

# CODE OF CIVIL PROCEDURE

- CHAPTER 1. GENERAL DEFINITIONS AND PROVISIONS, §§ 7320-7331.
2. COURTS, §§ 7339-7354.
3. FORM OF CIVIL ACTIONS, § 7355.
4. TIME OF COMMENCING ACTIONS, §§ 7358-7394.
5. PARTIES TO CIVIL ACTIONS, §§ 7395-7414.
6. OF THE PLACE OF TRIAL OF CIVIL ACTIONS, §§ 7415-7419.
7. MANNER OF COMMENCING CIVIL ACTIONS, §§ 7420-7438.
8. OF PLEADINGS IN CIVIL ACTIONS, §§ 7439-7485.
9. OF THE PROVISIONAL REMEDIES IN CIVIL ACTIONS, §§ 7487-7594.
10. DISMISSAL OF CIVIL ACTIONS, §§ 7597, 7598.
11. OF THE TRIAL AND JUDGMENT IN CIVIL ACTIONS, §§ 7599-7711.
- 11A. UNIFORM DECLARATORY JUDGMENTS ACT, §§ 7712a1-7712a16.
12. OF THE EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS, §§ 7714-7770.
13. PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION, § 7782.
14. OF THE COSTS AND DISBURSEMENTS IN CIVIL ACTION, §§ 7789-7814.
15. OF APPEALS IN CIVIL ACTIONS, §§ 7818-7849.
- 15A. WRITS OF ERROR, §§ 7849a1, 7849a2.
- 15B. CERTIFICATION OF QUESTIONS OF LAW TO SUPREME COURT IN CERTAIN CASES, §§ 7849b1-7849b3.
18. ADMISSION OR INSPECTION OF WRITINGS, § 7861.
19. EXAMINATION OF PARTIES, §§ 7864-7870.
20. WITNESSES AND EVIDENCE, §§ 7871-7938.
21. MOTIONS AND ORDERS, §§ 7940-7949a.
22. NOTICES AND FILING AND SERVICE OF PAPERS, §§ 7951-7959.
24. MISCELLANEOUS PROVISIONS, §§ 7963-7968.
25. ACTIONS IN PLACE OF SCIRE FACIAS, QUO WARRANTO AND OF INFORMATION IN THE NATURE OF QUO WARRANTO, §§ 7969-7976.
27. ACTIONS BY AND AGAINST CORPORATIONS, §§ 7986-8007.
28. ACTIONS TO RECOVER PENALTIES AND FORFEITURES, § 8015.
29. ACTION FOR THE PARTITION OF REAL PROPERTY, §§ 8044, 8053.
30. FORECLOSURE OF MORTGAGES, LIENS AND CONTRACTS, §§ 8074-8143.
31. ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY AND OTHER ACTIONS CONCERNING REAL ESTATE, §§ 8144-8155.
34. ACTIONS AGAINST THE STATE, §§ 8175, 8177.
35. CONTEMPTS, §§ 8178-8201.
36. EMINENT DOMAIN, §§ 8202-8231.
- 37A. CO-OPERATION OF UNITED STATES GEOLOGICAL SURVEY, §§ 8234a1, 8234a2.
38. IRRIGATION, §§ 8247a1-8320a24.
39. DEATH BY WRONGFUL ACT, §§ 8321-8325.

## CODE OF CIVIL PROCEDURE.

- CHAPTER 40. ARBITRATION, §§ 8327-8345.**  
**41. INSOLVENCY.**  
**41A. ASSIGNMENT FOR BENEFIT OF CREDITORS, §§ 8442a1-8442a6.**  
**42. SPECIAL PROCEEDINGS OF A CIVIL NATURE, §§ 8445-8473.**  
**43. SUMMARY PROCEEDINGS, §§ 8477, 8479.**  
**45. TRESPASS OF ANIMALS, §§ 8500-8506.**

### CHAPTER 1.

#### GENERAL DEFINITIONS AND PROVISIONS.

- § 7320. *Comp. Laws, 1913.*  
Statutes presumed to operate prospectively only. *E. J. Lander & Co. v. Deemy*, 46 N. D. 273, 176 N. W. 922.  
See also *Warren v. Olson*, 46 N. D. 203, 180 N. W. 529; *First Nat. Bank v. Bovey, Shute & Jackson*, — N. D. —, 191 N. W. 765; *Jenson v. Frazer*, 21 N. D. 267, 130 N. W. 832.
- § 7321. *Comp. Laws, 1913.*  
Forms of civil actions abolished. *French v. State Farmers' Mut. Hail Ins. Co.* 29 N. D. 426, L.R.A.1915D, 766, 151 N. W. 7.  
Whenever common law necessarily conflicts with the code, the code must govern. *Johnsen v. Wineman*, 34 N. D. 116, 157 N. W. 679.  
See also *Higgins v. Rued*, 30 N. D. 551, 153 N. W. 389; *Kurtz v. Paulson*, 33 N. D. 400, 157 N. W. 305.
- § 7324. *Comp. Laws, 1913.*  
Section applies to time for filing petitions, requesting that names of candidates for village trustees appear on the ballots. *Phillips v. Johnson*, — N. D. —, 197 N. W. 879.  
Section applies to all cases unless contrary intention affirmatively appears. *Friesz v. Olsness*, — N. D. —, 199 N. W. 590.  
Where last day of thirty day period for answer to complaint fell on Sunday, service of answer on Monday, was held timely. *Hogg v. Christenson*, 29 N. D. 8, 149 N. W. 562.
- § 7325. *Comp. Laws, 1913.*  
*Reeves & Co. v. Russell*, 28 N. D. 265, L.R.A.1915D, 1149, 148 N. W. 654.
- § 7326. *Comp. Laws, 1913.*  
*Northern P. R. Co. v. Jurgenson*, 25 N. D. 14, 141 N. W. 70.
- § 7329. *Comp. Laws, 1913.*  
*State v. Equity Co-op. Exch.* 44 N. D. 299, 175 N. W. 634; *Keller v. Reichert*, — N. D. —, 189 N. W. 680; *Dow v. Lillie*, 26 N. D. 512, L.R.A.1915D, 754, 144 N. W. 1082.
- § 7330. *Comp. Laws, 1913.*  
Proceeding to obtain judgment, for the enforcement of a civil right, or redress or prevention of a civil wrong, is a civil action. *Lehman v. Coulter*, 40 N. D. 177, 168 N. W. 724.  
Notice of contest of a vote, not the commencement of an action. *Voyen v. Eagle School Dist.* 47 N. D. 174, 181 N. W. 82.  
See also *Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co.* 30 N. D. 112, 151 N. W. 879; *Blumardt v. McDonald*, 36 N. D. 518, 162 N. W. 409; *Lark Equity Exch. v. Jones*, 42 N. D. 145, 171 N. W. 863; *Gotchy v. North Dakota Workmen's Comp. Bureau*, — N. D. —, 194 N. W. 663.
- § 7331. *Comp. Laws, 1913.*  
Notice of contest of a vote, not the commencement of an action. *Voyen v. Eagle School Dist.* 47 N. D. 174, 181 N. W. 82.  
See also *Gotchy v. North Dakota Workmen's Comp. Bureau*, — N. D. —, 194 N. W. 663; *Dow v. Lillie*, 26 N. D. 512, L.R.A.1915D, 754, 144 N. W. 1082.

## CHAPTER 2.

## COURTS.

- ARTICLE 2. THE SUPREME COURT, § 7339.  
 3. THE DISTRICT COURTS, §§ 7349-7354.  
 4. COUNTY COURTS WITH INCREASED JURISDICTION.

## ARTICLE 2.—THE SUPREME COURT.

## § 7339. Comp. Laws, 1913.

State ex rel. Erickson v. Burr, 16 N. D. 581, 113 N. W. 705; State ex rel. Birdzell v. Jorgenson, 25 N. D. 539, 49 L.R.A.(N.S.) 67, 142 N. W. 450; State v. McLean, 35 N. D. 203, 159 N. W. 847; State v. District Ct. — N. D. —, 186 N. W. 381; State v. District Ct. — N. D. —, 194 N. W. 745; Baker v. Lenhart, — N. D. —, 195 N. W. 16.

## ARTICLE 3.—THE DISTRICT COURTS.

## § 7349. Comp. Laws, 1913.

State ex rel. v. Hanley, 43 N. D. 388, 175 N. W. 569.

## § 7350. Comp. Laws, 1913.

State ex rel. v. Hanley, 43 N. D. 388, 175 N. W. 569; Bank of Inkster v. Christenson, — N. D. —, 194 N. W. 702.

## § 7352. Comp. Laws, 1913.

State ex rel. v. Hanley, 43 N. D. 388, 175 N. W. 569.

## § 7353. Comp. Laws, 1913.

State ex rel. v. Hanley, 43 N. D. 388, 175 N. W. 569; Peterson v. Finnegan, 45 N. D. 101, 176 N. W. 734; State v. Winbauer, 26 N. D. 43, 143 N. W. 387.

## § 7354. Comp. Laws, 1913.

State v. Hanley, 43 N. D. 388, 175 N. W. 569; Missouri Slope Land & Invest. Co. v. Halstead, 27 N. D. 591, 147 N. W. 643.

## ARTICLE 4.—COUNTY COURTS WITH INCREASED JURISDICTION.

**Explanatory note.** Sections 8926-8975, constituting chapters 8, 9 of the probate code in the Compiled Laws of 1913 and §§ 8944-8970, post, more properly belong here, as the increased jurisdiction of county courts has no relation to probate matters. As to procedure in county courts in probate matters, see §§ 8514-8544 in the Compiled Laws of 1913, and §§ 8544a1-8544a50.

## CHAPTER 3.

## FORM OF CIVIL ACTIONS.

## § 7355. Comp. Laws, 1913.

Forms of action abolished. Rott v. Goehring, 33 N. D. 413, L.R.A.1916E, 1086, 157 N. W. 294; Jacobson v. Horner, — N. D. —, 193 N. W. 327.

Distinctions between actions at law, and suits in equity abolished. Shary v. Eszlinger, 45 N. D. 133, 176 N. W. 938; Varnes v. Schwartz, — N. D. —, 197 N. W. 129.

Although distinctions between actions at law and suits in equity have been abolished, yet the two distinct systems remain. Schafer v. Olson, — N. D. —, 132 N. W. 645.

See also Wade v. Major, 36 N. D. 331, L.R.A.1917E, 633, 162 N. W. 399; Hellebust v. Bonde, 42 N. D. 324, 172 N. W. 812; Knight v. Harrison, 43 N. D. 76, 174 N. W. 632; Sargent County v. State, 47 N. D. 561, 182 N. W. 270; Roether v. National Union F. Ins. Co. — N. D. —, 200 N. W. 818.

## CHAPTER 4.

## TIME OF COMMENCING ACTIONS.

- ARTICLE 1. IN GENERAL, § 7358.  
 2. TIME OF COMMENCING ACTIONS FOR THE RECOVERY OF REAL PROPERTY, §§ 7362-7370.  
 3. TIME OF COMMENCING OTHER ACTIONS, §§ 7373-7381.  
 4. GENERAL PROVISIONS AS TO THE TIME OF COMMENCING ACTIONS, §§ 7383-7394.

## ARTICLE 1.—IN GENERAL.

## § 7358. Comp. Laws, 1913.

Statute of limitations must be pleaded in answer, and cannot be raised by demurrer, even though it is apparent on the face of the complaint. *Shane v. Peoples*, 25 N. D. 188, 141 N. W. 737; *Chicago & N. W. R. Co. v. Nepstad*, — N. D. —, 190 N. W. 1009.

See also *Gronna v. Goldammer*, 26 N. D. 122, 143 N. W. 394.

## ARTICLE 2.—TIME OF COMMENCING ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

## § 7362. Comp. Laws, 1913.

*Martin v. O'Brien*, 42 N. D. 306, 173 N. W. 809; *Munroe v. Donovan*, 31 N. D. 228, 153 N. W. 461.

## § 7363. Comp. Laws, 1913.

*Steinwand v. Brown*, 38 N. D. 602, 166 N. W. 129.

## § 7365. Comp. Laws, 1913.

*Martin v. O'Brien*, 42 N. D. 306, 173 N. W. 809; *Wehe v. Wehe*, 44 N. D. 280, 175 N. W. 366; *Morgan v. Jenson*, 47 N. D. 137, 181 N. W. 89.

## § 7366. Comp. Laws, 1913.

*Martin v. O'Brien*, 42 N. D. 306, 173 N. W. 809; *Steinwand v. Brown*, 38 N. D. 602, 166 N. W. 129.

## § 7367. Comp. Laws, 1913.

*Morgan v. Jenson*, 47 N. D. 137, 181 N. W. 89; *Steinwand v. Brown*, 38 N. D. 602, 166 N. W. 129.

## §§ 7368, 7369. Comp. Laws, 1913.

*Morgan v. Jenson*, 47 N. D. 137, 181 N. W. 89.

## § 7370. Comp. Laws, 1913.

*Martin v. O'Brien*, 42 N. D. 306, 173 N. W. 809.

## ARTICLE 3.—TIME OF COMMENCING OTHER ACTIONS.

## § 7373. Comp. Laws, 1913.

*Gronna v. Goldammer*, 26 N. D. 122, 143 N. W. 394.

## § 7374. Comp. Laws, 1913.

*McCarty v. Goodsman*, 39 N. D. 389, L.R.A.1918F, 160, 167 N. W. 503; *Union Nat. Bank v. Ryan*, 23 N. D. 482, 137 N. W. 449.

## § 7375. Comp. Laws, 1913.

Word "discovery" not convertible with "knowledge." If there be notice of facts or if there be information that puts plaintiff on inquiry, that would have led to knowledge, there is a "discovery." *Roether v. National Union F. Ins. Co.* — N. D. —, 200 N. W. 818.

An action to recover damages caused by trespassing animals, may be main-

*Time Actions Brought.* CODE OF CIVIL PROCEDURE. Chap. 4, § 7375.

tained at any time within six years after the cause of action accrued. *Schneider v. Marquart*, 45 N. D. 390, 178 N. W. 195.

Action for foreclosure of mechanic's lien accrues from time that last item of labor, or materials is furnished, and not from time of filing of statement of account with clerk of district court. *Sleeper v. Elliott*, 36 N. D. 280, 162 N. W. 305.

Section does not apply to a suit brought against the sureties upon a guardian's bond. *Gronna v. Goldammer*, 26 N. D. 122, 143 N. W. 394.

See also *Dinnie v. United Commercial Travelers*, 41 N. D. 42, 169 N. W. 811; *Reichert v. Reichert*, 41 N. D. 253, 170 N. W. 621; *Burke v. Welo*, — N. D. —, 190 N. W. 269; *Pratt v. Pratt*, 29 N. D. 531, 151 N. W. 294.

§ 7376. Comp. Laws, 1913.

*St. Anthony & D. Elevator Co. v. Martineau*, 30 N. D. 425, 153 N. W. 416.

§ 7379. Comp. Laws, 1913.

*Shellberg v. Kuhn*, 35 N. D. 448, 160 N. W. 504.

§ 7381. Comp. Laws, 1913.

As to what constitutes "commencement" of action. *Page v. Smith*, 33 N. D. 369, 157 N. W. 477.

Equitable action to redeem by the mortgagor or his successors must be commenced within ten years from time cause of action accrued. *Jungkunz v. Comonow*, 43 N. D. 212, 174 N. W. 68.

See also *Steinwand v. Brown*, 38 N. D. 602, 166 N. W. 129; *Martin v. O'Brien*, 42 N. D. 306, 173 N. W. 809.

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

§ 7383. Comp. Laws, 1913.

Requirement that summons be published against defendant within 60 days, applicable to garnishment proceedings. *Citizens State Bank v. Smeland*, 48 N. D. 466, 184 N. W. 987.

See also *Donovan v. Dickson*, 37 N. D. 404, 164 N. W. 27.

§ 7384. Comp. Laws, 1913.

Is applicable to an action brought in the state, for money loaned to one, while a resident of the state, even though the debtor resided outside of state for more than six years. *Pratt v. Pratt*, 29 N. D. 531, 151 N. W. 294.

See also *Union Nat. Bank v. Ryan*, 23 N. D. 482, 137 N. W. 449.

§ 7392. Comp. Laws, 1913.

*Martin v. O'Brien*, 42 N. D. 306, 173 N. W. 809.

§ 7394. Comp. Laws, 1913.

Partial payments on notes secured by real estate mortgage, which extend the right of action upon the note, also extended the right of action upon the mortgage. *Hansen v. Branner*, — N. D. —, — A.L.R. —, 204 N. W. 856.

CHAPTER 5.

PARTIES TO CIVIL ACTIONS.

§ 7395. Comp. Laws, 1913.

Vendor of a mare held entitled to maintain action against vendee, who agreed, as part of the purchase price, to pay debt of vendor. *Steen v. Neva*, 37 N. D. 40, 163 N. W. 272.

See also *Willbur v. Johnson*, 32 N. D. 314, 155 N. W. 671.

§ 7396. Comp. Laws, 1913.

Maker of a non-negotiable note can counterclaim against one purchasing same from payee, an unliquidated claim arising out of another contract, but prior to notice of assignment. *Emerson-Brantingham Co. v. Brennan*, 35 N. D. 94, 159 N. W. 710.

N. D. C. L.—79.

Chap. 5, § 7396. CODE OF CIVIL PROCEDURE. *Parties to Actions.*

Right to rescind a transaction for fraud exists against a beneficiary or an assignee, as well as against an immediate party. *Crane & O. Co. v. Sykeston School Dist.* 36 N. D. 254, 162 N. W. 413.

Lack of consideration for non-negotiable order defense to action upon acceptance thereof. *Clow v. Sweeney*, 42 N. D. 194, 172 N. W. 66.

Lien of attorney is subject to all existing set-offs. *Jacobsen v. Miller*, — N. D. —, 34 A.L.R. 317, 198 N. W. 349.

See also *Dixon-Reo Co. v. Horton Motor Co.* — N. D. —, 191 N. W. 780.

§ 7397. *Comp. Laws, 1913.*

Where vendee of a mare agrees to pay as part purchase price, the debt of vendor, the vendor may, upon his failure to do so, maintain an action against the vendee as trustee of an express trust. *Steen v. Neva*, 37 N. D. 40, 163 N. W. 272.

See also *Thronson v. Blough*, 38 N. D. 574, 166 N. W. 132; *Anderson v. Kain*, 40 N. D. 632, 169 N. W. 501; *Phillips v. Semingson*, 25 N. D. 460, 142 N. W. 47.

§ 7401. *Comp. Laws, 1913.*

Where answer indicates that third party is real party in interest, and where such party is incompetent, he may be considered a party, so as to authorize his appearance by guardian ad litem. *Thronson v. Blough*, 38 N. D. 574, 166 N. W. 132.

See also *McLarty v. Raymond*, 42 N. D. 241, 172 N. W. 836; *McGinnity v. Dowd*, 47 N. D. 554, 182 N. W. 938.

§ 7403. *Comp. Laws, 1913.*

In action to determine adverse claims to a homestead, wife may be joined with husband as joint plaintiff, even though legal title is held in husband's name. *Sexton v. Sutherland*, 37 N. D. 500, 164 N. W. 278.

§ 7404. *Comp. Laws, 1913.*

In action to determine adverse claims to a homestead, wife may be joined with husband as joint plaintiff, even though legal title is held in husband's name. *Sexton v. Sutherland*, 37 N. D. 500, 164 N. W. 278.

Parties severally liable may be joined in same suit. *Orth v. Procise*, 42 N. D. 149, 171 N. W. 861.

Persons, having interest in or incumbrance upon grain threshed, may be joined as parties defendant, in action to foreclose threshing lien. *Golly v. Kiner*, — N. D. —, 197 N. W. 883.

§ 7406. *Comp. Laws, 1913.*

Applicable to controversies over special assessments. *Kvello v. Lisbon*, 38 N. D. 71, 164 N. W. 305.

In an action to determine adverse claims to a homestead, wife may be joined with husband as joint plaintiff, even though legal title is held in husband's name. *Sexton v. Sutherland*, 37 N. D. 500, 164 N. W. 278.

See also *Meyer v. First Nat. Bank*, 48 N. D. 1006, 188 N. W. 580.

§ 7407. *Comp. Laws, 1913.*

*Stark County v. Mischel*, 33 N. D. 432, 156 N. W. 931.

§ 7408. *Comp. Laws, 1913.*

Action for pollution of stream does not abate by death of plaintiff. *McDonough v. Russell-Miller Mill. Co.* 47 N. D. 237, 182 N. W. 251.

§ 7412. *Comp. Laws, 1913.*

Original parties, remain parties to litigation. *More v. Western Grain Co.* 31 N. D. 369, 153 N. W. 976.

Warehouseman, may compel all parties to interplead, when in doubt as to validity of adverse claims to stored grain. *Covlin v. Volochenko*, — N. D. —, 204 N. W. 892.

See also *Severtson v. Peoples*, 28 N. D. 372, 148 N. W. 1054; *Simon v. Chicago, M. & S. P. R. Co.* — N. D. —, 194 N. W. 706; *Shirley v. Straub*, — N. D. —, 198 N. W. 675.

§ 7413. Comp. Laws, 1913.

Applicable to action for specific performance. *Boehm v. Long*, 43 N. D. 1, 172 N. W. 862.

§ 7414. Comp. Laws, 1913.

Order of interpleader may be allowed only, in action, upon contract, for specific real property, and for specific personal property. *More v. Western Grain Co.* 31 N. D. 369, 153 N. W. 976.

Warehouseman, may compel all parties to interplead, when in doubt as to validity of adverse claims to stored grain. *Covlin v. Volochenko*, — N. D. —, 204 N. W. 892.

See also *Clow v. Sweeney*, 42 N. D. 194, 172 N. W. 66; *Reinke v. Northwestern F. & M. Ins. Co.* 48 N. D. 1105, 189 N. W. 111.

CHAPTER 6.

OF THE PLACE OF TRIAL OF CIVIL ACTIONS.

§ 7415. **Where subject matter is.** Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trials in the cases provided by statute.

1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

2. For the partition of real property.

3. For the foreclosure of a mortgage of real property.

4. For the recovery of personal property distrained for any cause.

5. All actions brought on a policy of insurance to recover for the loss or damage to the property insured shall be tried in the county or judicial subdivision where such property is situated at the time of its loss or damage.

6. All actions against any domestic corporation shall be tried in any county or judicial subdivision designated in the complaint and in which the defendant corporation transacts business. [Laws 1919, ch. 3, § 1.]

Situs of suit for recovery of real property is within county wherein the land lies. *Wilson v. Kryger*, 29 N. D. 28, 149 N. W. 721.

Change of place of trial to county residence of private and corporate defendants, on joint demand of both, proper. *Farmer's Security Bank v. Springen*, 48 N. D. 364, 184 N. W. 664.

See also *Hinsey v. Alcox*, 38 N. D. 52, 164 N. W. 296; *Sargent County v. State*, 47 N. D. 561, 182 N. W. 270; *State ex rel. Lemke v. District Ct.* — N. D. —, 186 N. W. 381; *State v. First State Bank*, — N. D. —, 202 N. W. 391.

Venue, 40 Cyc. 56-79; *Corporations*, 14a C. J. pp. 790-797 §§ 2875-2891, p. 1357 § 4066; *Insurance*, 33 C. J. p. 155 § 894.

When may local venue be disregarded upon ground that action or proceeding is ancillary or incidental. L.R.A.1916D, 1134.

Venue of action against municipal corporation. 25 L.R.A.(N.S.) 711; L.R.A. 1915F, 1029.

Validity of provision in contract as to place where action may be brought. L.R.A.1916D, 696.

Venue of actions relating to real property. 27 R. C. L. 791 et seq. and Supps.

Venue of actions against corporations. 7 R. C. L. 695 et seq. and Supps; 27 R. C. L. 806 and Supps.

Venue of action upon insurance policy. 14 R. C. L. 1415.

§ 7416. Comp. Laws, 1913.

*Sargent County v. State*, 47 N. D. 561, 182 N. W. 270; *State ex rel. Lemke v. District Ct.* — N. D. —, 186 N. W. 381.

§ 7417. Comp. Laws, 1913.

Proper place of trial in action on attachment bond is county of defendant's

residence. Absolute right of defendant to have trial in county in which he resides. *Hinsey v. Alcox*, 38 N. D. 52, 164 N. W. 296.

Action for false imprisonment, properly triable in county of defendant's residence. *Price v. Willson*, 41 N. D. 209, 171 N. W. 245.

Change to county residence of private and corporate defendants, on joint demand of both, held proper. *Farmers' Security Bank v. Springen*, 48 N. D. 364, 184 N. W. 664.

See also *State v. Bloom*, — N. D. —, 190 N. W. 812.

§ 7418. Comp. Laws, 1913.

Fact that bias or prejudice exists against defendant in civil action does not justify change of venue against objection of adverse party, if a fair and impartial trial can be had in that county. *Booren v. McWilliams*, 33 N. D. 339, 157 N. W. 117.

Section presupposes that trial judge will consider convenience of witnesses and saving of expense, in granting change of venue, but does not require all actions to be sent to adjoining county for trial. *Kramer v. Heins*, 34 N. D. 507, 158 N. W. 1061.

Proper place of trial in action on attachment bond is county of defendant's residence. Absolute right of defendant to have trial in county in which he resides. *Hinsey v. Alcox*, 38 N. D. 52, 164 N. W. 296.

Change of venue may not be demanded, after actual service of answer, even though statutory time within which answer may be served, has not expired. *McCarty v. Thornton*, 38 N. D. 551, 165 N. W. 499.

Within sound discretion of trial court to grant application for a change of venue, and decision of trial court will not be interfered with, unless abuse of discretion be shown. *Curren v. Story*, 41 N. D. 361, 170 N. W. 875.

Where court overruled application for change of venue on one ground, but ignored another ground, case must be remanded for ruling thereon. *Lilly v. Haynes Co-op. Coal Min. Co.* 48 N. D. 937, 188 N. W. 38.

Order of trial court transferring case to county of defendant's residence, held not reversible, because it requires performance of idle acts, where plaintiff made no showing that defendants were not entitled to order as of right. *State v. Bloom*, —N. D. —, 190 N. W. 812.

See also *Price v. Willson*, 41 N. D. 209, 171 N. W. 245; *Fargo Silo Co. v. Pioneer Stock Co.* 42 N. D. 48, 171 N. W. 849; *Sargent County v. State*, 47 N. D. 561, 182 N. W. 270; *State ex rel. Lemke v. District Ct.* — N. D. —, 186 N. W. 381; *Axford v. Gaines*, — N. D. —, 195 N. W. 555.

§ 7419. Comp. Laws, 1913.

*State v. First State Bank*, — N. D. —, 202 N. W. 391.

## CHAPTER 7.

### MANNER OF COMMENCING CIVIL ACTIONS.

§ 7420. Comp. Laws, 1913.

Action commenced by service of summons on defendant. In cases in which attachment is permitted, action is commenced when summons is duly issued. *Johnson v. Engelhard*, 45 N. D. 11, 176 N. W. 134.

§§ 7421, 7422. Comp. Laws, 1913.

*Hagen v. Gresby*, 34 N. D. 349, L.R.A.1917B, 281, 159 N. W. 3.

§ 7423. Comp. Laws, 1913.

*Hagen v. Gresby*, 34 N. D. 349, L.R.A.1917B, 281, 159 N. W. 3; *Citizens State Bank v. Smeland*, 48 N. D. 466, 184 N. W. 987.

§ 7425. Comp. Laws, 1913.

As to effect of notice of *lis pendens*. *Boehm v. Long*, 43 N. D. 1, 172 N. W. 862.

Filing of *lis pendens*, is mere notice of pendency of an action, constructive to purchasers, or incumbrancers. *Beyer v. Investors' Syndicate*, 47 N. D. 358, 182 N. W. 934.

See also *Citizens State Bank v. Smeland*, 48 N. D. 466, 184 N. W. 987.

**§ 7426.** Comp. Laws, 1913.

Service on foreign corporation, by delivering process to one of the officers or representatives, is ineffectual unless person served, was "within the state, doing business" for such corporation. *Kluser v. Middlewest Grain Co.* 44 N. D. 210, 173 N. W. 468.

See also *Johnson v. Engelhard*, 45 N. D. 11, 176 N. W. 134; *Beyer v. Investors Syndicate*, 47 N. D. 358, 182 N. W. 934.

**§ 7428.** Comp. Laws, 1913.

Affidavit, stating that the "whereabouts" of defendant are unknown, does not comply with section, since word as used, is not synonymous with word "residence," and is wholly defective. *Krumenacker v. Andis*, 38 N. D. 500, 165 N. W. 524.

Affidavit for publication of summons, stating defendants were non-residents "as affiant is informed and believes," and stating "present postoffice address" of defendant "as affiant is informed and believes," held fatally defective. *Hughes v. Fargo Loan Agency*, 46 N. D. 26, 178 N. W. 993.

Affidavit for publication, stating that defendants are non-residents, that they resided in a certain county in Minnesota, that affiant does not know postoffice address, and where no copy of summons or complaint was served or mailed, held insufficient. *Paul v. Green*, — N. D. —, 191 N. W. 469.

Affidavit for publication of summons stating "that the last known postoffice address of the defendant is unknown," held insufficient. *Atwood v. Tucker*, 26 N. D. 622, 51 L.R.A.(N.S.) 597, 145 N. W. 587.

Provisions relating to service by publication, strictly construed, and must be strictly complied with. *Dallas v. Luster*, 27 N. D. 450, 147 N. W. 95.

See also *Jablonski v. Piesik*, 30 N. D. 543, 153 N. W. 274; *Philbrick v. McDonald*, 37 N. D. 16, 163 N. W. 538; *Johnson v. Engelhard*, 45 N. D. 11, 176 N. W. 134; *Beyer v. Investors Syndicate*, 47 N. D. 358, 182 N. W. 934.

**§ 7429.** Comp. Laws, 1913.

*Jablonski v. Piesik*, 30 N. D. 543, 153 N. W. 274; *Johnson v. Engelhard*, 45 N. D. 11, 176 N. W. 134.

**§ 7430.** Comp. Laws, 1913.

Affidavit for publication, stating that defendants are non-residents, that they reside in a certain county in Minnesota, that affiant does not know postoffice address and where no copy of summons or complaint was served or mailed, held insufficient. *Paul v. Green*, — N. D. —, 191 N. W. 469.

See also *Johnson v. Engelhard*, 45 N. D. 11, 176 N. W. 134.

**§ 7431.** Comp. Laws, 1913.

*Johnson v. Engelhard*, 45 N. D. 11, 176 N. W. 134; *Hughes v. Fargo Loan Agency*, 46 N. D. 26, 178 N. W. 993.

**§ 7432.** Comp. Laws, 1913.

*Johnson v. Engelhard*, 45 N. D. 11, 176 N. W. 134; *Citizens State Bank v. Smeland*, 48 N. D. 466, 184 N. W. 987; *Atwood v. Tucker*, 26 N. D. 622, 51 L.R.A. (N. S.) 597, 145 N. W. 587.

**§ 7435.** Comp. Laws, 1913.

Judgment, for plaintiff against a partnership, where only one co-partner is served, and defends the action, should be entered against the firm, and not against defendant served. *Continental Supply Co. v. Syndicate Trust Co.* — N. D. —, 202 N. W. 404.

See also *Orth v. Procise*, 42 N. D. 149, 171 N. W. 861.

**§ 7436.** Comp. Laws, 1913.

*Lobe v. Bartaschawich*, 37 N. D. 572, 164 N. W. 276.

**§ 7438.** Comp. Laws, 1913.

Appearance of defendant's attorney before justice of the peace to take a deposition, held to be a "general appearance." *Froelich v. Northern P. R. Co.* 39 N. D. 307, 167 N. W. 366.

See also *Thornley v. Lawbaugh*, 31 N. D. 651, 47 L.R.A.(N.S.) 1127, 143 N. W. 348; *Atwood v. Tucker*, 26 N. D. 622, 51 L.R.A.(N.S.) 597, 145 N. W. 587.

## CHAPTER 8.

## OF PLEADINGS IN CIVIL ACTIONS.

- ARTICLE 1. THE COMPLAINT, §§ 7439, 7440.  
 2. THE DEMURRER, §§ 7442-7447.  
 3. THE ANSWER, §§ 7448-7451.  
 4. THE REPLY, §§ 7452, 7453.  
 5. GENERAL RULES OF PLEADING, §§ 7458-7467.  
 6. MISTAKES IN PLEADING AND AMENDMENTS, §§ 7478-7485.

## ARTICLE 1.—THE COMPLAINT.

## § 7439. Comp. Laws, 1913.

Jacobson v. Horner, — N. D. —, 193 N. W. 327; Meske v. Melicher, — N. D. —, 194 N. W. 737.

## § 7440. Comp. Laws, 1913.

Hughes v. Fargo Loan Agency, 46 N. D. 26, 178 N. W. 993; Jacobson v. Horner, — N. D. —, 193 N. W. 327; Meske v. Melicher, — N. D. —, 194 N. W. 737; Golly v. Kiner, — N. D. —, 197 N. W. 883.

## ARTICLE 2.—THE DEMURRER.

## § 7442. Comp. Laws, 1913.

Stark County v. Mischel, 33 N. D. 432, 156 N. W. 931; Honsinger v. Stewart, 34 N. D. 513, 159 N. W. 12; Knight v. Harrison, 43 N. D. 76, 174 N. W. 632; Bruffarts v. Ober, 48 N. D. 997, 188 N. W. 174; DeWalt v. Heeren, — N. D. —, 197 N. W. 868; Willbur v. Johnson, 32 N. D. 314, 155 N. W. 671; Gardner v. Stangebye, 48 N. D. 513, 185 N. W. 369.

## §§ 7443, 7444. Comp. Laws, 1913.

Willbur v. Johnson, 32 N. D. 314, 155 N. W. 671; Gardner v. Stangebye, 48 N. D. 513, 185 N. W. 369.

## § 7445. Comp. Laws, 1913.

Applies only to complaints, amended after demurrer thereto has been sustained, and does not apply to amendment ordered by court, or agreed upon by the parties. Van Woert v. New York L. Ins. Co. 30 N. D. 27, 151 N. W. 29.

See also Froehlich v. Northern P. R. Co. 39 N. D. 307, 167 N. W. 306; Willbur v. Johnson, 32 N. D. 314, 155 N. W. 671; Gardner v. Stangebye, 48 N. D. 513, 185 N. W. 369.

## § 7446. Comp. Laws, 1913.

Willbur v. Johnson, 32 N. D. 314, 155 N. W. 671; Gardner v. Stangebye, 48 N. D. 513, 185 N. W. 369.

## § 7447. Comp. Laws, 1913.

Willbur v. Johnson, 32 N. D. 314, 155 N. W. 671; Gardiner v. Stangebye, 48 N. D. 513, 185 N. W. 369; Jensen v. Clausen, 34 N. D. 637, 159 N. W. 30; DeWalt v. Heeren, — N. D. —, 197 N. W. 868; State ex rel. Claver v. Broute, — N. D. —, 197 N. W. 871.

## ARTICLE 3.—THE ANSWER.

## § 7448. Comp. Laws, 1913.

A release is an affirmative defense of new matter, which must be specially pleaded. Swan v. Great Northern R. Co. 40 N. D. 258, L.R.A.1918F, 1063, 168 N. W. 657.

Term "defense" embraces only matters which, though admitting the cause of action, nevertheless sets up facts, which at the time when the action is brought, show that plaintiff is not entitled to recover. First State Bank v. Radke, — N. D. —, 35 A.L.R. 1355, 199 N. W. 930.

See also *Hansboro State Bank v. Imperial Elevator Co.* 46 N. D. 363, 179 N. W. 669; *Mathias v. State Farmers' Mut. Hail Ins. Co.* 40 N. D. 240, 168 N. W. 664.

§ 7449. Comp. Laws, 1913.

In action to recover on promissory note, cross-actions in ejectment, trespass to realty, forcible entry and detainer, or conversion, not proper subjects of counterclaim, there being no relation of causes of action. *Farmer v. Dakin*, 28 N. D. 452, 149 N. W. 354.

Maker of a non-negotiable note can counterclaim against one purchasing same from payee, an unliquidated claim arising out of another contract, but prior to notice of assignment. *Emerson-Brantingham Co. v. Brennan*, 35 N. D. 94, 159 N. W. 710.

In action on contract, defendant may counterclaim any other cause of action on contract, existing when action was commenced. *Strong v. Nelson*, 38 N. D. 385, 165 N. W. 511.

Section held to authorize entry of judgment in action to obtain possession of personal property, while issues based on defendant's counterclaim, setting up cause of action for fraud, remained undetermined. *Johnson v. Wagner*, 42 N. D. 542, 174 N. W. 73.

Inconsistent defenses may be pleaded. *J. R. Watkins Medical Co. v. Payne*, 47 N. D. 100, 180 N. W. 968; *Grewer v. Schafer*, — N. D. —, 197 N. W. 596.

Has no application to causes of action voluntarily joined, or consolidated under § 6825, defining procedure under mechanics' lien foreclosures. *Dakota Sash & Door Co. v. Brinton*, 27 N. D. 39, 145 N. W. 594.

See also *State Bank v. Nelson*, 48 N. D. 702, 186 N. W. 766; *Shary v. Eszlinger*, 45 N. D. 133, 176 N. W. 938; *Kain v. Garnaas*, 27 N. D. 292, 145 N. W. 825; *Roney v. H. S. Halvorsen Co.* 29 N. D. 13, 149 N. W. 688.

§ 7451. Comp. Laws, 1913.

*Park, Grant & Norris v. Nordale*, 41 N. D. 351, 170 N. W. 555.

ARTICLE 4.—THE REPLY.

§ 7452. Comp. Laws, 1913.

Does not require plaintiff to reply to new matter contained in answer, not constituting a counterclaim. *Moore v. Tomlinson*, 33 N. D. 638, 157 N. D. 685.

Answer, containing denial of allegations of complaint, which alleges new matter, not constituting counterclaim or defense to the action, is demurrable. *Beyer v. North American Coal & Min. Co.* 37 N. D. 319, 163 N. W. 1061.

Introduction of evidence of fraud in execution of insurance policy, where there was no allegation of fraud, held not erroneous. Express contradiction of new matter contained in answer not necessary. *Mathias v. State Farmers' Mut. Hail Ins. Co.* 40 N. D. 240, 168 N. W. 664.

Where defendant makes no request for reply, plaintiff may prove former adjudication of issues raised by the answer, even though he has filed no reply. *Kain v. Garnaas*, 27 N. D. 292, 145 N. W. 825.

See also *Beauchamp v. Retail Merchants Asso.* 38 N. D. 493, 165 N. W. 545; *Ripley v. McCutcheon*, 48 N. D. 1130, 189 N. W. 104; *Meske v. Melicher*, — N. D. —, 194 N. W. 737; *Fekjar v. Iowa State Live Stock Ins. Co.* 44 N. D. 389, 177 N. W. 455.

§ 7453. Comp. Laws, 1913.

Section held to authorize entry of judgment in action to obtain possession of personal property, while issues based on defendant's counterclaim, setting up cause of action for fraud remained undetermined. *Johnson v. Wagner*, 42 N. D. 542, 174 N. W. 73.

ARTICLE 5.—GENERAL RULES OF PLEADING.

§ 7458. Comp. Laws, 1913.

*Thompson v. Smith*, 45 N. D. 479, 178 N. W. 430; *Strong v. Nelson*, 38 N. D. 385, 165 N. W. 511; *Felton v. Nurnberg*, 46 N. D. 450, 79 N. W. 720; *Torgerson v. Minneapolis, St. P. & S. Ste. M. R. Co.* — N. D. —, 194 N. W. 741; *Jarski v. Jones*, — N. D. —, 201 N. W. 688; *Hocksprung v. Young*, 27 N. D. 322, 146 N. W. 547.

## § 7459. Comp. Laws, 1913.

Guild v. More, 32 N. D. 432, 155 N. W. 44; State ex rel. Minehan v. Meyers, 19 N. D. 804, 124 N. W. 701.

## § 7460. Comp. Laws, 1913.

Fischer v. Dolwig, 29 N. D. 561, 151 N. W. 431; State ex rel. Wehe v. North Dakota Workmen's Comp. Bureau, 46 N. D. 147, 180 N. W. 49.

## § 7461. Comp. Laws, 1913.

Presentation of claim against State Bonding Fund, for wrongful act of public employee, within statutory period, is condition precedent to recovery, and must be alleged in complaint. Madden v. Dunbar, — N. D. —, 201 N. W. 988.

Allegation that a claim against the State Bonding Fund was duly presented, sufficient as against demurrer. Bowman County v. McIntyre, — N. D. —, 202 N. W. 651.

See also Felton v. Nurnberg, 46 N. D. 450, 179 N. W. 720.

## § 7468. Comp. Laws, 1913.

Martinson v. Freeberg, 44 N. D. 363, 175 N. W. 618; Meyerlee v. Pioneer Pub. Co. 45 N. D. 568, 178 N. W. 792.

## § 7466. Comp. Laws, 1913.

Several causes of action arising out of the same transaction, may be joined in one suit, even though defendants may not have same liability. Roger v. Rasmussen, 34 N. D. 428, 158 N. W. 988.

One injured both in property right and in right to bodily security, resulting from same cause, may unite in the same complaint, both causes of action. Anderson v. Jacobson, 42 N. D. 87, 172 N. W. 64.

See also Stark County v. Mischel, 33 N. D. 432, 156 N. W. 931; John Miller Co. v. Harvey Mercantile Co. 38 N. D. 531, 165 N. W. 558; Knight v. Harrison, 43 N. D. 76, 174 N. W. 632; State ex rel. Lemke v. District Ct. — N. D. —, 186 N. W. 381.

## § 7467. Comp. Laws, 1913.

New matter contained in answer not constituting counterclaim or defense, is deemed controverted, as upon direct denial or avoidance by operation of law, and plaintiff may introduce evidence denying or avoiding same. Moores v. Tomlinson, 33 N. D. 638, 157 N. W. 685.

No reply necessary to new matter set up in answer as defense, and not constituting counterclaim. Pleading statute of frauds to such new matter held not necessary. A. M. Wilson Co. v. Knowles, — N. D. —, 204 N. W. 663.

See also Mann v. Redmon, 27 N. D. 346, 145 N. W. 1031; Van Woert v. Modern Woodmen, 29 N. D. 441, 151 N. W. 224; Beauchamp v. Retail Merchants Asso. 38 N. D. 483, 165 N. W. 545; Mathias v. State Farmers' Mut. Hail Ins. Co. 40 N. D. 240, 168 N. W. 664; Fekjar v. Iowa State Live Stock Ins. Co. 44 N. D. 389, 177 N. W. 455; Meske v. Melicher, — N. D. —, 194 N. W. 737; DeWalt v. Heeren, — N. D. —, 197 N. W. 868.

## ARTICLE 6.—MISTAKES IN PLEADING AND AMENDMENTS.

## § 7478. Comp. Laws, 1913.

Variance to be material must actually mislead adverse party to his prejudice in maintaining his action or defense. Rickel v. Sherman, 34 N. D. 298, 158 N. W. 266.

In prosecution for larceny of cattle, variance between description of animals as given in information and proof held not material. State v. Guyer, 47 N. D. 479, 182 N. W. 693.

See also French v. State Farmers' Mut. Hail Ins. Co. 29 N. D. 426, L.R.A.1915D, 766, 151 N. W. 7; Holler v. Amodt, 31 N. D. 11, 153 N. W. 465; Mathias v. State Farmers' Mut. Hail Ins. Co. 40 N. D. 240, 168 N. W. 664.

## § 7479. Comp. Laws, 1913.

Holler v. Amodt, 31 N. D. 11, 153 N. W. 465; Rickel v. Sherman, 34 N. D. 298, 158 N. W. 266.

## § 7480. Comp. Laws, 1913.

As to when variance does not amount to failure of proof. *Tonne v. Horace State Bank*, — N. D. —, 193 N. W. 934.

See also *Rickel v. Sherman*, 34 N. D. 298, 158 N. W. 266.

## § 7481. Comp. Laws, 1913.

Appeal does not lie from an order dismissing an action. *Malherek v. Fargo*, — N. D. —, 190 N. W. 176.

See also *Kain v. Garnaas*, 27 N. D. 292, 145 N. W. 825.

## § 7482. Comp. Laws, 1913.

Refusal to allow filing of amendment to answer, setting up new defense after close of plaintiff's case, held not an abuse of discretion. *Ennis v. Retail Merchants Asso. Mut. F. Ins. Co.* 33 N. D. 20, 156 N. W. 234.

Where an amendment to an answer was allowed to correspond to proof, and where trial was had on theory that answer had been amended, held, that this was in accordance with this section, although defendant did not redraw the pleading. *Jacobsen v. Forbragd*, 42 N. D. 1, 171 N. W. 624.

Allowing amendments introducing new defenses, after evidence is all in, generally not an abuse of discretion. *Prefontaine v. Great Northern R. Co.* — N. D. —, 199 N. W. 480.

Amendment to sheriff's return held proper and allowable although term of officer making return has expired. *Jongewaard v. Gesquire*, — N. D. —, 199 N. W. 585.

See also *French v. State Farmers' Mut. Hail Ins. Co.* 29 N. D. 426, L.R.A. 1915D, 766, 151 N. W. 7; *Holler v. Amodt*, 31 N. D. 11, 153 N. W. 465; *Kersten v. Great Northern R. Co.* 28 N. D. 3, 147 N. W. 787; *Sheimo v. Norqual*, 31 N. D. 343, 153 N. W. 470; *Northwestern Mut. Sav. & L. Asso. v. White*, 31 N. D. 348, 153 N. W. 972; *Kurtz v. Paulson*, 33 N. D. 400, 157 N. W. 305; *Steen v. Neva*, 37 N. D. 40, 163 N. W. 272; *Patterson Land Co. v. Lynn*, 44 N. D. 251, 175 N. W. 211; *Schantz v. Northern P. R. Co.* 47 N. D. 1, 180 N. W. 517; *Leach v. Nelson*, 48 N. D. 1046, 189 N. W. 251; *Minneapolis Threshing Mach. Co. v. Huncovsky*, — N. D. —, 194 N. W. 830; *Lee v. Luckasen*, — N. D. —, 204 N. W. 831.

## § 7483. Comp. Laws, 1913.

Application to reopen default judgment properly allowed, where parties agreed as to extension of time in which to answer. *Robinson v. Connole*, 29 N. D. 590, 151 N. W. 33.

Application to reopen default judgment will be denied where defendant is guilty of inexcusable laches, even though judgment is claimed to be void. *Arthur v. Schaffner*, 32 N. D. 2, 152 N. W. 123; *Herrman v. State Bank*, 34 N. D. 313, 158 N. W. 986; *State Bank v. O'Laughlin*, 37 N. D. 532, 164 N. W. 135; *French & Sons Piano Co. v. Getts*, — N. D. —, 192 N. W. 765; *Farmers & Merchants State Bank v. Stavn*, — N. D. —, 194 N. W. 689; *Croonquist v. Walker*, — N. D. —, 196 N. W. 108; *Madden v. Dunbar*, — N. D. —, 201 N. W. 991.

Granting motion setting aside and vacating judgment, where motion is not based on affidavit of merits, without verified answer, and no fraud in procuring judgment, is clear abuse of discretion. *Mongly v. Miller*, 41 N. D. 81, 169 N. W. 735.

Court may grant relief from default judgment upon showing of mistake, inadvertence, or excusable neglect. *Price v. Willson*, 41 N. D. 209, 171 N. W. 245; *Engen v. Medberry Farmers' Equity Elevator Co.* — N. D. —, 204 N. W. 7; *Murtha v. Big Bend Land Co.* 27 N. D. 384, 147 N. W. 97.

County court has no authority to vacate or open up final decree, after expiration of one year from date thereof, even though application is based on fraud, deception or misrepresentation. *Reichert v. Reichert*, 41 N. D. 253, 170 N. W. 621.

Refusal to vacate divorce decree; held abuse of discretion. *Talbott v. Talbott*, 45 N. D. 489, 178 N. W. 282.

Application to set aside judgment obtained by plaintiff through fraud not controlled by this section. District courts have inherent power to vacate fraudulent judgments. *Rykowsky v. Bentz*, 45 N. D. 499, 178 N. W. 284.

Action of district court, in opening and vacating default judgment, for purpose of permitting meritorious defense, will not be disturbed, unless abuse of discretion appears. *Truax v. Alton*, 46 N. D. 548, 179 N. W. 992.

To obtain relief from default judgment, a defendant must show that it was

taken by reason of mistake, inadvertence, or excusable neglect, that he used due diligence after notice thereof, and that he has a good defense. *Croonquist v. Walker*, — N. D. —, 196 N. W. 108.

