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PART III
CIVIL ACTIONS AND PROCEEDINGS

CHAPTER 74

PROBATE COURTS

GENERAL PROVISIONS

3622. Establishment, sessions, etc.—A probate court, which shall be a court of record having a seal, is established in each county. The office of the probate judge shall be kept open at the county seat at all reasonable hours, and the court shall always be open for the transaction of business. A general term of such court shall be held on the first Monday in each month, and special terms at such times and places in the county as the judge may deem advisable. (819, 4409, 4413)

PROBATE COURTS GENERALLY

1. Jurisdiction in general—The jurisdiction of the probate courts is defined by the constitution (See Const. art. 6 § 7). It is neither a common law nor statutory jurisdiction (84–289, 292, 87+783). It is expressly limited and restricted to the estates of deceased persons and persons under guardianship (77–218, 221, 79+828). Within its sphere this jurisdiction is exclusive. The constitution gives to probate courts the entire and exclusive jurisdiction over the estates of deceased persons and persons under guardianship, in the same manner and to the same extent that it gives to the district court jurisdiction over civil cases in law and equity arising out of other matters of contract or tort (30–277, 281, 15+245; 37–225, 233, 33+792; 71–241, 244, 73+859; 68–388, 391, 71+402; 61–444, 446, 64+48; 83–215, 218, 86+1; 63–5, 11, 65+91; 84–353, 355, 87+944; 86–140, 147, 90+378; 71–371, 373, 74+148; 104+301. See 77–218, 79+828). But the jurisdiction of probate courts to determine claims against the estates of decedents is not exclusive except as provided by statute. Claims ex delicto are prosecuted in the district court (55–111, 56+583). The legislature cannot enlarge or diminish the jurisdiction conferred by the constitution but it may regulate its exercise by prescribing modes of procedure to be followed by the court in exercising it, including the process or proceedings by which the jurisdiction shall attach to a particular estate (37–225, 232, 33+792; 40–236, 238, 41+977). The exclusive jurisdiction of the probate courts cannot be interfered with by injunction issued out of the district court (71–371, 373, 74+148). The powers of the probate courts are not only general but plenary in cases where they are authorized to act. They are not courts of limited jurisdiction in the ordinary sense of that term (86–140, 146, 90+378). Their jurisdiction is general and as respects the subjects committed to them they have all the powers that any court has (29–27, 35, 11+136; 61–335, 341, 63+880; 66–454, 457, 69+330). They have implied power to do what is essential to such powers as are expressly conferred (82–324, 327, 84+1017, 86+333; 83–215, 218, 86+1; 37–225, 233, 33+792). When a probate court legally probates a will or appoints a first administrator it thereby acquires jurisdiction to direct and control the administration; and such jurisdiction continues over the administration, as one proceeding, until its close (37–225, 33+792; 61–444, 447, 64+48; 47–527, 529, 50+698).

2. Jurisdiction of estates of deceased persons—The jurisdiction of the probate courts over the estates of deceased persons is for the purpose of administering such estates and includes all matters necessarily pertaining to the proper administration of them (40–236, 238, 41+977). Estates are settled and administered by executors and administrators under the jurisdiction, supervision and control of the probate courts (37–225, 233, 33+792). Such courts have power to take charge of, preserve and distribute according to law the property of decedents (33–94, 95, 22+10; 40–236, 238, 41+977); to construe wills (30–277, 15+245; 104+301); and to determine who are creditors, legatees, devisees and next of kin (40–236, 239, 41+977). To give rise to such jurisdiction there must be a death and ownership of property by the deceased (86–140, 146, 90+378).

3. Nature and object of administration proceedings—Administration proceedings are in rem, the res being the estate of the deceased (44–5, 7, 46+79; 62–29, 36, 64+99; 33–176, 178, 180, 22+251. Contra 16–494, 447). The existence of assets is essential to

administration (44–5, 7, 46+79). The substantial facts accomplished by administration are the payment of debts and the distribution of the residue of the property (89–303, 305, 94+869).

4. **Necessity of administration**—When administration is not asked by the next of kin or creditors and no claims are filed within five years the heirs of an intestate may dispense with administration and divide the personal property by agreement (89–303, 94+869).

5. **Jurisdiction over persons under guardianship**—The jurisdiction of probate courts over persons under guardianship includes not only the appointment of guardians and the control of their official actions, but the care and protection of the estates of the wards formerly vested in the court of chancery (30–277, 282, 15+245; 32–385, 388, 20+366; 23–51; 24–143, 148; 64–371, 373, 67+207; 72–19, 21, 22, 74+899). The insane are wards of the probate court (72–19, 22, 74+899).

6. **Held to have jurisdiction**—To make an election for an insane person to take under a will (30–277, 15+245; 32–336, 354, 20+324; 37–225, 233, 33+792; 88–404, 93+314); to construe a will whenever such construction is necessary to the administration of the estate of a deceased person (30–277, 282, 15+245; 104+301); to order paid out of the estate of an insane person the witness' fees and attorney's fees incurred in proceedings for his restoration to capacity (72–19, 74+899); to compel an accounting by an executor after his discharge leaving the estate unadministered (83–215, 86+1); to render a decree of heirship as provided by 1897 c. 157 (86–140. 90+378); to determine a claim to an estate on a contract by the decedent to make a will in favor of the claimant (69–136, 72+59).

7. **Held not to have jurisdiction**—To determine a controversy between an heir or devisee and a third party claiming from him (34–330, 336, 26+9; 33–94, 22+10); to make partition of real estate after it has been assigned to those entitled to it (37–160, 33+912); to entertain an action by a representative to recover real or personal property alleged to belong to the estate or to recover a debt owing the estate (33–94, 96, 22+10); to determine a claim to real property under a conveyance from the deceased (40–236, 239, 41+977); to specifically enforce a contract for the conveyance of real estate (75–350, 364, 78+4; 86–140, 147, 90+378); to determine that a party has no right to the specific performance of a contract to convey made by the deceased (40–236, 41+977); to order a payment to be made to an executor in his individual capacity (81–251, 254, 83+989); to declare and enforce a trust arising from the purchase by a guardian of real estate with money of the ward, the guardian subsequently dying (39–18, 38+609); to compel a representative to make a further accounting after final decree, such decree being unreversed and unmodified (84–289, 87+783); of an action by distributees against personal representatives for shares assigned to them by the court (61–91, 92, 63+255; 84–289, 294, 87+783); of an action for the recovery of real property (86–140, 147, 90+378); of an action to recover the purchase price of land belonging to minors sold by a guardian (52–386, 54+185).

8. **Presumption of jurisdiction**—The probate court is a court of superior jurisdiction and it enjoys the same presumptions of jurisdiction as the district court. Its judgments and decrees are not subject to collateral attack for want of jurisdiction not affirmatively appearing on the face of the record (29–27, 11+136; 37–225, 230, 33+792; 40–254. 255, 41+972; 41–325, 332, 43+385; 60–49, 51, 61+826; 61–18, 22, 63+1; 61–335, 340, 63+880; 68–320, 322, 71+396; 86–140, 146, 90+378; 90–177, 179, 95+1109. See notes to §§ 3625, 3774).

3623. Judge—Election—Bond—There shall be elected in each county a probate judge, who, before he enters upon the duties of his office, shall execute a bond to the county board in the penal sum of one thousand dollars, to be approved by said board, conditioned for the faithful discharge of his duties, and for the faithful application of all moneys and effects that may come into his hands in the execution of the duties of his office, which bond, with his oath of office, shall be filed with the register of deeds. (818)

3624. Deliver books to successor—Whenever the term of office of any probate judge expires he shall deliver over to his successor in office all books and papers in his possession relating to his office, and upon failure so to do within five days after demand by his successor he shall be guilty of a gross misdemeanor. (820)

3625. Books of record—To be indexed—The court shall keep the following books of record, each of which shall be properly indexed:

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1. A register, in which shall be entered minutes of all proceedings of the court; those pertaining to the estate of a deceased person under the name of the decedent; those pertaining to guardians under the name of the ward; those pertaining to an insane person under his name; with a notation of all papers filed in each case and the date of filing; also a reference to the volume and page of other books wherein any record shall have been made in such matter.

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

3. A record of bonds, in which shall be recorded all bonds filed and approved by such court.

4. A record of letters, in which shall be recorded all letters testamentary, or of administration or guardianship, issued by such court.

5. A record of claims, in which shall be entered, under the title of the estate, all claims filed in favor of or against such estate; it shall contain the number of the claim, the date of filing, name of claimant, nature and amount of claim, amounts allowed and disallowed, and the date of such allowance or disallowance; it shall also state the nature and amount of any offset, the amount thereof allowed and disallowed, with the final balance.

6. A record of orders, in which shall be recorded all orders, decrees, and judgments made by the court, except orders allowing or disallowing claims, orders directing the publication of notices, and interlocutory and non-appealable orders. (4414)

Except as provided by § 3774 (61–18, 63+1; 103+885) the records import absolute verity and are not subject to collateral attack (22–393; 29–27, 11+136; 60–49, 51, 61+826; 37–330, 33+907; 40–254, 41+972; 61–18, 63+1). In making entries it is not necessary to use the seal of the court (26–201, 207, 2+497). Entries may be made by the clerk under the direction of the judge. They should be made promptly, but a delay, even of years, is not fatal, at least, if made during the term of the judge (29–27, 39, 11+136). Letters of guardianship are properly recorded under subd. 4 and such record is competent evidence without the production of the original letters and without accounting for them (29–27, 11+136). An order granting or denying the application of a person under guardianship to be restored to capacity should be recorded under subd. 6. Interlocutory orders defined (83–58, 60, 85+917).

3626. Court first acquiring jurisdiction has exclusive jurisdiction—Jurisdiction acquired by a probate court shall preclude the subsequent exercise of jurisdiction by any other probate court over the same matter, except as otherwise specially provided by law. (4410)

3626
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3627. Counties in which administration shall be had—Wills shall be proved and administration upon the estates of decedents shall be granted:

3627
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1. If the decedent, at the time of his death, was a resident of this state, in the county of such residence;

2. If a non-resident, dying within or without this state, in any county wherein he left property, or into which any property belonging to his estate shall come; and such administration first legally granted shall extend to all the assets of the decedent in this state. (4411)

This was designed to prevent conflict between the probate courts of the several counties and to remove doubt as to the proper probate court to apply to in any case (37–225, 233, 33+792). In case of a non-resident proceedings must be had in a county where there is property of the estate subject to administration. And this is so although the proceedings are based on a will probated in another state (48–37, 50+932. See 45–242, 244, 47+790). A right of action for the death of a non-resident is an "asset" giving the court of the county where the injury resulting in death was inflicted jurisdiction (44–5, 46+79).

3628. Judge, when disqualified by interest—Every probate judge shall be disqualified from acting as such in any matter in which he, or his wife, or any of his or her kin nearer than first cousins, shall be interested as heir, executor, administrator, guardian, devisee, legatee, or creditor; in any matter involving the probate or interpretation of any will drawn or witnessed by him; in the determination of any question in which he shall be a necessary witness; and in any matter involving the property right of any person in respect to which he is or has been the attorney or counsel of such party. (4412; '99 c. 181; '01 c. 331)

3629. Judge disqualified or absent, who to act—Whenever so disqualified, any probate judge may, and when it is made to appear by the verified petition of any person interested or his attorney that such ground of disqualification exists he shall, make an entry in his records, reciting such grounds, and by order appoint the probate judge of an adjoining county to hear, try, and determine the matters as to which such disqualification relates. Whenever, by

reason of necessary absence, any probate judge shall be unable to act, he shall request, in writing, the probate judge of an adjoining county to act in his place in all matters arising during such absence. And the judge so appointed or requested shall attend for that purpose at such times as may be necessary. The expenses of the judge so acting shall be paid by the county in which he shall be so called to act. (4412; '99 c. 181; '01 c. 331)

3630. When a judge becomes insane—Whenever the verified petition of five voters of any county is presented to a judge of the district court of such county, stating that the probate judge of such county is insane, such judge shall examine into such alleged insanity in the manner provided by law for like examinations by probate judges. If upon the examination such probate judge is found to be insane or incapacitated to act by reason of mental disability, the district judge shall certify such findings to the governor, who shall thereupon declare the office of such probate judge vacant, and fill the same by appointment. (817, 4734)

3631. Clerk of probate court—Every probate judge may appoint a clerk, who shall perform the duties assigned him by law or such judge. Such appointment shall be in writing, signed by the judge, and filed in the office of the clerk of the district court of the county in which the same is made. Before entering upon the duties of his office, such clerk shall execute a bond to the county board, with sufficient sureties to be approved by said board, in the penal sum of five hundred dollars, conditioned for the faithful discharge of his duties. Said bond, with his oath, shall be filed and recorded in the office of the register of deeds, and an action may be maintained on said bond by any party aggrieved by the violation of the conditions thereof. (821, 822)

Clerk may authenticate and certify copies of the records (86–140, 148, 90+378). He may make entries in the records under the supervision of the judge (29–27, 39, 11+136).

3632. Judge or clerk not to be counsel—No judge or clerk of any probate court shall be counsel or attorney in any action or proceeding for or against any legatee, heir, creditor, executor, administrator, guardian or ward over whom, or whose estate or accounts, he has jurisdiction by law, nor shall either of them give counsel or advice, or draw or prepare any paper relating to any estate which is or may be brought before such court, except citations, orders, decrees, executions, warrants, or subpoenas issuing out of such court. Nor shall any such clerk, or the law partner of any probate judge or clerk, appear or practice as attorney in any matter or proceeding before such probate court. (4420–4422)

3633. Incidental powers—In addition to their general powers under the constitution, probate courts shall have the same power as district courts in the following matters:

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1. To examine witnesses and parties on oath, to compel their attendance, to preserve order during any proceedings before it, and punish contempts;

2. To issue citations, subpoenas, and attachments, to make orders, judgments, and decrees, to issue all necessary executions, warrants, or processes to enforce them, and to issue commissions to take depositions;

3. To adjourn any hearing from time to time, provided that when objection is made the adjournment shall be only for cause, shown by affidavit or otherwise;

4. To correct, modify, or amend its records to conform to the facts, and to correct its final decrees so as to include therein property omitted from the same or from administration. (4726, 4727, 4729, 4730)

1. Conforming records to the facts—84–289, 295, 87+783; 93–350, 101+496. See 77–533, 80+702; 65–60, 67+808.

2. Vacating orders, judgments and decrees—The court may vacate an order, judgment or decree procured by fraud, misrepresentation, or through surprise or excusable inadvertence or neglect (§ 3872 subd. 8; 32–142, 19+651; 32–155, 157, 19+973; 71–250, 255, 73+966; 82–324, 327, 84+1017, 86+333. See 57–109, 58+682; 61–335, 63+880). The court may change a former order by vacating it entirely or in part, by substituting another for it, or by vacating it in part and substituting something else in lieu thereof. The court cannot modify a judgment after the time for taking an appeal therefrom (93–350, 101+496). An order admitting a will to probate may be vacated to allow a contest

(71–250, 73+966). An order allowing a claim may be vacated to allow the claim to be contested (32–142, 19+651. See 53–529, 55+738). A final decree of distribution may be vacated to allow a claim to be presented against the estate (89–440, 95+211). It should require a very strong case to vacate such a decree after the lapse of two years (39–212, 215, 39+399). The probate of a will cannot be vacated for failure to appoint a guardian ad litem for minors interested in the estate (30–202, 14+887). The court loses power to vacate its orders and judgments when the subject matter passes beyond its jurisdiction (33–94, 22+10. See 65–60, 63, 67+808). A final decree of distribution cannot be set aside to the prejudice of bona fide purchasers from distributees (In re Estate of Kenny, Filed Jan. 19, 1906).

