

# GENERAL STATUTES

OF THE

STATE OF MINNESOTA,

IN FORCE JANUARY, 1891.

VOL. 2.

CONTAINING ALL THE LAW OF A GENERAL NATURE NOW IN FORCE AND NOT IN  
VOL. 1, THE SAME BEING THE CODE OF CIVIL PROCEDURE AND ALL REME-  
DIAL LAW, THE PROBATE CODE, THE PENAL CODE AND THE CRIM-  
INAL PROCEDURE, THE CONSTITUTIONS AND ORGANIC ACTS.

COMPILED AND ANNOTATED

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# MINNESOTA STATUTES 1891

## CHAPTER 85.

### THE PROBATE CODE.

This is acts 1889, ch. 46: "An act to establish a probate code." Approved April 24, and in force on and after October 1, 1899. This act repealed G. S. ch. 7, §§ 5, 6, 7, 8, 9; ch. 70, § 7; ch. 35, §§ 21, 22, 23, 27; chs. 46, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, and acts 1867, ch. 73; 1868, chs. 65, 67, 94; 1869, chs. 61, 62, 63; 1870, chs. 18, 61, 62, 63, 64, 65, 66; 1871, chs. 55, 56, 57; 1872, chs. 63, 64, 65; 1873, chs. 56, 57, 58, 59, 60; 1874, chs. 65, 71, 74; 1875, chs. 38, 39, 40, 54, 55, 56, 57, 74; 1876, chs. 37, 42, 77, 78; 1877, chs. 22, 23; 1878, chs. 5, 11, 17, 20, 76; 1879, chs. 11, 18, 20, 69; 1881, chs. 32, 43, 118; 1881, Ex. S. chs. 34, 76, 80; 1883, chs. 42, 58, 126; 1885, chs. 10, 19, 32, 50, 61, 63, 103, 105, 118, 123, 128, 163, 223; 1887, chs. 34, 52, 67, 75.

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TITLE 1.

JURISDICTION.

This title contains the substance and supersedes all of ch. 49 G. S., as amended 1868, ch. 94; 1870, ch. 66; 1872, ch. 63; except § 7, relating to proceedings; § 12, to costs; § 13, to orders; §§ 14, 15, 16, and acts 1874, ch. 71, relating to appeals, which are provided for in subsequent titles. Section 3, ch. 49, G. S., expressly conferring jurisdiction, was not carried into this code. This title also contains the substance of § 7, ch. 70; §§ 5, 6 and 7, ch. 7, of G. S., and acts 1875, ch. 37, §§ 2 and 3; 1881, Ex. S. ch. 80.

SEC. 5612. **Title of code.**— This act shall be known as the probate code of Minnesota.

Prob. C. § 1.

SEC. 5613. **Probate court.**— There is established in each organized county in this state, a probate court, which shall be held by the judge of probate, and shall be a court of record and shall have and use a seal.

Prob. C. § 2. Substantially § 1, ch. 49, G. S. 34 M. 163; 27 M. 297; 25 M. 468. See 24 M. 148; 28 M. 203; 37 M. 233; 38 M. 453.

**SEC. 5614. Exclusive jurisdiction.**—The jurisdiction acquired by any probate court over a matter or proceeding is exclusive of that of any other probate court, except when otherwise provided by law; and when a guardian is appointed, or any other proceeding is commenced, in the probate court of a particular county, all further proceedings in respect to the same shall be continued in that court.

Prob. C. § 3. Same as § 4, ch. 49, G. S. 20 M. 84; 37 M. 235.

**SEC. 5615. Administration—When and where.**—Wills must be proved and letters testamentary or of administration granted:

1. In the county in which the decedent was a resident at the time of his death;

2. In the county in which the decedent may have died, leaving estate therein, he not being a resident of the state;

3. In the county in which any part of the estate may be at the time of his death or shall thereafter come, the decedent having died out of the state, and not resident thereof at the time of his death;

4. In the county in which any part of the estate may be, the decedent not being a resident of the state, and not leaving estate in the county in which he died;

5. When the estate of the decedent is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, or being such non-resident and dying within the state, and not leaving estate in the county where he died, the probate court of that county in which application is first made for letters testamentary or of administration has exclusive jurisdiction of the settlement of the estate.

Prob. C. § 4. Substantially § 2, ch. 49, G. S., as amended 1868, ch. 94, § 1. 23 M. 84; 37 M. 233.

**SEC. 5616. Office.**—The judge of probate shall keep his office at the county seat, and the same shall be kept open at reasonable hours, suitable and convenient for the inspection and examination of the records therein; the court shall always be open for the transaction of business.

He shall on the first Monday of each month hold a general term of the probate court therein; he may hold special terms at such times and in such places in the county as he may deem advisable.

Prob. C. § 6. This section is contained in § 6, ch. 49, G. S., which also provided that records should be transferred to successor in office, "who has power to complete all unfinished business."

#### DISQUALIFICATIONS.

**SEC. 5617. Judge disqualified, when.**—When the judge of probate of any county, his wife, child, or other lineal descendant, parent, brother or sister shall be an heir, devisee or legatee or as a material witness, or when such judge shall be an executor, administrator or guardian of any ward or interested as creditor or otherwise in any question to be decided, he shall be disqualified to act in relation to that estate, or in the decision of such question, as the case may be.

The judge of probate so disqualified shall enter in his records the grounds of his disqualification, and shall make an order reciting said grounds of disqualification, and requiring the judge of probate of an adjoining county to attend at the office of the judge of probate so disqualified, and administer said estate or so much thereof as the said judge is so disqualified from doing.

And it shall be the duty of such judge of probate to hear, try and determine such matters in the same manner and with like effect as the judge of probate of said court might have done, had he not been so disqualified.

Prob. C. § 5. This contains § 5, ch. 49, G. S., as amended 1872, ch. 63.

**SEC. 5618. Cannot act as attorney.**—No judge of probate or his clerk shall be counsel or attorney in any action or proceeding for or against any



legatee, heir, creditor, executor, administrator, guardian or ward, in any matter which would by law come before such probate court.\*

Nor shall such judge or clerk be required to counsel, advise or draw or prepare any paper relating to any estate which is or may be brought before such court, except orders, citations, decrees, executions, warrants and subpoenas issued out of such court.

Prob. C. § 13. Above \* is substantially § 11, ch. 49, G. S., and below \* is new.

**SEC. 5619. Nor law partner.**— No attorney who is a law partner of any judge of probate, shall appear or practice as an attorney in any action or proceeding before such judge of probate.

Prob. C. § 14. Same as § 1, ch. 80, acts 1881, Ex. S.

**SEC. 5620. Nor clerk.**— No clerk of any probate court shall appear or practice as an agent or attorney in any action or proceeding in the probate court of which he is such clerk.

Prob. C. § 15. Same as § 2, ch. 80, acts 1881, Ex. S.

### RECORDS.

**SEC. 5621. Books of record.**— The probate court shall keep the following books of record:

1. A minute book, in which shall be entered a memorandum of all official business transacted by it or in the probate office.

2. A register, in which shall be entered every matter or proceeding had in said court under a proper title, that pertaining to the estate of each deceased person under the name of the deceased; that pertaining to guardians under the name of the minor or other person under guardianship; that pertaining to an insane person under his name, with a brief statement of the nature thereof, and of all papers filed which in anywise relate thereto, with the date of filing and a reference to the volume and page of the minute and other books, where any record shall have been made in any such matter or proceeding; such register shall be alphabetically indexed.

3. A record of wills, in which shall be recorded all wills admitted to probate with the certificate of the probate thereof.

4. A record of bonds, in which shall be recorded all bonds filed and approved by it.

5. A record of letters, in which shall be recorded all letters testamentary, administration or guardianship, issued by it.

6. A record of claims, in which shall be entered under the title of each estate, all claims filed with the probate court, in favor of or against the estate. It shall contain the number of the claim, the date of filing, name of claimant, nature of claim and the amount, amount allowed, amount disallowed with the date of such allowance or disallowance; it shall also contain the nature of offset, amount of offset, amount allowed, amount disallowed, with a final balance, in favor of estate or against estate.

7. A record of orders, decrees and judgments in which shall be recorded all orders, decrees and judgments and orders in the nature of decrees and judgments signed by the probate court and filed, except orders allowing or disallowing claims.

Prob. C. § 7. This section contains § 8, ch. 49, G. S., as amended 1868, ch. 94; 1870, ch. 66, and § 9, ch. 49, G. S., repealed by acts 1868, ch. 94. 24 M. 135; 29 M. 38; 23 M. 204.

**SEC. 5622. Same — Index.**— Each of such books shall have an index, referring to the entries in alphabetical order, under the name of the person to whose estate or business they relate, and indicating the page of the book where the entry is made.

Prob. C. § 8. Same as § 10, ch. 49, G. S.

## COMPENSATION — FEES.

SEC. 5623. **Compensation.**— There shall be allowed and paid to the several judges of probate in this state an annual compensation for their services as follows: In all counties having a special law fixing the compensation of such judge of probate or clerk of probate or for clerk hire, such sum as is therein provided; in all counties in which such compensation is not fixed by a special law, having a population of one thousand or less, the sum of one hundred dollars; and in all other counties the sum of one hundred dollars for the first thousand inhabitants, and an additional sum of fifty dollars for each additional thousand of population or major fraction thereof, to be paid monthly by the treasurer of the county upon the warrant of the county auditor, *provided*, that in counties having a special law fixing the compensation the same shall not exceed the sum of four thousand dollars per annum.

Prob. C. § 9. In G. S. ch. 70, § 7, fees were allowed. Acts 1875, ch. 37, provided in § 1 for compensation in proportion to population as above, making special provisions for Ramsey and Dakota counties, and did not contain the provision excluding where compensation fixed by special law. This was amended 1877, ch. 60, by striking out the Dakota county provision. These laws appeared as § 5, ch. 7, G. S. 1878, and were repealed by Prob. C. § 322. Acts 1875, ch. 37, §§ 4, 5, as amended 1885, ch. 103, enacted that the estates to be administered should pay into county treasury certain sums in lieu of fees, which were also repealed by Prob. C. § 322.

SEC. 5624. **Same.**— The county auditor in determining the population of any county, for the purpose of ascertaining the compensation to be paid to the judge of probate, shall take the census taken by the state of Minnesota in eighteen hundred and eighty-five or any census thereafter taken by the United States or the state of Minnesota, and add five per cent. of the population, as shown by the last census taken, for each year expiring after the year in which said census was taken.

Prob. C. § 10. Substantially § 2, ch. 37, acts 1875, which appeared as § 6, ch. 7, G. S. 1878, and repealed by § 322, Prob. C.

SEC. 5625. **Clerk hire.**— All probate judges whose salary exceeds the sum of twelve hundred dollars, may receive a further sum, to be annually fixed by the board of county commissioners, not exceeding five hundred dollars in any one year, for clerk hire.

Prob. C. § 11. Same as first sentence of § 3, ch. 37, acts 1875, which appeared as § 7, ch. 7, G. S. 1878, and repealed by Prob. C. § 322. The second sentence prohibited judges or clerks of probate from taking fees.

SEC. 5626. **Unlawful fees.**— The judge of probate or his clerk shall not charge or receive any fees or compensation, other than as provided in this code, but this shall not prohibit the judge of probate or his clerk from receiving fees for taking acknowledgment of papers and administering oaths outside of the line of probate duties.

Prob. C. § 12. Substantially second paragraph of § 3, ch. 37, acts 1875.

TITLE 2.

WILLS AND THE PROBATE THEREOF.

This title contains all of chs. 47 and 50 of G. S., except § 26, providing for maintenance of widow and minor children pending settlement of the estate; § 29, exempting specific devises from payment of debts when intended by testator; § 30, empowering executor to retain devises until estate settled; §§ 31, 32, 33, enabling devisees to hold pending settlement; and § 35, requiring attested copy of will and probate to be recorded in county in which lands lie, which do not appear to have been carried into the probate code.

MAKING AND REVOCATION OF WILLS.

SEC. 5627. **Who may make a will — Intestate.**— Any person of full age and sound mind may dispose by will of all or any part of his property, subject to the payment of his debts, except as otherwise provided in this code; and all estate of a testator not so disposed of shall descend as the estate of an intestate, and shall be administered by the executor or the administrator with the will annexed in the same manner as if he had been appointed administrator.

Prob. C. § 16, G. S. ch. 47, § 1, empowered disposal by will in writing of *lands* seized in his own right or any descendible interest therein, and married women to dispose by will in *writing* of real or personal property held or to which entitled, the same as if unmarried, except that husband must consent in writing. Acts 1869, ch. 61, struck out provision requiring consent of husband. Section 4 provided for disposal of personal estate by will in writing. These are consolidated in the above section by "all or any part of his property," and the prior limitations eliminated. 32 M. 348.

SEC. 5628. **Nuncupative wills.**— No nuncupative or unwritten will, bequeathing personal estate shall be valid, unless made by a soldier while in actual military service, or by a mariner while at sea.

Prob. C. § 20. Same as § 6, ch. 47, G. S.

SEC. 5629. **How executed.**— No will, except such nuncupative wills as are hereinafter mentioned, shall be effectual to pass any estate, real or personal, or to change [charge] or in any way affect the same, unless it is in writing, and signed at the end thereof by the testator, or by some person in his presence and by his express direction, and attested and subscribed in his presence by two or more competent witnesses; and if the witnesses are competent at the time of attesting the execution of the will, their subsequent incompetency, from whatever cause it arises, shall not prevent the probate and allowance of the will if it is otherwise satisfactorily proven.

Prob. C. § 19. Same as § 5, ch. 47, G. S. 20 M. 245; 25 M. 41.

SEC. 5630. **Revocation.**— No will, nor any part thereof, shall be revoked, unless by burning, tearing, cancelling or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence, and by his direction; or by some will, codicil, or other writing, signed, attested and subscribed in the manner provided for the execution of a will. Provided that nothing contained in this section shall prevent the revocation implied by law from subsequent change in the condition or circumstances of the testator.

Prob. C. § 23. Same as § 9, ch. 47, G. S. 20 M. 245; 38 M. 172.

CONSTRUCTION.

SEC. 5631. **What estate passes.**— Every devise of land in any will shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall appear by the will that the devisor intended to convey a less estate.

Prob. C. § 17. Same as § 2, ch. 47, G. S.

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SEC. 5632. **After-acquired property.**— All property acquired by the testator after making his will, shall pass thereby in like manner as if possessed at the time of making the will, if it appears by the will that such was his intention.

Prob. C. § 18. Same as § 3, ch. 47, G. S., except that latter confined to "any estate, right or interest in lands."

SEC. 5633. **When devisee or legatee dies.**— When a devise or legacy is made to any child or other relation of the testator, and the devisee or legatee dies before the testator, leaving issue who survives the testator, such issue shall take the estate so given by the will in the same manner as the devisee or legatee would have done if he had survived the testator, unless a different disposition is made or directed by the will.

Prob. C. § 42. Same as § 25, ch. 47, G. S.

## SHARE OF CHILD.

SEC. 5634. **Born after will made.**— When any child is born after the making of his parent's will and no provision is made therein for him, such child shall have the same share in the estate of the testator as if he had died intestate; and the share of such child shall be assigned to him as provided by law in case of intestate estates, unless it is apparent from the will that it was the intention of the testator that no provision should be made for such child.

Prob. C. § 39. Same as § 22, ch. 47, G. S. 14 M. 18.

SEC. 5635. **Omitted by mistake or accident.**— When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, and it appears that such omission was not intentional, but was made by mistake or accident, such child, or the issue of such child, shall have the same share in the estate of the testator as if he had died intestate, to be assigned as provided in the preceding section.

Prob. C. § 40. Same as § 23, ch. 47, G. S. 3 M. 209.

SEC. 5636. **Apportionment.**— When any share of the estate of a testator is assigned to a child born after the making of a will, or to a child or the issue of a child omitted in the will, as hereinbefore mentioned, the same shall first be taken from the estate not disposed of by the will, if any; if that shall not be sufficient, so much as is necessary shall be taken from all the devisees or legatees, in proportion to the value of the estate they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest, or other provision in the will, would thereby be defeated; in which case such specific devise, legacy, or provision may be exempted from such apportionment, and a different apportionment may be adopted, in the discretion of the court.

Prob. C. § 41. Same as § 24, ch. 47, G. S.

## DIVISES AND LEGACIES TO WITNESSES.

SEC. 5637. **When void.**— All beneficial devises, legacies and gifts, made or given in any will to a subscribing witness thereto, shall be wholly void, unless there are two other subscribing witnesses to the same; but a mere charge on the lands of the devisor for the payment of debts shall not prevent his creditors from being competent witnesses to his will.

Prob. C. § 21. Same as § 7, ch. 47, G. S., except that latter had word "competent" after "other" and before "subscribing."

SEC. 5638. **When will not established.**— If any witness to whom a beneficial devise is made or given would be entitled to any share of the estate of the testator in case the will is not established, then so much of the share that would have descended or been distributed to such witness as will not

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exceed the devise or bequest made to him in the will, shall be saved to him and he may recover the same of the devisees or legatees named in the will, in proportion to and out of the parts devised or bequeathed to them.

Prob. C. § 22. Same as § 8, ch. 47, G. S.

## PROVISION FOR PAYMENT OF DEBTS.

SEC. 5639. **Must be followed.**— When the testator makes provision by his will, or designates the estate to be appropriated for the payment of his debts, the expenses of administration, or family expenses, they shall be paid according to the provisions of the will, and out of the estate thus appropriated.

Prob. C. § 43. Same as § 27, ch. 47, G. S.

SEC. 5640. **When not sufficient.**— If the provisions made by the will, or the estate appropriated, is not sufficient to pay the debts, expenses of administration and family expenses, such part of the estate, real and personal, as is not disposed of by will, if any, shall be appropriated according to the provisions of the law for that purpose.

Prob. C. § 44. Same as § 28, ch. 47, G. S.

## PROBATE OF WILLS.

SEC. 5641. **Necessary to pass title.**— No will shall be effectual to pass either real or personal estate unless it is duly proved and allowed in the probate court, or, on appeal, and the probate of a will of real or personal estate as herein mentioned, shall be conclusive as to its due execution.

Prob. C. § 31. Same as § 17, ch. 47, G. S.

SEC. 5642. **Delivery of will to court.**— If any person having the custody of a will after the death of the testator, without reasonable cause, neglects to deliver the same to the probate court having jurisdiction of it, after being duly notified by such court for that purpose, he may be committed to the jail of the county by warrant issued by such court, and there be kept in close confinement until he delivers the will as above directed.

Prob. C. § 24. Same as § 13, ch. 47, G. S. Section 10, ch. 47, G. S., required custodian to deliver will to court within thirty days after death of testator, and § 11 required executor to accept or renounce within same time, and § 12 prescribed penalty for failure. These were not carried into probate code. 32 M. 445.

SEC. 5643. **Issuance of letters testamentary.**— When a will is duly proved and allowed, the probate court shall issue letters testamentary thereon to the executor named therein, if he is legally competent and accepts the trust and gives bond as required by law.

Prob. C. § 50. Same as § 1, ch. 50, G. S. Section 8, ch. 50, G. S., provided that the marriage of female executrix extinguished her authority. Acts 1874, ch. 65, enacted that marriage should not extinguish the authority. This act appeared as § 9, ch. 50, G. S. 1878, and was repealed by Prob. C. § 322.

SEC. 5644. **Petition for.**— Any executor, devisee or legatee named in any will, or any other person interested in the estate may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same is in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the state, or a nuncupative will.

Prob. C. § 25. Not in G. S.

SEC. 5645. **Form of.**— A petition for the probate of a will must be verified and must show:

1. The names, ages and residence of the heirs and devisees of the decedent, so far as known to the petitioner;
2. The probable value of the personal property of the estate, and also the probable value of the real property and its character;
3. The name of the executor or executors named in the will, if any, and his

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or their residence, if known, and the name of the person for whom letters testamentary or of administration are prayed.

Prob. C. § 26. New. G. S. ch. 47, § 14, only provided that when will delivered court shall appoint time and place for hearing and issue notices to all concerned.

SEC. 5646. **Defects not material.**— No defect of form or in the statement of facts contained in the petition shall invalidate the probate of a will.

Prob. C. § 27. Not in G. S.

SEC. 5647. **Notice.**— Such petition shall be filed in the probate court, and upon receiving and filing said petition, the court shall appoint a time and place for proving such will, when all persons interested may appear for or contest the probate of it; and it may cause such other or further notice to be given to any persons interested as it may deem proper.

Prob. C. § 28. Section 14, ch. 47, G. S., provided that upon the filing of the will the court appoint the time and place for hearing, and cause notice to be served on all persons interested. 30 M. 202; 28 M. 123.

SEC. 5648. **Defective notice.**— That any will duly executed and which has heretofore been actually admitted to probate by any probate court within this state, whether proper notice thereof had previously been given or not; and which will or a certified copy thereof has been of record in the office of the register of deeds of the county where the real estate thereby affected was at the time of the making of such record, or is situate, for a period of not less than ten years from the passage of this act may be read in evidence in any court within this state and shall have the same force and effect as if the proper notice of probate of such will had been given, and no right, title or estate in lands situate within this state derived under such will shall be held invalid or set aside by reason of any defect in such notice, unless the action in which the validity of such title shall be called in question, be commenced or the defense, alleging its invalidity be interposed within ten years after the actual recording of such will as aforesaid; *provided*, that persons under disability by reason of being minors, insane persons, idiots, persons in captivity, or in any country with which the United States were at war when such record was made, may commence action or interpose such defense at any time within ten years after the removal of such disability; *provided*, further, that such action shall be commenced with reasonable diligence in all cases.

1887, ch. 202, § 1: "An act defining the force and effect of wills heretofore admitted to record and to limit the time within which the same may be questioned." Approved March 3, 1887. In force January 1, 1888. And not to apply to any action or proceeding then pending.

SEC. 5649. **Testimony of one witness.**— If no person appears to contest the probate of a will at the time appointed for that purpose, the court may, in its discretion, grant probate thereof on the testimony of one of the subscribing witnesses only, if such witness testifies that such will was executed according to law, and that the testator had testamentary capacity to make the same at the time of the execution thereof.

Prob. C. § 29. Same as § 15, ch. 47, G. S.

SEC. 5650. **Other witnesses and testimony.**— If none of the subscribing witnesses reside in this state at the time appointed for proving the will, the court may, in its discretion, admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and, as evidence of the execution of the will, may admit proof of the hand-writing of the testator and of the subscribing witnesses.

Prob. C. § 30. Same as § 16, ch. 47, G. S.

SEC. 5651. **Nuncupative wills.**— Nuncupative wills may at any time within six months after the testamentary words are spoken by the decedent, be admitted to probate on petition and notice as provided for the probate of wills executed in writing. The petition must allege that the testamentary words or the substance thereof were reduced to writing within thirty days

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SECS. 5652-5657.] PROBATE CODE—WILLS AND PROBATE THEREOF.

after they were spoken, which writing must accompany the petition. No such will shall be admitted to probate except upon the evidence of at least two credible and disinterested witnesses.

Prob. C. § 38. Not in G. S.

SEC. 5652. **Certificate of proof—Evidence.**—Every will, when proved as provided in this chapter, shall have a certificate of such proof indorsed thereon or annexed thereto, signed by the judge of the probate court and attested by its seal; and every will so certified, and the record thereof, or a transcript of such record, certified by the judge of the probate court and attested by its seal, may be read in evidence in all the courts within this state, without further proof.