Order refusing to relieve one from default in preparing and serving proposed statement of case, is a final order, affecting a substantial right, and is appealable. *Rabinowitz v. Crabtree*, 27 N. D. 353, 145 N. W. 1055.

Verified answer on file before default, discloses defense, and dispenses with necessity of affidavits of merits to vacate default judgment. *Madden v. Dunbar*, — N. D. —, 201 N. W. 991.

See also *Hogg v. Christenson*, 29 N. D. 8, 149 N. W. 562; *Rabinowitz v. Crabtree*, 30 N. D. 133, 152 N. W. 130; *G. Somers & Co. v. Wilson*, 32 N. D. 14, 155 N. W. 30; *Skaar v. Eppeland*, 35 N. D. 116, 159 N. W. 707; *Wakeland v. Hanson*, 36 N. D. 129, 161 N. W. 1011; *Lobe v. Bartaschawich*, 37 N. D. 572, 164 N. W. 276; *Fylling v. Mork*, 45 N. D. 119, 176 N. W. 914; *Tuttle v. Tuttle*, 46 N. D. 79, 181 N. W. 888; *Dubs v. Northern P. R. Co.* 47 N. D. 210, 181 N. W. 606; *Krein v. Row*, 48 N. D. 1125, 189 N. W. 105; *Brainard v. Wetzstein*, — N. D. —, 198 N. W. 114; *North Dakota Co. v. Mix*, 25 N. D. 81, 141 N. W. 68.

§ 7485. Comp. Laws, 1913.

*Crane v. First Nat. Bank*, 26 N. D. 268, 144 N. W. 96.

## CHAPTER 9.

### OF THE PROVISIONAL REMEDIES IN CIVIL ACTIONS.

- ARTICLE 1. ARREST AND BAIL, §§ 7489–7515.  
 2. CLAIM AND DELIVERY OF PERSONAL PROPERTY, §§ 7516–7521.  
 3. INJUNCTION, §§ 7529–7533.  
 4. ATTACHMENT, §§ 7537–7562.  
 5. GARNISHMENT, §§ 7567–7586.  
 6. RECEIVERS, § 7588.  
 7. OF DEPOSIT, § 7594.

§ 7487. Comp. Laws, 1913.

*Sargent County v. State*, 47 N. D. 561, 182 N. W. 270; *Suchy v. Strain*, — N. D. —, 199 N. W. 193.

#### ARTICLE 1.—ARREST AND BAIL.

§ 7489. Comp. Laws, 1913.

Before issuance of order for arrest of defendant in civil action, plaintiff must make it appear by affidavit that he has sufficient cause of action, warranting resort to remedy of arrest and bail. *Brown v. Ball*, 29 N. D. 223, 150 N. W. 890.

See also *Brown v. Ball*, 43 N. D. 314, 174 N. W. 629; *State ex rel. Nyhus v. Ross*, 24 N. D. 586, 139 N. W. 1051.

§ 7491. Comp. Laws, 1913.

*Brown v. Ball*, 29 N. D. 223, 150 N. W. 890; *Brown v. Ball*, 43 N. D. 314, 174 N. W. 629; *State ex rel. Nyhus v. Ross*, 24 N. D. 586, 139 N. W. 1051.

§ 7515. Comp. Laws, 1913.

*Brown v. Ball*, 29 N. D. 223, 150 N. W. 890.

#### ARTICLE 2.—CLAIM AND DELIVERY OF PERSONAL PROPERTY.

§ 7516. Comp. Laws, 1913.

*More v. Western Grain Co.* 31 N. D. 369, 153 N. W. 976.

§ 7517. Comp. Laws, 1913.

One lawfully entitled to possession of personal property, by virtue of special property therein, may maintain action to recover possession thereof. *Suchy v. Strain*, — N. D. —, 199 N. W. 193.

§ 7520. **Exceptions by defendant.** The defendant may, within three days

*Provisional Remedies.* CODE OF CIVIL PROCEDURE. *Chap. 9, § 7520.*

after the service of a copy of the affidavit and undertaking, give notice to sheriff that he excepts to the sufficiency of the sureties, or the amount of the undertaking. If he fails to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice in like manner as bail upon an arrest, and the sheriff shall be responsible for the sufficiency of the sureties until the objection to them is either waived as above provided, or until they shall justify or new sureties shall be substituted and justify. If the defendant excepts to the sureties, or to the amount of the undertaking, he cannot reclaim the property as provided in the next section. When the defendant excepts to the amount of the undertaking, the sheriff shall retain possession of the property for five days after the service of notice of such exception upon the sheriff. In such case, the defendant may, upon two days' notice to the plaintiff, apply to the judge of the court in which the action is pending for an order requiring the plaintiff to execute an undertaking in such action in a larger amount than that of the undertaking which has been served. The affidavits upon which the defendant bases his application shall be served with the notice. If the application is denied, the order of the court shall direct the sheriff to forthwith deliver the property to the plaintiff. If the application is granted, the order of the court shall direct the sheriff to deliver the property to the defendant unless the plaintiff shall, within a time of not more than four days, to be fixed by the court, execute a bond in such sum as the court shall prescribe with sureties to be approved by the sheriff. [Laws 1915, ch. 76, § 1.]

Replevin, 34 Cyc. 1448, 1458-1459.

Justification of sureties on exceptions by defendant. 23 R. C. L. 897.

**§ 7521. Redelivery to defendant.** At any time before the delivery of the property to the plaintiff the defendant may, if he does not except to the sureties of the plaintiff, require the return thereof upon giving to the sheriff a written undertaking executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property as stated in the affidavit of the plaintiff for the delivery thereof to the plaintiff, if such delivery is adjudged and for the payment to him of such sum as may for any cause be recovered against the defendant. If a return of the property is not so required within three days after the taking and service of notice on the defendant, it shall be delivered to the plaintiff except as provided in section 7526. [R. C. 1905, § 6922; C. Civ. P. 1877, § 181; R. C. 1899, § 5336.]

In action on sureties' bond, whereby defendant in claim and delivery proceeding obtained redelivery of property, evidence held not to support verdict in favor of defendant based on offer to return property in substantially same condition. *Anderson v. Phillips*, 40 N. D. 586, 169 N. W. 315.

Defendant, in claim and delivery action, giving forthcoming or redelivery bond to prevent delivery of property to plaintiff, and to obtain delivery to himself, is estopped on trial, from denying that property was in his possession at commencement of action. *Warren v. Olson*, 46 N. D. 203, 180 N. W. 529.

In action on undertaking given by defendants in claim and delivery proceeding, it is necessary in order to recover against sureties, to allege and prove entry of judgment in alternative or establish that surety's rights were not prejudiced. *Farmers' Nat. Bank v. Ferguson*, 28 N. D. 347, 148 N. W. 1049.

See also *Larson v. Hanson*, 26 N. D. 406, 51 L.R.A.(N.S.) 655, 144 N. W. 681.

ARTICLE 3.—INJUNCTION.

§ 7529. Comp. Laws, 1913.

*Bartles Northern Oil Co. v. Jackman*, 29 N. D. 236, 150 N. W. 576.

§ 7530. Comp. Laws, 1913.

*State ex rel. Lofthus v. Langer*, 46 N. D. 462, 177 N. W. 408.

§ 7531. Comp. Laws, 1913.

Injunction pendente lite, may be allowed after service of an answer by defendant. *Murphy v. Swanson*, — N. D. —, 32 A.L.R. 82, 198 N. W. 116.

## § 7532. Comp. Laws, 1913.

Whether trial court committed error in granting injunction pendente lite, without requiring bond from plaintiffs, not important on appeal from final judgment, in action tried on merits. *Weeks v. Hetland*, — N. D. —, 202 N. W. 807.

See also *State ex rel. Lemke v. Union Light, Heat & P. Co.* 47 N. D. 402, 182 N. W. 539; *Murphy v. Swanson*, — N. D. —, 32 A.L.R. 82, 198 N. W. 116.

## § 7533. Comp. Laws, 1913.

*Sand v. Peterson*, 30 N. D. 171, 151 N. W. 271.

## ARTICLE 4.—ATTACHMENT.

## § 7537. Comp. Laws, 1913.

Obtaining property under false pretenses a ground of attachment. *Finch v. Armstrong*, 9 S. D. 255, 68 N. W. 740; *German Bank v. Folds*, 9 S. D. 295, 68 N. W. 747.

Removal of property with intent to hinder and delay creditors is ground of attachment, only when debt is not due. *Foley-Wadsworth Co. v. Porteous*, 8 S. D. 74, 65 N. W. 429; *Western Twine Co. v. Scott*, 11 S. D. 27, 75 N. W. 273; *Deering & Co. v. Warren*, 1 S. D. 35, 44 N. W. 1068.

In action for purchase price of goods, where property is attached and judgment obtained within four months of filing of petition in bankruptcy, the lien of attachment and of judgment is nullified by petition. *Gray v. Arnot*, 31 N. D. 461, 154 N. W. 268.

Vendor has, after delivery, no lien upon goods sold, except by virtue of levy of an attachment. *Gray v. Arnot*, 31 N. D. 461, 154 N. W. 268.

See also *Thornley v. Lawbaugh*, 31 N. D. 651, 47 L.R.A.(N.S.) 1127, 143 N. W. 348; *Johnson v. Engelhard*, 45 N. D. 11, 176 N. W. 134.

## § 7538. Comp. Laws, 1913.

The second and third of the annotations under this section in the Compiled Laws of 1913 should have gone under § 7537, ante, where it will be found.

*Johnson v. Engelhard*, 45 N. D. 11, 176 N. W. 134.

## § 7539. Comp. Laws, 1913.

*Johnson v. Engelhard*, 45 N. D. 11, 176 N. W. 134; *Citizens State Bank v. Smeland*, 48 N. D. 466, 184 N. W. 987.

## § 7542. Comp. Laws, 1913.

Measure of damages for breach of a forthcoming bond, is value of property belonging to defendant which had been seized, or was subject to seizure under the warrant. *Minneapolis Threshing Mach. Co. v. Warner*, — N. D. —, 203 N. W. 197.

See also *Kukowski v. Emerson-Brantingham Implement Co.* 43 N. D. 333, 175 N. W. 706.

## § 7545. Comp. Laws, 1913.

Warrant of attachment, not rendered functus officio by fact that levy has been made thereunder; sheriff may levy from time to time, until amount due is satisfied or final judgment rendered. *MacDonald v. Fitzgerald*, 42 N. D. 133, 171 N. W. 879.

See also *Kukowski v. Emerson-Brantingham Implement Co.* 43 N. D. 333, 175 N. W. 706.

## § 7546. Comp. Laws, 1913.

*MacDonald v. Fitzgerald*, 42 N. D. 133, 171 N. W. 879; *Kukowski v. Emerson-Brantingham Implement Co.* 43 N. D. 333, 175 N. W. 706; *Jongewaard v. Gesquire*, — N. D. —, 199 N. W. 585; *Minneapolis Threshing Mach. Co. v. Warner*, — N. D. —, 203 N. W. 197; *Mott v. Holbrook*, 28 N. D. 251, 148 N. W. 1061.

## § 7547. Comp. Laws, 1913.

Quasi or conditional jurisdiction of court over subject-matter of action is given by levy of warrant of attachment. *Goldstein v. Peter Fox Sons Co.* 22 N. D. 636, 40 L.R.A.(N.S.) 566, 135 N. W. 180.

See also *Past v. Rennie*, 30 N. D. 1, 151 N. W. 763; *Sox v. Miracle*, 35 N. D. 458, 169 N. W. 716; *Mott v. Holbrook*, 28 N. D. 251, 148 N. W. 1061.

**§ 7549. Comp. Laws, 1913.**

Annotation under this section in the Compiled Laws of 1913 should have gone under section 7547, ante, where it will be found.

Past v. Rennie, 30 N. D. 1, 151 N. W. 763.

**§ 7550. Comp. Laws, 1913.**

Release of property to third party on filing undertaking. Matheson v. F. W. Johnson Co. 16 S. D. 347, 92 N. W. 1083.

Third party claim stating that property claimed is property of claimers, and that claimers bought and paid for same, is sufficient without stating exact value, and without stating from whom same was acquired or consideration paid therefor. Coverdell v. Erickson, 39 N. D. 579, 168 N. W. 367.

**§ 7551. Comp. Laws, 1913.**

Failure of moving papers, upon which application is made to trial court to require third person to appear and testify as to property in his possession belonging to judgment debtor, to allege that he has such property renders same insufficient. Farmers' State Bank v. Berglund, — N. D. —, 198 N. W. 123.

See also First State Bank v. Radke, — N. D. —, 35 A.L.R. 1355, 199 N. W. 930.

**§ 7554. Comp. Laws, 1913.**

American Commercial Co. v. Randolph, — N. D. —, 191 N. W. 779.

**§ 7556. Comp. Laws, 1913.**

Bond given before appearance of defendant in action to foreclose lien on property to secure release thereof, after seizure, is "substitute bond," and not "discharge bond." Minneapolis Threshing Mach. Co. v. Warner, — N. D. —, 203 N. W. 197.

See also Park, Grant & Morris v. Nordale, 41 N. D. 351, 170 N. W. 555.

**§ 7561. Comp. Laws, 1913.**

Thornley v. Lawbaugh, 31 N. D. 651, 47 L.R.A.(N.S.) 1127, 143 N. W. 348; Park, Grant & Morris v. Nordale, 41 N. D. 351, 170 N. W. 555; Peterson v. Ogland, 48 N. D. 443, 184 N. W. 981.

**§ 7562. Comp. Laws, 1913.**

Park, Grant & Morris v. Nordale, 41 N. D. 351, 170 N. W. 555.

**ARTICLE 5.—GARNISHMENT.**

**§ 7567. Creditors may proceed by garnishment of wages.** Any creditor shall be entitled to proceed by garnishment in any court having jurisdiction of the subject of the action against any person, including a public corporation, who shall be indebted to or have any property whatever, real or personal, in his possession or under his control, belonging to such creditor's debtor, in the cases, upon the conditions and in the manner prescribed in this chapter. The term plaintiff is used in this chapter to embrace every judgment creditor and the term defendant a judgment debtor. Provided that the wages or salary of any person who is the head of a family and a resident of this state to the amount of \$15.00 per week, shall be exempt from garnishment. Every employer shall pay to such person such exempt wages or salary not to exceed the sum of \$15.00 per week of each week's wages earned by him, when due, upon such wage earner making and delivering to such employer his affidavit that he is such head of a family and residing with the same in this state, notwithstanding the service of such writ, and the surplus only of such exempt salary or wages shall be held by the employer to abide the event of the garnishment suit. At least two days prior to the issuance of any garnishment summons the creditor shall cause demand to be served upon the debtor and the employer for the excess above the amount herein exempted. Such demand with proof of service shall be filed with the court at the time of the issuance of garnishment summons. Failure to serve or file said notice as herein provided shall render said garnishment void. The excess of wages over and above the amount herein exempted shall

Chap. 9, § 7567. CODE OF CIVIL PROCEDURE. *Provisional Remedies.*

be held by the employer subject to such garnishment from the time of service of such demand and for five days thereafter. [Laws 1921, ch. 72, § 1.]

Situs of a debt for purposes of garnishment, is not necessarily the domicile of the creditor. *Bingenheimer Mercantile Co. v. Weber*, — N. D. —, 27 A.L.R. 1392, 191 N. W. 621.

Exemption which may be claimed by wage earner in garnishment suit ancillary to action to enforce collection of bill for groceries and provisions, has no application. *Radke v. Padgett*, — N. D. —, 192 N. W. 97.

See also *Shortridge v. Sturdivant*, 32 N. D. 154, 155 N. W. 20; *Dakota Nat. Bank v. Brodie*, 46 N. D. 247, 176 N. W. 738; *Sargent County v. State*, 47 N. D. 561, 182 N. W. 270.

Garnishment, 28 C. J. pp. 43-91, §§ 45-117, pp. 150-189, §§ 188-231, pp. 170-182, §§ 216-220, p. 217, § 287; Exemptions, 25 C. J. p. 70, § 112.

Right to garnish fees or salary of public officer after expiration of term of office. L.R.A.1917F, 1119.

Railroad employee's salary during Federal control. 4 A.L.R. 1717; 8 A.L.R. 989.

Constitutionality of statute authorizing garnishment of salary or wages of public officials or employees. 22 A.L.R. 760.

Garnishment of wages or salary due or to become due which have been assigned by the debtor prior to the garnishment. L.R.A.1916D, 367.

Garnishment of wages not yet due. 12 R. C. L. 779 and Supps.

Garnishment of salary not yet earned. 12 R. C. L. 794 and Supps.

Right to garnish wages generally. 12 R. C. L. 801 and Supps.

Garnishment of salary of public officials. 12 R. C. L. 802 and Supps.

§ 7568. Comp. Laws, 1913.

Issuance of execution necessary to jurisdiction over garnishee defendant, where garnishment is in aid of execution, and delivery to plaintiff's attorney is insufficient, unless it is delivered by him to sheriff for execution. *Hodge v. Anderson*, 35 N. D. 20, 159 N. W. 79.

See also *Citizens State Bank v. Smeland*, 48 N. D. 466, 184 N. W. 987; *Park, Grant & Morris v. Nordale*, 41 N. D. 351, 170 N. W. 555; *Radke v. Padgett*, — N. D. —, 192 N. W. 97.

§ 7569. Comp. Laws, 1913.

*Park, Grant & Morris v. Nordale*, 41 N. D. 351, 170 N. W. 555.

§ 7571. Comp. Laws, 1913.

*Solon v. O'Shea*, 45 N. D. 362, 177 N. W. 757; *Citizens State Bank v. Smeland*, 48 N. D. 466, 184 N. W. 987; *Park, Grant & Morris v. Nordale*, 41 N. D. 351, 170 N. W. 555; *Atwood v. Tucker*, 26 N. D. 622, 51 L.R.A.(N.S.) 597, 145 N. W. 587.

§ 7571a1. **Witness fees.** In all garnishment proceedings in the district court and county courts of increased jurisdiction the plaintiff, when garnishment summons is served upon the garnishee, shall tender to the garnishee the sum of two dollars (\$2.00), as his fee for making his affidavit of disclosure and filing the same in the office of the clerk of the court in which such garnishment proceedings is pending. Should the plaintiff take issue on the said answer to the garnishee summons and require the garnishee to stand trial, he shall, at the time issue is taken tender to the garnishee his traveling fees and fees for one day's attendance in court, which fees shall be the same as witness fees in the district court; provided, however, that where the garnishee is a foreign corporation and service is made upon the secretary of state or commissioner of insurance, it shall not be necessary to tender traveling fees either from the home office of the corporation or from the capitol of the state, but that in lieu thereof there shall be paid to the secretary of state or to the commissioner of insurance the sum of two dollars and ten cents (\$2.10) to be remitted to the garnishee. [Laws 1921, ch. 73, § 1; Laws 1919, ch. 136; Laws 1917, ch. 124, § 1.]

Garnishment, 28 Cyc. 348, § 550; Witnesses, 40 Cyc. 2170, 2184, 2188-2191.

Allowance of his costs to garnishee. 12 R. C. L. 840.

Witness fees. 28 R. C. L. 662 and Supps.

§ 7571a2. Filing papers when action dismissed. The garnishment summons and affidavit of garnishment shall be filed in the office of the clerk of the court in which such action is commenced within ten days after service thereof on the garnishee, or the garnishment proceedings shall be deemed discontinued. [Laws 1917, ch. 124, § 2.]

Garnishment, 28 C. J. pp. 233-236, §§ 319-324.

Filing of summons and affidavit in garnishment proceedings. 12 R. C. L. 824 and Supps.

Abandonment of garnishment proceedings. 12 R. C. L. 861 and Supps.

§ 7571a3. Defendant may defend garnishment proceedings; claim for exemption, when heard. The garnishee may at his option defend the principal action for the defendant if the latter does not but shall be under no obligation so to do; provided that in all cases where the defendant claims the debt or property garnished to be exempt, such claim of exemption may be heard and determined by the court at any time after the claim is made on three days' notice to the opposite party. [Laws 1917, ch. 124, § 3.]

Dismissal of garnishee action, before trial, on motion supported by affidavit, on ground that grounds for garnishment are untrue, denied. Park, Grant & Morris v. Nordale, 41 N. D. 351, 170 N. W. 555.

Garnishment, 28 C. J. p. 274, §§ 385-386, pp. 285-286, §§ 414-416.

Defenses of garnishee. 12 R. C. L. 829 and Supps.

Exemption of debtor. 12 R. C. L. 832 and Supps.

§ 7574. Affidavit denying liability. Within thirty days from the service of such garnishee summons the garnishee may, if the truth warrants, serve upon the plaintiff and may file, and upon order of the court shall file, in the office of the clerk of the district court, the same as other pleadings in a civil action, his affidavit in the following form, substantially:

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

..... Court.

A. B., plaintiff,

vs.

C. D., defendant, and

E. F., garnishee.

E. F., being duly sworn, says that on the ..... day of ....., A. D. 19.., he was served with a garnishee summons in the above entitled action; that he was then and is now in no manner and upon no account whatever indebted or under liability to the defendant (naming him); and that he then had and now has in his possession or under his control, no real estate and no personal property, effects or credits of any description whatever, belonging to said defendant or in which he has any interest; and is in no manner liable as garnishee in this action.

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

Thereby the proceeding against such garnishee shall be deemed discontinued, and the plaintiff shall pay the garnishee one dollar for his costs, unless within thirty days thereafter the plaintiff serves notice on such garnishee, that he elects to take issue on his answer to the garnishee summons and will maintain him to be liable as garnishee, in which case the issue shall stand for trial as a civil action, in which the affidavit on the part of the plaintiff shall be deemed the complaint, and the garnishee's affidavit the answer thereto. [Laws 1915, ch. 163, § 1.]

Garnishment, 28 C. J. p. 293, § 436.

Defense by garnishee of nonliability. 12 R. C. L. 835 and Supps.

## § 7575. Comp. Laws, 1913.

Hatcher v. Plumley, 38 N. D. 147, 164 N. W. 698; Radke v. Padgett, — N. D. —, 192 N. W. 97.

## § 7576. Comp. Laws, 1913.

Atwood v. Tucker, 26 N. D. 622, 51 L.R.A.(N.S.) 597, 145 N. W. 587.

## § 7577. Comp. Laws, 1913.

Ruso Farmers Supply Co. v. Jacobson, 47 N. D. 223, 181 N. W. 370.

## § 7578. Comp. Laws, 1913.

Brocket Mercantile Co. v. Lemke, 39 N. D. 37, 166 N. W. 800; Park, Grant & Morris v. Nordale, 41 N. D. 351, 170 N. W. 555.

## § 7580. Comp. Laws, 1913.

Judgment cannot be rendered against interpleaded party, as if by default where he serves special pleading, asserting that he brought suit against garnishee in another court, and laches of garnishee in applying for interpleader. Dakota Nat. Bank v. Johnson, — N. D. —, 204 N. W. 840.

Not applicable to garnishee proceeding commenced in justice court. Schroeder v. Davenport, 29 N. D. 400, 150 N. W. 926.

See also Ruso Farmers Supply Co. v. Jacobson, 47 N. D. 223, 181 N. W. 370; Park, Grant & Morris v. Nordale, 41 N. D. 351, 170 N. W. 555.

## § 7581. Comp. Laws, 1913.

F. B. Scott Co. v. Scheidt, 35 N. D. 433, 160 N. W. 502; Solon v. O'Shea, 45 N. D. 362, 177 N. W. 757; Jessen v. Schiller, 46 N. D. 41, 179 N. W. 372; Sargent County v. State, 47 N. D. 561, 182 N. W. 270; Ruso Farmers Supply Co. v. Jacobson, 47 N. D. 223, 181 N. W. 370; Citizens State Bank v. Smeland, 48 N. D. 466, 184 N. W. 987; Radke v. Padgett, — N. D. —, 192 N. W. 97; Park, Grant & Morris v. Nordale, 41 N. D. 351, 170 N. W. 555; Atwood v. Tucker, 26 N. D. 622, 51 L.R.A.(N.S.) 597, 145 N. W. 587.

## § 7582. Comp. Laws, 1913.

Judgment cannot be rendered against interpleaded party, as if by default, where he serves special pleading, asserting that he brought suit against garnishee in another court, and laches of garnishee in applying for interpleader. Dakota Nat. Bank v. Johnson, — N. D. —, 204 N. W. 840.

See also Hatcher v. Plumley, 38 N. D. 147, 164 N. W. 698; Brocket Mercantile Co. v. Lemke, 39 N. D. 37, 166 N. W. 800; Park, Grant & Morris v. Nordale, 41 N. D. 351, 170 N. W. 555.

## § 7583. Comp. Laws, 1913.

Hatcher v. Plumley, 38 N. D. 147, 164 N. W. 698; Sargent County v. State, 47 N. D. 561, 182 N. W. 270; Citizens State Bank v. Smeland, 48 N. D. 466, 184 N. W. 987; Radke v. Padgett, — N. D. —, 192 N. W. 97.

## § 7584. Comp. Laws, 1913.

Hatcher v. Plumley, 38 N. D. 147, 164 N. W. 698.

## § 7586. Comp. Laws, 1913.

Park, Grant & Morris v. Nordale, 41 N. D. 351, 170 N. W. 555.

## ARTICLE 6.—RECEIVERS.

## § 7588. Comp. Laws, 1913.

Refusal to appoint receiver warranted, where it would have done plaintiffs no possible good, and would have done defendants great injury. Langer v. Fargo Mercantile Co. 43 N. D. 237, 174 N. W. 90.

As to cases in which receivers may be appointed. Dale v. Duffy, 44 N. D. 33, 176 N. W. 97.

Receivers should not be appointed on ex parte presentation, where substantial rights are involved. Glein v. Miller, 45 N. D. 1, 176 N. W. 113.

Court of equity has no power to deprive mortgagor of real property of rents, use and benefit of property until expiration of period of redemption, by appoint-

*Provisional Remedies.* CODE OF CIVIL PROCEDURE. Chap. 9, § 7588.

ing a receiver of the crops. *Farm Mortg. Loan Co. v. Pettet*, — N. D. —, 30 A.L.R. 598, 200 N. W. 497.

See also *More v. Lane*, 37 N. D. 563, 164 N. W. 292; *Geo. B. Clifford & Co. v. Henry*, 40 N. D. 604, 169 N. W. 508.

ARTICLE 7.—OF DEPOSIT.

§ 7594. Comp. Laws, 1913.

Applies to controversy over fund derived from sale of crops, raised on land leased under croppers contract, and furnishes method of procedure, relieving an innocent party from litigating ownership of fund as between different claimants. *McKenzie v. Hopkins*, 29 N. D. 180, 150 N. W. 881.

As to effect of deposit of money value of property in court after action is brought. *McLaughlin v. Dodge Elevator Co.* 43 N. D. 231, 174 N. W. 871.

Refusal of defendant elevator company to comply with plaintiff's demand to deliver up stored grain, precludes defendant from claiming right to make deposit in court, so as to be relieved from liability for conversion. *Sand v. St. Anthony & D. Elevator Co.* — N. D. —, 191 N. W. 955.

See also *Warren v. Olson*, 46 N. D. 203, 180 N. W. 529.

CHAPTER 10.

DISMISSAL OF CIVIL ACTIONS.

§ 7597. Comp. Laws, 1913.

*Scandia State Bank v. Dinnie*, 42 N. D. 71, 172 N. W. 62; *Lee v. Lee*, 48 N. D. 971, 188 N. W. 43; *Bailey v. Davis*, — N. D. —, 193 N. W. 658; *Kruger v. Maercklein*, — N. D. —, 195 N. W. 511; *Farmers' Nat. Bank v. Ferguson*, 28 N. D. 347, 148 N. W. 1049.

§ 7598. Comp. Laws, 1913.

Section is analogous to ordinary statute of limitations, and must be invoked to be available. *John Miller Co. v. Minekler*, 30 N. D. 360, 152 N. W. 664.

Refusal to dismiss action for failure to bring same to trial within five years, held not erroneous. *Burke v. Minnekota Elevator Co.* 48 N. D. 795, 186 N. W. 948.

Court in passing on application to dismiss action for failure to bring same to trial is clothed with and must exercise judicial discretion, and decision will not be disturbed except for abuse of discretion. *Quinn Wire & Iron Works v. Boyd*, — N. D. —, 202 N. W. 852.

Refusal of trial judge to dismiss action for failure to prosecute to trial for over five years, held to be an abuse of discretion. *Donovan v. Jordan*, 25 N. D. 617, 142 N. W. 42.

See also *Barnett v. Will*, 39 N. D. 51, 166 N. W. 511.

CHAPTER 11.

OF THE TRIAL AND JUDGMENT IN CIVIL ACTIONS.

- ARTICLE 1. JUDGMENT UPON FAILURE TO ANSWER, ETC., §§ 7599, 7600.  
2. ISSUES AND MODE OF TRIAL, §§ 7605-7610.  
3. FORMATION OF THE TRIAL JURY, §§ 7615, 7616.  
4. OF THE CONDUCT OF THE TRIAL, §§ 7620-7631.  
5. OF THE VERDICT, §§ 7632-7635a2.  
6. OF THE TRIAL BY THE COURT, §§ 7637-7644a6.  
7. OF REFERENCES AND TRIALS BY REFEREES, §§ 7645, 7646.  
8. EXCEPTIONS, §§ 7652-7658.  
9. OF NEW TRIALS, §§ 7660-7666.  
10. MANNER OF GIVING, ENTERING AND SATISFYING JUDGMENTS, §§ 7678-7711.

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

## § 7599. Comp. Laws, 1913.

Entry of second judgment, in same case is void, the first judgment being a final determination of the rights of the parties. *Dickson v. Salisbury*, 45 N. D. 26, 177 N. W. 377.

See also *Albert Solberg & Co. v. Rettinger*, 40 N. D. 1, 168 N. W. 572.

## § 7600. Comp. Laws, 1913.

Section held not to authorize entry of default judgment without an assessment of damages. *Naderhoff v. Geo. Benz & Sons*, 25 N. D. 165, 47 L.R.A.(N.S.) 853, 141 N. W. 501.

See also *Robinson v. Connole*, 29 N. D. 590, 151 N. W. 33; *Froelich v. Northern P. R. Co.* 39 N. D. 307, 167 N. W. 366; *Dakota Nat. Bank v. Johnson*, — N. D. —, 204 N. W. 840.

## ARTICLE 2.—ISSUES AND MODE OF TRIAL.

## § 7605. Comp. Laws, 1913.

Authorizes entry of judgment in a possessory action, while issues upon which defendant's counterclaim for damages are based, remain undetermined. *Johnson v. Wagner*, 42 N. D. 542, 174 N. W. 73.

See also *Schantz v. Northern P. R. Co.* 47 N. D. 1, 180 N. W. 517.

## § 7607. Comp. Laws, 1913.

*Kanable v. Great Northern R. Co.* 45 N. D. 619, 178 N. W. 999.

## § 7608. Comp. Laws, 1913.

Issues of fact may be submitted by trial court, in an equity case for an advisory verdict. *State v. Royal Indemnity Co.* 44 N. D. 550, 175 N. W. 625.

As to right to jury trial in equity suits. *Gresens v. Martin*, 27 N. D. 231, 145 N. W. 823.

See also *Emery v. First Nat. Bank*, 32 N. D. 575, 156 N. W. 105; *Lehman v. Coulter*, 40 N. D. 177, 168 N. W. 724; *Goss v. Lindberg*, 41 N. D. 99, 169 N. W. 585; *Kanable v. Great Northern R. Co.* 45 N. D. 619, 178 N. W. 999; *Nygaard v. Northern P. R. Co.* 46 N. D. 1, 178 N. W. 961; *Schantz v. Northern P. R. Co.* 47 N. D. 1, 180 N. W. 517; *Varnes v. Schwartz*, — N. D. —, 197 N. W. 129.

## § 7610. Comp. Laws, 1913.

New note of issue and notice of trial required to place on the trial calendar as an issue of fact, case noticed for trial as issue of law only. *Oswald v. Moran*, 9 N. D. 170, 82 N. W. 741.

As to jurisdiction of court to place causes upon calendar for trial. *Pathman v. Williams*, 33 N. D. 365, 157 N. W. 293.

See also *Burke v. Minnesota Elevator Co.* 48 N. D. 795, 186 N. W. 948.

## ARTICLE 3.—FORMATION OF THE TRIAL JURY.

§ 7615. **Challenges classed; by whom; number allowed.** Either party may challenge the jurors, but when there are several parties on either side, they must join in a challenge before it can be made. The challenges are to individual jurors and are either peremptory or for cause. Each party is entitled to six peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff. [Laws 1917, ch. 149, § 1.]

*Comeford v. Morwood*, 34 N. D. 276, 158 N. W. 258.

Juries, 35 C. J. p. 358, § 396, p. 406, § 460, p. 409, § 468, p. 418, § 482.

Right of accused to full panel when making peremptory challenges. L.R.A. 1916A, 828.

Number of peremptory challenges. 16 R. C. L. 247 and Supps.

Peremptory challenges. 16 R. C. L. 243 et seq.

Challenges for cause. 16 R. C. L. 254 et seq.

Manner and order of exercising peremptory challenges. 16 R. C. L. 249 and Supps.

§ 7616. Comp. Laws, 1913.

Jurors who sat in other similar cases involving same facts, and who declared that their decision would be the same as before, subject to challenge for cause. *Wilkins v. National Union F. Ins. Co.* 48 N. D. 1295, 189 N. W. 317.

ARTICLE 4.—OF THE CONDUCT OF THE TRIAL.

§§ 7620, 7621. Comp. Laws, 1913.

*Hrabek v. Patocka*, — N. D. —, 194 N. W. 691.

§ 7624. Comp. Laws, 1913.

Section is permissive and not mandatory; failure of trial court to send papers received in evidence, out with jury, not error, except in case of abuse of discretion. *Rolette State Bank v. Minnekota Elevator Co.* — N. D. —, 195 N. W. 6.

Inspection of exhibits of personal property by jury during deliberations, held proper. *State v. Ehr*, — N. D. —, 204 N. W. 867.

§ 7625. **Conduct of jury in retirement.** When the case is finally submitted to the jury they may decide in court or retire for deliberation. If they retire, they must be kept together in some convenient place under charge of an officer, until they agree upon a verdict or are discharged by the court. Unless, by order of the court, the officer having them under his charge must not suffer any communication to be made to them, or to make any himself except to ask them if they have agreed upon a verdict; and he must not before their verdict is rendered communicate to any person the state of their deliberations or the verdict agreed upon. Provided, however, that where a trial jury contains both men and women members, the trial judge in his discretion, if he deems it proper to so do, direct that the women members of the jury be placed in charge of a woman bailiff and permitted to retire to a suitable place for rest; and the men members of the jury placed in charge of a man bailiff for a similar purpose. In all cases where the jury is permitted to be separated, as above stated, the trial judge shall admonish the jury that they must not in any manner discuss the case among themselves, or permit anyone to discuss it with them, while they are so separated; and that they must discuss and consider the case only in the jury room when all members of the jury are present. [Laws 1923, ch. 332, § 1.]

Trial, 38 Cyc. 1818-1821, 1826.

Consumption of liquor by jury as ground for new trial or reversal. L.R.A. 1915C, 302.

Receipt of document or statement in jury room, constituting new evidence, as ground for reversal in criminal case. 20 A.L.R. 1187.

Treating jurors as ground for reversal. 49 L.R.A.(N.S.) 889.

Employment of person to watch jury to guard against their being tampered with. 48 L.R.A.(N.S.) 540.

Separation of jury as reversible error in criminal case. 34 A.L.R. 1115.

Deliberations of jury. 16 R. C. L. 294 and Supps.

Communications between jurors and officers. 16 R. C. L. 295 and Supps.

Keeping jury together. 16 R. C. L. 294 and Supps.

Separation of jury. 16 R. C. L. 305 et seq. and Supps.

§ 7631. Comp. Laws, 1913.

*Watne v. Rue*, — N. D. —, 197 N. W. 766.

ARTICLE 5.—OF THE VERDICT.

§ 7632. Comp. Laws, 1913.

Finding of jury in special verdict should contain only ultimate conclusions of fact in controversy, and not the evidence to prove them; special verdict need not find a fact established by undisputed evidence. *Swallow v. First State Bank*, 35 N. D. 608, 161 N. W. 207.

In submitting case to jury for special verdict, it is error to read pleadings, to state issues of fact, contentions of parties, and to read statutory law relied on by parties. *Daniels v. Payne*, 48 N. D. 60, 182 N. W. 1010.

Giving general instructions of law, in submitting case to jury for special verdict, reversible error. *Olson v. Horton Motor Co.* 48 N. D. 490, 185 N. W. 365.

A special verdict is that by which the jury finds facts only, leaving judgment to court. *Huether v. McCaull Dinsmore Co.* — N. D. —, 204 N. W. 614.

See also *Nygaard v. Northern P. R. Co.* 46 N. D. 1, 178 N. W. 961; *Schantz v. Northern P. R. Co.* 47 N. D. 1, 180 N. W. 517; *Salewski v. Minneapolis, St. P. & S. Ste. M. R. Co.* 47 N. D. 64, 181 N. W. 72; *York v. General Utility Corp.* 44 N. D. 51, 176 N. W. 352.

**§ 7633. When special verdicts directed; special findings; how prepared.** The court in its discretion may upon the request of either party direct the jury to find a special verdict. Such verdict shall be prepared by the court in the form of questions in writing, which shall be confined to matters involving the merits of the case and shall admit of direct answer. Such questions shall be submitted by the court to the parties at or before the close of the testimony, and the court must incorporate therein such additional questions, of like character, as shall be demanded by either party, and the jury shall make their answers thereto in writing. The court may also direct the jury, if they render a general verdict, to find in writing upon any particular question of fact, to be stated as aforesaid.

In every action for the recovery of money only or of specific real property, the jury may in their discretion, when not otherwise directed by the court render a general or special verdict. The special verdict or finding must be filed with the clerk and entered upon the minutes. When the special findings of fact are inconsistent with the general verdict, the former controls the latter and the court must give judgment accordingly. [Laws 1921, ch. 132, § 1.]

Duty of court to prepare and submit questions for a special verdict. *Nygaard v. Northern P. R. Co.* 46 N. D. 1, 178 N. W. 961.

In submitting case to jury for special verdict, it is error to read pleadings, to state issues of fact, contentions of parties, and to read statutory law relied on by parties. *Daniels v. Payne*, 48 N. D. 60, 182 N. W. 1010.

Giving general instructions of law, in submitting case to jury for special verdict reversible error. *Olson v. Horton Motor Co.* 48 N. D. 490, 185 N. W. 365.

See also *York v. General Utility Corp.* 44 N. D. 51, 176 N. W. 352; *Schantz v. Northern P. R. Co.* 47 N. D. 1, 180 N. W. 517; *Oakland v. Nelson*, 28 N. D. 456, 149 N. W. 337; *Guild v. More*, 32 N. D. 432, 155 N. W. 44.

*Trial*, 38 Cyc. 1907-1932.

Special findings. 26 R. C. L. 1090.

Special verdicts and special findings. 27 R. C. L. 865 et seq.

Power of court to require special findings. 27 R. C. L. 866 and Supps.

Power of jury to find special verdict. 27 R. C. L. 865.

Inconsistency between special findings and general verdict. 27 R. C. L. 879 and Supps.

Effect of conflict between special findings and general verdict. 15 R. C. L. 609 and Supps.

**§ 7634.** Comp. Laws, 1913.

*Watne v. Rue*, — N. D. —, 197 N. W. 766.

**§ 7635.** Comp. Laws, 1913.

*Steidl v. Aitken*, 30 N. D. 281, L.R.A.1915E, 192, 152 N. W. 276; *Smythe v. Muri*, 34 N. D. 242, 158 N. W. 264; *German-American State Bank v. Erickson*, 41 N. D. 548, 170 N. W. 854; *Johnson v. Wagner*, 42 N. D. 542, 174 N. W. 73.

**§ 7635a1. Verdict by five-sixths of jury.** In all civil actions or proceedings in any court of record in this state after twelve hours deliberation the agreement of five-sixths of any jury therein shall be a sufficient and valid verdict; the deliberation of the jury shall be deemed to have commenced when the officer taking charge of the jury has been sworn, and the clerk shall enter such time in his records. [Laws 1923, ch. 333, § 1.]

Held unconstitutional. *Power v. Williams*, — N. D. —, 205 N. W. 9.

See also *Hustad v. International Oil Co.* — N. D. —, 202 N. W. 814.

- Juries, 35 C. J. p. 234, § 160; Trial, 38 Cyc. 1872.  
 Constitutionality of verdict by less than all the jurors. 24 L.R.A. 272.  
 Effect of consent of defendant in criminal case to proceeding with less than twelve jurors. 46 L.R.A.(N.S.) 38.  
 Number and agreement of jurors necessary to verdict. 43 L.R.A. 33.  
 Unanimity as essential to verdict in civil actions. 16 R. C. L. 224 and Supps.

**§ 7635a2. How verdict signed.** Where the verdict is agreed to by the full membership of the jury, the foreman shall sign the verdict; when less than the full membership agree on the verdict, the same shall be signed by all the jurors who agree therein and the clerk of said court shall enter on his minutes the number of said jurors agreeing in said verdict. [Laws 1923, ch. 333, § 2.]  
 Held unconstitutional. *Power v. Williams*, — N. D. —, 205 N. W. 9.  
 Trial, 38 Cyc. 1870.  
 Signing of verdict. 27 R. C. L. 850.

#### ARTICLE 6.—OF THE TRIAL BY THE COURT.

**§ 7637. Comp. Laws, 1913.**

*Kanable v. Great Northern R. Co.* 45 N. D. 619, 178 N. W. 999; *Emery v. First Nat. Bank*, 32 N. D. 575, 156 N. W. 105; *Gresens v. Martin*, 27 N. D. 231, 145 N. W. 823.

**§ 7638. Comp. Laws, 1913.**

Clerk's minutes do not constitute written decision. *Boyd v. Lemmon*, — N. D. —, 189 N. W. 681.

Findings, conclusions and order for judgment, constitute final decision, which must be in writing, and filed. *Crane v. First Nat. Bank*, 26 N. D. 268, 144 N. W. 96.

**§ 7639. Comp. Laws, 1913.**

Findings, conclusions, and order for judgment, constitute final decision, which must be in writing and filed. *Crane v. First Nat. Bank*, 26 N. D. 268, 144 N. W. 96.

See also *Boyd v. Lemmon*, — N. D. —, 189 N. W. 681; *State ex rel. Minehan v. Thompson*, 24 N. D. 273, 139 N. W. 960.

**§ 7643. Judgment notwithstanding verdict.** When at the close of the testimony any party to the action moves the court to direct a verdict in his favor, and the adverse party objects thereto, such motion shall be denied and the court shall submit to the jury such issue or issues, within the pleadings on which any evidence has been taken, as either or any party to the action shall request, but upon a subsequent motion, by such moving party after verdict rendered in such action, that judgment be entered notwithstanding the verdict, or if the jury have failed to agree upon a verdict, for a directed verdict, the court shall grant the same if, upon the evidence as it stood at the time such motion to direct a verdict was made, the moving party was entitled to such directed verdict. An order for judgment notwithstanding the verdict may also be made on a motion in the alternative form asking therefor, or if the same be denied, for a new trial. The ruling on the motion for a directed verdict may be reviewed by the supreme court without a motion for judgment notwithstanding the verdict or a motion in the alternative for such judgment or for a new trial having been first made in the trial court. If the motion for judgment notwithstanding the verdict be denied, the supreme court, on appeal from the judgment, may order judgment to be entered, when it appears from the testimony that a verdict should have been so directed; and it may also so order on appeal from the whole order denying such motion when made in the alternative form whether a new trial was granted or denied by such order. [Laws 1923, ch. 335; Laws 1921, ch. 133, § 1.]

As to power of appellate court to render judgment in an action tried by court. *Shellburg v. Wilton Bank*, 39 N. D. 530, 167 N. W. 721.

Supreme court has in proper case on appeal to order judgment non obstante

veredicto, although no motion was made in lower court therefor or for a new trial. *Houston v. Minneapolis, St. P. & S. Ste. M. R. Co.* 25 N. D. 468, 46 L.R.A. (N.S.) 589, 141 N. W. 994.

Supreme court has, upon appeal, from order granting new trial, where entire record is before it, and question involved is sufficiency of evidence, authority to order judgment in favor of party entitled thereto. *Thress v. Zemple*, 42 N. D. 599, 9 A.L.R. 1, 174 N. W. 85.

Broker, suing for commission, entitled to judgment non obstante, upon showing procurement of purchaser ready, willing, and able to buy, according to terms of principal. *Neff v. Schrader*, — N. D. —, 191 N. W. 466.

Motion for "directed verdict," motion for dismissal distinguished in. *Bailey v. Davis*, — N. D. —, 193 N. W. 658.

Final character of judgment not suspended because of motion for directed verdict. *Coughlin v. Aetna Life Ins. Co.* — N. D. —, 194 N. W. 661.

One objecting to motion for directed verdict does not waive such objection, by moving for directed verdict in his own favor. Upon objection, error to direct verdict. *First Nat. Bank of Ashley v. Strauss*, — N. D. —, 194 N. W. 900.

Motion for directed verdict challenges sufficiency of evidence, raises question of law, reviewable on appeal from judgment, without motion for new trial or without motion non obstante veredicto. *Rokusek v. National Union Fire Ins. Co.* — N. D. —, 195 N. W. 300.

Denial of motion for directed verdict, not available where appellants adduced their testimony, after error was cured. *Leonard v. Raleigh Co-op. Mercantile Co.* — N. D. —, 196 N. W. 102.

Motion for directed verdict at close of whole case, prerequisite to subsequent motion for judgment notwithstanding verdict. *Carson St. Bank v. Grant Grain Co.* — N. D. —, 197 N. W. 146.

Purpose and effect of chapter, is to defer ruling by court on sufficiency of evidence, until after verdict is returned. *McLeod v. Simon*, — N. D. —, 200 N. W. 790.

Motion for directed verdict necessary preliminary to motion for judgment notwithstanding verdict. *Gross v. Miller*, — N. D. —, 200 N. W. 1012.

Denial of motion notwithstanding verdict, reviewable by supreme court, after denial of directed verdict, although lower court grants or denies motion for new trial. *Welch Mfg. Co. v. Herbst Dept. Store*, — N. D. —, 204 N. W. 849.

See also *Wallin v. Great Northern R. Co.* 29 N. D. 469, 151 N. W. 291; *Ennis v. Retail Merchants Asso. Mut. F. Ins. Co.* 33 N. D. 20, 156 N. W. 234; *First Nat. Bank v. Messner*, 35 N. D. 78, 159 N. W. 92; *Stratton v. Rosenquist*, 37 N. D. 116, 163 N. W. 723; *Malherek v. Fargo*, — N. D. —, 191 N. W. 951; *Bratton v. Hoerr*, — N. D. —, 193 N. W. 308; *Meske v. Melicher*, — N. D. —, 194 N. W. 737.

Trial, 38 Cye. 1563, 1567; Judgments, 33 C. J. pp. 1177-1178, §§ 111-117; New Trial, 29 Cye. 747-748, 785, 942; Appeal and Error, 3 C. J. p. 510, § 343, p. 960, § 849, p. 979, § 889, p. 984, § 900, p. 1191, § 3229.

Effect of motion for judgment non obstante veredicto after entry of judgment on entry of second judgment without vacation or reversal of the first. 34 L.R.A. (N.S.) 348.

Right to judgment non obstante veredicto because of failure of proof. 12 L.R.A.(N.S.) 1021; L.R.A.1916E, 828.

Judgment notwithstanding verdict. 15 R. C. L. 606 et seq. and Supps.

Effect of direction of verdict on judgment notwithstanding verdict. 26 R. C. L. 1066 and Supps.

Motion for judgment notwithstanding verdict as waiver of new trial. 20 R. C. L. 226 and Supps.

**§ 7644. Change of judges for prejudice or bias.** When either party to a criminal or civil action pending in any of the district courts of the state, shall after issue joined and before the opening of any regular, special or adjourned term at which the cause is to be tried file an affidavit stating that he has reason to believe and does believe that he cannot have a fair and impartial trial or hearing before the judge of the district court by reason of the bias and prejudice of such judge, the court shall proceed no further in the action and shall thereupon be disqualified to do any further act in said cause; provided that

where the information in a criminal action is filed in term time such affidavit may be filed at any time before trial. [Laws 1923, ch. 331, § 1; Laws 1921, ch. 129, § 1; Laws 1919, ch. 1, § 1.]

Affidavit of prejudice filed after opening of term of court, but before date to which adjournment was taken, is not filed within time limited, and may be disregarded by the court. *Graham v. Nurnberg*, 39 N. D. 57, 166 N. W. 508.

Does not permit the filing of more than one affidavit of prejudice against judge at same term. *Pelton v. Rosen*, 46 N. D. 271, 176 N. W. 920.