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3634. Certified copies—The probate court shall furnish a certified copy of any paper on file or of record in such court, upon payment therefor at the rate of ten cents per folio, and twenty-five cents for each certificate. (4733)

See § 615.

3635. Decisions, when filed—The decision of any issue of law or fact shall be in writing, and filed in said court within ninety days after submission unless prevented by sickness or unavoidable casualty. This provision shall be construed as mandatory, and the county auditor shall not sign or issue a warrant for the salary of the probate judge, or any instalment thereof, unless the voucher for such warrant is accompanied by an affidavit of the judge that all matters submitted to him for decision ninety days or more prior to the filing of such affidavit have been decided as herein required, unless a decision has been prevented by sickness or casualty, in which case the reasons for the delay shall be specifically stated, and the making of a false affidavit shall be sufficient cause for complaint to the governor. ('03 c. 394)

3636. Definitions—The word "representative," when used in these laws with reference to probate courts and proceedings therein, shall be construed as including executors, administrators, special administrators, administrators with the will annexed, administrators de bonis non, and guardians. The word "minor" means a male under the age of twenty-one years, or a female under the age of eighteen years. (4534)

Females eighteen years old are of age (24–194; 138 Fed. 6).

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07 - 184
07 - 322
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3637. Salaries and clerk hire—In all counties in which the compensation of judges of probate is not fixed by special law, the probate judges shall receive in full compensation for all services rendered by them annual salaries as follows: In counties whose population is less than three thousand, three hundred dollars; if the population is three thousand and less than six thousand, four hundred and seventy-five dollars; if six thousand and less than nine thousand, six hundred and fifty dollars; if nine thousand and less than twelve thousand, eight hundred and twenty-five dollars; if twelve thousand and less than fifteen thousand, one thousand dollars; if fifteen thousand and less than eighteen thousand, eleven hundred and seventy-five dollars; if eighteen thousand and less than twenty-three thousand, thirteen hundred and fifty dollars; if twenty-three thousand and less than thirty thousand, fifteen hundred dollars; if thirty thousand and less than thirty-five thousand, eighteen hundred dollars; if thirty-five thousand and less than fifty thousand, two thousand dollars; if fifty thousand and less than one hundred thousand, three thousand dollars; if one hundred thousand or over, forty-five hundred dollars. In addition to the foregoing salaries, annual compensation for clerk hire for probate judges shall be as follows: In counties having a population of fifty thousand and less than one hundred thousand, one thousand dollars; if the population is one hundred thousand and less than two hundred thousand, fifty-three hundred dollars, of which eighteen hundred dollars shall be for the salary of the clerk of such court and the balance for additional clerk hire and stenographer; if two hundred thousand or over, fifty-nine hundred and forty dollars, of which twenty-five hundred dollars shall be for the salary of the clerk of such court, eleven hundred dollars for the salary of a deputy clerk, and the balance for salary of three general clerks. In counties having a population of thirteen thousand and less than fifty thousand, the county board may allow probate judges as clerk hire not to exceed nine hundred dollars annually.

In counties having less than thirteen thousand it may allow clerk hire, if deemed necessary, to an amount not exceeding one-fourth of the salary of the judge of such court. All such salaries and clerk hire shall be paid monthly from the county treasury upon the warrant of the county auditor. In all counties having a population of two hundred thousand or over, probate judges and clerks shall charge for their services the fees prescribed by law, which shall be paid into the county treasury. No probate judge or clerk shall charge or receive any fees, except for taking acknowledgments and administering oaths, outside their probate duties, or for certified copies of the records and files of the court, for which the same compensation shall be allowed as is given by law to clerks of the district court. (4416–4419; Sp. L. '91 c. 448; '99 c. 145; '01 c. 236; '02 c. 71; '03 c. 226; '03 c. 365 ss. 19, 20)

See 1905 cc. 81, 155

PROBATE PRACTICE

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3638. Proceedings, how begun—Every proceeding in the probate court shall be commenced by petition, briefly setting forth the ground of the application, and signed by or on behalf of the party making the same, and be verified as in the case of pleadings in civil actions. (4718)

In probate practice proceedings are initiated by petition. Issues are not joined by formal pleadings as in the district court. All petitions and motions relating to a particular subject matter may be heard and disposed of at the same time (83-366, 368, 86+351).

3639. Notice of hearing, when required—Before proceeding, the court shall require notice to be given to all persons interested, in the following cases:

1. In granting letters of administration;
2. In the allowance of any last will and testament, and granting letters thereon;
3. In hearing the account of an executor or administrator;
4. In distributing any estate to heirs, legatees, or devisees;
5. In licensing the sale, mortgage, or lease of real estate.

In all other cases, unless in this chapter otherwise provided, such notice shall be given as the court may direct.

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3640. Notice by citation—Additional notice—For the purposes of such notice, the court shall issue its citation, requiring all persons interested to show cause, if any they have, at a time and place specified, why the petition therein referred to should not be granted; and such citation shall be served by three weeks' published notice. The court, in its discretion, may cause other or further notice to be given to such persons as it may deem proper.

3641. Notice in certain cases—Every citation to an individual requiring him to perform a particular duty, if he resides in the state and his residence is known, shall be served upon him personally eight days before the day of hearing, or such less time as the court in such citation shall direct.

3642. Will of alien—Notice—Whenever application for letters of administration with the will annexed shall be made by any person other than the widow or kin of a decedent, and such decedent was a native of any foreign country, notice of the time and place of hearing shall be served by mail on the consular representative of such country, if there be one in this state; otherwise upon the secretary of state, who shall forward the same to the chief diplomatic representative of such country at Washington. (4732)

3643. Further notice—The court may require notice to be given in addition to the notices hereinbefore provided for, to designated parties known to be interested, by mailing the same, or by publication in a newspaper printed in other than the English language, or in such other manner as it may order.

3644. Notice of filing orders—Every probate judge, at the time of filing any appealable order, judgment, or decree, shall cause notice of such filing to be given, either personally or by mail, to all parties interested who have appeared of record on the hearing, or to their attorneys: Provided, that this

section shall not apply in uncontested cases or where final decision was made at the time of hearing.

3645. Notice of petition to remove representative—The probate court on its own motion may, and on petition of any person interested in the estate shall, cite the representative to appear and show cause why he should not be removed. Whenever such representative resides in the county, such citation shall be served upon him personally or by leaving a copy at his last usual place of abode with some person of suitable age and discretion then resident therein; when he resides out of the county and his residence is known, by mail; and when unknown, by publication. (4709, 4710)

76–323, 79+176; 83–366, 368, 86+351.

DESCENT OF PROPERTY

3646 117-NW 830

3646. Real estate in general—Posthumous children—When any person dies seized of any lands, tenements, or hereditaments, or any right thereto, or entitled to any interest therein, in fee simple or for the life of another, not having lawfully devised the same, they shall descend as hereinafter provided. And for all the purposes of this chapter a posthumous child shall be considered as living at the death of its parent. (4469, 4476)

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3647. Homestead—The homestead of such decedent shall descend, free from any testamentary or other disposition thereof to which the surviving spouse, if there be one, shall not have consented in writing, and exempt from all debts which were not valid charges thereon at the time of such death, as follows:

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1. If there be no surviving child, nor lawful issue of any deceased child, to the surviving spouse, if any.

2. If there be both a spouse and children, or issue of deceased children, surviving, then to such spouse for the term of his or her natural life, and remainder to such children and the issue of deceased children by right of representation.

3. In all other cases such homestead may be disposed of by decedent's last will. If not so disposed of, it shall descend the same as his other real estate, but exempt from his debts if inherited by his surviving children or the issue of children deceased. (4470)

The exemption of the homestead from the debts of the deceased is absolute, that is, it does not depend on the occupancy of the land by the surviving spouse as a home. But it is not exempt from the debts of the surviving spouse unless it is actually occupied as a home (50–264, 52+862; 71–108, 73+639; 31–168, 17+280). The rights of the surviving spouse do not depend upon any formal selection of the homestead (28–13, 8+830). The assent in writing of the surviving spouse to a testamentary disposition of a homestead may, at least if there are childen, be executed after the decease of the testator. The right of election under § 3649 applies to a testamentary disposition of a homestead (72–81, 75+111). A testamentary disposition of a homestead assented to by the surviving spouse does not render the property liable for the debts of the testator (72–95, 75+112). A failure to exercise the right of election under § 3649 has the same effect on a testamentary disposition of a homestead as a written assent, and it has this effect although the result is to cut off rights of surviving children in the homestead (75–53, 77+551). The provisions of § 3649 are not applicable where there is no child nor the issue of a deceased child surviving the testator (79–267, 82+635). The word "surviving" in the statute refers to the time of the death of the testator and not to the time the will was executed (75–2, 77+420). If the surviving spouse renounces the will the homestead descends to such spouse and the children unaffected by the will (86–91, 90+127). The homestead rights of a widow are limited to the land which her husband had actually devoted to homestead purposes and was occupying at the time of his decease (54–190, 55+960). Where a homestead has been lost by removal and failure to file the statutory notice it does not descend to the surviving spouse as such (40–172, 41+1059). A surviving spouse cannot be allowed to waive a claim to the homestead fixed by law and take a part thereof to the injury of other parties interested in the distribution of the decedent's estate (45–323, 47+973). Children by a former marriage stand on the same footing as children of the marriage existing at the time of the decedent's death (104+137). If there are no children a surviving spouse takes an absolute title to the homestead (89–482, 95+307). The estate of a surviving spouse in case there are children is an absolute unconditional estate for life (31–168, 17+280; 42–189, 193, 44+53). It is not qualified by or subject to a distinct

or independent right of occupancy by the children. The surviving spouse has the sole right to the use, enjoyment and disposition of such estate during his or her life without regard to the children (42–189, 193, 44+53). Such estate is a freehold (85–83, 89, 88+419. See 28–13, 8+830). Collateral heirs take subject to the debts of the decedent (62–380, 64+924, 65+348). Cited (62–135, 137, 64+155; 66–209, 212, 68+974; 66–327, 340, 69+31; 61–552, 554, 64+47).

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3648. Lands other than homestead—The surviving spouse shall also inherit an undivided one-third of all other lands of which decedent at any time during coverture was seized or possessed, to the disposition whereof, by will or otherwise, such survivor shall not have consented in writing, except such as have been appropriated to the payment of decedent's debts by either execution or judicial sale, by general assignment for the benefit of creditors, or by insolvency or bankruptcy proceedings, and subject to all judgment liens. But the lands so inherited shall be subject in their just proportion to such debts of the decedent as are not paid out of his personal estate. The residue of such other lands, or, if there be no surviving spouse, then the whole thereof, shall descend subject to the debts of the intestate, in the manner following:

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117-NW 830

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

2. If there be no surviving child and no lawful issue of any deceased child, and the intestate leaves a surviving spouse, then the whole estate shall descend to such spouse.

3. If the intestate leaves no issue nor spouse, his estate shall descend to his father and mother in equal shares, or, if but one survive, then to such survivor.

4. If there be no surviving issue nor spouse, nor father nor 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.

5. If the intestate leaves neither issue, spouse, father, mother, brother, nor sister, nor living issue of any deceased brother or sister, his estate shall descend to his next of kin in equal degree, except 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.

6. If the intestate leave no spouse nor kindred, his estate shall escheat to the state. (4471; '01 c. 33)

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1. Nature of wife's interest in husband's realty—It was formerly held that the statutory interest of a wife in her husband's realty given by this section was merely an enlargement of common law dower and ought to be construed in accordance with common law rules regarding dower (34–159, 24+920; 35–291, 293, 28+920; 46–477, 479, 49+251; 51–406, 53+717; 54–352, 56+46). It is now held that such interest is purely statutory without any of the essential features of dower and that it is not to be construed in accordance with common law rules regarding dower (55–274, 56+828; 71–61, 73+640; 75–4, 77+421). During the husband's life the wife's interest is inchoate and contingent. It is not an estate or even a vested interest. It is a mere expectancy (35–291, 28+920; 85–83, 88, 88+419). But it is an interest which the law recognizes and which the wife may protect (25–516; 74+273, 77+139; 79–267, 271, 82+635; 91–45, 97+452). On the death of the husband it becomes vested at once (55–274, 56+828; 62–135, 138, 64+155), and becomes a freehold estate if such was the estate of the husband (85–83, 89, 88+419).

2. Nature of husband's interest in wife's realty—The nature of a husband's interest in his wife's realty other than her homestead is the same as her interest in his (See cases under Note 1). It is not the common law estate by curtesy, but is a purely statutory interest (75–4, 7, 77+421).

3. Title vests on death of ancestor—Under this section the title to lands of an intestate vests in the surviving spouse and heirs immediately on his death without administration proceedings. Their estate is subject to alienation and devise and attachment. A purchaser, whether at a voluntary or compulsory sale, acquires the estate subject to the rights of creditors. The estate is not subject to the lien of a judgment rendered against the intestate before his death but not docketed until thereafter (62–135, 64+155).

4. Liability for debts—The interest of a surviving spouse under this section is subject to the payment of debts in the course of administration the same as the estate of other heirs (55–274, 56+828; 66–209, 212, 68+974; 71–61, 73+640; 75–4, 77+421; 93–489, 494, 101+797), but it can be so subjected only in administration proceedings (43–403, 45+853; 75–4, 77+421). Prior to 1901 c. 33 the inchoate interest of one spouse was un-

affected by a sale on execution against the other spouse (51–406, 53+717; 53–73, 77, 54+1055; 71–61, 65, 73+640; 74–273, 277, 77+139; 75–4, 7, 77+421; 89–432, 440, 95+216, 769; 91–45, 48, 97+452). This section does not refer to secured claims (62–135, 138, 64+155).

5. Sale to pay legacies—If the estate cannot be equitably divided the entire estate, including the undivided one-third interest of a surviving spouse, may be sold to pay legacies (93–489, 101+797).

6. Assent to disposition—Quitclaim deed signed by husband and wife will bar statutory interest of wife (57–452, 59+533). Interest of spouse subject to equitable doctrine of election or estoppel (32–336, 20+324. See 104+958).

7. Election—The provisions of § 3649 are applicable to this section (72–81, 75+111; 72–95, 75+112).

8. Subd. 3—Prior to revision a father took the entire estate to the exclusion of the mother (81–197, 206, 83+538).

9. Subd. 5—Next of kin in equal degree take per capita; in unequal degree, per stirpes. Where the next of kin were six nephews and nieces, two of them being children of one deceased brother and four of them of another, it was held that they all took equal shares (71–11, 73+511). Rule where the next of kin are all cousins (84–161, 86+1004).