Prob. C. § 45. Same as § 34, ch. 47, G. S.

## CONTESTS.

SEC. 5653. **In writing.**—No will shall be contested unless the grounds of objection thereto are made in writing and filed, but such objection may be made and filed at any time prior to filing the order allowing or disallowing the will.

Prob. C. § 48. Not in G. S.

SEC. 5654. **Subsequent will or codicil or revocation.**—If upon the hearing on the petition for proof of will, another instrument in writing purporting to be a subsequent will, or codicil or revocation of said will, or any part thereof, shall be presented in opposition thereto, said instrument shall be filed and thereupon said hearing shall be adjourned to a day to be appointed by the court, and notice shall be given to all persons interested, which notice shall set forth the reason of said adjournment and the grounds of opposition to said will, and shall be served personally or by publication, or both, as the court may direct, at which time proof shall be taken upon all of said wills, codicils, or revocations, and all matters pertaining thereto, and the court shall determine which of said instruments, if either, should be allowed as the last will and testament of the deceased. If upon said hearing it shall appear that neither of said instruments should be allowed as the last will and testament of the deceased and that said estate should be administered, the probate court shall thereupon issue letters of administration to the person or persons entitled thereto by law.

Prob. C. § 49. Not in G. S.

## PROBATE OF LOST OR DESTROYED WILLS.

SEC. 5655. **When and how.**—Whenever a will of real or personal estate shall be lost or destroyed, or is without the state, and cannot be produced, the probate court shall have power to take proof of the execution and validity of such will, and to establish the same, by parol or other evidence. The petition for the probate of such will shall set forth the provisions thereof.

Prob. C. § 35. Not in G. S.

SEC. 5656. **Testimony.**—All the testimony given must be reduced to writing, signed by the witnesses, filed and preserved. No such will shall be established unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in his lifetime, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.

Prob. C. § 36. Not in G. S.

SEC. 5657. **Certificate and letters.**—When such will is established the provisions thereof must be distinctly stated and certified by the probate court,

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and the certificate must be filed and recorded and letters testamentary or of administration with the will annexed must be issued thereon in the same manner as upon wills produced and duly proved.

Prob. C. § 37. Not in G. S.

## PROBATE OF FOREIGN WILLS.

SEC. 5658. **How proved.**— A will made out of the state, which might be proved and allowed by the laws of the state or country in which it was made, may be proved, allowed, and recorded in this state; and shall then have the same effect as if executed according to the laws of the state.

Prob. C. § 47. Not in G. S.

SEC. 5659. **When proved in other states.**— All wills, duly proved and allowed in any of the United States or territories or the District of Columbia or in any foreign country or state, according to the laws of such state, territory, district or country, whether or not such wills are executed according to the laws of this state, may be allowed, filed and recorded in the probate court of any county in which the testator has real estate, in the manner mentioned in the following sections.

Prob. C. § 32. Substantially § 18, ch. 47, G. S., except that in the latter this provision specifically covered personal as well as real estate.

SEC. 5660. **Copy of.**— When a copy of such will and the probate thereof duly authenticated, is produced by the executor, or other person interested in such will, to the probate court, such court shall appoint a time and place of hearing, and notice shall be given in the same manner as in the case of an original will presented for probate.

If on the hearing it shall appear to the court that the order or decree admitting such will to probate was made by a court of competent jurisdiction, and it does not appear that said order or decree is not still in force, the copy and the probate thereof shall be filed and recorded, and the will shall have the same force and effect as if originally produced and allowed in said court.

Prob. C. § 33. Substantially §§ 19, 20, ch. 47, G. S., except that section 20 provided that, if on the hearing it appears that the instrument is the last will, it shall be filed and recorded and have the same force and effect as if originally proved and allowed.

SEC. 5661. **Grant of letters.**— When any will is allowed as mentioned in the preceding section, the probate court shall grant letters testamentary, or letters of administration with the will annexed, and such letters testamentary or of administration shall extend to all the estate of the testator in this state; such estate after payment of his just debts, and expenses of administration, shall be disposed of according to such will, so far as such will may operate upon it, and the residue shall be disposed of as is provided by law in cases of estates in this state, belonging to persons who are residents of any other state or country.\* Letters testamentary or letters of administration with the will annexed, may issue to a foreign executor or administrator with the will annexed, though not a resident of this state, upon filing a duly authenticated copy of his appointment, and of the bond given by him in the state or country in which it was originally proved; provided that the probate court, before issuing such letters, may in its discretion, require him to give bonds as in other cases.

Prob. C. § 34. Same as § 21, ch. 47, G. S., as amended 1870, ch. 64. Below \* is amendment of 1870.

## QUALIFICATION OF EXECUTORS AND ADMINISTRATORS.

SEC. 5662. **Executor defined.**— The word "executor" in this code, shall be construed to include an administrator with the will annexed.

Prob. C. § 46. Same as § 36, ch. 47, G. S.

SEC. 5663. **Failure or refusal to accept.**— If any person named as an executor in any will fails to signify his acceptance of such trust, or in case he



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in writing refuses to accept it, the probate judge may grant letters testamentary to the other executors, if any, capable and willing to accept the trust, and if there are none such the probate court may, without further notice, grant administration with the will annexed, to such person as would have been entitled to administration if the deceased had died intestate.

Prob. C. § 54. G. S. ch. 50, § 5, provided that if executor refuses to accept, or neglects to give bond for twenty days, probate court could grant administration to others. Otherwise same as above.

**SEC. 5664. Neglect to file oath and bond.**— If a person appointed as executor or administrator with the will annexed, neglects for twenty days after such proof of will or order of appointment to file his oath and bond as required by this code, the probate court may, if there is no other executor capable and willing to accept the trust, appoint such other person administrator with the will annexed as would have been entitled thereto if the deceased had died intestate, and without notice.

Prob. C. § 55. This contains provision in § 5, ch. 50, G. S.

**SEC. 5665. Executor under full age.**— When the person named as executor in a will is under full age at the time of proving the will, administration with the will annexed shall be granted to the person who would have been entitled thereto if the deceased had died intestate, during the minority of said executor, and when he shall arrive at full age, letters testamentary shall be to him granted, and thereupon said administration before granted shall cease. In case there is another executor named in the will who accepts the trust, said executor shall have letters testamentary and shall administer the estate until the minor arrives at full age, when he may be admitted as joint executor on qualifying according to law.

Prob. C. § 56. Same as § 6, ch. 50, G. S.

**SEC. 5666. When executor dies, etc.**— When an executor dies, or is removed or his authority extinguished, the remaining executor, if there is one, may execute the trust; and if there is no other executor, administration with the will annexed may be granted of the estate not already administered,\* to the person who would by law be entitled thereto in case the deceased died intestate, and with or without notice, as the court may direct.

Prob. C. § 59. Above \* is § 10, ch. 50, G. S. Below \* is new. Same provision in § 11, ch. 51, G. S. 37 M. 232.

**SEC. 5667. Administration residuary.**— The executor of an executor shall not, as such, administer the estate of the first testator; but on the death of the only surviving executor, administration of the estate of the first testator, not already administered, may be granted with the will annexed, to such person as is entitled thereto by law, with or without notice, as the court may direct.

Prob. C. § 60. G. S. ch. 50, § 12, provided that administration be granted "to such person as the probate court may judge proper;" otherwise same as above.

**SEC. 5668. Same — Powers of.**— An administrator appointed in the place of any former executor or administrator, for the purpose of administering the estate not already administered, has the same power, and shall proceed in settling the estate in the same manner, as the former executor or administrator had, or should have done; and may prosecute or defend any action, commenced by or against the former executor or administrator, and have execution on any judgment recovered in the name of such former executor or administrator.

Prob. C. § 61. Same as § 15, ch. 51, G. S.

## BONDS.

**SEC. 5669. When required.**— Every executor, except such as are expressly exempted by statute or by the express provisions of a will, before entering upon the execution of his trust, and before letters testamentary are issued,

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shall give bonds to the judge of probate, in such reasonable sum as the probate court directs, with sufficient sureties, conditioned that the executor will faithfully execute the duties of his trust according to law; and the following conditions shall form a part of such bond, with or without being expressed therein:

1. To make and return to the probate court within three months, a true and perfect inventory of all goods, chattels, rights, credits and estate of the deceased, which shall come to his possession or knowledge or to the possession of any other person for him.

2. To administer, according to law and the will of the testator, all his goods, chattels, rights, credits and estate, which shall at any time come to his possession or to the possession of any other person for him; and out of the same pay and discharge all debts, legacies and charges chargeable on the same, or such dividends thereon as are ordered and decreed by the probate court.

3. To render a true and just account of his administration to the probate court within one year, and at any other time when required by such court.

4. To perform all orders and decrees of the probate court by the executor to be performed.

Prob. C. § 51. Same as § 2, ch. 50, G. S., before amended by acts 1878, ch. 76. Acts 1873, ch. 60, provided for additional bonds, and does not appear to be repealed. 21 M. 447; 31 M. 275.

SEC. 5670. **Certain acts legalized.**—In all cases where the probate court of any county in this state, in which the will of a deceased person has been proved and allowed, has issued letters testamentary on such will to the person named therein as executor, such executor having after the expiration of twenty days after the probate of such will and previously to the issuing of said letters testamentary given the bond required by section two of chapter fifty of the general statutes of one thousand eight hundred and seventy-eight, and approved by the judge of said probate court, such bond and letters testamentary and the administration of such executor thereunder are hereby legalized and made valid for all purposes the same as if such bond had been given and letters testamentary issued within twenty days after the probate of such will; and the authority of such executor, having so received letters testamentary, to act as executor of the will upon which such letters were issued, shall not be questioned or deemed invalid, nor shall any act of his administration as such executor be deemed invalid, because of his failure to accept the trust or to give such bond within twenty days after the probate of such will. *Provided*, that the provisions of this act shall in no way affect the rights of parties to any action now pending in any of the courts of this state.

1889, ch. 42: "An act to validate and legalize the bond, letters testamentary, acceptance of trust and administration of any executor of the will of any deceased person, where such executor has not given the bond required by section 2 of chapter 50 of the general statutes of one thousand eight hundred and seventy-eight, until after the expiration of twenty days after the probate of such will." Approved April 24, 1889. The section herein named is the preceding section as amended 1878, ch. 76.

SEC. 5671. **Separate or joint bond.**—When two or more persons are appointed executors of any will, the probate court may take a separate bond from each, or a joint bond from all, with sureties.

Prob. C. § 58. Same as § 13, ch. 50, G. S. Same provision in § 19, ch. 51, G. S. 28 M. 123.

SEC. 5672. **Bond notwithstanding exemption.**—When a testator in his will shall exempt the executor from giving any bond, the court shall nevertheless require a bond with sufficient sureties to be approved by the court, in such sum as it may direct, conditioned to pay all the debts, claims and demands chargeable on and proved against the estate of the testator, the expenses and charges of his last illness, funeral expenses and expenses of administration, or such portion thereof as he has assets in his hands applicable to that purpose.

Prob. C. § 52. Substantially § 1, ch. 76, acts 1878, which amended § 2, ch. 50, G. S., by adding this provision, and contained a second section making such provision general.

SEC. 5673. **Bond—When executor legatee.**—When the executor is a residuary or sole legatee, instead of the bond prescribed in section <sup>1</sup> fifty, he may give a bond in such sum and with such sureties as the court may direct, with conditions only to pay all the debts and legacies of the testator; and in such case he shall not be required to return an inventory.

Prob. C. § 53. Same as § 3, ch. 50, G. S. <sup>1</sup>This reference should be § 51, which is § 5669, *ante*.

SEC. 5674. **Administrator with will annexed.**—Every person appointed administrator with the will annexed, shall before entering upon the execution of his trust, give bond to the judge of probate, in the same manner and with the same conditions as is required of an executor, and shall proceed in all things to execute the trust in like manner as an executor is required to do; \*and whenever, by the terms of a will, the person (or persons) therein named as executor or executrix is empowered to sell and convey real estate, an administrator with such will annexed, appointed to execute the same, shall have the same power to sell and convey real estate that the person (or persons) named therein as executor or executrix could have had in executing such will.\* When all the executors appointed in a will are not authorized, according to the provisions of this chapter, to act as such, such as are authorized shall have the same authority to perform every act, and discharge every trust, required and allowed by the will; and their acts shall be as valid and effectual for every purpose as if all were authorized and acted together; and administrators with the will annexed shall have the same authority to perform every act, and discharge every trust, as the executor named in the will would have had, and their acts shall be as valid and effectual for every purpose.

Prob. C. § 57. Above first \* is § 7, ch. 50, G. S. Between \* \* is acts 1875, ch. 54, which amended § 7, ch. 50, of G. S., by adding that matter. Below last \* is § 11, ch. 50, G. S.

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### TITLE 3.

#### TITLE TO REAL PROPERTY BY DESCENT.

This contains all of ch. 46, G. S., and acts 1875, ch. 40; 1876, ch. 37; 1883, ch. 53; 1885, chs. 19, 118; 1887, ch. 52, which amended that chapter, except §§ 5, 6, 7, 8, 9 and 10 of that chapter, containing the law of advancement, carried into title 11, and § 11, providing that the law of descent did not apply to dower or curtesy, nor to “any limitation of an estate by deed or will,” which were not carried into probate code. For the reasons which caused the American statutes to change the common-law course of descent, see Jefferson’s Works, vol. I, pp. 29-35, and 6 Rand. 355.

SEC. 5675. **Descent of lands.**—When any person dies seized of any lands, tenements or hereditaments, or of any right thereto, or entitled to any interest therein, in fee simple or for the life of another, not having devised the same, they shall descend \* as hereinafter provided.

Prob. C. § 62. Same as § 1, ch. 46, G. S., and acts 1876, ch. 37, § 1, except the words “subject to his debts” at \* in G. S.

SEC. 5676. **Homestead.**—The homestead of the deceased, as such homestead is or may be defined by the statute relating to homestead exemptions, shall descend, free from any testamentary devise or other disposition to which the surviving husband or wife shall not have assented in writing, and free from all debts or claims upon the estate of the deceased, as follows:

1. If there be no child nor lawful issue of a deceased child living, to the surviving husband or wife.

2. If there be a child or the issue of any deceased child living and a surviving husband or wife, to such husband or wife during the term of his or her

natural life, remainder to the child or children and the issue of any deceased child by right of representation.

3. If there be no surviving husband or wife, to the child or children and the lawful issue of any deceased child by right of representation.

4. If there be no surviving husband or wife and no children or the issue of any deceased child living, such homestead shall descend in like manner as other property of the deceased and subject in like manner to the debts and claims against the estate of the deceased.

Prob. C. § 63. Acts 1875, ch. 40, an act abolishing dower and curtesy, provided in § 2 that the surviving husband or wife hold the homestead for natural life free from debts of deceased. This was re-enacted as § 2, ch. 37, acts 1876, an act relating to title by descent. Acts 1883, ch. 58, inserted "free from any testamentary or other disposition thereof." Acts 1887, ch. 52, added "to which such survivor shall not have assented in writing." Acts 1875, ch. 40, provided in § 40 that if, at the time of death, the survivor shall have wilfully and without just cause deserted and lived separate and apart from deceased for space of one year immediately prior to such decease, such survivor shall not be entitled to any estate whatever in the lands of deceased, which was repealed by Prob. C. § 322.

SEC. 5677. **Course of descent.**—Such surviving husband or wife shall also be entitled to and shall hold in fee simple, or by such inferior tenure as the deceased was at any time during coverture seized or possessed thereof, one equal undivided one-third of all other lands of which the deceased was at any time during coverture seized or possessed, free from any testamentary or other disposition thereof to which such survivor shall not have assented in writing, but subject, in its just proportion with the other real estate, to the payment of such debts of the deceased as are not paid from the personal estate.\*

The residue of said other lands, or, if there be no surviving husband or wife of such intestate, then the whole of said other lands shall descend subject to the debts of the intestate, in the manner following: \*

1. In equal shares to his children, and to the lawful issue of any deceased child, by right of representation.

2. If there be no child, and no lawful issue of any deceased child of the intestate living at his death,\* and the intestate leaves a surviving husband or wife, then the whole of his or her estate shall descend to such survivor.

3. If the intestate leave no issue nor husband or wife his estate shall descend to his father.

4. If the intestate leaves no issue nor husband or wife nor father, his estate shall descend to his mother.

5. If the intestate leaves no issue nor husband or wife, nor father or mother, his estate shall descend in equal shares to his brothers and sisters, and to the lawful issue of any deceased brother or sister, by right of representation.

6. If the intestate leaves no issue and no husband or wife, and no father, mother, brother or sister, his estate shall descend to his next of kin, in equal degree; excepting that when there are two or more collateral kindred in equal degree but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote.

7. If any person dies leaving several children, or leaving one child and the issue of one or more other children any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such deceased parent shall descend in equal share to the other children of the same parent, and to the issue of any such other children who have died, by right of representation.

8. If at the death of such child who dies under age and not having been married, all the other children of his said parent are also dead, and any of them has left issue, the estate that came to said child by inheritance from his said parent shall descend to all the issue of other children of the same parent; and if all the said issue are in the same degree of kindred to said child, they shall have the said estate equally; otherwise, they shall take according to the right of representation.

9. If the intestate leaves no issue, nor husband or wife, or kindred, his estate shall escheat to the state.

Prob. C. § 64. Above \* is § 3, ch. 40, acts 1875, the act which abolished dower and curtesy, and substituted "one undivided third" "of which the deceased died seized or possessed." This language was changed by acts 1876, ch. 37, § 3, to "one equal undivided one-third" "of which the deceased was at any time during coverture seized or possessed," which also added matter between \*. Acts 1875, ch. 40, § 4, provided that if at the time of the death the surviving husband or widow shall have wilfully and without just cause deserted and lived separate and apart from deceased for one year immediately prior to the decease, such survivor shall not be entitled to any estate whatever in any of the lands of deceased, which was repealed by Prob. C. § 322.

G. S. ch. 46, § 1, provided for descent to the children and issue equally. If none, to widow for life. If no issue or widow, to father. Then to brothers and sisters and mother; and if no brother or sister, to mother. Then to next of kin, and if none, to widow; and if no widow or kindred, then to state. By acts 1876, ch. 37, § 1, approved March 2d, order of descent was, to children and issue of any deceased child; to father, to mother one-third, and residue to sisters and brothers; to mother; to sisters and brothers and issue of deceased brother or sister; to next of kin; to surviving husband or wife; to state. Acts 1885, ch. 118, amended the third order to read residue to sisters and brothers and issue. Acts 1876, ch. 37, contained proviso excluding non-lien debts after three years from death of intestate, which was repealed by acts 1885, ch. 19. Acts 1885, ch. 50, repealed by 1889, ch. 46, § 322, Prob. C., provided a method for proving heirship to realty.

**SEC. 5678. Degree of kindred — Computed.**—The degree of kindred shall be computed according to the rules of the civil law; and kindred of the half blood shall inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

Prob. C. § 68. Same as § 4, ch. 46, G. S.

**SEC. 5679. Right of representation — Posthumous children.**—Inheritance by "right of representation," takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parent would have taken, if living.

Posthumous children are considered as living at the death of their parents.

Prob. C. § 69. Same as § 12, ch. 46, G. S. This is the common-law inheritance *per stirpes*, which could not take by representation from an alien. 2 Kent, Com. 53; 9 Wheat. 354; 7 Wend. 333; 10 Wend. 1.

**SEC. 5680. Illegitimate child.**—Every illegitimate child shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, acknowledge himself to be the father of such child, and shall, in all cases, be considered as an heir of his mother, and shall inherit his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he shall not be allowed to claim, as representing his father or mother, any part of the estate of his or her kindred, either lineal or collateral, unless before his death his parents intermarry,\* and his father after such marriage, acknowledges such child, as aforesaid, or adopts such child into his family, in which case such child and all legitimate children shall be considered as brothers and sisters, and on the death of either of them intestate and without issue, the other shall inherit his estate, and he theirs, as hereinbefore provided, in like manner as if all the children had been legitimate, saving to the father and mother respectively their rights in the estate of all said children, as provided hereinbefore, in like manner as if all had been legitimate.

Prob. C. § 66. Same as G. S. ch. 46, § 2, except that at \* the words "and have other children." For reasons of such capacity, see 5 Wheat. 207-260. 34 M. 178; 31 M. 169; 27 M. 298; 41 N. W. 1059.

**SEC. 5681. Same.**—If any illegitimate child dies intestate without lawful issue, his estate shall descend to his mother, or, in case of her decease, to her heirs at law.

Prob. C. § 67. Same as § 3, ch. 46, G. S. 15 M. 512; 35 M. 393; 33 M. 55; 32 M. 348; 27 M. 114.

**SEC. 5682. Election by surviving husband or wife.**— When a parent dies testate, having in and by a last will and testament made provision for a surviving husband or wife in lieu of any right or interest secured to such survivor by statute in the estate of such deceased person, unless such surviving husband or wife, by an instrument in writing made and filed in the probate court in which such will is proved, and within six months after the probate thereof, shall renounce and refuse to accept the provisions so made in such will, such surviving husband or wife shall be deemed to have elected to make [take] under the will and in accordance with the terms and conditions thereof.

Prob. C. § 65. Not in G. S.

## TITLE 4.

### ADMINISTRATION AND DISTRIBUTION OF ESTATES OF INTESTATES.

This contains all of ch. 51, G. S., as amended 1871, ch. 56; 1876, ch. 42, except § 2, providing for jurisdiction provided for in title 1; § 11, providing for administration when administrator dies without having fully administered; and §§ 10, 14, provided for elsewhere.

#### ADMINISTRATION.

**SEC. 5683. Who entitled to administer.**— Administration of the estate of a person dying intestate shall be granted to one or more of the persons hereinafter mentioned, and they shall be respectively entitled to the same in the following order:

First. The widow, or next of kin, or both, as the judge of probate may think proper, or such person as the widow or next of kin may request to have appointed, if suitable and competent to discharge the trust.

Second. If the widow, or next of kin, or the person selected by them, is unsuitable or incompetent, or if the widow or next of kin neglects for thirty days after the death of the intestate to apply for administration, or to request that administration be granted to some other person, the same may be granted to one or more of the principal creditors, if any such are competent and willing to take it.

Prob. C. § 71. Same as § 3, ch. 51, G. S., except that latter also provided if no creditor competent and willing, court empowered to appoint any other person. 23-M. 84.

**SEC. 5684. Petition for.**— A petition for letters of administration must be verified and must show:

1. The jurisdictional facts;
2. The names, ages, and residence of the heirs of the intestate so far as known to the petitioner;
3. The probable value of the personal property of the estate and also the probable value of the real property and its character;
4. The name and address of the person for whom administration is prayed.

No defect of form or in the statement of facts contained in the petition shall invalidate the proceedings.

Prob. C. § 72.

**SEC. 5685. Order and notice for hearing.**— When a petition for the appointment of an administrator is received and filed, the probate court shall make an order designating a time and place for hearing said petition, and the newspaper in which notice of said hearing shall be published; notice of such hearing shall be given to all persons interested, by publishing such order in the designated newspaper; and as provided by law.