District court judge against whom affidavit of prejudice is filed in criminal action, has no authority to designate another district judge to act in his stead at trial. *State v. Peterson*, — N. D. —, 190 N. W. 309.

See also *Ennis v. Retail Merchants Asso. Mut. F. Ins. Co.* 33 N. D. 20, 156 N. W. 234.

Judges, 33 C. J. p. 990, § 132, pp. 998-1002, §§ 150-158, pp. 1012-1014, §§ 178-181, p. 1015, § 184, p. 1018, § 192, pp. 1020-1022, §§ 198-202.

Constitutionality of statute making mere filing of affidavit of bias or prejudice sufficient to disqualify judge. 5 A.L.R. 1275.

Prohibition to prevent prejudiced judge from proceeding with case. 8 A.L.R. 1238.

Disqualification of judge by reason of bias and prejudice. 15 R. C. L. 530.

**§ 7644a1. Same; affidavit of prejudice; by whom made.** Such affidavit shall be made by the defendant or his attorney or the attorney for the state in a criminal action and in civil actions by the party to the action desiring such change of trial judge or by his attorney. [Laws 1923, ch. 331, § 2; Laws 1921, ch. 129, § 2; Laws 1919, ch. 1, § 2.]

All parties defendant must join in disqualifying affidavit, except defaulting parties, or merely nominal parties. *Huether v. Havelock Equity Exchange*, — N. D. —, 204 N. W. 828.

Judges, 33 C. J. p. 1014, § 182.

**§ 7644a2. Same; affidavit to be filed.** Such affidavit with two copies thereof shall be filed with the clerk of the court in which the action is pending. Upon the filing of such affidavit the clerk shall immediately give notice to the judge so disqualified by delivering to him a copy of such affidavit. Said clerk shall promptly forward to the clerk of the state supreme court a copy of such affidavit. [Laws 1923, ch. 331, § 3; Laws 1921, ch. 129, § 3; Laws 1919, ch. 1, § 3.]

**§ 7644a3. Same; the supreme court to designate trial judge.** The supreme court shall upon receipt of such affidavit of prejudice from the clerk of the district court designate a district judge to act in the place and stead of the judge disqualified. [Laws 1923, ch. 331, § 4; Laws 1921, ch. 129, § 4; Laws 1919, ch. 1, § 4.]

*State ex rel. McDonald v. Hanley*, 43 N. D. 388, 175 N. W. 569.

Judges, 33 C. J. p. 1029, § 217, p. 1031, § 221.

**§ 7644a4. Same; expenses of judge.** Any judge of the district court designated by the supreme court to act in said cause shall as soon as possible after receiving such notice from the supreme court and during said term, unless otherwise agreed by the parties to said action, proceed with the trial of said cause, first giving reasonable notice of the date of trial to the parties to said action, or their attorneys, and the actual expenses of such incoming judge shall upon the furnishing of a voucher therefor by said judge to the state auditor be approved for payment and paid to the state treasurer out of the general fund. [Laws 1923, ch. 331, § 5; Laws 1921, ch. 129, § 5; Laws 1919, ch. 1, § 5.]

Judges, 33 C. J. p. 1032, §§ 222, 224, pp. 956-957, §§ 71-75.

**§ 7644a5. Jurors not to be excused by disqualified judge.** After the filing of such affidavit of prejudice with the clerk of the district court no juror shall be excused except for good cause shown to the incoming judge and by such incoming judge. [Laws 1923, ch. 331, § 6; Laws 1921, ch. 129, § 6; Laws 1919, ch. 1, § 6.]

Judges, 33 C. J. p. 1020, § 198.

§ 7644a6. **Number of changes allowed.** No more than one change shall be granted on the application of either party in any action. [Laws 1923, ch. 331, § 7; Laws 1921, ch. 129, § 7; Laws 1919, ch. 1, § 7.]  
Pelton v. Rosen, 46 N. D. 271, 176 N. W. 920.

ARTICLE 7.—OF REFERENCES AND TRIALS BY REFEREES.

§ 7645. Comp. Laws 1913.

Emery v. First Nat. Bank, 32 N. D. 575, 156 N. W. 105; Kanable v. Great Northern R. Co. 45 N. D. 619, 178 N. W. 999; Gresens v. Martin, 27 N. D. 231, 145 N. W. 823.

§ 7646. Comp. Laws, 1913.

Emery v. First Nat. Bank, 32 N. D. 575, 156 N. W. 105; Geo. B. Clifford & Co. v. Henry, 40 N. D. 604, 169 N. W. 508; Kanable v. Great Northern R. Co. 45 N. D. 619, 178 N. W. 999; Gresens v. Martin, 27 N. D. 231, 145 N. W. 823.

ARTICLE 8.—EXCEPTIONS.

§ 7652. Comp. Laws, 1913.

State ex rel. Minehan v. Thompson, 24 N. D. 273, 139 N. W. 960.

§ 7653. Comp. Laws, 1913.

Hope Nat. Bank v. Smith, 38 N. D. 425, 165 N. W. 550; Watne v. Rue, — N. D. —, 197 N. W. 766; State v. Kerns, — N. D. —, 198 N. W. 698; State ex rel. Minehan v. Thompson, 24 N. D. 273, 139 N. W. 960.

§ 7654. Comp. Laws, 1913.

Drinkwater v. Pake, 33 N. D. 190, 156 N. W. 930.

§ 7655. Comp. Laws, 1913.

Within the authority and discretion of the trial judge to order original exhibits transmitted as part of appeal record. Weist v. Farmers' State Bank, 30 N. D. 548, 153 N. W. 283.

Statement of case as certified by trial court imports absolute verity, and cannot be contradicted, varied, or extended in appellate court by affidavits or other evidence dehors the record. Garbush v. Firey, 33 N. D. 154, 156 N. W. 537.

See also Leu v. Montgomery, 31 N. D. 1, 148 N. W. 662; Shuman v. Lesmeister, 34 N. D. 209, 158 N. W. 271; Skaar v. Eppeland, 35 N. D. 116, 159 N. W. 707; Brissman v. Thistlethwaite, — N. D. —, 192 N. W. 85; Wilson v. Kryger, 29 N. D. 28, 149 N. W. 721.

§ 7656. Comp. Laws, 1913.

Intended to apply only to cases where a statement of cases is required in order to bring ruling complained of on record. Leu v. Montgomery, 31 N. D. 1, 148 N. W. 662.

Motion for new trial must specify grounds of the motion and appeal from denial of new trial will not be allowed, unless statement is settled and made part of the record. Kanable v. Great Northern R. Co. 45 N. D. 619, 178 N. W. 999.

Denial of motion for new trial for failure to specify grounds therefor, not erroneous. Lofthouse v. Galesburg State Bank, — N. D. —, 190 N. W. 177.

Party moving for new trial must present all grounds which he claims entitle him thereto, he cannot present one ground in trial court and another in appellate court. O'Dell v. Hiney, — N. D. —, 190 N. W. 774.

Failure of moving party to specify particulars wherein evidence is deemed insufficient to sustain the verdict cannot be urged for first time in appellate court, and will be deemed waived. Shuman v. Lesmeister, 34 N. D. 209, 158 N. W. 271.

Service with notice of appeal, of a statement of errors of law complained of, and specification of insufficiency of evidence, not a jurisdictional prerequisite to such appeal. Wilson v. Kryger, 26 N. D. 77, 51 L.R.A.(N.S.) 760, 143 N. W. 764.

Rule is reasonable, designed to inform court and respondent's counsel of particulars relied on as to alleged insufficiency, and must be substantially complied with. Feil v. Northwest German Farmers' Mut. Ins. Co. 28 N. D. 355, 149 N. W. 358.

See also Wilson v. Kryger, 29 N. D. 28, 149 N. W. 721; Chaffee v. Edinger, 29

N. D. 537, 151 N. W. 223; Guild v. More, 32 N. D. 432, 155 N. W. 44; Crisp v. State Bank, 32 N. D. 263, 155 N. W. 78; Morris v. Minneapolis, St. P. & S. Ste. M. R. Co. 32 N. D. 366, 155 N. W. 861; Jensen v. Clausen, 34 N. D. 637, 159 N. W. 30; Jensen v. Bowen, 37 N. D. 352, 164 N. W. 4; Carr v. Neva, 38 N. D. 158, 164 N. W. 729; State ex rel. Minehan v. Thompson, 24 N. D. 273, 139 N. W. 960; Weist v. Farmers' State Bank, 30 N. D. 548, 153 N. W. 283; Cedar Rapids Nat. Bank v. Coffey, 25 N. D. 457, 141 N. W. 997; McDowell v. McDowell, 27 N. D. 577, 147 N. W. 104; Miller v. Thompson, 31 N. D. 147, 153 N. W. 390; Rabinowitz v. Crabtree, 27 N. D. 353, 145 N. W. 1055.

§ 7657. Comp. Laws, 1913.

Applies in cases where there is disagreement between trial court and counsel as to facts concerning trial, and may be invoked upon refusal of trial court to allow a truthful statement of what occurred at trial. Blood v. Howard, 31 N. D. 602, 154 N. W. 524; Hrabek v. Patocka, — N. D. —, 194 N. W. 691.

§ 7658. Comp. Laws, 1913.

Crane v. First Nat. Bank, 26 N. D. 268, 144 N. W. 96.

ARTICLE 9.—OF NEW TRIALS.

§ 7660. **Causes for new trial.** The former verdict or other decision may be vacated and a new trial granted on the application of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict or to a finding on any question submitted to them by the court by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

3. Accident, or surprise, which ordinary prudence could not have guarded against.

4. Newly discovered evidence material to the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.

5. Excessive damages appearing to have been given under the influence of passion or prejudice. Where a new trial is asked for on this ground, and it appears that the passion and prejudice affected only the amount of damages allowed, and did not influence the findings of the jury on other issues in the case, the trial court on hearing the motion, and the supreme court on appeal, shall have power to order a reduction of the verdict in lieu of a new trial; or to order that a new trial be had unless the party in whose favor the verdict was given remit the excess of damages.

6. Insufficiency of the evidence to justify the verdict or other decisions, or that it is against law.

7. Error in law occurring at the trial and excepted to by the party making the application.

8. Loss or destruction, without fault on the part of the party aggrieved, of the official shorthand minutes, taken at the trial containing the testimony offered and the instructions of the court when given orally to the jury, or either, before a transcript thereof has been made. [Laws 1923, ch. 334; Laws 1921, ch. 131, § 1.]

Causes enumerated as grounds for new trial, are exclusive. Higgins v. Rued, 30 N. D. 551, 153 N. W. 389; Dubs v. Northern P. R. Co. 47 N. D. 210, 181 N. W. 606.

Motion for new trial on ground of newly discovered evidence, is addressed to sound judicial discretion of trial court, and appellate court will not interfere except in case of abuse of discretion. Aylmer v. Adams, 30 N. D. 514, 153 N. W. 419; McGregor v. Great Northern R. Co. 31 N. D. 471, 154 N. W. 261; Keek v.

Kavanaugh, 45 N. D. 81, 177 N. W. 99; *State v. Stepp*, — N. D. —, 191 N. W. 482; *Security State Bank v. Kramer*, — N. D. —, 198 N. W. 679; *Pace v. Workmen's Comp. Bureau*, — N. D. —, 201 N. W. 348.

Taking each juror's estimate of what should be assessed as damages, and dividing total number of jurors, and afterward agreeing that such quotient should be amount of verdict, is not a quotient or chance verdict. *Great Northern R. Co. v. Lenton*, 31 N. D. 555, 154 N. W. 275.

Motion for new trial on ground of excessive damages, appearing to have been given under passion or prejudice, addressed to discretion of trial court, and appellate court will not interfere except for abuse of discretion. *Reid v. Ehr*, 36 N. D. 552, 162 N. W. 903; *Wagoner v. Bodal*, 37 N. D. 594, 164 N. W. 147.

Denial of motion for new trial for accident and surprise, held to be abuse of discretion. *McGinnity v. J. I. Case Threshing Mach. Co.* 38 N. D. 288, 164 N. W. 955.

Motion for new trial must specify grounds of the motion, and appeal from denial of new trial will not be allowed, unless statement is settled, and made part of the record. *Kanable v. Great Northern R. Co.* 45 N. D. 619, 178 N. W. 999.

Where verdict is unchallenged in trial court as excessive, defendant cannot on appeal for first time raise the question. *Schmidt v. Stone*, — N. D. —, 194 N. W. 917.

Affidavits of jurors inadmissible to impeach their verdict for misconduct of jury, except where misconduct consists of resorting to chance in determining issues. *Johnson v. Seel*, 26 N. D. 299, 144 N. W. 237.

Motion for new trial must present all grounds relied upon. *O'Dell v. Hiney*, — N. D. —, 190 N. W. 774.

Within discretion of trial judge whether party entitled to new trial for newly discovered evidence, appellate court need not interfere with ruling, unless there is abuse of discretion. *Pace v. North Dakota Workmen's Comp. Bureau*, — N. D. —, 201 N. W. 348.

See also *Booren v. McWilliams*, 34 N. D. 74, 157 N. W. 698; *Jensen v. Clausen*, 34 N. D. 637, 159 N. W. 30; *Swallow v. First State Bank*, 35 N. D. 608, 161 N. W. 207; *Johnson v. Mullen*, 39 N. D. 246, 167 N. W. 326; *McCann v. Gilmore*, 42 N. D. 119, 172 N. W. 236; *Larsen v. Friis*, 48 N. D. 507, 185 N. W. 363; *Cohn v. Wyngarden*, 48 N. D. 344, 184 N. W. 575; *Bull v. Smith*, 45 N. D. 613, 178 N. W. 426; *Carpenter v. Dickey*, 26 N. D. 176, 143 N. W. 964; *State v. Peterson*, — N. D. —, 190 N. W. 309.

Criminal Law, 16 C. J. pp. 1120-1205, §§ 2622-2730; New Trial, 29 Cyc. 759-918, 1020-1025; Appeal and Error, 4 C. J. p. 1157, § 3170.

Motion for new trial as remedy of one convicted of crime while insane. 10 A.L.R. 215.

Right to new trial because of instruction against finding of lower degree, in the absence of evidence of lower grade of homicide than that of which accused is found guilty. 21 A.L.R. 619; 27 A.L.R. 1099.

Duty of jury to follow instruction as to amount of party's liability if liable at all. 23 A.L.R. 305.

Prejudice of juror concerning contingent fee cases or particular kinds of litigation or defenses as ground for new trial. 27 A.L.R. 1052.

Communications between jurors and others as ground for new trial in criminal case. 22 A.L.R. 254; 34 A.L.R. 103.

Threat to dismiss jury in criminal case for term, unless they could agree on verdict, as coercion. 10 A.L.R. 421.

Cumulative evidence as ground for new trial in civil cases. L.R.A.1916C, 1162.

Insanity of accused at the time of the offense, raised for the first time on motion for new trial. L.R.A.1918B, 1146.

Physical condition of plaintiff, after verdict in an action for personal injuries, tending to show falsity of testimony as to extent or character of his injury, as ground for new trial. L.R.A.1915B, 243.

Unknown disqualification of juror existing at time of his selection as ground for new trial. 50 L.R.A.(N.S.) 933.

Treating jurors as ground for new trial. 19 L.R.A.(N.S.) 733; 49 L.R.A.(N.S.) 889.

Unauthorized view by juror or jury. L.R.A.1915B, 703.

Consumption of liquor by jury. L.R.A.1915C, 302.

Attack out of court in presence of jurymen upon credibility of witness as ground for new trial. L.R.A.1917B, 248.

Employment of person to watch jury to guard against their being tampered with. 48 L.R.A.(N.S.) 540.

New trial because of communication by judge with jury not in open court. 17 L.R.A.(N.S.)609; L.R.A.1915D, 719.

Effect of failure to swear jury. L.R.A.1917D, 399.

Granting new trial because of excessive verdict as interference with constitutional right to jury trial. 51 L.R.A.(N.S.) 860.

Granting of new trial by appellate court on account of excessive damages. 51 L.R.A.(N.S.) 388.

Power of court to disregard testimony because of contract to scientific principles. L.R.A.1916D, 301.

Effect of misconduct of spectator during criminal trial. L.R.A.1918E, 959.

Admonishing or warning witness by judge in criminal case. L.R.A.1917E, 859.

Misstatement of facts or statement of facts not in evidence by counsel to the jury. L.R.A.1918D, 45.

Perjury as ground for new trial. 51 L.R.A.(N.S.) 286.

Loss or incompleteness of record for purpose of appeal. L.R.A.1915B, 353.

Violation of rules of court, by trial court as ground for new trial. 23 A.L.R. 52.

Homicide, giving of instruction permitting finding of lower degree than that of which accused was convicted as ground for new trial. 21 A.L.R. 621.

Abuse of witness by counsel as ground for new trial. 4 A.L.R. 414.

Incompetency, negligence, illness or the like of counsel as ground for new trial in criminal case. 24 A.L.R. 1025.

Inability to perfect record for appeal as ground for new trial. 13 A.L.R. 102; 16 A.L.R. 1158.

Receipt of document or statement in jury room constituting new evidence as ground for new trial in criminal case. 20 A.L.R. 1187.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial. 12 A.L.R. 663.

Party against whom verdict is rendered as entitled to new trial on ground of inadequacy of verdict. 31 A.L.R. 1091.

Statements by witness after criminal trial tending to show that his testimony was perjured, as ground for new trial. 33 A.L.R. 550.

New trial because of separation of jury. 34 A.L.R. 1115.

Grounds for new trial. 20 R. C. L. 226 et seq. and Supps.

§ 7661. Comp. Laws, 1913.

As to sufficiency of notice of motion for new trial. *Swallow v. First State Bank*, 28 N. D. 283, 148 N. W. 630.

§ 7663. Comp. Laws, 1913.

*Gohl v. Bechtold*, 37 N. D. 141, 163 N. W. 725; *Weigel v. Powers Elevator Co.* — N. D. —, 198 N. W. 121; *Edwards v. Great Northern Ry. Co.* 42 N. D. 154, 171 N. W. 873; *Rabinowitz v. Crabtree*, 27 N. D. 353, 145 N. W. 1055.

§ 7664. Comp. Laws, 1913.

As to jurisdiction of court to determine motion for new trial after expiration of time for appeal. *Skaar v. Eppeland*, 35 N. D. 116, 159 N. W. 707.

See also *Gohl v. Bechtold*, 37 N. D. 141, 163 N. W. 725; *State ex rel. McDonald v. Hanley*, 43 N. D. 388, 175 N. W. 569; *Kanable v. Great Northern R. Co.* 45 N. D. 619, 178 N. W. 999; *Weigel v. Powers Elevator Co.* — N. D. —, 198 N. W. 121.

§ 7665. Comp. Laws, 1913.

Grounds upon which new trial may be granted by court on its own motion, are exclusive. *Dubs v. Northern P. Co.* 47 N. D. 210, 181 N. W. 606.

See also *Gohl v. Bechtold*, 37 N. D. 141, 163 N. W. 725; *Erickson v. Wyper*, 33 N. D. 193, 157 N. W. 592; *Reid v. Ehr*, 36 N. D. 552, 162 N. W. 903; *Wagoner v. Bodal*, 37 N. D. 594, 164 N. W. 147; *Johnson v. Mullen*, 39 N. D. 246, 167 N. W. 326; *McCann v. Gilmore*, 42 N. D. 119, 172 N. W. 236.

§ 7666. Comp. Laws, 1913.

Gohl v. Beehtold, 37 N. D. 141, 163 N. W. 725; Weigel v. Powers Elevator Co. — N. D. —, 198 N. W. 121; Rabinowitz v. Crabtree, 27 N. D. 353, 145 N. W. 1055.

ARTICLE 10.—MANNER OF GIVING, ENTERING AND SATISFYING JUDGMENTS.

§ 7678. Comp. Laws, 1913.

As to what constitutes proper notice of entry of judgment. National Union F. Ins. Co. v. Martin, 41 N. D. 393, 170 N. W. 880.

§ 7679. Comp. Laws, 1913.

Authorizes entry of appropriate judgment in possessory action, while issues upon which defendant's counterclaim for damages are based, remain undetermined. Johnson v. Wagner, 42 N. D. 542, 174 N. W. 73.

§ 7680. Comp. Laws, 1913.

Honstain Bros. Co. v. Linden Invest. Co. 45 N. D. 210, 177 N. W. 114; Hughes v. Fargo Loan Agency, 46 N. D. 26, 178 N. W. 993; State Bank v. Nelson, 48 N. D. 702, 186 N. W. 766.

§ 7682. Comp. Laws, 1913.

More v. Western Grain Co. 31 N. D. 369, 153 N. W. 976; Farmers Nat. Bank v. Ferguson, 28 N. D. 347, 148 N. W. 1049.

§ 7688. Comp. Laws, 1913.

Weigel v. Powers Elevator Co. — N. D. —, 198 N. W. 121; State ex rel. Minehan v. Meyers, 19 N. D. 804, 124 N. W. 701.

§ 7689. Comp. Laws, 1913.

Requests for instructions not a part of judgment roll, and cannot be reviewed on appeal unless incorporated in statement of case. Guild v. More, 32 N. D. 432, 155 N. W. 44.

See also Parsons v. Rowell, 42 N. D. 441, 173 N. W. 761; Weigel v. Powers Elevator Co. — N. D. —, 198 N. W. 121.

§ 7690. Comp. Laws, 1913.

Crisp v. State Bank, 32 N. D. 263, 155 N. W. 78; Weigel v. Powers Elevator Co. — N. D. —, 198 N. W. 121.

§ 7691. Comp. Laws, 1913.

Lien of a judgment expires ten years from date of docketing, in county where rendered. Lenhart v. Lynn, — N. D. —, 194 N. W. 937.

See also Arntson v. First Nat. Bank, 39 N. D. 408, L.R.A.1918F, 1038, 167 N. W. 760.

§ 7692. **Judgments, renewal of. Continuing lien.** Any judgment directing in whole or in part the payment of money which has heretofore, or may hereafter, be duly entered and docketed in the book in the office of the clerk of any district court of this state, whether said judgment was originally rendered by the court in whose clerk's office the same is entered, or whether entered upon a transcript of judgment from any other county in the state, pursuant to sections 7691, 7694 and 7695, or upon a certified transcript of the docket entry of a judgment or decree of any district court or circuit court of the United States, within the state of North Dakota, pursuant to sections 7696 and 7697, or entered upon a certified transcript of the judgment of a justice of the peace, pursuant to section 7705, or entered pursuant to any other provision of law, may be renewed, and the lien thereof continued for a further period of ten years from and after the filing and docketing of the affidavit for renewal, as hereinafter provided. [Laws 1909, ch. 157, § 1; R. C. 1905, § 7083; Laws 1901, ch. 110, § 1.]

Union Nat. Bank v. Ryan, 23 N. D. 482, 137 N. W. 449.

§ 7693. Comp. Laws, 1913.

Creates concurrent remedy and does not repeal § 7384 of Revised Codes. Union Nat. Bank v. Ryan, 23 N. D. 482, 137 N. W. 449.

## § 7706. Comp. Laws, 1913.

Krach v. Security State Bank, 43 N. D. 441, 175 N. W. 573; Jacobsen v. Miller, — N. D. —, 34 A.L.R. 317, 198 N. W. 349.

## § 7709. Comp. Laws, 1913.

Honstain Bros. Co. v. Linden Invest. Co. 45 N. D. 210, 177 N. W. 114.

## § 7711. Comp. Laws, 1913.

Schweigert-Ewald Lumber Co. v. Bauman, 42 N. D. 221, 172 N. W. 808.

## CHAPTER 11A.

## UNIFORM DECLARATORY JUDGMENTS ACT.

Wirtz v. Nestos, — N. D. —, 200 N. W. 524.

§ 7712a1. **Scope.** Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree. [Laws 1923, ch. 237, § 1.]

Judgments, 33 C. J. p. 1097 § 57.

Declaration of rights or declaratory judgments. 12 A.L.R. 52; 19 A.L.R. 1124.

Declaratory judgments or orders in general. 4 R. C. L. Supps. 1003.

§ 7712a2. **Power to construe, etc.** Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder. [Laws 1923, ch. 237, § 2.]

Judgments, 33 C. J. p. 1097 § 57.

Construction and validity of instruments. 4 R. C. L. Supps. 1005.

§ 7712a3. **Before breach.** A contract may be construed either before or after there has been a breach thereof. [Laws 1923, ch. 237, § 3.]

Judgments, 33 C. J. p. 107 § 57.

§ 7712a4. **Executor, etc.** Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto.

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

(b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings. [Laws 1923, ch. 237, § 4.]

Judgments, 33 C. J. p. 1097 § 57.

Management of estates and trusts. 4 R. C. L. Supp. 1005.

§ 7712a5. **Enumeration not exclusive.** The enumeration in sections 2, 3, and 4 does not limit or restrict the exercise of the general powers conferred in section 1, in any proceeding where declaratory relief is sought, in which a judg-

*Chap. 11A, § 7712a5. CODE OF CIVIL PROCEDURE. Declaratory, etc.*

ment or decree will terminate the controversy or remove an uncertainty. [Laws 1923, ch. 237, § 5.]

Judgments, 33 C. J. p. 1097 § 57.

**§ 7712a6. Discretionary.** The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. [Laws 1923, ch. 237, § 6.]

Judgments, 33 C. J. p. 1097 § 57.

Discretionary jurisdiction in respect to declaratory judgments. 4 R. C. L. Supp. 1004.

**§ 7712a7. Review.** All orders, judgments and decrees under this act may be reviewed as other orders, judgments and decrees. [Laws 1923, ch. 237, § 7.]

Judgments, 33 C. J. p. 1097 § 57.

**§ 7712a8. Supplemental relief.** Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith. [Laws 1923, ch. 237, § 8.]

Judgments, 33 C. J. p. 1097 § 57.

**§ 7712a9. Jury trial.** When a proceeding under this act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. [Laws 1923, ch. 237, § 9.]

Judgments, 33 C. J. p. 1097 § 57.

**§ 7712a10. Costs.** In any proceeding under this act the court may make such award of costs as may seem equitable and just. [Laws 1923, ch. 237, § 10.]

Judgments, 33 C. J. p. 1097 § 57.

**§ 7712a11. Parties.** When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard. [Laws 1923, ch. 237, § 11.]

Judgments, 33 C. J. p. 1097 § 57.

**§ 7712a12. Construction.** This act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered. [Laws 1923, ch. 237, § 12.]

Judgments, 33 C. J. p. 1097 § 57; Statutes, 36 Cyc. 1105, 1173.

Liberal construction of remedial statutes. 25 R. C. L. 1077 and Supps.

**§ 7712a13. Words construed.** The word "person" wherever used in this act, shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever. [Laws 1923, ch. 237, § 13.]

Person, 30 Cyc. 1526.

**§ 7712a14. Provisions severable.** The several sections and provisions of this act, except sections 1 and 2, are hereby declared independent and severable, and

*Declaratory, etc.* CODE OF CIVIL PROCEDURE. *Chap. 11A, § 7712a14.*

the invalidity, if any, of any part or feature thereof shall not affect or render the remainder of the act invalid or inoperative. [Laws 1923, ch. 237, § 14.]

Statutes, 36 Cyc. 983, 1105.

Partial unconstitutionality of statutes. 6 R. C. L. 121 et seq. and Supps.

**§ 7712a15. Uniformity of interpretation.** This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with Federal laws and regulations on the subject of declaratory judgments and decrees. [Laws 1923, ch. 237, § 15.]

Statutes, 36 Cyc. 1105, 1154.

**§ 7712a16. Short title.** This act may be cited as the Uniform Declaratory Judgments Act. [Laws 1923, ch. 237, § 16.]

## CHAPTER 12.

### OF THE EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS.

- ARTICLE 1. THE EXECUTION AND LEVY, §§ 7714-7723.
2. EXEMPTIONS, §§ 7729-7742.
  3. SALES, §§ 7744-7751.
  5. REDEMPTION, §§ 7753-7762.
  6. THE SHERIFF'S DEED, § 7763.
  7. VALIDATING EXECUTION SALES, § 7765.
  8. GENERAL PROVISIONS, § 7770.

#### ARTICLE 1.—THE EXECUTION AND LEVY.

§ 7714. Comp. Laws, 1913.

Judgment foreclosing equity of redemption in specific property, providing for issuance of special execution, directing sheriff to take and sell property, is enforceable by writ reciting material parts of judgment. Provision for return of writ within 60 days, is directory. *Workman v. Salzer Lumber Co.* — N. D. —, 199 N. W. 769.

See also *Bull v. Smith*, — N. D. —, 25 A.L.R. 1402, 191 N. W. 624.

§ 7715. Comp. Laws, 1913.

*Winston, H. F. Co. v. Price*, 37 N. D. 554, 164 N. W. 101.

§ 7716. Comp. Laws, 1913.

*Mott v. Holbrook*, 28 N. D. 251, 148 N. W. 1061.

§ 7719. Comp. Laws, 1913.

Section is directory. *Workman v. Salzer Lumber Co.* — N. D. —, 199 N. W. 769.

§ 7720. Comp. Laws, 1913.

*Past v. Rennie*, 30 N. D. 1, 151 N. W. 763; *Rolette County Bank v. Hanlyn*, 48 N. D. 72, 183 N. W. 260; *Mott v. Holbrook*, 28 N. D. 251, 148 N. W. 1061.

§ 7721. Comp. Laws, 1913.

*Godman v. Olson*, 38 N. D. 360, 165 N. W. 515.

§ 7723. Comp. Laws, 1913.

*Albert Solberg & Co. v. Rettinger*, 40 N. D. 1, 168 N. W. 572.

#### ARTICLE 2.—EXEMPTIONS.

§ 7729. Comp. Laws, 1913.

Homestead is subject to execution or forced sale only in satisfaction of judgments obtained on debts secured by mechanics' liens, on debts secured by mortgage on homestead executed by both husband and wife, and for purchase price and taxes. *Cullen v. Sullivan*, — N. D. —, 199 N. W. 760.

**§ 7730. Comp. Laws, 1913.**

Sale of homestead under execution conveys no title. *Johnson v. Twichell*, 13 N. D. 426, 101 N. W. 318.

Homestead is subject to execution or forced sale only in satisfaction of judgments obtained on debts secured by mechanics' liens, on debts secured by mortgage on homestead executed by both husband and wife for purchase price, and taxes. *Cullen v. Sullivan*, — N. D. —, 199 N. W. 760.  
See also *Charlson v. Charlson*, 48 N. D. 851, 187 N. W. 418.

**§ 7731. Additional exemption.** In addition to the property mentioned in the preceding section, the head of a family may himself, or by his agent, select from all other of his personal property not absolutely exempt, goods, chattels, merchandise, money or other personal property not to exceed in the aggregate one thousand dollars in value, which is also exempt and must be chosen and appraised as hereinafter provided. [Laws 1919, ch. 128.]

Applies to heads of families, and does not relate to survivors of a deceased person, or to probate proceedings. *Woods v. Teeson*, 31 N. D. 610, 154 N. W. 797.

See also *Stringer v. Elsaas*, 37 N. D. 20, 163 N. W. 558; *Charlson v. Charlson*, 48 N. D. 851, 187 N. W. 418.

Exemptions, 25 C. J. p. 23 §§ 28-35, p. 42 § 63, p. 90 § 150, p. 92 § 152, p. 131 § 232, p. 142 § 259.

Wife as head of family within exemption statute. 51 L.R.A.(N.S.) 1121.

What constitutes a "family" under exemption laws. 4 L.R.A.(N.S.) 365; L.R.A. 1917C, 361.

Election of exempt property by judgment debtors. 11 R. C. L. 549 and Supps.

**§ 7733. Comp. Laws, 1913.**

*Stringer v. Elsaas*, 37 N. D. 20, 163 N. W. 558; *Burrell v. Goldstein*, 23 N. D. 257, 136 N. W. 243; *Schroeder v. Davenport*, 29 N. D. 400, 150 N. W. 926.

**§§ 7734, 7735. Comp. Laws, 1913.**

*Stringer v. Elsaas*, 37 N. D. 20, 163 N. W. 558.

**§ 7736. Comp. Laws, 1913.**

Permits the exercise of right to exemptions within a reasonable time, which is not limited by the three days allowed to principal debtor. *First International Bank v. Lee*, 25 N. D. 197, 141 N. W. 716.

**§ 7737. Comp. Laws, 1913.**

*Stringer v. Elsaas*, 37 N. D. 20, 163 N. W. 558.

**§ 7738. Notice of levy; claim within ten days.** In all cases of levy upon personal property by the sheriff, constable or other officer he must give notice thereof by copy to the debtor, his attorney, agent or wife, or, failing to conveniently find either to such child as is described in section 7736; and the debtor or such other person for him must claim or demand the benefit of these exemptions within ten days after such notice from the officer. Said notice must have written or printed upon its face the further notice to the debtor, that if exemptions are claimed or demanded, such claim must be made within ten days after service of notice. [Laws 1919, ch. 128; Laws 1915, ch. 157.]

Applies to principal debtor. *First International Bank v. Lee*, 25 N. D. 197, 141 N. W. 716.

Exemptions, 25 C. J. p. 130, § 230, pp. 131-134, §§ 233-237.

Time and manner of making claim for exemption. 11 R. C. L. 548 and Supps.

**§ 7739. Cases in which only absolute exemptions are allowed.** No personal property except absolute exemptions shall be exempt from execution or attachment in an action for laborer or mechanic's wages or for a debt incurred for property obtained under false pretenses; and no personal property shall be exempt from such process in an action for the collection of a bill of a nurse for professional service, or in an action for the collection of a bill for board, medicine or attendants furnished patients at any hospital in this state, or in an action

for the collection of a bill for groceries and other provisions, except the absolute exemptions and household and kitchen furniture, stoves and two cows, the value of which exclusive of absolute exemptions shall not exceed five hundred dollars (\$500.00) which value in case of dispute shall be determined by appraisers to be selected in accordance with the provisions of section 7120; provided this act shall not apply to accounts and debts contracted prior to the date of its passage and approval. [Laws 1919, ch. 128; Laws 1915, ch. 155, § 1.]

Radke v. Padgett, — N. D. —, 192 N. W. 97.

Exemptions, 25 C. J. p. 95, § 160 pp. 101-104 §§ 176-180 p. 90 § 150.

Claims subject to exemption. 11 R. C. L. 535 et seq.

**§ 7741. Partnerships can claim but one exemption.** A partnership firm can claim but one exemption of one thousand dollars (\$1,000.00) in value or alternative property when so applicable instead thereof, out of the partnership property. All partnership property claimed as exempt shall constitute a part of the exemptions of the several partners the same being divided in proportion to the interests of the partners in the firm assets, and in no case shall the aggregate exemptions of the several partners exceed the amount which would have been allowed to them if the partnership had not existed. [Laws 1923, ch. 264; Laws 1915, ch. 156, § 1.]

F. B. Scott Co. v. Scheidt, 35 N. D. 433, 160 N. W. 502.

Exemptions, 25 C. J. p. 87 § 146.

Individual partner's right to exemption in partnership property. 4 A.L.R. 300.

Exemption out of partnership property. 11 R. C. L. 533, 534 and Supps.

**§ 7742.** Comp. Laws, 1913.

Krumenacher v. Andis, 38 N. D. 500, 165 N. W. 524.

#### ARTICLE 3.—SALES.

**§ 7744. Sale of personal property under execution.** The officer who levies upon personal property by virtue of an execution must before he proceeds to sell the same cause public notice to be given of the time and place of such sale for at least ten days before the day of sale. The notice must be given by advertisement published in some newspaper printed in the county or sub-division, said newspaper to be designated by the judgment creditor or his attorney, or, in case no newspaper is published therein, by posting advertisements in five public places in the county. If the levy be upon crops, when harvested, such crops may, at the option of the judgment creditor, be sold in the nearest usual market therefor, at any time, after such levy, in the usual manner, at the market price thereof, in such market and without the notice hereinbefore provided; in which case, however, the notice of levy shall contain a statement where and when such crops will be sold; but should the judgment debtor, his agent or attorney, at the time of making said levy give notice to the officer making said levy that said judgment debtor intends to settle said judgment, said officer shall hold said grain ten days before making sale thereof. The usual and reasonable charges for such sale and the transportation of such grain to such market shall be deemed proper expenses chargeable as costs in such proceedings, and in case notice above provided for is served on the officer reasonable charges for storing said grain. Perishable property may be sold by order of the court or a judge thereof, prescribing such notice, time and manner of sale as may be reasonable, considering the character and condition of the property. [Laws 1915, ch. 220, § 1.]

Executions, 23 C. J. pp. 329-330 §§ 51-52, p. 440 § 232, p. 451 § 251, pp. 624-628 §§ 574-580, pp. 636-643 §§ 593-602, p. 696 § 696.

Notice of sale of property under execution. 10 R. C. L. 1291.

Sale of crops under execution. 10 R. C. L. 1300.

Sale of perishable goods under execution. 10 R. C. L. 1300.

**§ 7745.** Comp. Laws, 1913.

Winslow v. Klundt, — N. D. —, 201 N. W. 169.

N. D. C. L.—81. 1281

## § 7747. Comp. Laws, 1913.

Sale under execution en masse of property which consists of several known lots or parcels is not void but voidable. *Michael v. Grady*, — N. D. —, 204 N. W. 182.

## § 7750. Comp. Laws, 1913.

*Workman v. Salzer Lumber Co.* — N. D. —, 199 N. W. 769.

§ 7751. **Purchaser's right; sheriff's certificate.** Upon a sale of real property the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two years' unexpired term, the sale is absolute. In all other cases the real property is subject to redemption as provided in this chapter. The officer must give to the purchaser a certificate of sale, containing:

1. A particular description of the real property sold.
2. The price bid for each distinct lot or parcel.
3. The whole price paid.
4. When subject to redemption it must be so stated.

Such certificate must be executed by the officer and acknowledged or proved as is or may be required by law for deeds of real property and must be recorded in the office of the register of deeds of the county wherein the real property is situated within sixty days from the date of said sale, and such sheriff's certificate or a certified copy thereof certified by such register shall be taken and deemed evidence of the facts therein recited and contained. [Laws 1915, ch. 222, § 1.]

*Geo. B. Clifford & Co. v. Henry*, 40 N. D. 604, 169 N. W. 508; *Warren v. Olson*, 46 N. D. 203, 180 N. W. 529.

Executions, 23 C. J. pp. 657-660 §§ 633-638, p. 712 § 722, p. 746 § 789.

Right of purchaser at execution sale of land subject to mortgage to question validity of mortgage. L.R.A.1917C, 838.

Right of plaintiff in a suit in which a decree of sale was rendered to assert, as against a purchaser thereunder, a title or interest not litigated in the suit. L.R.A.1917C, 888.

Destruction of or damage to property after judicial or execution sale as affecting rights and liability of successful bidder. 17 A.L.R. 970.

Application of rule that plaintiff in ejectment, need not trace title back of common source, where title is claimed under judicial sale. 7 A.L.R. 877.

Adverse possession by purchaser at judicial sale of property held in trust. 2 A.L.R. 47.

Adverse possession as to cotenants by one claiming under or through judicial sale of the entire property for the debt of the other cotenant. 27 A.L.R. 17.

Retainer of indebtedness of heir, legatee, or distributee as against purchasers on execution. 1 A.L.R. 1035.

Rights of seller of fixtures, retaining title thereto or a lien thereon, as against purchasers of the realty at judicial sale. 13 A.L.R. 456; 23 A.L.R. 805.

Nature and extent of interest of purchaser of, entirety estate, on execution sale, under judgment against one of the spouses. 27 A.L.R. 826.

Judicial or execution sale of realty as affecting debtor's share in crops grown by tenant or cropper. 13 A.L.R. 1425.

Issuance of writ of assistance to put purchaser at execution sale in possession. 52 L.R.A.(N.S.) 697.

Allowing reasonable time to examine title. 52 L.R.A.(N.S.) 751.

Right of one who redeems from judicial sale as against purchaser, where title fails. 48 L.R.A.(N.S.) 481.

Right of seller of chattel retaining title or lien as against purchaser at judicial sale of realty to which it is affixed by owner. 49 L.R.A.(N.S.) 401.

Dower in land subject to purchase money mortgage sold on execution against husband. 52 L.R.A.(N.S.) 549, 551.

Right of dower in improvements made by purchaser at judicial sale. 3 B. R. C. 961.

Effect of agreement between landlord and tenant for removal of fixtures by latter on rights of purchaser at execution sale. L.R.A.1915E, 829.

Validity of agreement to purchase property at judicial sale for joint benefit. 38 L.R.A.(N.S.) 719.

Power of one of several joint purchasers at a judicial sale to bind the others. 35 L.R.A.(N.S.) 1139.

Right of purchaser under judgment against insane person. 35 L.R.A.(N.S.) 1092.

Purchaser's rights upon sale under execution. 10 R. C. L. 124, et seq. and Supps.

Certificate of sale under execution. 10 R. C. L. 1317.

#### ARTICLE 5.—REDEMPTION.

§ 7753. Comp. Laws, 1913.

Right of redemption limited to period of one year from day of sale; permissible extension applicable only in case of redemption by redemptioners within a year from day of sale. *State v. Herman*, 36 N. D. 177, 161 N. W. 1017.

Second mortgagee, a redemptioner. *Security State Bank v. Kramer*, — N. D. —, 198 N. W. 679.

See also *Brastrup v. Ellingson*, 36 N. D. 68, 161 N. W. 553; *Beyer v. North American Coal & Min. Co.* 42 N. D. 483, 173 N. W. 782; *Leverson v. Olson*, 25 N. D. 624, 142 N. W. 917.

§ 7753a. Notice of redemption; statement as to amount allowed as credit.

Whenever redemption is made by a redemptioner, as defined by law, from a foreclosure or execution sale, the redemptioner must state in the notice of redemption filed in the office of the register of deeds an amount that he will credit on his claim against the debtor upon making redemption, and if the amount so stated is less than the amount of the lien under which he makes redemption a subsequent redemptioner may redeem from him by paying the amount paid by such redemptioner, together with the amount of any taxes, assessments, or other items paid by such redemptioner in protection of the title, and interest on all such sums as provided by law, together with the amount stated by such first redemptioner as the amount he is willing to allow on the claim under which he redeemed. The amount so stated by a redemptioner as a credit on the claim under which he redeems shall be treated as a payment of that amount on such indebtedness, and it shall be the duty of the redemptioner to immediately indorse the same upon the evidence of his claim, and if such claim be a judgment he shall cause a statement of such amount to be entered by the clerk of court in the judgment docket. [Laws 1923, ch. 251, § 1.]

Executions, 23 C. J. p. 717 § 733, p. 718 § 736, p. 722 § 743; Mortgages, 27 Cyc. 1814, 1823, 1833.

Redemption of property sold under execution. 10 R. C. L. 1344, et seq. and Supps.

Redemption from mortgage foreclosure sale. 19 R. C. L. 644 et seq. and Supps.

§ 7754. Payment of and period of redemption. The judgment debtor or redemptioner may redeem the property from the purchaser within one year after the sale on paying the purchaser the amount of his purchase with eight per cent interest thereon together with the amount of any assessment or taxes which the purchaser may have paid thereon after the purchase, and interest at the same rate on such amount; and if the purchaser is also a creditor having a prior lien to that of the redemptioner other than the judgment under which such purchase was made, the amount of such lien with interest. [Laws 1917, ch. 109, § 1; Laws 1915, ch. 223, § 1.]

Third mortgagee, to redeem from second mortgagee, who purchased at first mortgage foreclosure sale, must pay amount of second mortgagee's purchase, with 12% interest, taxes paid plus interest thereon, and amount of second mortgage lien with interest. *O'Leary v. Schoenfeld*, 30 N. D. 374, 152 N. W. 679.

Right of redemption limited to period of one year from day of sale; permissi-

ble extension applicable only in case of redemption by redemptioner, within a year from day of sale. *State v. Herman*, 36 N. D. 177, 161 N. W. 1017.

Does not require one seeking to redeem from a purchaser at a mortgage foreclosure sale to pay to purchaser in addition to his purchase price with interest, amount of a mortgage lien, prior to the one foreclosed. *Leverson v. Olson*, 25 N. D. 624, 142 N. W. 917.

See also *Fox v. Nelson*, 30 N. D. 589, 153 N. W. 395; *Bank of Mowbray v. Kelland*, 33 N. D. 382, 157 N. W. 291; *Brastrup v. Ellingson*, 36 N. D. 68, 161 N. W. 553.

Executions, 23 C. J. pp. 718-719 §§ 736-738; Mortgages, 27 Cyc. 1815, 1823-1825, 1827-1828.

Receiver's right to redeem from judicial or execution sale of insolvent's property. 35 A.L.R. 262.

Constitutionality of statute extending period for redemption. 1 A.L.R. 143; 38 A.L.R. 229.

Redemption by one having two or more liens on same property. 3 A.L.R. 163.

Right to redeem as affected by deed delivered in escrow as further security for debt. L.R.A.1915B, 492.

Power of court on equitable grounds to permit redemption from mortgage foreclosure sale after expiration of statutory period of exemption. L.R.A. 1917E, 637.

Lien intervening that under which property was sold and that under which it was redeemed as affected by the redemption. 26 A.L.R. 435.

Scope and import of term "Owner" in statutes declaring who may redeem from sale under execution. 2 A.L.R. 794.

Imprisonment as extending time for redemption. 18 A.L.R. 531.

Amount to be paid on redemption from mortgage foreclosure sale. 19 R. C. L. 646.

Time allowed for redemption from execution sale. 10 R. C. L. 1347 and Supps.

Time for redemption from mortgage foreclosure sale. 19 R. C. L. 650 et seq. and Supps.

§ 7755. Comp. Laws, 1913.

Section is remedial and intended not only for benefit of creditor's holding lien subsequent to one being foreclosed, but to prevent sacrifice of debtors property. *Fox v. Nelson*, 30 N. D. 589, 153 N. W. 395.

Second mortgagee may redeem from fourth mortgagee, who redeemed, with 60 days thereafter, although the original year expired, by paying to fourth mortgagee, amount which he paid to redeem, with interest, taxes and assessments with interest, without paying amount of fourth mortgage. *Bank of Mowbray v. Kelland*, 33 N. D. 382, 157 N. W. 291.

Right of redemption limited to period of one year from day of sale; permissible extension applicable only in case of redemption by redemptioner within a year from day of sale. *State v. Herman*, 36 N. D. 177, 161 N. W. 1017.

Does not require one seeking to redeem from a purchaser at a mortgage foreclosure sale to pay to purchaser in addition to his purchase price amount of a mortgage lien, prior to the one foreclosed. *Leverson v. Olson*, 25 N. D. 624, 142 N. W. 917.

§ 7756. Comp. Laws, 1913.

As to recordation of notices of redemption. *Heitsch v. Minneapolis Threshing Machine Co.* 29 N. D. 94, L.R.A.1915D, 349, 150 N. W. 457.

Applies to redemptioners and not to purchasers. *O'Leary v. Schoenfeld*, 30 N. D. 374, 152 N. W. 679.

Effect of failure of redemptioner to file duplicate of his redemption notice with county register of deeds. *Fox v. Nelson*, 30 N. D. 589, 153 N. W. 395.

Right of redemption limited to period of one year from day of sale; permissible extension applicable only in case of redemption by a redemptioner within a year from day of sale. *State v. Herman*, 36 N. D. 177, 161 N. W. 1017.

See also *Security State Bank v. Kramer*, — N. D. —, 198 N. W. 679.

§ 7757. Comp. Laws, 1913

Upon expiration of period of redemption, full beneficial ownership of debtor

passes to purchaser at execution sale; execution of sheriff's deed being merely a ministerial act required to complete formal transfer of legal title. *State v. Herman*, 36 N. D. 177, 161 N. W. 1017.

See also *Fox v. Nelson*, 30 N. D. 589, 153 N. W. 395; *Security State Bank v. Kramer*, — N. D. —, 198 N. W. 679.

**§ 7758. Redemption; filing of certificate.** In no case shall the debtor be required to pay more to effect a redemption than the purchase price with eight per cent interest from the day of sale and all taxes and assessments paid with eight per cent interest thereon from the date of payment, notwithstanding the fact that he seeks to redeem from the redemptioner. If the debtor redeems, the effect of the sale is terminated and he is restored to his estate. Upon a redemption by the debtor the person to whom the payment is made must execute and deliver to him a certificate of redemption acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the register of deeds of the county in which the property is situated, and the register of deeds must note the record thereof in the margin of the record of the certificate of sale. In case the debtor redeems from a redemptioner who has to effect his redemption paid liens on the property, other than for taxes or assessments, the redemptioner shall be subrogated to all the rights of the former holders of such liens, and the filing of written notices of such redemptions as required by section 7756 shall constitute notice of the rights of such redemptioner in and to all the liens so held by him as equitable assignee as fully as if formal written assignments thereof had been recorded. All the statutes relating to redemptions from execution sales shall govern sales on mortgage foreclosure and these provisions shall apply to all sales hereafter made. [Laws 1917, ch. 109, § 2; Laws 1915, ch. 223, § 2.]