10. Cited—92–527, 529, 100+366; 61–552, 554, 64+47; 66–327, 340, 69+31.

3649
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117-NW 518

3649. Election—Interpretation—Devise not additional—If the will of a deceased parent makes provision for a surviving spouse in lieu of the rights in his estate secured by statute, unless such survivor, by an instrument in writing filed in the probate court in which such will is proved within six months after the probate thereof, shall renounce and refuse to accept the provisions of such will, such spouse shall be deemed to have elected to take thereunder. And no devise or bequest to a surviving spouse shall be treated as adding to the right or interest secured to such survivor by statute, unless it clearly appears from the contents of the will that such was the testator's intent: Provided, that if the title to the homestead be in litigation, and the same be not determined within the six months aforesaid, then said spouse may so elect within thirty days after said litigation is concluded. (4472; '97 c. 240)

Applicable to testamentary disposition of homestead. Assent in writing may be executed after decease of testator (72–81, 75+111; 72–95, 75+112). Inapplicable where there is no child nor issue of a deceased child surviving the testator (79–267, 82+635). Failure to file writing renouncing and refusing to take under will is an election to take under will (72–32, 74+1020). Failure to elect has same effect on testamentary disposition of homestead as a written assent and it has this effect although the result is to cut off the rights of surviving children in the homestead (75–53, 77+551). If a surviving spouse renounces a will the homestead descends to such spouse and the children unaffected by the will (86–91, 90+127). Failure to elect held not to affect judgment lien (77–138, 79+660). Election to take under will held not to affect creditors (72–95, 75+112). Election of widow to take under will bars her from claiming realty conveyed by her husband during coverture without her consent (42–14, 43+563). Widow held not put to an election by provisions of a will (32–513, 21+725). Election by court or guardian for insane widow (30–277, 15+245; 32–336, 354, 20+324; 37–225, 233, 33+792; 88–404, 93+314). Under former statutes (32–336, 20+324; 34–159, 24+920; 46–477, 49+251).

3650. Illegitimate child—An illegitimate child shall inherit from his mother the same as if born in lawful wedlock, and also from the person who, in writing and before a competent attesting witness, shall have declared himself to be his father; but such child shall not inherit from the kindred of either parent by right of representation, unless during his lifetime his parents intermarry, in which case he shall no longer be deemed illegitimate. (4473)

3651. Estate of illegitimate child—If any illegitimate child dies intestate and without lawful issue, his estate shall descend to his mother, or, in case of her prior decease, to her heirs at law. (4474)

3652. Degrees, how 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 from one of his ancestors, in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance. (4475)

3653
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115-NW 265

3653. Personal estate—Distribution—When any person dies owning personal property, or any interest therein, the same shall be disposed of and distributed as follows:

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

2. In case there is no surviving widow, then the minor children, if any, shall receive the same allowances, to be selected by their guardian.

3. The widow or children, or both, constituting the family of the decedent, shall have such reasonable allowance out of his personal estate as the probate court deems necessary for their maintenance during the settlement of the estate, according to their circumstances, which in case of an insolvent estate shall not be longer than one year after administration is granted, nor, in any case, after the distributive share of the widow in the residue of the personal estate has been assigned to her.

4. If from the inventory of an 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 allowances made for the widow and children, the court, after the payment of the funeral charges and expenses of administration, shall assign for the use and support of the widow or the children, or both, constituting the family of the decedent, the whole of said estate.

5. If the personal estate amounts to more than the allowances mentioned in this section, the excess thereof, after the payment of the funeral charges and expenses of administration, shall be applied to the payment of the decedent's debts.

6. The residue, if any, of the personal estate shall be distributed as follows: one-third thereof to the surviving spouse, if any, free from any testamentary disposition thereof to which such survivor shall not have consented in writing; the remainder of such residue, or, if there be no surviving spouse, then the whole thereof, except as otherwise disposed of by will, shall be distributed in the same proportions to the same persons and for the same purposes as prescribed for descent of real estate by § 3648 subds. 1–6.

7. All the provisions of this section shall apply as well to a surviving husband as to a surviving wife. (4477; '99 c. 149; '03 c. 334)

1. Subd. 1—Right to allowance absolute. Appropriation of prescribed amount by widow and sale by her before formal order of allowance sustained (39–334, 40+156).

2. Subd. 3—Allowance may be made before inventory and appraisal (104+535), and before election under § 3649 (64–315, 67+69). May be made out of rents and profits of realty (64–315, 67+69). Widow electing to take under will not entitled to allowance in addition to provisions of will, as against other devisees (64–315, 67+69). Statutory allowances received during administration held not payments upon a widow's annuity under an antenuptial contract (30–80, 14+259).

3. Subd. 6—Provision giving one-third to surviving spouse not consenting to other testamentary disposition is new (See for former rule 32–513, 515, 21+725; 35–291, 28+920; 88–404, 93+314).

4. Cited—55–300, 308, 56+1115; 61–552, 554, 64+47; 66–209, 212, 68+974; 66–327, 340, 69+31; 81–197, 206, 83+538.

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107-NW 148

3654. Application to determine descent—Whenever any person dies leaving real estate, or some interest therein, and no will has been proved nor any administration granted thereon in this state within five years after his death, or real property has been omitted in the administration or in the final decree, any person claiming an interest in such real estate may petition the probate court of the county wherein the same or any part thereof is situated to determine its descent and assign it to the persons entitled thereto. ('97 c. 157; '01 c. 346 s. 1; '03 c. 23)

86–140, 143, 90+378.

3655. Contents of petition—Such petition, which shall be verified, shall state that more than five years have passed since decedent's death, that no will has been probated nor any administration granted in this state, or if administration was had, that real property was omitted in the administration or final decree, and shall give the name of the decedent, the time and place of his death, the contents of his will, if he left one, and the names and residences of

his heirs, and of his devisees, if any, according to the best information of said petitioner; and it shall contain a description of such real estate, and disclose the interest of the decedent and of the petitioner therein. ('01 c. 346 s. 2)

3656. Hearing, notice, etc.—Upon the filing of said petition the court, by its order, shall require all persons interested to show cause, at a time and place therein fixed, why the same should not be granted, and notice of such hearing shall be given in the manner prescribed by law upon an application for a final decree. All parties interested may appear and be heard thereon, and the court, in its discretion, may require that issues be framed and may confine the proofs to such issues. ('01 c. 346 s. 1; '03 c. 23)

3657. Action by the court—If, upon such hearing, it transpires that such decedent died testate, his will shall be admitted to probate upon the proofs required by law in other cases. And in all cases the court shall hear and determine the facts, and enter its decree, assigning and distributing all such real estate to the persons entitled thereto, which decree shall have the force and effect of a final decree of the probate court, and may be appealed from in like manner. A certified copy of any such decree may be filed for record with the register of deeds, who shall record the same, and enter in his reception book the name of the decedent as grantor, and the names of the persons to whom said real estate is assigned, as grantees. ('01 c. 346 s. 3)

3658. Government homestead patented to "heirs"—Whenever any person holding a homestead or tree claim under the laws of the United States shall have died before a patent therefor has issued, and, by reason of such death, a patent shall afterward be granted to "the heirs" of such person, the probate court of the county in which the lands so patented are situated, upon petition, notice, and hearing substantially in the form and manner provided for in §§ 3654–3657, may determine who are such heirs, and may assign to them their respective shares in said homestead or tree claim; and a copy of the decree of assignment may be filed, recorded, and entered in like manner and with like effect. ('01 c. 275; '02 c. 12)

WILLS—EXECUTION, EFFECT, ETC.

3659. Who may make a will—How executed—Every person of full age and sound mind, by his last will in writing, signed by him, 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, may dispose of his estate, real and personal, or any part thereof, or right or interest therein; and the words "every person" shall include married women. (4423, 4426)

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A will must be signed by the testator in the presence of the subscribing witnesses, or, if not so signed, the testator must acknowledge to such witnesses that the signature thereto attached is his, or in some other way unequivocally indicate to them that the will about to be signed by them as witnesses is his last will, and has been signed by him. The right to dispose of property by will is statutory and the statutory mode of execution must be followed with reasonable strictness. If it is not the will is void (79–101, 81+758; 81–30, 83+439). If the witnesses sign in the immediate and conscious presence of the testator it is not necessary that he should see them do so. It is not necessary that he should formally request them to attest his will (25–39). Where the witnesses subscribed the will in a room adjoining that in which the testator lay in bed but immediately after signing showed him their signatures and he pronounced it "all right" after examination, it was held sufficient (80–180; 83+58). Where another signs for the testator by the latter's "express direction" the direction must precede the signing and the signing must be in obedience to the direction. Subsequent acquiescence by the testator is alone insufficient. If the direction is by gestures they must be as unambiguous as words (45–361, 47+1069). An attestation of alterations in a will held insufficient (20–245, 220, See 76–237, 79+104). A letter acknowledging a debt as a proper claim against the estate of the writer held not a will because not attested (73–266, 76+27). Query whether a contract to make a will executed and attested as prescribed by this section may be treated as a will (69–136, 72+59). What constitutes a "sound mind" (57–307, 311, 59+199; 83–324, 86+408; 27–280, 6+791, 7+144; 86–163, 90+319; 42–273, 44+61; 38–112, 35+726; 39–204, 39+143).

3660. Competency of witnesses—If a witness to a will is competent at the time of his attestation, his subsequent incompetency shall not prevent the

probate and allowance of such will; nor shall a mere charge on the land of the testator for the payment of his debts prevent a creditor from being a competent witness to his will. (4426; '99 c. 338)

56–33, 57+219.

3661. Nuncupative wills—Nuncupative wills shall not be valid unless made by a soldier in actual service or by a mariner at sea, and then only as to personal estate. (4427)

3662. Wills made out of the state—A will made out of the state and valid according to the laws of the state or country in which it was made, or of the testator's domicil, if in writing and signed by the testator, may be proved and allowed in this state, and shall thereupon have the same effect as if it had been executed according to the laws of this state. (4454; '01 c. 114)

3663. Legacy to subscribing witness—A beneficial devise or legacy made in a will to a subscribing witness thereto shall be void, unless there be two other competent subscribing witnesses who are not beneficiaries thereunder. But if such witness would have been entitled to any share of the testator's estate in the absence of a will, then so much of the share that would have descended or have been distributed to him as will not exceed the value of the devise or bequest shall be assigned to him by the probate court in its decree of distribution from the part of the testator's estate included in such void bequest. (4428, 4429)

56–33, 57+219; 67–335, 69+1090.

3664. Probate necessary and conclusive—No will shall be effectual to pass either real or personal estate unless duly proved and allowed in the probate court or on appeal. Such probate shall be conclusive as to the due execution of a will. (4438)

The probate of a will is conclusive that it was duly executed in conformity with the statute by the person purporting to execute it; that he had legal capacity to execute it; and that it was his last will. It does not determine the legal effect of the will or of its various provisions (26–259, 2+945; 47–171, 176, 49+679; 33–509, 511, 24+301; 45–429, 47+1133).

3665. Written wills, how revoked or canceled—No will in writing, except in the cases hereinafter mentioned, shall be revoked or altered otherwise than by some other will in writing, or by some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses; but nothing in this section shall prevent the revocation implied by law from subsequent change in the condition or circumstances of the testator. (4430)

20–245, 220; 38–169, 36+269; 47–171, 49+697; 76–237, 79+104; 88–386, 93+109; 104+825.

09 3666 53 **3666. Will revoked by marriage**—If, after making a will, the testator marries, the will is thereby revoked.

This provision is new (See 66–327, 69+31; 85–247, 88+739).

3667. Duty of custodian of will—A person who has the custody of a will shall forthwith, after notice or information of the death of the testator, deliver such will into the probate court which has jurisdiction thereof, or to the executor named in the will; and if a person, without reasonable cause, neglects so to deliver a will after being duly cited for that purpose by such court, he shall be deemed guilty of contempt of court. (4431)

3668. After-born child—If any child of a testator, born after the death of such testator, has no provision made for him by his father in his will or otherwise, he shall take the same share of his father's estate that he would have taken if the father had died intestate. (4446)

14–18, 5.

3669. Child not provided for in will—If a testator omits to provide in his will for any of his children or the issue of a deceased child, they shall take the same share of his estate which they would have taken if he had died intestate, unless it appears that such omission was intentional, and not occasioned by accident or mistake. (4447)

3-209, 140; 14-18, 5.

3670. From what estate such share taken—If an after-born child, or a child or the issue of a child omitted in the will, takes a portion of a testator's estate under the provisions of §§ 3668, 3669, such portion shall first be taken from the estate not disposed of by will, if any; if that be insufficient, so much as is necessary shall be taken from all the devisees and legatees in proportion to the value of what they respectively receive under such will. But if the obvious intention of the testator in relation to some specific devise, bequest, or other provision of the will would thereby be defeated, then such specific devise, legacy, or provision may be exempted from such apportionment, and a different apportionment be adopted, in the discretion of the court. (4448)

3671. Devisee or legatee dying before testator—If a devise or legacy be made to a child or other relative of the testator, who dies before the testator, but leaves issue who survive the testator, such issue, unless a different disposition be made or required by the will, shall take the same estate which such devisee or legatee would have taken if he had survived. (4449)

92-448, 451, 100+235.

3672. Construction of devise—Every devise of land shall convey all the estate of the testator therein, unless it appears by the will that he intended to convey a less estate. (4424)

34-173, 178, 24+924.

3673. After-acquired property—All property acquired by the testator after making his will shall pass thereby in like manner as if possessed by him at the time when he made his will, unless a different intention manifestly and clearly appears from the will. (4425)

65-361, 362, 68+41.

3674. Deposit of wills—A will in writing inclosed in a sealed wrapper, indorsed upon which is the name of the testator, his place of residence, the day when, and the person by whom, it is delivered, may be deposited with the probate judge of the county where the testator lives, by the testator or by any person for him, and such judge shall receive and safely keep the same, and give a certificate of its deposit. During the testator's lifetime such will shall be delivered only to him or upon his written order, witnessed by at least two subscribing witnesses and duly acknowledged. After the testator's death, and at the first session of the probate court after notice thereof, it shall be publicly opened and retained by the probate judge. He shall give notice thereof to the executor therein named, if any there be, otherwise to the persons interested in its provisions, or, if the jurisdiction of the case belongs to any other court, he shall deliver the same to the executor named therein, or to some trusty person interested in its provisions, to be presented to such other court. These provisions shall apply to all wills heretofore deposited with probate judges. ('03 c. 72)

PROBATE OF WILLS

3675. Who may petition for—Any executor, devisee, or legatee named in a will, or any other person interested in the estate, at any time after the death of the testator, may petition the probate court of the proper county to have the will proved, whether the same be in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the state, or a nuncupative will. (4432)

Possession of will not essential (45-242, 244, 47+790).