Prob. C. § 73. G. S. ch. 51, § 20, substantially same, except that three weeks' publication required. This was amended 1871, ch. 56, providing for certain personal service when "deceased was a native of any foreign country."

# MINNESOTA STATUTES 1891

SECS. 5686-5691.] PROBATE CODE — ADMINISTRATION AND DISTRIBUTION.

SEC. 5686. **Hearing.**— Any person may contest the petition, or may oppose the appointment of the person for whom letters are prayed on the ground of incompetency, or he may assert his own rights to administration under said petition, by filing written objections, stating the ground thereof. Such objection may be made and filed at any time prior to the order for the appointment of the administrator.

On the hearing, it being proved that notice has been given as required, the court upon hearing the allegations and proofs of all the parties shall order the issuing of letters of administration.

Prob. C. § 74.

SEC. 5687. **Bond.**— Every administrator, except such as are expressly exempted by statute, before he enters upon the execution of his trust, and before letters of administration are granted him, shall give a bond to the judge of probate in such reasonable sum as he may direct, with sufficient sureties, to be approved by the probate court, with substantially the same conditions as required in case of an executor as provided in section<sup>1</sup> fifty, with such variations as are necessary to make it applicable to the case of an administrator.

When two or more persons shall be appointed administrators of any estate, the probate court may take a separate bond from each, or a joint bond from all.

Prob. C. § 75. Same as §§ 4, 18, ch. 51, G. S. <sup>1</sup>This reference is to § 51, which is § 5669, ante. 21 M. 447.

SEC. 5688. **Will proved after administration granted.**— If, after the granting of letters of administration by the probate court on the estate of any deceased person, as if he had died intestate, a will of such deceased person is duly proved and allowed, the first administration shall, by decree of the probate court, be revoked, and the powers of the administrator cease; and he shall thereupon surrender his letters of administration unto the probate court, and render an account of his administration, within such time as the court shall direct.

Prob. C. § 80. Same as § 16, ch. 51, G. S.

SEC. 5689. **Same — Power of executor.**— The executor of the will, in such case, is entitled to demand, sue for and collect all the goods, chattels, rights and credits of the deceased remaining unadministered, and may be admitted to prosecute to final judgment any suit commenced by the administrator before the revocation of his letters of administration.

Prob. C. § 81. Same as § 17, ch. 51, G. S.

## SPECIAL ADMINISTRATOR.

SEC. 5690. **When appointed.**— When there shall be delay in granting letters testamentary or of administration, from any cause, or when it shall appear to the satisfaction of the court to be necessary, the probate court may appoint a special administrator to act until the matter causing the delay shall be disposed of, or the necessity therefor cease to exist, and an executor or administrator is appointed.

Such special administrator may be appointed without notice, and no appeal shall be allowed from the appointment of such special administrator.

Prob. C. § 76. Substantially § 5, ch. 51, G. S.

SEC. 5691. **Powers of.**— Such special administrator shall have power to collect all the goods, chattels and credits of the deceased and to care for, gather and secure crops, and preserve all the property of the deceased, for the executor or administrator who may afterwards be appointed, and may for such purposes commence and maintain actions as an administrator; and with leave of the court may lease for a term not exceeding one year the real

# MINNESOTA STATUTES 1891

PROBATE CODE — ADMINISTRATION AND DISTRIBUTION. [SECS. 5692-5694.]

property of the deceased, and may sell such personal property and do such other things as the court shall direct.

Such special administrator shall not be liable to an action by any creditor, or be called upon in any way to pay the debts against the deceased.

Prob. C. § 77. Substantially §§ 6, 7, ch. 51, except the power to lease.

**SEC. 5692. Bond.**— Every such special administrator shall, before entering upon the duties of his trust, give a bond to the judge of probate, with sufficient sureties, in such sum as he shall direct, with a condition that he will make and return a true inventory of all the goods, chattels, rights, credits and effects of the deceased, which come to his possession or knowledge; and that he will truly account for all the goods, chattels, credits and effects of the deceased, which shall be received by him, whenever required by the probate court, and will deliver the same to the person who shall afterwards be appointed executor or administrator of the deceased, or to such other person as shall be legally authorized to receive the same.

Prob. C. § 78. Same as § 8, ch. 51, G. S.

**SEC. 5693. Powers cease, when.**— Upon granting letters testamentary or of administration on the estate of the deceased, the power of such special administrator shall cease, and he shall forthwith deliver to the executor or administrator, all the goods, chattels, moneys or effects of the deceased in his hands; and the executor or administrator may be admitted to prosecute to final judgment any action commenced by such special administrator, \* and may have execution on any judgment recovered in the name of such special administrator.

Prob. C. § 79. Same as § 9, ch. 51, G. S., except below \*, which is new.

## DISTRIBUTION.

**SEC. 5694. Distribution of personal estate.**— When any person dies possessed of any personal estate, or of any right or interest therein not lawfully disposed of by his last will and testament, the same shall be applied and distributed as follows:

1. The widow shall be allowed all the wearing apparel of her deceased husband; his household furniture, to be selected by her, not exceeding in value five hundred dollars; other personal property, to be selected by her, not exceeding in value five hundred dollars; and such allowances shall be made as well when the widow receives the provisions made for her in the will of her husband as when he dies intestate.

2. In case there is no widow surviving, then such allowance shall be made to the minor children, if any, and be selected by the guardian of such children.

3. The widow or children, or both, constituting the family of the deceased, shall have such reasonable allowance out of the personal estate as the probate court deems necessary for her or their maintenance during the progress of the settlement of the estate, according to her or their circumstances, which, in the case of an insolvent estate, shall not be longer than one year after granting administration, or in any case after the share of the widow in the residue of the personal estate mentioned in subdivision six of this section, shall have been assigned to her.

4. If, on the return of the inventory of any intestate estate, it appears that the value of the whole estate does not exceed the sum of one hundred and fifty dollars in addition to the allowance made for the widow and children, the probate court shall by decree for that purpose, after the payment of the funeral charges and expenses of administration, assign for the use and support of the widow or widow and children constituting the family of the deceased, the whole of such estate.

5. If the personal estate amounts to more than the allowances mentioned in



this section, the excess thereof shall, after the payment of the funeral charges and expenses of administration, be applied to the payment of the debts of the deceased.

6. The residue, if any, of the personal estate, shall be distributed in the same proportion and to the same persons and for the same purposes, as prescribed for the descent and disposition of real estate.

7. All of the foregoing provisions shall apply as well to a surviving husband as to a surviving wife.

Prob. C. § 70. G. S. ch. 51, § 1, allowed all articles of apparel and ornament not exceeding \$250; provided for maintenance of children until seven years of age, and widow to take of the residue same share as child; otherwise same as above, except subdivisions 2 and 7. Acts 1872, ch. 64, gave surviving husband a child's share of residue. Acts 1875, ch. 55, increased widow's allowance of household furniture from \$250 to \$500, and other personal property from \$200 to \$400. Acts 1876, ch. 42, reduced latter sum to \$300; required maintenance until child reaches ten years, and struck out that surviving relict take child's share of the residue. 35 M. 293; 34 M. 166; 30 M. 81; 27 M. 299; 40 N. W. 156.

## TITLE 5.

### INVENTORY AND COLLECTION OF THE EFFECTS OF DECEASED PERSONS.

This title contains all of ch. 52, G. S., except § 9, compelling any person who has been intrusted by executor or administrator to account.

#### INVENTORY.

SEC. 5695. **When.**— Every executor or administrator shall, within three months after his appointment, make and return into the probate court a true inventory and appraisement of the real estate, and of all the goods, chattels, rights and credits of the deceased, which have come to his possession or knowledge; but an executor who is a residuary or sole legatee, who has given bond to pay all the debts and legacies, as provided by law, shall not be required to return an inventory.

Prob. C. § 82. Same as § 1, ch. 52, G. S. Acts 1881, ch. 67, amended § 1, ch. 52, G. S., by requiring payment of highest rate provided in acts 1875, ch. 37, if no inventory filed; but as latter act was § 8, ch. 7, G. S., and is repealed by 1889, ch. 46, § 322 (Probate Code), so also is acts 1881, ch. 67, repealed under the doctrine of implied repeals.

SEC. 5696. **Form.**— The property inventoried shall be classed under the following heads:

1. All the real estate.
2. All the furniture and household goods.
3. All wearing apparel and ornaments.
4. All stock in banks and other corporations.
5. All mortgages, bonds, notes and other written evidence of debt.
6. All other personal property.

Prob. C. § 84. This contains substance of § 4, ch. 52, G. S. 40 N. W. 156.

SEC. 5697. **Appraisement.**— The estate and effects comprised in the inventory shall be appraised by two or more disinterested persons appointed by the probate court for that purpose, who shall be sworn to the faithful discharge of their duties; and if any part of such estate or effects are in any other county, the probate court may, in its discretion, appoint appraisers in such county.

Prob. C. § 83. Same as § 2, ch. 52, G. S.

SEC. 5698. **Manner of.**— The appraisers shall class the different items under their respective heads, and shall set down opposite to each item, in fig-

ures, the value thereof in money, and shall foot up the amount of each class. The appraisers shall forthwith deliver said inventory, certified to by them, to the executor or administrator.

Prob. C. § 85. This contains § 3, ch. 52, G. S.

ALLOWANCE OF HOMESTEAD AND DISTRIBUTION.

SEC. 5699. **Petition for.**— On or after the return of the inventory and appraisement as provided in section<sup>1</sup> eighty-four, the surviving husband or wife, or in case there is no surviving husband or wife, the children, or in case the children are minors, the guardian, shall petition the probate court for the setting apart of the homestead of the deceased, and for the allowance of the personal property.

Such petition shall show the right of the parties, and if made by or for the children, their names and ages, the description of the homestead claimed and description of the personal property which is desired to be selected, and the value thereof, according to the appraisements.

Prob. C. § 86. <sup>1</sup>Sec. 5696, *ante*.

SEC. 5700. **Hearing.**— Upon the filing of such petition the court shall proceed to determine the rights of the petitioner under this code, and if it appears that the petitioner is entitled to have the homestead set apart and to make such selection of personal property; the court shall make an order setting apart such homestead, and shall allow the selection of such personal property, the court shall enter upon the inventory the items so selected, set apart and allowed; the items so selected shall not be deemed assets in the hands of the executor or administrator, but shall forthwith be delivered by the executor or administrator to the person entitled thereto.

Prob. C. § 87. Similar provision was contained in § 2, ch. 53, G. S.

ASSETS.

SEC. 5701. **Property not set apart.**— Property not set apart or selected shall be deemed assets in the hands of the executor or administrator with which he is charged.

Prob. C. § 88. G. S. ch. 52, § 5. All the personal estate was first chargeable, and, if not sufficient, the real estate except the dower. 14 M. 65.

SEC. 5702. **Possession of residue.**— The executor or administrator shall have the right to the possession of all the residue of the real and personal estate of the decedent, and to receive the rents and profits of the real estate, until the estate is settled, or until delivered over by order of the probate court to the heirs or devisees, and must keep in good, tenantable repair, all houses, buildings, and fixtures thereon, which are under his control.

Prob. C. § 89. Substantially § 6, ch. 52, G. S. 14 M. 65; 22 M. 249; 33 M. 224; 31 M. 71; 29 M. 419; 25 M. 25.

SEC. 5703. **Compound debts.**— When any debtor of a deceased person is unable to pay all his debts, the executor or administrator, with the consent of the probate court, may compound with such debtor and give him a discharge upon receiving a fair and just dividend of his effects.

Prob. C. § 94. Same as § 10, ch. 52, G. S.

SEC. 5704. **Action for realty.**— The executor or administrator, may himself, or jointly with the heirs or devisees, maintain an action for the possession of the real estate or for the purpose of quieting title to the same.

Prob. C. § 90.

SEC. 5705. **Action to set aside fraudulent conveyances.**— When there is a deficiency of the assets in the hands of the executor or administrator, and when the deceased in his lifetime has conveyed any real estate, or

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SECS. 5706-5710.] PROBATE CODE — INVENTORY AND COLLECTION.

right or interest therein, with the intent to defraud his creditors, or to avoid any right, debt or duty of any person, or has so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator shall commence, and prosecute to final judgment, an action for the recovery of the same, and may recover, for the benefit of the creditors, all such real estate so fraudulently conveyed, and may also, for the benefit of such creditors, sue for and recover all goods, chattels, rights or credits which may have been so fraudulently conveyed by the deceased in his lifetime.

Prob. C. § 99. Same as § 15, ch. 52, G. S. 24 M. 385.

SEC. 5706. **Same — When.**— No executor or administrator is bound to commence such action, unless on application of creditors of the deceased, nor unless the creditors making the application pay such part of the costs and expenses, or give such security to the executor or administrator therefor as the probate court deems equitable.

Prob. C. § 100. Same as § 16, ch. 52, G. S.

SEC. 5707. **Same — To pay debts.**— All real estate recovered as provided in section<sup>1</sup> ninety-nine shall be sold for the payment of debts, in the same manner as if the deceased had died seized thereof upon obtaining a license therefor from the probate court; and the proceeds of all goods, chattels, rights and credits, recovered as aforesaid, shall be appropriated in payment of the debts of the deceased, in the same manner as other assets in the hands of the executor or administrator.

Prob. C. § 101. Same as § 17, ch. 52, G. S. <sup>1</sup>Sec. 5705, *ante*.

## MORTGAGES.

SEC. 5708. **When assets.**— When any mortgagee of real estate, or any assignee of such mortgagee, dies without having foreclosed, the right of redemption, all the interest in the mortgaged premises, conveyed by such mortgage, and the debts secured thereby, shall be considered as personal assets in the hands of the executor or administrator, and he may foreclose the same, and have any other remedy for the collection of such debt which the deceased could have had, if living, or may continue any proceedings commenced by the deceased for that purpose.

Prob. C. § 95. Same as § 11, ch. 52, G. S.

SEC. 5709. **Redemption — Purchase by executor or administrator.**— In case of the redemption of any such mortgage, or the sale of the mortgaged premises, by virtue of a power of sale contained therein, or otherwise, the money paid thereon shall be received by the executor or administrator, and he shall thereupon give and execute all necessary satisfactions, releases and receipts.

**Purchase by executor.**— And if, upon a sale of the mortgaged premises, the same is bid in by the executor or administrator, for such debt, he shall be seized of the same, for the same persons, whether creditors, next of kin, or others, who would have been entitled to the money if the premises had been redeemed, or purchased at such sale by some other person.

Prob. C. § 96. Same as § 12, ch. 52, G. S.

SEC. 5710. **Same — Sale.**— Any real estate so held by an executor or administrator, or which is purchased by him, as such, upon a sale on execution for the recovery of a debt due the estate, may be sold for the payment of debts or legacies, and the charges of administration, in the same manner as if the deceased had died seized thereof, upon obtaining a license therefor from the probate court, in the manner provided by law.

Prob. C. § 97. Same as § 13, ch. 52, G. S.

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PROBATE CODE — CLAIMS.

[SECS. 5711-5715.]

SEC. 5711. **Same — When to be distributed.**— If any land held by an executor or administrator, as mentioned in the preceding section, is not sold by him, as therein provided, it shall be assigned and distributed to the same persons, and in the same proportions, as if it had been part of the personal estate of the deceased.

Prob. C. § 98. Same as § 14, ch. 52, G. S., except that latter also provided for partition.

## RESTORATION OF EFFECTS.

SEC. 5712. **When.**— If any executor or administrator, heir, legatee, creditor, or other person interested in the estate of any deceased person, complains to the probate court, in writing, that any person is suspected to have concealed, embezzled, carried away or disposed of any money, goods, or chattles of the deceased, or that such person has in his possession or knowledge, any deeds, conveyances, bonds, contracts, or other writings which contain evidence of or tend to disclose the right, title, interest or claim of the deceased to any real or personal estate, or any claim or demand, or any last will and testament of the deceased, the said probate court may cite such suspected person to appear before it, and may examine him on oath upon the matter of such complaint.

Prob. C. § 91. Same as § 7, ch. 52, G. S.

SEC. 5713. **Same — Commitment.**— If the person so cited refuses to appear and submit to such examination, or to answer such interrogatories as may be put to him touching the matter of such complaint, the court may, by warrant for that purpose, commit him to the common jail of the county, there to remain in close custody until he submits to the order of the court; all such interrogatories and answers shall be in writing and signed by the party examined, and filed in the probate court.

Prob. C. § 92. Same as § 8, ch. 52, G. S. Section 9 of G. S. empowered probate court to compel an account from any person who had been intrusted by administrator or executor with any part of the estate.

SEC. 5714. **When chargeable by action.**— If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels or effects of any deceased person, such person shall stand chargeable, and be liable to the action of the executor or administrator of such estate for double of the value of the property so embezzled or alienated, to be recovered for the benefit of such estate.

Prob. C. § 93. Same as § 10, ch. 51, G. S.

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## TITLE 6.

### CLAIMS.

This and the next title take the place of ch. 53, G. S., and acts 1870, ch. 65; 1873, ch. 58; 1878, ch. 5; 1878, ch. 11; 1879, ch. 69; 1887, ch. 34.

### PRESENTING AND ALLOWING CLAIMS.

SEC. 5715. **Order for.**— At the time of granting letters testamentary or of administration, the court shall make an order limiting the time in which creditors may present claims against the deceased for examination and allowance, which shall not be less than six months nor more than one year from the date of such order; said order shall fix the time or times and place in which the court will examine and adjust claims and demands of all persons against deceased.

# MINNESOTA STATUTES 1891

SECS. 5716-5721.]

PROBATE CODE — CLAIMS.

**When barred.**— No claim or demand shall be received after expiration of the time so limited, unless, for good cause shown, the court may in its discretion receive, hear and allow such claim upon notice to the executor or administrator, but no claim shall be received or allowed unless presented within one year and six months from the time when notice of the order is given, as provided in the next section, and before final settlement, and the allowance or disallowance of any claim shall have the same force and effect as a judgment for or against the estate.

Prob. C. § 102. From § 3, ch. 65, acts 1870; 1879, ch. 69, and §§ 6, 7, 14, 29, ch. 53, G. S. 25 M. 380; 21 M. 172, 174; 39 N. W. 401.

**SEC. 5716. Publication of.**— The order prescribed in section one hundred and two shall be published according to law, and shall be notice to all creditors and persons interested.

Prob. C. § 103. From § 4, ch. 53, G. S. 28 M. 123.

**SEC. 5717. Presentment and proof.**— All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented to the probate court within the time limited in said order, and any claim not so presented is barred forever; such claim or demand may be pleaded as an offset or counterclaim to an action brought by the executor or administrator.

**Itemized and verified.**— All claims shall be itemized, and verified by the claimant, his agent or attorney, stating the amount due, that the same is just and true, that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of affiant. If the claim be not due, or be contingent, when presented, the particulars of such claim must be stated. The probate court may require satisfactory vouchers or proofs to be produced in support of any claim.

Prob. C. § 104. See 20 M. 313; 35 M. 308, 439; 28 M. 382; 26 M. 152; 25 M. 468; 37 M. 229; 34 M. 503.

**SEC. 5718. Statement of offsets.**— The executor or administrator shall, on or before the time set for hearing claims, file in the probate court a statement in writing of all offsets which he claims in favor of the estate against any of the claims filed, and the probate court may in its discretion allow the executor or administrator additional time for so filing an offset and may set a day for hearing both the claim against the estate and the offset claimed.

Prob. C. § 105. 34 M. 297.

**SEC. 5719. Barred claims.**— No claim or demand shall be allowed that is barred by the statute of limitation, nor shall any offset that is barred by the statute of limitation be allowed.

Prob. C. § 106.

**SEC. 5720. Paid without allowance legalized.**— That in all cases when any executor or administrator has heretofore paid in good faith any debts or claims against the estate which he represents, without the same having been duly approved, as required by law, and whose final account has not yet been settled, such payments may be allowed by the judge of probate, upon proof satisfactory to said judge of probate at the final accounting, that said debts or claims were just and existing demands against said estate at the time of said payment.

1887, ch. 184 (March 8); 1889, ch. 27 (April 24); 1889, ch. 32 (April 23): "An act relating to the allowance of the accounts of executors and administrators." All are the same and have the same title.

**SEC. 5721. Order of allowance or disallowance.**— Upon the allowance or disallowance of any claim the court shall make its order allowing or disallowing the same. The order shall contain the date of allowance and the amount allowed, the amount disallowed, and be attached to the claim with the offsets if any.

Prob. C. § 110.

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PROBATE CODE — CLAIMS.

[SECS. 5722-5728.]

SEC. 5722. **Interest on claim allowed.**— After the order allowing any claim is made as is provided in section 1 one hundred and ten, the claim as allowed shall draw the same rate of interest as judgments recovered in the district courts.

Prob. C. § 108. 1 Sec. 5721, *supra*.

SEC. 5723. **Joint contract.**— When two or more persons are indebted on any joint contract, or upon a judgment founded on a joint contract, and either of them die, his estate is liable therefor, and the amount thereof may be allowed by the probate court, as if the contract had been joint and several, or as if the judgment had been against him alone.

Prob. C. § 114. Same as § 19, ch. 53, G. S.

SEC. 5724. **Execution in favor of estate.**— When the probate court allows any balance against a claimant and in favor of the estate, and the claimant does not appeal to the district court within the time provided in this code for appeal, the probate court may issue execution for the collection of such balance; such execution shall be executed in the same manner as executions issuing out of the district court.

Prob. C. § 109.

SEC. 5725. **Remanding after appeal.**— In case of appeal from the allowance or disallowance of any claim in whole or in part, the district court shall certify to the probate court the decision or judgment rendered therein.

Prob. C. § 115. From § 24, ch. 53, G. S. 6 M. 568; 9 M. 149; 20 M. 442; 34 M. 501; 28 M. 382; 35 M. 439; 37 M. 454; 38 M. 11.

## ACTIONS ON CLAIMS.

SEC. 5726. **Against the estate — Barred.**— No action at law for the recovery of money only shall be brought in any of the courts of this state against any executor, administrator or guardian upon any claim or demand which may be presented to the probate court except as provided in this code. No claim against a decedent shall be a charge against or lien upon his estate unless presented to the probate court as herein provided within five years after the death of such decedent: provided that this provision shall not be construed as affecting any lien existing at the date of such death. Provided further, that said provision shall not be construed as affecting the right of a creditor to recover from the next of kin, legatee or devisee to the extent of assets received. This provision shall be applicable to the estate of persons who died prior as well as to those who may die after the adoption of this code.

Prob. C. § 107. 29 M. 296; 15 M. 159; 20 M. 313; 29 M. 296.

SEC. 5727. **Same — Pending at time of death.**— All actions which are pending against a deceased person at the time of his death, may, if the cause of action survives, be prosecuted to final judgment; and the executor or administrator may be admitted to defend the same, and if judgment is rendered against the executor or administrator, the court rendering it shall certify the same to the probate court, and the amount thereof shall be paid in the same manner as other claims allowed against the estate.

Prob. C. § 111. Same as § 16, ch. 53, G. S. 21 M. 172; 35 M. 192; 39 N. W. 399.

SEC. 5728. **In favor of estate.**— Nothing in this chapter shall be construed to prevent an executor or administrator, when he thinks it necessary, from commencing and prosecuting any action against any other person or from prosecuting any action commenced by the deceased in his lifetime, for the recovery of any debt or claim to final judgment, or from having execution on any judgment.

