendant the rate of taxation shall be three per centum; and on all sums above twenty-five thousand dollars ($25,000.00) up to fifty thousand dollars ($50,000.00), passing to any such person the rate shall be four and one-half per centum and on all sums above fifty thousand dollars ($50,000.00) up to one hundred thousand dollars ($100,000.00), six per centum and on all sums above one hundred thousand dollars ($100,000.00), seven and one-half per centum, and on all sums above five hundred thousand dollars ($500,000.00), nine per centum.

Upon the transfer of property in any manner hereinbefore described of the value of twenty-five thousand dollars ($25,000.00) or less, where the same shall be for the use of any person in any other degree of collateral consanguinity than is hereinbefore stated, or to a transfer in blood of the decedent, or to a body politic or corporate, the rate of taxation shall be five per centum; and on all sums above twenty-five thousand dollars ($25,000.00) up to fifty thousand dollars ($50,000.00), to any such person the rate shall be six per centum, and on all sums above fifty thousand dollars ($50,000.00) up to one hundred thousand dollars ($100,000.00) nine per centum, and on all sums above one hundred thousand dollars ($100,000.00) up to five hundred thousand dollars ($500,000.00) twelve per centum, and on all sums above five hundred thousand dollars ($500,000.00) fifteen per centum.

Upon the transfer of property in any manner hereinbefore described to or for the use of collateral relations or strangers in blood who are aliens not

residing in the United States, or to or for the use of any corporation which is not chartered by the authority of the government of the United States or of any state, a tax of twenty-five per centum shall be levied and collected. [1913, ch. 185, § 2.]

Effect on transfer tax of apportioning property of nonresident decedent within the state to payment of debts or legacies which are exempt or subject to a reduced rate. 18 L.R.A.(N.S.) 946.

§ 8978. Time of taking effect. All taxes imposed by this chapter shall take effect at and upon the death of the decedent or donor and shall be due and payable at the expiration of one (1) year from such death except as otherwise provided in this chapter; provided, however, that taxes on any devise, bequest, legacy or gift limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the full and true value thereof cannot be ascertained at or before the time when the taxes become due and payable when the person or corporation beneficially entitled thereto shall come into actual possession or enjoyment thereof. [1913, ch. 185, § 3.]

§ 8979. Duty of officers. Any administrator, executor or trustee having in charge or in trust any property for distribution embraced in or belonging to any inheritance, devise, bequest, legacy or gift, subject to the tax thereon as imposed by this chapter, shall deduct the tax therefrom, and within thirty (30) days thereafter he shall pay over the same to the county treasurer as herein provided.

If such property be not in money he shall collect the tax in such inheritance, devise, bequest, legacy or gift upon the appraised value thereof from the person entitled thereto.

He shall not deliver or be compelled to deliver any property embraced in any inheritance, devise, bequest, legacy or gift, subject to tax under this chapter, to any person until he shall have collected the tax thereon. [1913, ch. 185, § 4.]

§ 8980. To whom paid. The tax imposed by this chapter upon inheritances, devises, bequests, legacies or gifts shall be paid to the treasurer of the county in which the court having jurisdiction, as herein provided, is located; and the tax so imposed shall be payable to the state treasurer as hereinafter provided, and the treasurer to whom the tax is paid shall give the executor, administrator, trustee or person paying such tax duplicate receipts therefor, one of which shall be immediately transmitted to the state auditor, whose duty it shall be to charge the treasurer so receiving the tax with the amount thereof; and when such tax is paid to the county treasurer he shall seal said receipt with the seal of his office and countersign the same and return it to the executor, administrator or trustee, whereupon it shall be a proper voucher in the settlement of his accounts.

No executor, administrator or trustee shall be entitled to a final accounting of an estate, in the settlement of which a tax may become due under the provisions of this chapter, until he shall produce a receipt so sealed and countersigned or a certified copy of the same. All taxes paid into the county treasury under the provisions of this chapter shall immediately be paid into the state treasury upon the warrant of the state auditor and shall belong to and be a part of the revenue fund of the state. Provided, however, that the county treasurer of each county shall retain two (2) per cent of the amount of all taxes paid and accounted for by him under this chapter and pay the same into the general fund of such county. [1913, ch. 185, § 5.]

§ 8981. Lien on property. Every tax imposed by this chapter shall be a lien upon the property embraced in any inheritance, devise, bequest, legacy or gift until paid, and the person to whom such property is transferred, and the administrators, executors and trustees of every estate embracing such property shall be personally liable for such tax until its payment to the extent of the value of such property. [1913, ch. 185, § 6.]