3676. Contents of petition—Every petition for the probate of a will shall show:

1. The jurisdictional facts.

2. The name and residence of the person named as executor, if known, and the name of the person for whom letters are prayed.

3. The names, ages, and places of residence of the heirs and devisees of the decedent, so far as known to the petitioner.

4. The probable value and character of the property of the estate, real and personal.

No defect of form or in the statement of facts contained in the petition shall invalidate the probate of a will. (4433, 4434)

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3677. Filing petition—Notice—Proof and allowance of will—Such petition shall be filed in the probate court, and thereupon the court shall appoint a time and place for proving the will, and cause notice thereof to be given as provided by law. At the time appointed, the court shall hear proof and allow or disallow the will. If the probate is not contested, the court may admit the same to probate on the testimony of one of the subscribing witnesses only, if such witness testifies that the will was executed in all respects as required by law, and that the testator was of full age and sound mind at the time of its execution. (4435, 4436)

Statutory notice gives court jurisdiction (30–202, 14+887). Appointment of guardians ad litem for infants not essential (30–202, 14+887. See 32–158, 20+124; 62–29, 36, 64+99). The only facts adjudicated by the probate of a will are the validity of its execution and that it is the subsisting will of the testator (47–171, 49+697; 45–429, 430, 47+1133). The legal effect of the will is not before the court (26–259, 260, 2+945; 33–509, 511, 24+301; 47–171, 176, 49+697). The burden is on the proponent to prove the due execution of the will in conformity with the statute (79–101, 106, 81+758; 40–371, 42+286). He must prove that the testator was sane (40–371, 42+286). Proof of execution by affidavit of one of the witnesses held insufficient (71–250, 254, 73+966). A judgment creditor of an heir may contest the probate (45–429, 47+1133; 71–241, 244, 73+859). An order allowing a will may be vacated to permit a contest (71–250, 73+966). An order allowing a will on insufficient proof is not void (71–250, 254, 73+966). Where a probate court legally probates a will it thereby acquires jurisdiction to direct and control the administration; and such jurisdiction continues over the administration, as one proceeding, until its close (37–225, 33+792; 61–444, 447, 64+48; 47–527, 529, 50+698).

3678. Testimony of other than subscribing witnesses—If none of the subscribing witnesses reside in the state at the time appointed for proving the will, the court, in its discretion, may admit the testimony of other witnesses to prove the sanity of the testator and the due execution of the will, and as evidence of such execution may admit proof of the handwriting of the testator and of the subscribing witnesses. (4437)

40–371, 374, 42+286; 71–250, 254, 73+966.

3679. Objections, when filed—No one shall be heard to contest the validity of a will unless the grounds of objection thereto are stated in writing and filed in court before the time appointed for proving the will. (4455)

3680. Proof required in case of contest—Whenever the probate of a will is contested, all the subscribing witnesses thereto who are within the state, and are competent and able to testify, shall be produced and examined. The death, absence from the state, or disability of any such witness shall be shown to the court by affidavit.

3681. Certificate of proof of will—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. (4452)

3682. When subsequent will is presented—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 there-

upon 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. (4456)

FOREIGN WILLS

3683. Wills proved elsewhere—Every will duly proved and allowed outside of this state, in accordance with the laws in force in the place where proved, may be allowed, filed, and recorded in any county in which the testator left property upon which such will may operate. (4439)

Proof that testator left property in the county is essential. Will so allowed and filed operates as if originally probated here. Administration extends to all property in the state (48–37, 50+932). Foreign probate conclusive as to allowance in this state (60–112, 114, 61+1018; 60–73, 78, 61+1020). Applicable where testator left only personalty in this state. Under this section a will executed according to the laws of another state and admitted to probate there, although not executed according to our laws, may be admitted to probate here. Application of foreign creditor of non-resident testator for probate here denied on the ground that his proper remedy was to present his claim in the administration proceedings at the testator's domicil (45–242, 47+790). Effect of probate to validate prior acts of foreign executor (60–73, 61+1020). Court may compel non-resident executor to submit to service of process in action to determine liability against estate (66–246, 68+1063). An allowance of a foreign will hereunder is evidence of the death of the testator and the devise of lands (40–434, 42+286). Proceedings hereunder authorized after full administration of estate of testator as intestate without setting aside such administration (47–20, 49+392).

3684. Filing—Petition—Notice—When a copy of such will, and of the probate thereof, duly authenticated, shall be presented to the court by the executor or other person interested in the will, with a petition for its allowance and for letters, the court shall appoint a time and place of hearing, notice of which shall be given as in the case of an original petition for the probate of a will. (4440)

60–73, 77, 61+1020; 60–112, 114, 61+1018.

3685. Hearing proofs of probate of foreign will—If on the hearing the court shall find from the copies before it that the probate of such will was granted by a court of competent jurisdiction, and it does not appear that the order or decree so granting it 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 proved and allowed in such court. (4440)

45–29, 47+311. See cases under § 3683.

3686. Letters testamentary, etc., to be granted—When any will is allowed as provided in §§ 3684, 3685, the court shall grant letters testamentary, or of administration with the will annexed, which shall extend to all the estate of the testator in this state. Such estate, after payment of debts and expenses of administration, shall be disposed of according to such will, so far as it may operate upon it, and the residue as is provided by law in cases of estates in this state belonging to persons who are residents of any other state or county. (4441)

Foreign executor entitled to letters unless special reasons exist to the contrary (60–112, 61+1018; 60–73, 78, 61+1020). Authority of local court to grant letters not dependent on action of court of testator's domicil (45–29, 47+311).

3687. Ancillary administration—In all cases of administration in this state of the estates of decedents who were non-residents, upon payment of the expenses of administration and of the debts here proved, the residue of the personalty shall be distributed according to the terms of the will applicable

thereto, if there be a will, or according to the law of the decedent's domicil. Or the court, in its discretion, may direct that it be transmitted to the personal representative of the decedent at the place of such domicil, to be disposed of by him. And the real estate not sold in the course of administration shall be assigned according to the will, if there be one; otherwise, according to the laws of this state. (4441)

45-242, 244, 47+790.

LOST OR DESTROYED WILLS

3688. Petition—Proof—The petition for the probate of a lost or destroyed will, or one which is without the state and cannot be produced in court, shall set forth the provisions of the will, and such provisions shall be embodied in the notice of hearing thereon. The probate court shall take testimony as to the execution and validity of such will, and the same may be established by parol or other evidence. All testimony taken shall be reduced to writing, signed by the witnesses, and filed in said court. (4442, 4443)

3689. Will must have been in existence—No such will shall be established unless the same is proved to have been in existence at the time of the testator's death, or to have been fraudulently destroyed in his lifetime, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses. (4443)

Degree of proof required (55-401, 407, 56+1056).

3690. Provisions to be certified—When such will is established, the provisions thereof must be distinctly stated and certified by the judge, which certificate shall be filed and recorded, and letters testamentary or of administration with the will annexed shall be issued thereon, in the same manner as upon wills produced and duly proved. (4444)

NUNCUPATIVE WILLS

3691. Proceedings and proof—Nuncupative wills, at any time within six months after the testamentary words are spoken by the decedent, may be admitted to probate on petition and notice, as provided for in case of other wills. The petition shall allege that the testamentary words, or the substance thereof, were reduced to writing within thirty days after they were spoken, which writing shall accompany the petition. No such will shall be admitted to probate except upon the evidence of at least two credible and disinterested witnesses. (4445)

GRANTING LETTERS TESTAMENTARY

3692. When granted—When a will has been duly proved and allowed, the 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; otherwise, such court shall grant letters of administration with the will annexed. (4457)

Inapplicable to foreign wills (60-112, 61+1018; 60-73, 78, 61+1020). Order conclusive that executor is entitled to letters and that bond is sufficient (25-347, 354. See § 3698).

3693. Failure of executors—If a person named as executor in a will has died or refused to accept the trust, or, after being duly cited for that purpose, neglects to accept the same, or for twenty days after the probate of the will neglects to give bond according to law, the court shall grant letters to the other executors, if there are any competent and willing to accept the trust; and in all cases where the executors named in a will are not all appointed, those receiving letters shall have the same authority to act, in every respect, as all would when duly appointed, and acting together. If there be no other executor competent and willing to accept the trust, the court shall appoint as administrator with the will annexed the person who would have been entitled to administration had there been no will. (4461, 4462)

3694. When executor a minor—When a person named as executor in a will is, at the time of the probate thereof, under full age, the other executor,

if any, who accepts the trust, shall administer the estate until the minor arrives at full age, when, upon giving bond according to law, he may be admitted as a joint executor of such will. (4463)

3695. Executor of an executor—The executor of an executor shall not, as such, administer on the estate of the first testator. (4467)

GRANTING LETTERS OF ADMINISTRATION

3696. Who entitled to administration—Administration of the estate of a person dying intestate shall be granted to one or more of the persons hereinafter mentioned, and in the following order:

1. The surviving spouse or next of kin or both, as the court may determine, or some person selected by them or either of them, provided that in any case the person appointed shall be suitable and competent to discharge the trust.

2. If all such persons are incompetent or unsuitable, or refuse to accept, or if the surviving spouse or next of kin, for thirty days after the death of the intestate, neglect to apply for administration, the same may be granted to one or more of the principal creditors, if any such are competent and willing to take it, or to some other person who may be interested in the administration of the estate.

3. If none of the persons mentioned in the preceding subdivisions of this section shall apply for administration within four months after the death of the intestate, the same shall be granted to any suitable or competent person interested in the estate by purchase or otherwise.

4. If the decedent was a native of any foreign country, and the surviving spouse and next of kin neglect for thirty days after his death to apply for administration, the same may be granted to the consul or other representative of the country of which the decedent was a native, residing in this state, who has filed a copy of his appointment with the secretary of state, or to such person as he may select, if suitable and competent to discharge the trust.

5. If the person so appointed neglects for thirty days, after written notice of such appointment, under the seal of the probate court, served personally or by mail, to file the oath and bond required by law and the court, such neglect shall be deemed a refusal to serve, and the court may appoint such other person or persons as are next entitled to administer such estate. Such person may be appointed without notice. (4478; '95 c. 98; '99 c. 149 s. 2)

Application by creditor (45-242, 245, 47+790; 89-303, 306, 94+869).

3697. Petition, what it must show—A petition for letters of administration shall show: 3697 105-M - 32

1. The jurisdictional facts.

2. The names, ages, and places of residence of the heirs so far as known to the petitioner.

3. The probable value of the real and personal property and the general character of the real estate.

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. (4479)

3698. Hearing—Contest—Granting letters—On filing such petition, the court shall by order fix a time and place for hearing the same. Any person interested may contest the petition or oppose the appointment of the person for whom letters are prayed, on the ground of incompetency, or his own right to administration, by filing written objections, stating the ground thereof, at or before the time fixed for the hearing. On the hearing, proof of service of the notice being filed, the court shall hear the proofs offered by all parties, and order the issue of letters of administration to such person as it deems entitled thereto. (4480, 4481) 3698 05 - 254 3698 105-M - 31

Letters of administration issued by a court having jurisdiction are not subject to collateral attack for error or irregularity (23-84; 26-303, 3+697; 37-225, 33+792; 40-7, 11, 41+232. See 29-27, 38, 11+136; 25-347). In all cases to which the administrator, as such, is a party, for the purpose of showing his representative capacity and authority

to act in the premises, the letters are at least prima facie evidence of every fact on which such capacity and authority depend, including the death of the person on whose estate they issued (26-303, 3+697. See 33-176, 180, 22+251). De facto administrator (37-225, 230, 33+792). When a probate court legally appoints a first administrator it thereby acquires jurisdiction to direct and control the administration; and such jurisdiction continues over the administration, as one proceeding, until its close (37-225, 33+792; 47-527, 529, 50+698; 61-444, 447, 64+48). Nature of administration proceedings (See § 3622 Note 3).

3699. Administration revoked on proving will—If after granting administration on an estate, as of an intestate decedent, a will is proved and allowed, the court shall by order revoke the administration, and the powers of such administrator shall cease, and he shall surrender his letters to the court and render an account of his administration within such time as the court shall direct. In such case the executor of the will shall be entitled to sue for and collect all goods, chattels, rights, and credits of the decedent remaining unadministered, and be admitted to prosecute any suit commenced by the administrator before the revocation of his letters. (4487, 4488)

47-20, 22, 49+392.

3700. Administrator with will annexed—In case no executor is named in a will, or the executors named therein are dead or refuse to act, or neglect to qualify, administration with the will annexed shall be granted to such person as would have been entitled thereto if the decedent had died intestate. Such administrator shall have all the powers and perform all the duties of an executor, and may sell and convey real estate where the executor is empowered so to do by the terms of the will: Provided, that if a person named in the will as executor shall qualify before such administrator is appointed, letters testamentary may be issued to him. (4461, 4462, 4464)

Has powers of executor (65-124, 131, 67+657; 35-179, 182, 28+217).

3701. Administrator de bonis non—If a sole or surviving executor or administrator dies, resigns, or is removed before having fully administered an estate, the probate court, with or without notice, shall grant letters of administration with the will annexed, or otherwise as the case may require, to a suitable person to administer the goods and estate of the decedent not already administered. Such administrator shall have the same power and proceed in the same manner as the original executor or administrator. He may prosecute or defend any action commenced by or against the original executor or administrator, and have execution on any judgment recovered in the name of such original executor or administrator. (4466, 4468, 4711; '97 c. 231 s. 1)

Power to appoint may be exercised whenever the estate is unadministered in whole or in part (15-159, 123). Appointment not subject to collateral attack though irregular (37-225, 33+792).

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3702. Special administrator—Whenever the appointment of an executor or administrator is necessarily delayed, or for any reason the probate judge determines that it is necessary or expedient, he may, with or without notice, appoint a special administrator, to take charge of the estate so long as such judge deems it necessary, and no appeal shall be allowed from the appointment of such administrator. (4483)

Special administrator pending appeal (23-415; 104+765).

3703. Powers and duties—A special administrator may collect all personal property of the decedent, care for, gather and secure crops, and preserve all such property for the executor or administrator who may afterwards be appointed, and for that purpose may commence and maintain actions as an administrator. He may, by leave of the court, sell personal property, take charge of the real property, and lease the same for a term not exceeding one year, and do all other things necessary for the preservation of the estate. But he shall not be liable to an action by any creditor, or be called upon in any way to pay the debts of the decedent. (4484)

Powers strictly limited as herein prescribed. No power to avoid fraudulent conveyances or to contract generally (71-453, 73+1099; 72-441, 75+699; 92-411, 100+233). Right of appeal (In re Last Will of Mary Sheeran, Filed Dec. 22, 1905).