Prob. C. § 112. Same as § 17, ch. 53, G. S.

SEC. 5729. **Same — Set-off.**— In such case the defendant may set off any claim he has against the deceased, instead of presenting it to the probate court; and if final judgment is rendered in favor of the defendant, the same shall be certified by the court rendering it, to the probate court, and the judgment shall be considered true balance.

Prob. C. § 113. Same as § 18, ch. 53, G. S. 29 M. 296.

## TITLE 7.

### PAYMENT OF DEBTS AND LEGACIES.

This title contains substance of §§ 29, 30, 32, 33, 34, 35, 37, 38, 39, ch. 53, G. S., and §§ 1, 2, ch. 58, acts 1873, and acts 1878, ch. 5.

#### TIME FOR SETTLEMENT.

SEC. 5730. **Court to designate.**—The probate court at the time of granting letters testamentary or of administration, shall make an order allowing to the executor or administrator a reasonable time, not exceeding one year and six months, for the settlement of the estate.

Prob. C. § 116. Substantially § 29, ch. 53, G. S.

SEC. 5731. **Same — Extension.**—The probate court may, upon good cause shown by the executor or administrator, extend the time for the settlement of the estate not exceeding one year at a time, nor so that the whole time allowed to the original executor or administrator shall exceed three years, unless under the provisions of the will a longer time be necessary.

Prob. C. § 117. From § 30, ch. 53, G. S. 25 M. 26.

SEC. 5732. **Same — When executor, etc., dies.**—When an executor or administrator dies, resigns, or becomes incapable of discharging his trust, and another administrator is appointed, the probate court may extend the time for the settlement of the estate beyond the time allowed to the original executor or administrator, not exceeding one year at a time, and not exceeding one year beyond the time which the court might by law allow to such original executor or administrator as provided in section 1 one hundred and seventeen.

Prob. C. § 118. Same as § 32, ch. 53, G. S., as amended 1873, ch. 58, § 2. <sup>1</sup>Sec. 5731, *supra*.

SEC. 5733. **Same — Acts after time limited.**—After the expiration of the time finally limited, an executor or administrator shall not be disqualified from doing anything necessary to settle the estate which he might have done before unless removed by the probate court; but he shall not be relieved from any liability or penalty incurred by his failure to settle the estate within the time limited.

Prob. C. § 119. This is § 1, ch. 58, acts 1873, which amended § 30, ch. 53, G. S.

#### PAYMENT.

SEC. 5734. **When estate solvent.**—In case there is sufficient assets in the hands of the executor or administrator for that purpose he shall proceed to pay all the debts and legacies of the deceased in full.

Prob. C. § 121. Substantially § 33, ch. 53, G. S.

SEC. 5735. **When estate insolvent.**—If the assets which the executor or administrator has received and which can be used for the payment of debts

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PROBATE CODE — PAYMENT OF DEBTS AND LEGACIES. [SECS. 5736-5740.

and are not sufficient therefor, he shall, after paying the expenses of administration pay the debts against the deceased in the following order:

1. Funeral expenses.
2. Expenses of last sickness.
3. Debts having preference by laws of the United States.
4. Taxes.
5. Debts duly proven to be due to other creditors; provided that no debt or claim for which the creditor holds a mortgage pledge, or other security, shall be so paid until the creditor shall have first exhausted his security or shall have released or surrendered the same.

Prob. C. § 122. From § 34, ch. 53, G. S., as amended 1878, ch. 5. 41 N. W. 1034.

SEC. 5736. **Same.**—No preference shall be given in the payment of any debt over any debts of the same class; nor shall a debt due and payable be entitled to preference over debts not due.

Prob. C. § 123. From § 35, ch. 53, G. S.

SEC. 5737. **Sale of realty to pay debts.**—When there is not sufficient personal estate in the hands of the executor or administrator to pay all the debts and legacies and the allowance to the widow and minor children, the probate court, may on petition of the executor or administrator order the sale of the real estate or so much thereof as may be necessary to pay the same.

Prob. C. § 120.

SEC. 5738. **Payment of mortgage or security.**—Whenever a creditor of the deceased has a mortgage, pledge or other security for his debt, the executor or administrator may, without proof thereof being made to the probate court, pay such debt or the interest thereon, as the same shall mature, but no such payment shall be made unless the same shall appear to be for the best interests of the estate, and the probate court upon such hearing shall so order. Upon application for such order, the same may be made with or without notice to the parties interested in the estate as the court may direct.

Prob. C. § 126.

SEC. 5739. **In cases of appeal.**—If an appeal is taken from the decision of the probate court allowing or disallowing any claim, in whole or in part, the executor or administrator shall not pay the same until it has finally been determined on such appeal, but he shall retain in his hands sufficient assets to pay the same in like proportion as other claims of the same class.

Prob. C. § 124. From §§ 37, 38, ch. 53, G. S. 35 M. 217.

SEC. 5740. **Subsequent distribution.**—If the whole of the debts and legacies were not paid by the first distribution, and if the whole assets have not been distributed, or if other assets afterward come to the hands of the executor or administrator, the probate court may from time to time make further order for the distribution of the assets.

Prob. C. § 125. Same as § 39, ch. 53, G. S. 32 M. 163.



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SECS. 5741-5745.] PROBATE CODE — GUARDIANS AND WARDS.

## TITLE 8.

### GUARDIANS AND WARDS.

This title contains the substance of and supersedes ch. 59, G. S., and acts 1868, ch. 67; 1869, ch. 63; 1870, ch. 63; 1870, ch. 61; 1873, ch. 59; 1875, chs. 38, 39; 1876, ch. 77; 1877, ch. 23; 1878, ch. 20; 1881, Ex. S. ch. 34; 1885, ch. 32; 1885, chs. 61, 128; 1887, ch. 67, and §§ 20-32, ch. 57, G. S. Section 7, ch. 59, G. S., providing when bond not to be given; § 16, extent of jurisdiction; § 18, requiring appraisement; § 28, requiring new bond; § 29, embezzling ward's property; and § 30, compensation of guardian, and § 4, ch. 23, acts 1877; §§ 2, 3, 4, 5, 6, 7, ch. 77, acts 1876; § 1, ch. 78, acts 1876; §§ 4, 5, ch. 39, acts 1875; and acts 1885, ch. 105, were repealed and none of their provisions carried into probate code, except as in § 309, G. S. ch. 57, § 29, as amended 1870, ch. 63, conferring certain powers on foreign guardians; and §§ 51-62, ch. 57, G. S., as amended 1867, ch. 73, providing for the sale of property belonging to lunatics, were not carried into probate code.

**SEC. 5741. Who are minors.**— Males of the age of twenty-one years and females of the age of eighteen years shall be considered of full age for all purposes; before those ages, they shall be considered minors.

Prob. C. § 127. Same as § 2, ch. 59, G. S. 24 M. 195.

### APPOINTMENT OF GUARDIAN.

**SEC. 5742. By will.**— A father may, by his last will and testament, appoint guardians for his children, whether born at the time of making the will or afterwards, to continue during the minority of the child, or a less time.

Such testamentary guardian shall have the same powers and perform the same duties, with regard to the person and estate of the ward, as a guardian appointed by the probate court.

Prob. C. § 132. Same as § 6, ch. 59, G. S.

**SEC. 5743. By probate court.**— The probate court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will, and who are residents of the county, or who reside without the state and have estate within the county.\* Such appointment may be made on the petition of a relative or other person on behalf of the minor, or on the petition of the minor, if fourteen years of age.

Prob. C. § 128. Above \* is § 1, ch. 59, G. S., except "who have no guardians legally appointed by will." 29 M. 31.

**SEC. 5744. Same— Minor under fourteen years.**— If the minor is under the age of fourteen years, the probate court may nominate and appoint his guardian; if he is above that age he may nominate his own guardian, who, if approved by the probate court, shall be appointed accordingly.

If not so approved, or if the minor resides out of this state, or if, after being duly cited by the probate court, he neglects for ten days to nominate a suitable person, the probate court may nominate and appoint his guardian, in the same manner as if he was under the age of fourteen years.

Prob. C. § 129. Same as § 3, ch. 59, G. S.

**SEC. 5745. By minor over fourteen years.**— When a guardian has been appointed by the court for a minor under the age of fourteen years, the minor at any time after he attains that age, may, unless such guardian is a testamentary guardian, appoint his own guardian, subject to the approval of the court.

Prob. C. § 131.

# MINNESOTA STATUTES 1891

PROBATE CODE — GUARDIANS AND WARDS. [SECS. 5746-5753.]

SEC. 5746. **Same.**— A minor above the age of fourteen years may nominate his guardian before a justice of the peace, or a city or town clerk, who shall certify the fact to the probate court.

Prob. C. § 130. Same as § 4, ch. 59, G. S.

SEC. 5747. **Marriage of female ward.**— The marriage of a female under guardianship as a minor shall terminate such guardianship.

Prob. C. § 136. Same as first sentence of § 27, ch. 59, G. S. 23 M. 51; 38 M. 453.

SEC. 5748. **Women may be guardians.**— A married woman, by reason of such marriage, shall not be disqualified from holding the position of guardian, either of the person or estate of a minor, the same as if she was unmarried.\* The marriage of a female guardian shall not terminate her guardianship.

Prob. C. § 135. Above \* is amendment of 1873, ch. 59, to § 5, ch. 59, G. S. By G. S. ch. 59, § 26, marriage of female guardian extinguished her authority.

SEC. 5749. **Guardian of the estate only.**— The probate court may, in its discretion, appoint a guardian of the estate only of a ward, and commit the custody of such ward to some other person; and the court may from time to time direct the guardian to pay to such custodian such sums of money for the maintenance and education of such ward as may be necessary and proper.

Prob. C. § 134.

SEC. 5750. **Guardian ad litem.**— Nothing contained in this chapter affects or impairs the power of any court to appoint a guardian to protect the interest of any minor interested in any suit or proceeding commenced or to be commenced or other matter pending therein, at any time.

Prob. C. § 141.

## SPECIAL PROVISIONS.

SEC. 5751. **In order of appointment.**— When any person is appointed guardian of a minor, the court may, with the consent of such person, insert in the order of appointment conditions not otherwise obligatory, providing for the care, treatment, education and welfare of the minor. The performance of such conditions shall be a part of the duties of the guardian for the faithful performance of which he and his sureties on his bond shall be responsible.

Prob. C. § 139.

SEC. 5752. **Care of person and estate.**— The guardian of a minor shall have the custody and education of his ward, and the care and management of all his estate, and, unless sooner discharged according to law, shall continue in office until the minor arrives at full age. But the father of the minor, if living, and in case of his death the mother, they being respectively competent to transact their own business, and not otherwise unsuitable, shall be entitled to the custody of the person of the minor and the care of his education.

Prob. C. § 133. Substantially § 5, ch. 59, G. S. Acts 1873, ch. 59, amended this section of G. S. by providing that married women may act as guardians.

SEC. 5753. **Maintenance out of estate.**— If any minor having a father living, has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of the father's family, and to all the circumstances of the case, the expenses of the maintenance and education of such child may be defrayed out of his own property, in whole or in part, as shall be deemed reasonable by the probate court, and when necessary his real estate may be sold for that purpose by the guardian, upon obtaining license therefor as provided in other cases of sales by guardians. The charges for such expenses may be allowed in the settlement of the accounts of the guardian.

Prob. C. § 140. Same as § 22, ch. 59, G. S.

# MINNESOTA STATUTES 1891

SECS. 5754-5758.] PROBATE CODE — GUARDIANS AND WARDS.

## GUARDIANS OF INCOMPETENTS.

**SEC. 5754. Appointment — Application.**— The probate court may appoint a guardian or guardians of any person who, by reason of old age, or loss or imperfection of mental faculties, is incompetent to have the charge or management of his property, or person who, by excessive drinking, gaming, idleness or debauchery, so spends, wastes or lessens his estate as to be likely to expose himself or his family to want or suffering, either upon the application of the county commissioners of the county where such person resides, or upon the petition of any relation or friend of such person, which petition shall set forth the facts and be verified by the affidavit of the petitioner to the effect that he believes the facts as so stated are true.

Prob. C. § 142. Same as § 8, ch. 59, G. S., as amended 1877, ch. 23, § 1; 1878, ch. 20, § 1. 24 M. 148.

**SEC. 5755. Same — Notice of application.**— Upon the presentation of such application or petition, the probate court shall fix the time and place for the hearing of the same, and shall cause notice of such hearing, and of the time and place thereof, to be given to the person proposed to be put under guardianship, at least fourteen days prior to the time fixed for such hearing. Provided, that if such person is an inmate of a state hospital for the insane then a like notice shall be given to the superintendent of such hospital.

Prob. C. § 143. Same as § 9, ch. 59, G. S., as amended 1877, ch. 23, § 2, except the proviso.

**SEC. 5756. Same — Hearing.**— At the hearing, the court shall consider all competent evidence that may be produced in support of and against the application or petition; and if, after a full hearing it appears that the person so proposed to be put under guardianship comes within the description of persons mentioned in section eight<sup>1</sup> of this chapter, the court shall appoint a guardian or guardians, not exceeding \_\_\_\_\_ in number, of his person and estate.

Prob. C. § 144. Same as § 10, ch. 59, G. S., as amended 1877, ch. 23, § 3. <sup>1</sup>This reference is evidently to § 5754, *supra*.

**SEC. 5757. Powers and duties.**— Every guardian appointed as provided in the preceding section, has the care and custody of the person of his ward, and the management of all his estate until such guardian is legally discharged; and he must give bond in like manner as prescribed in section<sup>1</sup> one hundred and thirty-eight, except, that the provision relating to the education of the ward shall not apply.

Prob. C. § 145. Same as § 12, ch. 59, G. S., as amended 1877, ch. 23, § 5. <sup>1</sup>This reference should be § 137, which is § 5763, *post*.

**SEC. 5758. Restoration to capacity.**— Any person who has been declared insane or incompetent, or the guardian of any relative or friend may petition the probate court of the county in which he was declared insane or incompetent, to have the fact of his restoration to capacity judicially determined. Upon the filing of said petition the court must by order appoint a day for hearing said petition. The court shall cause personal notice of said hearing to be given to the guardian of the person so declared insane or incompetent, if there be a guardian in this state. On the hearing, the guardian, relative or friend of the person so declared insane or incompetent, and in the discretion of the court, any other person, may contest the right to the relief demanded. Witnesses may be required to appear and testify, and may be called and examined by the court of its own motion. If it be found that the person be of sound mind, and capable of taking care of himself and his property, his restoration to capacity shall be adjudged, and the guardianship of such person, if such person be not a minor, shall cease.

Prob. C. § 146.

## GUARDIAN OF ABSENT PERSON.

SEC. 5759. **Appointment.**— When a person liable to be put under guardianship, according to the provisions of this chapter, resides without this state, and has any estate therein, any friend of such person, or any one interested in his estate, in expectancy or otherwise, may apply to the judge of probate of any county in which there is any estate of such absent person; and after such notice to all persons interested as the judge shall order, and a full hearing and examination, a guardian may be appointed for such absent person.

Prob. C. § 152. Same as § 13, ch. 59, G. S.

SEC. 5760. **Bond.**— Every such guardian must give bond in the same manner and in the like conditions as hereinbefore provided for other guardians, except that the provisions respecting the inventory, the disposal of the estate and effects and the account to be rendered by the guardian, must be confined to such estate and effects as come to his hands in this state.

Prob. C. § 154. Substantially § 15, ch. 59, G. S.

SEC. 5761. **Powers and duties.**— Such guardian shall have the same powers and duties with respect to any estate of the ward within this state, and also with respect to the person of the ward, if he comes to reside therein, as are prescribed with respect to other guardians appointed under this chapter.

Prob. C. § 153. Same as § 14, ch. 59, G. S.

SEC. 5762. **Removal of ward's property from state.**— When a ward is a non-resident and has a guardian appointed by a court, of competent jurisdiction, of any other state, territory, county or district, and the ward is entitled to property in this state which may be removed therefrom, and such removal will not conflict with the terms and limitations attending the right by which the ward owns the same, such property may be removed to the state or country in which such ward may reside, upon application of the guardian to the probate court of the county in the state in which letters of guardianship have been issued, and if guardianship has not been granted in this state, then to the probate court of the county in the state in which the estate of the ward or any thereof is situated, in the following manner: The guardian so applying must produce a transcript of the record of his appointment and qualification as such guardian, certified according to the laws of this state, together with an order of the court appointing such foreign guardian authorizing such application, and must also give thirty days' notice of such application to the resident executor, administrator, guardian, agent or other person having custody of such property; thereupon, if no good cause be shown to the contrary, the probate court shall make an order granting such guardian leave to remove the property of said ward to the state or country in which such ward may reside; which order shall be full and complete authority to said guardian to sue for and receive the same in his own name, for the use and benefit of said ward, and the person so having custody of such property in this state shall, upon delivery thereof to such foreign guardian upon such order, be released from further liability therefor.

Prob. C. § 155. Substantially acts 1868, ch. 67, §§ 1, 2.

## GUARDIAN'S BOND AND OATH.

SEC. 5763. **When — Conditions of.**— Before the order appointing any person guardian under the provisions of this chapter takes effect, and before letters issue, the court must require a bond, with sufficient sureties, to be approved by the probate court, and in such sum as the court shall order, conditioned that the guardian will faithfully execute the duties of his trust accord-

ing to law, and the following conditions shall form a part of such bond with or without being expressed therein :

1. To make a true inventory of all the estate, real and personal, of his ward, that shall come to his possession or knowledge, and to return the same into the probate court within three months.

2. To dispose of and manage all such estate according to law, and for the best interests of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the custody, education and maintenance of the ward.

3. To render an account on oath of the property, estate and moneys of the ward in his hands, and all proceeds or interest derived therefrom, and of the management and disposition of the same within one year after his appointment, and at such other times as the probate court shall direct.

4. At the expiration of his trust, to settle his accounts with the probate court, and to pay and deliver all the estate, moneys, and effects remaining in his hands or due from him on such settlement, to the person lawfully entitled thereto. Upon filing said bond duly approved, letters of guardianship must issue to the person appointed.

Prob. C. § 137. Substantially § 17, ch. 59, G. S.

SEC. 5764. **Oath.**— Every person appointed guardian shall, before entering upon the duties of the trust, take and subscribe an oath to fully perform all the duties of such guardian according to law.

Prob. C. § 138.

#### INVENTORY.

SEC. 5765. **When.**— Every guardian shall within three months after his appointment make and return to the probate court an inventory of all the property, real and personal, belonging to the estate of his ward ; said inventory together with an appraisement shall be made in the same manner as in estate of deceased persons.

Prob. C. § 151. Substantially § 1, ch. 77, acts 1876, as amended 1885, ch. 105, § 1, and § 18, ch. 59, G. S.

#### DUTIES AND POWERS OF GUARDIANS.

SEC. 5766. **Pay debts.**— Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, must pay all just debts due from the ward out of his personal estate and the income of his real estate, if sufficient ; if not, then out of his real estate, upon obtaining an order for the sale thereof, in the manner provided in this code for the sale of real estate of decedents.

Prob. C. § 147. Same as first part of § 19, ch. 59, G. S.

SEC. 5767. **Settle all accounts.**— Every guardian must settle all accounts of the ward, and demand, sue for, and receive all debts due to him, or may with the approval of the court, compound for the same and give discharge to the debtor, on receiving a fair and just dividend of his estate and effects ; and he shall appear for and represent his ward in all legal proceedings unless another person is appointed for that purpose.

Prob. C. § 148. Same as last part of § 19, ch. 59, G. S.

SEC. 5768. **Sales of property — Payment of claims.**— All proceedings relating to the sales of property of persons under guardianship, and all proceedings relating to the presentation, allowance and payment of claims and demands against such person, must be had and made as required by the provisions of this code relating to the estates of decedents, so far as they are applicable, unless otherwise specially provided in this chapter.

Prob. C. § 156.

SEC. 5769. **Manage the estate — Furnish support.**— Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance and support of the ward and his family, if there be any; and if such income and profits be insufficient for that purpose, the guardian may sell the real estate upon obtaining a license therefor as provided by law, and must apply the proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any.

Prob. C. § 149. Same as § 20, ch. 59, G. S.

SEC. 5770. **Same — Maintenance.**— When a guardian has advanced for the necessary maintenance, support or education of his ward, an amount not disproportionate to the value of his estate or his condition of life, and the same is made to appear to the satisfaction of the court by proper vouchers and proofs, to be a proper charge against the estate of such ward, the guardian shall be allowed credit therefor in his settlements. Whenever a guardian fails, neglects or refuses to furnish suitable and necessary maintenance, support or education for his ward, out of the estate of such ward, the court may order him to do so, and enforce such order by proper process. Whenever any third person, at his request, supplies a ward with such suitable and necessary maintenance, support or education, and it is shown to have been done after refusal or neglect of the guardian to supply the same, the court may direct the guardian to pay therefor out of the estate, and enforce such payment by due process.

Prob. C. § 150.

SEC. 5771. **Partition.**— Whenever real estate is owned by any ward in this state jointly or in common with any other person or persons, the guardian of such ward may have partition thereof, either by proceedings in court for that purpose, or, except when he has an adverse interest to that of the ward in the estate to be divided, by amicable agreement with the joint or common owner or owners, with the consent of the probate court in writing thereto; upon such amicable agreement for partition, the guardian shall have the right to release and quitclaim, to such joint or common owner or owners, all the right, title and interest of such ward in and to the portion of the property to be taken by such joint or common owner or owners, pursuant to such agreement, upon receiving from such joint or common owner a like release and quitclaim to such ward of all the rights, title and interest in and to the portion of the property to be taken by said ward.

Prob. C. § 157. Substantially first paragraph of § 21, ch. 59, G. S., as amended 1870, ch. 61, § 1. 29 M. 31.

SEC. 5772. **Plat real estate.**— Whenever any guardian shall deem it for the interest of his ward to lay out and plat the real property of his ward, or any part thereof, he may by consent of the probate court in writing, cause the same to be done pursuant to the statute relating to town plats; such plats shall be executed by and as such guardian; when so executed, filed and recorded it shall have the same force and effect as if executed and recorded by such ward if under no disability.

Prob. C. § 158. Substantially second paragraph of § 1, ch. 61, acts 1870, which amended § 21, ch. 59, of G. S.

SEC. 5773. **Contract for improvements.**— A guardian may with the approval of the probate court, make any contract for improvement of the real estate of his ward or for the erection or maintenance of line fence or party wall as the ward could do if under no disability.

Prob. C. § 159.

SALE OF WARD'S ESTATE.

**SEC. 5774. For maintenance.**—When the income of an estate under guardianship is insufficient to maintain the ward and educate the ward when a minor, his guardian may sell his real or personal estate for that purpose, upon obtaining an order therefor.

Prob. C. § 160. This provision was contained in §§ 20, 21, ch. 57, G. S., and amended by acts 1885, ch. 128; 1887, ch. 67, which were repealed by Prob. C. § 322. 35 M. 192.

**SEC. 5775. For reinvestment.**—When it appears to the satisfaction of the court, upon the petition of the guardian, that for the benefit of his ward his real estate, or some part thereof, should be sold and the proceeds thereof reinvested in other real estate, or invested in first mortgage on real estate, or bonds of the United States, or of this state, or in the municipal or school bonds of the state of Minnesota, or in the improvement or protection of other real estate of the ward, his guardian may sell the same for such purpose, upon obtaining an order therefor.