*Fox v. Nelson*, 30 N. D. 589, 153 N. W. 395; *Security State Bank v. Kramer*, — N. D. —, 198 N. W. 679.

Executions, 23 C. J. pp. 718-719 §§ 736-737, p. 723 § 745, p. 728 § 754; Mortgages 27 Cyc. 1825, 1827-1828, 1835, 1865-1867.

Effect of redemption from mortgage foreclosure sale. 19 R. C. L. 565 and Supps.

Redemption from execution sale. 10 R. C. L. 1351 et seq.

§§ 7759, 7760. Comp. Laws, 1913.

*Security State Bank v. Kramer*, — N. D. —, 198 N. W. 679.

§ 7761. Comp. Laws, 1913.

*Farm Mortg. Loan Co. v. Pettet*, — N. D. —, 36 A.L.R. 598, 200 N. W. 497.

**§ 7762. Debtor's right to possession, rents, etc., during redemption period.** The debtor under an execution or foreclosure sale of his property shall be entitled to the possession, rents, use and benefit of the property sold from the date of such sale until the expiration of the period of redemption. [Laws 1919, ch. 132, § 1.]

Purchaser at foreclosure sale, under foreclosure by advertisement, is entitled to rents or value of use and occupation as though foreclosed by action, whether premises are in possession of mortgagor or tenant of mortgagor. *Geo. B. Clifford & Co. v. Henry*, 40 N. D. 604, 169 N. W. 508.

Purchaser at foreclosure sale, of farm lands operated under a contract reserving to the owner title and possession to a certain amount of grain, acquires the rights that the owner had in the grain. *Warren v. Olson*, 46 N. D. 604, 169 N. W. 508.

Purchaser at sale under execution is entitled to rents from the time of sale. *F. A. Patrick & Co. v. Knapp*, 27 N. D. 100, 145 N. W. 598.

Applies only to mortgages executed and delivered, after enactment of this chapter, is inapplicable to mortgages given prior thereto. *First Nat. Bank v. Bovey, Shute & Jackson*, — N. D. —, 191 N. W. 765.

Mortgagor entitled to use and benefit of mortgaged property until expiration of period of redemption, and equity cannot deprive him of same, by appointing

receiver. *Farm Mortgage Loan Co. v. Pettet*, — N. D. —, 36 A.L.R. 598, 200 N. W. 497.

See also *Griffith v. Fox*, 32 N. D. 650, 156 N. W. 239; *Bovey-Shute Lumber Co. v. Thomas*, 42 N. D. 12, 171 N. W. 859; *Sylvester v. Mackey*, 48 N. D. 256, 183 N. W. 1019; *First Nat. Bank v. Bovey, Shute & Jackson*, — N. D. —, 191 N. W. 765; *Farm Mortgage Loan Co. v. Pettet*, — N. D. —, 36 A.L.R. 598, 200 N. W. 497; *Warren v. Olson*, 46 N. D. 203, 180 N. W. 529.

Executions, 23 C. J. p. 775 § 827, p. 776 § 831; *Mortgages*, 27 Cyc. 1331, 1338.

Right of debtor to rents and profits of his property sold on mortgage foreclosure. 19 R. C. L. 650.

#### ARTICLE 6.—THE SHERIFF'S DEED.

§ 7763. *Comp. Laws, 1913.*

Upon expiration of period of redemption, full beneficial ownership of debtor passes to purchaser at execution sale; execution of sheriff's deed being merely a ministerial act required to complete formal transfer of legal title. *State v. Herman*, 36 N. D. 177, 161 N. W. 1017.

#### ARTICLE 7.—VALIDATING EXECUTION SALES.

§ 7765. *Comp. Laws, 1913.*

*Jordan v. Donovan*, 42 N. D. 641, 172 N. W. 838.

#### ARTICLE 8.—GENERAL PROVISIONS.

§ 7770. *Comp. Laws, 1913.*

Proceeding for amercement of sheriff may be instituted by motion in original case in which execution is issued, without a separate action or trial by jury. *A. Solberg & Co. v. Rettinger*, 40 N. D. 1, 168 N. W. 572.

Section is imperative and penal in its terms, and grants no discretion to court. Showing of damages or lack of damages on account of failure to levy or make return of execution within time prescribed by statute is irrelevant and immaterial. *Lee v. Dolan*, 34 N. D. 449, 158 N. W. 1007.

Proceeding will not lie for amercement of sheriff, for failure to perform services for which he is entitled to his fees in advance, and where such fees were demanded and not paid. *Northern Drug Co. v. Kunkel*, 37 N. D. 285, 163 N. W. 832.

### CHAPTER 13.

#### PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

§ 7782. *Comp. Laws, 1913.*

Section has no application to exemption which may be claimed by wage earner in garnishment suit ancillary to action to enforce collection of bill for groceries and provisions. *Radke v. Padgett*, — N. D. —, 192 N. W. 97.

### CHAPTER 14.

#### OF THE COSTS AND DISBURSEMENTS IN CIVIL ACTIONS.

§ 7789. *Comp. Laws, 1913.*

Attorney, who made contract for contingent fee in personal injury action, held entitled to reasonable value of services performed or actual damages sustained, where he was dismissed, and case was later settled out of court. *Simon v. Chicago, M. & St. P. R. Co.* 45 N. D. 251, 177 N. W. 107.

See also *Swallow v. First State Bank*, 35 N. D. 323, 160 N. W. 137; *Moran v. Simpson*, 42 N. D. 575, 173 N. W. 769.

§ 7790. *Comp. Laws, 1913.*

Does not cover disbursements in making transcript on an appeal. *Investors' Syndicate v. Pugh*, 25 N. D. 490, 142 N. W. 919.

Cost fee or charge does not belong to former trial; nor to former appeal, but to successful party on second trial, the costs being costs of new trial and not of former appeal. *Corbett v. Great Northern R. Co.* 28 N. D. 136, 148 N. W. 4.

See also *Swallow v. First State Bank*, 35 N. D. 323, 160 N. W. 137.

§ 7791. Comp. Laws, 1913.

Stipulation in promissory note for attorney fees in case of default is contrary to public policy and void, and will not be enforced by courts of this jurisdiction, even though the instrument was executed in a foreign state, where such provision is valid. *Continental Supply Co. v. Syndicate Trust Co.* — N. D. —, 202 N. W. 404.

§ 7792. Comp. Laws, 1913.

Answer, in action to have deed declared a mortgage, and for an accounting, admitting that deed is a mortgage, and asking the court to determine amount due thereon, is not "an action or proceeding" as used in this section. *McCurdy v. Boring*, 27 N. D. 1, 146 N. W. 730.

See also *Dahlund v. Lorentzen*, 30 N. D. 275, 152 N. W. 684; *Powers Elevator Co. v. Stolz*, 33 N. D. 628, 157 N. W. 693; *Smith v. Bradley*, 27 N. D. 613, 147 N. W. 784.

§ 7793. Comp. Laws, 1913.

Costs in disbarment proceedings. *Re Kirby*, 10 S. D. 416, 73 N. W. 908, 39 L.R.A. 859.

Disbursements in making transcript of record on an appeal, is allowable. *Investors' Syndicate v. Pugh*, 25 N. D. 490, 142 N. W. 919.

See also *Swallow v. First State Bank*, 35 N. D. 323, 160 N. W. 137; *Geo. B. Clifford & Co. v. Henry*, 40 N. D. 604, 169 N. W. 508; *State ex rel. Linder v. Equity Co-op. Exch.* 44 N. D. 299, 175 N. W. 634; *Erickson v. Backman*, — N. D. —, 191 N. W. 343.

§ 7794. Comp. Laws, 1913.

In action in district court on an account, on which there is due, \$50 or more, which plaintiff recovers, he is entitled to costs, even though the award equals or exceeds that amount by inclusion of interest. *Weber Chimney Co. v. Riley*, 39 N. D. 487, 167 N. W. 753.

See also *Butler Bros. v. Schmidt*, 32 N. D. 360, 155 N. W. 1092; *Paulson v. Sorenson*, 33 N. D. 488, 157 N. W. 473; *Powers Elevator Co. v. Stolz*, 33 N. D. 628, 157 N. W. 693; *Swallow v. First State Bank*, 35 N. D. 323, 160 N. W. 137.

§ 7795. Comp. Laws, 1913.

*Powers Elevator Co. v. Stolz*, 33 N. D. 628, 157 N. W. 693; *Swallow v. First State Bank*, 35 N. D. 323, 160 N. W. 137.

§ 7796. Comp. Laws, 1913.

*Swallow v. First State Bank*, 35 N. D. 323, 160 N. W. 137.

§ 7797. Comp. Laws, 1913.

Upon dismissal of case in justice's court for want of jurisdiction, upon motion made or demurrer interposed by defendant, he is entitled to judgment for costs. *Scandinavian American Bank v. Hall*, 37 N. D. 293, 164 N. W. 22.

See also *Swallow v. First State Bank*, 35 N. D. 323, 160 N. W. 137.

§ 7798. Comp. Laws, 1913.

*Swallow v. First State Bank*, 35 N. D. 323, 160 N. W. 137.

§ 7799. Comp. Laws, 1913.

*Weber Chimney Co. v. Riley*, 39 N. D. 487, 167 N. W. 753.

§ 7800. Comp. Laws, 1913.

*Swallow v. First State Bank*, 35 N. D. 323, 160 N. W. 137.

§ 7802. Comp. Laws, 1913.

Improper taxation of costs remedied by motion to have judgment modified, and not by appeal. *Re Kirby*, 10 S. D. 414, 73 N. W. 907; *Sorenson v. Donahoe*, 12 S. D. 204, 80 N. W. 179.

See also *McCarty v. Goodsman*, 40 N. D. 220, 168 N. W. 721.

- § 7804. Comp. Laws, 1913.  
Swallow v. First State Bank, 35 N. D. 323, 160 N. W. 137.
- § 7807. Comp. Laws, 1913.  
State ex rel. Linde v. Equity Co-op. Exch. 44 N. D. 299, 175 N. W. 634.
- § 7810. Comp. Laws, 1913.  
Upon change of venue, county to which case is sent may recover disbursement and other necessary expenses incident to trial from county in which action was commenced. Pierce County v. McHenry County, 35 N. D. 239, 159 N. W. 841.
- § 7812. Comp. Laws, 1913.  
Not error for trial court to refuse to dismiss action for failure of nonresident plaintiff to furnish security for costs, where motion is made at the opening of trial, and without other notice. Bergh v. Wyman Farm Land & Loan Co. 30 N. D. 158, 152 N. W. 281.
- § 7813. Comp. Laws, 1913.  
Bergh v. John Wyman Farm Land & Loan Co. 30 N. D. 158, 152 N. W. 281.
- § 7814. Comp. Laws, 1913.  
Not error for trial court to refuse to dismiss action for failure of nonresident plaintiff to furnish security for costs, where motion is made at opening of trial and without other notice. Bergh v. Wyman Farm Land & Loan Co. 30 N. D. 158, 152 N. W. 281.  
See also Naderhoff v. Geo. Benz & Sons, 25 N. D. 165, 47 L.R.A.(N.S.) 853, 141 N. W. 501.

## CHAPTER 15.

## OF APPEALS IN CIVIL ACTIONS.

- § 7818. Comp. Laws, 1913.  
Larson v. Dutton, 40 N. D. 230, 168 N. W. 625.
- § 7820. Comp. Laws, 1913.  
Appeal to supreme court from an order of district court, must be taken within 60 days after notice, even before order is filed with clerk of district court. Lake Grocery Co. v. Chiostrri, 31 N. D. 616, 154 N. W. 533; More v. Western Grain Co. 31 N. D. 369, 153 N. W. 976.  
An appeal may be taken from default judgment. Hope Nat. Bank v. Smith, 38 N. D. 425, 165 N. W. 550.  
Appeal taken from judgment more than six months after notice of entry of such judgment has been served, confers no jurisdiction on appellate court to consider the case except to dismiss same. National Union F. Ins. Co. v. Martin, 41 N. D. 393, 170 N. W. 880.  
Motion to dismiss appeal must be granted where notice of appeal, undertaking, and specification of errors are served on respondent and filed with clerk of district court more than six months after entry of judgment. Embden State Bank v. Schulze, — N. D. —, 193 N. W. 481.  
Appeal from a judgment must be taken within six months from date of notice of entry thereof. Carson State Bank v. Grant Grain Co. — N. D. —, 197 N. W. 146.  
See also Ross v. Kenmare, 27 N. D. 487, 146 N. W. 897; Grove v. Morris, 31 N. D. 8, 151 N. W. 779; Gohl v. Bechtold, 37 N. D. 141, 163 N. W. 725; Woodward v. Blake, 38 N. D. 38, L.R.A.1918A, 88, 164 N. W. 156.
- § 7821. Comp. Laws, 1913.  
Party whose interest will not be affected is not an adverse party. Sutton v. Min. Co. 12 S. D. 576. 82 N. W. 188; Prescott v. Brooks, 11 N. D. 93, 90 N. W. 129.  
See also McCaull-Webster Elevator Co. v. Adams, 39 N. D. 259, L.R.A.1918D, 1036, 167 N. W. 330; Wilson v. Kryger, 26 N. D. 77, 51 L.R.A.(N.S.) 760, 143 N. W. 764.

- § 7822. Comp. Laws, 1913.  
Clerk attaches the files to order denying vacation of judgment, and certifies to the record, and transmits the same as appeal record. *Harris v. Hessin*, 30 N. D. 33, 151 N. W. 4.  
See also *Solon v. O'Shea*, 45 N. D. 362, 177 N. W. 757; *Dow v. Lillie*, 26 N. D. 512, L.R.A.1915D, 754, 144 N. W. 1082.
- § 7823. Comp. Laws, 1913.  
Undertaking can only be waived in writing. *McConnell v. Spicker*, 13 S. D. 406, 83 N. W. 435.
- § 7824. Comp. Laws, 1913.  
*Wilson v. Kryger*, 26 N. D. 77, 51 L.R.A.(N.S.) 760, 143 N. W. 764.
- § 7825. Comp. Laws, 1913.  
Judgment, in action for foreclosure of vendor's lien on real property, rendered in personal form against defendant, coupled with usual decree of foreclosure directing sale, is not "a judgment directing payment of money." *Schafer v. Olson*, — N. D. —, 132 N. W. 645.  
As to sufficiency of undertaking on appeal. *Fargo Silo Co. v. Pioneer Stock Co.* 41 N. D. 345, 170 N. W. 626; *Merchants State Bank v. Beighle*, — N. D. —, 199 N. W. 592.
- § 7826. Comp. Laws, 1913.  
*Workman v. Salzer Lumber Co.* — N. D. —, 199 N. W. 769.
- § 7828. Comp. Laws, 1913.  
Defines supersedeas bond required in foreclosure proceedings. *Schafer v. Olson*, — N. D. —, 132 N. W. 645.  
Giving twenty-four hours notice to adverse party of intention to apply for order fixing amount of supersedeas bond, not jurisdictional requirement. *Beyer v. Robinson*, 32 N. D. 560, 156 N. W. 203.
- § 7829. Comp. Laws, 1913.  
Deficiency judgment, in pursuance of section, held correct. *Hilmen v. Bryn*, 39 N. D. 211, 167 N. W. 219.
- § 7831. Comp. Laws, 1913.  
*Hilmen v. Bryn*, 39 N. D. 211, 167 N. W. 219; *Schafer v. Olson*, — N. D. —, 132 N. W. 645.
- § 7832. Comp. Laws, 1913.  
Application to supreme court for order fixing amount of supersedeas bond denied where similar application is pending before district court. *Langer v. Courier News*, 48 N. D. 280, 183 N. W. 1009.  
See also *State ex rel. Lemke v. Union Light, Heat & P. Co.* 47 N. D. 402, 182 N. W. 539.
- § 7833. Comp. Laws, 1913.  
*Lorentzen v. Stiles*, 48 N. D. 1201, 189 N. W. 249.
- § 7836. Comp. Laws, 1913.  
Section does not give an intending appellant right to supersede a portion of judgment or decree that is executed prior to appeal. *Random v. Random*, 37 N. D. 287, 163 N. W. 833.  
See also *Langer v. Courier News*, 48 N. D. 280, 183 N. W. 1009; *Kennelly v. Northern P. R. Co.* 48 N. D. 685, 186 N. W. 548; *Beyer v. Robinson*, 32 N. D. 560, 156 N. W. 203.
- § 7837. Comp. Laws, 1913.  
*Weist v. Farmers' State Bank*, 30 N. D. 548, 153 N. W. 283; *W. T. Rawleigh Medical Co. v. Laursen*, 25 N. D. 63, 48 L.R.A.(N.S.) 198, 141 N. W. 64.
- § 7839. Comp. Laws, 1913.  
*Thornhill v. Olson*, 26 N. D. 27, 142 N. W. 913.
- § 7840. Comp. Laws, 1913.  
Upon motion to dismiss appeal, court will in furtherance of justice enlarge

time for service of statement and specification upon showing of good cause. *Wilson v. Kryger*, 26 N. D. 77, 51 L.R.A.(N.S.) 760, 143 N. W. 764.

Where justification in appeal bond is defective, appellant may be allowed to either amend the undertaking or to file a new bond in supreme court. *W. T. Rawleigh Medical Co. v. Laursen*, 25 N. D. 63, 48 L.R.A.(N.S.) 198, 141 N. W. 64.

See also *Beyer v. Robinson*, 32 N. D. 560, 156 N. W. 203; *Arendts v. Best*, 38 N. D. 389, 165 N. W. 500; *Kennelly v. Northern P. R. Co.* 48 N. D. 685, 186 N. W. 548.

§ 7841. Comp. Laws, 1913.

Does not provide for appeal from order of district court allowing amended complaint to be filed. *Marquart v. Schaffner*, 30 N. D. 342, 152 N. W. 660; *Holobuck v. Schaffner*, 30 N. D. 344, 152 N. W. 660.

Judgment or order quashing writ of habeas corpus and awarding possession and custody of minor child to one of contending parties, is a final order, affecting substantial rights and is appealable. *Larson v. Dutton*, 40 N. D. 230, 168 N. W. 625.

Order overruling motion for judgment based on findings of jury on special verdict submitted and granting new trial, appealable as affecting substantial rights. *Boulger v. Northern P. R. Co.* 41 N. D. 316, 171 N. W. 632.

Order sustaining exceptions to and suppressing a deposition, not appealable. *Kennelly v. Northern P. R. Co.* 41 N. D. 395, 170 N. W. 868.

Order refusing to require party to give security for cost, not appealable. *Ostlund v. Ecklund*, 42 N. D. 83, 171 N. W. 857.

Order vacating judgment previously entered, appealable. *Ellis v. George*, 43 N. D. 408, 175 N. W. 623.

Party who was to be substituted for defendant against whom action was commenced, held entitled to new trial, where verdict was had against both defendants, and where he failed to appeal. *Brown v. Minneapolis, St. P. & S. Ste. M. R. Co.* 46 N. D. 582, 180 N. W. 792.

Order dissolving order enjoining statutory proceedings for foreclosure of land contract is appealable. *Rourke v. Hoover Grain Co.* 48 N. D. 247, 183 N. W. 1005.

Order overruling demurrer to one of several counterclaims is appealable. *Ripley v. McCutcheon*, 48 N. D. 1130, 189 N. W. 104.

Order overruling motion for directed verdict and denying motion for judgment notwithstanding the disagreement of the jury, not appealable. *Bowen v. Montana L. Ins. Co.* — N. D. —, 190 N. W. 314.

Order denying motion for judgment on pleadings held not appealable. *Wall v. First Nat. Bank*, — N. D. —, 193 N. W. 51.

An order for judgment is not appealable. *Olness v. Duffy*, — N. D. —, 194 N. W. 113.

Appeal does not lie from order denying jury trial until after trial of equitable issue. *Gulbro v. Roberts*, 43 N. D. 455, 175 N. W. 616.

Right of appeal from findings and conclusions of trial court, interlocutory in their nature, not sustainable under subdivision 1. *Dean v. Smith*, — N. D. —, 197 N. W. 589.

Order denying motion to vacate judgment, upon grounds appealing to discretion of court, is appealable. *Boyd v. Lemmon*, — N. D. —, 189 N. W. 681.

Order striking amended complaint for files is an order involving merits of an action, and is appealable. *Stimson v. Stimson*, 30 N. D. 78, 152 N. W. 132.

Order setting aside stipulation for dismissal of an action, is appealable as one involving "the merit of an action or some part thereof." *Lilly v. Haynes Co-op. Coal Min. Co.* 48 N. D. 937, 188 N. W. 38.

Restraining order enjoining State Treasurer from depositing state funds and funds of state institutions in Bank of North Dakota, held not appealable. *State ex rel. Lemke v. District Ct.* — N. D. —, 186 N. W. 381.

Whether, after expiration of one year from date of order granting new trial action should be dismissed or retained for trial, is within discretion of trial court. *Harris v. Hessin*, 46 N. D. 330, 13 A.L.R. 1147, 179 N. W. 698.

Order refusing to relieve party from default in preparing and serving statement of case, is final order, involving a substantial right, and appealable. *Rabinowitz v. Crabtree*, 27 N. D. 353, 145 N. W. 1055.

Order overruling an objection to the jurisdiction of a judge to hear and de-

termine a cause, not appealable. *Baird v. Lefor*, — N. D. —, 38 A.L.R. 807, 201 N. W. 997.

Order denying motion non obstante veredicto not appealable, to be reviewable on appeal, such order must be included in or connected with denial of motion for new trial. *Turner v. Crumpton*, 25 N. D. 134, 141 N. W. 209.

Order of district court, confirming an order of county court, in an ancillary administration, refusing to grant petition to administrator to sell certain real estate and transmit proceeds to court for payment of debts, is final, involving substantial rights, and appealable. *Dow v. Lillie*, 26 N. D. 512, L.R.A.1915D, 754, 144 N. W. 1082.

Order refusing to enjoin foreclosure of a mortgage by advertisement, is appealable. *Beiseker v. Svendsgaard*, 28 N. D. 366, 149 N. W. 352.

Appeal from a judgment does not authorize review of order made after judgment denying vacation of such judgment. *Shockman v. Ruthruff*, 28 N. D. 597, 149 N. W. 680.

See also *Kramer v. Heins*, 34 N. D. 507, 158 N. W. 1061; *Steinmueller v. Liebond*, 43 N. D. 460, 175 N. W. 729; *Whitney v. Ritz*, 24 N. D. 576, 140 N. W. 676.

§ 7842. *Comp. Laws, 1913.*

Appeal from judgment, and from order overruling motion for new trial after judgment, not duplicitous. *Hawkins v. Hubbard*, 2 S. D. 631, 51 N. W. 774; *Williams v. Williams*, 6 S. D. 284, 61 N. W. 38.

See also *Morris v. Minneapolis St. P. & S. Ste. M. R. Co.* 32 N. D. 366, 155 N. W. 861; *Kurtz v. Paulson*, 33 N. D. 400, 157 N. W. 305; *McGregor v. Great Northern R. Co.* 42 N. D. 269, 4 A.L.R. 1635, 172 N. W. 841; *Ransom County Farmers Bank v. Cavett*, — N. D. —, 194 N. W. 388; *Shockman v. Ruthruff*, 28 N. D. 597, 149 N. W. 680.

§ 7843. *Comp. Laws, 1913.*

*Morris v. Minneapolis St. P. & S. Ste. M. R. Co.* 32 N. D. 366, 155 N. W. 861; *Lofthouse v. Galesburg State Bank*, 48 N. D. 1019, 188 N. W. 585; *Veum v. Stefferud*, — N. D. —, 196 N. W. 104; *Thornhill v. Olson*, 26 N. D. 27, 142 N. W. 913.

§ 7844. *Comp. Laws, 1913.*

Supreme court has authority, upon appeal from order granting new trial, where entire record is before court, to order judgment in favor of party entitled thereto, pursuant to his motions made therefor. *Thress v. Zemple*, 42 N. D. 599, 9 A.L.R. 1, 174 N. W. 85.

Appellate court has authority upon appeal from a judgment to reverse, affirm or modify it, and if necessary or proper, to order a new trial. *Weigel v. Powers Elevator Co.* — N. D. —, 198 N. W. 121.

See also *Shellburg v. Wilton Bank*, 39 N. D. 530, 167 N. W. 721; *Larson v. Russell*, 45 N. D. 33, 176 N. W. 998; *Thorp v. Thorp*, 46 N. D. 113, 180 N. W. 26; *Voves v. Great Northern R. Co.* 26 N. D. 110, 48 L.R.A.(N.S.) 30, 143 N. W. 760.

§ 7846. **Appeals in cases tried without jury.** On appeal in the supreme court in any action tried by the court, but without a jury, if it appear to the court that any material evidence was excluded, the court may issue a mandate to the trial court to take such evidence without delay and to certify and return it to the supreme court, and all proceedings in the supreme court shall be stayed pending the return of such evidence. A party desiring to appeal from a judgment in any such action, shall cause a statement of the case to be settled within the time and in the manner prescribed by article 8 of chapter 11 of the Compiled Laws of North Dakota for the year 1913, and shall specify therein the questions of fact that he desires the supreme court to review, and all questions of fact not so specified shall be deemed on appeal to have been properly decided by the trial court. Only such evidence as relates to the questions of fact to be reviewed shall be embodied in this statement. But if the appellant shall specify in the statement that he desires to review the entire case, all the evidence and proceedings shall be embodied in the statement. The supreme court shall try anew the question of fact specified in the statement or in the entire case, if the

appellant demands a retrial of the entire case, and shall finally dispose of the same whenever justice can be done without a new trial, and either affirm or modify the judgment or direct a new judgment to be entered in the district court; the supreme court may, however, if it deem such course necessary to the accomplishment of justice, order a new trial of the action. In actions tried under the provisions of this section, failure of the court to make findings upon all the issues in the case shall not constitute a ground for granting a new trial or reversing the judgment; provided that the provisions of this section shall not apply to actions or proceedings properly triable with a jury. [Laws 1919, ch. 8, § 1.]

**Explanatory note.** Article 8 of chapter 11 of the Compiled Laws of 1913 referred to in the preceding section, is article 8 of chapter 11 of the Code of Civil Procedure.

Applies to equity cases tried by jury, wherein appellant desires supreme court to retry some or all issues of fact; party has right to appeal from judgment without demanding retrial of any issue of fact. *Christ v. Johnstone*, 25 N. D. 6, 140 N. W. 678.

In appeal in which trial de novo is asked, supreme court is not bound by findings of trial court either as to law or facts of case. *Englert v. Dale*, 25 N. D. 587, 142 N. W. 169.

Does not apply where district court calls a jury in an equity case for advisory purposes, nor does supreme court try such cases anew on appeal. Section applies to cases tried in district court without a jury. *Merritt v. Adams County Land & Invest. Co.* 29 N. D. 496, 151 N. W. 11; *Emery v. First Nat. Bank*, 32 N. D. 575, 156 N. W. 105.

Statement in notice of appeal reciting that appellant demands trial de novo of the action in the supreme court, is insufficient. *State Bank v. Hileman*, 31 N. D. 417, 154 N. W. 532.

New trial will be ordered in district court, where trial de novo in supreme court is asked, and where testimony in record is in vague, indefinite and uncertain condition. *Williams County State Bank v. Gallagher*, 35 N. D. 24, 159 N. W. 80; *Drivdahl v. International Harvester Co.* 43 N. D. 284, 174 N. W. 817.

Trial de novo in supreme court not permitted, in action properly triable by jury, even though jury was waived. *Novak v. Lovin*, 33 N. D. 424, 157 N. W. 297.

Supreme court will order new trial when such cause is necessary to the accomplishment of justice. *Sutherland v. Noggle*, 35 N. D. 538, 160 N. W. 1000.

Judgment, awarding defendant divorce on his counterclaim, and awarding plaintiff certain property, is upon appeal, open to review, and cause is subject to trial de novo in supreme court. *Hoellinger v. Hoellinger*, 38 N. D. 636, 166 N. W. 519.

Duty of attorneys to refrain from encumbering record with incompetent, immaterial and irrelevant testimony. *Druey v. Baldwin*, 41 N. D. 473, 172 N. W. 663.

In trials de novo in supreme court, term "judgment reversed," used in opinion of court determining the case, means a final disposition thereof unless new trial is ordered or may be granted. *Orth v. Procise*, 42 N. D. 149, 171 N. W. 861.

Section applies to judgments only. *Dale v. Duffy*, 44 N. D. 33, 176 N. W. 97.

In trial by court, insufficiency of evidence not a ground for new trial. *Bull v. Smith*, 45 N. D. 613, 178 N. W. 426.

Upon appeal, supreme court reviews the proper testimony in record, and findings of trial court are presumed to be based upon proper testimony in record. *Roberge v. Roberge*, 46 N. D. 402, 180 N. W. 15.

In action tried to court without jury, it is duty of court upon objection to rule upon evidence offered. *Peoples State Bank v. Steenson*, — N. D. —, 190 N. W. 74.

Where record is remanded to lower court, duty of lower court to comply with mandate of supreme court and where supreme court directs that judgment be modified, duty of trial court to modify only as directed. *Colter v. Dill*, — N. D. —, 193 N. W. 662.

Foreclosure suit with advice or a verdict not an action "tried without a jury" authorizing new trial on appeal. *Minneapolis Threshing Machine Co. v. Huncovsky*, — N. D. —, 194 N. W. 830.

Whether findings of trial court, sustained by evidence, not reviewable by

supreme court, unless appellant has demanded, trial anew. *Lunde v. Irish*, — N. D. —, 195 N. W. 825.

Appellate court on trial de novo must review the record presented, and find facts for itself, giving some appreciable weight to determination of trial court. *Doyle v. Doyle*, — N. D. —, 202 N. W. 860.

Action to declare payment preference under bankruptcy law, not triable de novo on appeal. *McCormick v. Union Farmers' State Bank*, 48 N. D. 834, 187 N. W. 421.

See also *Hughes v. Magoris*, 27 N. D. 479, 147 N. W. 94; *Severtson v. Peoples*, 28 N. D. 372, 148 N. W. 1054; *Thorp v. Thorp*, 46 N. D. 113, 180 N. W. 26; *Gotchy v. North Dakota Workmen's Compensation Bureau*, — N. D. —, 194 N. W. 663; *Simon v. Chicago, M. & St. P. Ry.* — N. D. —, 194 N. W. 706; *Larson v. Dutton*, 40 N. D. 230, 168 N. W. 625; *Ellis v. George*, 43 N. D. 408, 175 N. W. 623; *Patterson Land Co. v. Lynn*, 44 N. D. 251, 175 N. W. 211; *Klimpel v. Hayko*, 47 N. D. 416, 182 N. W. 535.

Appeal and Error, 3 C. J. p. 1370, § 1519, 4 C. J. p. 186, § 1789, pp. 192-199, §§ 1798-1801, pp. 330-340, §§ 1955-1971, p. 652, § 2542, pp. 725-731, §§ 2645-2661, p. 1059, § 3044, pp. 1112-1113, §§ 3093-3094, p. 1193, § 3232.

Statement of case on appeal. 2 R. C. L. 158 and Supps.

Review of questions of fact by appellate court. 2 R. C. L. 193 et seq. and Supps.

Rendering of final judgment by appellate court. 2 R. C. L. 280 et seq. and Supps.

**§ 7847. Printing of abstracts not required; preparation of brief, filing thereof.** Upon any appeal to the supreme court it shall not be necessary to file or use any printed abstract or statement of the case, but in lieu thereof, the appellant shall cause to be filed in the lower court and returned to the supreme court, with the other record, two copies in addition to the original, of the statement of the case as settled and certified. The supreme court shall prescribe by rule or regulation the manner in which, and the time within which, briefs shall be prepared and filed, and for the allowance of costs in respect to the same. [Laws 1919, ch. 7, § 1.]

*Chaffee v. Edinger*, 29 N. D. 537, 151 N. W. 223; *Morris v. Minneapolis, St. P. & S. Ste. M. R. Co.* 32 N. D. 366, 155 N. W. 861.

Appeal and Error, 3 C. J. pp. 1437-1438, §§ 1602-1603, 4 C. J. p. 369, §§ 2030-2031.

Filing of briefs. 2 R. C. L. 176 et seq. and Supps.

**§ 7849. Comp. Laws, 1913.**

When appellant fails to serve and file abstract in time for next term, but no motion to dismiss appeal is made on that ground at that term, court may excuse such failure upon proper showing at subsequent term. *W. T. Rawleigh Medical Co. v. Laursen*, 25 N. D. 63, 48 L.R.A.(N.S.) 198, 141 N. W. 64.

## CHAPTER 15A.

### WRITS OF ERROR.

*Larson v. Dutton*, 40 N. D. 230, 168 N. W. 625.

**§ 7849a1. Authority to prescribe rules as to.** The supreme court of the state of North Dakota shall have authority to prescribe rules for the issuance of writs of error to inferior courts of this state, to enforce the due administration of justice in all matters within its jurisdiction. [Laws 1917, ch. 225, § 1.]

Appeal and Error, 3 C. J. pp. 300-314, §§ 4-27.

Procedure to obtain writ of error. 2 R. C. L. 101 et seq. and Supps.

**§ 7849a2. Same.** The authority of the said supreme court to so provide for writs of error shall be in addition to the provisions of law now existing applicable to appeals. [Laws 1917, ch. 225, § 2.]

Appeal and Error, 3 C. J. pp. 300-314, §§ 4-27.

## CHAPTER 15B.

## CERTIFICATION OF QUESTIONS OF LAW TO SUPREME COURT IN CERTAIN CASES.

Supreme court has no jurisdiction on certified questions not ruled on by court below. *Guilford School Dist. v. Dakota Trust Co.* 46 N. D. 307, 178 N. W. 727.

**§ 7849b1. Halting proceeding pending certification.** Where any cause is at issue, civil or criminal, in any district court or county court with increased jurisdiction, in this state and the issue of the same will depend principally or wholly on the construction of the law applicable thereto and such construction or interpretation is in doubt and vital, or of great moment in the cause, the judge of any such court may, on the application of the attorney or attorneys for plaintiff or defendant in a civil case, and upon the application of the attorney for the plaintiff and defendant in a criminal cause, halt all proceedings until such question or questions shall have been certified to the Supreme Court and it or they have been determined. [Laws 1919, ch. 2, § 1.]

Does not contemplate advisory opinions to trial court. Questions certified must be for benefit of only parties to action. *Ullman v. Campbell*, — N. D. —, 199 N. W. 482.

To confer jurisdiction upon supreme court, question certified must be such that determination in cause will depend upon construction of law applicable to question. *Union Insurance Agency of Minot v. Insurance Co. of North America*, — N. D. —, 197 N. W. 225.

Certification of question held to present nothing for exercise of supreme court's jurisdiction. *Clark v. Wildrose Special School Dist.* 45 N. D. 497, 178 N. W. 730.

Certified questions must present doubtful construction of law, distinctly stated, and must not involve examination of evidence and determination of sufficiency thereof. *Malherek v. Fargo*, 48 N. D. 1109, 189 N. W. 245; *Stutsman County v. Dakota Trust Co.* 45 N. D. 451, 178 N. W. 725; *Harrington v. Eggen*, — N. D. —, 197 N. W. 136.

Appeal and Error, 3 C. J. p. 989, § 912, p. 997, § 928; Criminal Law, 17 C. J. p. 19, § 3272.

Certified questions. 2 R. C. L. 301 et seq. and Supps.

**§ 7849b2. Discretion as to.** In all actions both civil and criminal, the matter of certifying questions shall be in the sound discretion of the trial judge, and the supreme court may refuse to consider the same if it or they are frivolous, or are merely interlocutory in their nature, or otherwise not of sufficient importance to determine the issues in the cause at bar. [Laws 1919, ch. 2, § 2.]

*Clark v. Wildrose Special School Dist. No. 90*, 47 N. D. 297, 182 N. W. 307.

Appeal and Error, 3 C. J. p. 989, § 912, p. 997, § 928; Criminal Laws, 17 C. J. p. 19, § 3272.

**§ 7849b3. Record; briefs.** In all causes certified under this act so much of the record as may be necessary to a clear understanding of the pending issues shall be sent to the supreme court, and briefs as provided in other matters shall be made and filed and oral arguments, if desired, shall be heard in all cases. In criminal causes the record shall be certified at the expense of the state or county in case of indigent defendants. [Laws 1919, ch. 2, § 3.]

Appeal and Error, 3 C. J. p. 1407, § 1582; Criminal Law, 17 C. J. p. 186, § 3491.

## CHAPTER 18.

## ADMISSION OR INSPECTION OF WRITINGS.

§ 7861. Comp. Laws, 1913.

*Kernhamp v. Schulz*, 44 N. D. 20, 176 N. W. 108.

## CODE OF CIVIL PROCEDURE.

### CHAPTER 19.

#### EXAMINATION OF PARTIES.

**§ 7864.** Comp. Laws, 1913.

Where there is a reference under this section, to examine a party to the suit, costs may be taxed under § 7793. *Geo. B. Clifford & Co. v. Henry*, 40 N. D. 604, 169 N. W. 508.

**§§ 7865-7869.** Comp. Laws, 1913.

*Ryding v. Hanson*, 30 N. D. 99, 152 N. W. 120.

**§ 7870.** Comp. Laws, 1913.

One directing business affairs of a corporation according to policy adopted by its board, and has charge of principal office, and custody and control of its books, is a "managing agent." *Huether v. McCaull-Dinsmore Co.* — N. D. —, 204 N. W. 614.

See also *Asch v. Washburn Lignite Coal Co.* 48 N. D. 734, 186 N. W. 757; *Ryding v. Hanson*, 30 N. D. 99, 152 N. W. 120; *Knapp v. Minneapolis, St. P. & S. Ste. M. R. Co.* 33 N. D. 291, 156 N. W. 1019; *State v. Borstad*, 27 N. D. 533, 147 N. W. 380.

### CHAPTER 20.

#### WITNESSES AND EVIDENCE.

- ARTICLE 1. WHO MAY BE EXCLUDED, § 7871.**  
**2. MEANS OF PRODUCING WITNESSES, §§ 7873-7877a.**  
**3. MODE OF TAKING THE TESTIMONY OF WITNESSES, § 7883.**  
**4. AFFIDAVIT, § 7887.**  
**5. DEPOSITIONS, §§ 7889, 7890.**  
**6. OFFICERS WHO MAY TAKE DEPOSITIONS, §§ 7891, 7894.**  
**7. MANNER OF TAKING AND AUTHENTICATING DEPOSITIONS, §§ 7895-7905.**  
**8. EXCEPTIONS TO DEPOSITIONS, § 7906.**  
**9. BUSINESS RECORDS AS EVIDENCE, § 7909.**  
**10. OF PUBLIC DOCUMENTS, RECORDS, ETC., §§ 7911-7923.**  
**11. PROCEEDINGS TO PERPETUATE TESTIMONY, §§ 7927, 7933a.**  
**12. LAW OF PRESUMPTIVE EVIDENCE, §§ 7935, 7936.**  
**13. SUBJECTS OF WHICH COURTS WILL TAKE JUDICIAL NOTICE, §§ 7937-7938.**

#### ARTICLE 1.—WHO MAY BE EXCLUDED.

**§ 7871.** Comp. Laws, 1913.

Testimony by a party to the action to enforce contract of sale of land with decedent to effect that decedent promised to go to town next day and fix up deal on terms of contract was inadmissible. *Larson v. Larson*, 19 N. D. 160, 23 L.R.A. (N.S.) 849, 121 N. W. 202.

As to admissibility of statements by deceased persons. *Lake Grocery Co. v. Chiostri*, 34 N. D. 386, 158 N. W. 998.

Testimony of wife, given in behalf of party adverse to husband, held properly in evidence, where no objection was made as to her competency to become a witness without his consent. *Evenson v. Nelson*, 39 N. D. 523, 168 N. W. 36.

Maker of promissory note held competent to testify as to true consideration therefor, in action by indorsee, after death of indorser, no representative of his being a party to the action. *First Nat. Bank v. Carroll*, 46 N. D. 62, 179 N. W. 664.

Testimony concerning transactions with deceased admissible where none of parties to action are representatives, heirs, or next of kin of deceased. *Mowry v. Gold Stabeck Co.* 48 N. D. 764, 186 N. W. 865.

Not applicable in proceedings for probate or contest of a will. *Keller v. Reichert*, — N. D. —, 189 N. W. 690.

In action against executor and heirs at law of deceased, testimony of executor concerning transaction with deceased is inadmissible, even though called as an adverse party, where evidence and witness are antagonistic to interests of estate. *Druey v. Baldwin*, 41 N. D. 473, 172 N. W. 663.

In action to determine adverse claim to note, mortgage, and assignment of decedent's property testimony of defendant as to possession of note, mortgage held incompetent. *Williams v. Clark*, 42 N. D. 107, 172 N. W. 825.

Does not authorize introduction of testimony by executrix of deceased's estate, in action against executrix to recover property claimed to be unlawfully held, of conversations held with third persons, outside of presence of surviving husband or wife. *Truman v. Dakota Trust Co.* 29 N. D. 456, 151 N. W. 219.

See also *Ryding v. Hanson*, 30 N. D. 99, 152 N. W. 120; *Sunberg v. Sebelius*, 38 N. D. 413, 165 N. W. 564; *Wehsner v. Kansas City Life Ins. Co.* 45 N. D. 627, 178 N. W. 970; *Roberge v. Roberge*, 46 N. D. 402, 180 N. W. 15; *Anderson v. Overby*, 46 N. D. 631, 180 N. W. 708; *Krapp v. Krapp*, 47 N. D. 308, 181 N. W. 950; *Dexter v. Lichtenwalter*, 48 N. D. 633, 186 N. W. 279; *Brady v. Brady's Estate*, — N. D. —, 194 N. W. 938; *Harris v. Hessin*, 46 N. D. 330, 13 A.L.R. 1147, 179 N. W. 698.

#### ARTICLE 2.—MEANS OF PRODUCING WITNESSES.

##### § 7873. Comp. Laws, 1913.

State ex rel. *Lofthus v. Langer*, 46 N. D. 462, 177 N. W. 408.

§ 7875. **Subpœna; how served.** Subpœnas shall be served either by reading or by a copy (which copy need not contain the name of any other witness), delivered to the witness or left at his usual place of business, as hereinafter provided. When either party to an action shall deposit with the sheriff traveling fees and fees for one day's attendance of any witness, together with a subpœna for such witness, and a written demand that such witness be served by mail, telegraph or telephone, the sheriff shall serve and make return of such subpœna by any one of the following methods:

(1) By registered mail in the manner provided for summoning jurors and making return thereon in section 827 of the compiled laws of North Dakota for the year 1913.

(2) By telegram to the witness, setting forth the subpœna in full. The sheriff shall demand from the telegraph company a service message showing delivery or non-delivery of such telegram, and such service message, if it shows delivery, shall be prima facie evidence of such service, the officer to make return accordingly.

(3) By telephone by reading the subpœna over the telephone to the person to be served. If the person upon whom service is made shall, over the telephone acknowledge his identity to the officer making the service, such acknowledgment shall be prima facie evidence of service and the return shall be made accordingly.

Provided, however, where the party demanding service by mail, telephone or telegraph is a defendant in a criminal action, no deposit of traveling fees or witness fees shall be required.

Where the service is made by mail, telegraph or telephone, the sheriff shall receive in lieu of mileage, per diem and livery the cost of postage, telegrams or telephone calls. In case the witness served by mail, telegraph or telephone shall fail to appear, the sheriff shall return the deposit to the party that made the same. [Laws 1919, ch. 209, § 1.]

Witnesses, 40 Cyc. 2165, 2170.

§ 7877. **Demand of fees in advance.** A witness personally served may demand his traveling fees and fee for one day's attendance when the subpœna is served upon him and if the same is not paid the witness shall not be obliged to obey the subpœna. The fact of such demand and non-payment shall be stated in the return.

A witness served by mail, telephone or telegraph may upon his appearance demand and shall receive from the sheriff his traveling fees and fee for one day's attendance. [Laws 1919, ch. 209, § 2.]

Witnesses, 40 Cyc. 2170.

Witness fees. 28 R. C. L. 662 and Supps.

§ 7877a. **Emergency.** Whereas an emergency exists in that there is now no way to serve subpoenas except by personal service, and whereas, it is necessary for the immediate preservation of public peace, health and safety that immediate relief be given, therefore this act is hereby declared an emergency measure and shall take effect and be in force from and after its passage and approval. [Laws 1919, ch. 209, § 4.]

ARTICLE 3.—MODE OF TAKING THE TESTIMONY OF WITNESSES.

§ 7883. Comp. Laws, 1913.

State ex rel. Lofthus v. Langer, 46 N. D. 462, 177 N. W. 408.

ARTICLE 4.—AFFIDAVIT.

§ 7887. Comp. Laws, 1913.

State ex rel. Lofthus v. Langer, 46 N. D. 462, 177 N. W. 408.

ARTICLE 5.—DEPOSITIONS.

§ 7889. Comp. Laws, 1913.

Jorgenson v. Farmers & M. Bank, 44 N. D. 98, 170 N. W. 894; State ex rel. Lofthus v. Langer, 46 N. D. 462, 177 N. W. 408.

§ 7890. Comp. Laws, 1913.

State ex rel. Lofthus v. Langer, 46 N. D. 462, 177 N. W. 408; Kennelly v. Northern P. R. Co. 48 N. D. 685, 186 N. W. 548.

ARTICLE 6.—OFFICERS WHO MAY TAKE DEPOSITIONS.

§§ 7891, 7894. Comp. Laws, 1913.

State ex rel. Lofthus v. Langer, 46 N. D. 462, 177 N. W. 408.

ARTICLE 7.—MANNER OF TAKING AND AUTHENTICATING DEPOSITIONS.

§ 7895. Comp. Laws, 1913.

State ex rel. Lofthus v. Langer, 46 N. D. 462, 177 N. W. 408.

§ 7899. Comp. Laws, 1913.

Magoffin v. Watros, 45 N. D. 406, 178 N. W. 134.

§ 7900. Comp. Laws, 1913.

Word "transmit," does not mean personal carrying by the officer or sending through the mails, but any means selected by such officer, which will secure safe transfer of document without its being tampered with, is sufficient. O'Leary v. Schoenfeld, 30 N. D. 374, 152 N. W. 679.

§ 7902. Comp. Laws, 1913.

Not error, upon objection properly and timely made, to suppress unauthenticated deposition, taken in foreign state, before an officer not having a seal. De Walt v. Heeren, — N. D. —, 197 N. W. 868.

§ 7904. Comp. Laws, 1913.

Jorgenson v. Farmers & M. Bank, 44 N. D. 98, 170 N. W. 894.

§ 7905. Comp. Laws, 1913.

After trial and filing of briefs, it is improper for party, without action of court or consent of other party, to take, return, and submit in evidence a deposition. Bahnmann v. Lehmann, — N. D. —, 193 N. W. 477.

## ARTICLE 8.—EXCEPTIONS TO DEPOSITIONS.

## § 7906. Comp. Laws, 1913.

Exception to deposition containing certain testimony as to status of account between plaintiff and its agent, held properly sustained, the books of account being the best evidence. *Great Western L. Assur. Co. v. Shumway*, 25 N. D. 269, 141 N. W. 479.

See also *Leach v. Nelson*, — N. D. —, 196 N. W. 755.

## ARTICLE 9.—BUSINESS RECORDS AS EVIDENCE.

## § 7909. Comp. Laws, 1913.

Loose-leaf ledger account for merchandise sold, made under double-entry system from original memoranda of orders taken, held admissible in evidence. *Fargo Mercantile Co. v. Johnson*, 46 N. D. 304, 181 N. W. 953.

In action by persons having special property in certain grain by virtue of a thresher's lien, against elevator company for conversion of grain, admission of memorandum book by plaintiff purporting to show number of bushels of grain threshed held prejudicial error. *Miller v. National Elevator Co.* 32 N. D. 352, 155 N. W. 871.

See also *Farmers' Co-op. Elevator Co. v. Medhus*, 30 N. D. 251, 152 N. W. 352; *Dr. R. D. Eaton Chemical Co. v. Doherty*, 31 N. D. 175, 153 N. W. 966; *Northern Trust Co. v. First Nat. Bank*, 33 N. D. 1, 156 N. W. 212; *Starke v. Stewart*, 33 N. D. 359, 157 N. W. 302; *Weber v. Interstate Business Men's Acci. Asso.* 48 N. D. 307, 16 A.L.R. 1390, 184 N. W. 97; *Minot Flour Mill Co. v. Swords*, 23 N. D. 571, 137 N. W. 828.