3704. Inventory, etc.—A special administrator shall make and return a true inventory of all the goods, chattels, rights, credits, and effects of the decedent which come to his possession or knowledge, and account for all such property received by him, whenever required by the court. Upon granting letters testamentary or of administration the power of such special administrator shall cease, and he shall forthwith deliver to the executor or administrator all the property in his hands. The executor or administrator may prosecute to final judgment any action commenced by such special administrator, and may have execution on any judgment recovered in his name. (4485, 4486)

REPRESENTATIVES—GENERAL PROVISIONS

3705. General powers and duties—Every executor and administrator shall be entitled to the possession of all real and personal estate of the decedent which has not been set apart for the surviving spouse or children, and shall be charged with all such property. He shall 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. He shall keep in tenantable repair all houses, buildings, and fixtures thereon which are under his control. He may himself, or jointly with the heirs or devisees, maintain an action for the possession of the real estate or to quiet title to the same. (4495–4497, 4632)

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Pending administration an executor or administrator may recover possession of realty in the possession of an heir without showing that such recovery is necessary for the purposes of administration (91–121, 97+648). He may sue for the possession of realty without an order of court (22+249; 33–220, 224, 22+383). The statute is not operative in favor of the executor until he has proved the will (16–509, 460). The title to realty vests immediately in the heir or devisee on the death of the ancestor with right of possession until the executor or administrator asserts his right under the statute (29–418, 13+197; 14–65, 49; 25–22, 25; 26–259, 261, 2+945; 34–330, 336, 26+9; 38–179, 183, 36+451; 91–121, 123, 97+648; 85–152, 156, 88+433; 92–310, 100+7). The representative has no title to or interest in the realty save only the privilege to claim the possession during administration (29–418, 420, 13+197). A representative may lease the realty but only for the term of administration (31–70, 16+490; 42–427, 429, 44+313). He may recover for trespass to the realty if he takes possession (29–418, 13+197; 32–81, 19+391). Formerly he could not maintain an action to quiet title before taking possession (14–65, 49). Adverse possession of an ancestor is not interrupted during a reasonable time for the appointment of an administrator (45–545, 48+407). Ejectment will lie against a representative in possession of the realty (83–445, 86+450). The title to personalty vests in the representative on his appointment and he has a right to reduce it to his possession; not in his own right, however, but as a trustee, and for a particular purpose (61–552, 554, 64+47; 89–303, 94+869). He may dispose of it without an order or license of the court (25–22, 24). Cited (63–296, 298, 65+464; 72–441, 75+699).

3706. Liability—Collection of debts, etc.—No executor or administrator shall make profit by the increase, nor suffer loss by the decrease or destruction without his fault, of any part of the personal estate, but he shall account for the excess when he sells for more than the appraisal, and not be responsible for the loss when he sells for less, if such sale appears to be beneficial to the estate. He shall not be accountable for debts due decedent which remain uncollected without fault on his part, but where he neglects or unreasonably delays to raise money by collecting debts or selling real or personal estate, or neglects to pay over the money in his hands, and by reason thereof the value of the estate is lessened, or unnecessary costs or interest accrues, or the persons interested suffer loss, the same shall be deemed waste, and the executor or administrator shall be charged in his account with the damages sustained. He shall not purchase any claim against the estate he represents, and where he pays less than the full amount of a claim he shall charge in his account only the sum actually paid. (4632–4635, 4637)

Liable for not collecting debts (25–22, 25). Liable for interest on trust funds used for his personal advantage (62–408, 65+74). The bona fide payment of a debt due a person dying intestate, made to the sole heir at law of the deceased, will, if equity requires it, operate as a discharge of the debtor from liability to a subsequently appointed administrator (61–552, 64+47).

3707. Allowances to executors, etc.—Every executor, administrator, and guardian shall be allowed all necessary expenses in the care, management, and settlement of the estate, including proper and reasonable fees paid to attorneys, and for his own services such fees as are provided by law or fixed by the court; 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 an instrument in writing, filed in the probate court, he renounces all claim for compensation provided by the will. When costs are allowed against an executor or administrator in any proceeding in any court, he shall pay the same out of the estate, as an expense of administration, and the same shall be allowed to him in his administration account: Provided, that costs and attorneys' fees paid or incurred in actions or proceedings in court shall not be allowed if it appear that such actions or proceedings were prosecuted or resisted without just cause. (4636, 4644, 4724)

Allowance for costs (29–295, 13+131). Attorney's fees denied in proceeding to charge estate of deceased executor (76–132, 78+1039). A representative who is not guilty of wilful default, misconduct or gross negligence in the management of his trust is entitled to compensation (62–408, 65+74). There can be no legitimate charges of administration when there is no estate to administer (57–109, 58+682).

3708. Representative may resign—A representative may resign his trust at any time, but such resignation shall not be effectual for any purpose until the court shall have examined and allowed his final account, and made an order accepting such resignation. (4707)

Rule prior to statute (28–202, 9+731; 32–158, 20+124; 24–180, 183).

3709. Removal—Whenever a representative becomes insane or otherwise incapable of discharging his trust or unsuitable therefor, or has 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 court may remove him. (4708)

4–25, 11; 24–180; 26–391, 404, 4+685; 32–158, 20+124; 37–225, 33+792; 76–323, 79+176; 83–366, 368, 86+351.

3710. Accounting by administrator of deceased representative—Whenever a sole or surviving representative dies, his executor or administrator, immediately upon his appointment, shall file in the probate court an account of the administration of the decedent, together with a petition for the allowance of such account and the discharge of the bondsmen of such deceased representative. Such petition shall be heard and account examined in the same manner and on the same notice as is provided by law for the final settlement of administration accounts and distribution of estates. But if such estate has not been fully administered by the decedent, the bondsmen shall not be discharged or relieved from liability until a successor is appointed and qualified. (4711; '97 c. 231 s. 1)

76–132, 78+1039.

3711. Foreign executor, etc., may act, when—An executor, administrator, or guardian appointed in another state or country, upon filing for record with the register of deeds of the proper county an authenticated copy of his letters or other record of his appointment, may assign, release, satisfy, or foreclose any mortgage, judgment, or lien, belonging to the estate represented by him, on real or personal property, in the same manner as such representative appointed in this state could do. Such foreign representative may act by his attorney in fact, appointed by power executed in the manner required by law for a conveyance, and filed for record with the register of the county where such act is performed. (4715–4717, 6053)

35–191, 28+238; 38–38, 35+714; 76–216, 220, 78+1111; 78–249, 254, 80+1056.

INVENTORY AND APPRAISAL OF ESTATES

3712. Inventory—Within three months after his appointment every executor and administrator shall make and return to the court a verified inventory and appraisement of all the real and personal estate of the decedent which

shall have come to his possession or knowledge. Such property shall be classified therein as follows: 1. Real estate. 2. Furniture and household goods. 3. Wearing apparel and ornaments. 4. Stock in banks and other corporations. 5. Mortgages, bonds, notes, and other written evidence of debt. 6. All other personal property: Provided, that an executor who is the sole or residuary legatee, and has given bond for the payment of debts and legacies, shall not be required to return such inventory. (4489, 4491)

3713. Appraisal—The property inventoried shall be appraised by two or more disinterested persons appointed by the court for that purpose, and if any part of such property is situated in any other county the court may, in its discretion, appoint appraisers in such other county. The appraisers shall set down opposite each item of the inventory, in figures, the value thereof in money, and foot up by itself the amount of each class, and forthwith deliver such inventory and appraisal, certified by them, to the executor or administrator. (4490, 4492)

SETTING ASIDE HOMESTEAD, ETC.

3714. Petition—After the inventory has been returned to the court, the surviving spouse, or in case there be none the children, or when they are minors their guardian, may petition the court to set aside the homestead and assign the personal property allowed by law. Such petition shall show the right of the parties, and, if made by or for the children, their names and ages, a description of the homestead claimed, and of the personal property selected, and the appraised value thereof. (4493)

Allowance for support pending administration may be granted before the inventory is returned (104+535).

3715. Order—Upon the filing of such petition, if it appears that the petitioner is entitled to have the homestead set aside and such allowance of personal property made, the court shall make an order setting apart such homestead and assigning such personal property, and shall enter upon the inventory the items so allowed. The property so set aside shall be delivered by the executor or administrator to the person entitled thereto, and shall not be treated as assets in his hands. (4494)

Selection of personalty by widow and sale thereof without order of court sustained (39–334, 40+156).

COLLECTION OF ASSETS

3716. Compounding claims—When a debtor of a decedent is unable to pay his debts in full, the executor or administrator may, with the consent of the court, compound with such debtor on receipt of a fair and just dividend of his effects. (4501)

3717. Foreclosure of mortgages—When any mortgagee of real estate, or any person to whom a mortgage is assigned, dies without having foreclosed such mortgage, all the interest in the mortgaged premises conveyed by such mortgage and the debt secured thereby shall be considered as personal assets in the hands of the executor or administrator; and he shall have the same right to foreclose the mortgage or collect the debt as the decedent could have had if living, and he may complete any proceeding commenced by decedent for such purpose. (4502)

61–285, 287, 63+730; 81–454, 84+323; 85–152, 88+433.

3718. Release, redemption, purchase at sale—When redemption is made, or a sale of the premises had, by virtue of a power of sale contained therein or otherwise, the executor or administrator shall receive the money paid, and execute any necessary satisfaction, release, or receipt. If, upon foreclosure sale, the mortgaged premises are bid in by the executor or administrator for such debt, he shall be seized of the same for the persons who would have been entitled to the money had the premises been redeemed or purchased at such sale by some other person. (4503)

3719. Disposition of real estate so purchased—Any real estate purchased by an executor or administrator as such at a foreclosure sale, or sale on execution for the recovery of a debt due the estate, may be sold under license of the probate court, for the payment of debts or legacies and the expenses of administration, in the same manner as if the decedent had died seized thereof; and if not so sold 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 decedent. (4504, 4505)

3720. Property fraudulently conveyed—Whenever the property of a decedent available for the payment of his debts is insufficient to pay the same in full, the executor or administrator may recover any property, real or personal, which said decedent may have disposed of with intent to defraud his creditors, or by conveyance which for any reason is void as to them. And upon the application of a creditor and the payment of or security for such part of the expenses as the court shall direct, such representative shall prosecute all actions necessary to recover the property so disposed of. (4506, 4507)

Inapplicable to special administrator (71–453, 73+1099. See § 3703). Not exclusive. Creditor may proceed independently (79–299, 303, 82+589). Replevin held to lie (24–383). Cited (46–380, 382, 49+186; 81–107, 108, 83+469).

3721. Same—Disposal of recovered property—All real estate recovered as provided in § 3720 shall be sold under license from the court, for the payment of debts, in the same manner as if the decedent had died seized thereof, and the proceeds of all personal estate recovered as aforesaid shall be appropriated for payment of the debts in the same manner as other assets in the hands of the executor or administrator. (4508)

3722. Complaint for embezzlement, etc.—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 chattels of the decedent, 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 decedent to any real or personal estate, or any claim or demand, or any last will and testament of the decedent, the court may cite such suspected person to appear before it, and may examine him on oath upon the matter of such complaint. (4498)

3723. Refusal of person cited to appear—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, he shall be deemed guilty of contempt, and punished therefor according to law. All such interrogatories and answers shall be in writing, signed by the party examined, and filed in the probate court. (4499)

3724. Embezzlement before letters issue—If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the personal estate of a decedent, such person shall be liable, in an action by the executor or administrator for the benefit of such estate, for double the value of the property so embezzled or alienated. (4500)

3725. Property in hands of coroner—Whenever personal property of a decedent comes into the hands of any coroner, and there is no proper person to receive it, he shall immediately return an inventory of all such property to the probate court. (4712)

3726. May be sold, when—Proceeds, how disposed of—If no one entitled to such property demands the same within six months, the coroner shall report that fact to the court, which may order the same sold at public auction by such coroner upon such notice as it directs. The coroner shall sell the same as directed and make report thereof. He shall be allowed his reasonable expenses for the care and sale of the property, and deposit the remainder of the proceeds of such sale with the county treasurer in the name of the decedent. The treasurer shall give the coroner duplicate receipts therefor, one

of which he shall file with the county auditor and the other in the probate court. In case an executor or administrator shall qualify within six years from the time of such deposit, the treasurer shall pay the same to said executor or administrator. (4713, 4714)

CLAIMS AGAINST ESTATES

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3727. Order limiting time to present claims—Upon granting letters testamentary or of administration the court shall make an order limiting the time for creditors to present claims against the estate, and fixing the time and place when and where proofs will be heard and such claims examined and adjusted. The time so limited shall not be more than one year, nor less than six months, unless it shall appear by affidavit that there are no debts, in which case the limitation may be three months: Provided, that when it shall appear from the petition for letters that the decedent left no property except his homestead and such personal estate as is allowed by law to the surviving spouse or minor children, no order in respect to claims need be made. (4509; '99 c. 82)

Order must be made at time of granting letters (70–140, 142, 72+965). Limitation of three months (90–172, 175, 95+1110). Administrator cannot waive presentation of claim in compliance with order (79–377, 82+669).

3728. Order published—Three weeks' published notice of such order shall be given, and the last publication shall be made within six weeks after the order is filed. (4510; '01 c. 28)

3729. Extension of time for cause—For cause shown, and upon notice to the executor or administrator, the court, in its discretion, may receive, hear, and allow a claim when presented before the final settlement of the administrator's or executor's account, and within one year and six months after the time when notice of the order was given. (4509; '99 c. 82)

Allowance of claim after time limited discretionary. Relief should be freely granted when no injury can result to innocent parties and administration will not be delayed (79–257, 82+580; 67–51, 69+609, 908; 24–134; 34–296, 25+631; 47–281, 50+197; 42–54, 43+692; 46–92, 48+460; 90–172, 176, 95+1110). Court has jurisdiction to set aside a final decree of distribution to allow a creditor to file a claim (89–440, 95+211). Showing to be made on application. Compliance with § 3730 (46–92, 48+460). Limitation of one year and six months (61–361, 366, 63+1069; 77–59, 61, 79+651). Mode of reviewing order (24–134; 28–381, 10+209; 72–434, 75+700).

3730. Claims, how presented or barred—All claims against the estate of a decedent, arising upon contract, whether due, not due, or contingent, must be presented to the court for allowance, within the time fixed by the order, or be forever barred: Provided, that contingent claims arising on contract, which do not become absolute and capable of liquidation before final settlement, need not be so presented or allowed. Claims presented for allowance shall be itemized, and be verified by an affidavit of the claimant or his agent or attorney showing the balance due, that no payments have been made thereon that are not credited, and that there are no offsets thereto known to the affiant. Any such claim may be pleaded as an offset or counterclaim in any action brought against the claimant by the executor or administrator. If the claim presented be contingent, or not due, the particulars thereof shall be stated. (4511; '95 c. 97)

1. In general—Inapplicable to claims ex delicto (55–111, 56+583. See 84–381, 383, 87+941; 65–162, 167, 67+987); to claims arising out of administration, including funeral expenses (46–526, 49+286); or where a guardian has been appointed for a mentally incompetent person (86–395, 90+1051). Debts to be allowed and paid out of the estate of a deceased person must be such as were incurred, or such as arise on obligations entered into, by him. Obligations incurred by the representative are not such (52–1, 5, 53+1015). Compliance with statute cannot be waived by representative (79–377, 82–669). It is the duty of the representative to pay taxes on the estate but they are probably not claims which are required to be presented and allowed under this section (See 92–411, 414, 100+233; 35–215, 28+256; 28–13, 8+830; 63–61, 65+119).