Prob. C. § 161. G. S. ch. 59, § 23, authorized sale of personal property. This provision was contained in §§ 22, 23, ch. 57, G. S. 11 M. 384.

INVESTMENT OF FUNDS.

**SEC. 5776. How.**—Any guardian having funds in his hands uninvested either from the sale of real estate or personal property, or from other sources, belonging to his ward, may be allowed to invest the same only in such securities as are mentioned in section 1 one hundred and sixty-one.

Prob. C. § 162. Acts 1875, ch. 39, § 1, enacted substantially same provision. 1 Sec. 5775, *supra*. This provision was contained in § 24, ch. 57, G. S.

**SEC. 5777. Application for.**—To obtain an order for such investment the guardian shall present to the probate court a petition setting forth the estate of his ward, real and personal, and the amount of money in his hands which he may desire to invest as aforesaid, with the facts and circumstances on which the petition is founded, tending to show the expediency of such investment.

Prob. C. § 163. Same provision in § 2, ch. 39, acts 1875. Substantially §§ 25, 26, 27, ch. 57, G. S.

**SEC. 5778. Order for.**—If it shall satisfactorily appear to the court from such petition that it would be for the best interests of the ward to invest such moneys, the court shall make its order granting the prayer of such petition, which petition may be heard in a summary manner without notice, and such guardian shall so invest such funds.

Prob. C. § 164. Same provision in § 3, ch. 39, acts 1875. Substantially § 28, ch. 57, G. S.

SETTLEMENT BY GUARDIANS.

**SEC. 5779. Annually.**—Every guardian shall annually return an account to the probate court under oath, specifying therein the amount of property received by him and remaining in his hands or invested by him during the year, and shall show in detail his receipts and disbursements for the current year, and a description of all the property remaining in his hands belonging to his ward, and at the same time the court shall examine into the sufficiency of his bond.

Prob. C. § 165. Substantially § 1, ch. 38, acts 1875, as amended 1885, ch. 32: "An act to provide for the rendering of accounts of guardians."

**SEC. 5780. Final—Notice of.**—When any minor ward under guardianship arrives at full age, or when a female ward under full age marries, or when any person under guardianship as an insane or other incompetent person has been restored to capacity, the guardian of such ward shall render his final account of his guardianship to the probate court and turn over all the

property in his possession belonging to the ward, to said ward. Upon the filing of said final account of his guardianship with the probate court, with a petition for final settlement and allowance, the court shall make an order fixing a time and place of hearing on said petition and the settlement and allowance of said account; a copy of said order shall be served upon such ward at least fourteen days before said day of hearing, if he be within the state, if not by publishing the same according to law.

Prob. C. § 166. Substantially § 2, ch. 38, acts 1875.

**SEC. 5781. Hearing — Order.**— At the time and place so fixed for said hearing the probate court shall examine said account, and may examine the guardian and ward or any other person who shall appear in said matter touching said account, and if upon such examination it appears to the court that the said account should be allowed in whole or in part, it shall make an order allowing the same in whole or in part, as the case may be.

When such final account shall be allowed the court shall make an order discharging such guardian.

Prob. C. § 167. Substantially §§ 3, 4, ch. 38, acts 1875.

**SEC. 5782. Certain payments legalized.**— That in all cases where a guardian of an insane person has heretofore paid in good faith any debts or claims against the estate which he represents without the same having been duly approved by law, and whose final account has not yet been settled, such payments may be allowed by the judge of probate, on the final settlement of said guardian, upon proof satisfactory to said judge of probate that said claims or debts were just and existing demands against said estate at the time of said payment.

1889, ch. 34: "An act relating to the allowance of the accounts of guardians of insane persons." Approved April 24, 1889.

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## TITLE 9.

### SALES OF LANDS BY EXECUTORS, ADMINISTRATORS AND GUARDIANS.

This title contains substance of and supersedes ch. 57, G. S., as amended 1868, ch. 65; 1869, ch. 62; 1870, ch. 18; 1872, ch. 65; 1873, ch. 56; 1879, ch. 18, and 1881, ch. 43, except §§ 20-29, as amended 1870, ch. 63; 1885, ch. 128; 1887, ch. 67, providing for sales by guardians carried into title 8, and § 38 as amended 1879, ch. 20; §§ 51-62, providing for sales of real estate belonging to lunatics, as amended 1867, ch. 73, and acts 1871, ch. 57, providing for curing irregularities in sales, which were repealed by and not carried into probate code.

#### By EXECUTORS AND ADMINISTRATORS.

**SEC. 5783. Petition for sale.**— To obtain a license to sell real estate, the executor or administrator shall present a petition to the probate court from which he received his appointment, setting forth the amount of the personal estate that has come into his hands, the disposition thereof, and how much, if any, remains undisposed of; the debts outstanding against the deceased as far as the same can be ascertained; the legacies unpaid, if any; a description of all the real estate excepting the homestead of which the testator or intestate died seized; the condition and value of the respective portions or lots, the persons interested in said estate, with their residences, if known, and if unknown that fact shall be stated.

Prob. C. § 168. Substantially § 2, ch. 57, G. S. 19 M. 117, 338.

**SEC. 5784. Order to show cause.**— If it appears by such petition that there is not sufficient personal estate in the hands of an executor or adminis-



trator to pay the debts outstanding against the deceased, the legacies or expenses of administration, and that it is necessary to sell the whole or some portion of the real estate for the payment of such debts, legacies or expenses, the probate court shall thereupon make an order directing all persons interested in the estate to appear before it, at a time and place therein to be specified, to show cause why a license should not be granted to the executor or administrator applying therefor, to sell so much of the real estate of the deceased as shall be necessary to pay such debts, legacies and expenses.

Prob. C. § 169. Substantially § 3, ch. 57, G. S.

SEC. 5785. **Hearing.**— The probate court, at the time and place appointed in such order, upon proof of the due publication of the order, shall proceed to the hearing of such petition, and shall hear and examine the allegations and proofs of the petitioner; and of all persons interested in the estate who oppose the petition.

Prob. C. § 170. Substantially § 5, ch. 57, G. S.

SEC. 5786. **When sale will not be granted.**— License shall not be granted, if any of the persons interested in the estate give bonds to the judge of probate, in such sum and with such sureties as he directs and approves, with condition to pay all the debts, legacies and the expenses of administration, so far as the goods and chattels, rights and credits of the deceased are insufficient therefor, within such time as the court may direct.

Prob. C. § 172. Same as § 7, ch. 57, G. S.

SEC. 5787. **Order of sale.**— If the probate court is satisfied after a full hearing upon the petition, and an examination of the proofs and allegations of the parties interested, that a sale of the whole or some portion of the real estate is necessary for the payment of debts, legacies or expenses of administration, it shall thereupon make an order of sale authorizing the executor or administrator to sell the whole, or so much and such part of the real estate described in the petition as it deems necessary or beneficial.

Prob. C. § 173. Same as § 9, ch. 57, G. S. Acts 1881, ch. 43, amended this section of G. S. and was repealed by Prob. C. § 322. 37 M. 238, 330.

SEC. 5788. **Same — Contents.**— The order shall describe the lands to be sold, and may direct the order in which several tracts, lots or parcels shall be sold, and shall direct whether they shall be sold at private sale or at public auction; and if it appears that any part of such real estate has been devised and not charged in such devise with the payment of debts, the probate court shall order that part descended to heirs to be sold before that so devised; and if it appears that any lands devised or descended have been sold by the heirs of devisees, then the lands in their hands remaining unsold shall be ordered to be first sold.

Prob. C. § 175. Same as § 10, ch. 57; G. S. Section 38, ch. 57, G. S., amended 1879, ch. 20, provided for terms of sale, which was not carried into probate code.

SEC. 5789. **Public and private sale.**— The court may on the hearing of a petition for the sale of lands, make an order for the sale of a part of the land, describing it, at public auction, and also another order for a sale of a part of the land, describing the same, at private sale.

Prob. C. § 194.

SEC. 5790. **Private sale — Appraisement — Notice.**— If upon the hearing of a petition for the sale of land, it shall satisfactorily appear to the court, that it would be for the best interest of the estate or ward, to sell the whole or some part thereof at private sale, the court shall direct such sale to be made at private sale by the executor, administrator or guardian.

**Appraisement.**— The court shall also direct the executor, administrator or guardian, to have the land or any part thereof re-appraised, and the land so directed to be appraised shall not be sold until such appraisement is made.

Such re-appraisal shall be made by two or more competent persons appointed by the court for that purpose; the appraisers before entering upon their duties, shall take and subscribe an oath to faithfully and honestly appraise such land at its full cash value, which oath and their appraisal shall be filed in the probate court; and no such land shall be sold at private sale for less than its appraised value.

**Notice.**— The probate court may also direct the executor, administrator or guardian, to give notice of such sale as it may direct, and in case the court directs notice to be given, the executor, administrator or guardian, shall not sell until such notice is given.

Prob. C. § 193.

**SEC. 5791. Sale of whole estate.**— If it appears to the court that it is necessary to sell a part of the real estate and that by the sale of such part, the residue of the estate or some specific part or piece thereof, would be greatly injured, said court may license a sale of the whole estate, or of such part thereof as may be judged necessary, and most for the interest of all concerned.

Prob. C. § 171. Same as § 6, ch. 57, G. S.

**SEC. 5792. Subdivide the land.**— If it shall appear to the probate court necessary or beneficial to the interests of all parties interested it may direct and require the executor or administrator to subdivide any tract or parcel of land into lots, and to lay off such streets or alleys or both, as may be necessary or desirable and dedicate the same to the public use; and upon the approval of a plat of such subdivision by the probate court the executor or administrator shall proceed to comply with the then existing law in relation to town plats; and when a plat of such subdivision is duly recorded in the office of the register of deeds of the county in which such real estate is situated, according to law, said executor or administrator shall sell according to said plat. The executor or administrator shall not sell at private sale for less than the appraised value.

Prob. C. § 174. Substantially § 1, ch. 43, acts 1881, which amended § 9, ch. 57, G. S.

**SEC. 5793. Sales subject to all charges.**— Sales and conveyances of land made by executors and administrators, pursuant to the provisions of this chapter, may be made subject to all charges thereon, by mortgage or otherwise, existing at the time of the death of the testator or intestate, and in case the estate of the deceased is in any way liable for the amount secured by such mortgage or for any such charge, the sale shall not be confirmed by the probate court until the purchaser executes a bond to the executor or administrator, as required in the case of a sale of a contract for the purchase of lands on which payments are to become due,\* or unless the land or interest therein so sold, shall be first released, discharged and made clear from such incumbrance or charge, by the owner or holder thereof, upon the payment to him of the proceeds of the sale or so much thereof as may be necessary to satisfy such incumbrance or charge; or the executor or administrator may sell the whole or any part, subdivision, or portion, of the interest and estate of the deceased in any lot or tract of land charged with any lien or incumbrance, and upon the release of the lot, tract or part so sold from such lien or incumbrance, apply the proceeds of such sale or sales towards the payment of such charge, lien or incumbrance, until the same is fully paid; and the executor or administrator shall account for any balance remaining after such payment, as proper proceeds of the estate; and in all such cases the purchaser shall not be required to give any bond.

Prob. C. § 181. Above \* is § 18, ch. 57, G. S., and below \* is amendment of 1881, ch. 43, § 2. 38 M. 237; 37 M. 330.

**SEC. 5794. Sale of homestead.**— Whenever any guardian has been ordered by the probate court to sell or mortgage any real estate of his ward,

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who has a husband or wife living, such guardian cannot sell or mortgage the homestead unless such husband or wife joins in such deed or mortgage; nor shall the sale or mortgage of any land of a ward by his guardian in any manner affect the interests or estate of such husband or wife therein unless such husband or wife join in such deed or mortgage.

Prob. C. § 195.

**SEC. 5795. Who cannot purchase.**—No executor, administrator or guardian making the sale, shall directly or indirectly purchase, or be interested in the purchase of any part of the real estate so sold; and all sales made contrary to the provisions of this section shall be void.

Prob. C. § 198. Substantially § 37, ch. 57, G. S. 33 M. 221; 11 M. 34; 38 M. 334.

**SEC. 5796. Oath to sell.**—Every executor, administrator or guardian licensed to sell real estate, as provided in this chapter, shall, before fixing on the time and place of sale, and if the sale is at private sale, before making the sale, take and subscribe an oath in substance as follows: That in disposing of the estate which he is licensed to sell, he will use his best judgment in fixing on the time and place of sale, and will exert his utmost endeavors to dispose of the same in such manner as will be most for the advantage of all persons interested; which oath shall be filed in the probate court before confirmation of the sale.\*

When any executor, administrator or guardian, so licensed to sell real estate, resides out of this state, he may take and subscribe such oath before any notary public, or clerk of the court of record, of the state where he resides, and the same, with the seal of the officer before whom the same was taken attached, shall have the same force and effect as if taken before any officer within this state authorized to administer oaths.

Prob. C. § 197. Substantially § 41, ch. 57, G. S., and below \* is amendment of 1873, ch. 56. 29 M. 39; 26 M. 489. Acts 1873, ch. 56, provided that sales theretofore made by foreign administrator, executor or guardian wherein the oath was taken outside of state and filed in the state were legalized.

**SEC. 5797. Same.**—In case an action relating to any estate heretofore sold by an executor, administrator or guardian, in which any heir or person claiming under the deceased, or in which the ward or any person claiming under him, shall contest the validity of the sale, it shall not invalidate such sale on account of its appearing that the executor, administrator or guardian had not taken the oath prescribed in section forty-five of chapter fifty-seven, of the statutes of eighteen hundred and seventy-eight: *provided*, that this act shall not be construed to impair or in any way affect any action now pending.

1889, ch. 196: "An act in relation to sale of real estate heretofore made by executors, administrators or guardians." Approved April 24, 1889.

**SEC. 5798. Bond to sell.**—Every executor, administrator or guardian licensed to sell or mortgage real estate for any purpose whatever, whether appointed in this state or elsewhere, shall before sale, give bond to the judge of probate, with sufficient sureties, to be approved by the court, conditioned to sell or mortgage the same and account for and dispose of the proceeds as provided by law.

Prob. C. § 190. Substantially § 33, ch. 57, G. S. 11 M. 347.

**SEC. 5799. Date of sale.**—After an order of sale is made and said bond filed with the court, the executor, administrator or guardian shall thereupon be authorized to sell the real estate as therein described, within one year after the making of such order, or within such further time, not exceeding two years, as may be allowed by said court.

Prob. C. § 191. Substantially § 34, ch. 57, G. S., as amended 1879, ch. 18. 37 M. 236.

**SEC. 5800. Notice of sale.**—When an order is made directing a public sale, notice of the time and place of holding the same shall be published ac-

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[SECS. 5801-5806.]

ording to law; the court may direct further notice to be given; in such notice land shall be described with common certainty. Such sale shall be in the county where the lands are situated, at public auction, between the hours of nine o'clock in the morning and the setting of the sun of the same day. But when the lands are contiguous and lie in two or more counties, the notice may be given and sale made in either.

Prob. C. § 192. Substantially §§ 35, 36, ch. 57, G. S. Without the amendments of 1872, ch. 65, §§ 1, 2; 1881, ch. 43, § 3. 11 M. 384; 22 M. 393.

**SEC. 5801. Proof of notice.**— An affidavit of the executor, administrator or guardian, or of some other person having knowledge of the fact that notice of any sale was given in this chapter being made and filed in the probate court, together with a copy of the notice, shall be admitted as evidence of the time, place and manner of giving the notice.

Prob. C. § 199. Same as § 42, ch. 57, G. S.

**SEC. 5802. Adjourn sale.**— If, at the time appointed for such sale, the executor, administrator or guardian, deems it for the interest of all persons concerned therein, he may adjourn the same from time to time, not exceeding in all three months.

Prob. C. § 200. Same as § 43, ch. 57, G. S.

**SEC. 5803. Notice of adjournment.**— In case of adjournment notice thereof shall be given by a public declaration, at the time and place first appointed for the sale; and if adjournment is for more than one day, further notice shall be given by posting or publishing the same, or both, as time and circumstances may admit.

Prob. C. § 201. Same as § 44, ch. 57, G. S.

**SEC. 5804. Report of sale.**— The executor, administrator or guardian making any sale, shall immediately make a return of his proceedings upon the order of sale, to the probate court granting the same; the probate court shall examine the proceedings, and may examine such executor, administrator or guardian, or any other person on oath, touching the same; and if it is of the opinion that the proceedings were unfair, or that the sum bid is disproportionate to the value or that a sum exceeding such bid, at least ten per cent., exclusive of the expenses of a new sale may be obtained, it shall vacate such sale, and direct another to be had, of which notice shall be given as originally directed in the order; and the sale shall be conducted in all respects as if no previous sale had taken place.

Prob. C. § 202. Same as § 39, ch. 57, G. S. 11 M. 384; 22 M. 393; 28 M. 123; 26 M. 300.

**SEC. 5805. Confirmation of sale.**— If it appears to the probate court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, or if disproportionate, that a sum exceeding such bid, at least ten per cent, exclusive of the expenses of a new sale, cannot be obtained, the court may make an order confirming such sale, and directing conveyance to be executed.

Prob. C. § 203. Same as § 40, ch. 57, G. S. 37 M. 237, 330.

## BY FOREIGN EXECUTORS OR ADMINISTRATORS.

**SEC. 5806. Procedure.**— An executor or administrator appointed in another state, upon any estate where there is no executor or administrator appointed in this state, may file an authenticated copy of his appointment in the probate court for any county in which there is real estate of the deceased, after which he may be licensed by the same probate court to sell real estate for the payment of debts, legacies and charges of administration, in the same manner, and upon the same terms and conditions as are prescribed in the case of an executor or administrator appointed in this state, except as hereinafter provided.\* And such foreign executor or administrator may act by his attor-

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ney in fact, thereto by him duly appointed by power of attorney under his hand and seal and executed and acknowledged in the same manner as is required for the conveyance of real estate, which power of attorney shall be recorded in the office of the register of deeds for the county in which the real estate is situated.

Prob. C. § 182. Above \* is § 19, ch. 57, G. S., and below \* is amendment 1868, ch. 65. 35 M. 192. Acts 1869, ch. 63, § 3, contained same provision as in acts 1868, ch. 65. Acts 1869, ch. 63, § 1, providing for filing exemplification of record of appointment, amended by 1885, ch. 61; and in § 2 empowering executor, administrator or guardian to discharge of record any judgment, mortgage or lien, amended 1881, Ex. S. ch. 34, were repealed by Probate Code, § 322. Acts 1867, ch. 70, providing that foreign executors or administrators, after filing authenticated copy of appointment, were authorized to discharge mortgages in same manner as deceased, seems to be repealed by implication. Acts 1873, ch. 56, providing that sales theretofore made by executors, administrators or guardians residing in any other state, where oath was taken outside of this state, but filed within it, are hereby legalized and made valid.

**SEC. 5807. Same — Certain proceedings legalized.**— That all conveyances or other acts heretofore made or done by any foreign executor or executors, either by themselves or through their attorneys in fact, when such conveyances or acts were authorized by the will of the deceased and such will has been duly admitted to probate in this state prior to the making of such conveyances or doing of such acts, or has been probated in this state prior to the passage of this act and the estate affected thereby has been distributed in accordance with the conveyances or other acts of such foreign executors, be; and the same are hereby legalized and made valid for all intents and purposes.

1889, ch. 41: "An act to legalize conveyances or other acts of foreign executors or their attorneys in fact." Approved April 24th.

## BY HUSBAND OR WIFE.

**SEC. 5808. When other insane or incompetent.**— In case any person who has been adjudged insane or otherwise incompetent to transact his own business or manage his estate, the husband or wife of such person may mortgage or convey any real property, except the homestead, the title to which is in such husband or wife of such insane or incompetent person, except the homestead, during the continuance of such incapacity, as fully as such husband or wife could do if unmarried.

Prob. C. § 196. Acts 1885, ch. 223 (repealed by Probate Code, § 322), provided for such sale or mortgage by order of probate court after petition and notice. Acts 1887, ch. 47 (*ante*, § 4110), enacted that if husband insane for one year, wife empowered to convey alone, except that guardian join if there be one. Acts 1889, ch. 90 (*ante*, § 3870), enacted that when either husband or wife insane, the probate court gives authority to sell or mortgage.

## RECORD OF SALE.

**SEC. 5809. Court to furnish.**— It shall be the duty of the probate court to furnish to any person applying therefor, a certified copy under its official seal of any papers on file in the probate office, relating to or in any way connected with the sale of any real estate by any executor, administrator or guardian upon payment of the legal fees therefor.

Prob. C. § 207. Same as § 1, ch. 57, acts 1873: "An act to preserve the evidence of title to real estate purchased at executors', administrators' or guardians' sales." Approved February 21, 1873. 30 M. 111.

**SEC. 5810. Same — Register to record.**— The register of deeds of the county where such real estate is situated may record any such certified copy.

Prob. C. § 208. Same as § 2, ch. 57, acts 1873.

**SEC. 5811. Same — Certified copy.**— Such certified copy or the record thereof, shall in case of any action concerning the title to said real estate, or the validity of said sale, be prima facie evidence of the original.

Prob. C. § 209. Same as § 3, ch. 57, acts 1873. 30 M. 111.

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[SECS. 5812-5816.]

## ACTION FOR RECOVERY.

**SEC. 5812. When to be brought.**— No action for the recovery of any real estate sold by an executor or administrator, under this chapter, shall be maintained by any heir or other person claiming under the deceased, unless it is commenced within five years next after the sale; and no action for any estate so sold by a guardian shall be maintained by the ward, or by any person claiming under him, unless commenced within five years next after the termination of the guardianship; except that minors and others under legal disability to sue at the time when the right of action first accrues, may commence such action at any time within five years after the removal of such disability.

Prob. C. § 204. Same as § 46, ch. 57, G. S. Section 50, ch. 57, G. S., providing that executor, administrator or guardian liable in damages for double value if land fraudulently sold, was not carried into probate code. 19 M. 338; 33 M. 222; 26 M. 493; 37 M. 3.

**SEC. 5813. Irregularity in proceedings.**— In case of an action relating to any estate sold by an executor, administrator or guardian, in which an heir or person claiming under the deceased, or in which the ward, or any person claiming under him, shall contest the validity of the sale, it shall not be avoided on account of any irregularity in the proceedings, if it appears —

1. That the executor, administrator or guardian was licensed to make the sale by the probate court having jurisdiction.

2. That he gave a bond which was approved by the probate court.

3. That he took the oath prescribed in this chapter.

4. That he gave notice of the time and place of sale, as in this chapter prescribed, if such notice was required by the order of license.

5. That the premises were sold in the manner required by the order of license, and the sale confirmed by the court, and that they are held by one who purchased them in good faith.

Prob. C. § 205. Same as § 47, ch. 57, G. S., and acts 1881, ch. 43, § 4. Acts 1871, ch. 57, an act to quiet and perfect titles to real estate sold by executors, administrators and guardians, approved March 4th, repealed by Probate Code, § 322, provided that defects and irregularities in sales theretofore made which did not render the sale absolutely void should be rectified and confirmed by proceeding as therein directed.