## ARTICLE 10.—OF PUBLIC DOCUMENTS, RECORDS, ETC.

## § 7911. Comp. Laws, 1913.

Exemplified copies of a decree setting aside taxes, properly received by trial court. *Leach v. Rolette County*, 29 N. D. 593, 151 N. W. 768.

## § 7916. Comp. Laws, 1913.

Permits introduction in evidence of recorded contract for sale of land, without accounting for nonproduction of original contract. *Farmers' Equity Exch. v. Blum*, 39 N. D. 86, 166 N. W. 822.

## § 7917. Comp. Laws, 1913.

*State v. Kilmer*, 31 N. D. 442, 153 N. W. 1089; *Dickinson v. White*, 25 N. D. 523, 49 L.R.A.(N.S.) 362, 143 N. W. 754.

## § 7918. Comp. Laws, 1913.

*State v. Kilmer*, 31 N. D. 442, 153 N. W. 1089.

## § 7919. Comp. Laws, 1913.

Does not prescribe exclusive method of proving public documents original documents, when properly identified, are best evidence, and the section does not preclude such proof. *Harmening v. Howland*, 25 N. D. 38, 141 N. W. 131.

See also *State ex rel. Ertelt v. Daniels*, 35 N. D. 5, 159 N. W. 17; *State v. Kilmer*, 31 N. D. 442, 153 N. W. 1089; *Weber v. Interstate Business Men's Acci. Asso.* 48 N. D. 307, 16 A.L.R. 1390, 184 N. W. 97.

## § 7922. Comp. Laws, 1913.

Carlisle tables, proper and competent evidence, but introduction not absolutely necessary. *Rober v. Northern P. R. Co.* 25 N. D. 394, 142 N. W. 22.

## § 7923. Comp. Laws, 1913.

Confidential communications by client to attorney inadmissible, although relation has terminated. *Fosston Mfg. Co. v. Lemke*, 44 N. D. 343, 175 N. W. 723.

Object of section is to protect against physicians disclosing condition of patients, particularly when patients are afflicted with diseases which might bring reproach and criticism upon patient, if known. *Booren v. McWilliams*, 26 N. D. 558, 145 N. W. 410.

In prosecution for rape, receiving testimony of physician, who examined accused, at request of sheriff, that accused had venereal disease, held erroneous. *State v. Moore*, — N. D. —, 204 N. W. 341.

## ARTICLE 11.—PROCEEDINGS TO PERPETUATE TESTIMONY.

§ 7927. Comp. Laws, 1913.

Ross v. Cooper, 38 N. D. 173, 164 N. W. 679.

§ 7933a. **Testimony of injured persons.** The testimony of a person injured may be taken and perpetuated in the following manner:

1. The party desiring the perpetuation of such testimony shall issue a written notice specifying the time and place of taking the same, which shall be served upon the party against whom proceedings for damages for such injury is intended to be commenced.

2. The notice shall be served a sufficient time before the day specified therein to allow the intended defendant party time to attend by the usual route of travel, and one day for preparation, exclusive of Sundays and the day of service.

3. The examination may be adjourned from day to day and it shall be unlawful for any person or corporation to prevent or attempt to prevent the taking of such testimony.

4. Such depositions and testimony may be taken before any officer authorized to take depositions and must be written by the officer, or in his presence by the witness or some disinterested person, and must be subscribed to by the witness if the witness is able.

5. Testimony so taken shall be sealed and endorsed with the name of the officer taking same and by him addressed and transmitted to the clerk of the district court in which the contemplated action or proceeding is intended to be commenced. It shall remain under seal until opened by the order of the court, officer or tribunal or at the request of a party to the action or proceeding or his attorney.

6. On the trial of an action brought by any person for the recovery of damages for injury against the party upon whom such notice has been served, or their successors in interest wherein it may be material to establish the facts which such depositions prove or tend to prove. Upon proof of the death of the witness the depositions may be used by either party in the same manner as depositions of other witnesses and may be read in evidence in any stage of the action or proceeding.

7. Such depositions may be taken within or without the state and shall be authenticated in the same manner as the authentication of depositions as provided for in section 7902 of the compiled laws of North Dakota for the year 1913. [Laws 1917, ch. 110, § 1.]

Depositions, 18 C. J. pp. 607-609, §§ 4-9, p. 611, §§ 11-12, p. 615, § 18, p. 617, § 21, pp. 619-620, §§ 24-25, p. 630, § 61, pp. 660-672, §§ 147-181, pp. 680-681, §§ 200-202, pp. 695-799, §§ 226-241, pp. 712-717, §§ 278-299, pp. 741-749, §§ 342-374.

Notice of taking deposition. 8 R. C. L. 1152 et seq. and Supps.

Reduction of testimony to writing. 8 R. C. L. 1154.

Death of witness after giving deposition. 8 R. C. L. 1137 and Supps.

Who may take depositions. 8 R. C. L. 1142, 1143.

## ARTICLE 12.—LAW OF PRESUMPTIVE EVIDENCE.

§ 7935. Comp. Laws, 1913.

Receipt containing recital "Received of a full settlement of contract made by a" for certain real estate, is open to explanation and proof, and is not conclusive as reciting no facts, and nature of settlement is nowhere stated. Coyle v. Due, 28 N. D. 400, 149 N. W. 122.

§ 7936. Comp. Laws, 1913.

Presumptions are disputable, and will not stand as against matters of fact to the contrary, admitted on demurrer. Bowman County v. McIntyre, — N. D. —, 202 N. W. 651.

Person who has acted in a public office presumed to have been regularly appointed thereto. State v. Scott, 37 N. D. 105, 163 N. W. 810.

Ownership of premises and materials furnished therefor presumed to continue, where trial court found that material was furnished under an agreement between plaintiff and defendant, and that defendant was owner of premises when agreement was made and materials furnished. *McCaul-Webster Elevator Co. v. Adams*, 39 N. D. 259, L.R.A.1918D, 1036, 167 N. W. 330.

Statute of limitations of a foreign state, if sought to be relied on, must be pleaded and proved, and in absence of such pleading and proof, common law applies. *Pratt v. Pratt*, 29 N. D. 531, 151 N. W. 294.

In absence of proof of law of foreign state, presumption is that common law prevails there. *Douglas State Bank v. Sutherland*, — N. D. —, 204 N. W. 683.

See also *Wylde v. Patterson*, 31 N. D. 282, 153 N. W. 630; *McGilvra v. Minneapolis St. P. & S. Ste. M. R. Co.* 35 N. D. 275, 159 N. W. 854; *Rohan v. Johnson*, 33 N. D. 179, L.R.A.1916E, 64, 156 N. W. 936; *Cranmer v. Lyon*, 34 N. D. 357, 158 N. W. 272; *Orfield v. Harney*, 33 N. D. 568, 157 N. W. 124; *Petrie v. Wyman*, 35 N. D. 126, 159 N. W. 616; *State v. Kilmer*, 31 N. D. 442, 153 N. W. 1089; *Wilson v. Kryger*, 29 N. D. 28, 149 N. W. 721; *Cohn v. Wyngarden*, 48 N. D. 344, 184 N. W. 575; *First State Bank v. Radke*, — N. D. —, 35 A.L.R. 1355, 199 N. W. 930; *Anderson v. Overby*, 46 N. D. 631, 180 N. W. 708; *Farmers State Bank v. First Nat. Bank*, — N. D. —, 199 N. W. 961; *Vallmer v. Stregge*, 27 N. D. 579, 147 N. W. 797; *Hiam v. Andrews Grain Co.* 48 N. D. 250, 183 N. W. 1016; *Bingenheimer Mercantile Co. v. Sack*, — N. D. —, 195 N. W. 969; *State v. Schultz*, 44 N. D. 269, 174 N. W. 81; *McDonough v. Russell Miller Mill. Co.* 38 N. D. 465, 165 N. W. 504; *Hartung v. Manning*, — N. D. —, 196 N. W. 554; *O'Hare v. Bismarck Bank*, 45 N. D. 641, 178 N. W. 1017; *Golly v. Kiner*, — N. D. —, 197 N. W. 883; *Dorr County State Bank v. Adams*, — N. D. —, 199 N. W. 941; *Bank of Conway v. Stary*, — N. D. —, 37 A.L.R. 1186, 200 N. W. 505; *McEwen v. McEwen*, — N. D. —, 197 N. W. 862.

#### ARTICLE 13.—SUBJECTS OF WHICH COURTS WILL TAKE JUDICIAL NOTICE.

##### § 7937. Comp. Laws, 1913.

Supreme court takes judicial notice of its determinations alleged in a complaint. *Burdick v. Farmers' Mercantile Co.* 48 N. D. 227, 184 N. W. 4.

Appellate court may take judicial notice of former cases between same parties. *Stead v. Manheart*, 48 N. D. 536, 185 N. W. 1009.

See also *Beyer v. Investors' Syndicate*, 47 N. D. 358, 182 N. W. 934.

**§ 7937a. Same; Compiled Laws; Revised Codes of 1905.** All the courts of this state shall take judicial notice of a publication of the laws of this state purporting to be a codification of the laws of the state and commonly referred to and known as "The Revised Codes of 1905," and a publication purporting to be a compilation of the laws of this state commonly referred to and known as "Compiled Laws of North Dakota, 1913;" and, whenever, in any enactment of the Fourteenth Legislative Session, or any subsequent legislative session, any reference shall be made to either said Revised Codes of North Dakota, 1905, or said Compiled Laws of North Dakota, 1913, such reference shall be deemed and taken to refer to the original laws purporting to be contained in either of said publications. And any amendment or repeal of any law by reference to either of said publications shall be deemed and taken to be an amendment or repeal of the original laws purporting to be embodied in said publications and declared repealed or amended, and no inaccuracy in the reference to said publications shall defeat such amendment or repeal if it be sufficient to enable the court to ascertain what is intended. [Laws 1915, ch. 82, § 1.]

Evidence, 23 C. J. p. 59, § 1809, p. 128, § 1947; Statutes, 36 Cyc. 1067-1070, 1079-1085, 1236.

Judicial notice of statutes. 10 R. C. L. 1111 and Supps.

Judicial notice of domestic statutes. 25 R. C. L. 946 et seq.

##### § 7938. Comp. Laws, 1913.

Page v. Farmery, 29 N. D. 209, 150 N. W. 471; *State v. Kilmer*, 31 N. D. 442, 153 N. W. 1089; *Asch v. Washburn Lignite Coal Co.* 48 N. D. 734, 186 N. W. 757; *State v. Schultz*, 44 N. D. 269, 174 N. W. 81; *State ex rel. Livingston v. Rose*, 41

N. D. 251, 170 N. W. 879; Shary v. Eszlinger, 45 N. D. 133, 176 N. W. 938; State v. Stockwell, 23 N. D. 70, 134 N. W. 767; State ex rel. Erickson v. Burr, 16 N. D. 581, 113 N. W. 705; Ex parte Corliss, 16 N. D. 470, 114 N. W. 962.

## CHAPTER 21.

### MOTIONS AND ORDERS.

§ 7940. Comp. Laws, 1913.

Naderhoff v. George Benz & Sons, 25 N. D. 165, 47 L.R.A.(N.S.) 853, 141 N. W. 501.

§ 7941. Comp. Laws, 1913.

Peterson v. Finnegan, 45 N. D. 101, 176 N. W. 734.

§ 7944. Comp. Laws, 1913.

Appeal from order vacating garnishment must present record identifying papers or evidence presented. Solon v. O'Shea, 45 N. D. 362, 177 N. W. 757.

See also Harris v. Hessin, 30 N. D. 33, 151 N. W. 4.

§ 7945. Comp. Laws, 1913.

Supreme court will assume trial judge found evidence insufficient in absence of memorandum with order granting or refusing new trial. Kavanaugh v. Nestler, 45 N. D. 376, 177 N. W. 647.

See also Skaar v. Eppeland, 35 N. D. 116, 159 N. W. 707.

§ 7949. **Cases continued.** In all actions, civil or criminal, pending in any court in this state at any time when the legislature is in session, it shall be sufficient cause for a continuance of said action to a succeeding term of said court, if it shall be made to appear by affidavit of any attorney of record, that either party to said action applying for such continuance or the attorney [sic] has been the attorney of record of either party since commencement of such action or suit or for more than fifteen days prior to filing such affidavit, and is a member of either house of the legislature, and is then or will be at the beginning of the term of said court in which said action is pending, actually engaged in the performance of his duties at the said session of the legislature, and that the attendance of such party or the attorney of record is necessary to the fair and proper trial of said action. Notice of motion, together with a copy of the affidavit, shall be served upon the other party to the action, at least ten days prior to the opening of said term of court at which said action is pending, if said action is pending in such court at the opening of the term. [Laws 1921, ch. 130, § 1.]

Continuances, 13 C. J. p. 125, § 5, p. 143, §§ 41-42, p. 146, § 51, pp. 179-183, §§ 119-125; Criminal Law, 16 C. J. p. 453, § 823, p. 455, § 826.

Continuance of case because of attendance of party in state legislature. 6 R. C. L. 552 and Supps.

Application for continuance. 6 R. C. L. 561 et seq.

§ 7949a. **Same.** Upon the proof of service of such notice and affidavit the case shall be continued over to the next succeeding term, and shall not be tried over the objection of the party within ten days after the adjournment of the legislature. [Laws 1921, ch. 130, § 2.]

Continuances, 13 C. J. pp. 191-192, §§ 144-147; Criminal Law, 16 C. J. p. 510, § 939.

## CHAPTER 22.

### NOTICES AND FILING AND SERVICE OF PAPERS.

§ 7951. Comp. Laws, 1913.

Garske v. Hann, 48 N. D. 42, 182 N. W. 933; Cedar Rapids Nat. Bank v. Coffey, 25 N. D. 457, 141 N. W. 997.

## § 7952. Comp. Laws, 1913.

Does not authorize service of notice of appeal where parties reside in same city. *Garske v. Hann*, 48 N. D. 42, 182 N. W. 933.

See also *Fargo Silo Co. v. Pioneer Stock Co.* 42 N. D. 48, 171 N. W. 849; *Ross v. Kenmare*, 27 N. D. 487, 146 N. W. 897.

## § 7953. Comp. Laws, 1913.

*Fargo Silo Co. v. Pioneer Stock Co.* 42 N. D. 48, 171 N. W. 849.

## § 7954. Comp. Laws, 1913.

Where service of paper, by one party has effect of setting time to run against opposite party, time beginning to run, is twice as long when service is by mail, as when made personally. *More v. Western Grain Co.* 31 N. D. 369, 153 N. W. 976.

See also *Embden State Bank v. Schulze*, — N. D. —, 193 N. W. 481.

## § 7957. Comp. Laws, 1913.

*American Loan & Inv. Co. v. Dalen*, — N. D. —, 191 N. W. 490.

## § 7959. Comp. Laws, 1913.

*Garske v. Hann*, 48 N. D. 42, 182 N. W. 933; *Demars v. Gardiner*, 27 N. D. 60, 145 N. W. 129.

## CHAPTER 24.

## MISCELLANEOUS PROVISIONS.

## § 7963. Comp. Laws, 1913.

*Hilman v. Strong*, 34 N. D. 228, 157 N. W. 986.

## § 7965. Comp. Laws, 1913.

Four distinct actions in claim and delivery brought by different parties, involving different issues, cannot be consolidated, although against same defendant, either for trial in district court or for appeal. *Willoughby v. Smith*, 26 N. D. 209, 144 N. W. 79.

## § 7966. Comp. Laws, 1913.

After expiration of time for appeal, the action is terminated, and trial court has no jurisdiction to hear motion for new trial. *Higgins v. Rued*, 30 N. D. 551, 153 N. W. 389; *Grove v. Morris*, 31 N. D. 8, 151 N. W. 779; *Garbush v. Firey*, 33 N. D. 154, 156 N. W. 537.

After expiration of time for appeal the action is terminated, and trial court has no jurisdiction to hear motion for new trial, unless final character of judgment has been suspended by proceedings commenced prior to expiration of time for appeal. *Gohl v. Bechtold*, 37 N. D. 141, 163 N. W. 725; *Bovey-Shute Lumber Co. v. Donahue*, 43 N. D. 247, 175 N. W. 205; *Coughlin v. Ætna L. Ins. Co.* — N. D. —, 194 N. W. 661.

Power to vacate or modify judgments is not restricted to the term at which they are entered. *Bank of Inkster v. Christenson*, — N. D. —, 194 N. W. 702.

See also *Skaar v. Eppeland*, 35 N. D. 116, 159 N. W. 707; *Weigel v. Powers Elevator Co.* — N. D. —, 198 N. W. 121.

§ 7968. **Lost or destroyed papers.** If any process, citation, original petition or any other paper is lost or destroyed by fire or otherwise or withheld by any person the court may authorize a copy thereof to be filed and used instead of the original; and when it shall appear to the satisfaction of the judge of said court that any order of the court has been heretofore made in any proceeding, the records of said proceeding and said order having been destroyed by fire or otherwise, the court shall again make and file such order therein, and all proceedings up to and including said order shall be deemed to have been taken and made as provided by law, and said final order shall have the same effect as if the entire record of said proceedings were still in existence and on file in said action or proceeding in said court. [R. C. 1905, § 7348; Laws 1899, ch. 107; R. C. 1899, § 5740a.]

**Explanatory note.** The title of the act and the emergency clause refer to papers in county court only.

## CHAPTER 25.

ACTIONS IN PLACE OF SCIRE FACIAS, QUO WARRANTO AND OF INFORMATION  
IN THE NATURE OF QUO WARRANTO.

## § 7969. Comp. Laws, 1913.

Legality of proceedings of school board, in reforming a district, which could be tested by common law writ of quo warranto, may be tested by civil action in district court. *Weiderholt v. Lisbon Special School Dist.* 41 N. D. 146, 169 N. W. 809.

In a proceeding to review a void order of a school board, inquiry will not extend to determination of legality of prior acts of board, which may be properly inquired into in civil action substituted for quo warranto. *State ex rel. Mayo v. Thursby-Butte Special School Dist.* 45 N. D. 555, 178 N. W. 787.

See also *State ex rel. Linde v. Equity Co-op. Exch.* 44 N. D. 299, 175 N. W. 634; *State ex rel. Langer v. Gamble-Robinson Fruit Co.* 44 N. D. 376, 9 A.L.R. 98, 176 N. W. 103; *State ex rel. Langer v. Lofthus*, 45 N. D. 357, 177 N. W. 755.

## § 7971. Comp. Laws, 1913.

Proceeding in nature of quo warranto, not intended to provide remedy for unlawful or irregular annexation of adjacent to incorporated city, when instituted by individuals, or those having special interests in the subject. *Red River Valley Brick Co. v. Grand Forks*, 27 N. D. 8, 145 N. W. 725.

See also *State ex rel. Langer v. Lofthus*, 45 N. D. 357, 177 N. W. 755; *Tallmadge v. Walker*, 34 N. D. 590, 159 N. W. 71.

## § 7972. Comp. Laws, 1913.

*Knapp v. Minneapolis, St. P. & S. Ste. M. R. Co.* 33 N. D. 291, 156 N. W. 1019.

## §§ 7973-7976. Comp. Laws, 1913.

*Red River Valley Brick Co. v. Grand Forks*, 27 N. D. 8, 145 N. W. 725.

## CHAPTER 27.

## ACTIONS BY AND AGAINST CORPORATIONS.

- ARTICLE 2. ACTIONS AGAINST OFFICERS, §§ 7986-7988.  
3. ACTIONS AGAINST INSOLVENT CORPORATIONS, §§ 7989-8000.  
4. PROCEEDINGS TO ANNUL CORPORATIONS, §§ 8004, 8007.

## ARTICLE 2.—ACTIONS AGAINST OFFICERS.

## §§ 7986-7988. Comp. Laws, 1913.

*John Miller Co. v. Harvey Mercantile Co.* 38 N. D. 531, 165 N. W. 558.

## ARTICLE 3.—ACTIONS AGAINST INSOLVENT CORPORATIONS.

## § 7989. Comp. Laws, 1913.

In proceedings to sequester corporate property, fraudulent grantees, all officers and stockholders, and all others who have incurred a liability to the corporation may be joined as defendants. *John Miller Co. v. Harvey Mercantile Co.* 38 N. D. 531, 165 N. W. 558.

## § 7994. Comp. Laws, 1913.

*State ex rel. Linde v. Equity Co-op. Exch.* 44 N. D. 299, 175 N. W. 634.

## § 7995. Comp. Laws, 1913.

*John Miller Co. v. Harvey Mercantile Co.* 38 N. D. 531, 165 N. W. 558.

## §§ 7996-7998. Comp. Laws, 1913.

*Davis v. Johnson*, 41 N. D. 85, 170 N. W. 520.

## § 7999. Distribution of property. Upon a final judgment being rendered

in any action under this article, the court shall cause a just and fair distribution of the property of such corporation and of the proceeds thereof to be made in the order prescribed in section 8007. [R. C. 1905, § 7379; R. C. 1895, § 5771.]

John Miller Co. v. Harvey Mercantile Co. 38 N. D. 531, 165 N. W. 558.

§ 8000. Comp. Laws, 1913.

The John Miller Co. v. Harvey Mercantile Co. 38 N. D. 531, 165 N. W. 558;  
Davis v. Johnson, 41 N. D. 85, 170 N. W. 520.

#### ARTICLE 4.—PROCEEDINGS TO ANNUAL CORPORATIONS.

§ 8004. Comp. Laws, 1913.

Annulment of corporate franchises for unlawful combination to fix prices. State ex rel. Langer v. Gamble-Robinson Fruit Co. 44 N. D. 376, 9 A.L.R. 98, 176 N. W. 103.

See also Farmers' State Bank v. Brown, — N. D. —, 204 N. W. 673.

§ 8007. Comp. Laws, 1913.

Surety upon bond of insolvent bank held entitled to be subrogated to priority of state in payment from assets of insolvent bank, the statute giving the state the preference having been repealed subsequent to insolvency. State ex rel. Miller v. Buttzville State Bank, 26 N. D. 197, 144 N. W. 105.

See also John Miller Co. v. Harvey Mercantile Co. 38 N. D. 531, 165 N. W. 558.

### CHAPTER 28.

#### ACTIONS TO RECOVER PENALTIES AND FORFEITURES.

§ 8015. Comp. Laws, 1913.

Page v. Farmery, 29 N. D. 209, 150 N. W. 471.

### CHAPTER 29.

#### ACTION FOR THE PARTITION OF REAL PROPERTY.

§ 8044. Comp. Laws, 1913.

Monroe v. Donovan, 31 N. D. 228, 153 N. W. 461.

§ 8053. Comp. Laws, 1913.

First Nat. Bank v. Bovey-Shute-Jackson, — N. D. —, 191 N. W. 765.

### CHAPTER 30.

#### FORECLOSURE OF MORTGAGES, LIENS AND CONTRACTS.

- ARTICLE 1. FORECLOSURE BY ADVERTISEMENT, §§ 8074–8098a.  
2. FORECLOSURE BY ACTION, §§ 8099–8106.  
3. PROTECTION OF PURCHASERS AT FORECLOSURE SALES, § 8117.  
4. FORECLOSURE OF LAND CONTRACTS, §§ 8119–8122a.  
5. FORECLOSURE OF MORTGAGES UPON PERSONAL PROPERTY, §§ 8124–8136.  
6. ACTIONS TO FORECLOSE LIENS ON PERSONAL PROPERTY, §§ 8137–8143.

#### ARTICLE 1.—FORECLOSURE BY ADVERTISEMENT.

**Explanatory note.** Necessity of notice, see § 8099a, post.

§ 8074. Comp. Laws, 1913.

Plaintiff, in foreclosure action, which was enjoined, is entitled to recover, in such action, costs and disbursements, incurred in proceeding which was enjoined,

where it appears that he had a right to foreclose the mortgage. *McCarty v. Goodman*, 40 N. D. 220, 168 N. W. 721.

Order dissolving order enjoining proceedings to foreclose land contract is appealable. *Rourke v. Hoover Grain Co.* 48 N. D. 247, 183 N. W. 1005.

Power of court to enjoin foreclosure of mortgage by advertisement is discretionary, and will be disturbed for abuse only. *Beiseker v. Svendsgaard*, 28 N. D. 366, 149 N. W. 352.

§ 8075. Comp. Laws, 1913.

Foreclosure by mortgagee, where his name is signed thereto by agent or attorney, and property is bid in, in his name, at his direction, and he accepts and retains benefits thereof, is his act, and is valid. *Davidson v. Hauge*, 44 N. D. 449, 176 N. W. 121.

Allegation in complaint that plaintiff executed writing, duly authorizing an attorney at law to take necessary proceedings for foreclosure of mortgage and collection of debt, and to commence action, sufficient, without expressly using phrase "power of attorney." *Hocksprung v. Young*, 27 N. D. 322, 146 N. W. 547.

See also *Fendrich v. Buffalo Pitts Co.* 46 N. D. 201, 180 N. W. 707.

§ 8076. **Foreclosure of real estate mortgage by agent or attorney not valid, when.** No sale of real estate upon a foreclosure made by an agent or attorney by advertisement shall be valid for any purpose, unless such power of attorney as is provided for by law, shall be procured and recorded in the office of the register of deeds of the county wherein said real estate is located, on or before the day fixed or appointed to make the same; provided, that any person, firm or corporation not owning such mortgage, but controlling the same shall, in addition to furnishing such power of attorney, furnish such agent or attorney making such foreclosure a copy of the instrument authorizing such control, and a failure to do so shall invalidate the foreclosure. [Laws 1925, ch. 141, § 1; Laws 1923, ch. 250, § 1.]

Foreclosure by mortgagee, where his name is signed thereto by attorney or agent, and property is bid in, in his name, at his direction, and he accepts and retains benefits thereof, is his act, and is valid. *Davidson v. Houge*, 44 N. D. 449, 176 N. W. 121.

See also *Hocksprung v. Young*, 27 N. D. 322, 146 N. W. 547.

Agency, 2 C. J. pp. 452-457, §§ 53-60; Mortgages, 27 Cyc. 1450, 1461, 1465, 1478.

Sale of mortgaged property under power of sale in mortgage. 19 R. C. L. 586 et seq.

§ 8076a1. **Validating prior sales.** All sales of real estate made prior to the passage and approval of this act under executions issued pursuant to judgments entered in actions for the foreclosure of real estate mortgages, are hereby declared to be legal and valid for all purposes, even though no power of attorney was filed for record in the office of the register of deeds of the county wherein said real estate was located prior to the day of sale of said real estate, provided such a power of attorney as is provided for in section 8075 of the Compiled Laws of North Dakota for 1913 was filed in the office of the clerk of the district court of the county in which such judgment was entered, prior to such date of sale. [Laws 1925, ch. 141, § 2; Laws 1923, ch. 250, § 2.]

Mortgages, 27 Cyc. 1450, 1695, 1732.

§ 8076a2. **Same.** All sales of real estate made under a mortgage foreclosure prior to the passage and approval of this act, are hereby declared legal and valid for all purposes, even though no power of attorney was filed for record in the office of the register of deeds of the county wherein said real estate was located, before the day of sale of said real estate, provided said power of attorney as is provided for in section 8075 of the Compiled Laws of North Dakota for 1913 was filed for record in the office of the register of deeds of the county wherein said real estate is located, at or prior to the time fixed or appointed to make the sale. [Laws 1925, ch. 141, § 3.]

Mortgages, 27 Cyc. 1450, 1695, 1732.

**§ 8078.** Comp. Laws, 1913.

Secures to holder or holders of installment notes, right to foreclose lien of mortgage applicable to each note, by exercising power of sale, and does not apply to foreclosure for entire amount of mortgage lien. *McCarty v. Goodsman*, 39 N. D. 389, L.R.A.1918F, 160, 167 N. W. 503.

**§ 8079.** See § 8099a, post.

Six publications in six successive weeks, last one being the day before foreclosure sale, sufficient. *Bailey v. Hendrickson*, 25 N. D. 500, Ann. Cas. 1915C, 739, 143 N. W. 134.

**§ 8080.** See § 8099a, post.

Dating foreclosure notice one day prior to filing assignment held not to invalidate foreclosure. *Kyllonen v. Acme Harvesting Mach. Co.* 48 N. D. 38, 182 N. W. 249.

See also *Hendrick v. Jackson*, 39 N. D. 466, 167 N. W. 757.

**§ 8081.** Comp. Laws, 1913.

Duty of sheriff to make foreclosure sales of real estate mortgages by advertisement. *Stutsman County v. Wright*, 41 N. D. 167, 170 N. W. 326.

See also *Bailey v. Hendrickson*, 25 N. D. 500, 143 N. W. 134.

**§ 8083.** Comp. Laws, 1913.

*Clifford & Co. v. Henry*, 40 N. D. 604, 169 N. W. 508; *Lunds v. Irish*, — N. D. —, 195 N. W. 825.

**§ 8084. Certificate of sale; contents; record.** Whenever any real property shall be sold by virtue of a power of sale contained in any mortgage the officer making the sale shall immediately give to the purchaser a certificate of sale containing:

1. A particular description of the real property sold.
2. The price bid for each distinct lot or parcel.
3. The whole price paid.
4. The costs and fees for making the sale.

Such certificate must be executed and acknowledged and must be recorded in the office of the register of deeds of the county wherein the real property is situated within sixty days from the date of said sale, and such sheriff's certificate or a certified copy thereof certified by such register of deeds shall be taken and deemed evidence of the facts therein recited and contained. [Laws 1915, ch. 221, § 1.]

Sheriff's certificate issued upon execution sale carries right, title, and interest of judgment debtor subject to redemption. *Burdick v. Farmers' Mercantile Co.* 48 N. D. 227, 184 N. W. 4.

*Mortgages*, 27 Cyc. 1488.

**§ 8085.** Statements to be made in notice of redemption, see § 7753a, ante.

Assignee of mortgages is a redemptioner entitled to redeem from a statutory redemptioner accepting payment and issuing certificate of redemption to him. *North Dakota Horse & Cattle Co. v. Serumgard*, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 117 N. W. 453.

One seeking to redeem from purchaser at foreclosure sale, not required to pay purchaser, amount of prior mortgage lien held by him, in addition to purchase price with interest. *Leverson v. Olson*, 25 N. D. 624, 142 N. W. 917.

See also *First Nat. Bank v. Bovey, Shute & Jackson*, — N. D. —, 191 N. W. 765; *Clifford & Co. v. Jesse Henry*, 40 N. D. 604, 169 N. W. 508; *Cathro v. McArthur*, 30 N. D. 337, 152 N. W. 686; *Bank of Mowbray v. Jerry Kelland*, 33 N. D. 382, 157 N. W. 291; *Farmers Bank v. Knife River Lumber & Grain Co.* 37 N. D. 371, 163 N. W. 1053.

**§ 8087.** Comp. Laws, 1913.

*Geo. B. Clifford & Co. v. Henry*, 40 N. D. 604, 169 N. W. 508; *Olson v. Gowan-Lenning Brown Co.* 47 N. D. 544, 182 N. W. 929; *Lunde v. Irish*, — N. D. —, 195 N. W. 825.

**§ 8095.** Comp. Laws, 1913.

Register of deeds held not liable for failure to mail foreclosure notice, when he did not know mortgagee's post office or that a notice mailed to post office nearest to land would be forwarded to him. *Farmers' Grain & Mill. Co. v. Sundberg*, 39 N. D. 551, 168 N. W. 55.

**§ 8098a. Limiting attorney's fees on.** On the foreclosure of any lien or mortgage by advertisement, attorney's fees shall not exceed ten per cent of the principal sum actually due and shall in no case exceed twenty-five dollars, and the sheriff's fees shall not exceed three dollars. [Laws 1919, ch. 130.]

*First Nat. Bank v. Bovey, Shute & Jackson*, — N. D. —, 191 N. W. 765.  
Mortgages, 27 Cyc. 1501-1502, 1778.

## ARTICLE 2.—FORECLOSURE BY ACTION.

**§ 8099.** Comp. Laws, 1913.

Provision in bond or note that interest when due and unpaid shall be added to the principal, as affecting right to foreclose mortgage securing the same for default in interest. 42 L.R.A.(N.S.) 108.

**§ 8099a. Notice.** Before any action or proceeding shall be commenced to foreclose a mortgage on real property, a written notice describing land, the date and amount of the mortgage, the sum due for principal, interest and taxes respectively, and stating that if the same be not paid within thirty days from the date of the notice, proceedings will be commenced to foreclose the mortgage, shall be served more than thirty days prior to the commencement of such action or proceedings by registered mail addressed to the title owner according to the records in the office of the register of deeds concerning and affecting the title to the premises described in such notice at his or their post office address as shown by such records, and if such address is not so shown, personal service upon such owner or owners proven by the certificate of the sheriff or by the affidavit of the person serving the same shall be sufficient, or if the sheriff's return shows that after diligent inquiry made for the purpose of serving such notice, he is unable to make service thereof upon the said title owner or owners of record within the county where the said land is situated, then and in such case, such notice shall not be required to be served upon such owner or owners whose post office address is not shown by such records in the office of the register of deeds. An affidavit of proof of such service of notice shall be filed with the clerk of the court at the time of filing complaint in any action for foreclosure and shall be recorded with the notice and certificate of sale in all other cases. Provided, however, that if said owner shall, before the expiration of thirty days from the service of such notice, perform the conditions or comply with the provisions upon which the default shall have occurred, such mortgage shall be reinstated and shall remain in full force and effect the same as if no default had occurred therein.

Provided, further, that if an action or proceeding to foreclose is not begun within ninety days after the date of the notice herein provided for, then all proceedings hereunder shall be deemed to be discontinued. [Laws 1925, ch. 142; Laws 1921, ch. 66; Laws 1919, ch. 131, § 1.]

Tender of interest during 30-day notice period for foreclosure does not cure default in payment, or reinstate mortgage. *State Bank of Reynolds v. First Nat. Bank of Reynolds*, — N. D. —, 192 N. W. 967.

Does not negative ordinary legal effect of acceleration clause in mortgage and note. *State Bank of Reynolds v. First Nat. Bank of Reynolds*, — N. D. —, 192 N. W. 967.

See also *First Nat. Bank v. Bovey, Shute & Jackson*, — N. D. —, 191 N. W. 765.  
Mortgages, 27 Cyc. 1541.

**§ 8100.** Comp. Laws, 1913.

*Corbett v. Ulsaker Printing Co.* — N. D. —, 24 A.L.R. 1047, 190 N. W. 75; *Bull v. Smith*, — N. D. —, 25 A.L.R. 1402, 191 N. W. 624.

§ 8102. **When others made parties.** If the mortgage debt is secured by the obligation, or other evidence of debt, of any other person than the mortgagor, the plaintiff may make such other person a party to the action and the court may render judgment for the balance of such debt remaining unsatisfied after a sale of the mortgaged premises, as well against such other person as against the mortgagor, and may enforce such judgment as in other cases by execution or other process. [R. C. 1905, § 7479; R. C. 1899, § 5868; C. Civ. P. 1877, § 619.]

§ 8106. *Comp. Laws, 1913.*

Geo. B. Clifford & Co. v. Henry, 40 N. D. 604, 169 N. W. 508; First Nat. Bank v. Bovey, Shute & Jackson, — N. D. —, 191 N. W. 765.

#### ARTICLE 3.—PROTECTION OF PURCHASERS AT FORECLOSURE SALES.

§ 8117. *Comp. Laws, 1913.*

Act held not unconstitutional, though applied to mortgages executed before its enactment. Requirement that notice of redemption be recorded with register of deeds does not impair mortgagor's obligation of contract or deprive him of property without due process of law. Heitsch v. Minneapolis Threshing Mach. Co. 29 N. D. 94, L.R.A.1915D, 349, 150 N. W. 457.

#### ARTICLE 4.—FORECLOSURE OF LAND CONTRACTS.

§ 8119. *Comp. Laws, 1913.*

Nonresident purchaser cannot claim that his rights were foreclosed without due process for lack of actual notice, where decree of foreclosure was based on a default available to the vendor and held to be controlling. Kryger v. Wilson, 242 U. S. 171, 61 L. ed. 229, — Sup. Ct. Rep. —.

Upon cancellation of contract for deed by service of notice, vendor may maintain action of forcible detainer against purchaser upon his refusal to surrender possession. E. J. Lander & Co. v. Deemy, 46 N. D. 273, 176 N. W. 922.

Vendor in land contract having notice or knowledge that vendee has assigned his interest in the contract, must serve notice of cancellation on assignee. Raasch v. Goulet, — N. D. —, 204 N. W. 338.

See also Duffy v. Egeland, 26 N. D. 135, 143 N. W. 350; Buller v. Falk, 41 N. D. 624, 171 N. W. 823; Amidon v. Walters, 48 N. D. 56, 183 N. W. 107; Raad v. Grant, 43 N. D. 546, 169 N. W. 588; Rourke v. Hoover Grain Co. 48 N. D. 247, 183 N. W. 1005; Wilson v. Kryger, 29 N. D. 28, 149 N. W. 721.

§ 8120. *Comp. Laws, 1913.*

Vendor in land contract having notice or knowledge that vendee has assigned his interest in the contract, must serve notice of cancellation upon assignee. Buller v. Falk, 41 N. D. 624, 171 N. W. 823; Raasch v. Goulet, — N. D. —, 204 N. W. 338.

Time specified in notice for cancellation of land contract fixes such time, subject to statutory requirements. Rourke v. Hoover Grain Co. 48 N. D. 247, 183 N. W. 1005.

See also Raad v. Grant, 43 N. D. 546, 169 N. W. 588; E. J. Lander & Co. v. Deemy, 46 N. D. 273, 176 N. W. 922; Amidon v. Walters, 48 N. D. 56, 183 N. W. 107; Wilson v. Kryger, 29 N. D. 28, 149 N. W. 721.

§ 8121. *Comp. Laws, 1913.*

Vendor, in land contract having notice or knowledge that vendee has assigned his interest in the contract, must serve notice of cancellation on assignee. Raasch v. Goulet, — N. D. —, 204 N. W. 338.

See also Raad v. Grant, 43 N. D. 546, 169 N. W. 588; E. J. Lander & Co. v. Deemy, 46 N. D. 273, 176 N. W. 922; Stutsman County v. Dakota Trust Co. 47 N. D. 228, 181 N. W. 586; Amidon v. Walters, 48 N. D. 56, 183 N. W. 107; Rourke v. Hoover Grain Co. 48 N. D. 247, 183 N. W. 1005; Buller v. Falk, 41 N. D. 624, 171 N. W. 823; Wilson v. Kryger, 29 N. D. 28, 149 N. W. 721.

§ 8122. **Time allowed.** Such vendee, or purchaser or his assigns shall have one year after the service of such notice upon him in which to perform the conditions or comply with the provisions upon which the default shall have occurred

and upon such performance and upon making such payments, together with the cost of service of such notice, such contract or other instrument shall be reinstated and shall remain in full force and effect the same as if no default had occurred therein. If, however, such vendee or purchaser, or his assigns, shall not complete such performance or make such payment within the one year herein provided, then and in that event the contract shall be terminated and shall not be reinstated by any subsequent offer of performance, or tender of payment. No provision in any contract for the purchase of land or an interest in land shall be construed to obviate the necessity of giving the aforesaid notice and no contract shall terminate unless such notice is given, any provision in such contract to the contrary notwithstanding, but the notice herein required shall not be deemed necessary where the contract in question is sought to be terminated by an action at law or in equity brought for that purpose upon failure to perform.

In all cases of cancellation by notice of any such contract which has been recorded in the office of the register of deeds, a copy of the notice of cancellation served upon the vendee together with an affidavit of service and an affidavit of vendor or his assigns, that the default of vendee under the terms of the contract were not cured within one year from the date of service of such notice, shall be recorded in the office of the register of deeds. [Laws 1921, ch. 65, § 1; Laws 1917, ch. 151, § 1; Laws 1915, ch. 180, § 1.]

Upon cancellation of contract for deed by service of notice, vendor may maintain action of forcible detainer against purchaser upon his refusal to surrender possession. *E. J. Lander & Co. v. Deemy*, 46 N. D. 273, 176 N. W. 922.

Time specified in notice for cancellation of land contract fixes such time. *Rourke v. Hoover Grain Co.* 48 N. D. 247, 183 N. W. 1005.

Attempt by defaulting vendee under land contract to recover portion of purchase paid, is in derogation of contract, and is not aided by fact that vendor has not canceled the contract under this section. *Harrington v. Eggen*, — N. D. —, 199 N. W. 447.

Vendor in land contract having notice or knowledge that vendee has assigned his interest in the contract must serve notice of cancellation on assigned. *Raasch v. Goulet*, — N. D. —, 204 N. W. 338.

Appointment of receivers on ex parte presentation, in attempt by vendor to cancel contract for deed, where substantial rights of vendee are involved, should not be made. *Glein v. Miller*, 45 N. D. 1, 176 N. W. 113.

Applies only to contracts made after law took effect, and inapplicable to contracts made prior thereto. *E. J. Lander & Co. v. Deemy*, 46 N. D. 273, 176 N. W. 922.

See also *Raad v. Grant*, 43 N. D. 546, 169 N. W. 588; *Buller v. Falk*, 41 N. D. 624, 171 N. W. 823; *Stutsman County v. Dakota Trust Co.* 47 N. D. 228, 181 N. W. 586; *Amidon v. Walters*, 48 N. D. 56, 183 N. W. 107; *Ryan v. Bremseth*, 48 N. D. 710, 186 N. W. 818.

Vendor and Purchaser, 39 Cyc. 1383-1387, 1603-1611, 1850, 1891.

Forfeiture of contract of sale for default of purchaser. 27 R. C. L. 613 and Supps.

Rescission by vendor of contract of sale. 27 R. C. L. 659 and Supps.

**§ 8122a. Counterclaim; injunction against canceling contract.** Provided, that when it shall be made to appear by affidavit of the vendee or purchaser or his assigns, his agent or attorney, to the satisfaction of a judge of the district court of the county where the property is situated, that the vendee or purchaser or his assigns has a legal counterclaim or any other valid defence against the collection of the whole or any part of the amount claimed to be due on such contract, such judge may, by an order to that effect, enjoin the vendor or his successor in interest from the cancellation of such contract as herein provided, and direct that all further proceedings for the cancellation be had in the district court properly having jurisdiction of the subject matter; and for the purpose of carrying out the provisions thereof, service may be made upon the

vendor or his assigns or upon his attorney or agent. [Laws 1921, ch. 65, § 2; Laws 1917, ch. 151, § 2.]

Order dissolving order enjoining statutory proceedings to foreclose land contract, appealable. *Rourke v. Hoover Grain Co.* 48 N. D. 247, 183 N. W. 1005.

See also *Lee v. Jordan*, — N. D. —, 195 N. W. 660.

*Vendor and Purchaser*, 39 Cyc. 1850, 1894.

Equitable relief from forfeiture of contract of sale. 27 R. C. L. 667.

#### ARTICLE 5.—FORECLOSURE OF MORTGAGES UPON PERSONAL PROPERTY.

§ 8124. **When proceedings enjoined.** When the mortgagee or his assignee has commenced foreclosure by advertisement and it shall be made to appear by the affidavit of the mortgagor, his agent or attorney, to the satisfaction of the judge of the district court of the county where the mortgaged property is situated that the mortgagor has a legal counterclaim or any other valid defense against the collection of the whole or any part of the amount claimed to be due on such mortgage, such judge may by an order to that effect enjoin the mortgagee or assignee from foreclosing such mortgage by advertisement and direct that all further proceedings for the foreclosure be had in the district court properly having jurisdiction of the subject-matter; and for the purpose of carrying out the provisions of this section service may be made upon the attorney or agent of the mortgagee or assignee. [R. C. 1905, § 7499; R. C. 1895, § 5884; Laws 1883, ch. 62, § 1.]

§ 8125. Comp. Laws, 1913.

*McCarty v. Goodsman*, 39 N. D. 389, L.R.A.1918F, 160, 167 N. W. 503; *Sand v. St. Anthony & D. El. Co.* — N. D. —, 191 N. W. 955.

§ 8126. Comp. Laws, 1913.

*Stutsman County v. Wright*, 41 N. D. 167, 170 N. W. 326.

§ 8127. Comp. Laws, 1913.

*Sand v. St. Anthony & D. Elevator Co.* — N. D. —, 191 N. W. 955.

§§ 8128, 8132. Comp. Laws, 1913.

*McCarty v. Goodsman*, 39 N. D. 389, 167 N. W. 503; *Dahlund v. Lorentzen*, 30 N. D. 275, 152 N. W. 684; *Wonser v. Walden Farmers Elevator Co.* 31 N. D. 382, 153 N. W. 1012.

§ 8133. Comp. Laws, 1913.

*Blair v. Maxbass Secur. Bank*, 44 N. D. 12, 176 N. W. 98.

§ 8134. Comp. Laws, 1913.

Notice of redemption is sufficient if it apprise agent making sale of mortgagor's intention to redeem property from foreclosure sale, even though it contain erroneous designation of mortgagee. *Harth v. St. Paul Cattle Loan Co.* — N. D. —, 191 N. W. 615.

Requirement that redemptioner tender amount for which property was sold, with costs of sale, embraces item of sheriff's fees. *Harth v. St. Paul Cattle Loan Co.* — N. D. —, 191 N. W. 615.

See also *Norris v. German-American State Bank*, 38 N. D. 276, 165 N. W. 570.

§ 8136. Comp. Laws, 1913.

*Norris v. German-American State Bank*, 38 N. D. 276, 165 N. W. 570.

#### ARTICLE 6.—ACTIONS TO FORECLOSE LIENS ON PERSONAL PROPERTY.

§ 8137. Comp. Laws, 1913.

*Dahlund v. Lorentzen*, 30 N. D. 275, 152 N. W. 684; *Mead v. First Nat. Bank*, 24 N. D. 12, 138 N. W. 365.

§ 8138. Comp. Laws, 1913.

In action to foreclose chattel mortgage, jurisdiction of court to render judg-

ment, not conditioned upon plaintiffs taking possession of property under warrant of seizure. *Workman v. Salzer Lumber Co.* — N. D. —, 199 N. W. 769.

See also *Krach v. Security State Bank*, 43 N. D. 441, 175 N. W. 573.

§ 8139. Comp. Laws, 1913.

*Minneapolis Threshing Mach. Co. v. Warner*, — N. D. —, 203 N. W. 197.

§ 8140. Comp. Laws, 1913.

*Krach v. Security State Bank*, 43 N. D. 441, 175 N. W. 573.

§ 8142. Comp. Laws, 1913.

*Minneapolis Threshing Mach. Co. v. Warner*, — N. D. —, 203 N. W. 197.

§ 8143. Comp. Laws, 1913.

*Mead v. First Nat. Bank*, 24 N. D. 12, 138 N. W. 365; *Dahlund v. Lorentzen*, 30 N. D. 275, 152 N. W. 684.

## CHAPTER 31.

### ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY AND OTHER ACTIONS CONCERNING REAL ESTATE.

§ 8144. Comp. Laws, 1913.

Burden of establishing resulting trust or conveyance made to defraud creditors, held to be on appellant, who set up same to defeat title of plaintiff as vendee under contract for deed. *Bernauer v. McCaull-Webster Elevator Co.* 41 N. D. 561, 171 N. W. 282.

In action to determine adverse claims, grantee asserting title held to have burden of proving constructive delivery of deeds. *Magoffin v. Watross*, 45 N. D. 406, 178 N. W. 134.

Wife may be joined with husband as joint plaintiff in action to determine adverse claims to a homestead, though legal title is held in husband's name. *Sexton v. Sutherland*, 37 N. D. 500, 164 N. W. 278.

City may maintain action to determine rights of a party claiming title in fee to streets, parks, and alleys dedicated to public use. *Lamoure v. Lasell*, 26 N. D. 638, 145 N. W. 577.

See also *Beyer v. Investors Syndicate*, 47 N. D. 358, 182 N. W. 934; *Thornhill v. Olson*, 31 N. D. 81, L.R.A.1916A, 493, 153 N. W. 442; *Union Nat. Bank v. Person*, 48 N. D. 478, 185 N. W. 266; *Gardner Hotel Co. v. Hagaman*, 47 N. D. 434, 182 N. W. 685; *Cayle v. Due*, 28 N. D. 400, 149 N. W. 122; *Murphy v. Missouri & K. Land & Loan Co.* 28 N. D. 519, 149 N. W. 957.

§ 8146. Comp. Laws, 1913.

*Simons v. Dowd*, 48 N. D. 540, 186 N. W. 261.

§ 8146. Comp. Laws 1913.

Wife may be joined with husband as joint plaintiff in action to determine adverse claims to a homestead, though legal title is held in husband's name. *Sexton v. Sutherland*, 37 N. D. 500, 164 N. W. 278.

§ 8147. **Description of property. Complaint.** In an action for the determination of adverse claims, the property must be described in the complaint with such certainty as to enable an officer upon execution to identify it. In other respects the complaint, exclusive of the venue, title, subscription and verification, may be substantially in the following form, the blanks being properly filled. The plaintiff for cause of action shows to the court that he has an estate in, interest in, lien or incumbrance upon (as the case may be) the following described real property, situate in the above named county and state, to wit: .....