2. Contingent claims—A contingent claim is one where the liability depends on some future event, which may or may not happen, and therefore makes it wholly uncertain whether there ever will be a liability (61–361, 364, 63+1069; 85–134, 136, 88+439; 75–481, 489, 78+95). A contingent claim which does not become absolute and capable of

liquidation during administration need not be presented to the probate court and is not allowable therein (61–361, 63+1069; 61–520, 63+1072; 66–246, 68+1063; 72–232, 75+220). If a contingent claim becomes absolute after the time limited for presenting claims but before final settlement application must be made for leave to file or the claim will be barred (85–134, 88+439; 90–172, 176, 95+1110; 137 Fed. 42). A contingent claim which becomes absolute before the expiration of the time limited for presenting claims must be presented or it will be barred (75–481, 489, 78+95). Under former statutes (25–466; 26–433, 4+1113; 48–174, 200, 50+1117).

3. **Effect of not presenting**—Claims required to be presented are forever barred if not presented (84–381, 383, 87+941. See cases cited below and under § 3733), and no action can be maintained thereon against heirs (47–382, 50+367; 65–107, 108, 67+803). After an estate is closed an action will not lie in the federal courts on a claim provable under this section (187 U. S. 211).

4. **Held provable**—A claim against a stockholder for unpaid stock (44–478, 47+155; 66–246, 68+1063); a claim for reimbursement in connection with a land contract (75–481, 78+95); a claim for failure to convey land (85–134, 88+439; 88–281, 92+1121); a claim for an assessment levied on a stockholder (90–172, 95+1110); a claim for breach of warranty in sale of personal property (84–381, 87+941); a claim for deficiency on foreclosure of a mortgage (45–167, 47+653); a judgment claim (62–135, 64+155).

5. **Held not provable**—A claim arising on tort (55–111, 56+583); a claim for funeral expenses (46–526, 49+286); a claim against a person under guardianship (86–395, 90+1051); a claim against sureties on a guardian's bond (61–361, 63+1069); a claim for taxes and insurance payable by a lessee (61–520, 63+1072); a claim for an assessment on stock (66–209, 68+974; 70–519, 73+416); a claim against a surety on an assignee's bond (72–232, 75+220; 77–59, 79+651); a claim against a stockholder for the enforcement of his constitutional liability (56–420, 57+1065; 80–432, 436, 83+377); a claim against a stockholder on bonus stock (48–174, 200, 50+1117); a claim against a surety on an administrator's bond (25–466); a claim for money paid at the request of an executor to relieve an estate from an incumbrance (52–1, 53+1015).

3731. Offset against claims—The executor or administrator, on or before the time set for hearing claims, shall file in the court a statement, in writing, of all offsets which he claims in favor of the estate against any of the claims filed, and the court, in its discretion, may allow the executor or administrator additional time for so filing an offset, and may set a day for hearing both the claim and offset. (4512)

3732. Claims barred by statute—No claim or demand, or offset thereto, shall be allowed which was barred by the statute of limitations when filed. (4513)

3733. Actions against executors or administrators—No action at law shall lie against an executor or administrator for the recovery of money upon any demand against the decedent allowable by the probate court, and no claim against a decedent shall be a charge upon his estate unless presented to the probate court for allowance within five years after his death: Provided, that nothing in this section shall be construed as preventing an action to enforce a lien existing at the date of decedent's death, nor as affecting the rights of a creditor to recover from the next of kin, legatees, or devisees to the extent of assets received. (4514)

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Inapplicable to claims not provable in the probate court (55–111, 112, 56+583; 61–520, 524, 63+1072; 90–172, 175, 95+1110). Allowance of claim not presented within five years erroneous but not subject to collateral attack (71–371, 74+148). Five year limitation applies only to claims provable under § 3730 (72–232, 234, 75+220). Limitation applies though no administration had (89–303, 306, 94+869). Proviso cited (61–361, 368, 63+1069). Claim held barred (80–385, 390, 83+348. See 63–296, 300, 65+464). Lien existing at time of decedent's death (39–28, 38+634). Cited (65–246, 247, 68+18; 86–140, 144, 90+378).

3734. Order adjudicating claim—Effect—Interest—Upon the adjudication of any claim, the court shall make its order allowing or disallowing the same, which order shall have the effect of a judgment for or against the estate, as the case may be. Such order shall contain the date of adjudication, the amount allowed, the amount disallowed, and shall be attached to the claim with the offsets, if any. The claim allowed shall bear interest at the legal rate. (4515, 4517)

The allowance of a claim has the effect of a judgment against the estate and is conclusive on all persons interested therein (47–118, 49+684; 25–22; 40–296, 300, 41+1033; 47–193, 197, 48+608, 49+665; 79–299, 304, 82+589), and the statute of limitations does not

run on the original claim (79–299, 304, 82+589). The court may vacate an allowance of a claim to allow a contest thereon (32–142, 19+651. See 53–529, 55+738). Interest (70–140, 143, 72+965). Cited (61–361, 365, 63+1069).

3735. Balance against claimant, how collected—When a balance is allowed against a claimant and in favor of the estate, and no appeal is taken within the time provided therefor, the court may issue execution for such balance, which shall be collected in the same manner as an execution issued out of the district court. (4516)

3736. Actions pending against a decedent—All actions pending against a decedent at the time of his death may, if the cause of action survives, be prosecuted to final judgment, and the executor or adminstrator may be admitted to defend the same. If judgment be rendered against the executor or administrator the court rendering it shall certify the same to the probate court, and it shall be paid in the same manner as other claims against the estate. (4518)

Inapplicable to actions in another state (21–172). Applicable to foreign representatives (35–191, 28+238), and to actions in the federal courts (45–197, 48+419). Cited (27–475, 477, 8+383; 29–295, 296, 13+131; 39–212, 216, 39+399).

3737. Administrator may sue—Balance—Nothing in this chapter shall prevent an administrator or executor from beginning any action, or from prosecuting to final judgment any action begun by the decedent, for the recovery of any debt or claim. The defendant in such action may set off any claim he has against the estate, instead of presenting the same to the probate court, and, if the final judgment be in his favor, the same shall be certified by the court rendering it to the probate court and shall be considered the true balance. (4519, 4520)

Setoff may be made after time for presenting claims has expired and estate distributed (52–501, 55+58; 79–386, 82+632). Right to setoff not dependent on having presented claim to probate court (92–110, 113, 99+780).

3738. Joint debtor—Estate, how liable—Whenever two or more persons are indebted on any joint contract, or upon a judgment founded on a joint contract, and one of them dies, his estate shall be liable therefor, and the amount thereof may be allowed by the probate court the same as though the contract had been joint and several or the judgment had been against him alone. (4521)

71–155, 164, 73+720; 72–232, 235, 75+220.

3739. Judgment on appeal to be certified to probate court—Upon the determination of an appeal from the allowance or disallowance of any claim or part thereof, the district court shall certify to the probate court the decision or judgment rendered therein. (4522)

PAYMENT OF DEBTS AND LEGACIES

3740. Time limited for settlement of estates—At the time of granting letters testamentary or of administration, the court shall make an order allowing the executor or administrator reasonable time, not exceeding eighteen months, for the settlement of the estate. But for good cause shown by the executor or administrator, such time may be extended, not exceeding one year at a time. (4523, 4524)

Duty of representative to pay claims before expiration of time limited for settlement (70–140, 143, 72+965). Effect of this section on time to apply for license to sell realty (40–296, 300, 41+1033).

3741. Time, when another administrator is appointed—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 originally allowed, not exceeding one year at a time, and not exceeding one year beyond the time which the court might by law allow to the original executor or administrator, as provided in §.3740. (4525)

3742. Executor, etc., not disqualified to act, when—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. (4526)

3743. Real estate may be sold, when—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. (4527)

The personal property is the primary fund for the payment of debts, legacies, etc., while the real estate is only a secondary fund for that purpose (25–22, 25; 26–259, 261, 2+945). Allowance of widow pending administration may be paid out of the rents and profits of the real estate (64–315, 67+69). When the estate cannot be equitably divided the entire estate, including the third of a surviving spouse, may be sold (93–489, 101+797).

3744. Debts and legacies paid in full, when—In case there are 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. (4528)

See 1905 c. 234

No order of court necessary. To save interest claims should be paid promptly on allowance if there are assets in hand (70–140, 143, 72+965).

3745. Order of payment when estate insolvent—If the assets which the executor or administrator has received and which can be used for the payment of debts are not sufficient therefor, he shall, after paying the expenses of administration, pay the debts against the decedent 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. (4529)

Preferences allowed (61–520, 525, 63+1072; 30–209, 214, 14+895; 35–215, 217, 28+256). Exhaustion of mortgage security (70–77, 78, 72+826). Liability of representative for funeral expenses (46–526, 49+286). After preferred claims are paid all other creditors are to be paid pro rata (62–135, 140, 64+155).

3746. No preference to be given—No preference shall be given in the payment of any debt over any other debts of the same class, nor shall a debt due and payable be entitled to preference over debts not due. (4530)

61–520, 525, 63+1072.

3747. Payment in case of an appeal—Whenever 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. (4531)

3748. Further order of distribution, when—If the whole of the debts and legacies were not paid by the first distribution, and the whole assets have not been distributed, or if other assets afterward come to the hands of the executor or administrator, the court may, from time to time, make further order for the distribution of the assets. (4532)

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3749. Payment of secured debts—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 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, after hearing application therefor, shall so order. Such order may be made with or without notice, as the court may deem best. (4533)

3750. Provisions in will as to payment of debts—When the testator makes provision by his will, or designates the estate to be appropriated for the payment of debts, expenses of administration, or family expenses, they shall be paid according to the provisions of the will, and out of the estate thus appropriated. If the provisions made by the will, or the estate appropriated, is not sufficient to pay such debts and expenses, so much of the estate, real and personal, as is not disposed of by the will, if any, shall be appropriated according to the provisions of the law for that purpose. (4450, 4451)

DISPOSAL OF REALTY BY REPRESENTATIVES

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3751. Real estate may be sold, when—The real estate of a decedent or ward may be sold under license of the probate court in the following cases:

1. When the personal estate of a decedent is insufficient to pay his debts, the legacies, if any, and the expenses of administration, or the court shall deem it for the best interests of the estate and of all persons interested therein.

2. When the personal property in the hands of a guardian is insufficient to pay all the debts of the ward, with the charges of managing his estate, or the court deems it for the best interests of the ward.

3. When the income of the estate of a ward is insufficient to maintain him and his family, or to educate the ward when a minor; or when it appears that it would be for the benefit of the ward that his real estate or any part thereof should be sold, and the proceeds thereof put at interest or invested in other real estate, in first mortgages on real estate, or bonds of the United States or of this state, or municipal or school district bonds of this state, or in the improvement or protection of any other real estate of the ward. (4527, 4567, 4568, 4576; '01 c. 89)

Subd. 1 (64–315, 67+69; 89–253, 256, 94+679; 93–489, 101+797. See § 3743)

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3752. Real estate mortgaged or leased, when—Whenever it shall appear that the interests of all persons concerned will be better protected by mortgaging or leasing such real estate than by selling the same, the court may, by license, authorize the mortgaging or leasing thereof, and may authorize the representative to agree to the extension or renewal of an existing mortgage or lease. (4593, 4594, 4596, 4617–4621)

3753. Petition for license—To obtain a license to sell, mortgage, or lease for more than one year, the representative shall present a verified petition to the court appointing him, setting forth what personal estate has come into his hands; the disposition thereof; how much, if any, remains undisposed of; the debts outstanding against the decedent or ward, so far as can be ascertained, *and, if it be the estate of a decedent, the legacies unpaid, if any*; a description of all the real estate other than the homestead of a decedent, and the condition and value of the several tracts; the names and residences, so far as known, of all persons interested therein, and, if unknown, a statement of that fact; and facts showing grounds for such sale, mortgage, or lease. (4575; '01 c. 89)

Debts outstanding may be stated in gross (19–117, 85). Meaning of "condition" of the several tracts (19–338, 292). A general petition covers the third of a surviving spouse (55–274, 56+828). Petition must be made within reasonable time after allowance of claims (40–296, 41+1033. See 54–448, 454,. 56+53; 80–385, 390, 83+348). If a representative is licensed to sell by a court having jurisdiction a proper petition is not essential to a valid sale (83–354, 86+342. See § 3774).

3754. Notice—Order to show cause—If it appears from such petition that license ought to be granted for any of the reasons set forth therein, the court shall make an order directing all persons interested in such estate to appear at a time and place therein named, and show cause, if any there be, why license should not be granted as prayed. Such order shall be served upon all persons interested in such estate by three weeks' published notice. (4576)

3755. Proceedings on hearing—At the time and place fixed in such order, upon proof of the due publication thereof, the court shall hear all proper evidence for or against the prayer of such petition. When satisfied that a sale of the whole or some portion of the real estate is necessary or for the best in-

terests of the estate or ward, the court may order the sale of the whole or so much and such part of the real estate described in the petition as it deems necessary or beneficial, and if satisfied that the interests of the estate will be better subserved by mortgaging or leasing such real estate it may authorize such mortgage or lease. (4577, 4580, 4593, 4617, 4621; '01 c. 89)

3756. Whole estate may be sold, when—Whenever it appears to the court that it is necessary to sell a part of the real estate of a decedent or ward, and that by a sale of such part the residue, or some specified part or piece thereof, would be greatly injured, the court may license a sale of the whole estate, or such part thereof as may be judged necessary, and most for the interest of all concerned. (4578; '01 c. 89)

93–489, 101+797.

3757. Bond to prevent sale—License shall not be granted if any of the persons interested in the estate shall give bond to the judge of probate in such sum and with such sureties as he directs and approves, conditioned to pay all the debts, legacies, and expenses of administration, so far as personal property of the estate is insufficient therefor, within such time as the court may direct. But this section shall not apply to cases wherein it appears to the court that it would be for the best interests of the estate of the decedent, and of all the persons interested therein, that the said real estate, or any part thereof, not specifically disposed of by the will of the deceased, be sold. (4579; '01 c. 89)

3758. License—The license shall describe the land to be sold, mortgaged, or leased. It may specify the order in which several tracts shall be sold, and shall direct whether the land shall be sold at private sale or public auction. If any part of such real estate has been devised, and not charged in such devise with the payment of debts, it shall direct that part not so devised to be sold first, and, if any lands have been sold by heirs or devisees, it shall direct the remainder to be sold first. When the petition is to mortgage lands, the license shall fix the maximum amount and rate of interest for which the mortgage may be given, and specify for what purpose the proceeds shall be used. (4582, 4593–4595, 4598)

Description of land in license held sufficient (41–266, 43+4). Misdescription held fatal to sale and not subject to amendment (77–533, 80+702).