**SEC. 5814. Same.**— If the validity of a sale is drawn in question by a person claiming adversely to the title of the deceased, or the ward, or claiming under a title that is not derived from or through the deceased or ward, the sale shall not be void on account of any irregularity in the proceedings, if it appears that the executor, administrator or guardian was licensed to make the sale by a probate court having jurisdiction, and that he did accordingly execute and acknowledge in legal form a deed for the conveyance of the premises.

Prob. C. § 206. Same as § 49, ch. 57, G. S.

## CONTRACT FOR PURCHASE.

**SEC. 5815. Sale of.**— If a deceased person at the time of his death was possessed of a contract for the purchase of land, and any interest, right or title in such land has been obtained under such contract, it may be sold on the petition of the executor or administrator, in the same manner and upon like terms and conditions as are provided in respect to land of which he had died seized, except as hereinafter provided.

Prob. C. § 176. Same as § 13, ch. 57, G. S.

**SEC. 5816. Same — How made.**— Such sale shall be made subject to all payments that may thereafter become due on such contract; and if there are any such payments thereafter to become due, such sale shall not be confirmed by the probate court until the purchaser executes a bond to the executor or administrator for his benefit and indemnity and for the benefit and indemnity

of the persons entitled to the interest of the deceased in the lands so contracted for, in double the whole amount of payments thereafter to become due on such contract, with such sureties as the court approves.

Prob. C. § 177. Same as § 14, ch. 57, G. S.

SEC. 5817. **Same — Bond.**— Said bond shall be conditioned that such purchaser will make all payments for such land that shall become due after the date of such sale, and fully indemnify the executor or administrator, and the persons so entitled, against all demands, costs, charges and expenses by reason of any covenant or agreement contained in such contract; but if there is no payment thereafter to become due on such contract no bond shall be required of the purchaser.

Prob. C. § 178. Same as § 15, ch. 57, G. S.

SEC. 5818. **Same — Confirmation.**— Upon the confirmation of such sale, the executor or administrator shall execute to the purchaser an assignment of such contract, which shall vest in the purchaser, his heirs and assigns, all the right, interest and title of the persons entitled to the interest of the deceased in the land sold, and all the rights and interest in and to said contract at the time of the sale, and such purchaser shall have the same rights and remedies against the vendor of such land as the deceased would have had if living.

Prob. C. § 179. Same as § 16, ch. 57, G. S.

SEC. 5819. **Same — Proceeds of.**— The proceeds of every such sale of the interest of the deceased person in the lands under contract, as hereinbefore mentioned, shall be disposed of in all respects in the same manner as the proceeds of the sale of lands of which the deceased dies seized.

Prob. C. § 180. Same as § 17, ch. 57, G. S.

#### MORTGAGES.

SEC. 5820. **When executor, etc., may mortgage.**— When the personal estate of a deceased person is insufficient to pay his debts, with the charges of administration, and to pay any taxes, assessments or other charges which are an existing lien upon his estate; or whenever the personal estate of such deceased person is insufficient to pay for any improvements which are necessary for the preservation of his real estate or any part thereof, his executor or administrator may mortgage his real estate for the purpose of obtaining funds for the payment of such debts, charges, taxes, assessments or liens, or for the making of such necessary improvements upon obtaining a license therefor and proceeding as herein provided.

Prob. C. § 186. This is § 1, ch. 40, acts 1889. G. S. ch. 57, § 1, authorized the sale of realty when personalty insufficient to pay debts.

SEC. 5821. **Procedure.**— To obtain such license, the executor or administrator shall proceed in the manner provided by this act for the obtaining of a license to sell real estate, and in his petition the executor or administrator shall particularly describe the tract or tracts which it is proposed to mortgage.

Prob. C. § 187. This is § 2, ch. 40, acts 1889.

SEC. 5822. **When order granted.**— Whenever it appears to the satisfaction of the probate court that it is necessary for an executor or administrator to mortgage real estate for any of the purposes aforesaid, and that it will be for the benefit of all persons interested, such license shall be granted; and the decree of the court granting such license shall fix the amount for which the mortgage may be given, and the rate of interest which may be paid thereon, and for what purposes the money shall be used.

Prob. C. § 188. This is § 3, ch. 40, acts 1889.

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PROBATE CODE — SALES OF LANDS.

[SECS. 5823-5826.]

SEC. 5823. **Extension of mortgage.—Bond.**—The probate court may in like manner authorize an executor or administrator to make an agreement for the extension or renewal of an existing mortgage on the estate of a deceased person.

**Bond.**—No license to mortgage real estate shall be granted to an executor or administrator until he shall have executed and filed with the probate court before whom the matter is pending, a bond with sufficient sureties to be approved by the probate judge, conditioned that he will apply the funds realized by such mortgage to the purposes specified in the decree of the court.

Prob. C. § 189. This §§ 4, 5, ch. 40, acts 1889.

## RIGHT OF WAY TO RAILROADS.

SEC. 5824. **Executors,' etc., power to grant.**—Whenever any railroad company has located the line of its road upon or contiguous to any land belonging to any decedent or ward or in which the decedent or ward may have any interest, it shall be lawful for the executor, administrator or guardian to agree in writing and settle and adjust the damages with the railroad company, to said land by reason of the location of said railroad, and the executor, administrator or guardian may in such agreement grant to the railroad company such right of way, as shall be necessary and required by such railroad company, and upon such terms and conditions as may be agreed upon between the executor, administrator or guardian and said railroad company, subject to the approval of the probate court.

Prob. C. § 183. Substantially § 1, ch. 62, acts 1869, as amended 1870, ch. 18, § 1, which also provided that a petition be presented for this purpose.

SEC. 5825. **Petition for.**—Such approval may be obtained upon filing in the probate court a verified petition of the railroad company and the executor, administrator or guardian, setting forth the name of the decedent or ward, the corporate name of the railroad company, a description of the land to be used or taken, and for what purpose, the amount to be paid, and that such amount is the full value of the lands so taken, and the damages to the remainder of the lands. To such petition shall be attached or endorsed thereon the agreement mentioned in section <sup>1</sup> one hundred and eighty-six [one hundred and eighty-three].

Prob. C. § 184. This provision is contained in acts 1869, ch. 62, amended 1870, ch. 18. <sup>1</sup>Sec. 5824, *supra*.

SEC. 5826. **Order.**—Upon the filing of such petition and agreement, the court shall proceed to hear and determine the same in a summary manner, without notice, and if the court is satisfied after a full hearing, that said agreement is just and equitable, it shall record such petition and agreement and make an order approving such agreement. A copy of said order and agreement duly certified by the probate court, may be filed in the office of the register of deeds of the county wherein such land is situated and when so filed shall be notice to all persons.

Prob. C. § 185.



# MINNESOTA STATUTES-1891

SECS. 5827-5833.] PROBATE CODE—CONVEYANCES IN CERTAIN CASES.

## TITLE 10.

### CONVEYANCES OF REAL ESTATE BY EXECUTORS, ADMINISTRATORS AND GUARDIANS IN CERTAIN CASES.

This is substantially G. S. ch. 58, as amended 1875, ch. 57.

**SEC. 5827. To complete contract of deceased.**—When any person who is bound by a contract in writing to convey any real estate dies before making the conveyance, the probate court may make a decree authorizing and directing the executor or administrator to convey such real estate to the person entitled thereto, in all cases where such deceased person, if living, might be compelled to execute such conveyance.

Prob. C. § 210. Same as § 1, ch. 58, G. S. 41 N. W. 977.

**SEC. 5828. Petition for.**—On the presentation of a petition by any person claiming to be entitled to such conveyance from any executor or administrator, setting forth the description of the land and the facts upon which such claim to conveyance is predicated, the probate court shall by order appoint a time and place of hearing such petition; and notice thereof shall be given to those interested, by publishing said order according to the provisions of this code.

Prob. C. § 211. Substantially § 2, ch. 58, G. S., as amended 1875, ch. 57.

**SEC. 5829. Hearing.**—At such hearing upon proof by affidavit of the due publication of the notice, all persons interested in the estate may appear before the probate court and oppose such petition; and the court may examine on oath the petitioner and all others produced before it for that purpose.

Prob. C. § 212. Same as § 3, ch. 58, G. S.

**SEC. 5830. Decree.**—After a full hearing upon such petition, and examination of the facts and circumstances of such claim, if the probate court is satisfied that a conveyance of the real estate described in the petition should be made, according to the provisions of this chapter, it shall thereupon make a decree, authorizing and directing the executor or administrator to make and execute a conveyance thereof, to the petitioner, otherwise it shall dismiss such petition.

Prob. C. § 213. Substantially § 4, ch. 58, G. S., as amended 1875, ch. 57.

**SEC. 5831. Appeal.**—Any person interested may appeal from such decree or dismissal to the district court for the same county, as in other cases, but if no appeal is taken from such decree within the time limited therefor by law, or if such decree is affirmed on appeal, the executor or administrator shall execute the conveyance according to the direction contained in such decree; and a certified copy of the decree shall be recorded with the deed, in the office of the register of deeds in the county where the lands lie, and shall be evidence of the correctness of the proceedings, and of the authority of the executor or administrator to make the conveyance.

Prob. C. § 214. Same as § 5, ch. 58, G. S.

**SEC. 5832. Effect of conveyance.**—Every conveyance made in pursuance of a decree of the probate court as provided in this chapter, shall be effectual to pass the estate contracted for, as fully as if the contracting party himself was still living and executed the conveyance.

Prob. C. § 215. Same as § 6, ch. 58, G. S.

**SEC. 5833. Recording decree.**—A copy of the decree for conveyance, made by the probate court and duly certified, and recorded in the office of the register of deeds in the county where the lands lie, shall give the person enti-

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tled to such conveyance a right to the possession of the lands contracted for, and to hold the same according to the terms of the intended conveyance, in like manner as if they had been conveyed in pursuance of the decree.

Prob. C. § 216. Same as § 7, ch. 58, G. S., except that the latter contained sentence: "And such right may be enforced, if necessary, by said court according to the course of practice therein."

SEC. 5834. **Death of contractee.**— If the person to whom the conveyance was to be made dies before the commencement of proceedings according to the provisions of this chapter, or before the conveyance is completed, any person who would have been entitled to the estate under him, as heir, devisee or otherwise, in case the conveyance had been made according to the terms of the contract; or the executor or administrator of such deceased person, for the benefit of the person so entitled, may commence such proceedings, or prosecute the same, if already commenced, and the conveyance shall thereupon be so made as to vest the estate in the same persons who would have been so entitled to it, or in the executor or administrator for their benefit.

Prob. C. § 217. Same as § 8, ch. 58, G. S.

SEC. 5835. **Insane and incompetents.**— The provisions of this chapter shall apply to guardians of insane persons and others adjudged incompetent to manage their estates, and guardians shall make such conveyances under the same proceedings as is herein provided for executors and administrators.

Prob. C. § 218.

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## TITLE 11.

### SETTLEMENT OF EXECUTORS' AND ADMINISTRATORS' ACCOUNTS AND ASSIGNMENT OF THE RESIDUE OF THE ESTATE.

This contains all of ch. 54, G. S., as amended 1885, ch. 10. The amendment of 1887, ch. 75, providing for resignation and release and discharge of executor and administrator upon allowance of settlement, was not carried into probate code.

#### SETTLEMENT.

SEC. 5836. **When required.**— Every executor or administrator shall render his account of his administration within the time allowed him for the settlement of the estate and at such other time as he is required by the court, until the estate is wholly settled.

Prob. C. § 225. Substantially § 9, ch. 54, G. S., as amended 1885, ch. 10.

SEC. 5837. **Penalty for failure.**— When an executor or administrator, after being duly cited by the probate court, neglects to render his account, he is liable on his bond for all damages which may accrue.

Prob. C. § 230. Substantially § 12, ch. 54, G. S.

SEC. 5838. **Petition for final settlement.**— When the estate is fully administered, the executor or administrator shall petition the probate court for an order fixing a time and place in which it will examine, settle and allow the final account of the executor or administrator, and for the assignment of the residue of the estate to the persons entitled thereto by law. The final account shall be filed in the probate court at the time of filing said petition.

Prob. C. § 226.

SEC. 5839. **Order for hearing.**— Upon the filing of said petition the court shall make an order fixing a time and place for hearing of the same. Said order shall be published according to law.

Prob. C. § 227. Same in § 14, ch. 54, G. S. 32 M. 162; 25 M. 381.

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SECS. 5840-5845.] PROBATE CODE — SETTLEMENT OF ACCOUNTS.

SEC. 5840. **Hearing — Decree.**— On hearing such petition, the probate court shall examine every executor and administrator upon oath as to the truth and correctness of his account before the same is allowed; but such examination may be omitted when no objection is made to the allowance of the account, and there is no reason to doubt the justness and correctness thereof: and the heirs, legatees and devisees may be examined on oath upon any matter relating to the account of any executor or administrator, whenever the correctness thereof is called in question.\*

**Decree.**— If from such examination the account is found just and correct the probate court shall allow and settle the same, and upon satisfactory evidence shall determine the rights of the persons to the residue of said estate and unless partition is asked for and directed as hereinafter provided, make a decree accordingly, assigning said residue to the persons thereto entitled by law.

Prob. C. § 228. Above \* is § 10, ch. 54, G. S., and below \* found in § 36, ch. 53, G. S.

SEC. 5841. **Same — Distribution.**— In such decree the court shall name the persons and the proportion or parts to which each is entitled, and if real estate, give a description as near as may be of the land to which each is entitled; and such persons may demand and recover their respective shares from the executor or administrator, or any other person having the same; and a certified copy of any decree of distribution of real estate may be recorded in the office of the register of deeds in every county in this state in which are situated any of the lands described in such decree; and such register of deeds shall enter in his reception book the name of the deceased as grantor, and the names of the heirs, legatees or devisees, as grantees, and shall make in such reception book so many separate grantor and grantee entries for such decree as there are persons taking real estate in such county under said decree.

Prob. C. § 229. This is last half of § 4, ch. 56, G. S., as amended 1875, ch. 56. 19 M. 227.

## HOW MADE.

SEC. 5842. **Chargeable with.**— Every executor and administrator is chargeable in his account, with the whole of the goods, chattels, rights and credits of the deceased which come to his possession; also with all the proceeds of the real estate which is sold for the payment of debts and legacies; and with all the interest, profit and income that in any way comes to his hands from the estate of the deceased.

Prob. C. § 219. Same as § 1, ch. 54, G. S.

SEC. 5843. **Account for.**— Every executor and administrator shall account for the personal estate of the deceased, as the same is appraised, except as herein provided. An executor or administrator shall not make profit by the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the personal estate; and he shall account for the excess when he sells any part of the personal estate for more than the appraisal; and if he sells any for less than the appraisal, he is not responsible for the loss, if it appears to be beneficial to the estate to sell it.

Prob. C. § 220. Same as §§ 2, 3, ch. 54, G. S.

SEC. 5844. **Claims disallowed.**— No executor or administrator shall purchase any claim against the estate he represents, and if he pays any claim for less than its nominal value, he is only entitled to charge in his account the amount he actually paid.

Prob. C. § 222.

SEC. 5845. **Waste.**— When an executor or administrator neglects or unreasonably delays to raise money by collecting the debts or selling the real or personal estate of the deceased, or neglects to pay over the money he has in his hands, and the value of the estate is thereby lessened, or unnecessary costs

or interest accrues, or the persons interested suffer loss, the same shall be deemed waste, and the discharge [damages] sustained may be charged against the executor or administrator in his account.

Prob. C. § 224. Same as § 8, ch. 54, G. S., except that latter provided that damages be charged against the account, "or he shall be liable therefor on his administration bond."

SEC. 5846. **Not accountable.**— No executor or administrator is accountable for any debts due to the decedent, if it appears that they remain uncollected without his fault.

Prob. C. § 221. Same as § 6, ch. 54, G. S.

SEC. 5847. **Allowed expenses.**— He shall be allowed all necessary expenses in the care, management and settlement of the estate, including reasonable fees paid to attorneys for conducting the necessary proceedings or suits, and for his services, such fees as are provided in this code; but when the decedent, by his will, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless by a written instrument filed in the probate court, he renounces all claim for compensation provided by the will.

Prob. C. § 223. Same as § 11, ch. 54, G. S.

SEC. 5848. **Costs.**— When costs in any case are allowed against an executor or administrator, in any proceeding in any court, the executor or administrator shall pay the same out of the estate, as an expense of administration, and the same shall be allowed him in his administration account, unless it appears to the satisfaction of the court that the action or proceeding in which the costs were taxed shall have been prosecuted or resisted without just cause on his part.

Prob. C. § 231. Substantially § 13, ch. 54, G. S. 29 M. 296.

#### ADVANCEMENTS.

SEC. 5849. **When gifts and grants are.**— Gifts and grants shall be deemed to have been made in advancement only, when they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such, by the child or other descendant.

Prob. C. § 235. Same as § 8, ch. 46, G. S. For the learning on this subject see 1 Mad. Ch. 508; 2 Vern. 753; 3 P. Wms. 526; 1 Bro. P. C. 167; 14 Ves. Jr. 324; 4 Desau. 274; 1 Serg. & R. 422; 17 Mass. 356.

SEC. 5850. **When settled.**— All questions as to the advancements made, or alleged to have been made by the decedent to any heir, shall be heard at the time of the settlement of the final account as in this chapter provided, by the court, and such advancement shall be specified in the decree assigning the estate.

Prob. C. § 238. Same as § 17, ch. 56, G. S.

SEC. 5851. **Considered in distribution.**— Any estate, real or personal, given by the intestate in his lifetime as an advancement to any child or other lineal descendant, shall be considered as a part of the estate of the intestate so far as regards the division and distribution of the estate among his issue; and shall be taken by such child or other descendant towards his share of the estate of the intestate.

Prob. C. § 232. Same as § 5, ch. 46, G. S. This is the common law of hotchpot and only applicable to intestacy. 1 Bro. P. C. 167; 14 Ves. Jr. 324; 4 Desau. 274.

SEC. 5852. **Same — How.**— For the purpose of determining the proportion the person receiving such advancement may be entitled to receive, the probate court shall ascertain the value of the whole of the residue of such estate, and may for that purpose have such property or any part thereof appraised or its value determined in any other manner as it may deem best.

Prob. C. § 239.

SEC. 5853. **Value of.**— If the value of the estate so advanced is expressed in the conveyance or in the charge thereof made by the intestate, or in the acknowledgment of the party receiving it, it shall be considered as of that value in the division or distribution of the estate; otherwise it shall be estimated according to its value when given as nearly as the same can be ascertained.

Prob. C. § 236. Same as § 9, ch. 46, G. S.

SEC. 5854. **Manner of.**— If such advancement is made in real estate, the value thereof shall, for the purposes mentioned in the preceding section, be considered a part of the real estate to be divided; and if it is in personal estate, it shall be considered as a part of the personal estate; and if, in either case, it exceeds the share of real or personal estate, respectively that would have come to the heir so advanced, he shall not refund any part of it but shall receive so much less out of the part of the estate as will make his whole share equal to those of the other heirs who are in the same degree with him.

Prob. C. § 234. Same as § 7, ch. 46, G. S.

SEC. 5855. **When exceeds share.**— If the amount of such advancement exceeds the share of the heir so advanced, he shall be excluded from any further portion in the division and distribution of the estate, but he shall not be required to refund any part of such advancement; and if the amount so received is less than his share, he shall be entitled to as much more as will give him full share of the estate of the deceased.

Prob. C. § 233. Same as § 6, ch. 46, G. S.

SEC. 5856. **Death of child advanced.**— If any child or other lineal descendant so advanced, dies before the intestate, leaving issue, the advancement shall be taken into consideration in the division and distribution of the estate, and the amount thereof shall be allowed accordingly by the representatives of the heirs so advanced, in like manner as if the advancement had been made directly to them.

Prob. C. § 237. Same as § 10, ch. 46, G. S.

## TITLE 12.

### PARTITION AND DISTRIBUTION.

This contains ch. 56, G. S., except §§ 1, 2, 3, providing for allowance for children under seven years; § 4, for assignment of residue, carried into title 11; § 8, notice of partition and distribution; § 9, partition when shares have been alienated; § 13, partition when deceased was tenant in common; § 16, when partition might be dispensed with; § 22, partition of the reversion; § 19, when partition conclusive, which were not carried into probate code.

#### PARTITION.

SEC. 5857. **Commissioners for.**— If upon the hearing of the petition for a decree of distribution the estate, real or personal, to be assigned to two or more heirs, devisees or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition may be made, on the petition of any of the persons interested, by three discreet and disinterested persons, to be appointed commissioners for that purpose by the probate court, who shall be duly sworn; and the judge of probate shall issue a warrant to them for that purpose. If the real estate lies in different counties, the probate court may appoint different commissioners for each county; and in such case the estate in each county shall be divided separately, as if there was no other estate to be divided; but the commissioners first appointed shall, unless otherwise directed by the probate court, make divisions of such real estate,

whenever situated within this state.\* In making any partition of any estate the commissioners shall have power but shall not be required to divide any specific tracts.

Prob. C. § 240. Above \* same as §§ 6, 7, ch. 56, G. S. 32 M. 164.

SEC. 5858. **By metes and bounds.**—The several shares in the real and personal estate shall be set out to each individual in proportion to his right, by metes and bounds, or description, that the same may be easily distinguished; unless any two or more of the parties interested consent to have their shares set out so as to be held by them in common and undivided.

Prob. C. § 241. Same as § 10, ch. 56, G. S. 25 M. 25.

SEC. 5859. **When cannot be divided.**—When any such real estate cannot be divided without prejudice or inconvenience to the owners, the probate court may assign the whole to one or more of the parties entitled to share therein, who will accept it; provided, the party so accepting the whole pays to the other parties interested their just proportion of the true value thereof, or secures the same to their satisfaction; the true value of the estate shall be ascertained by commissioners appointed by the probate court, and sworn for that purpose.

Prob. C. § 242. Excepting a distinction of preference, same as § 11, ch. 56, G. S.

SEC. 5860. **Same.**—When any tract of land, messuage or tenement is of greater value than either party's share in the estate to be divided, and cannot be divided without injury to the same, it may be set off by the commissioners appointed to make partition to either of the parties who will accept it; provided, the party accepting it pays or secures to one or more of the others, such sums as the commissioners award, to make the partition equal; and the commissioners shall make their award accordingly; but such partitions shall not be established by the court until the same [sums] so awarded are paid to the parties entitled to the same, or secured to their satisfaction.

Prob. C. § 243. Same as § 12, ch. 56, G. S. Acts 1883, ch. 42, repealed by 1889, ch. 46, § 322, amended this section of G. S. by adding provision to sell the land if none of the parties accept it.

SEC. 5861. **Guardians — Agents.**—Before any partition is made, as herein provided, guardians shall be appointed for all minors and insane persons, interested in the estate to be divided; and some discreet person shall be appointed to act as agent for such parties as reside out of the state; and notice of the appointment of such agent shall be given to the commissioners in their warrant; and notice shall be given to all persons interested in the partition, their guardians or agents, by the commissioners, of the time when they will proceed to make partition.

Prob. C. § 244. Same as § 14, ch. 56, G. S.