That the defendants claimed [sic] certain estates or interests in or liens or incumbrances (as the case may be) upon the same, adverse to plaintiff. (Here allege the facts concerning use and occupation and value thereof, and any property wasted or removed and the value thereof, if pertinent.)

*Chap. 31, § 8147. CODE OF CIVIL PROCEDURE. Conflicting Claims.*

Wherefore, plaintiff prays. (1) That the defendants be required to set forth all their adverse claims to the property above described, and that the validity, superiority and priority thereof be determined: (2) That the same be adjudged null and void, and that they be decreed to have no estate or interest in, or lien or incumbrance upon said property: (3) That this title be quieted as to such claim, and that defendants be forever debarred and enjoined from further asserting the same: (4) That he recover possession of the premises described, (if possession is desired): (5) That he recover . . . . . dollars as the value of the use and occupation and value of property wasted and removed therefrom: (6) That he have such other general relief as may be just, together with costs and disbursements. [R. C. 1905, § 7522; Laws 1901, ch. 5; R. C. 1895, § 5906; C. Civ. P. 1877, § 637.]

Description of plaintiff's estate, interest or lien in statutory form of complaint held to state facts sufficient to constitute a cause of action. *Northwestern Improv. Co. v. Oliver County*, 38 N. D. 57, 164 N. W. 315.

See also *Thornhill v. Olson*, 31 N. D. 81, 153 N. W. 442; *Great Northern R. Co. v. County of Grand Forks*, 38 N. D. 1, 164 N. W. 320.

§ 8151. *Comp. Laws, 1913.*

*Bowman v. Retelieuk*, 40 N. D. 134, 168 N. W. 576; *Farmers State Bank v. Anton*, — N. D. —, 199 N. W. 582; *Murphy v. Missouri & K. Land & Loan Co.* 28 N. D. 519, 149 N. W. 957; *Dakota Sash & Door Co. v. Brinton*, 27 N. D. 39, 145 N. W. 594.

§ 8152. *Comp. Laws, 1913.*

*Bowman v. Retelieuk*, 40 N. D. 134, 168 N. W. 576.

§ 8153. *Comp. Laws, 1913.*

*Bowman v. Retelieuk*, 40 N. D. 134, 168 N. W. 576; *O'Hare v. Bismarck Bank*, 45 N. D. 641, 178 N. W. 1017; *Farmers State Bank v. Anton*, — N. D. —, 199 N. W. 582; *Murphy v. Missouri & K. Land & Loan Co.* 28 N. D. 519, 149 N. W. 957; *Thornhill v. Olson*, 31 N. D. 81, L.R.A.1916A, 1193, 153 N. W. 442; *Page v. Smith*, 33 N. D. 369, 157 N. W. 477.

§ 8155. *Comp. Laws, 1913.*

*Farmers State Bank v. Anton*, — N. D. —, 199 N. W. 582.

CHAPTER 34.

ACTIONS AGAINST THE STATE.

§ 8175. *Comp. Laws, 1913.*

Injunction against enforcement of tax by state officers permitted. *Wallace v. Hines*, 253 U. S. 66, 64 L. ed. 782, 40 Sup. Ct. Rep. 435.

Authorizes action to be brought against state where title to property is involved. *Delaney v. State*, 42 N. D. 630, 174 N. W. 290.

As actions against guaranty fund commission by depositors of insolvent banks. *Wirtz v. Nestos*, — N. D. —, 200 N. W. 524.

See also *State ex rel. Lofthus v. Langer*, 46 N. D. 462, 177 N. W. 408.

§ 8177. *Comp. Laws, 1913.*

Section held not to refer or to apply to a direct garnishment proceeding ancillary to suit against Bank of North Dakota. *Sargent County v. State*, 47 N. D. 561, 182 N. W. 270.

CHAPTER 35.

CONTEMPTS.

- ARTICLE 1. CRIMINAL CONTEMPTS, §§ 8178, 8179.  
3. PRACTICE IN CONTEMPTS, §§ 8181-8201.

## ARTICLE 1.—CRIMINAL CONTENTS.

## § 8178. Comp. Laws, 1913.

State v. Dufek, — N. D. —, 193 N. W. 928; State v. Finlayson, 41 N. D. 494, 170 N. W. 910.

## § 8179. Comp. Laws, 1913.

State v. Finlayson, 41 N. D. 494, 170 N. W. 910.

## ARTICLE 3.—PRACTICE IN CONTEMPTS.

## § 8181. Comp. Laws, 1913.

Judgment of conviction of contempt, without order stating facts constituting the offense and reciting that same occurred in immediate view and presence of court held void. State v. Dufek, — N. D. —, 193 N. W. 928.

See also State v. Finlayson, 41 N. D. 494, 170 N. W. 910.

## § 8188. Comp. Laws, 1913.

Requirement that court or judge before whom an accused is produced, to cause interrogatories to be filed specifying circumstances of offense charged, is mandatory. State v. Dufek, — N. D. —, 193 N. W. 928.

## § 8190. Comp. Laws, 1913.

Punishment for civil contempt rests in sound discretion of trial court, and fine may be nominal. Red River Valley Brick Corp. v. Grand Forks, 27 N. D. 431, 146 N. W. 876.

## § 8201. Comp. Laws, 1913.

Section only allows appeals in contempt cases where defendant has been found guilty, and not where proceedings are dismissed. State ex rel. Heffron v. District Ct. 26 N. D. 32, 143 N. W. 143.

## CHAPTER 36.

## EMINENT DOMAIN.

## § 8202. Comp. Laws, 1913.

Sargent County v. State, 47 N. D. 561, 182 N. W. 270.

§ 8203. **Exercised for what public uses.** Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

1. All public uses authorized by the government of the United States.
2. Public buildings and grounds for the use of the state and all other public uses authorized by the legislative assembly of this state.
3. Public buildings and grounds for the use of any county, incorporated city, village, town or school; canals, aqueducts, flumes, ditches or pipes for conducting water for the use of the inhabitants of any county, incorporated city, village or town; or for draining any county, incorporated city, village or town; raising the banks of streams, removing obstructions therefrom and widening, deepening or straightening their channels; roads, streets and alleys and all other uses for the benefit of any county, incorporated city, village or town, or the inhabitants thereof which may be authorized by the legislative assembly; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized.
4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, by-roads, plank and turnpike roads, railroads and street railways, electric light plants and power transmission companies, canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mains and for irrigating purposes, draining and reclaiming lands.
5. Roads, tunnels, ditches, flumes, pipes and dumping places for working

mines; also outlets, natural or otherwise, for the flow, deposit or conduct of the tailings or refuse from mines; also mill dams.

6. By-roads leading from highways to residences and farms.

7. Telegraph and telephone lines.

8. Sewerage of any incorporated city, or any village or town, whether incorporated or unincorporated, or of any settlement consisting of not less than ten families, or of any public buildings belonging to the state, or of any college or university.

9. Cemeteries and public parks. [Laws 1915, ch. 153, § 1.]

As to right of boards of trustees of villages to lay out and extend streets, by condemnation or otherwise across rights of way of railroad companies. *Ashley v. Minneapolis, St. P. & S. Ste. M. R. Co.* 37 N. D. 147, 163 N. W. 727.

Eminent Domain, 20 C. J. pp. 546-587 §§ 34-74.

Power to establish building line along street under eminent domain. 28 A.L.R. 315.

Right to condemn property in excess of needs for public purpose, the excess to be devoted to private use. 14 A.L.R. 1350.

Imposing building restrictions in exercise of power of eminent domain. 8 A.L.R. 594.

Exercise of eminent domain for purpose of irrigating land of private owner. 9 A.L.R. 583, 27 A.L.R. 519.

Exercise of eminent domain to control use or improvement of property not taken. 23 A.L.R. 876.

Power to condemn against particular use of property. 8 A.L.R. 594.

Condemnation of park lands, for uses inconsistent with purpose of their dedication. 18 A.L.R. 1271.

Logging road or logging railroad. L.R.A.1917A, 102.

Compulsory use of private property in road work. 42 L.R.A.(N.S.) 1045; L.R.A.1918D, 974.

Power to exercise for purposes of school. 48 L.R.A.(N.S.) 485.

Public buildings. 10 R. C. L. 34 and Supps.

School buildings. 10 R. C. L. 52.

Canals. 10 R. C. L. 48 and Supps.

Public water supply. 10 R. C. L. 48 and Supps.

Drainage. 10 R. C. L. 36 and Supps.

Levees. 10 R. C. L. 36 and Supps.

Navigation. 10 R. C. L. 47 and Supps.

Public water supply. 10 R. C. L. 48 and Supps.

Wharves, docks, and piers. 10 R. C. L. 48 and Supps.

Ferries. 10 R. C. L. 47 and Supps.

Railroads. 10 R. C. L. 42 and Supps.

Artificial lights. 10 R. C. L. 49.

Creation and distribution of power. 10 R. C. L. 50 and Supps.

Irrigation. 10 R. C. L. 59 and Supps.

Mill dams. 10 R. C. L. 54.

Telegraph and telephone lines. 10 R. C. L. 52.

Cemeteries. 10 R. C. L. 52.

Public parks. 10 R. C. L. 36 and Supps.

*State v. Minneapolis, St. P. & S. Ste. M. R. Co.* 28 N. D. 621, 150 N. W. 463.

**§ 8203a. Emergency.** Whereas, an emergency is hereby declared to exist in this that there is no law now on our statute books giving electric light plants the right of eminent domain, now therefore, this act shall take effect and be in force from and after its passage and approval. [Laws 1915, ch. 153, § 1.]

**§ 8205. What property may be taken.** The private property which may be taken under this chapter includes:

1. All real property belonging to any person.

2. Lands belonging to this state or to any county, incorporated city, village, or town not appropriate [appropriated] to some public use.

3. Property appropriated to public use, but such property shall not be

taken unless for a more necessary public use than that to which it has been already appropriated, and use by a municipality shall be deemed a more necessary public use than use for the same purpose by a private corporation; and whenever a right of way shall have been taken and the person, firm or corporation taking such right of way shall fail or neglect for five years to use the same for the purpose to which it had been appropriated, the attempt by another person, firm or corporation to appropriate such right of way shall be considered a more necessary public use.

4. Franchises for toll roads, toll bridges, ferries and all other franchises; but such franchises shall not be taken unless for free highways, railroads or other more necessary public use.

5. Any system of water works, electric light and power plant wells, reservoirs, pipe lines, machinery, franchises and all other property of any character whatsoever comprising a water works system or electric light and power system.

6. All rights of way for any and all the purposes mentioned in section 8203 and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed or intersected by any other right of way or improvement or structure thereon. They shall also be subject to a limited use in common with the owner thereof when necessary; but such uses, crossings, intersections and connections shall be made in the manner most compatible with the greatest public benefit and the least private injury.

7. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law. Provided that in the event that such property is acquired by condemnation proceedings the city or municipality instituting such proceedings shall be bound by the decision of the court and jury in such proceedings, and shall pay into court, within six months after the rendering of the verdict therein, the full amount found by the jury to be the amount of the damages for such taking. [Laws 1921, ch. 63, § 1.]

Eminent Domain, 20 C. J. pp. 587-619 §§ 75-109.

State power of eminent domain over property of United States. 4 A.L.R. 548.

Right to condemn property previously condemned or purchased for public use, but not actually so used. 12 A.L.R. 1502.

Scope and effect of constitutional or statutory provision exempting property from eminent domain proceedings. L.R.A.1916A, 1097.

When property is subject to eminent domain. 10 R. C. L. 180 and Supps.

What use protects property from subsequent taking. 10 R. C. L. 201 and Supps.

Federal property. 10 R. C. L. 20 and Supps.

Land of incompetent person. 10 R. C. L. 204 and Supps.

Land already in public use. 10 R. C. L. 198 and Supps.

Property situated in another state. 10 R. C. L. 19 and Supps.

Property of cities and towns. 10 R. C. L. 77.

§ 8206. Comp. Laws, 1913.

Ashley v. Minneapolis, St. P. & S. Ste. M. R. Co. 37 N. D. 147, 163 N. W. 727.

§ 8223. Comp. Laws, 1913.

Montana Eastern R. Co. v. Lebeck, 32 N. D. 162, 155 N. W. 648.

§ 8224. Comp. Laws, 1913.

In condemnation proceedings, compensation is to be estimated with reference to value of land to owner for purposes then used, and with reference, of what its present value is in view of uses to which it is reasonably capable of being put. Montana Eastern R. Co. v. Lebeck, 32 N. D. 162, 155 N. W. 648.

§§ 8226, 8227. Comp. Laws, 1913.

Minot v. Olson, 42 N. D. 246, 173 N. W. 458.

§ 8231. **New trials and appeals.** The provisions of this code relative to new trials and appeals, except in so far as they are inconsistent with the

provisions of this chapter apply to the proceedings mentioned in this chapter; provided, that upon the payment of the damages assessed the plaintiff shall be entitled to enter into, improve and hold possession of the property sought to be condemned as provided in section 8229 and devote the same to the public use in question; and no motion for a new trial or appeal shall after such payment in any manner retard the contemplated improvement. Any money which shall have been deposited, as provided in section 8229, shall be applied to the payment of the recovery upon a new trial and the remainder, if there is any, shall be returned to the plaintiff. [R. C. 1905, § 7603; R. C. 1895, § 5973.]

## CHAPTER 37A.

### CO-OPERATION OF UNITED STATES GEOLOGICAL SURVEY.

§ 8234a1. **Topographic surveys and maps.** In order to continue the execution and speedy completion of a topographic survey and map of this state and assist in the development of flood protection, domestic water supply, restoration of water areas, irrigation and drainage projects, the state engineer is hereby authorized to confer with the director of the United States Geological Survey and to accept the co-operation of the United States with this State in the execution of topographic surveys and maps of this state, which is hereby authorized to be made; and said state engineer shall have the power to arrange with said director or other authorized representative of the United States Geological Survey concerning the details of such work, the method of its execution, and the order in which these surveys and maps of different parts of the state shall be undertaken.

Provided, that the said director of the United States Geological Survey shall agree to expend on the part of the United States upon said work a sum equal to that hereby appropriated for this purpose. In arranging details heretofore referred to, the state engineer shall, in addition to such other provisions as he may deem wise, require that the maps resulting from this survey shall show the outlines of all counties, towns, and extensive wooded areas, as existing on the ground at the time of the execution of the survey; the location of all railways, roads, streams, canals, lakes, and rivers, and shall contain contour lines showing the elevation and depression for every twenty feet or oftener in vertical interval of the surface of the country; the resulting map shall wholly recognize the co-operation of the State of North Dakota, and as each manuscript sheet of the map is completed the state engineer shall be furnished by the United States Geological Survey with photographic copies of the same, and as the engraving on each sheet is completed the state engineer shall be furnished by said director with transfers from the copperplates of the same. [Laws 1925, ch. 144, § 1.]

§ 8234a2. **Appropriation.** The sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated for the purposes specified in this act out of any moneys in the treasury not otherwise appropriated. [Laws 1925, ch. 144, § 2.]

## CHAPTER 38.

### IRRIGATION.

ARTICLE 1a. IRRIGATION DISTRICTS, §§ 8247a1-8247a75.

1b. MISSOURI RIVER CONFERENCE, §§ 8247b1-8247b4.

9. FLOOD IRRIGATION PROJECTS, §§ 8320a1-8320a24.

## ARTICLE 1a.—IRRIGATION DISTRICTS.

§ 8247a1. **Irrigation districts; organization; electors.** Whenever a majority of the electors owning lands or holding leasehold estates in the manner and to the extent hereinafter provided in any district susceptible of one mode of irrigation from a common source and by the same system of works, desire to provide for the irrigation of the same, they may propose the organization of an irrigation district under the provisions of this act, and when so organized, each district shall have the powers conferred or that may hereafter be conferred by law upon such irrigation district. Provided, that where ditches or canals have been constructed before the passage of this act of sufficient capacity to water the lands thereunder for which the water taken in such ditches is appropriated, such ditches and franchises and the land subject to be watered thereby, shall be exempt from operation of this law, except such district shall be formed to make purchase of such ditches, canals and franchises. Provided, that this law shall not be construed to in any way affect the rights of ditches already constructed. Provided, further, that the term elector, as used in this chapter shall include any resident of the state of North Dakota, owning not less than ten acres of land within any district or proposed district, or entryman upon public lands therein, or any resident of the state of North Dakota holding a leasehold estate in not less than forty acres of state land within said district for a period of not less than five years from the date at which said elector seeks to exercise the elective franchise. Provided, however, when the elector is the owner or entryman of land in more than one division of the irrigation district and resides without the district he shall be considered an elector in that division of the district in which the major portion of his land is situated. [Laws 1917, ch. 115, § 1.]

Waters, 40 Cyc. 817.

Organization of irrigation districts. 15 R. C. L. 496 and Supps.

§ 8247a2. **District; how formed.** A petition shall be filed with the board of county commissioners, signed by a majority of the said electors of the proposed district who shall be entrymen upon or shall own, or hold leasehold estates in a majority of the whole number of acres owned or held by the electors of the proposed district, which petition shall set forth and particularly describe the boundaries of said district and shall pray that the same be organized under the provisions of this article. The petitioners must accompany the petition with a map of the proposed district. Said map shall show the location of the proposed canal or the works by means of which it is intended to irrigate the lands of the proposed district, and canals situated within the boundaries of the proposed district: Provided, canals that merely pass through said lands, and which do not irrigate any of the same, need not be shown. If the water supply be from natural streams, the flow of said stream or streams shall be stated in cubic feet per second.

If the water supply for the district is to be gathered by storage reservoirs, the map shall show the location of the proposed reservoirs and shall give their capacity in acre feet.

The map shall be drawn to a scale of two inches to the mile. Cross sections of the proposed canal, and all canals existing within the boundaries of the proposed district and shown on the map, and of all proposed dams and embankments, shall be given in sufficient detail to show the contemplated method of construction, and the capacity shall be given in cubic feet per second of the proposed and said existing canals. Such cross sections shall be drawn to a scale of ten feet to the inch, and said map and cross sections shall be certified to by a competent irrigation engineer. The petition must be accompanied with a good and sufficient bond, to be approved by the said board of county commissioners, in double the amount of the probable cost of organizing such district, conditioned that the sureties will pay all costs in case said organization

shall not be effected. Such petition shall be published for at least two weeks prior to the date when the same is to be presented, in some newspaper printed and published in the county where the petition is presented, together with a notice stating the date of the meeting at which same will be presented. A copy of such petition and all maps and other papers filed with the same shall be filed in the office of the state engineer for at least four weeks before the date set for such hearing. It shall be the duty of the state engineer to examine such petition, maps and other papers, and if he deem it necessary, to further examine the proposed district, the works proposed to be purchased, or the location of the works to be constructed, and he shall prepare a report upon the matter in such form as he deems advisable, and submit the same to the said board of county commissioners, at the meeting set for the hearing of said petition. At the time set for said hearing the said board may amend such plan of irrigation as they may find advisable, and when they shall have determined to proceed with the matter, the said board may adjourn such hearing from time to time, not exceeding four weeks in all, and on the final hearing may make such changes in the proposed boundaries as they may find to be proper, and shall establish and define the boundaries; Provided, the said board shall not change the boundaries so as to exempt from the operation of this article any territory within the boundaries of the district proposed by the petitioners, which is susceptible of irrigation by the same system of works applicable to the other lands in such proposed district; nor shall any land which will not, in the judgment of said board, be benefited by irrigation by said system be included in such districts: Provided, any person whose lands are susceptible of irrigation from the same source, shall, upon application of the owner to the said board, be entitled to have such lands included in such district. The said board shall also make an order dividing the district into three, five or seven divisions, as they may deem proper, and be as nearly equal in size as may be practicable, and which shall be numbered, and one director shall be elected for each division.

The said board shall then give notice of an election to be held in such proposed district, for the purpose of determining whether, or not, the same shall be organized under the provisions of this article. Such notice shall describe the boundaries as established and shall designate a name for such proposed district, and said notice shall be published for at least three weeks prior to such election in a newspaper in the county; and if any portion of such proposed district lies within another county, or counties, then said notice shall be published in a newspaper published within each of said counties. Such notice shall require the electors to cast ballots which contain the words, "Irrigation District—Yes," or "Irrigation District—No," or words equivalent thereto; and also the names of persons voted for to fill various elective offices hereinafter prescribed. No person shall be entitled to vote at any election held under the provisions of this article unless he shall be a qualified elector. [Laws 1917, ch. 115, § 2.]

Waters, 40 Cyc. 817.

Scope and import of term "Owner" in statutes relating to formation of irrigation districts. 2 A.L.R. 791.

Organization of irrigation districts. 15 R. C. L. 496 and Supps.

**§ 8247a3. Same; election; organization.** Such election shall be conducted in accordance with the general laws of the state. The said county board shall meet on the second Monday next succeeding such election and proceed to canvass the vote cast thereat; and if upon such canvass it appears that a majority of all the votes cast are "Irrigation District—Yes," the said board shall, by an order entered on their minutes, declare such territory duly organized as an irrigation district, under the name and style therefor designated, and shall declare the persons receiving the highest number of votes for such several offices to be duly elected to such offices. The said board shall cause a copy of such order, duly certified, to be immediately filed for record in the office of the county register of deeds of each county in which any portion of such lands are situated,

and must also immediately forward a copy thereof to the clerk of the board of county commissioners of each of the counties in which any portion of the district may lie; and no board of county commissioners of any county, including any portion of such district, shall, after the date of the organization of such district, permit another district to be formed including any of the lands of such district, without the consent of the board of directors thereof; and from and after the date of such filing, the organization of such district shall be complete, and the officers thereof shall be entitled immediately to enter upon the duties of their respective offices, upon qualifying in accordance with law, and shall hold such offices until their successors are elected and qualified.

For the purpose of the election above provided for the said county board must establish a convenient number of election precincts in the said proposed district, and define the boundaries thereof, which precincts may thereafter be changed by the board of directors of such district. [Laws 1917, ch. 115, § 3.]

Waters, 40 Cyc. 817, 820.

Conduct of elections. 9 R. C. L. 1091 et seq. and Supps.

**§ 8247a4. Officers; election; term; bond.** The officers elected in compliance with the foregoing sections upon qualifying as hereinafter provided, shall hold their respective offices until the next general election for irrigation district, when their successors shall be elected. At such general election the assessor, treasurer and member of the board of directors having the highest number of votes shall hold their respective offices for the term of three years; a member of the board of directors having the next highest number of votes shall be declared to be elected for two years; the member of the board of directors having the next highest number of votes shall be elected for one year. In case of a tie, the election, or the term of office of the members tying shall be determined by lot. Each year thereafter there shall be elected for a term of three years, one member of said board of directors, and every three years thereafter an assessor and treasurer, the term of office of each of whom shall be three years. The member of the said board of directors shall be nominated and elected by a majority vote of the electors of the division in the irrigation district for which he is to serve as such director. The regular election of said district shall be held on the first Tuesday in January. Within ten days after receiving their certificates of election hereinafter provided for said officers shall take and subscribe the official oath. The assessor shall execute an official bond in the sum of \$500.00, the district treasurer, an official bond in the sum of not less than \$1,000.00, and not less than double the amount of money that may come into his hands, the amount to be determined by the board of directors, said bond to be approved by the board of directors, and each member of said board of directors shall execute an official bond in the sum of \$1,000.00, which bond shall be approved by the judge of the district court in the county where such organization was effected, and after such approval all bonds shall be recorded in the office of the register of deeds of such county. Provided, that in case any district organized hereunder is appointed fiscal agent of the United States or by the United States is authorized to make collections of money for and on behalf of the United States in connection with any federal reclamation project, such treasurer and each such director shall execute a further additional official bond in such sum as the Secretary of the Interior may require, conditioned for the faithful discharge of the duties of his office and the faithful discharge by the district of its duties as fiscal or other agent of the United States under any such appointment or authorization; such additional bonds to be approved, recorded and filed as herein provided for other official bonds, and any such additional bonds may be sued upon by the United States or any person injured by failure of such officer or district to fully, promptly and completely perform their respective duties. All official bonds herein provided shall be in the form prescribed by law for official bonds of county officers, except the obligee named in said bond shall be the said district. The officers elected shall

assume the duties of their office the first Monday in March after their election; Provided, all incumbents shall hold their respective offices until their successors are elected and qualified, as above provided. [Laws 1917, ch. 115, § 4.]

Waters, 40 Cyc. 820.

Oath of office of public officer. 22 R. C. L. 448.

Official bonds. 22 R. C. L. 496 et seq. and Supps.

**§ 8247a5. Subsequent elections.** Fifteen days before any election held under the provisions of this article, subsequent to the organization of the district, the secretary of the board of directors shall cause notice to be posted in three public places in each election precinct of the time and place of holding the election, and shall also post a general notice of the same in the office of the board, specifying the polling places of each precinct. Prior to the time for posting the notices the board must appoint from each precinct, from the electors thereof, one clerk and two judges, who shall constitute a board of election for such precinct. If the board fails to appoint a board of election, or the members appointed do not attend at the opening of the polls on the morning of election, the electors of the precinct present at that hour may appoint the board, or supply the place of an absent member thereof. The board of directors must, in its order appointing the board of election, designate the hour and place in the precinct where the election must be held. [Laws 1917, ch. 115, § 5.]

Elections, 20 C. J. pp. 95-103 §§ 76-89; Waters, 40 Cyc. 820.

Notice of election. 9 R. C. L. 989 et seq. and Supps.

**§ 8247a6. Same; qualification of election officers.** One of the judges shall be chairman of the election board and may: First, administer all oaths required in the progress of an election, Second, appoint judges and clerks, if during the progress of the election any judge or clerk ceases to act. Any member of the board of election, or clerk thereof, may administer and certify oaths required to be administered during the progress of an election. Before opening the polls each member of the board must take and subscribe to an oath to faithfully perform the duties imposed by law. Any elector of the precinct may administer and certify such oath. The polls must be opened at eight o'clock on the morning of the election and be kept open until six o'clock P. M. of the same day; provided that in districts embracing twelve thousand acres, or less, the polls may be opened at one o'clock P. M. and be kept open until five-thirty o'clock P. M. of the same day. [Laws 1917, ch. 115, § 6.]

Elections, 20 C. J. pp. 89-92 §§ 68-75.

Oath of office. 22 R. C. L. 448.

**§ 8247a7. Same; return and canvass of vote.** No lists, tally paper, or certificate returned from any election shall be set aside or rejected for want of form if it can be satisfactorily understood. The board of directors must meet at its usual place of meeting on the first Monday after each election and canvass the returns. If at the time of meeting the returns from each precinct in the district in which the polls were opened have been received, the board of directors must then and there proceed to canvass the returns; but if all the returns have not been received the canvass must be postponed from day to day until all the returns have been received, or until postponements have been had. The canvass must be made in public, and by opening the returns and ascertaining the vote of the district for each person voted for and declaring the result thereof. [Laws 1917, ch. 115, § 7.]

Elections, 20 C. J. pp. 191-204 §§ 238-263.

Canvassing of vote. 9 R. C. L. 1009 et seq.

**§ 8247a8. Declaration of result; certificates of election.** The secretary of the board of directors must, as soon as the result is declared, enter upon the records of such board a statement of such results, which statement must show:

First: The whole number of votes cast in the district and in each division of the district.

Second: The name of the persons voted for.

Third: The office to fill which each person was voted for.

Fourth: The number of votes given in each precinct for each of such persons.

Fifth: The number of votes given in the district for each of such persons.

The board of directors must declare elected the person having the highest number of votes given for each office. The secretary must immediately make out and deliver to such person a certificate of election, signed by him and authenticated with the seal of the district. In case of a vacancy in the office of assessor or treasurer, the vacancy shall be filled by appointment by the board of directors; in case of a vacancy in the office of member of the board of directors, the vacancy shall be filled by appointment by a majority of the remaining members of the board and district treasurer. Any officer appointed, as above provided, shall hold his office until the next general election of said district and until his successor is elected and qualified. [Laws 1917, ch. 115, § 8.]

Elections, 20 C. J. pp. 204-205 §§ 261-264.

Certificate of election issued by canvassing board. 9 R. C. L. 1113 and Supps.

**§ 8247a9. Board of directors; powers and duties.** On the first Wednesday following their election the directors shall meet and organize as a board, elect a president from their number, and appoint a secretary who need not be a member of the board. The board shall have the power, and it shall be its duty to manage and conduct the business affairs of the district, make and execute all necessary contracts, employ such agents, officers and employees as may be required and prescribe their duties, adopt a seal for said district, which shall be kept in the custody of the secretary, establish equitable by-laws, rules and regulations for the distribution and use of water, and generally to perform all such acts as shall be necessary to fully carry out the purposes of this article. The said by-laws, rules and regulations shall be printed in convenient form for distribution. All water rights shall be appurtenant to the land. If any tract of land, or any part thereof, to which a water right has attached shall at any time become sub-irrigated, to the extent that water is no longer of any benefit thereon for irrigation purposes, the owner or entryman thereof may make application to the irrigation district board to relieve such lands so sub-irrigated from the district assessment as provided herein, releasing in such application all claim to such water right as may belong to, or that has been applied to or upon said lands until such time as the said lands may be drained and water may again be applied to beneficial use. Provided, that such land owner or entryman may apply for a permit to transfer such water right to any other lands to which the same may be beneficially applied, and apply to have such new or additional tract included within the boundaries of such district as provided by law and the exclusion of such lands, and the inclusion of the new tract as herein contemplated. The board shall thereupon make the appropriate order of suspension of assessment, or of the exclusion and inclusion of the lands, and the transfer of the water right. A certified copy of such order shall be filed for record and recorded in the office of the register of deeds in the county in which such land is situated, and thereafter all the obligations against such lands from which such water right has been taken, arising by reason of such water right, shall thereupon be cancelled and such obligation shall follow and attach with such water right to the land so included, if any: Provided, nothing herein contained shall authorize or empower the board of directors to include any land within its district unless the owner or lessee thereof shall pay or obligate such land to pay the same rate per acre for such water as all other lands have originally paid or shall have been obligated for, to cover costs of construction. It shall be the duty of the directors to make all necessary arrangements for right of way for laterals from the main canal to each tract of land subject to assessment, and when necessary the board shall exercise its right of eminent domain

to procure right of way for laterals and shall make such rules in regard to the payment for such right of way as may be just and equitable: Provided this section shall not be construed to deprive any person, persons, company or corporation now entitled thereto, to exercise the right of eminent domain. [Laws 1917, ch. 115, § 9.]

Waters, 40 Cyc. 821.

Lands which may be included. 15 R. C. L. 496.

**§ 8247a10. Same; meetings; quorum; record.** The board of directors shall hold regular meetings in their office on the first Tuesday of each month and continue in session from 10 o'clock A. M. to 4 o'clock P. M. each of said days and such special meetings as may be required for the proper transaction of business. Provided, all special meetings shall be ordered by the president of the board, the order must be entered of record, and five days' notice thereof must be given each member. The order must specify the business to be transacted, and no other than that specified shall be transacted at such special meeting. All meetings of the board must be published, and a majority of the members shall constitute a quorum for the transaction of business and upon all questions requiring a vote there shall be a concurrence of at least a majority of such board. All records of the board must be open to the inspection of any elector during business hours, and said board shall cause to be published at the close of each regular or special meeting a brief statement of the proceedings thereof in one newspaper of general circulation in the district, if same can be done at an expense not exceeding one third of the legal rate for advertising notices. The board, its agents and employees shall have the right to enter upon any land within the district, to make surveys, and may locate the line of any canal, or canals, and the necessary branches for such location. The board shall also have the right to acquire either by purchase or condemnation, all lands and waters and other property necessary for the construction, use, maintenance and repair and improvement of any canals, power plants of any kind or nature, and lands for reservoirs for storage of water and all necessary appurtenances. The board shall also have the right to acquire by purchase or condemnation any irrigation works, power plant, ditches, canals or reservoirs already constructed, for the use of said district. In case of purchase, the bonds of the district hereinafter provided for may be used at their par value in payment. The board may also construct the necessary dams, reservoirs and works for the collection of water for the district and do any and every lawful act necessary to be done that sufficient water may be furnished to each tract of land in the district for irrigation purposes, and may enter into any obligation or contract with the United States for the construction, operation and maintenance of the necessary work for the delivery and distribution of water therefrom under the provision of the federal reclamation act and all acts amendatory thereof, or supplementary thereto, and the rules and regulations established thereunder; or the board may contract with the United States for a water supply under any act of congress providing for or permitting such contract, and in case contract has been, or may be hereafter made with the United States as herein provided, bonds of the district may be deposited with the United States at ninety per cent of their par value, to the amount to be paid by the district to the United States under any such contract, the interest on such bonds to be provided for by assessment and levy as in the case of other bonds of the district and regularly paid to the United States to be applied as provided in such contract, and if bonds of the district are not so deposited it shall be the duty of the board of directors to include as part of any levy or assessment provided for in section 19 of this act, an amount sufficient to meet each year all payments accruing under the terms of any such contract; and the board may accept on behalf of the district appointment of the district as fiscal agent of the United States, or authorization of the district by the United States to make collections of money for and

on behalf of the United States in connection with any federal reclamation project, whereupon the district shall be authorized to so act and to assume the duties and liabilities incident to such action, and the said board, shall have full power to do any and all things required by the federal statutes in connection therewith, and all things required by the rules and regulations established by any department of the federal government in regard thereto. The use of all water required for irrigation of lands of any district formed under the provisions of this article, together with canals and ditches already constructed, the rights of ways for canals and ditches, sites for reservoirs, and pumping plants, and all other property required in fully carrying out the provisions of this article, is hereby declared to be a public use, subject to the regulation and control of the state in the manner prescribed by law. If contract is made with the United States, as in this section provided, and bonds are not to be deposited with the United States in connection with such contract, bonds need not be issued, or if required to raise funds in addition to the amount of such contract, shall be issued only in the amount needed in addition thereto. [Laws 1917, ch. 115, § 10.]

Waters, 40 Cyc. 814, 821-824.

**§ 8247a11. Title to property.** The legal title to all property acquired under the provisions of this article shall immediately, and by operation of law, vest in such irrigation district in its corporate name, and shall be held by such district in trust for, and is hereby dedicated and set apart to the uses and purposes set forth in this article. The board is hereby authorized and empowered to hold, use, and acquire, manage, occupy and possess such property as herein provided. [Laws 1917, ch. 115, § 11.]

Waters, 40 Cyc. 821.

**§ 8247a12. May acquire property; sue and be sued, etc.** The board is hereby authorized and empowered to take conveyances or other assurances for all property acquired by it under the provisions of this article, in the name of such irrigation district, to and for the uses and purposes herein expressed, and to institute and maintain any and all actions and proceedings, suits at law or in equity, necessary or proper in order to fully carry out the provisions of this article, or to enforce, maintain, protect, or preserve any and all rights, privileges and immunities created by this article, or acquired in pursuance thereof. In all courts, actions, suits or proceedings, the board may sue, appear and defend, in person or by attorneys, in the name of such irrigation district. [Laws 1917, ch. 115, § 12.]

Waters, 40 Cyc. 821.

**§ 8247a13. Bonds; when issued; interest.** As soon as practicable after the organization of any such district, the board of directors shall, by a resolution entered on its record, formulate a general plan of its proposed operation, in which it shall state what constructed works or other property is proposed to purchase and the cost of purchasing the same; and further, what construction work it proposed to do and how it proposed to raise the funds for carrying out said plan. For the purpose of ascertaining the cost of any such construction work, the board shall cause such surveys, examinations, and plans to be made as shall demonstrate the practicability of such plan, and furnish the proper basis for an estimate of the cost of carrying out the same. All such surveys, examinations, maps, plans, and estimates, shall be made under the direction of a competent irrigation engineer and certified by him. The board shall then submit a copy of the same to the state engineer within ninety days thereafter, who shall file a report upon the same with the board, which report shall contain such matters as in the judgment of the said state engineer may be desirable. Upon receiving the report, the board of directors shall proceed to determine the amount of money necessary to be raised, and if a bond issue is contemplated, shall immediately thereupon call a special election, at which shall

be submitted to the electors of such district possessing the qualifications prescribed by this act, the question of whether, or not, the bonds of said district shall be issued and the amount so determined: Provided, such bonds shall not be issued for more than the actual estimated cost of said ditches, the purchase price of ditches, the cost of construction work, all as contained in its general plan of operation as well as the first years' interest upon such bond issued.

Notice of such election must be given by posting notice in three public places in each election precinct in said district for at least twenty days, and also by publication of such notice in some newspaper, published in the county where the office of the board of directors of such district is required to be kept, once a week for at least three successive weeks. Such notice must specify the time of holding the election, the amount of bonds proposed to be issued, and the election must be held, and the result thereof determined and declared in all respects as nearly as practicable in conformity with the provisions of this act governing the election of officers: Provided, no informalities in conducting such an election shall invalidate the same if the election shall have been otherwise fairly conducted. At such election, the ballots shall contain the words, "Bonds—Yes," and "Bonds—No," or words equivalent thereto. If a majority of the ballots cast are "Bonds—Yes," the board of directors shall immediately cause bonds in said amount to be issued; such bonds shall be payable in lawful money of the United States, as follows, to-wit: At the expiration of eleven years, not less than five per cent of said bonds; at the expiration of twelve years, not less than six per cent; at the expiration of thirteen years, not less than seven per cent; at the expiration of fourteen years, not less than eight per cent; at the expiration of fifteen years, not less than nine per cent; at the expiration of sixteen years, not less than ten per cent; at the expiration of seventeen years, not less than eleven per cent; at the expiration of eighteen years, not less than thirteen per cent; at the expiration of nineteen years, not less than fifteen per cent; and for the twentieth year a percentage sufficient to pay off said bonds, and shall bear interest at the rate of six per cent per annum, payable semi-annually, on the first day of January and July of each year. The principal and interest shall be payable at the office of the treasurer of the county in which said district was originally organized. The bonds shall be each of the denomination of not less than one hundred dollars nor more than five hundred dollars, shall be negotiable in form, executed in the name of the district and signed by the president and secretary, or by their lithographic fac simile, and the seal of the district shall be affixed thereto. They shall be numbered consecutively as issued and bear date at the time of their issue. Coupons for the interest shall be attached to each bond, signed by the president and secretary. The bonds shall express on their face that they were issued by the authority of this article, stating its title and date of approval. Each bond shall be made payable at a given time for its entire amount, and the bonds issued in series only, each series being payable at the expiration of a certain number of years, as hereinbefore set forth. The secretary shall keep a record of the bonds sold, their number, date of sale, the prices received, and the name of the purchaser; Provided, any such district may by a majority vote provide for the issuance of bonds that will mature in any number of years less than twenty, and arrange for the payment thereof in installments at the same ratio as above provided; and provided further, such district by a majority vote may provide and authorize the payment of interest at a rate not exceeding six per cent per annum on any or all due and unpaid interest coupons attached to valid and outstanding bonds of such district heretofore or hereafter issued and sold, for [from] the date of registration of such interest coupons for payment, or if previously registered, then from the date of such election to pay such interest, until paid. Such question may be submitted at any general or special election of the district by

ballot which shall generally describe the bonds to which such coupons are attached upon which such interest is to be paid, by number, series, and date of issue, and such ballots shall be substantially the following form:

"For the payment of interest or coupons attached to bonds numbered ..... Yes..... Series ..... dated ..... at ..... per cent per annum." No.....

Such election shall be governed by the laws now in force relating to bond elections in such districts, and if a majority of the ballots cast on such proposition shall be in favor thereof the board of directors shall declare the same adopted and the funds to pay such interest shall be estimated and included in the levy for the bond fund of such irrigation district as provided by law. Thereafter, upon the presentation of any bond with coupons attached, or any detached coupons of such bonds, upon which interest is payable under the provisions of this article, the treasurer shall stamp or write on such coupons: "bears interest at ..... per cent per annum from the registration for payment (or if previously registered for payment, then from the date of election to pay interest.)"

.....  
County Treasurer.

And payment of such coupon shall include the payment of the interest accruing under this article.

At least as often as once a year after organization, the board of directors shall make a report to the state engineer of the condition of the work of construction, as to capacity, stability and permanency, and whether or not the plan of irrigation formulated under the provisions of this title is being successfully carried out, and whether or not in the opinion of the board, the funds available will complete the proposed works. Upon the receipt of such report by the state engineer he shall make such suggestions and recommendations to such board of directors as he may deem advisable for the best interest of the district. [Laws 1917, ch. 115, § 13.]

Waters, 40 Cyc. 821; Elections, 20 C. J. pp. 95-103 §§ 76-89.  
Issuance of bonds by irrigation districts. 15 R. C. L. 497, and Supps.

§ 8247a14. Bonds; sale of; notice. The board may sell such bonds from time to time in such quantities as may be necessary and most advantageous to raise the money for the construction of such canals and works, the acquisition of property and rights, and otherwise to fully carry out the object and purposes of this article. Before making any sale, the board shall at a meeting, by resolution declare its intention to sell a specified amount of the bonds, and the day and hour and place of such sale, and shall cause such resolution to be entered in the minutes, and notice of sale to be given by publication thereof at least twenty days in a daily newspaper published in each of the cities of Bismarek and Fargo, and in any other newspaper, at their discretion. The notice shall state that sealed proposals will be received by the board at their office, for the purchase of the bonds till the day and hour named in the resolution. At the time appointed the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder, and may reject all bids; but said board shall in no event, sell any of said bonds for less than ninety-five per cent of the face value thereof. [Laws 1917, ch. 115, § 14.]

Waters, 40 Cyc. 821.  
Bonds of irrigation districts. 15 R. C. L. 497 and Supps.

§ 8247a15. Same; how paid. Such bonds, and the interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district, and all real property of the district shall be and remain liable to be assessed, for such payments as herein provided, and for all payments due or to become due to the United States under any contract between the district and

the United States, accompanying which bonds of the district have not been deposited with the United States as in section 10 of this act provided. [Laws 1917, ch. 115, § 15.]

Waters, 40 Cyc. 824.

Bonds of irrigation districts. 15 R. C. L. 497 and Supps.

**§ 8247a16. Apportionment of benefit.** The assessor must between the first Monday in March and the first Monday in May of each year, examine each tract or legal subdivision of land in said district including entered and unentered public lands of the United States subject thereto under the act of Congress approved August 11, 1916, entitled an act to promote the irrigation of arid lands, and shall determine the benefits which will accrue to each of such tracts or subdivisions on account of the construction or acquisition for such irrigation works; and the amount so apportioned or distributed to each of said tracts or subdivisions as finally equalized or confirmed by the court as the case may be, shall be and remain the basis for fixing the annual assessments levied against such tracts or subdivisions in carrying out the purposes of this act. Such assessor shall make or cause to be made, a list of such apportionment or distribution, which list shall contain a complete description of each subdivision or tract of land of such district with the amount and rate per acre of such apportionment or distribution of cost, and the name of the owners thereof; or he may prepare a map on a convenient scale showing each of said subdivisions or tracts with the rate per acre of such apportionment entered thereon; provided, that where all lands on any map or section of a map are assessed at the same rate, a general statement to that effect shall be sufficient. Said list or map shall be made in duplicate and one copy of each shall be filed in the office of the state engineer and one copy shall remain in the office of the board of directors for public inspection. Whenever any assessment is made either in lieu of bonds, of any annual levy, for raising the interest on bonds, or any portion of the principal or the expenses of maintaining the property of the district, or any special assessment voted by the electors, it shall be spread upon the lands in proportion to the benefits received, and the whole of the assessment of benefits shall equal the amount of bonds or other obligations authorized at the election last above mentioned. Provided, however, the assessment of any property in the name of the wrong person shall in no way invalidate the assessment thereof.

The assessor shall also determine and list the amount payable by each tract obligated to the United States by contract, if any, for the payment of water charges. [Laws 1917, ch. 115, § 16.]

Waters, 40 Cyc. 824.

Assessment of land in irrigation district. 15 R. C. L. 497 and Supps.

**§ 8247a17. Equalization.** On or before the fifteenth day of May in each year the assessor must complete his assessment roll and deliver it to the secretary of the board, who must immediately give notice thereof, and of the time the board of directors acting as a board of equalization will meet to equalize assessments, by publication in a newspaper published in each of the counties comprising the district. The time fixed for the meeting shall not be less than ten, nor more than twenty days from the first publication of the notice; and in the meantime the assessment roll must remain in the office of the secretary for the inspection of all persons interested. [Laws 1917, ch. 115, § 17.]

Waters, 40 Cyc. 824; Taxation, 37 Cyc. 1073-1111.

**§ 8247a18. Same; duties of board.** Upon the day specified in the notice required by the preceding section for the meeting of the board of directors which is hereby constituted a board of equalization for that purpose, it shall meet and continue in session from day to day, so long as may be necessary, not to exceed ten days exclusive of Sundays, to hear and determine such objections to the apportionment of benefits and assessment as may come before

them; and the board may change the apportionment of benefits and assessment as may be just. The secretary of the board shall be present during its session, and note the changes made in the valuation and assessment of property, and in the names of the persons whose property is assessed; and within ten days after the close of the session he shall have the total values and assessment as finally equalized by the board, extended into columns and added. [Laws 1917, ch. 115, § 18.]

Waters, 40 Cyc. 824; Taxation, 37 Cyc. 1073-1111.

**§ 8247a19. Levy; bond fund; collection.** The board shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds, and all payment due, or to become due the ensuing year to the United States under any contract between the district and the United States, which when collected, shall be called the "Bond and United States Contract fund of ..... Irrigation District," and at the expiration of ten years after the issuing of the bonds the board must increase said assessment for the ensuing years in a percentage of the whole amount of bonds outstanding, as follows: For the eleventh year, five per cent; for the twelfth year, six per cent; for the thirteenth year, seven per cent; for the fourteenth year, eight per cent; for the fifteenth year, nine per cent; for the sixteenth year, ten per cent; for the seventeenth year, eleven per cent; for the eighteenth year, thirteen per cent; for the nineteenth year, fifteen per cent; and for the twentieth year, a percentage sufficient to pay off said bonds. If the board deem it necessary, it may at the time levy an assessment for the care and maintenance of irrigation works already constructed and for the payment of salaries of officers and general expenses, which assessment shall be called the "General Fund of ..... Irrigation District." The secretary of the board must compute and enter in separate columns of the assessment books the respective sums of dollars and cents in each fund, together with the sum payable by each tract obligated to the United States by contract, if any, for the payment of water charges, to be paid on the property therein enumerated; and the said secretary shall certify to the auditor of the county in which the said land is located, the amount of such taxes in each fund levied upon each tract of land by said board, including sums due to the United States and said county auditor shall enter the amount of each fund in separate columns of the tax list of his county; and all tax lists when delivered to the county treasurer shall contain all taxes in each fund levied on each tract of land by the board of such irrigation district, and general fund tax mentioned above shall be collected by the county treasurer at the same time and in the same manner as all other taxes are collected in this state; provided, however, such county treasurer shall receive in payment of the general fund tax above mentioned for the year in which said tax is levied, warrants drawn against said general fund, the same as so much lawful money of the United States, if such warrants do not exceed the amount of the general fund tax which the person tendering the same owes; provided, further, that such county treasurer shall accept and issue receipt therefor whenever same may be tendered, and shall receive in payment of the district bond fund tax above mentioned, for the year in which said taxes were levied, interest coupons past due issued by said irrigation district the same as so much lawful money of the United States, if such interest coupons do not exceed the amount of the district bond fund which the person tendering the same owes. All such taxes collected, or received, for the district bond and general funds, either in money, interest coupons or warrants on general fund, by the treasurer of any county other than the one in which the district was originally organized, shall be remitted by him to the treasurer of the county in which the district was originally organized; such remittance to be made on the fifth day of each and every month from and after the time this act shall take effect. All such taxes collected or received from the general fund of said district by the treasurer of the county in

which the district was originally organized shall be paid to the treasurer of such irrigation district, upon an order signed by the president and secretary of such district and all warrants received in payment of general fund taxes may be turned over, as so much money, to the district treasurer on such orders. In case of the neglect or refusal of a board of directors of any irrigation district to cause an assessment and levy to be made for the payment of principal and interest of outstanding bonds, and for all payments due or to become due the ensuing year to the United States, under any contract between the district and the United States and for expenses incurred in organizing said district, as in this act provided, then the assessment of property made for the preceding year together with any sums due to the United States in accordance with the terms of existing contract shall be adopted and shall be the basis and assessment for the district and the county board of the county in which the district was originally organized shall cause an assessment roll of said district to be prepared, and shall make the levy for the payment of the principal and interest on bonds and to meet all payments due or to become due, the ensuing year to the United States under any contract between the district and the United States, and to meet the expenses for organizing said districts in the same manner and with like effect as if the same has been made by said board of directors; and the expense incident thereto shall be borne by such district. All such taxes collected and paid to the county treasurer shall be received by such treasurer in his official capacity, and he shall be responsible for the safe keeping, disbursement, and payment thereof, the same as for other moneys collected by him as such treasurer. [Laws 1917, ch. 115, § 19.]