3759. Bond and oath before sale—Every representative licensed to sell or mortgage real estate shall give bond before sale, as provided hereafter in the subdivision on probate bonds. Before fixing the time and place of sale, if at public auction, and before making the sale, if at private sale, he shall take and subscribe an oath 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 advantageously to all persons interested therein, which oath shall be filed in the probate court before confirmation of sale. (4597, 4604)

Sufficiency of bond (51–97, 52+1079; 66–454, 458, 69+330). Effect on appeal of no finding by trial court as to filing of bond (33–220, 222, 22+383). Sufficiency of oath (11–384, 278; 50–105, 52+381). Proof of filing oath (45–380, 47+1134). See § 3812.

3760. Sale at public auction—Notice—When the license directs a sale at public auction, three weeks' published notice of the time and place of sale shall be given, and the court may order further notice whenever deemed advisable. The notice shall describe the land with reasonable certainty. Such sale shall be in the county where the lands are situated, between 9 o'clock a. m. and the setting of the sun on the same day. When the lands are contiguous, and lie in two or more counties, the notice may be given and sale made in either. (4599)

Notice must state particular place in city where sale will be had (38–325, 37+449). Sufficiency of description of land (49–210, 51+915; 51–97, 52+1079). Sufficiency of publication under former statutes (11–384, 278; 22–393; 26–299, 3+699; 28–120, 123, 9+629; 38–325, 37+449; 50–105, 52+381).

3761. When at private sale, must be appraised—If, on hearing, the court is satisfied that it will be for the best interests of the estate to sell the whole or

some part of the land at private sale, it shall so order. But before any land shall be sold at private sale it shall be reappraised by two or more competent persons to be appointed by the court, who, before entering upon their duties, shall take and subscribe an oath to faithfully appraise such land at its full cash value. Such oath and the order of their appointment shall be filed with the court. The court may in such case also order such notice as it deems advisable to be given by the representative before sale is made. No such land shall be sold at private sale for less than its appraised value. (4600)

3762. Part sold at public and part at private sale—On the hearing of a petition for sale of lands, the court may license the sale of a part of the land at public auction, and of another part at private sale. In either case the license shall describe the land to be sold thereunder. (4601)

3763. Husband and wife must join, when—The homestead of a ward having a spouse shall not be sold or mortgaged by his guardian unless such spouse shall join in the 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 spouse therein, unless he or she shall join in the conveyance. (4602)

3764. Representative not to purchase—No representative 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. (4605)

26–487, 489, 5+359; 29–27, 39, 11+136; 41–194, 42+933; 77–1, 7, 79+494. See 47–193, 48+608, 49+665; 47–118, 49+684; 94–433, 103+217.

3765. Adjournment of sale—The executor, administrator, or guardian may adjourn the sale from time to time, as he may deem for the best interests of all persons concerned, but not exceeding three months in all. Each adjournment shall be publicly announced at the time and place fixed for the sale, and, if for more than one day, further notice thereof shall be given by posting or publication, or both, as the circumstances will admit. (4607, 4608)

Statement in report that sale was "legally made" covers adjournments (22–393, 396).

3766. Sale of interest held under contract—Whenever a decedent dies entitled under contract of purchase to any interest in land, such interest may be sold in the same cases, and in like manner, as lands of which he died seized. And in case there are any payments thereafter to become due upon such contract, such sale shall be made subject thereto, and shall not be confirmed until the purchaser shall execute a satisfactory bond to the administrator, for the benefit and indemnity of all persons entitled to the interest of decedent in such lands, conditioned for the payment of all sums unpaid on the contract. (4583–4585)

3767. Same—Upon the confirmation of such sale, the administrator shall assign the contract, which shall vest in the purchaser, his heirs and assigns, all the right, title, and interest of all persons entitled to the interest of the decedent in such land, and all the right and interest of all such persons in such contract, and the purchaser shall, by such sale, acquire all rights and remedies against the vendor of such land as decedent would have, if living. The proceeds of such sale shall be disposed of, in all respects, in the same manner as the proceeds of sales of lands of which the decedent died seized. (4586, 4587)

3768. Sales, etc., subject to charges—When the estate of a decedent or ward is in any way liable for any charge upon the lands thereof, by mortgage or otherwise, such lands may be sold by the representative, subject to such charges, but the sale shall not be confirmed by the court until the purchaser executes a bond to the representative, approved by the court, conditioned to save said estate and such representative harmless, or unless such charge shall be first satisfied and released by the owner or holder thereof. The representative may sell the whole or any part of the interest of the decedent or ward in any tract of land charged with any incumbrance, and upon release of the tract so sold may apply the proceeds of such sale or sales to the payment

of the incumbrance until the same is fully paid, and he shall account only for the balance remaining as proceeds of the estate. (4588)

46–477, 49+251; 37–225, 33+792.

3769. Sales of land by foreign administrator, etc.—In all cases where no executor, administrator, or guardian has been appointed in this state, a foreign executor, administrator, or guardian may file an authenticated copy of his letters in the probate court of any county in this state in which there is real estate of such decedent or ward, after which he may be licensed by such court to sell or mortgage real estate, as in the case of resident representatives; and such foreign representatives may act by resident attorney in fact, duly appointed for that purpose. (4589, 4622; '95 c. 99)

33–220, 22+383; 40–254, 41+972.

3770. Damages for taking for public use—Whenever the land of a decedent or ward is desired for any public purpose by any person or corporation having the power of eminent domain, the representative may agree upon and adjust the damages that would result from a taking thereof, and, upon payment of such damages being made, may convey the land, or any right therein, so desired. But no such agreement or conveyance shall be valid unless approved by the probate court. (4590; '99 c. 196)

30–107, 14+462; 43–363, 45+849.

3771. Approval, how obtained—Such approval may be obtained upon filing in such court a verified petition of the person or corporation and the representative, setting forth the name of the decedent or ward, the name of the person or corporation with whom the agreement is made, a description of the land taken and for what purpose, the amount to be paid, and that such amount is the full value of the land taken, and the damages to the remainder. The agreement, signed by the parties, shall be attached to the petition. (4591; '99 c. 196)

3772. Petition, approval, effect—Upon the filing of such petition and agreement, the court shall hear and determine the same without notice, and, after hearing, the court, if satisfied that the agreement is just and equitable, shall make an order approving the same, and the petition, agreement, and order shall be recorded. A certified copy of such order and agreement may be filed for record with the register of deeds of the county wherein such land is situated, and when so filed shall be notice to everybody. (4592; '99 c. 196)

3773. Report of sale—Resale—Confirmation—The representative making a sale shall immediately report in writing his proceedings under the license to the court, with due proof that notice of sale has been given. Thereupon the court shall inquire into the regularity and fairness of the sale, and may examine any person under oath touching the same. If it appears that there has been any irregularity or unfairness, or that the sum bid is less than the value, or that a sum sufficiently in excess of such bid to warrant a new sale may be obtained, it shall vacate such sale and order another, notice of which shall be given, and the sale conducted in all respects as if no previous sale had taken place. But if it appears that the first sale was regularly and fairly conducted, and that the sum bid was not disproportionate to the value of the property, or not sufficiently so to warrant the expense of a new sale, the court may confirm such sale and order a conveyance under it. (4609, 4610)

Confirmation does not extend to matters anterior to the sale (30–107, 14+462; 37–325, 33+792). Regularly the confirmation should precede the execution of the deed but a subsequent confirmation will suffice (30–107, 14+462). Confirmation of sale not made pursuant to prior license held not to make marketable title in action for specific performance (44–250, 46+403).

3774. Sale not to be avoided, when—In case of an action relating to any estate sold by a representative in which an heir or person claiming under the decedent, or a ward or person claiming under him, shall contest the validity of the same, it shall not be avoided on account of any irregularity in the proceedings if it appears:

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1. That the representative 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. (4612)

Whenever the records of a probate court are silent or wanting in material particulars, as to the five essentials of a valid sale as herein prescribed, the sale may be collaterally attacked within the time limited by § 3776 (103+885). Otherwise if the record shows affirmatively compliance with such requirements (61-18, 63+1). If a representative is licensed to sell by a court having jurisdiction the sale cannot be impeached collaterally for errors in the proceedings which culminated in the license (89-253, 256, 94+679, and cases cited under subd. 1 below). Substantial compliance with the statute relating to sales is sufficient. This section is to be liberally construed as a curative act. The probate records relating to sales must be liberally construed and titles depending on such records sustained notwithstanding any mere irregularities or technical omissions therein as to the five essentials (66-454, 69+330; 83-354, 356, 86+342). Subd. 1 (11-384, 278; 28-202, 9+731; 29-27, 39, 11+136; 37-330, 33+907; 45-380, 382, 47+1134; 83-354, 86+342; 89-253, 256, 94+679). Subd. 2 (11-347, 247; 51-97, 102, 52+1079; 66-454, 458, 69+330; 103+897). Subd. 3 (45-380, 382, 47+1134). Subd. 4 (38-325, 37+449; 49-210, 51+915; 51-97, 52+1079; 103+885; 103+897). Subd. 5 (26-487, 493, 5+359; 103+897).

3775. Validity not affected by irregularity—If the validity of a sale is drawn in question by a person claiming adversely to the title of the decedent or the ward, or claiming under a title that is not derived from or through the decedent or ward, the sale shall not be void on account of any irregularity in the proceedings, if it appears that the representative 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. (4613)

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26-487, 493, 5+359.

3776. Limitation of actions to recover—No action for the recovery of real estate sold by an executor or an administrator hereunder shall be maintained by any heir or other person claiming under the decedent, unless it is begun within five years next after the sale. And in case of real estate sold by a guardian no action for its recovery shall be maintained by or under the ward, unless it is begun within five years next after the termination of the guardianship: Provided, that minors and others under legal disability to sue when the right of action first accrues may begin such action at any time within five years after the disability is removed. (4611)

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Constitutional (24-288; 47-527, 50+698). A statute of repose and retroactive (103+897). Inapplicable to party in possession defending title derived from ward against the affirmative attack of one relying on a guardian's sale (30-107, 14+462). Applicable to void as well as irregular sales. To set the statute running it is sufficient if there is a sale in fact by a representative licensed by the proper court (19-338, 292; 37-1, 32+784; 103+897). Not limited to actions of ejectment (77-1, 7, 79+494). A conveyance held sufficient to set the statute running (103+897). Formerly the statute included an exception in favor of non-residents (33-220, 22+383; 103+897). Cited (26-487, 493, 5+359; 45-380, 383, 47+1134).

3777. Court may decree conveyance, when—When any person under contract in writing to convey any real estate dies or becomes insane or incompetent before making the conveyance, the probate court may direct the administrator or guardian to convey such real estate to the person entitled thereto, in all cases where such decedent, if living, or such ward, if sane or competent, might be compelled to convey. (4623, 4631)

Sections 3777-3782 do not give the probate court jurisdiction of actions for specific performance (40-236, 41+977; 75-350, 364, 78+4).

3778. Petition—Notice of hearing—On presentation of a petition by any person claiming to be entitled to such conveyance, setting forth a description of the land and the facts upon which such claim for conveyance is based, the

probate court shall fix a time and place of hearing, and cause three weeks' published notice thereof to be given. (4624)

3779. Hearing and action thereon—At the time appointed for hearing after due proof of publication of notice, the court shall hear all proper evidence both for and against granting the petition, and, if satisfied that the conveyance should be made, it shall order the representative to execute such conveyance to the petitioner; otherwise it shall dismiss the petition. (4625, 4626)

40–236, 41+977.

3780. Conveyance—Effect—Order recorded—If no appeal is taken from such order within the time limited therefor by law, or if the same is affirmed on appeal, the administrator or guardian shall execute the conveyance as directed, and a certified copy of the order shall be recorded with the deed in the office of the register of deeds in the county where the land lies. Such conveyance shall be as effectual to pass the estate contracted for as if executed by the decedent while living, or the ward while sane or competent. (4627, 4628)

3781. Effect of recording—Where no conveyance has been executed, the record of a certified copy of the order in such register of deeds' office shall be as effectual to give the person entitled to the conveyance a right to the possession of the lands and to hold them as though the conveyance had been made pursuant to the decree. (4629)

3782. Heirs of purchaser may prosecute proceedings—If the person to whom the conveyance was to be made dies before the commencement of proceedings, 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 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 persons so entitled to it or in the administrator for their benefit. (4630)

3783. Platting by representatives—Whenever a guardian shall deem it for the best interests of his ward that the land of such ward be platted, or an executor or administrator shall think it necessary or beneficial to all persons interested to plat any tract of land in his charge as such, he may, with the approval of the probate court, cause a plat thereof to be made, and may execute and file the same for record, in like manner and with like effect as if he were the owner. (4565, 4581)

ACCOUNTING—DISTRIBUTION—FINAL SETTLEMENT

3784. Account to be rendered, when—Every executor and administrator shall render an account of his administration within the time allowed for the settlement of the estate, and at such other times as the court may require, until the estate is wholly settled. (4638, 4643)

Conclusiveness of intermediate accountings (78–325, 81+7). Jurisdiction of probate court to compel an accounting exclusive. Not lost by discharge of representative leaving estate unadministered (83–215, 86+1).

3785. Partial distribution—If the court shall deem it proper, a portion of the estate may be assigned to the persons entitled thereto, before the final settlement, and, to that end, the court may require the administrator or executor, when necessary, to settle his account to date, and may make such other orders as may be proper. (4664; '97 c. 231 s. 2; '01 c. 10)

See 1905 c. 21

3786. Same—Finality—Bond—Such assignment shall be final both as to the persons entitled to said estate and as to the proportions in which they are entitled to the same. All subsequent assignments of such estate shall be to the same persons and in the same proportions as determined by such decree. But no distribution of any part of an estate shall be made until the expiration of the time limited by the court for filing and allowance of claims, nor until

a bond in at least double the amount of the claims, filed against said estate and remaining unpaid, is given to the judge of probate, with such surety as the court directs, to secure payment of the debts of the deceased, unpaid legacies and expenses of administration. ('01 c. 10)

Bond (75–228, 230, 77+818). See 1905 c. 21

3787. Lien of attorney—When any foreign heir, devisee, or legatee has appeared by attorney, said attorney may acquire a lien upon the distributive share or legacy of such heir by serving upon the executor or administrator, before such decree is made, a notice of his intent to claim a lien, for his agreed compensation, or the reasonable value of his services, and filing such notice, with proof of service thereof, in the probate court. The amount of such lien shall be determined and allowed by the probate court at the time of hearing a petition for partial or general distribution of the estate in which such lien has been filed, and any money or property decreed therein to such heir or legatee shall be decreed subject to such lien. The executor or administrator shall satisfy said lien out of any money or specific personal property so decreed, and for that purpose may, by order of the probate court, sell so much of such specific personal property as will satisfy said lien claim and the expenses of sale. ('01 c. 10) See 1905 c. 21

3788. Petition for final settlement and distribution—When the estate is fully administered, the representative shall apply to the court to fix a time and place for adjusting and allowing his final account, and to assign the residue of the estate to the persons entitled thereto. The final account shall be filed with the petition. (4639)

Decree based on petition of only one of two representatives held irregular but not void (40–296, 41+1033). The fact that some of the distributees are minors is not a ground for keeping the estate open (61–91, 63+255).