SEC. 5862. **Report of commissioners.**—The commissioners shall make report of their proceedings to the probate court, in writing; and the court may, for sufficient reasons, set aside such report and commit the same to the same commissioners, or appoint others; and the report, when finally accepted and established, shall be recorded in the records of the probate court.

Prob. C. § 245. Substantially § 15, ch. 56, G. S.

SEC. 5863. **Confirmation of report.**—When the report of commissioners is confirmed by order of court the court shall make a decree assigning the estate to the persons entitled thereto in accordance therewith.

Prob. C. § 246.

SEC. 5864. **Agent for non-resident.**—When any estate is assigned by decree of the court, as provided for in this chapter, to any person residing out of this state, and having no agent therein, and it is necessary that some person shall be authorized to take possession and charge of the same, for the benefit of such absent person, the court may appoint an agent for that purpose,

and authorize him to take charge of such estate, as well as to act for such absent person in the partition and distribution.

Prob. C. § 249. Same as § 23, ch. 56, G. S. 25 M. 25.

SEC. 5865. **Same — Bond.**— Such agent shall give bond to the judge of probate, to be approved by him, faithfully to manage and account for such estate, before he is authorized to receive the same; and the court appointing such agent may examine and allow his account, on application made by him or any person interested, and may allow a reasonable sum out of the estate for his services and expenses.

Prob. C. § 250. Same as § 24, ch. 56, G. S.

#### DISTRIBUTION.

SEC. 5866. **Partial or general, when.**— A partial or general decree of distribution may also be made on the application of the executor or administrator, or of any person interested; but no heir, devisee or legatee is entitled to a decree for his share, until a bond is given to the judge of probate with such sureties as the court directs to secure the payment of the debts of the deceased, legacies and expenses of administration, or such part thereof as still remains unprovided for, by reason of such distribution.

Prob. C. § 251. Substantially § 5, ch. 56, G. S.

#### EXPENSES.

SEC. 5867. **Payment of.**— If, at the time of the partition or distribution of any estate, as provided in this chapter, the executor or administrator has retained sufficient effects in his hands which may lawfully be applied for that purpose, the expenses of such partition or distribution may be paid by such executor or administrator, when it appears to the court just and equitable, and not inconsistent with the intention of the testator.

Prob. C. § 247. Same as § 20, ch. 56, G. S.

SEC. 5868. **Same.**— But if there are no effects in the hands of the executor or administrator which may be lawfully applied to that purpose, the expenses and charges of the partition, being ascertained by the probate court, shall be paid by all the parties interested in the partition, in proportion to their respective shares or interests in the premises; and the proportion shall be settled and allowed by the probate court; and if any one neglects to pay the sum assessed on him by the court, an execution may be issued therefor against him by such court, in favor of the person entitled to the same.

Prob. C. § 248. Same as § 21, ch. 56, G. S.

#### DECREE WITHOUT NOTICE.

SEC. 5869. **Effect of.**— In any case where a decree has heretofore been made or shall hereafter be made without notice by a probate court, purporting to assign the estate of a deceased person or the residue thereof, to the person or persons entitled thereto, \* any person interested in any real estate embraced within the terms of such decree, whether as heir or devisee of such deceased person, or as grantee of any heir or devisee, may apply to said court to have the said real estate of such deceased person, or the portion thereof in which the applicant is interested, assigned to the person or persons entitled thereto; and thereupon such court shall by order appoint a time for hearing said application, and shall direct notice of such hearing to be given by publication of said order in a newspaper published in the county where said court is held, and named in the order, for three weeks successively, at least once in each week, and upon the hearing, unless it appears that there are debts or claims existing against the deceased or the estate, not paid or provided for, the probate court shall enter a decree assigning said real estate to the person

or persons entitled thereto, and the share or shares so assigned shall be held by the respective owners free from all debts, claims or demands, against the estate, except that the same shall not affect the lien of any mortgage upon said real estate.

1883, ch. 113: "An act providing for the assignment of the estates of deceased persons in certain cases," approved March 1, 1883, as amended 1885, ch. 49, by striking out at \*, "and such probate court has made an order in terms discharging the executor or administrator of such estate."

## TITLE 13.

### APPEALS.

This contains substance of §§ 14, 15, 16, ch. 49, G. S., as amended 1877, ch. 22; 1874, ch. 74; 1878, ch. 17; 1885, ch. 63, and § 2, ch. 71, acts 1874.

### PROCEDURE.

SEC. 5870. **When allowed.**—An appeal may be taken to the district court from a judgment, order or decree of the probate court, in the following cases:

1. An order admitting a will to probate and record, or refusing the same.
2. An order appointing an executor, administrator or guardian, or removing him, or refusing to make such appointment or removal.
3. An order directing or refusing to direct real property to be sold, mortgaged or leased, or confirming or refusing to confirm such sale, mortgaging or leasing.
4. An order allowing any claim of any creditor against the estate in whole or in part to the amount of twenty dollars or more.
5. An order disallowing any claim of any creditor against the estate in whole or in part to the amount of twenty dollars or more.
6. An order or decree by which a legacy or distributive share is allowed or payment thereof directed, or such allowance or direction refused, when the amount in controversy exceeds twenty dollars.
7. An order setting apart property, or making an allowance for the widow or child, or refusing the same.
8. An order allowing an account of an executor, administrator or guardian, or refusing to allow the same, when the amount allowed or disallowed exceeds twenty dollars.
9. An order vacating or refusing to vacate a previous order, judgment or decree made or rendered, alleged to have been procured by fraud, misrepresentation, or through surprise or excusable inadvertence or neglect.
10. An order or decree directing or refusing a conveyance of real estate.

Prob. C. § 252. This contains all of § 14, ch. 49, G. S., as amended 1877, ch. 22. 23 M. 415; 34 M. 502; 33 M. 95; 32 M. 143; 31 M. 274; 30 M. 204; 28 M. 382; 24 M. 135; 33 M. 11.

SEC. 5871. **Appeal from allowance or disallowance.**—The appeal may be taken from the allowance or disallowance of a claim against the estate, by the executor, administrator or guardian, or the creditor. When an executor or administrator declines to appeal from the allowance of a claim against the estate, or the disallowance of a setoff or counterclaim, any person interested in the estate as creditor, devisee, legatee or heir, may appeal from such decision, in the same manner as the executor or administrator might have done; and the same proceedings shall be had, in the name of the executor or administrator; *provided*, that the person appealing in such case, gives a bond with sureties to be approved by the judge of probate, as well to secure



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the estate from damages and costs, as to secure the intervening damages and costs to the adverse party.

Prob. C. § 253.

**SEC. 5872. Who may appeal.**— In all other cases the appeal can only be taken by a party aggrieved, who appeared and moved for or opposed the order or judgment appealed from, or who, being entitled to be heard thereon, had not due notice or opportunity to be heard, the latter fact to be shown by affidavit filed and served with the notice.

Prob. C. § 254. Same as § 15, ch. 49, G. S. 35 M. 194; 32 M. 156; 32 M. 443; 28 M. 203.

**SEC. 5873. How and when.**— No appeal shall be effectual for any purpose unless the following requisites are complied with by the appellant within thirty days after notice of the order, judgment or decree appealed from, viz.:

1. The appellant shall serve a notice of such appeal on the opposite party, his agent or attorney who appeared for him or them in the probate court, or in case no appearance is made in the probate court by the adverse party, then by delivering a copy of such notice to the judge of the probate court for them; such notice shall specify the matter, judgment, order or decree appealed from, or such part thereof as is appealed from, and signed by the appellant or his attorney, and shall be served in the same manner as notices in civil actions, and such notice, with the proof of service of the same, shall be filed in the probate court.

2. In case any person other than the executor, administrator or guardian appeals, they shall execute a bond to the probate judge, with sufficient sureties to be approved by the probate court, conditioned that the appellant will prosecute his appeal with due diligence to a final determination, and pay all costs and disbursements, and abide the order of the court therein. In no case can an appeal from an order, judgment or decree be taken after six months from the entry thereof.

Prob. C. § 255. Part of § 16, ch. 49, G. S., as amended 1874, ch. 74, § 2; 1873, ch. 17, § 1; 1885, ch. 63. 35 M. 308; 34 M. 501; 32 M. 354; 28 M. 382.

**SEC. 5874. Transcript.**— Upon filing such notice of appeal and proof of service, the probate court shall forthwith make and return to the district court of the proper county a certified transcript of all the papers and proceedings upon which the order, judgment or decree appealed from shall have been founded, including a copy of such order, judgment or decree, and also copies of the notice of appeal and proof of service and copy of bond on appeal; upon filing such transcript and return the district court shall be deemed to have acquired jurisdiction of the cause and may compel the probate court to make a further or amended return and may allow amendments to be made or mischances to be supplied or corrected, to the same extent as in civil actions in said court, except that the notice of appeal shall not be amended, nor the time extended for taking such appeal.

Prob. C. § 256. Substantially § 2, ch. 71, acts 1874. 33 M. 479; 32 M. 354.

**SEC. 5875. Effect of appeal — Additional bond.**— Such appeal shall suspend the operations of the order, judgment or decree appealed from and stay proceedings until such appeal is determined or the district court to which such appeal is taken shall otherwise order. The district court in which such appeal may be pending, shall have power in the exercise of a sound discretion upon good cause shown, to require the appellant to give such further bond with surety, or such further security to be filed or deposited with the clerk of such district court, for the payment of damages in consequence of such suspension or stay which may be awarded against such appellant, in case he fail to obtain a reversal of the order, judgment or decree so appealed from, as such district court may deem proper under the circumstances.

Prob. C. § 257. Substantially § 2, ch. 74, acts 1874, and § 1, ch. 17, acts 1878.

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PROBATE CODE — APPEALS.

[SECS. 5876-5882.]

## TRIAL ON APPEAL.

SEC. 5876. **Notice.**— Upon an appeal the cause may be brought on for trial before the district court by either party upon eight days' notice to the adverse party; such notice shall be served on the attorney of the opposite party if he have one; if not it shall be deposited with the clerk of the district court of the proper county for him; and the appellant shall cause the same to be entered on the calendar for trial on or before the first day of the term at which said cause is noticed for trial, and if not so placed upon the calendar the appeal shall be dismissed.

Prob. C. § 258. Substantially part of § 2, ch. 71, acts 1874. 26 M. 407.

SEC. 5877. **Calendar.**— When such cause is placed upon the calendar the court shall hear, try and determine the same in the same manner as if originally commenced in the district court.

Prob. C. § 259.

SEC. 5878. **In allowance or disallowance.**— In all cases of appeal from the allowance or disallowance of a claim against the estate, the district court shall on or before the second day of the term direct pleadings to be made up as in civil actions, but no allegations shall be permitted except such as are essential to the specific matter to which the appeal relates, and thereon the proceedings shall be tried; all questions of law arising on the cause shall be summarily heard and determined upon the same pleadings; the issues of fact shall be tried as other issues of fact are tried in the district court.

Prob. C. § 260.

SEC. 5879. **When tried by court.**— All other appeals shall be tried by the court without a jury, unless the court orders that the whole issue or some specific question of fact involved therein be tried by a jury or referred.

Prob. C. § 261.

## JUDGMENT.

SEC. 5880. **Of affirmance.**— In case the appellant fails to prosecute his appeal, or when the order, judgment or decree appealed from is sustained by the court on the merits, the district court shall enter judgment affirming the decision of the probate court with costs. Upon the filing of a certified transcript of the decision and judgment of the district court in the probate court, the same proceedings shall be had as if no appeal had been made.

Prob. C. § 262.

SEC. 5881. **Same.**— In all cases of affirmance of the order, judgment or decree appealed from, judgment shall be rendered against the appellant and his sureties on his appeal bond, and execution may issue against him and such sureties.

Prob. C. § 265.

SEC. 5882. **Of reversal.**— In case the order, judgment or decree of the probate court appealed from is reversed or modified in whole or in part by the final judgment of the district court, the district court shall make such order or decree as the probate court should have done, if it can do so, or if it cannot, then it shall remand the case to the probate court, with direction that the probate court make such order or decree, or proceed further in compliance with such final decision of the district court.

Such final decision and judgment shall be certified by the district court to the probate court, and upon filing the same in the probate court, such court shall proceed to make any order or proceeding directed by such district court, if any directions are made. In case the decision and judgment of the district court requires no action of the probate court, then such order or decision shall be substituted in place of the original order, judgment or decree, and like proceedings shall

be had as if it has been so ordered by the probate court. In case the district court remands the case to the probate court with directions, the probate court shall in a summary manner comply with such direction, without notice.

Prob. C. § 263.

SEC. 5883. **Of costs.**—In all cases of appeal the prevailing party shall be entitled to costs and disbursements, to be taxed as costs in civil actions, and in case judgment is rendered against the estate, they shall become an adjudicated claim against the estate. If the judgment is against a claimant against the estate for costs, or any counterclaim, execution may issue as in other cases.

Prob. C. § 264.

## TITLE 14.

### COMMITMENT OF INSANE PERSONS.

#### JURISDICTION.

SEC. 5884. **Of probate court.**—The probate court of any county, upon information being filed showing that there is an insane person in the county needing care and treatment and that it is dangerous for him to be at large, shall, if necessary, issue its warrant under the seal of the court, to apprehend the alleged insane person; such warrant shall be issued in the name of the state of Minnesota and be directed to the sheriff or any constable of the county; it shall direct him to forthwith apprehend the alleged insane person and have him sent before the court for examination as to his sanity and to ascertain the fact of sanity or insanity; said warrant shall be served in the same manner as warrants in criminal proceedings.

Prob. C. § 266. This is part of § 17, ch. 6, acts 1866, as amended 1867, ch. 12, § 3; 1868, ch. 18, § 8; 1872, ch. 16; 1877, ch. 41; 1877, ch. 42, § 1; 1885, ch. 163.

SEC. 5885. **Of court commissioner.**—In case the probate judge is absent from the county or unable to perform his duties, or would be disqualified as a juror, or is a material witness, the court commissioner shall upon information of insanity attend at the office of the probate judge so absent or unable to act, and shall hear and determine the matters fully as provided in this chapter in the same manner and with like effect as the judge of probate of said court might have done had he not been so absent or unable to perform his duties.

Such court commissioner shall cause the same records to be kept in the county where such alleged insane person is as if kept by the probate court therein and in addition the cause of his performing such duties.

Prob. C. § 280. This jurisdiction was given court commissioner in acts 1866, ch. 6; 1867, ch. 12; 1868, ch. 18; 1872, ch. 16; 1877, ch. 41; 1877, ch. 42; 1885, ch. 163.

SEC. 5886. **Not idiocy or imbecility.**—The term insane, as used in this chapter, includes every species of insanity, but does not include idiocy or imbecility.

Prob. C. § 276. This is § 28, ch. 6, acts 1866, as amended 1867, ch. 12, § 10; 1868, ch. 18, § 16.

#### COMMITMENT.

SEC. 5887. **Jury to examine.**—Upon the filing of such information, the court shall make an order directed to two reputable persons, one at least of whom shall be a duly qualified physician, and such persons in connection with the judge of probate shall constitute a jury to examine the person alleged to be insane and they shall ascertain the fact of sanity or insanity.

Prob. C. § 267. Acts 1866, ch. 6, § 17, provided for jury of six; 1867, ch. 12, § 3, for a jury of three, one to be regular physician; 1868, ch. 18, § 8, for examination by regular physician

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only; 1872, ch. 16, § 1, for examination by one or three physicians; 1877, ch. 41, § 1, made same provision; 1877, ch. 42, § 1, provided for jury of probate judge and two respectable persons, one of whom to be physician; 1885, ch. 163, made same provision.

SEC. 5888. **Sworn.**— The persons designated in the order before making such examination shall be each duly sworn to examine said patient impartially and to the best of their ability.

Prob. C. § 268.

SEC. 5889. **Witnesses.**— The probate court shall cause such witnesses to be sworn and examined, as is necessary; and may issue process to compel the attendance of witnesses before it on such examination; the alleged insane person, or any relative or friend, may be allowed to introduce such evidence as the court deems proper, in opposition to said information.

Prob. C. § 269.

SEC. 5890. **Questions.**— The following questions shall be propounded and answered, or as near as may be, in the examination of a person alleged to be insane, and if the person is committed a copy of them shall be sent with the warrant to the superintendent of the hospital for his information:

1. What is the person's name?
2. Where does he or she reside?
3. What is his or her age?
4. Is he or she married or single?
5. Has he or she any children, if so, how many?
6. What is his or her occupation?
7. Is he or she a church member?
8. What has been his or her habits as regards temperance and morality?
9. Where was he or she born?
10. Is insanity hereditary in the family?
11. What relatives, if any, have been insane?
12. What is the cause of this attack?
13. What is the form of this attack: acute, chronic, exalted, depressed, paroxysmal?
14. Is there any accompanying bodily disorder?
15. When were the first symptoms of the disease manifested, and in what way?
16. Is this the first attack?
17. If not, when did the others occur, and what was the duration of each?
18. On what subject or in what way is insanity now manifested?
19. Has he or she ever shown any disposition to injure others? if so, was it from sudden passion or premeditation?
20. Has suicide ever been attempted? if so, in what way, and is the propensity now active?
21. Is there any disposition to filthy habits, destruction of clothes, etc.?
22. Has he or she been subject to any bodily disease, epilepsy, suppressed eruptions, discharges or sores, or ever had any injury to the head?
23. Has restraint or confinement ever been employed?
24. If so, what kind and how long?
25. Has he or she ever been under medical treatment? if so, mention particulars and effects?
26. State any other particulars supposed to have a bearing on the case.
27. State address of relative or friend.

Prob. C. § 273. This is substantially § 25, ch. 6, acts 1866, as amended 1868, ch. 18, § 14; 1872, ch. 16, § 5.

SEC. 5891. **Findings.**— When such examination is completed the jury shall forthwith make report of their findings in writing, which shall be filed in the probate court; their findings shall be that the person is "sane" or "insane."

Prob. C. § 270.

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**SEC. 5892. Relatives may take charge.**— The relatives or friends of any person, alleged to be insane or who shall be found to be insane under the provisions of this chapter, shall in all cases have the right to take charge of and keep said person, if they shall desire to do so; the probate court may require a satisfactory bond of such relative or friends, conditioned for the proper care and safe keeping of such person; such bond shall run to the state of Minnesota, and be approved by the probate court; and if the relatives or friends of any patient kept in the hospital shall ask for the discharge of such patient, the superintendent may require a bond to be executed to the state of Minnesota in such sum and with such sureties as he may deem proper, conditioned for the care and safe keeping of such patient; but no patient charged with or convicted of crime shall be so discharged.

Prob. C. § 275. Substantially § 19, ch. 6, acts 1866, as amended 1868, ch. 18, § 10.

**SEC. 5893. Warrant — Execution.**— If the person so examined is found to be sane, he shall be discharged; if found to be insane, the probate court shall order him committed to the care and custody of the superintendent of one of the hospitals for insane, and in such order shall direct that duplicate warrants be issued to the sheriff or some other suitable person, who shall be authorized to convey said insane person to the hospital designated; the warrant may be in the following language, to-wit:

STATE OF MINNESOTA, }  
 County of \_\_\_\_\_, } ss. In Probate Court.

In the matter of the insanity of \_\_\_\_\_.

To the Superintendent of the \_\_\_\_\_ Hospital for the Insane at \_\_\_\_\_:

\_\_\_\_\_ having been, upon examination, found to be insane, you are therefore required to receive him (or her) into the hospital, and keep him (or her) there until legally discharged.

In witness whereof I have hereunto set my hand, and affixed the seal of the probate court of said county, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18\_\_\_\_.

[SEAL.]

Judge of Probate, \_\_\_\_\_ County, Minnesota.

One of such warrants shall be filed in the office of the superintendent of the hospital, and the other, with the superintendent's endorsement thereon that said patient has been received by him, shall be returned to the probate court and filed therein.

Prob. C. § 271. Substantially part of § 17, ch. 6, acts 1836, as amended 1867, ch. 12, § 3; 1868, ch. 18, § 8; 1872, ch. 16; 1877, ch. 41; 1877, ch. 42; 1885, ch. 163.

**SEC. 5894. Same.**— In case the person committed is a female, she shall be accompanied, while being conveyed to the hospital, either by her husband or by a woman, who shall be designated by the probate court in the order of committal.

Prob. C. § 272. This is acts 1887, ch. 145, which amended § 21, ch. 35, G. S., by adding the foregoing thereto.

**SEC. 5895. Same — Penalty for abandonment.**— That any officer or person who shall receive into his custody, any person for the purpose of conveying such person to any hospital for the insane for the state of Minnesota, and shall abandon such person before delivering him or her to the superintendent of any such hospital, and obtaining the indorsement of the receipt of such person by such superintendent upon the warrant or other order by virtue of which he received such person into his custody, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail not exceeding three months nor less than ten days or by fine not exceeding one hundred dollars nor less than twenty dollars.

1885, ch. 162: "An act to prevent the abandonment of any person committed to any hospital for the insane for the state of Minnesota." Approved February 6, 1885.

DISCHARGE.

SEC. 5896. **Certificate.**— When any person has been committed to the care and custody of the superintendent of the hospital for the insane, by warrant of a probate court, shall be discharged from such hospital, the superintendent shall, upon the day of such discharge send by mail to the judge of probate of the county in which such warrant was issued, a certificate signed by him stating that such person has been discharged from such hospital, and the date of such discharge, which certificate shall be filed in the probate court.

Prob. C. § 274. This is acts 1879, ch. 11, which amended § 17, ch. 41, acts 1877, by adding the foregoing thereto.

FEEs AND EXPENSES.

SEC. 5897. **Allowances.**— The following fees shall be allowed by the probate court:

To the physician or physicians, and such other person on the jury for examining the person, and making written report thereof, three dollars each per day, and fifteen cents for each mile traveled in so doing.

To the person authorized to convey the insane person to the hospital, three dollars per day for the time necessarily employed, and all necessary disbursements for travel and support of himself and insane person and assistants, and reasonable compensation for assistants.

To the person accompanying an insane female to the hospital, three dollars per day and the expense of travel and support of such person.

Prob. C. § 277. Substantially part of § 18, ch. 6, acts 1866, as amended 1867, ch. 12, § 4; 1868, ch. 18, § 9; 1872, ch. 16, § 4; 1877, ch. 42, § 2.

SEC. 5898. **Audited.**— Such fees and disbursements shall be audited by the probate court, and on written order of the probate court shall be paid by the county treasurer; such order shall be filed with the county auditor, who shall draw his warrant for the amount thereof on the county treasurer.

Prob. C. § 278. Substantially part of § 18, ch. 6, acts 1866, as amended 1867, ch. 12, § 4; 1868, ch. 18, § 9; 1872, ch. 16, § 4; 1877, ch. 42, § 2; 1881, ch. 32.

SEC. 5899. **Same.**— The fees and expenses for the examination of a person alleged to be insane, but found to be sane, shall be audited, and paid in the same manner as in cases where the person is found to be insane.

Prob. C. § 279.

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TITLE 15.

COMMITMENT OF PERSONS UNDER GUARDIANSHIP TO THE INEBRIATE HOSPITAL.

This is substantially acts 1883, ch. 126.

SEC. 5900. **Authorized.**— Any person who is or who shall hereafter be placed under guardianship by reason of mental incompetency, when such incompetency was or is caused by excessive drinking, may be committed to the special department for the treatment of inebriates, in the second hospital for insane at Rochester, Minnesota.