§ 8982. Rate of interest. If such tax is not paid within one year from the accruing thereof, interest shall be charged and collected thereon at the rate of seven (7) per centum per annum from the time the tax is due, unless by reasons of claims upon the estate, necessary litigation or other unavoidable cause of delay, such tax cannot be determined as herein provided; in such case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which seven (7) per centum shall be charged. [1913, ch. 185, § 7.]

§ 8983. Enforcement. Every administrator, executor or trustee shall have full power to sell so much of the property embraced in any inheritance, devise, bequest, legacy or gift as will enable him to pay the tax imposed by this chapter, in the same manner as he might be entitled by law to do for the payment of the debts of a testator or intestate. [1913, ch. 185, § 8.]

§ 8984. Duty of heirs. If any bequest or legacy shall be charged upon or payable out of any property, the heir or devisee shall deduct such tax therefrom and pay such tax to the administrator, executor or trustee, and the tax shall remain a lien or charge on such property until paid; and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the bequest or legacy might be enforced, or by the state's attorney or attorney-general, under section 8996. If any bequest or legacy shall be given in money to any person for a limited period the administrator, executor or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him to make an apportionment, if the case requires, of the sum to be paid into his hands by such legatee or beneficiary, and for such further order relative thereto as the case may require. [1913, ch. 185, § 9.]

§ 8985. Errors, how corrected. When any tax imposed by this chapter shall have been erroneously paid, wholly or in part, the person paying the same shall be entitled to a refundment of the amount so erroneously paid, and the auditor of state shall, upon satisfactory proofs presented to him of the facts relating thereto, draw his warrant upon the state treasurer for the amount thereof, in favor of the person entitled thereto; provided, however, that all applications for such refunding of erroneous taxes shall be made within three (3) years from the payment thereof, and be approved by the court having original jurisdiction of the matter. [1913, ch. 185, § 10.]

§ 8986. Foreign estates. If a foreign executor, administrator or trustee shall assign or transfer any stock or obligations in this state, standing in the name of the decedent or in trust for the decedent, liable to any such tax, the tax shall be paid to the treasurer of the proper county on the transfer thereof and no such assignment or transfer shall be valid until such tax is paid. [1913, ch. 185, § 11.]

§ 8987. Duties of holders of assets, etc. No safety deposit company, bank or other institution, person or persons holding securities or assets of a decedent, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or upon their order or request, unless notice of the time and place of such intended transfer be served upon the county treasurer, personally or by representative, and state tax commission, to examine said securities at the time of such delivery or transfer. If upon such examination the county treasurer and state tax commission or their representatives shall for any cause deem it advisable that such securities or assets should not be immediately delivered or transferred, they may forthwith notify in writing such company, bank, institution or person to defer delivery or transfer thereof for a period not to exceed ten (10) days from the date of such notice, and thereupon it shall be the duty of the party notified to defer such delivery or transfer until the time stated in such notice or until the revocation thereof within such ten (10) days. Failure to serve

the notice first above mentioned, or to allow such examination or to defer the delivery of such securities or assets for the time stated in the second of said notices shall render said safety deposit company, trust company, bank or other institution, person or persons, liable to the payment of the tax due upon the said security or assets, pursuant to the provisions of this chapter. [1913, ch. 185, § 12.]

§ 8988. Petition, citation and order. Upon the presentation of any petition to any county court of this state for letters testamentary or of administration, or for ancillary letters testamentary or of administration, the court shall cause a copy of the citation or order for the hearing of such petition to be served upon the county treasurer of his county not less than ten (10) days prior to such hearing. The court shall thereupon, as soon as practicable after the granting of any such letters, proceed to ascertain and determine the value of every inheritance, devise, bequest, legacy or gift embraced in or payable out of the estate in which such letters are granted and the tax due thereon.

The county treasurer shall have the same rights to apply for letters of administration as are conferred upon creditors by law. [1913, ch. 185, § 13.]

§ 8989. Appraisers. The county court shall, in any matter mentioned in the preceding section, either upon its own motion or upon the application of any interested party, including county treasurers, and as often as and when occasion requires, appoint one or more persons as appraisers to appraise the true and full value of the property embraced in any inheritance, devise, bequest, legacy or gift subject to the payment of any tax imposed by this chapter. [1913, ch. 185, § 14.]

§ 8990. How appraised. Every inheritance, devise, bequest, legacy or gift upon which a tax is imposed under this chapter, shall be appraised at its full and true value immediately upon the death of decedent, or as soon thereafter as may be practicable.

