

GENERAL STATUTES
OF THE
STATE OF MINNESOTA

36

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ANNOTATIONS AND GENERAL INDEX TO BOTH VOLUMES.

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trust, and he and his sureties shall still be liable: *provided, however*, that no action or proceeding shall be against such executor, administrator, or sureties, save by permission of the probate court upon notice to him or them, and upon proof, to the satisfaction of such court, of the probability of intentional fraud or malfeasance in such estate; nor shall any judgments be rendered against him or them unless such intent is shown in the trial court. (*Id.* § 3.)

***§ 22. "Executor" defined.**

The word "executor," in this act, shall be construed to include an administrator with the will annexed. (*Id.* § 4.)

CHAPTER 55.

PROBATE BONDS, AND THE PROSECUTION OF THEM.

See *Litchfield v. McDonald*, 35 Minn. 167, 28 N. W. Rep. 191; *O'Gorman v. Lindeke*, 26 Minn. 93, 1 N. W. Rep. 841; *Balch v. Hooper*, 32 Minn. 158, 20 N. W. Rep. 124; *Forepaugh v. Hoffman*, 23 Minn. 295.

***§ 2. Requiring additional and new bonds.**

Whenever any judge of probate is satisfied that the bond of an executor, administrator, or guardian is insufficient, he may, on his own motion, or on application of any one or more of the relatives of the deceased, or of the ward, require an additional bond; and a refusal or failure to furnish or give the same within a reasonable length of time shall be deemed a sufficient cause for the removal of such executor, administrator, or guardian. Upon application to the probate court having jurisdiction, made by a surety of an executor, administrator, or guardian, to be discharged from further liability as such surety, said court shall by order require such executor, administrator, or guardian to furnish a new bond, to the satisfaction of said court, within ten days after personal service of such order. Compliance with such order shall operate to discharge such surety from liability for any subsequent act or omission of such executor, administrator, or guardian, and an order shall be thereupon made to that effect; and in such case the surety so exonerated may enforce an accounting before the court by such executor, administrator, or guardian concerning all his prior acts and doings. If an executor, administrator, or guardian, upon being ordered to furnish a new bond as aforesaid, shall fail to comply therewith, he shall be removed, and be compelled to render and settle his account as soon as practicable. (1873, c. 60, § 1, *as amended* 1885, c. 123.)

§ 3. (Sec. 2.) Action by creditor.

As to suits by creditors, on administration bonds executed prior to the passage of the General Statutes, see *Lanier v. Irvine*, 24 Minn. 116, 121.

In an action brought by a creditor under this section, upon an administrator's bond, the plaintiff can only embrace in the complaint claims which have been ascertained and directed by the decree of distribution to be paid, and it is a good defense, *pro tanto*, in an action upon such bond, that one of several claims, in favor of a creditor plaintiff, was not presented to the proper probate court, and that such court never directed or ordered its payment. *Wood v. Myrick*, 16 Minn. 494, (Gil. 447.)

See *Forepaugh v. Hoffman*, 23 Minn. 295; *Berkey v. Judd*, 31 Minn. 275, 17 N. W. Rep. 619; *Huntsman v. Hooper*, 32 Minn. 163, 20 N. W. Rep. 127.

§ 4. (Sec. 3.) Action by next of kin.

Action without leave by the administrator of the next of kin. *White v. Weatherbee*, 126 Mass. 450.

See *Huntsman v. Hooper*, 32 Minn. 163, 20 N. W. Rep. 127; *Forepaugh v. Hoffman*, 23 Minn. 295.

§ 5. (Sec. 4.) Actions by persons interested.

Chapter 50, § 2, *supra*, must be construed in connection with this section and section 3 of this chapter. *Berkey v. Judd*, 31 Minn. 275, 17 N. W. Rep. 618.

The "creditors" to whom a right of action upon an executor's bond is given by statute are those who have been determined to be such by an allowance of their claims against the estate, by commissioners or by the judge of probate, in the manner prescribed by statute. *First Nat. Bank v. How*, 28 Minn. 150, 9 N. W. Rep. 626.

Action for the benefit of a creditor of an heir. *Fay v. Hunt*, 5 Pick. 398.

An action may be brought in the name of the judge of probate upon the bond of an executor, administrator, or guardian, where there has been any refusal or omission to perform any order or decree mentioned in this section. *O'Gorman v. Lindeke*, 26 Minn. 93, 1 N. W. Rep. 841.

An omission to obey an order of the probate court, directing the payment into court of the amount found due upon a final accounting of an administrator, is such a refusal or omission as is mentioned in this section. *Id.*

Where the bond is joint and several, the action may be against only one of the obligators. The order of the probate court that the bond be prosecuted, without saying whether against one or all of the obligators, does not make it imperative to join all. *Id.*

A creditor may, under this section, bring an action upon a probate bond in his own name, although his claim has not been ordered paid by decree of distribution. *Wood v. Myrick*, 16 Minn. 494, (Gil. 447,) and *Waterman v. Millard*, 22 Minn. 261, distinguished; *Forepaugh v. Hoffman*, 23 Minn. 295.

See *Stewart v. Phenice*, (Iowa,) 22 N. W. Rep. 636.

§ 6. (Sec. 5.) Prosecution of bond.

See *Palmer v. Pollock*, 26 Minn. 433, 440, 4 N. W. Rep. 1113.

§ 7. (Sec. 6.) Leave to sue.

This section, authorizing suit to be brought on an administrator's bond in the name of a creditor whose claim has been ordered paid, and who has been authorized by the probate court to sue, applies as well to bonds given before as after its passage. *Lanier v. Irvine*, 24 Minn. 116.

The statute of limitations does not begin to run upon an action brought upon the bond of an executor or administrator by a creditor or next of kin, under this chapter, until permission to bring such action has been granted such person. *Wood v. Myrick*, 16 Minn. 494, (Gil. 447.)

Ex parte application for leave to sue. *Elwell v. Prescott*, 38 Wis. 274.

Sufficiency of order granting leave to sue. *Johannes v. Youngs*, 48 Wis. 101, 4 N. W. Rep. 32.

See *Forepaugh v. Hoffman*, 23 Minn. 295; *Palmer v. Pollock*, 26 Minn. 433, 440, 4 N. W. Rep. 1113.

§ 8. (Sec. 7.) Judgment.

See cases cited in note to § 7, *supra*.

§ 10. (Sec. 9.) Moneys collected—Disposition.

Sections 6, 9, 10, show, among other things, that an administrator *de bonis non* may properly be entitled to recover the amount collected upon his predecessor's administration bond. Hence it follows that such administrator *de bonis non* is a proper party, by petition to the probate court, to set in motion proceedings which will result in such collection. Section 10 also shows that the money to be collected on such bond is properly directed to be paid to the administrator *de bonis non*, to be disposed of by him according to law, for the payment of the debts of his decedent, or otherwise. *Palmer v. Pollock*, 26 Minn. 434, 4 N. W. Rep. 1113.