Waters, 40 Cyc. 824.

Irrigation district as a municipality within tax laws. 17 A.L.R. 81.

Assessment of land in irrigation district. 15 R. C. L. 497 and Supps.

**§ 8247a20. Limit of warrants by district.** No irrigation district shall in any year issue warrants in excess of ninety per cent of the levy for said year: Provided, in case of due and outstanding obligations against the district on account of operation and maintenance and current expense contracted prior to the year in which any levy is made, the district board shall have power to make additional levy, not to exceed one dollar per acre upon all irrigable lands within the district to create a special fund for the payment of past due obligations: Provided, further, whenever the claims or obligations against any fund for any year are fully paid, the board shall have the power to transfer any unused balance to any fund for any preceding or succeeding year. [Laws 1917, ch. 115, § 20.]

Waters, 40 Cyc. 821, 824.

**§ 8247a21. Lien of assessments.** All assessments on real property and assessments on leasehold estates on land owned by the state and to the extent provided by said act of August 11, 1916, on entered or unentered public lands are a lien against the property assessed, from and after the first of October in the year in which it is assessed, and shall draw interest at the rate of one per cent per month from the first day of May of the year following such assessment; and such lien is not removed until the assessments are paid or the property sold for the payment thereon, and it shall be the duty of the county treasurer to collect such assessment in the same manner as other taxes against real estate are collected, and the revenue laws of the state for the collection and sale of land for such taxes are hereby made applicable to the collection of assessments under this act, and taxes so collected shall constitute a sinking fund to be used for the payment of the bonds and interest thereon. The leasehold estate of any leases of land owned by the state may be sold for taxes assessed as herein provided in the same manner and form as provided by the revenue law of the state for the collection and sale of lands for taxes, provided, the lien for the bonds of any series shall be a preferred lien to that of any sub-

sequent series, and the lien for the payments due to the United States under any contract between the district and the United States, accompanying which bonds have not been deposited with the United States shall be a preferred lien to that of any issue of bonds or any series of any issue subsequent to the date of such contract, and all funds arising from assessment and levy, if any, shall be devoted to the obligations of the district payable from said funds and as to all obligations from the bond and United States contract fund shall be so devoted in the order of priority of the creation of the obligation. [Laws 1917, ch. 115, § 21.]

Waters, 40 Cyc. 823, 824; Taxation, 37 Cyc. 1138-1150, 1190-1380; Counties, 15 C. J. p. 589 § 294.

Subjection of state property to special assessments. 25 R. C. L. 114 and Supps.  
Lien of assessment. 25 R. C. L. 187.

**§ 8247a21a. Abatement of assessments.** The board of county commissioners shall have power with the approval of the tax commissioner to abate assessments made by irrigation districts in cases in which the application is approved by the board of directors of the irrigation district. In case such assessments are made for the purpose of meeting payments due to the United States under any contract between the irrigation district and the United States, the application for abatement shall not be granted unless it also bears the approval of the director of the United States Reclamation Service or the Secretary of the Interior. The application for the abatement may be made by the board of directors of the irrigation district instead of by individual taxpayers and any number of tracts of land may be included in a single application. [Laws 1923, ch. 303.]

Waters, 40 Cyc. 824.

**§ 8247a22. Payment under protest.** When any person against whose property said assessments have been made shall pay such assessments under protest as provided by the general revenue law of this state, the board of directors of any irrigation district organized under the provisions of this act may pass upon and make orders disposing of moneys paid under protest to the county treasurer in the county or counties in which said lands are situated in the same form and manner as provided by law, and such proceedings shall be had as in such section provided in so far as the same applies; provided, however, no taxes or assessments shall be ordered refunded unless the person complaining shall file in the office of the secretary of such district a copy of his tax receipt, showing the same paid under protest, together with a sworn affidavit in writing showing one of the following reasons why such tax or assessments should be refunded:

First: That the land upon which such tax or assessment was levied is not within the boundaries of the district for which the lands were taxed or assessed;

Second: That the said lands are exempt by law, setting forth the reason therefor;

Third: That by reason of sub-irrigation the lands could not now be benefited by irrigation, or that the lands are not susceptible of irrigation from the canal of the district. [Laws 1917, ch. 115, § 22.]

Waters, 40 Cyc. 819, 824; Taxation, 37 Cyc. 1183-1185.

**§ 8247a23. Payment of bonds; investment of bond fund.** Upon the presentation of the coupons and bonds due at the office of the treasurer of the county in which the district was originally organized, it shall be his duty to pay the same from the bond funds. Whenever, after ten years from the issuance of the bonds, the sinking fund shall amount to the sum of ten thousand dollars, the board of directors may direct the county treasurer in which the district was originally organized to pay such an amount of the bonds not due as the money of the fund will redeem, at the lowest value at which they may be offered for liquidation, after advertising for at least four weeks in some daily

newspaper in each of the cities hereinbefore named, and in any newspaper which the board may deem advisable, for sealed proposals for the redemption of the bonds. Such proposals shall be opened by the board in open meeting, at the time named in the notice, and the lowest bid for the bonds must be accepted: Provided, no bond shall be redeemed at a rate above par. In case the bids are equal, the lowest numbered bond shall have the preference. In case none of the holders of the bonds desire to have the same redeemed, as herein provided, the money shall be invested by the treasurer of the county in which the district was originally organized, under the direction of the board of directors of the district, in United States bonds, or the bonds or warrants of the state which shall be kept in the "bond fund," and may be used to redeem the district bonds whenever the holders thereof may desire. [Laws 1917, ch. 115, § 23.]

Waters, 40 Cyc. 821-823.

Payment of bonds of irrigation districts. 15 R. C. L. 497 and Supps.

**§ 8247a24. Construction of works; notice; bond of contractor.** After adopting a plan of said canal or canals, storage reservoirs and works, the board of directors shall give notice, by publication thereof not less than twenty days in one newspaper published in each of the counties in which the district is situated, provided a newspaper is published therein, and in such other newspaper as they deem advisable, calling for bids for the construction of the work or any portion thereof; if less than the whole work is advertised, then the portion so advertised, must be particularly described in such notice. The notice shall set forth that plans and specifications can be seen at the office of the board, and that the board will receive sealed proposals therefor, and that the contract will be let to the lowest responsible bidder, stating the time and place for opening the proposals, which at the time and place shall be opened in public and as soon as convenient thereafter the board shall let such work, either in part or as a whole to the lowest responsible bidder, or they may reject any or all bids and re-advertise for proposals, or may proceed to construct the work under their own superintendence with the labor of the residents of the district. Contracts for the purchase of material shall be awarded to the lowest responsible bidder. The person, or persons, to whom a contract may be awarded shall enter into a bond with good and sufficient sureties, to be approved by the board, payable to such district for its use, to an amount equal to twenty-five per cent of the contract price for the faithful performance of the contract; provided, however, in case twenty-five per cent of the contract price shall exceed the sum of fifty thousand dollars, then such bond shall be in the sum of fifty thousand dollars. The work shall be done under the direction and to the satisfaction of the engineer and be approved by the board. Provided, further, that the provisions of this section shall not apply in case of any contract between the district and the United States. [Laws 1917, ch. 115, § 24.]

Waters, 40 Cyc. 821.

Advertising for bids for public works. 22 R. C. L. 611.

Bond of contractor of public works. 22 R. C. L. 628 et seq.

**§ 8247a25. Payment of claims by district; treasurer's report.** No claim shall be paid by the treasurer until the same shall have been allowed by the board, and only upon warrants signed by the president and counter-signed by the secretary; and if the district treasurer has not sufficient money on hand to pay such warrant when it is presented for payment, he shall endorse thereon, "Not paid for want of funds," and endorse thereon the date when so presented, over his signature, and from the time of such presentation until paid, such warrant shall draw interest at the rate of seven per cent per annum. The board may draw from time to time from the construction fund and deposit it in the county treasury of the county where the office of the board is situated, any sum in excess of the sum of twenty-five thousand dollars. The county

treasurer is hereby authorized and required to receive and receipt for the same and place the same to the credit of the district, and he shall be responsible upon his official bond for the safekeeping and disbursement of the same as in this article provided. He shall pay out of the same, or any part thereof, to the treasurer of the district only upon the order of the board, signed by the president, and attested by the secretary. The county treasurer shall report in writing on the second Monday in each month the amount of money in the county treasury, the amount of receipts for the month preceding, and the amount of moneys paid out; the report shall be verified and filed with the secretary of the board. The district treasurer shall also report to the board in writing on the first Monday of each month the amount of money in the district treasury, the amount of receipts for the month preceding, and the amount of items of expenditures, and the said report shall be verified and filed with the secretary of the board. All claims against the district shall be verified the same as is required in the case of claims filed against the counties in this state; and the secretary of the district is hereby authorized and empowered to administer oaths to the parties verifying said claim, the same as the county clerk or notary public might do. The district treasurer shall keep a register in which he shall enter each warrant presented for payment, showing the date and amount of such warrant, to whom payable, the date of presentation for payment, the date of payment, and the amount paid in redemption thereof, and all warrants shall be paid in order of their presentation for payment to the district treasurer. All warrants shall be drawn and payable to the claimant or bearer, the same as county warrants. [Laws 1917, ch. 115, § 25.]

**§ 8247a26. Irrigation property; construction; operation; payment.** The cost and expense of purchasing and acquiring property and constructing the works and improvements herein provided for, shall be wholly paid out of the construction fund, or in the bonds of said district at their par value, after having first been advertised for sale as in this article provided and having received no bids therefor at ninety-five per cent or upwards of their face value; provided, in case the said bonds, or the money raised by the sale is insufficient for the purposes for which said bonds were issued, additional bonds may be issued, after submission of the question at a general or special election to the qualified voters of said district; and in case of the issuance of additional bonds, the lien for taxes for the payment of the interest and principal of said issue shall be a subsequent lien to any prior bond issue. Provided, bonds need not be issued where the cost and expense of purchasing and acquiring property and constructing the works and improvements herein provided for are covered by a contract between the district and the United States. In lieu of the issuance of additional bonds the board of directors may provide for the completion of the irrigation system of the district by the levy of an assessment for the other purposes provided in this article. For the purpose of defraying the expenses of the organization of the district, and the care, operation, management, repair and improvement of such portions of such canal and works as are completed and in use, including salaries of officers and employees, the board may either fix rates of tolls and charges, and collect the same from all persons using said works for irrigation or other purposes, or may provide for the payment of said expenditures by a levy of assessments therefor, or by both said tolls and assessments, if by assessment, such levy shall be made upon the completion and equalization of the assessment roll; and the board shall have the same powers and functions for the purposes of said levy as are now possessed by county commissioners in this state, and said assessments shall be collected as in § 19 of this act provided. Provided, further, if after the annual assessment for the current year, the funds provided are for some unusual or unforeseen cause insufficient for the proper maintenance and operation of said district, the board of directors shall have the power to borrow additional funds needed, to an amount not to exceed fifty cents per acre for the

land embraced in said district, pledging the credit of the district for payment of the same, and shall include in the estimate for the levy for the ensuing year for the general fund the amount so borrowed, and provide for the payment of the same. [Laws 1917, ch. 115, § 26.]

Waters, 40 Cyc. 821, 824.

**§ 8247a27. Construction across streams, highways, railroads and ditches.**

The board of directors shall have the power to construct such works across any stream of water, water-course, street, avenue, highway, railway, canal, ditch or flume which the route of said canal or canals may intersect or cross in such manner as to afford security for life and property; but the board shall restore the same, when so crossed or intersected, to its former state as near as may be, or in a sufficient manner not to have impaired unnecessarily its usefulness; and every company whose railroad shall be intersected or crossed by such works shall unite with the board in forming such intersections and crossings, and grant the privilege aforesaid, and if such railroad company and such board, or the owners and controllers of the property, thing or franchise so to be crossed, cannot agree upon the amount paid therefor, or the points or the manner of the crossings, the same shall be ascertained and determined in all respects as is provided in respect to the taking of land. The right-of-way is hereby given, dedicated and set apart, to locate, construct and maintain such works over and through any of the lands which are now, or may be the property of the state; and also there is given, dedicated and set apart, for the use and purposes aforesaid, all water and water-rights owned by this state within the district. [Laws 1917, ch. 115, § 27.]

Waters, 40 Cyc. 814-815, 820-821.

**§ 8247a28. Salaries of officers and directors.** The board of directors shall each receive three dollars per day and mileage at the rate of five cents per mile in attending meetings, and actual and necessary expenses while engaged in official business under the order of the board. The board shall fix the compensation to be paid to the other officers named in this article, to be paid out of the treasury of the district. Provided, however, in any district containing less than one hundred thousand acres the salary of the secretary shall not exceed eight hundred dollars per annum, and the compensation of the assessor shall not exceed three dollars per day for each day employed in his official duty, and the salary of the treasurer shall not exceed eight hundred dollars per annum. [Laws 1917, ch. 115, § 28.]

Waters, 40 Cyc. 820.

**§ 8247a29. Officers not interested in contract; penalty.** No director or any officer named in this article shall be interested, in any manner, directly or indirectly in any contract awarded, or to be awarded by the board, or in the profits to be derived therefrom, nor shall he receive any bonds, gratuity, or bribe, and for any violation of this provision, such officer shall be deemed guilty of a felony, and such conviction shall work a forfeiture of his office, and he shall be punished by a fine not exceeding five thousand dollars, or by imprisonment in the penitentiary not exceeding five years, nor less than one year. [Laws 1917, ch. 115, § 29.]

Officers, 29 Cyc. 1435, 1450.

Removal of public officers on conviction of bribery. 22 R. C. L. 568 and Supps.

**§ 8247a30. Special elections.** The board of directors may at any time, when in their judgment advisable, call a special election and submit to the qualified electors of the district the question whether, or not, a special assessment shall be levied for the purpose of raising money to be applied for any of the purposes provided for in this act. Such election must be called upon the notice prescribed, and the same shall be held and the result thereof determined and declared in all respects in conformity with the provisions of this act. The notice must specify the amount of money proposed to be raised,

and the purpose for which it is intended to be raised, at such election; the ballots shall contain the words, "Assessment—Yes," and "Assessment—No." If a majority of the votes are "Assessment—Yes," the board shall at the time of the annual levy thereunder, levy an assessment sufficient to raise the amount voted. The rate of assessment shall be ascertained by adding to the amount estimated as needed fifteen per cent for anticipated delinquencies to the assessed value of the property in the district as it appears on the assessment roll for the current year, and then dividing the sum to be raised by the amount of such aggregate assessed value. The assessment so levied and computed shall be entered upon the assessment roll and upon the tax list by the county auditor and collected at the same time and in the same manner as other assessments, and all revenue laws of this state for the collection and sale of land for taxes are hereby made applicable to the assessment herein provided for, and when collected said assessment shall be paid over by the county treasurer to the district treasurer for the purpose specified in the notice in such special election. [Laws 1917, ch. 115, § 30.]

Waters, 40 Cyc. 824.

Vote required at special elections. 9 R. C. L. 1119 and Supps.

Special election at same time as general election. 9 R. C. L. 1119.

**§ 8247a31. Unauthorized debts.** The board of directors, or other officers of the district, shall have no power to incur any debt, or liability whatever, either by issuing bonds or otherwise in excess, of the express provisions of this act, and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void, provided, any irrigation district organized under the provisions of this article shall have the power to and it shall be its duty to provide for the proper drainage of any and all lands embraced within its limits which are, or have been sub-irrigated by reason of the lawful use of water from its canal by the owner or lessee of the lands sub-irrigated or from any cause not the fault, or by the consent of such owner or lessee, and for such purpose such district shall have all the authority herein granted for levying special assessments or otherwise providing funds necessary to properly drain such lands; entering upon lands for the purpose of making surveys; exercising the right of eminent domain; contract for the construction of necessary ditches; and further shall have the right to extend such drainage ditches outside of the limits of such districts for the purpose of conducting the drainage water to other lands upon which the same may be lawfully used or to return the same to some natural water course. The powers herein granted shall include the power to enter into a contract with the United States to carry out and effectuate all proper drainage of the district, or any part thereof, and any such contract shall be treated for all intents and purposes, as if made under section 10 of this act. [Laws 1917, ch. 115, § 31.]

Waters, 40 Cyc. 820-821.

**§ 8247a32. Apportionment of water; water commissioners.** In case the water supply shall not be sufficient to supply continuously the lands susceptible of irrigation therefrom, then it shall be the duty of the board of directors constituted as hereinafter provided, to apportion in a just and equitable proportion, a certain amount of said water upon certain or alternate days to different localities as they may, in their judgment think best for the interest of all parties concerned, and with due regard to the legal and equitable rights of all. [Laws 1917, ch. 115, § 32.]

Waters, 40 Cyc. 815, 821.

**§ 8247a33. High waters; duty of board.** It shall be the duty of the board of directors to keep the waters flowing through the ditches and canals under their control to the full capacity of such ditches and canals in times of high water and when the same can be beneficially applied to the lands thereunder and does not interfere with the rights of other appropriators. It is further pro-

vided, that upon the filing of a petition in the office of the board of directors of any irrigation district, signed by a majority of the land owners who are electors therein requesting that rules and regulations be adopted by the board permitting and providing for any of the following specific orders or changes in the method of operating its canal, it shall become the duty of such board to immediately provide for the adoption and enforcement of same, viz.:

First: That an automatic measuring device be placed in or near the headgate of any main diverting gate of the main canal, in order that a continuous record shall be kept by such district of the amount of water received into the canal for the use of the lands in such district.

Second: That automatic measuring devices be placed in the headgates of all main laterals and distributing laterals within the district from and by which water is diverted to tracts or units of twenty acres, or more, for the purpose of determining at all times the amount of water going to or being received upon any and all such tracts of land, and making it the duty of the superintendent of the canal to keep a separate and correct record of the amount of water delivered through each of such headgates at all times, and file the same in the office of the board of directors for public inspection.

Third: That a system be provided for the interchange of water from one tract of land to another at the option of the owner or lessee of any lands within such district at any time, and further provide that rules made by the board of directors for delivering water in alternate sections of a canal or ditch shall not interfere with this right. [Laws 1917, ch. 115, § 33.]

Waters, 40 Cyc. 820-821.

**§ 8247a34. Prior acts not repealed.** None of the provisions of this act shall be construed as repealing or in any wise modifying the provisions of any other act relating to the subject of irrigation or drainage. Nothing herein contained shall be deemed to authorize any person or persons to divert the waters of any river, creek, stream, canal or ditch from its channel, whereby the vested rights of any person or persons having any interest in such river, creek, stream, canal, or ditch, or the waters thereof are invaded or interfered with unless previous compensation be ascertained and paid therefor, under the laws of this state authorizing the taking of private property for public use. [Laws 1917, ch. 115, § 34.]

Waters, 40 Cyc. 815, 821.

Diversion of water. 27 R. C. L. 1122 et seq.

**§ 8247a35. Change of district boundaries; effect.** The boundaries of any irrigation district now or hereafter organized under the provisions of this act may be changed, and tracts of land included within the boundaries of such district, at or after its organization under the provisions of this act may be excluded therefrom in the manner herein prescribed; but neither such change of the boundaries of the district, nor such exclusion of lands from the district shall impair or affect its organization, or the rights in or to property, or any of its rights or privileges, of whatever kind or nature; nor shall it effect or discharge any contract, obligation, lien or charge for or upon which it was or might become liable or chargeable, had such change of its boundaries not been made, or had not any land been excluded from the district. [Laws 1917, ch. 115, § 35.]

Waters, 40 Cyc. 817, 819.

Exclusion of land from irrigation district. 15 R. C. L. 497.

**§ 8247a36. Additional land when included; petition.** The holder or holders of title, or evidence of title, and the secretary of the interior for unentered or public land, representing one half or more of any body of lands adjacent to the boundary of an irrigation district, which are contiguous, and which, taken together, constitute one tract of land, may file with the board of directors of said district a petition in writing, praying that the boundaries of such district

may be so changed as to include their lands. The petition shall describe the boundaries of the parcel or tract of land, and shall also describe the boundaries of the several parcels owned by the petitioners, if the petitioners be the owners, respectively of district [sic] parcels; but such description need not be more particular than may be required to be when such lands are entered by the county or precinct assessor in the assessment book. Such petition must contain the assent of the petitioners to the inclusion in said district of the parcels or tracts of land described in the petition, and of which the petition alleges that they are respectively the owners; and it must be acknowledged in the same manner that conveyance of lands are required to be acknowledged. [Laws 1917, ch. 115, § 36.]

Waters, 40 Cyc. 819.

Lands which may be included in irrigation district. 15 R. C. L. 496.

**§ 8247a37. Same; cost of proceeding.** The secretary of the board of directors shall cause notice of the filing of such petition to be given and published in the same manner and for the same time that notices of special elections for the issuance of bonds are required by said article to be published. The notice shall state the filing of such petition and the name of the petitioner, a description of the lands mentioned in the petition, and the prayers of the petition; and it shall notify all persons interested, or that may be affected by such change of the boundaries of the district, to appear at the office of the board at a time named in the notice, and show cause, in writing, if any they have, why the change in the boundaries of the district as proposed in the petition should not be made. The time to be specified in the notice at which they shall be required to show cause shall be the regular meeting of the board next after the expiration of the time for the publication of the notice. The petitioner shall advance to the secretary sufficient money to pay the estimated cost of all proceedings under this article. [Laws 1917, ch. 115, § 37.]

Waters, 40 Cyc. 817, 819.

**§ 8247a38. Same; hearing; assent of parties.** The board of directors at the time and place mentioned in the notice, or at such other time or times to which the hearing of the petition may be adjourned, shall proceed to hear the petition and all objections thereto, presented in writing by any person, showing cause as aforesaid, why the proposed change of the boundaries of the district should not be made. The failure of any person interested in the district or in the matter of the proposed change of its boundaries to show cause in writing, as aforesaid, shall be deemed and taken as an assent on his part, to the change of the boundaries of the district, as prayed for in the petition, or to such a change thereof as will include a part of the lands. The filing of such petition with the board, as aforesaid, shall be deemed and taken as an assent on the part of each and all of such petitioners to such a change of the boundaries that they may include the whole or any portion of the lands described in the petition. [Laws 1917, ch. 115, § 38.]

Waters, 40 Cyc. 817, 819.

**§ 8247a39. Payment of share of original cost by petitioners.** The board of directors, to whom such a petition is presented, may require as a condition precedent to the granting of the same, that the petitioners shall severally pay to such district such respective sums, as nearly as the same can be estimated, (the several amounts to be determined by the board) as said petitioners or their grantors would have been required to pay to such district as assessments had such lands been included in such district at the time the same was originally formed. [Laws 1917, ch. 115, § 39.]

Waters, 40 Cyc. 817, 819.

**§ 8247a40. Order of board; survey.** The board of directors, if they deem it not for the best interest of the district that a change of its boundaries be so made as to include therein the lands mentioned in the petition shall order

that the petition be rejected. But if they deem it for the interest of the district that the boundaries of the district be changed and if no person interested in the proposed change of its boundaries show cause in writing why the proposed change should not be made, or if having shown cause, withdraws the same, the board may order that the boundaries of the district be so changed so as to include therein the lands mentioned in the petition, or some part thereof. The order shall describe the boundaries as changed, and shall so describe the entire boundaries of the district as they will be after the change thereof, as aforesaid, be made; and for that purpose the board may cause a survey to be made of such portions of such boundaries as is deemed necessary. [Laws 1917, ch. 115, § 40.]

Waters, 40 Cyc. 819.

**§ 8247a41. Objections to proposed change; action of board.** If any person interested in the district, or the proposed change of its boundaries, shall show cause, as aforesaid, why such boundaries should not be changed, and shall not withdraw the same, and if the board of directors deem it for the best interest of the district that the boundaries thereof be so changed as to include therein the lands mentioned in the petition, or some part thereof, the board shall adopt a resolution to that effect. The resolution shall describe the exterior boundaries of the lands which the board are of the opinion should be included within the boundaries of the district when changed. [Laws 1917, ch. 115, § 41.]

Waters, 40 Cyc. 819.

**§ 8247a42. Vote on proposed change; notice.** Upon the adoption of the resolution mentioned in the last preceding section, the board shall order that an election be held within the district to determine whether the boundaries of the district shall be changed as mentioned in the resolution, and shall fix the time at which such election shall be held, and cause notice thereof to be given and posted and published, and such election shall be held and conducted, the returns thereof shall be made and canvassed, and the result of the election ascertained and declared, and all things pertaining thereto conducted in the manner prescribed by this act in case of a special election to determine whether bonds of an irrigation district shall be issued. The ballots cast at the election shall have the words, "For change of boundary," or "Against change of boundary," or words equivalent thereto. The notice of election shall describe the boundaries in such manner and terms that the boundary can be readily traced. Provided, that in case contract has been made between the district and the United States as in section 10 or 31 of this act provided, no change shall be made in the boundaries of the district and the board shall make no order changing the boundaries of the district until the secretary of the interior shall assent thereto in writing and such assent be filed with the board of directors. [Laws 1917, ch. 115, § 42.]

Waters, 40 Cyc. 817, 819.

**§ 8247a43. Result of vote; duty of board.** If at such election a majority of all the votes cast at said election shall be against such change of boundaries of the district, the board shall order that the petition be denied, and shall proceed no further in that matter. But if a majority of such votes be in favor of such change of the boundaries of the district, the board shall thereupon order the boundaries of the district to be changed in accordance with the resolutions adopted by the board. The order shall describe the entire boundaries of the district, and for that purpose the board may cause a survey of such portions thereof to be made as the board may deem necessary. [Laws 1917, ch. 115, § 43.]

Waters, 40 Cyc. 819.

**§ 8247a44. Order of change; filing; copy; effect.** Upon a change of the boundaries of a district being made, a copy of the order of the board of di-

rectors ordering such change, certified by the president and secretary of the board, shall be filed for record in the recorder's office of each county within which are situated any of the lands of the district, and thereupon the district shall be and remain an irrigation district as fully and to every intent and purpose as if the lands which are included in the district by the change of the boundaries, as aforesaid, had been included therein at the original organization of the district. [Laws 1917, ch. 115, § 44.]

Waters, 40 Cyc. 819.

**§ 8247a45. Record; evidence.** Upon the filing of the copies of the order, as in the last preceding section mentioned, the secretary shall record in the minutes of the board the petition aforesaid; and the minutes or a certified copy thereof, shall be admissible in evidence with the same effect as the petition. [Laws 1917, ch. 115, § 45.]

Waters, 40 Cyc. 819.

**§ 8247a46. Authority of guardians, executors and administrators.** A guardian, executor, or an administrator of an estate, who is appointed as such under the laws of this state, and who, as such guardian, executor or administrator, is entitled to the possession of the lands belonging to the estate which he represents, may, on behalf of his ward or the estate which he represents, upon being thereunto authorized by the proper court, sign and acknowledge the petition in this article mentioned, and may show cause, as in this article mentioned, why the boundaries of the district should not be changed. [Laws 1917, ch. 115, § 46.]

Waters, 40 Cyc. 817, 819.

**§ 8247a47. Re-division of district; directors; election precincts.** In case of the inclusion of any land within any district by proceedings under this article the board of directors must, at least thirty days prior to the next succeeding general election, make an order re-dividing such district into three, five or seven divisions, as nearly equal in size as may be practicable, which shall be numbered and one director shall thereafter be elected by each division. For the purposes of elections the board of directors may establish a convenient number of election precincts in the districts, and define the boundaries thereof, which precincts may be changed from time to time as the board may deem necessary. [Laws 1917, ch. 115, § 47.]

Waters, 40 Cyc. 820.

**§ 8247a48. Excluding lands from district; petition.** The owner or owners in fee of one or more tracts of land, entrymen of unpatented lands and the Secretary of the Interior for unentered public lands, which constitute a portion of an irrigation district, may file with the board of directors of the district a petition praying that such tracts and any other tracts contiguous thereto be excluded and taken from the district. The petition shall describe the boundaries of the land which the petitioners desire to have excluded from the district and also the lands of each of such petitioners which are included within such boundaries; but the description of such lands need not be more particular nor certain than is required when the lands are entered in the assessment book by the county or precinct assessor; such petition must be acknowledged in the same manner and form as is required in case of a conveyance of land, and the acknowledgment shall have the same force and effect as evidence as the acknowledgment of such conveyance. [Laws 1917, ch. 115, § 48.]

Waters, 40 Cyc. 819.

Exclusion of lands from irrigation district. 15 R. C. L. 497.

Form of acknowledgment. 1 R. C. L. 255.

**§ 8247a49. Notice; how given; contents.** The secretary of the board of directors shall cause a notice of the filing of such petition to be published for

at least two weeks in some newspaper published in the county where the office of the board of directors is situated, and if any portion of such territory to be excluded lie within another county or counties, then said notice shall be so published in a newspaper published within each of said counties; or if no newspaper be published therein, then by posting such notice for the same time in at least three public places in the district, and in case of the posting of notices, one of such notices must be posted on the lands proposed to be excluded. The notice shall state the filing of such petition; the names of the petitioners; description of the lands mentioned in such petition, and the prayer of the petition; and it shall notify all persons interested in or that may be affected by such change of the boundaries of the district to appear at the office of the board at a time named in the notice, and show cause in writing, if any they have, why the change in the boundaries of said district, as proposed in said petition, should not be made. The time to be specified in the notice at which they shall be required to show cause shall be at the regular meeting of the board next after the expiration of the time for the publication of the notice. [Laws 1917, ch. 115, § 49.]

Waters, 40 Cyc. 819.

**§ 8247a50. Hearing; assent of parties interested; nonirrigable lands.** The board of directors, at the time and place mentioned in the notice, or at the time or times to which the hearing of such petition may be adjourned, shall proceed to hear the petition and all objections thereto, presented in writing by the persons showing cause as aforesaid, why the prayer of such petition should not be granted. The failure of any person interested in the district to show cause in writing why the tract or tracts of land mentioned in the petition should not be excluded from said district, shall be deemed and taken as an assent by him to the exclusion of such tract or tracts of land; or any part thereof, from said district; and the filing of such petition with such board as aforesaid, shall be deemed and taken as an assent by each and all of such petitioners to the exclusion from such district of the lands mentioned in the petition, or any part thereof; provided, in no case shall any land be held by a district or taxed for irrigation on purposes which cannot from any natural cause be irrigated thereby. [Laws 1917, ch. 115, § 50.]

Waters, 40 Cyc. 819.

**§ 8247a51. When board exclude land from district.** The board of directors, if they deem it not for the best interest of the district that the lands mentioned in the petition, or some portion thereof, should be excluded from the district, shall order that the petition be denied; but if they deem it for the best interest of the district that the lands mentioned in the petition, or some portion thereof, be excluded from the district, or if having shown cause withdraws the same, and also, if there are no outstanding bonds of the district and no contract between the district and the United States, then the board may order that the lands mentioned in the petition or some defined portion thereof be excluded from the district. [Laws 1917, ch. 115, § 51.]

Waters, 40 Cyc. 819.

Exclusion of land from irrigation district. 15 R. C. L. 497.

**§ 8247a52. When bonds outstanding; assent of bondholders.** If there be outstanding bonds of the district or if the district shall have entered into a contract with the United States as provided in section 10 or 31 of this act then the board may adopt a resolution to the effect that the board deem it to be for the best interest of the district that the lands mentioned in the petition, or some portion thereof should be excluded from the district. The resolution shall describe such lands so that the boundaries thereof can be readily traced. The holder of such outstanding bonds may give their consent in writing to the effect that they severally consent that the board may make an order by which the lands mentioned in the resolution may be excluded from the district and

in case contract has been made with the United States as aforesaid the Secretary of the Interior may assent to such change. The assent may be acknowledged by the several holders of such bonds in the same manner and form as is required in case of conveyance of land, and the acknowledgment shall have the same force and effect as evidence as an acknowledgment of such conveyance, except the assent of the Secretary of the Interior need not be acknowledged. The assent must be filed with the board and must be recorded in the minutes of the board; and such minutes, or a certified copy thereof, shall be admissible in evidence with the same effect as the assent; but if such assent of the bond holders and in case of contract with the United States such assent of the Secretary of the Interior be not filed, the board shall deny and dismiss the petition. [Laws 1917, ch. 115, § 52.]

Water, 40 Cyc. 819, 821.

**§ 8247a53. Objections to proposed exclusion; vote; notice.** If the assent aforesaid of the holders of the bonds be filed and entered of record as aforesaid, and if there be objections presented by any person showing cause as aforesaid which have not been withdrawn, then the board may order an election to be held in the district to determine whether an order shall be made excluding said lands from the district as mentioned in the resolution. The notice of such election shall describe the boundaries of all the lands which it is proposed to exclude, and such notice shall be published for at least two weeks prior to such election in a newspaper published within the county—where the office of the board of directors is situated; and if any portion of such territory to be excluded lies within another county or counties, then such notice shall be so published in a newspaper published in each of such counties. Such notice shall require the electors to cast ballots which shall contain the words "For Exclusion," "Against Exclusion," or words equivalent thereto. Such election shall be conducted in accordance with the general election laws of the state: Provided, no particular form of ballot shall be required. [Laws 1917, ch. 115, § 53.]

Waters, 40 Cyc. 819, 821.

**§ 8247a54. Result of vote; order of board.** If at such election a majority of all the votes cast shall be against the exclusion of the lands from the district, the board shall deny and dismiss said petition and proceed no further in the matter; but if a majority of such votes be in favor of the exclusion of the lands from the district the board shall thereupon order that the lands mentioned in the resolutions be excluded from the district, [should the exclusion of the lands from the district], and for that purpose the board may cause a survey to be made of such portions of the boundaries as the board may deem necessary. [Laws 1917, ch. 115, § 54.]

**Explanatory note.** The expression in brackets, in the section above, seems to have been inserted by mistake.

Waters, 40 Cyc. 819.

**§ 8247a55. Filing of copy of order; effect.** Upon the entry in the minutes of the board of any of the orders hereinbefore mentioned a copy thereof certified by the president and secretary of the board shall be filed for record in the recorder's office of each county within which are situated any of the lands of the district; and thereupon the district shall be and remain an irrigation district as fully to every intent and purpose, as it would be had no change been made in the boundaries of the district, or had the lands excluded therefrom never constituted a portion of the district. [Laws 1917, ch. 115, § 55.]

Waters, 40 Cyc. 819.

**§ 8247a56. Effect of change on office of director; vacancy.** If the lands excluded from any district shall embrace the greater portion of any division or divisions of such district, then the officer or director for such division shall become and be vacant at the expiration of ten days from the final order of the board excluding the lands, and such vacancies shall be filled by appointment

by the board of county commissioners of the county where the office of such board is situated from the district at large. A director appointed as above provided shall hold his office until the next regular election for the district, and until his successor is elected and qualified. [Laws 1917, ch. 115, § 56.]

Waters, 40 Cyc. 820.

§ 8247a57. **Redivision of district; election precincts.** At least thirty days before the next general election of such district, the board of directors thereof shall make an order dividing said district into three, five and seven divisions as nearly equal in size as practicable, which shall be numbered and one director shall be elected by each division. For the purpose of election in such district the board of directors must establish a convenient number of election precincts, and define the boundaries thereof, which precinct may be changed from time to time, as the board of directors may deem necessary. [Laws 1917, ch. 115, § 57.]

Waters, 40 Cyc. 820.

§ 8247a58. **Refunding assessments to owners of lands excluded.** In case of the exclusion of any lands under the provisions of this act, there shall be refunded to any and all persons who have paid any assessment or assessments to such district, for any lands so excluded, any sum or sums so paid. Such payments shall be made in the same manner as other claims against such district, and from such fund or funds as the board of directors may designate; Provided, where such parties have realized benefits from the organization and operation of the district, the value of such benefits shall be deducted from the assessments paid in by said parties and the balance, if any, refunded. [Laws 1917, ch. 115, § 58.]

Waters, 40 Cyc. 824.

§ 8247a59. **Bonds; confirmation of proceedings for.** The board of directors of any irrigation district organized under the provisions of this act, shall, before issuing and before selling any bonds of such irrigation district, and in their discretion before making any contract or levying any assessment or taking any special action, commence a special proceeding, in and by which the proceedings of such board and of said district, providing for and authorizing the issue and sale of the bonds of said district, the making of any contracts or levying any assessment or taking any special action shall be judicially examined, approved and confirmed or disapproved and disaffirmed. [Laws 1917, ch. 115, § 59.]

Waters, 40 Cyc. 822.

§ 8247a60. **Same; petition.** The board of directors of the irrigation district or such holder or holders of any bond or bonds of the district shall file in the district court of the county in which the lands of the district, or some portion thereof, are situated, a petition praying in effect, that the proceedings aforesaid, may be examined, approved and confirmed by the court. The petition shall state the facts showing the proceedings had for the issue and sale of the bonds, the making of any contract, the levying of any assessment or taking of any special action, and shall state generally that the irrigation district was duly organized, and that the board of directors was duly elected, but the petition need not state the facts showing such organization of the district, or the election of the first board of directors. [Laws 1917, ch. 115, § 60.]

Waters, 40 Cyc. 822.

§ 8247a61. **Same; hearing; judgment.** The court shall fix the time for the hearing of the petition, and shall order the clerk of the court to give and publish a notice of the filing of the petition. The notice shall be given and published in the same manner and for the same length of time that the notice of a special election provided for by law to determine whether the bonds of the district shall be issued is required to be given and published. The notice shall state the time and place fixed for the hearing of the petition and prayer

of the petition, and that any person interested in the organization of the district, or in the proceedings for the issue or sale of the bonds, may, on or before the day fixed for the hearing of the petition, demur to or answer the petition. The petition may be referred to and described in the notice as the petition of ..... (giving his name), praying that the proceedings set forth therein may be examined, approved and confirmed by the court. [Laws 1917, ch. 115, § 61.]

Waters, 40 Cyc. 822.

**§ 8247a62. Same; defense by person interested.** Any person interested in the district, or in the issue or sale of the bonds, may demur to or answer the petition. The provisions of the code of civil procedure respecting the demurrer and answer to a verified complaint shall be applicable to a demurrer and answer to the petition. The person so demurring and answering the petition shall be the defendants to the special proceedings and the board of directors shall be the plaintiff. Every material statement of the petition not specifically controverted by the answer must, for the purpose of said special proceeding be taken as true; and each person failing to answer the petition shall be deemed to admit as true all the material statements of the petition. The rules of pleading and practice provided by the code of civil procedure which are not inconsistent with the provisions of this article are applicable to the special proceeding herein provided for. [Laws 1917, ch. 115, § 62.]

Waters, 40 Cyc. 822.

**§ 8247a63. Same; jurisdiction of courts; cost, etc.** Upon the hearing of such special proceeding the court shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm or disapprove and disaffirm each and all of the proceedings for the organization of said district under the provisions of this act, from and including the petition for the organization of the district, and all other matters which may effect [sic] the legality or validity of the proceedings and objects set forth in the petition. The court in inquiring into the regularity, legality, or correctness of said proceedings, must disregard any error, irregularity, or omission which does not effect [affect] the substantial rights of the parties to such special proceedings; and it may approve and confirm other and subsequent parts of the proceedings, and in so far as possible the court shall remedy and cure all defects in said proceedings. The court shall find and determine whether the notice of the filing of the petition has been duly given and published for the time and in the manner of this act prescribed. The costs of the special proceedings may be allowed and apportioned between the parties in the discretion of the court. If the court shall determine the proceedings for the organizations of the district legal and valid, and the proceedings for the voting and issuing of said bonds legal and valid, the board of directors shall then proceed to prepare a written statement beginning with the filing of the petition for the organization of the district, and including all subsequent proceedings for the organization of the district, the voting and issuing of said bonds and other objects of said petition, and ending with the decree of the court finding the proceedings for the organization of the district and subsequent proceedings, legal and valid, and when the proceedings are for the confirmation of a bond issue, shall present said written statement and the bonds to the state engineer and such written statement shall be certified under oath by the board of directors of the district, and the state engineer shall then examine said statement and the bonds so submitted to him and if he is satisfied that said bonds are in conformity with the law and are in all respects in due form, he shall record the statement and register the bonds in his office, and no such bonds shall be issued or be valid unless they shall be so registered and have endorsed thereon a certificate of said state engineer showing that such bonds are issued pursuant to law, the data filed in the office of said officer being the basis of such certificate; provided

further, that the provisions of this section with reference to the registration of irrigation district bonds shall be optional as to bonds that have heretofore been issued or are now being issued. [Laws 1917, ch. 115, § 63.]

Waters, 40 Cyc. 822-823.

§ 8247a64. **Water supply from without state; contracts; bonds.** Provided, when any district contemplated in this article shall find it necessary to procure and acquire the supply of water necessary for any or all of the ditches outside of the boundaries of this state, and from some adjoining state, then in such event it shall be lawful for such district to contract or bargain with any person, company or corporation legally existing within such state, outside of the boundaries of this state for the required supply of such necessary water for the district within the state. The voting, issuance and sale of bonds in such district within the state for the payment of such rights and franchises of such persons, companies, or corporations of such foreign state, for the use and benefit of such district within this state, shall be deemed valid, and of full force and effect and have the same operation as though the same rights and franchise existed wholly within this state. [Laws 1917, ch. 115, § 64.]

Waters, 40 Cyc. 814, 821.

§ 8247a65. **Water supply from without district.** The board of directors of any irrigation district organized under the laws of this state may enter into contracts for a supply of water for the irrigation of the lands within said irrigation districts with any person, firm, association, corporation or the United States of America; the source of supply of said water may be either within or without the boundaries of the state of North Dakota, and said water supply may be either the entire supply for said district or to supplement an appropriation already made by the said district. [Laws 1917, ch. 115, § 65.]

Waters, 40 Cyc. 814, 821.

§ 8247a66. **Contracts for storage water.** If the contract hereinbefore mentioned provides for payment of the entire purchase price of said water supply within one year after the making of said contract the board of directors of such irrigation district shall at the time of entering into said contract, pass a resolution that a levy shall be made sufficient to raise such sum as is necessary to pay said purchase price and the board of directors shall thereafter and at the same time the levy of other taxes for said district is made, levy a tax against the taxable property of the district sufficient to raise and pay such sum. [Laws 1917, ch. 115, § 66.]

Waters, 40 Cyc. 824.

§ 8247a67. **Payment for stored water.** If said contract provides for payment to be made extending for a period of more than one year from the date of making said contract, the board of directors of such irrigation district shall submit said contract to the legal voters of said district at any general election, or at a special election called therefor for the approval or disapproval of said contract. If a special election is called for such purpose the notice of election, conduct of said election and the canvass of the votes shall so far as practicable be the same as in election held for the purpose of voting upon the issuance of bonds. The ballots at said election shall have printed thereon "For approval of contract for water supply" and "Against approval of contract for water supply." Those voting for approval of said contract shall make their ballots after the clause beginning "Against approval." The notice of said election need not give the entire contract, but shall be sufficient if it shall state in a general way the substance of said proposed contract. If a majority of the voters that vote on said proposition vote for approval of said contract the board of directors shall enter into said contract and shall thereafter at the time the other taxes of the district are levied, levy a tax on the taxable property of the district sufficient to pay the amount due on said contract and to

become due on said contract before the next annual levy in said district. [Laws 1917, ch. 115, § 67.]

§ 8247a68. **Federal credit to district.** Any irrigation district, heretofore or hereafter, organized under the laws of the state of North Dakota, for irrigation or drainage purposes is hereby authorized and empowered to enter into contract with the United States of America whereby the bonds of the district are guaranteed by the United States or financial credit is extended by the United States, to the district and for the sale, purchase or use [of] any canal, ditch, reservoir, right of way, irrigation or drainage system or other property owned or to be acquired for the use of such district. [Laws 1917, ch. 115, § 68.]

Waters, 40 Cyc. 821.

§ 8247a69. **Districts to comply with Federal laws.** Any irrigation district organized under the laws of North Dakota is hereby authorized to accept of the provisions of any act of Congress of the United States applicable to such district and to obligate itself to comply with such laws, rules and regulations as may be promulgated by any department of the United States in pursuance of such acts, and irrigation districts contracting with the United States under the provisions of this act shall be governed in all matters by the laws of the state relating to irrigation or drainage districts as the case may be except in such things as may be otherwise provided for such district. This section shall not limit the rights which any irrigation district has under existing laws to purchase a water supply or otherwise contract and shall be cumulative thereto. [Laws 1917, ch. 115, § 69.]

Waters, 40 Cyc. 821.

§ 8247a70. **Dissolution of districts.** Whenever a majority of the assessment payers, representing a majority of the number of acres of irrigable land within any irrigation district, shall petition the board of directors to call a special election, for the purpose of submitting to the qualified electors of such irrigation district, a proposition to vote on the discontinuance of such irrigation district, and a settlement of its bonded and other indebtedness, it shall be the duty of the board of directors to call an election, setting forth the object of the same, and to cause a notice of such election to be published in some newspaper in each of the counties in which the district is located, and in which a newspaper is published, for a period of thirty days prior to such election, setting forth the time and place for holding such election in each of the voting precincts in the district, and shall also cause a written or printed notice of such election to be posted in some conspicuous place in each of the voting precincts.

It shall also be the duty of the directors to provide ballots to be used at said election, on which shall be written or printed the words: "For dissolution, Yes," and "For dissolution, No," which ballots shall be placed in the hands of the proper election officers in the several voting precincts of such district prior to the opening of the polls on the day of such election; and the election shall be conducted in all respects in the same manner as provided by law for the election of officers of the district. The return of the election, together with the ballots cast thereat, shall be certified by the several election boards of such district to the board of directors within three days from and after said election, which board shall, on or before the third day after said election, canvass such returns and declare the result of such election, which result shall be at once recorded in the records of the district board. If a majority of the votes shall be "For dissolution, No," there shall not be another election upon the question of a dissolution of the district during the year in which said election was held. If a majority of the votes are "For dissolution, Yes," then the board shall immediately notify all persons having claims against the district of the result of such election, and may proceed to adjust, settle, and compromise any

and all such claims, in whatever form the indebtedness of such district may be.

For the purpose of raising money to pay any and all indebtedness of the district, such board may sell and dispose of the canal, franchises, and other property owned by the district at not less than a valuation to be fixed by a board of three appraisers, one member of which shall be appointed by the board of directors of such district; one to be appointed by the board of county commissioners of the county in which the district was originally organized, which two appraisers shall elect a third; which board of appraisers shall be sworn by the clerk of the board of county commissioners of the county, to appraise the canal, franchises and other property of the district at its cash value; and as soon thereafter as practicable, such appraiser shall make an appraisal, and report in writing their appraisal of all the property owned by the district, to the board of directors; which board shall advertise the property for sale at least four weeks in such manner as in the judgment of the board shall be to the best interest of the district; and shall state in such advertisement a description of the property, and the time and place when bids in writing for the same shall be opened and considered, and bids orally received and considered. At the time designated in such notice, or as soon thereafter as such board can meet, it shall open and consider all bids received for the purchase of the property and it shall have the power to reject any and all bids for such property, which are not in the judgment of the board a fair consideration for the property; and after the bids are thus rejected by the board, it may by private negotiations with any person, persons or corporation sell and convey by deed executed by such board, all of the property, for part cash and part in deferred payments, bearing the same interest as the bonded indebtedness of such district; and in case the district has no bonded indebtedness the interest upon such deferred payments shall be such as may be agreed upon by the board and the purchaser, not exceeding the rate allowed by law. Such deferred payments shall be a lien upon all of the property thus sold by the board which shall have the same force and effect as a mortgage against such property and may, when due, be foreclosed in the manner provided by law for the foreclosure of mortgages. In addition to such lien, the board of directors may require the purchasers of the property to furnish the district with such additional security upon all deferred payments as in its judgment shall make such payments secure; and all notes, bonds, mortgages and other securities shall be made out to and in the name of the irrigation district, and shall be, together with the money received from such sale, deposited with the county treasurer of the county in which the district was originally organized. All suits at law or equity brought for the purpose of collecting such indebtedness, shall be brought in the name of such district by counsel employed by the district board; and in case the board shall be disorganized, such employment shall be by the board of county commissioners.