Prob. C. § 281. This is part of § 1, ch. 126, acts 1883.

SEC. 5901. **Jury to determine.**— Whenever the guardian, or any relative of such person under guardianship shall present to the probate court of the county appointing such guardian, a petition showing that such person is a proper subject for medical treatment on account of excessive drinking, the

court shall cause such person to be examined by a jury constituted and appointed in like manner as is provided for the examination of insane persons, to ascertain the fact as to whether such person is a proper subject for medical treatment on account of excessive drinking.

Prob. C. § 282. This is part of § 1, ch. 126, acts 1883.

SEC. 5902. **Notice of hearing.**— In all cases where the petition shall be made as aforesaid by any person other than the guardian, such guardian shall have such reasonable notice of the hearing upon such petition as in the judgment of the probate court the justice of the case requires.

Prob. C. § 283.

SEC. 5903. **Warrant of commitment.**— If upon such examination such person is found to be a proper person for medical treatment, on account of excessive drinking, the court shall order him committed to the special department for the treatment of inebriates in the second hospital for insane; and he shall direct that duplicate warrants be issued in like manner as is provided in case of insane persons committed, which warrants may be in the following language:

STATE OF MINNESOTA, }  
County of ———. } ss.

*To the Superintendent of the Second Hospital for Insane at Rochester, Minnesota:*

— having been found, upon examination, to be a proper subject for medical treatment on account of excessive drinking, you are therefore required to receive — into the special department of said hospital for the treatment of inebriates and keep — there until legally discharged.

In witness whereof I have hereunto set my hand and affixed the seal of the probate court this — day of —, A. D. 18—.

[SEAL.]

Judge of Probate, — County, Minnesota.

Prob. C. § 284. This is part of § 1, ch. 126, acts 1883.

SEC. 5904. **Procedure.**— Such patient shall be conveyed and the warrants endorsed, returned and filed, and the same fees, costs and disbursements allowed and paid, and the patient discharged from said hospital in like manner as is provided in case of insane persons committed to the hospital for insane, and the same process may be employed to compel the appearance of parents, witnesses and jurors upon said examination as is provided in case of examination of insane persons.

Prob. C. § 285. Contains § 2, ch. 126, acts 1883.

## TITLE 16.

### PROBATE BONDS AND THEIR PROSECUTION.

This contains sections 1, 6, ch. 55, G. S., as amended 1871, ch. 55, and acts 1873, ch. 60. Sections 2, 3, 4, 5, 7, 8, 9, 10, providing for actions and judgments on such bonds, were not carried into probate code.

SEC. 5905. **How made and prosecuted.**— All bonds required by law to be taken in, or by order of, the probate court, shall run to the judge of probate and his successor in office, unless otherwise provided, and in case of any breach of the conditions thereof, may be prosecuted in the name and for the benefit of any person interested therein, whenever the probate court directs.

Prob. C. § 286. Substantially § 1, ch. 55, G. S. Acts 1871, ch. 55, amended this section of G. S. by adding other provisions. 35 M. 169; 32 M. 161, 164; 26 M. 95; 24 M. 122; 31 M. 275; 16 M. 494; 22 M. 261; 28 M. 151; 23 M. 295.

SEC. 5906. **Additional bond.**— Whenever any probate court is satisfied that the bond of an executor, administrator or guardian is insufficient, it may,

on its own motion, or on application of one or more of the persons interested in the estate 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.

Prob. C. § 287. Same as acts 1873, ch. 60, as amended by acts 1885, ch. 123, by adding provision enabling sureties on such bonds "to be discharged from further liability."

SEC. 5907. **Permission to sue.**— When, on application, the probate court has authorized any bond to be prosecuted, it shall make a certified copy of the bond, and a certificate, under the seal of the court, that permission has been given to the person named in such certificate, to prosecute the same.

Prob. C. § 289. Same provision in § 6, ch. 55, G. S. 32 M. 161; 26 M. 440.

SEC. 5908. **Copy evidence.**— A copy of any bond duly certified by the probate court, shall be received in evidence, in the same manner and with like effect as the original bond.

Prob. C. § 288.

TITLE 17.

FORMS OF LETTERS.

SEC. 5909. **Letters testamentary.**— Letters testamentary may be substantially in the following form:

STATE OF MINNESOTA, }  
County of ———. } ss.

The last will of ———, deceased, having been proved and recorded in the probate court of the county of ———, ———, who is named therein as such, is hereby appointed executor.

Witness, ———, judge of the probate court of the county of ———, and the seal of the court affixed, the ——— day of ———, A. D. 18—.

[SEAL.] By the court, ———,  
Judge of Probate, ——— County, Minnesota.

Prob. C. § 290.

SEC. 5910. **Administration with will.**— Letters of administration with the will annexed may be substantially in the following form:

STATE OF MINNESOTA, }  
County of ———. } ss.

The last will of ———, deceased, have been proved and recorded in the probate court of the county of ———, and there being no executor named in the will (or as the case may be), ——— is hereby appointed administrator with the will annexed.

Witness, ———, judge of the probate court of the county of ———, and the seal of the court affixed, the ——— day of ———, A. D. 18—.

[SEAL.] By the court, ———,  
Judge of Probate, ——— County, Minnesota.

Prob. C. § 291.

SEC. 5911. **Administration.**— Letters of administration may be substantially in the following form:

STATE OF MINNESOTA, }  
County of ———. } ss.

——— is hereby appointed administrator of the estate of ———, deceased.

Witness ———, judge of the probate court in the county of ———, and the seal of the court affixed the ——— day of ———, A. D. 18—.

[SEAL.] By the court, ———,  
Judge of Probate, ——— County, Minnesota.

Prob. C. § 292.



SEC. 5912. **Guardianship.**— Letters of guardianship may be substantially in the following form:

STATE OF MINNESOTA, }  
 County of ———. } ss.

———— is hereby appointed guardian of the person and estate of ———, minor. (Or as the case may be.)

Witness ———, judge of the probate court of the county of ———, and the seal of the court affixed the ——— day of ———, A. D. 18—.

[SEAL.]

By the court, ———,  
 Judge of Probate, ——— County, Minnesota.

Prob. C. § 293.

## TITLE 18.

### RESIGNATIONS AND REMOVALS OF EXECUTORS, ADMINISTRATORS AND GUARDIANS.

SEC. 5913. **Resignation.**— An executor, administrator or guardian may at any time resign his trust, but such resignation shall not be effectual for any purpose until the court shall have examined and allowed his final account and shall have made its final order accepting such resignation.

Prob. C. § 294. Contained in § 1, ch. 75, acts 1887.

SEC. 5914. **Removal.**— When any executor, administrator or guardian, becomes insane or otherwise incapable of discharging his trust or unsuitable therefor, or has wasted or mismanaged the estate, or has failed to file an inventory of his account or to perform any order or decree of the probate court or has absconded, the probate court may remove him.

Prob. C. § 295. Substantially § 9, ch. 50, G. S., §§ 12, 14, ch. 51, G. S. 4 M. 25; 26 M. 404; 37 M. 232.

SEC. 5915. **Same — Citation.**— The probate court may on its own motion or on the petition of any person interested in the estate or ward, cite an executor, administrator or guardian to show cause why he should not be removed. Such citation shall be served on such executor, administrator or guardian, personally, or by leaving a copy at his last usual place of abode, with some person of suitable age and discretion then resident therein.

Prob. C. § 296.

SEC. 5916. **Same — Service of citation.**— In case any such executor, administrator or guardian, cannot be found within the county, or has no residence therein, a copy of such citation shall be deposited in the United States post office directed to him at his place of residence if such residence is known, if not known then the court may hear, try and determine the matters relating to such removal as if such citation had been duly served.

Prob. C. § 297.

SEC. 5917. **Administrator de bonis non.**— When any executor, administrator or guardian's resignation is accepted by the probate court, or he is removed, dies, or his authority extinguished, the remaining executor, administrator or guardian, if there be one, shall execute the trust; if there is no other, the probate court shall appoint such other person or persons as are next entitled thereto, to administer such estate not already administered. Such person may be appointed without notice.

Prob. C. § 298.

### PRIOR RESIGNATIONS.

SEC. 5918. **When an acquittance.**— That in all cases where any executor or administrator has heretofore resigned his trust, and the same has been accepted and his final account of administration has been examined, allowed and

approved by the proper court, such resignation is hereby declared to be legal and binding, and to have forever discharged him from all his duties, powers and liabilities as such executor or administrator, and he and his sureties upon any bond filed in such matter or estate are hereby forever released and acquitted.

1887, ch. 190, § 1: "An act to discharge executors and administrators and cancel their bonds." Approved March 7, 1887. This is substantially § 1, ch. 75, acts 1887, repealed by Probate Code, § 822, except that the above only applies to resignations "heretofore" made.

**SEC. 5919. Same — Exception.**— In all cases where any executor or administrator shall have heretofore made his final account of administration, and the same has been duly examined, allowed and approved by the proper court, he is hereby declared to have forever terminated his duties and powers as such trustee, and he, and the sureties upon any and all bonds which may have been filed in such estate, are hereby forever released and acquitted from all liability in such matter at the expiration of two years after the date of such allowance, *provided*, however, that in case improper credits shall have been allowed or proper charges against him have been omitted upon settlement of his final account, by mistake, the liability of such executor or administrator shall remain in respect thereto as heretofore, anything in this act to the contrary notwithstanding.

1887, ch. 190, § 2. Contained in acts 1887, ch. 75.

**SEC. 5920. When not an acquittance.**— Nothing in this act shall be construed to release an executor or administrator who has been guilty of intentional fraud or malfeasance in executing his 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.

1887, ch. 190, § 3. Contained in acts 1887, ch. 75.

**SEC. 5921. Executor defined.**— The word "executor" in this act shall be construed to include an administrator with the will annexed.

1887, ch. 190, § 4. Contained in acts 1887, ch. 75.

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## TITLE 19.

### CORONER TO TAKE CHARGE OF PERSONAL ESTATE IN CERTAIN CASES.

**SEC. 5922. When.**— When in case the probate court shall commit any insane person who has any money or other personal property, and there is no proper person or relative to take charge of such property, the court may deliver it to the coroner of the county for safe keeping or disposal as herein provided; also in case any money or property shall come into the hands of the coroner belonging to any deceased person when there is no proper person or relative to receive it. Such coroner in either case shall safely keep all such money or property until disposed of according to law.

Prob. C. § 299.

**SEC. 5923. When to be sold.**— In case no one entitled to such property shall demand the same within six months, the coroner shall report such fact to the probate court who may order the property sold at public sale, upon such notice as the court may direct by such coroner, who shall sell the same as directed and report such sale to the probate court. Such coroner shall be

allowed all reasonable expenses for the care of such property and selling the same, and after deducting such expenses he shall deposit the proceeds of such sale with the treasurer of the county, in the name of the deceased or insane person; the treasurer shall give the coroner duplicate receipts for the same, one of which shall be filed by the coroner with the county auditor and one in the probate court.

Prob. C. § 300.

SEC. 5924. **Proceeds.**—In case any executor, administrator or guardian shall be appointed within six years from the depositing of any such money with the county treasurer such county treasurer shall pay over to such executor, administrator or guardian such money so deposited for the descendant or ward. In case any insane person is restored all such money or property shall be returned to him.

Prob. C. § 301.

## TITLE 20.

### MISCELLANEOUS PROVISIONS.

#### POWERS OF PROBATE COURT.

SEC. 5925. **To correct records.**—The probate court may at any time, correct, modify or amend its records to conform with the facts in the same manner as a district court.

Prob. C. § 315. Acts 1881, Ex. S. ch. 76, repealed, made substantially the same provision.

SEC. 5926. **Examine witnesses — Preserve order.**—The probate court shall have the same power to examine witnesses and parties on oath, to compel their attendance, to preserve order during any proceeding before it, and punish contempt, as a district judge, possesses under the provisions of law.

Prob. C. § 311.

SEC. 5927. **Issue process.**—The probate court has power to issue a citation to a party, to issue a subpoena or attachment, and make all necessary orders, judgments and decrees, and issue all necessary executions, warrants or processes to enforce them; it may also issue commissions to take depositions.

Prob. C. § 312.

SEC. 5928. **Depositions.**—Depositions may be taken in all cases, and in the same manner and with like effect as depositions taken in the district court.

Prob. C. § 313.

SEC. 5929. **Adjourn hearings.**—The probate court may in its discretion adjourn any hearing before it from time to time for such reasonable time as it shall direct; in case of objection such adjournment shall be only for good cause shown by affidavit or otherwise.

Prob. C. § 314.

SEC. 5930. **Order notices.**—When notice of any proceedings in a probate court of this state shall be required by law, or be deemed necessary or desirable by the judge of such court, and the manner of giving the same shall not be directed by any statute, the court shall order notice of such proceedings to be given to all persons interested therein in such manner and for such length of time as it shall deem reasonable.

Prob. C. § 321.

SEC. 5931. **Furnish copy of records.**—It shall be the duty of the probate court to furnish a certified copy under its official seal of any paper on file

or of record in said court upon payment thereof at the rate of ten cents per folio and twenty-five cents for each certificate.

Prob. C. § 318.

SEC. 5932. **Husband construed.**— Whenever in this code the word “husband” occurs it shall be construed to apply also to wife.

Prob. C. § 316.

SEC. 5933. **Sheriff to execute process.**— The sheriff shall have the same powers and duties to execute the warrants, writs and other process of the probate court as given and imposed upon him by law with reference to the district court.

Prob. C. § 320.

SEC. 5934. **When probate judge insane.**— Whenever the probate judge of any county becomes or is considered insane, the judge of the district court for such a county shall, upon the verified petition of five legal voters thereof, proceed to examine into such alleged insanity, substantially in and manner and for the purpose prescribed in title three, chapter thirty-five, general statutes one thousand eight hundred and seventy-eight. If on such examination such probate judge is found to be insane or incapacitated to act from mental derangement, the governor shall, on presentation of the certificate of such findings or authenticated copy thereof, declare the office of such probate judge vacant and appoint a suitable person to fill such vacancy as provided by law.

Prob. C. § 319. This is acts 1885, ch. 164.

#### FOREIGN EXECUTOR, ADMINISTRATOR OR GUARDIAN.

SEC. 5935. **Evidence of appointment.**— A duly certified copy of letters testamentary or of administration or guardianship of any executor, administrator or guardian appointed in any foreign country, or in any other state, territory, the District of Columbia, or in any county in the state, or any other exemplification of the record of any such appointment, may be filed and recorded in the office of the register of deeds of any county in the state, and such record or a transcript thereof duly certified shall in all cases be prima facie evidence of such appointment.

Prob. C. § 302. This is § 1, ch. 63, acts 1869, which was amended by acts 1885, ch. 61.

SEC. 5936. **Discharge mortgages — Liens.**— Any such executor, administrator or guardian, may assign or release, satisfy and fully or partially discharge of record, any lien, mortgage or judgment on real estate or personal property, in the same manner and with like effect as the decedent or mortgagee could have done in his lifetime or the ward could have done if he was not under disability.

Prob. C. § 303. Substantially § 2, ch. 63, acts 1869, which was amended by 1881, Ex. S. ch. 34.

SEC. 5937. **Act as attorney in fact.**— Any foreign executor, administrator or guardian may act by his attorney in fact, thereto by him duly appointed, by a power of attorney executed and acknowledged in the same manner as is required for a conveyance of real estate, and recorded in the office of the register of deeds of the county in this state in which such act may be performed.\* The acts of an executor or administrator, as such before the revocation of his letters testamentary or of administration, shall not be invalidated by such revocation.

Prob. C. § 304. Above \* is § 3, ch. 63, acts 1869.

#### PETITIONS AND INFORMATION.

SEC. 5938. **To be in writing.**— All petitions and information shall be in writing and signed by the person making the same; they shall be verified to the effect that the same is true to the knowledge of the person making it,

except as to those matters stated on his information and belief, and as to those matters that he believes them to be true; the petition or information shall be made by at least one of the parties interested; a petition may be made and verified by an agent or attorney.

Prob. C. § 305.

SEC. 5939. **When deceased foreigner.**— When such application is made by any person, not the widow or of kin to the deceased, and the deceased was a native of any foreign country, the judge of probate shall cause such notice of the time and place of hearing such application to be served on the consul or other representative of the kingdom, state or country of which the deceased was a native, residing in the state of Minnesota, who may have filed a copy of his appointment as such consul or representative with the secretary of the state, by depositing a copy thereof in the post-office, postage paid, addressed to such consul or representative; and in case the kingdom, state or country of which deceased was a native, shall have no consul or representative in the state of Minnesota, then such notice shall be served as aforesaid on the secretary of state, and shall be by him forwarded to the representative of such kingdom, state or country at the city of Washington.

Prob. C. § 317.

#### DISBURSEMENTS.

SEC. 5940. **Allowed.**— Every executor, administrator or guardian shall be allowed their actual and necessary disbursements, including reasonable attorney's fees, and such reasonable sum for his personal services, as the court may deem just.

Prob. C. § 309.

SEC. 5941. **Fees of appraisers.**— All appraisers appointed by the probate court shall be allowed three dollars each per day and ten cents a mile for travel in going and returning.

Prob. C. § 310.

#### PUBLICATION.

SEC. 5942. **In English.**— All publications provided for in this code shall be printed and published in a newspaper printed and published in the English language, in the county, once in each week for three successive weeks.

Prob. C. § 306.

SEC. 5943. **When no newspaper.**— In case there is no newspaper printed and published in such county authorized to publish legal notices, then publication shall be made in such newspaper as the probate court may direct.

Prob. C. § 307.

SEC. 5944. **Proof of.**— Proof of publication shall be made in the same manner as other proofs of publication provided by law; all such proofs of publication shall be filed and shall be prima facie evidence of such publication, except on appeal.

Prob. C. § 308.

## TITLE 21.

## REPEALS, AND WHEN THIS CODE TAKES EFFECT.

SEC. 5945. **Proceedings conform to code.**— No action or proceeding commenced before this code takes effect and no right accrued is affected by its provisions, but the proceedings therein must conform to the requirements of this code, so far as applicable.

Prob. C. § 323.

SEC. 5946. **Fees.**— Each probate judge in this state shall receive for the use of the county for services rendered by him or his clerk or clerks, the fees herein provided, and no more.

Registering each matter to be charged but once, five cents. Recording a will, bond, letters testamentary, administration or guardianship, claim, orders, decrees and judgments, and orders in the nature of decrees and judgments, ten cents for each hundred words. Taking affidavits or verifications in probate matters, ten cents. Filing any papers except accounts and vouchers of executors, administrators and guardians, five cents each. Issuing any citation, writ, subpoena, or notice, twenty cents each. Entering order of publication, twenty cents each. Entering return of any citation, writ or subpoena, ten cents. Swearing each witness, five cents. Entering the attendance of each witness, five cents. Indexing each matter or cause, eight cents. Entering each order of court, five cents per folio. Transcribing or making copies of any files, papers, orders, decrees, or any records of any proceedings in court, when required by any person, ten cents per folio, and twenty cents for certificates. Making up complete record on certiorari or on appeal from any order, decree or judgment, ten cents per folio, and twenty-five cents for certificate of return. Issuing order or release of sale or mortgage, twenty-five cents, and ten cents per folio for each folio after the first. Each certificate to which the seal of the court is required, and not herein provided for, thirty-five cents. Probate of will, and entry thereof, fifty cents. Issuing letters testamentary, or letters of guardianship, or of administration under seal of court when not contested, seventy-five cents; when contested three dollars per day during the hearing thereof. Taking bond of executors, administrators or guardians, copy of order to appraisers, ten cents. Filing warrant and vouchers of an executor, administrator or guardian for settlement, and entering the same on the minutes of the court, fifteen cents; entering order of settlement of same, twelve cents. Examining partial or final accounts of guardians, executors or administrators, seventy-five cents each, where there are not more than fifty vouchers to be examined, and if any account shall contain more than fifty vouchers, the sum of five cents for each additional voucher so examined. Issuing citations to executors, administrators or guardians, twenty-five cents. Hearing every contested application for the appointment or removal of a guardian, administrator or executor, three dollars per day for each day of such hearing. Hearing on contested wills, three dollars per day for each day so occupied. Hearing objections on final accounting, three dollars per day. Approving bond on appeal, fifty cents. Examining and allowing accounts of executors, administrators, guardians, and claims against estates, fifteen cents for the first page, and for each additional page, five cents. Entering the accounts of an executor, administrator or guardian, ten cents for each folio.

Prob. C. § 324. G. S. ch. 70, § 5 (7), provided for fees of judges of probate, which was amended 1868, ch. 96. Acts 1875, ch. 37, required each estate administered to pay gross sum into county treasury as a fund for payment of judge's salary. This act was subsequently amended 1877, ch. 60; 1885, ch. 103.

SEC. 5947. **Record of fees.**— Each probate judge shall, in every matter, examination, hearing or proceeding, make out, file and record in a suitable

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SECS. 5948, 5949.]

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book for that purpose, an itemized account of all fees by him or his clerk received or charged therein; and on the first days of January, April, July and October of each year he shall make out and file with the county auditor an account, duly verified, of all fees by him charged or received during the next preceding three months, and shall pay into the county treasury all such fees received by him or his clerk, and if he fails so to do, shall be liable on his official bond for any deficit thereof and in addition thereto shall forfeit and pay for each instance of such failure and neglect any sum not less than fifty nor more than five hundred dollars, to be recovered in an action in the name of the state.

Prob. C. § 325.

SEC. 5948. **Repeal.**— That sections five, six, seven, eight and nine of chapter seven, and sections twenty-one, twenty-two, twenty-three and twenty-seven of chapter thirty-five, all of chapters forty-six, forty-seven, forty-nine, fifty, fifty-one, fifty-two, fifty-three, fifty-four, fifty-five, fifty-six, fifty-seven, fifty-eight, fifty-nine, and section seven of chapter seventy of the general statutes of eighteen hundred and seventy-eight, and chapters eleven, eighteen, twenty and sixty-nine of the general laws of eighteen hundred and seventy-nine, and chapters thirty-two, forty-three and one hundred and eighteen of the general laws of eighteen hundred and eighty-one, chapters seventy-six and eighty of the general laws of eighteen hundred and eighty-one, extra session, chapters forty-two, fifty-eight and one hundred and twenty-six of the general laws of eighteen hundred and eighty-three, chapters ten, nineteen, thirty-two, fifty, sixty-one, sixty-three, one hundred three, one hundred five, one hundred eighteen, one hundred twenty-three, one hundred twenty-eight, one hundred sixty-three and two hundred twenty-three of the general laws of eighteen hundred and eighty-five, and chapters thirty-four, fifty-two, sixty-seven, and seventy-five of the general laws of eighteen hundred and eighty-seven and all other acts or parts of acts inconsistent with this act are hereby repealed: *provided*, that nothing therein contained shall be considered as repealing any of the provisions of chapter one hundred and seven general laws of eighteen hundred and eighty-three, or any act amendatory thereof.

Prob. C. § 322. Acts 1883, ch. 107, is an act to authorize the organization and incorporation of annuity safe, deposit and trust companies.

SEC. 5949. **When take effect.**— This act shall take effect and be in force on and after the first (1st) day of October, eighteen hundred and eighty-nine (1889). Approved April 24th, 1889.

Prob. C. § 326.