Provided, however, that when such devise, bequest, legacy or gift shall be of such a nature that its full and true value cannot be ascertained at such time, it shall be appraised in like manner at the time such value first becomes ascertainable. [1913, ch. 185, § 15.]

Basis and method of computing value of life estate or annuity for purposes of succession tax. 46 L.R.A.(N.S.) 714.

§ 8991. Duties of appraisers, fees and compensation. The appraiser appointed under the provisions of this chapter shall forthwith give notice by mail to all persons known to have a claim or interest in the inheritance, devise, bequest, legacy or gift to be appraised, including the county treasurer and state tax commission, and such persons as the county court may by order direct of the time and place when they will make such appraisal.

They shall at such time and place appraise the same at its full and true value as herein prescribed, and for that purpose the said appraisers are authorized to issue subpoenas and compel the attendance of witnesses before them, and to take evidence of such witnesses, under oath, concerning such property and the value thereof, and they shall make report thereof, and of such value, in writing, to said court, together with the testimony of the witnesses examined and such other facts in relation thereto and to the said matter as said court may order to and require. Every appraiser shall be entitled to compensation at the rate of three ($3.00) dollars per day for each day actually and necessarily employed in such appraisal, and his actual and necessary traveling expenses, and such witnesses and the officer or person serving any such subpoenas shall be entitled to the same fees as allowed witnesses or sheriffs for similar service in courts of record. The compensation and fees claimed by any person for services performed under this chapter shall be approved by the judge of county court, who shall certify the amount thereof, to the auditor of state, who shall examine the same, and, if found

correct, he shall draw his warrant upon the state treasury for the amount thereof in favor of the person entitled thereto. [1913, ch. 185, § 16.]

§ 8992. Report of appraisers. The report of the appraisers shall be filed in duplicate with the county court, and from such report and other proof relating to any such estate before the county court, the court shall, forthwith, as of course, determine the true and full value of all such estate and the amount of tax to which same are liable; or the county court may so determine the full and true value of all such estates and the amount of tax to which the same are liable without appointing appraisers; provided, however, a duplicate of such report and appraisement shall be forthwith forwarded by the court to the state tax commission. [1913, ch. 185, § 17.]

§ 8993. Penalty. Any appraisers appointed under this chapter who shall take any fee or reward from any person, representative, firm or corporation liable to pay said tax or any portion thereof, shall be guilty of a misdemeanor, and shall be forthwith dismissed by the county judge from such services. [1913, ch. 185, § 18.]

§ 8994. Notice of tax. The county court shall immediately give notice, upon the determination of the value of any inheritance, devise, bequest, legacy or gift which is taxable under this chapter, and of the tax to which it is liable, to all parties known to be interested therein, including the state tax commission and county treasurer. [1913, ch. 185, § 19.]

§ 8995. Reassessment. Within thirty (30) days after the assessment and determination by the county court of any tax imposed by this chapter, the state tax commission, county treasurer or any person interested therein may file with said court objections thereto, in writing, and praying for a reassessment and redetermination of such tax. Upon any objection being so filed, the court shall appoint a time for the hearing thereof and cause notice of such hearing to be given the state tax commissioner, county treasurer and all persons interested at least ten (10) days before the hearing thereof. At the time appointed in such notice the court shall proceed to hear such objections, and any evidence which may be offered in support thereof or opposition thereto; and, if, after such hearing, said court shall be of the opinion that a reassessment or redetermination of such tax should be made it shall, by order, set aside the assessment and determination theretofore made, and order a reassessment in the same manner as if no assessment had been made. [1913, ch. 185, § 20.]

§ 8996. Duty of state's attorney. If the treasurer of any county shall have reason to believe that any tax is due and unpaid under this chapter after the refusal or neglect of the persons liable therefor to pay the same he shall notify in writing the state's attorney of his county of said failure or neglect, and such state's attorney, if he have probable cause to believe that such tax is due and unpaid, shall apply to the county court for a citation, citing the persons liable to pay such tax to appear before the court on a day specified not more than three (3) months from the day of such citation, and show cause why the tax should not be paid. The judge of the county court, upon such application and whenever it shall appear to him that any such tax accruing under this chapter has not been paid, as required by law, shall issue such citation and the service of such citation, and the time, manner and proof thereof, and the hearing and determination thereof shall conform as near as may be to the provisions of the probate code of this state; and whenever it shall appear that any such tax is due and payable and the payment thereof cannot be enforced under the provisions of this chapter in said county court the person or corporation from whom the same is due is hereby made liable to the state for the amount of such tax, and it shall be the duty of the state's attorney of the proper county, and the attorney-general of the state, to sue for in the name of the state, and enforce the collection of such tax, and all the taxes so collected shall be forthwith paid into the county treasury. It

shall be the duty of the state's attorney to appear for and represent the county treasurer on the hearing of such citation. [1913, ch. 185, § 21.]