After a sale of the property and franchise of the district, the board of directors shall, with the amount realized from such sale, together with such other funds as such district may have, make settlement, payment and redemption, if possible, of all outstanding bonded and other indebtedness of the district, but shall in no case pay more than the market value of such outstanding bonds with interest up to the time of payment; and in cases where bonds not yet due cannot be redeemed by reason of the refusal of the owner thereof to surrender them before due, the board may invest the surplus money of the district, after paying all debts that can be paid, in state, county, or other safe bonds, bearing the same or greater rate of interest, if possible, than the district bonds thus outstanding, for the purpose of paying such outstanding bonds of the district when due. In case the amount realized from the sale of such district property together with other money of the district, shall be insufficient for the payment of all the indebtedness of said district, assessments

shall continue to be made against the lands included in the district in the manner provided by law for assessments to pay bonds and other indebtedness of irrigation districts, until a sufficient amount is raised to fully pay all obligations of such district. In all cases where bonds and other obligations of irrigation districts shall be issued after the passage of this act, such bonds and obligations shall become subject to redemption by the board of directors of any irrigation district, as soon as the property and franchise of such district shall be sold after such district has elected to dissolve as a district, as herein provided.

After all the property of the district shall be disposed of as above provided, and all of the obligations of such district shall have been paid the board of directors shall file in the office of the county clerk of each county in which said district is located, and in the office of the state engineer, a report attested by the clerk and seal of the board, stating that the district has disposed of its property and franchise, and become disorganized and dissolved, which report shall be recorded in the miscellaneous records of such counties; and if any person, persons or corporations, having any claim against such district not settled or disposed of at the time of the filing of such report, shall fail and neglect to bring suit upon such claim within five years from the time of the filing of such report, such claim or claims shall be forever barred as against such district as well as against all persons and property therein. Provided that in case a contract has been made with the United States no action shall be taken by the board of directors for the dissolution of any irrigation district as herein provided unless the assent of the secretary of the interior in writing has been filed with the secretary of the board of directors and a certified copy thereof filed in each county where such district lands are situate. [Laws 1917, ch. 115, § 70.]

Waters, 40 Cyc. 821, 824.

**§ 8247a71. Irrigation district bonds; refunding.** The board of directors of any irrigation district in the state of North Dakota which has issued valid interest bearing bonds that are now outstanding and unpaid, may take up and pay off any such bonds whenever legally possible, by the issue and sale or the issue and exchange therefor of the bonds of such irrigation district; but bonds so to be issued shall not exceed the amount lawfully owing and unpaid upon the bond or bonds so sought to be taken up and paid. Bonds so issued shall not bear interest greater in rate or amount per annum than the bonds so sought to be taken up and paid. [Laws 1917, ch. 115, § 71.]

Waters, 40 Cyc. 821.

**§ 8247a72. Procedure in refunding bonds.** Whenever it is desired to issue bonds under this article the board of directors shall, by resolution entered in the minutes of their proceedings, direct public notice to be given, stating the amount of the indebtedness sought to be taken up and paid, and the date it was voted, the rate of interest it bears, and that the same is sought to be taken up and paid off by the issuance and sale, or the issuance and exchange of bonds bearing interest at an equal or less rate and amount per annum, and stating the date on which, and the places where, any taxpayer of such irrigation district may file objections to such proposed action. Such notice shall be signed by the president and secretary of said irrigation district, and shall be published for two weeks in some newspaper in general circulation in the district, or by posting the notice in three of the most public places in the district for at least fifteen days prior to such date. If after such publication and on the day for filing objections, no objection to such action by the board of directors is filed, then the board of directors may issue and sell, or exchange, as the case may be, the bonds authorized by this article, not exceeding the amount stated in such notice, nor exceeding the amount of actual bonded indebtedness of the district then outstanding and unpaid, nor bearing interest

greater in rate or amount and thereby take up and pay off the bonds described in the notice. [Laws 1917, ch. 115, § 72.]

Waters, 40 Cyc. 821.

§ 8247a73. **Hearing of objection to issue.** If, on the day appointed in such notice, any written objections be filed, the objection or objections shall be heard and decided by the board of directors; and from their decision an appeal may be taken to the district court, in the manner of appeals from the county board. [Laws 1917, ch. 115, § 73.]

Waters, 40 Cyc. 821.

§ 8247a74. **Recitals of refunding bonds.** The bonds so issued shall have recited therein the object of issue, the title of the article under which the issue was made, stating the issue to be made in pursuance thereof, and shall also state the number, date and amount of the bonds for which it was substituted; and such new bonds shall not be delivered until the surrender of the bond or bonds so designated, and they shall be paid and levy made and tax collected for their payment in accordance with laws now governing the bonds heretofore issued. [Laws 1917, ch. 115, § 74.]

Waters, 40 Cyc. 821.

§ 8247a75. **Liability for failure to deliver water.** Every irrigation district within the state of North Dakota shall be liable in damages for negligence in delivering or failure to deliver water to the users from its canal to the same extent as private persons and corporations; provided, however, such districts shall not be liable as herein provided, unless the party suffering such damage by reason of such negligence or failure shall, within thirty days after such districts shall fail to deliver water, serve a notice in writing on the chairman of the board of directors of such district, setting forth particularly the acts committed or the commissions of the duties to be performed on the party of the district, which it is claimed constitute such negligence or omission, and that he expects to hold such district liable for whatever damages may result; provided, further, such action shall be brought within one year from the time the cause has accrued. [Laws 1917, ch. 115, § 75.]

#### ARTICLE 1b.—MISSOURI RIVER CONFERENCE.

**Explanatory note.** For Red River of the North Conference between same states, as to flood protection and drainage, see §§ 2495d1-2495d4, ante.

§ 8247b1. **Appointment.** The governor of the state of North Dakota shall appoint the state engineer, or the assistant to the state engineer, who is in charge of matters relating to irrigation and water rights, and one other elector and taxpayer of the state, both of whom shall serve without compensation as representatives of the state of North Dakota, and who shall be duly authorized to represent the state of North Dakota on a joint commission to be composed of representatives of North Dakota, South Dakota, and Montana, and a duly authorized representative of the United States of America, such commission to be constituted for the purpose of negotiating and entering into a compact or agreement between the said states, and between said states and the United States, with the consent of Congress, respecting the further utilization and disposition of the waters of the Missouri river and streams tributary thereto and fixing and determining the rights of the said states and the rights of the United States in and to the use and disposition of the waters of said stream and the benefits to be derived therefrom, provided, however, that any compact or agreement so entered into by said states and the United States, shall not be binding or obligatory upon any of the high contracting parties thereto, unless and until the same shall have been ratified and approved by the legislatures of the said states and by the Congress of the United States. [Laws 1923, ch. 248, § 1.]

Waters, 40 Cyc. 703, 815.

§ 8247b2. **Notice of appointment; when duties to be performed.** The governor of North Dakota shall notify the respective governors of the states of South Dakota and Montana of the appointment of the representatives of North Dakota, as soon as said representatives shall have been appointed and qualified, but said representatives shall not enter upon the performance of their duties until a representative or representatives to serve upon said joint commission shall have been named and qualified for each of the said states named in section 1 hereof, provided, however, that said representative shall proceed immediately after the passage of this act and its approval by the governor, in carrying out the provisions of section 3 hereof as pertains to the Missouri river and its tributaries within the boundaries of the state of North Dakota, and the securing of the necessary data and information called for by this act shall not be contingent upon appointment and qualification of the representatives of the other states concerned or of the representative of the United States of America. [Laws 1923, ch. 248, § 2.]

§ 8247b3. **Authority.** Said representatives of the state of North Dakota shall have full authority to make or cause to be made any and all investigations of the Missouri river and the drainage area thereof, which may become necessary in order to sufficiently advise said representatives of the physical conditions obtaining upon said streams and the drainage area thereof, and of the present and future needs of the state of North Dakota and its citizens in the use and benefit of the waters of the said stream and the streams tributary thereto. To that end, said representatives shall have authority to administer oaths, examine and require the attendance of witnesses, and to perform such other duties and gather such data as may be necessary to sufficiently apprise said representatives of the facts and furnish him or them with adequate information in order that they may properly perform their duties as representatives of the state of North Dakota upon said joint commission. [Laws 1923, ch. 248, § 3.]

§ 8247b4. **No appropriation; outside aid.** No appropriation is made for the purposes of carrying out this act; but the state engineer shall be permitted to utilize his office force and staff, where this can be done without detriment to the other work required to be performed under existing laws; and the representatives appointed under the provisions of this act may receive financial or other assistance from such associations or individuals as are interested in and willing to give such aid in performance of the services required to be performed under the provisions of this act. [Laws 1923, ch. 248, § 4.]

#### ARTICLE 9.—FLOOD IRRIGATION PROJECTS.

Northern P. R. Co. v. Sargent County, 43 N. D. 156, 174 N. W. 811.

§ 8320a1. **When improvements may be constructed.** Dams, gates, and necessary ditches and canals for the purpose of controlling, regulating and foreing the overflow of water in non-navigable rivers or streams within the state of North Dakota may be established, constructed and maintained in the several counties of this state whenever the same shall be conducive to the public health, convenience or welfare, under the provisions of this chapter. [Laws 1919, ch. 116, § 1.]

Waters, 40 Cyc. 558, 666, 814, 815.

Construction and maintenance of canals and ditches. 15 R. C. L. 486 et seq. and Supps.

§ 8320a2. **Board of flood irrigation; how appointed.** The board of county commissioners of any organized county in this state shall have the power and is authorized at any meeting of the board, by a majority vote of all the members, upon its own motion or on the petition of any person or persons interested, to appoint five freeholders of the county as a board of flood irrigation

of such county. At the time of the appointment of such board one shall be appointed for a term of one year, one for a term of two years, one for a term of three years, one for a term of four years, and one for a term of five years. Subsequent appointments shall be made for terms of five years. All persons so appointed shall hold office until their successors are appointed and qualified. In case of a vacancy the board of county commissioners may fill the same for the unexpired term by appointment. The board of county commissioners shall provide an office for said board of flood irrigation at the county seat, suitable for its use and the keeping of its records and shall provide suitable record books for its use. [Laws 1919, ch. 116, § 2.]

Waters, 40 Cyc. 814, 815.

**§ 8320a3. Oath; bond; organization; legal advice.** Any person appointed as a member of the board of flood irrigation shall within ten days after his appointment take, subscribe and file in the office of the county auditor an oath to faithfully perform the duties of a member of the board of flood irrigation under the law, and within the same time make, execute and file in the auditor's office a bond to the county with sureties to be approved by the auditor in such sum as shall be ordered by the board of county commissioners, conditioned for the faithful discharge of his duties as a member of the board of flood irrigation. The members of said board shall organize by electing from their number a chairman and a secretary; they shall keep an office at the county seat and shall keep a record of its acts and proceedings and a separate record of the proceedings relating to each separate flood irrigation project, all of which shall be open for public inspection and such records shall have the same force and effect as other public records. Three members of said board shall at all times constitute a quorum for the transaction of business. Said board may, when it is necessary, employ a clerk and fix his compensation. It may also employ and call to its assistance a competent surveyor or engineer. The state's attorney of each county shall, so far as his other duties will permit, act as the legal advisor of the board. The board may, however, by and with the consent of the county commissioners, employ other counsel to advise and represent it in its proceedings. [Laws 1919, ch. 116, § 3.]

Waters, 40 Cyc. 815.

Oath of office. 22 R. C. L. 448.

Official bonds. 22 R. C. L. 496 et seq. and Supps.

**§ 8320a4. How established.** A petition for the construction of a dam or a system of dams, including gates and other proper and necessary constructions incidental thereto may be made in writing to the board of flood irrigation, which petition shall be signed by at least six freeholders of the district to be affected by the flood irrigation project, and which shall set forth and particularly describe the boundaries of the district that will be affected. The petitioners must accompany the petition with a map of such proposed district, which map shall show the approximate location of the proposed dam or dams and other necessary works by means of which it is intended to control the waters of such river or stream. Said petition shall also describe in a general way the benefits expected to be derived from the establishment of such improvement.

Upon the presentation of a petition, as hereinbefore provided, and filing of same, the board of flood irrigation shall, as soon as practicable, proceed to examine the site of the proposed improvement and the territory or district to be benefited thereby; and if, in its opinion, it is necessary for the public good it shall enter a resolution to that effect and shall also enter a resolution designating a competent engineer who shall make all necessary and proper surveys of the lands that may be benefited or injured by the establishment of such improvements and who shall prepare all proper and necessary plans and specifications for all the improvements required to be constructed, and upon the completion of such plans and specifications shall file the same with the said

board of flood irrigation, together with an estimate of the cost of the construction of such improvements as well as of the annual maintenance thereof.

The board of flood irrigation shall require a bond from the petitioners in a sum sufficient to pay all expenses of the required surveys and plans and specifications and of the flood irrigation board, if it should appear, after the engineer's report is filed, that the proposed improvement would cost more than the amount of the benefit to be derived therefrom.

For the purpose of making examinations or surveys or getting the necessary information for the preparation of plans and specifications the board of flood irrigation, its engineers or employes, may enter upon any lands deemed proper and necessary. Copies of the report and of the plans and specifications of the engineer shall be filed in the office of the county auditor in the county in which the improvement is proposed to be constructed, with the board of flood irrigation, and in such other places as the board of flood irrigation may order, all of which shall be open to inspection.

In locating an improvement, the board of flood irrigation may, under the advice of the engineer, vary from the location described in the petition, as it seems best.

Upon the filing of the engineer's report the board of flood irrigation shall fix a date and public place for hearing objections to the petition and the place of such hearing shall be located at some point in the vicinity of the land which will be affected by such improvement, and that will be the most convenient point for the majority of the land owners affected to attend. At least ten days notice of such hearing shall be given by causing five notices to be posted in the district to be affected at such points as will be likely, in the opinion of the board, to secure the greatest publicity. And in addition thereto, a notice shall be sent by registered mail to the last known address of each and every owner of land which may be affected by the proposed project at least ten days prior to the date of such hearing.

Notices of this hearing shall briefly set out the substance of the petition, the date of the filing of the engineer's report and the date when the board will act upon the petition and must be signed by the members of the board, or a majority thereof. All persons whose land may be affected by any such project may appear before the board of flood irrigation and fully express their opinion and offer evidence upon the matters pertaining thereto. Should two thirds of the land owners whose land is subject to assessment for the construction of such project and who own at least one-half of such land believe that the benefits to be derived are not equal to the expense of the construction they may petition the board of flood irrigation to have further proceedings discontinued, whereupon said board shall, by resolution, order all further proceedings in connection therewith discontinued. [Laws 1919, ch. 116, § 4.]

Waters, 40 Cyc. 666, 815.

**§ 8320a5. Assessment of damages; how made.** At the hearing provided for in the preceding section the board of flood irrigation shall also determine what damage will be suffered, if any, by the owners of all lands within the district that will be affected by the building of such irrigation project, and in determining such damages no allowances shall be made for any benefits that may accrue to said land by the building of said project. The benefits, if any, shall be assessed under the provisions of section 9 of this act.

The assessment of such damages shall be subject to review, and ten days' notice of the time and place when and where such assessment will be reviewed by the board of flood irrigation shall be given by publishing in some newspaper of general circulation in said county. A notice, not less than five in all, and at least one in each township or municipality interested in such project shall be posted at such points as may be likely, in the opinion of such board, to secure the greatest publicity for each notice. Printed notices shall also be sent by registered mail to the last known address of each and every land

owner whose land shall be affected by the construction of such project. The place appointed for such hearing shall be located at some point in the vicinity of the land which shall be affected, that will be convenient for the majority of the land owners affected by such project to attend. At the time and place appointed, such board shall proceed to hear all complaints or objections relative to such assessment of damages and correct or confirm the same.

Should any land owner believe that the assessment of the damage suffered by him has not been fairly or equitably made he may appeal to the district court of the county wherein such land is situated, by filing a petition with the clerk of the district court of said county, asking for a review of such assessment of damages; provided, however, that such petition must be filed within fifteen days after the entry of the order confirming the same.

Upon the filing of such petition in the office of the clerk of said district court, said clerk shall immediately notify the board of flood irrigation thereof, whereupon the said board shall certify all its records and proceedings in said matter to the district court. Said issue shall be regarded to be on the calendar of said court at the next court term thereof and shall be promptly heard by the court. If it appear to said court upon such hearing that such assessment or assessments have not been equitably made it may proceed to correct the same, which correction and adjustment shall be final, unless appeal is taken to the supreme court. Costs may be granted to either party in the discretion of the court. [Laws 1919, ch. 116, § 5.]

Waters, 40 Cyc. 674-675, 815.

**§ 8320a6. Showing required to establish project.** If, upon the examination by the board of flood irrigation, and after the filing with said board of the plans and specifications for said project, or if upon the hearing upon the petition, it shall appear that there was not sufficient cause for making such petition, or that the proposed project would cost more than the amount of benefits derived therefrom, the board of flood irrigation shall deny the petition, and the petitioners shall be jointly and severally liable to such board for all costs and expenses incurred in the proceedings, to be recovered by such board by action. If it shall appear that there was sufficient cause for the making of such petition and that the proposed project will not cost more than the amount of benefits to be derived therefrom the board of flood irrigation shall thereupon make an order establishing the project, accurately describing it, and give the same a name by which it shall be recorded and indexed. [Laws 1919, ch. 116, § 6.]

Waters, 40 Cyc. 814-815.

**§ 8320a7. Right of way.** The right of way for the construction of any and all improvements required in such project, including all sites for dams, etc., if not conveyed to the county by the owner may be acquired by the board of flood irrigation by the exercise of the right of eminent domain in the manner prescribed by chapter 36 of the Code of Civil Procedure of the Compiled Laws of 1913. Such right of way, when acquired, shall be the property of the county. [Laws 1919, ch. 116, § 7.]

Eminent Domain, 20 C. J. p. 575 § 57; Waters, 40 Cyc. 814.

Irrigation as public purpose authorizing exercise of eminent domain. 10 R. C. L. 59 and Supps.

**§ 8320a8. Damages and right of way, how paid.** Upon the assessment by the board or court of the amount of damages to which the respective owners of land which may be damaged by the construction of such project may be entitled, and upon the assessment by the board or court of the amount of damages to which the respective owners of the right of way may be entitled, the board of flood irrigation shall issue warrants in sums sufficient to pay the damages so assessed, drawn upon the proper county treasurer and payable out of any funds in the hands of the treasurer for the construction of such flood

irrigation project. Such warrants shall be negotiated at not less than their par value and the proceeds thereof paid to the owners of the land entitled thereto, according to such assessments of damages, the surplus, if any, to be paid to the county treasurer who shall place the same to the credit of the proper flood irrigation project fund. [Laws 1919, ch. 116, § 8.]

**§ 8320a9. Assessment of accruing benefits.** Upon acquiring the right of way and after the completion of the assessments of damages as hereinbefore set out the board of flood irrigation shall assess the per cent. of the cost of constructing and maintaining such flood irrigation project and providing the right of way therefor and of paying all damages incurred by the owners of land affected thereby which any lot, piece or parcel of land shall be liable to pay by reason of the benefits accruing thereto, either directly or indirectly, by reason of the construction of such project, but such assessment shall be subject to review by the commissioners as hereinafter provided. [Laws 1919, ch. 116, § 9.]

**§ 8320a10. Assessment of benefits subject to review.** The assessment of benefits provided for in the preceding section shall also be subject to review in the same manner; and upon similar notices as provided for the review of the assessment of damages in section 5 hereof. [Laws 1919, ch. 116, § 10.]

**§ 8320a11. Return of assessment of benefits.** After the assessment of benefits has been made, as provided in the preceding sections, or has been confirmed, if appeals have been taken, and the specific amount of each assessment has been extended as hereinafter provided, the board of flood irrigation shall make return thereof to the county auditor who shall record the same in a book to be provided by the county for that purpose. Such return shall contain the petition for the project, a copy of the minutes of the survey and of the plans and specifications signed by the engineer, a copy of the order establishing the flood irrigation project, conveyances of the right of way, if any, and the assessments of damages and benefits. [Laws 1919, ch. 116, § 11.]

**§ 8320a12. Notice of construction.** After the order establishing the project has been entered the board of flood irrigation shall advertise a notice, asking for sealed proposals for bids for the construction of all work required, as shown by the plans and specifications on file, which notice shall be published at least once a week for three successive weeks in the official paper of the county, and in such other papers or builder's bulletins as the board may order. Sealed bids shall be addressed to the board of flood irrigation and shall be publicly opened by them at a regular or special meeting designated in the notice.

The contract for the construction of the work shall be let to the lowest responsible bidder, but the board may reject any or all bids submitted. At least fifteen days time shall intervene between the hearing upon the review of the assessments and the letting of the contracts. The successful bidder shall give a bond to the board of flood irrigation in the sum equal to the contract price, conditioned upon the faithful performance of and compliance with the terms and conditions of said contract. [Laws 1919, ch. 116, § 12.]

**§ 8320a13. Computation, apportionment and taxation of costs.** After the letting of such contracts such board shall make a computation of the cost of the project which shall include all the expenses of locating and establishing the same, including the cost of right-of-way, the damages paid to land owners for any cause, the fees of the board, the cost of surveys, plans and specifications, interest on all warrants issued or to be issued by the board of flood irrigation on account of such project, accumulated or to accumulate prior to the time when the tax levied or to be levied to pay therefor is collectible by law, and all other expenses, together with the amount of all contracts let for

the construction of the same. The sum of all the costs and expenses thus incurred or to be incurred shall be the cost of the construction of such project.

After fixing the cost as hereinbefore set out the board of flood irrigation shall carry out upon the assessment list the specific amount which each lot or tract of land, benefited by the project for which the tax is levied, is liable to pay on account of procuring the same according to the per cent which by section 9 hereof it is required to fix and determine.

Such list shall thereupon be filed in the office of the county auditor of the county in which the lands benefited are situated, and the auditor shall thereupon extend upon the tax list as a special tax as provided by law the several amounts shown by such list, specifying in such tax list the particular flood irrigation project for the construction or procurement of which the special tax is assessed, which special tax shall be collected and enforced in the same manner as other taxes. [Laws 1919, ch. 116, § 13.]

**§ 8320a14. Collection of flood irrigation taxes; payment of expenses.** The flood irrigation taxes shall be collected by the county treasurer, and all moneys so collected shall be credited to the flood irrigation fund to which they belong, and the county treasurer shall be the treasurer of such funds. Payment of all expenses and costs of locating and constructing any such project shall be made by the board of flood irrigation who shall issue warrants in such amounts and to such persons as by such board may be found due, which warrants shall be signed by the chairman and secretary. All such warrants, after presentation to the county treasurer for payment, if not paid for want of funds, shall be registered by the county treasurer, and shall thereafter bear interest at the rate of six per cent. per annum. [Laws 1919, ch. 116, § 14.]

**§ 8320a15. Additional assessments; when necessary.** In case the amount realized from the assessment made for the construction of any such project shall not be sufficient to pay therefor or to complete the same and pay all fees and incidental expenses, or to pay and retire any bonds issued in connection with the construction thereof, or in case of an enlargement of such project, or an extension thereof becomes necessary, a further assessment shall be made to meet the additional expense and the amount thereof shall be levied and collected in the manner hereinbefore provided. [Laws 1919, ch. 116, § 15.]

**§ 8320a16. Assessment for maintenance.** The board of flood irrigation shall have the exclusive care, management and control of said project, but may for such purpose enter into contracts with responsible parties for the operation thereof and for the purpose of defraying expenses of the care, operation, maintenance and repair of such project, including fees of the members of the board, said board shall annually certify to the county auditor the amount that will be required for such purposes during the following year; whereupon the county auditor shall apportion to the several parcels or tracts of land within such project the amount which each parcel or tract of land shall be assessable with such apportionment to be made on the same basis as the original benefits were assessed under the provisions of section 9 hereof, and shall extend such amount upon the tax lists as a special tax as provided by law. The taxes so collected shall be credited to the proper fund. [Laws 1919, ch. 116, § 16.]

**§ 8320a17. Joint powers of flood irrigation boards in two or more counties; apportionment of cost.** Whenever it shall be deemed necessary by the boards of flood irrigation of two or more counties in the state, to construct or extend a project through or into two or more counties in this state, it shall be lawful and the several boards of flood irrigation in the counties into or through which such proposed project may extend when completed, are empowered to establish, construct and maintain such project through or into two or more counties in the manner following, to-wit: There shall first be presented to the several boards of flood irrigation in each of such counties a petition for the

establishment of such flood irrigation project in their several counties as provided by law and such boards of such several counties shall determine upon the necessity or expediency of the establishment of such flood irrigation project as provided by law. The several boards of flood irrigation of all counties through or into which such proposed project may run shall then meet and agree upon the proportion of damages and benefits to accrue to the lands affected in each county affected and for this purpose they shall consider the entire course and territory of such project in all said counties as one project. They may apportion the cost of establishing and constructing such entire project ratably and equitably up on the lands in each county in proportion to the benefits to accrue to such lands, and when they have so apportioned the same they shall make written reports of such apportionment to the auditors of the several counties affected, which reports shall show the portion of cost of such entire project to be paid by tax upon the lands in each of such counties and such reports shall be signed by the boards of flood irrigation of all counties affected. Upon the filing of such reports, the several boards of flood irrigation shall meet and assess against the lands in each of such counties ratably and equitably as provided by law an amount sufficient to pay the proportion of cost of such drain in each of such counties so fixed by all said commissioners. [Laws 1919, ch. 116, § 17.]

Waters, 40 Cyc. 814-815.

**§ 8320a18. Tax or assessment void; when new proceedings.** The collection of no tax or assessment levied or ordered to be levied to pay for the location and construction of any project of flood irrigation laid out and constructed under this chapter shall be perpetually enjoined or declared absolutely void in consequence of any error of any officer or board in the location and establishment thereof, nor by reason of any error or informality appearing in the record of the proceedings by which any such project shall have been located or established, nor for want of proper conveyance or condemnation of the right of way, but the court in which any proceeding may hereafter be brought to reverse or to declare void the proceedings by which any project has been located or established or to enjoin the tax levied to pay the labor and cost and expenses shall on application of either party appoint such person or persons to examine the premises, or to survey the same, or both, as may be deemed necessary and the court shall on final hearing make such order in the premises as shall be just and equitable, and may order such tax to remain on the tax list for collection or any part thereof, or if the same shall have been paid under protest shall order the whole or such part thereof as may be just and equitable to be refunded, the costs of said proceedings to be apportioned among the parties as justice may require. If any proceedings for the location, establishment or construction of any project under the provisions of this chapter, have been heretofore, or shall be hereafter enjoined, vacated, set aside, declared void or voluntarily abandoned by the board of flood irrigation, in consequence of any error, irregularity or want of jurisdiction affecting the validity of such proceedings, and if any warrants have been or shall hereafter be issued in connection with such aforesaid invalid or abandoned proceedings, the board of flood irrigation may nevertheless proceed under the provisions of this chapter to locate, establish and construct the project under the same or different name, and in the same or different location described in the invalid or abandoned proceedings; provided, however, such new proceedings shall be in accordance with the general provisions of this chapter. [Laws 1919, ch. 116, § 18.]

**§ 8320a19. Liability of members of flood irrigation board.** Each board of flood irrigation shall make a report to the county commissioners of all projects begun, in process of construction or finished and shall also render a full account of all moneys which shall come into its hands; and every member of the

board of flood irrigation shall be liable on his bond for any mis-application of money coming into his hands as such member of such board. The report required by this section shall include an itemized statement of all expenses and warrants drawn on account of each and every drain. [Laws 1919, ch. 116, § 19.]

Waters, 40 Cyc. 815.

§ 8320a20. **Compensation of members of the board.** The members of the board of flood irrigation shall receive for their services three dollars per day for the time actually spent by them in the performance of the duties of their office. [Laws 1919, ch. 116, § 20.]

§ 8320a21. **Power to administer oath.** The members of the board of flood irrigation shall have the power to administer any oath required in any proceeding had before them or in which they may be called to act officially. [Laws 1919, ch. 116, § 21.]

§ 8320a22. **Bonds; when and how authorized.** The board of county commissioners of any county in which any such project is proposed to be located and constructed is authorized to issue bonds which shall be known as flood irrigation bonds, in such sums as may be necessary for the purpose of defraying the expenses incurred or to be incurred in obtaining the right of way or in locating or constructing any such project, said word "expenses" to be construed to mean and to cover every item of cost of said project from its inception to its completion as hereinbefore provided, which bonds shall be paid out of the revenues to be derived from taxes levied, or be levied, and collected from that portion of the county found by the board of flood irrigation to be benefited thereby. Such bonds shall bear interest at a rate not exceeding seven per cent. and shall be divided in such amounts and payable at such periods not exceeding fifteen years, as the board of county commissioners may determine; provided, that any land owner who may desire to pay the entire amount assessed against his land for the entire cost of such project, including warrants and interest thereon, may, prior to the sale of such bonds pay into the county treasury the amount of said assessments for which the treasurer shall give his receipt in full, and such lands shall not be included in the list of lands assessed. The county auditor shall give notice of the determination of the board of county commissioners to issue bonds by publishing a notice in the official newspaper of the county at least fifteen days before the date of selling said bonds. Said notice shall designate the project proposed to be bonded, and in general terms notify all persons interested of their right to pay their total assessment prior to the date of the sale of said bonds, as provided in this section. The money paid in shall be used to take up warrants, and the bonds issued shall be for such an amount as will pay the remainder of the cost of construction; and the said board shall provide sinking funds for the payment at maturity of each series of bonds issued and for the payment of the annual interest on the same. The bonds issued under the provisions of this chapter shall be signed by the chairman of the board of county commissioners of such county and countersigned by the county auditor, who shall keep a record of the bonds issued under the provisions of this chapter. Such board shall have the power to negotiate such bonds at not less than the par value thereof as it may deem for the best interest of all persons interested in such project. Such bonds shall contain a recital that the same are issued in accordance with the provisions and pursuant to the authority of this chapter and that they are to be paid out of the sinking funds to be created as in this chapter provided. Whenever such bonds shall be issued the tax hereinbefore provided for shall not be collected all in one year, but shall be divided into parts corresponding with the amounts and maturities of the bonds and such parts shall be extended year by year upon the tax lists by the county auditor against the proper parcels of land and property liable to taxation for that purpose and collected in such

year, and such fund shall constitute the sinking fund provided by this section. [Laws 1919, ch. 116, § 22.]

**§ 8320a23. Levy of tax for interest; sinking fund.** The board of county commissioners shall in each year at the time of levying the taxes, levy upon the property liable to taxation on account of the location and construction of any project as by this chapter provided a tax sufficient to pay the annual interest on any bonds which may have been issued for the purpose of locating and constructing such project. Separate sinking funds shall be provided for each separate project for the construction of which bonds shall have been issued, and no funds in any such sinking fund shall be applied to any other purpose than the payment of the bonds for the payment of which such fund was created. No county shall be liable for the payment of any bonds issued under the provisions of this chapter, but such bonds shall be paid only out of the sinking funds created as in this chapter provided. [Laws 1919, ch. 116, § 23.]

**§ 8320a24. Emergency.** Whereas it is highly necessary and expedient that this act shall go into immediate operation, this act is hereby declared to be necessary for the immediate preservation of the public peace, health and safety, and shall go into effect and be in force from and after its passage and approval. [Laws 1919, ch. 116, § 24.]

## CHAPTER 39.

### DEATH BY WRONGFUL ACT.

**§ 8321.** Comp. Laws, 1913.

Does not apply where death occurs while deceased is engaged in interstate commerce. *Hein v. Great Northern R. Co.* 34 N. D. 440, 159 N. W. 14.  
See also *Olson v. Hemsley*, 48 N. D. 779, 187 N. W. 147.

**§ 8322.** Comp. Laws, 1913.

*Hein v. Great Northern R. Co.* 34 N. D. 440, 159 N. W. 14.

**§ 8323. Who may bring action.** The action shall be brought by the following persons in order named:

1. The surviving husband or wife, if any.
2. The surviving children, if any.
3. The surviving mother or father.
4. The personal representative.

If any person entitled to bring the action refuses or neglects so to do for a period of thirty days after demand of the person next in order, such person may bring the same. [Laws 1917, ch. 106, § 1.]

Father, of one injured while in employ of one who failed to comply with workmen's compensation act, entitled to bring action. *Olson v. Hemsley*, 48 N. D. 779, 187 N. W. 147.

Does not apply where death occurs while deceased is engaged in interstate commerce. *Hein v. Great Northern R. Co.* 34 N. D. 440, 159 N. W. 14.

Death, 17 C. J. pp. 1262-1270 §§ 115-122.

Statutory right of adult child to recover for death of parent. L.R.A.1916E, 176.

Right of foreign or 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. L.R.A.1917A, 37.

Personal representative as proper party to maintain statutory action for death. L.R.A.1916E, 160.

Right of personal representative to revive action for personal injury. L.R.A. 1915E, 1129.

Parent's statutory right of action for death of child. L.R.A.1916E, 120.

Statutory right of action for death of illegitimate where mother is dead. L.R.A. 1916E, 132.

Mother's statutory right of action for death of illegitimate child. L.R.A. 1916E, 125.

Right of husband to recover in action for breach of warranty, for loss of services of wife, occasioned by her injury or death in consequence of such breach. 3 B. R. C. 197.

Necessity of interest or estate in premises affected by nuisance to sustain action for death from the nuisance. 43 L.R.A.(N.S.) 871.

Beneficiaries and parties plaintiff to statutory action for death including necessity of pecuniary loss or dependency. L.R.A.1916E, 118.

Action by or on behalf of statutory beneficiary as affected by nuisance to sustain action for death from the nuisance. L.R.A.1916C, 806.

Who may maintain action under Federal Employers' Liability Act. L.R.A. 1915C, 76.

Personal relations of spouses or marital misconduct of either spouse as affecting. 18 A.L.R. 1409.

Who may bring action for wrongful death. 8 R. C. L. 756 et seq. and Supps.

§ 8325. An amendment of this section in 1923 was vetoed by the governor. See Laws 1923, page 547.

## CHAPTER 40.

### ARBITRATION.

§ 8327. Comp. Laws, 1913.

Parties in difference may orally agree to submit their controversy to arbitration. *Johnsen v. Wineman*, 34 N. D. 116, 157 N. W. 679.

§ 8333. Comp. Laws, 1913.

*Johnson v. Rutherford*, 28 N. D. 87, 147 N. W. 390.

§ 8345. Comp. Laws, 1913.

*Johnsen v. Wineman*, 34 N. D. 116, 157 N. W. 679.

## CHAPTER 41.

### INSOLVENCY.

**Explanatory note.** Administration of insolvent banks, see §§ 5191a1-5191a19, ante.

## CHAPTER 41A.

### ASSIGNMENT FOR BENEFIT OF CREDITORS.

§ 8442a1. **Supervision of district court.** When any person, partnership or corporation in this state shall make an assignment for the benefit of creditors, or a trust deed, of the whole or any substantial part of his property, the same shall be administered under the supervision of the district court. [Laws 1921, ch. 18, § 1.]

Assignments for Benefit of Creditors, 5 C. J. p. 1211 § 322.

Jurisdiction of courts over assignments for creditors. 2 R. C. L. 666 and Supps.

§ 8442a2. **Receiver; grounds for appointing; who to be appointed; administration and distribution by.** The making of such an assignment shall be cause for the appointment of a receiver of the property of the assignor, and the public administrator of the county wherein the greater part of the assets of such assignor shall be situated shall, either on his own petition or on the petition of any creditor of the assignor, be appointed receiver of the property of such assignor, and shall proceed to administer and distribute the same in the

place and instead of the assignee named in such assignment, and as nearly as may be in accordance with the terms and provisions of such assignment, under the supervision of the district court. [Laws 1921, ch. 18, § 2.]

Assignments for Benefit of Creditors, 5 C. J. p. 1196 § 288; Receivers, 34 Cyc.

1.

Appointment of receiver on assignment for creditors. 23 R. C. L. 26.

**§ 8442a3. Same; public administrator of which county appointed.** When the property of the assignor is situated in different counties, the public administrator of any county wherein a portion of such property is situated, first, petitioning, shall be entitled to be appointed receiver as aforesaid; but the court shall thereafter, on the petition of any creditor or public administrator, and on the facts being shown to its satisfaction, vacate the said appointment, and appoint as receiver the public administrator of the county wherein the greater part of the assignor's property is situated. [Laws 1921, ch. 18, § 3.]

**§ 8442a4. Assignee, administration by.** In case of failure of any creditor or public administrator to apply for the appointment of a receiver as above provided, the estate may be administered by the assignee appointed in the assignment, but shall be administered and distributed under the supervision of the district court. [Laws 1921, ch. 18, § 4.]

Assignments for Benefit of Creditors, 5 C. J. p. 1196 § 288.

Powers and duties of assignee. 2 R. C. L. 706 et seq. and Supps.

**§ 8442a5. Terms of sale; fees and expenses; validity of transfers.** No property of such estate shall be sold except subject to the confirmation of the district court, on petition of the receiver or assignee, and on such notice as the court may fix. The fees and expenses of all officers and employees shall be under the control of the court, and shall not be paid by the receiver or assignee until approved by the court. Any transfer of any property by any assignee or trustee or receiver shall be void unless the same shall have been approved by the judge of the district court before whom such matter should be pending. [Laws 1921, ch. 18, § 5.]

Assignments for Benefit of Creditors, 5 C. J. p. 1211 § 322, p. 1218 § 333, p. 1219 § 335, p. 1220, § 339, p. 1126 § 350, pp. 1246-1248 §§ 396-397, § 1253, § 410.

Sale of property by assignee. 2 R. C. L. 710 and Supps.

**§ 8442a6. Jurisdiction of proceeding.** The district court of any county where any property of the assignor may be situated shall have jurisdiction to entertain proceedings in accordance with the provisions of this act; but may, and on the facts being shown to its satisfaction shall, transfer such proceedings to the district court of the county wherein the greater part of the assignor's property is situated. [Laws 1921, ch. 18, § 6.]

Assignments for Benefit of Creditors, 5 C. J. p. 1211 § 322.

Jurisdiction of courts. 2 R. C. L. 666 and Supps.

## CHAPTER 42.

### SPECIAL PROCEEDINGS OF A CIVIL NATURE.

- ARTICLE 2. WRIT OF CERTIORARI, §§ 8445-8454.  
3. WRIT OF MANDAMUS, §§ 8457-8460.  
4. WRIT OF PROHIBITION, §§ 8470-8473.

#### ARTICLE 2.—WRIT OF CERTIORARI.

**§ 8445. When and by whom granted.** A writ of certiorari shall be granted by the supreme and district courts, when inferior courts, officers, boards or tribunals have exceeded their jurisdiction and there is no appeal, nor, in the judgment of the court, any other plain, speedy and adequate remedy, and

also when in the judgment of the court it is deemed necessary to prevent miscarriage of justice. [Laws 1919, ch. 76, § 1.]

Certiorari will not lie to review order denying change of venue. *Squire v. County Ct.* 25 N. D. 468, 141 N. W. 1135.

Appellate court may not, under writ of certiorari, consider sufficiency of evidence or review findings of lower court, except for purpose of determining whether lower court has exceeded its jurisdiction. *Lincoln Addition Improv. Co. v. Lenhart*, — N. D. —, 195 N. W. 16; *Cofman v. Ousterhous*, 40 N. D. 390, 18 A.L.R. 219, 168 N. W. 826; *State ex rel. Wehe v. Frazier*, 47 N. D. 314, 182 N. W. 545.

Certiorari does not lie to review annexation proceedings not depending on jurisdiction. *State ex rel. Mayo v. Thursby-Butte Special School Dist.* 45 N. D. 555, 178 N. W. 787.

Jurisdiction of Governor in removing commissioner of workmen's compensation Bureau, reviewable on certiorari. *State ex rel. Wehe v. Frazier*, 47 N. D. 314, 182 N. W. 545.

Certiorari does not lie to compel city council to attach territory from corporation. *State ex rel. Claver v. Broute*, — N. D. —, 197 N. W. 871.

Final order or judgment in mandamus proceedings not reviewable on certiorari. *State ex rel. Brunette v. Pollock*, 35 N. D. 430, 160 N. W. 511.

Certiorari lies only to review acts in excess of jurisdiction, and not to review sufficiency of evidence where jurisdiction shown. *State ex rel. Wehe v. Frazier*, 47 N. D. 314, 182 N. W. 545.

In certiorari proceeding, appellate court may not review sufficiency of evidence or review findings by lower court, except to determine jurisdiction of court below. *Baker v. Lenhart*, — N. D. —, 195 N. W. 16.

Appellant in certiorari proceedings has burden of showing prejudicial error, affirmatively, by record. *Brissman v. Thistlethwaite*, — N. D. —, 192 N. W. 85.

See also *State ex rel. Byerley v. State Board of Canvassers*, 44 N. D. 126, 172 N. W. 80; *Lynch v. Dist. Court*, 48 N. D. 431, 185 N. W. 303; *Mogaard v. Robinson*, 48 N. D. 859, 187 N. W. 142; *State ex rel. Lemke v. Dist. Ct.* — N. D. —, 186 N. W. 381; *Baker v. Same*, — N. D. —, 195 N. W. 35; *State ex rel. Johnson v. Clark*, 21 N. D. 517, 131 N. W. 715.

Certiorari, 11 C. J. pp. 99-105 §§ 25-35, pp. 111-119 §§ 53-66, pp. 139-140 §§ 104-110.

State's or public officer's right to review on certiorari of order in habeas corpus releasing one from custody. 10 A.L.R. 385.

Right of garnishee to certiorari to renew judgment against principal defendant on ground of lack of jurisdiction. 51 L.R.A.(N.S.) 600.

To review excessive sentence. 45 L.R.A. 158; 51 L.R.A.(N.S.) 388.

Certiorari to review order adjudging one in contempt for violation of injunction. 28 A.L.R. 65.

When writ of certiorari will issue. 5 R. C. L. 253 and Supps.

Existence of other remedy. 5 R. C. L. 256 and Supps.

Discretion of court in issuing writ of certiorari. 5 R. C. L. 254 and Supps.

§ 8446. Comp. Laws, 1913.

*State ex rel. Johnson v. Clark*, 21 N. D. 517, 131 N. W. 715.

§§ 8448-8450. Comp. Laws, 1913.

*Baker v. Lenhart*, — N. D. —, 195 N. W. 16.

§ 8451. Comp. Laws, 1913.

Appellant in certiorari proceeding has burden of showing prejudicial error, affirmatively by the record. *Brissman v. Thistlethwaite*, — N. D. —, 192 N. W. 85.

See also *Weiderholt v. Lisbon Special School Dist.* 41 N. D. 146, 169 N. W. 809.

§ 8452. Comp. Laws, 1913.

*Baker v. Lenhart*, — N. D. —, 195 N. W. 16.

§ 8453. Comp. Laws, 1913.

Appellate court may not, under writ of certiorari, consider sufficiency of evidence or review findings of lower court, except for purpose of determining whether

lower court has exceeded its jurisdiction. *Baker v. Lenhart*, — N. D. —, 195 N. W. 16.

See also *Mogaard v. Robinson*, 48 N. D. 859, 187 N. W. 142; *Brissman v. Thistlethwaite*, — N. D. —, 192 N. W. 85.

§ 8454. *Comp. Laws, 1913.*

*Weiderholt v. Lisbon Spec. School Dist.* 41 N. D. 146, 169 N. W. 809.

#### ARTICLE 3.—WRIT OF MANDAMUS.

§ 8457. *Comp. Laws, 1913.*

Mandamus, not remedy to compel city commissioners to pay on the contract price of a pavement, balance of 15 per cent, which was retained pursuant to contract. *S. Birch & Sons Constr. Co. v. Fargo*, 39 N. D. 370, 167 N. W. 390.

Original jurisdiction of supreme court may be invoked in mandamus, to test right to possession of office of superintendent of public instruction. *State ex rel. Langer v. McDonald*, 41 N. D. 389, 170 N. W. 873.

Mandamus to compel state auditor to issue warrants to pay salaries of and meet expenses of tax commission. *State ex rel. Birdzell v. Jorgenson*, 25 N. D. 539, 49 L.R.A.(N.S.) 67, 142 N. W. 450; *State ex rel. Wallace v. Kositzky*, 44 N. D. 291, 175 N. W. 207.

Mandamus appropriate remedy against former county treasurer and legal depository to compel payment of public funds placed upon time deposit. *State ex rel. Kopriva v. Larson*, 48 N. D. 1144, 189 N. W. 626.

Inferior tribunals cannot be compelled to decide questions of fact in a particular way, though it may be compelled to take action, and to make some determination. *Mogaard v. Garrison*, 47 N. D. 468, 182 N. W. 758.

Mandamus to compel inferior court to perform its duty. *State ex rel. Heffron v. District Ct.* 26 N. D. 32, 143 N. W. 143.

See also *Lien v. Savings, Loan & T. Co.* 43 N. D. 260, 174 N. W. 621; *Cofman v. Ousterhous*, 40 N. D. 390, 18 A.L.R. 219, 168 N. W. 826; *Equity Co-op. Packing Co. v. Hall*, 42 N. D. 523, 173 N. W. 796; *State ex rel. Wehe v. North Dakota Workmen's Comp. Bureau*, 46 N. D. 147, 180 N. W. 49; *State ex rel. Coghlan v. Poindexter*, — N. D. —, 190 N. W. 818; *State ex rel. Red River Brick Corp. v. District Ct.* 24 N. D. 28, 138 N. W. 988.

§ 8458. *Comp. Laws, 1913.*

Inferior tribunals cannot be compelled to decide questions of fact in a particular way, though it may be compelled to take action and to make some determination. *Mogaard v. Garrison*, 47 N. D. 468, 182 N. W. 758.

Prerequisites necessary to issuance of writ of mandamus, are that relator has clear legal right to performance of a particular duty, and that law affords no other plain, speedy and adequate remedy. *Strauss v. Costello*, 29 N. D. 215, 150 N. W. 874.

Mandamus will not lie to compel district court to vacate its order dismissing contempt proceedings, and punish parties named for contempt, there being an adequate remedy by appeal. *State ex rel. Red River Brick Corp. v. District Ct.* 24 N. D. 28, 138 N. W. 988.

See also *State ex rel. Kopriva v. Larson*, 48 N. D. 1144, 189 N. W. 626; *State ex rel. Braatlien v. Drakeley*, 26 N. D. 87, 143 N. W. 768.

§ 8460. *Comp. Laws, 1913.*

*Northern P. R. Co. v. Jurgenson*, 25 N. D. 14, 141 N. W. 70.

#### ARTICLE 4.—WRIT OF PROHIBITION.

§ 8470. *Comp. Laws, 1913.*

Writ of prohibition will issue only when proceedings of a tribunal, corporation, board, or officer are without or in excess of jurisdiction. *State ex rel. McDonald v. Hanley*, 43 N. D. 388, 175 N. W. 569; *Lynch v. District Ct.* 48 N. D. 431, 185 N. W. 303.

See also *State ex rel. Lemke v. District Ct.* — N. D. —, 186 N. W. 381; *State ex rel. Linde v. Packard*, 32 N. D. 301, 155 N. W. 666; *Northern P. R. Co. v. Jurgenson*, 25 N. D. 14, 141 N. W. 70.

§ 8471. Comp. Laws, 1913.

Writ of prohibition will issue only when proceedings of a tribunal, corporation, board, or officer, are without or in excess of jurisdiction. *State ex rel. McDonald v. Hanley*, 43 N. D. 388, 175 N. W. 569; *Lynch v. District Ct.* 48 N. D. 431, 185 N. W. 303.

See also *Northern P. R. Co. v. Jurgenson*, 25 N. D. 14, 141 N. W. 70.

§§ 8472, 8473. Comp. Laws, 1913.

*Northern P. R. Co. v. Jurgenson*, 25 N. D. 14, 141 N. W. 70.

CHAPTER 43.

SUMMARY PROCEEDINGS.

ARTICLE 1.—CONFESSION OF JUDGMENT WITHOUT ACTION.

§§ 8477, 8479. Comp. Laws, 1913.

*Matt v. Halbrook*, 28 N. D. 251, 148 N. W. 1061.

CHAPTER 45.

TRESPASS OF ANIMALS.

§ 8500. Comp. Laws, 1913.

Refers to an action wherein plaintiff has seized, and seeks to impress claim for damages as lien against offending animals. *Schneider v. Marquart*, 45 N. D. 390, 178 N. W. 195.

See also *Ryding v. Hanson*, 30 N. D. 99, 152 N. W. 120; *Martin v. Ludowese*, 48 N. D. 342, 184 N. W. 575.

§ 8501. Comp. Laws, 1913.

*Ryding v. Hanson*, 30 N. D. 99, 152 N. W. 120.

§ 8502. Comp. Laws, 1913.

*Ryding v. Hanson*, 30 N. D. 99, 152 N. W. 120; *Schneider v. Marquart*, 45 N. D. 390, 178 N. W. 195.

§ 8503. Comp. Laws, 1913.

*Ryding v. Hanson*, 30 N. D. 99, 152 N. W. 120; *Schneider v. Marquart*, 45 N. D. 390, 178 N. W. 195; *Martin v. Ludowese*, 48 N. D. 342, 184 N. W. 575.

§§ 8504–8506. Comp. Laws, 1913.

*Ryding v. Hanson*, 30 N. D. 99, 152 N. W. 120.