§ 8997. Records, how kept. The auditor of state shall furnish to each county court a book which shall be a public record and in which shall be entered by the judge or clerk of said court the name of every decedent upon whose estate an application has been made for the issue of letters of administration, or letters testamentary or ancillary letters, the date and place of death of such decedent, names and places of residence and relationship to decedent of the heirs at law of such decedent, the estimated value of the property of such decedent, names and places of residence and relationship to decedent of the heirs at law of such decedent, the names and places of residence of the legatees, devisees and other beneficiaries in any will of any such decedent, the amount of the legacy, and the estimated value of any property devised therein and to whom devised.

These entries shall be made from data contained in the papers filed on such application or in any proceeding relating to the estate of the decedent.

The judge or clerk shall also enter in such book the amount of property of any such decedent, as shown by the inventory thereof, when made and filed in his office, and the returns made by any appraisers appointed by him under this chapter, and the value of all inheritances, devises, bequests, legacies and gifts inherited from such decedent, or given by such decedent in his will or otherwise as fixed by the court, and the tax assessed thereon, and the amount of any receipts for payment thereof filed with him.

The state auditor shall also furnish forms for the reports to be made by such judge, which shall correspond with the entries in such book. [1913, ch. 185, § 22.]

§ 8998. Reports of officers. Each judge of the county court shall on the first day of January, April, July and October of each year, make a report in duplicate upon the forms furnished by the state auditor containing all data and matters required to be entered in such book, one of which shall be immediately delivered to the county treasurer and the other transmitted to the state tax commission.

The register of deeds of each county shall, at the same time, make reports in duplicate to the auditor of state, containing a statement of any conveyance filed or recorded in his office of any property which appears to have been made or intended to take effect in possession or enjoyment after the death of the grantor or vendor or vendee, and the description of the property transferred, as shown by such instrument, one of which duplicates shall be immediately delivered to the county treasurer and the other transmitted to the state tax commission. [1913, ch. 185, § 23.]

§ 8999. Exemption. All bequests and devises of property within this state when the same is for one of the following charitable purposes, namely, the relief of aged, indigent and poor, maintenance of sick or maimed or for the support or education of orphans or indigent children, shall be exempt from the payment of any tax under this law. [1913, ch. 185, § 24.]

Is not void because making exemptions other than allowed by constitution. Re McKennan, 25 S. D. 369, 33 L.R.A.(N.S.) 606, 126 N. W. 611.

Applicability of general tax exemptions to succession taxes. 23 L.R.A.(N.S.) 1208; 48 L.R.A.(N.S.) 373; 1 B. R. C. 877.

Exemption of bequest to government from succession tax. 23 L.R.A.(N.S.) 1209.

Must property out of state be included in fixing exemptions under inheritance tax. 39 L.R.A.(N.S.) 1024.

Effect on transfer tax of apportioning property of nonresident decedent within the state to payment of debts or legacies which are exempt or subject to a reduced rate. 18 L.R.A.(N.S.) 946.

§ 9000. Repeal. Chapter 10 of the probate code of the state of North Dakota, being sections 8320, 8321, 8322, 8323, 8324, 8325, 8326, 8327, 8328, 8329, 8330, 8331, 8332, 8333, 8334, 8335, 8336, 8337, 8338 and 8339 of the Revised Codes of the state of North Dakota for the year 1905, and all acts

and parts of acts of this state, relating to the taxation of inheritances, devises, legacies, bequests and gifts, so far as the same are inconsistent or in conflict with the provisions of this chapter, are hereby repealed. Provided, however, that such repeal shall in no wise affect any suit, prosecution or court proceeding pending at the time this chapter shall take effect, or any right which the state of North Dakota may have at the time of the taking effect of this chapter, to claim a tax upon any property under any existing act or acts hereby repealed for which no proceedings have been commenced, and all appeals, rights of appeals in all suits pending or appeals from assessments of taxes made by appraisers' report, or orders fixing the tax or otherwise existing in this state at the time of taking effect of this chapter. [1913, ch. 185, § 25.]

Chapter 10 of the probate code, repealed in the foregoing section, consisted of Laws 1903, ch. 171.