3789. Order for hearing and notice—Upon filing said petition, the court shall make an order fixing a time and place for hearing the same, and cause three weeks' published notice thereof to be given, and may order such further notice as it deems advisable. (4640)

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Under a former statute the notice was held jurisdictional (16–494, 447; 28–120, 122, 9+629. See 61–335, 339, 63+880; 23–51, 54).

3790. Proceedings on hearing—On hearing such petition, the court may examine the representative on oath, and hear all proper testimony offered touching the account or relating to the distribution of the estate. If the account is found correct, it shall be settled and allowed; if incorrect, it shall be corrected under the direction of the court, and then settled and allowed. Upon such settlement the court shall determine who are entitled to the residue of the estate, and shall then or thereafter make its decree assigning such residue to the persons entitled thereto by law. (4641)

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The expenses of administration, including funeral expenses, are to be allowed hereunder and not under § 3730 (46–526, 528, 49+286). Guardians ad litem need not be appointed for minor heirs or legatees interested in the estate (32–158, 20+124). In settling the accounts of representatives the court should be governed by broad principles of equity. The representative should be permitted to show the real nature of his transactions and their fairness, unimpeded by technical rules (91–299, 305, 97+1046). Conclusiveness of order allowing a final account, including items allowed on intermediate accountings (78–325, 81+7). An item in an account held sufficiently specific (91–299, 97+1046). Expenses of hunting for heirs or next of kin or for looking after one's own interest in the estate are not allowable as expenses of administration (57–21, 58+684). An administrator held chargeable with profits of his attorney in purchasing and selling a life estate in the real estate for which the administrator was trustee (94–433, 103+217).

3791. Assignment of residue and record thereof—In such decree the court shall name the distributees and describe the proportion or part to which each is entitled. A certified copy of any decree of distribution of real estate may be filed for record with the register of deeds of any county in which any of the lands therein described are situated. The register of deeds shall enter in his reception book the name of the decedent as grantor, and the names of the distributees as grantees, making a separate entry for each person so taking lands in such county as grantee under the decree: Provided, that before a certified

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copy of any decree of distribution of real estate is recorded in the office of the register of deeds, it shall be presented to the county auditor of the county in which such real estate is situated, who shall transfer the same, and note upon every such certified copy "Transfer entered," over his official signature. Unless such statement is made upon such certified copy, the register of deeds shall refuse to record the same. (4642; '01 c. 284)

1. **Jurisdiction of probate court exclusive**—The accounting of the representative and the distribution of the estate must be had in the probate court. The district court is without original jurisdiction of such matters (71–241, 244, 73+859, and cases cited).

2. **Necessity of**—A decree of distribution is necessary to close the administration and relieve the representatives (58–29, 59+956), and to charge the representatives for non-payment of legacies (32–163, 20+127). It is not necessary to transfer the title of realty (25–22, 25. See notes to §§ 3648, 3705); or of personalty (89–303, 94+869). A representative may pay over funds to the party entitled thereto as heir without an order of court. Such an order simply protects him and his sureties from subsequent claims (81–484, 84+332. See 91–299, 305, 97+1046).

3. **Powers of court**—In making distribution the court has power to determine the succession of the property of the deceased subject to administration and the rights of creditors. It determines who are the heirs or devisees and what part of the estate is, after administration, to be assigned to the share of each (34–330, 336, 26+9; 69–136, 138, 72+59; 71–255, 268, 73+967). In making distribution the court necessarily determines the legal effect of a will (84–353, 355, 87+944). Its jurisdiction for such purposes is exclusive (30–277, 282, 15+245; 104+301). The construction of the will by the court on final distribution is only for the purposes in hand. It is a conclusive adjudication that the persons to whom the distribution is made are the only persons entitled to the property distributed as devisees or legatees under the will and of that fact only. For any other purposes or upon any other questions it is coram non judice (71–255, 268, 73+967). The court has no power to determine the rights of one claiming through the acts of an heir or devisee the real estate to which such heir or devisee succeeds (34–330, 26+9; 44–526, 47+171; 69–136, 138, 72+59; 71–241, 244, 73+859). But such a claimant may appear in the probate court, demand an accounting, and oppose proceedings to divest the heir or devisee of his share and to vest the same in others as distributees (45–429, 47+1133; 71–241, 73+859). The court has power to determine a claim to the estate under a contract with the decedent to make a will in favor of the claimant (69–136, 72+59).

4. **Effect of decree**—The effect of a decree of distribution is to transfer the title to the personalty and the right of possession of the realty from the personal representative to the distributees, devisees or heirs. The property then ceases to be the estate of the deceased person, and becomes the individual property of the distributees, with full right of control and possession and with the right of action for it against the personal representative if he does not deliver it to them (61–91, 92, 63+255; 84–289, 294, 87+783; 25–22, 25). If the court has jurisdiction the decree of distribution is conclusive on all persons interested in the estate whether under disability or not, or whether in being or not. Administration proceedings are in rem, acting directly on the res, which is the estate of the deceased. The decree is a judgment in rem binding on all the world and not subject to collateral attack (62–29, 64+99; 26–259, 262, 2+945; 72–32, 36, 74+1020; 75–321, 324, 78+3; 86–140, 147, 90+378; 93–233, 101+68. See 83–98, 103, 85+937, 86+444; 46–61, 63, 48+454). The decree is not evidence of heirship as against strangers (46–61, 48+454). The effect of a decree of distribution is to divest the probate court of jurisdiction of the property distributed and prior to 1903 c. 195 it was held that it divested the probate court of jurisdiction of the estate (40–296, 41+1033; 61–91, 63+255; 84–289, 87+783; 37–160, 33+912; 187 U. S. 211).

5. **Enforcement of decree**—Probate court has no jurisdiction to enforce its decree of distribution. The remedy of distributees from whom their shares are withheld by representatives is an action in the district court (61–91, 92, 63+255; 84–289, 294, 87+783).

6. **Miscellaneous**—A clause in a final decree "and of all the real property of which the said testator died seized, whether the same is described in the inventory herein or not," construed as not including a homestead (89–482, 95+307). An assignment construed as an assignment in fee (26–201, 207, 2+497). Recording decree (87–348, 349, 92+8). Prior to 1903 c. 195 it was held that after a final decree the court could not compel a representative to make a further accounting so long as such decree was unreversed and unmodified (84–289, 87+783). By obtaining a final decree pending an action against him a representative cannot free himself of liability on the judgment rendered therein (51–146; 53+198).

3792. Decree after discharge of executor, etc.—Where an executor or administrator has been discharged, and by neglect or other cause no final decree assigning the residue of the estate has ever been entered, an heir, devisee, legatee, or any one claiming by, through, or under any one of them, may petition the court for the assignment of the residue to the persons entitled thereto by law, and the court shall make an order for hearing, which shall be published

according to law. If on hearing it appears that such decree should be entered, the court shall determine the rights of all persons to the residue, and make decree accordingly, assigning such residue to the persons entitled thereto. ('99 c. 343)

3793. Opening decree of distribution made without notice—Any decree of distribution made without due notice may be set aside, for want of such notice, by the court in which it was entered, upon the petition of any person interested in the property which it purports to assign. Three weeks' published notice of hearing upon such petition shall be given. And if it shall appear that all debts of the decedent, and all claims upon his estate, have been paid or provided for, the court shall assign such estate to the persons entitled thereto. (4749)

61–335, 340, 63+880.

3794. Discharge of representative—Whenever the probate court shall find, upon petition, that any executor, administrator, or guardian has fully executed his trust, and has paid over to the persons entitled thereto all money and other property in his hands as such, said court may enter an order finally discharging him and his bondsmen from further liability. ('03 c. 195 ss. 1, 2)

See 1905 c. 332

Prior to 1903 c. 195 there was no provision for an order discharging a representative and it was held that the decree of distribution ipso facto discharged him (84–289, 87+783). A discharge of one of two representatives on his sole petition held irregular but not void (40–296, 298, 41+1033).

3795. Deposit with county treasurer—If it shall appear that any part of the money on hand has not been paid over because the person entitled thereto cannot be found in the state or his place of residence is unknown, the court may direct the petitioner to deposit the same with the county treasurer, taking duplicate receipts therefor, one of which he shall file with the county auditor and one in the probate court. Upon filing such receipts the petitioner shall be entitled to the discharge provided for in § 3794. ('03 c. 195 s. 3)

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3796. Subsequent disposal of fund—Money so deposited shall be credited to the county revenue fund; but upon application made to the probate court within twenty-one years after such deposit, and upon personal notice to the county attorney and county treasurer, it may direct the county auditor to issue to the person entitled thereto his warrant for the amount thereof. No interest shall be allowed or paid thereon, and if not claimed within said twenty-one years no recovery thereof shall be had. ('03 c. 195 ss. 4, 5)

ADVANCEMENTS

3797. What are, how treated—Any estate, real or personal, given by an intestate in his lifetime, to a child or other lineal descendant, when expressed in the gift or grant as an advancement or charged in writing by the intestate as such, or so acknowledged by the child or other descendant, shall be deemed an advancement to such heir, and treated as part of the estate of such intestate in the distribution of the same, and shall be taken by such heir toward his share of the estate. When the amount advanced exceeds the share of such heir he shall receive nothing in the distribution, but shall not be required to refund any part of such advancement. When the amount so received is less than his share, he shall be entitled to enough more to make up his full share. (4645, 4646, 4648)

79–377, 379, 82+669.

3798. How considered—Value, how estimated—When such advancement is made in real estate the value thereof shall, for the purpose of distribution, be considered a part of the real estate to be divided, and when it is in personal estate as a part of the personal estate; and when in either case it exceeds the share of real or personal estate, respectively, that would have come to such heir, he shall not refund any part of it, but shall receive so much less out of the other part of the estate as will make his whole share equal to that of other heirs entitled to a like amount with him. When 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 heir receiving it, that shall be its value in the distribution; otherwise, it shall be estimated according to its value when given, as nearly as can be ascertained. (4647, 4649)

3799. When heir dies before intestate—When a child or other lineal descendant, to whom an advancement has been made, dies before the intestate, leaving issue, such advancement shall be taken into consideration in the distribution of the estate. and the amount thereof shall be allowed by the representatives of such heir, the same as though such advancement had been made directly to them. (4650)

3800. When to be determined—Value, how determined—All questions as to advancements made or alleged to have been made by the intestate to any heir shall be heard and determined by the court at the time of final settlement, and every such advancement shall be specified in the decree distributing and assigning the estate. For the purpose of determining what proportion any one who has received an advancement is entitled to, the court shall ascertain the value of the entire residue of such estate, by ordering an appraisal, or in such other manner as it may deem best. (4651, 4652)

PARTITION

3801. When granted—When, upon the hearing of the petition for a decree of distribution, the estate to be assigned to two or more persons is in common and undivided, and the respective shares are not separated and distinguished, partition may be made on the petition of any person interested. Upon such petition being made, the court may appoint three disinterested persons as referees to make partition, and shall issue a warrant to them for that purpose. Unless otherwise directed by the court, the referees shall make partition of all the real estate situated within the state; but if there be real estate in different counties, the court may appoint different referees for each county, and in such case the real estate in each county shall be divided separately, as if there were no other estate to be divided by the court. Such referees shall have power, but shall not be required, to divide specific tracts. (4653)

After the close of administration the probate court has no jurisdiction of partition proceedings (37–160, 33+912; 84–289, 293, 87+783). This subdivision does not authorize a sale where an equitable division cannot be had (93–489, 495, 101+797).

3802. Shares, how set out—The several shares in the real and personal estate shall be set off to each individual, in proportion to his right as determined by the court, by metes and bounds or descriptions, so that the same can be easily distinguished, unless any two or more of the parties interested consent to have their shares set off so as to be held by them in common and undivided. (4654)

3803. Indivisible estate—Assignment—When any such real estate cannot be divided without prejudice or inconvenience to the owners, the court may assign the whole to one or more of the parties entitled to share therein, who will accept it, and pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction. In such case, the true value shall be ascertained by appraisers appointed by the court for that purpose. (4655)

3804. Indivisible tract—When any tract of land 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 referees to either of the parties who will accept it, and pay or secure to one or more of the others such sums as the referees award to make the partition equal, and they shall make their award accordingly. Such partition shall not be confirmed until the sums so awarded are paid to the parties entitled thereto or secured to their satisfaction. (4656)

3805. Guardians and agents—Notice—Before partition is made the court shall appoint guardians for all minors and insane persons interested in the estate to be divided for whom guardians have not already been appointed, and discreet persons as agents of parties who reside out of the state and are not

otherwise represented. The warrant shall recite such appointments, and the referees shall give notice to all persons interested in the partition, their guardians or agents, of the time when they will proceed to make partition. (4657)

3806. Report—Confirmation—Decree—The referees shall make written report of their proceedings to the court; and the court may, for sufficient cause, set it aside, and appoint other referees, or direct the same referees to make another partition. When the report is confirmed it shall be recorded, and the court shall make a decree assigning the estate to the persons entitled thereto in accordance therewith. (4658, 4659)

3807. Expenses of partition—If at the time of the partition or distribution the executor or administrator has retained sufficient effects in his hands which may lawfully be applied to that purpose, the expenses of such partition or distribution may be paid by him, when it appears to the court just and equitable, and not inconsistent with the intention of the testator. But if there be no such effects the expenses shall be paid by the parties interested, in proportion to their respective shares or interests in the premises, as shall be determined by the court. If any person neglects to pay the sum so assessed against him, the court may issue execution therefor in favor of the person entitled thereto. (4660, 4661)

3808. Agent for non-resident—When an estate is assigned by decree of court, as herein provided, to any person residing out of the state and having no agent therein, and it is necessary that some person be authorized to take possession and charge of the same for his benefit, the court may appoint an agent for that purpose, as well as to act for such absent person in the partition. Such agent shall give bond to the judge, to be approved by him, faithfully to manage and account for such estate, and the court may examine and allow his account, and award a reasonable sum out of the estate for his services and expenses. (4662, 4663)

PROBATE BONDS

3809. Bonds, when required, conditions—Every representative, before entering upon the duties of his trust, shall give a bond in such sum as the court directs, with sufficient sureties, conditioned for the faithful discharge of all the duties of his trust according to law.

3810. When executor is residuary legatee—When the executor of a will, or administrator with the will annexed, is the sole or residuary legatee thereunder, instead of the bond required by § 3809 he may give bond in such sum and with such sureties as the court shall direct, conditioned only for the payment of debts and legacies of the testator, and in such case he shall not be required to return an inventory. (4460, 4489)

3811. Joint or separate bonds—When two or more persons are appointed joint executors, administrators, or guardians, the court may take a separate bond from each, or a joint bond from all. (4465)

3812. Bond before sale—Before any representative shall proceed under a license to sell or mortgage real estate, he shall give a bond in such amount and with such sureties as the judge shall require and approve, conditioned for the faithful discharge of his duties under said license, and to account for and pay over according to law all moneys received on account thereof. (4597)

See § 3759.

3813. Guardians and sureties discharged, when—Whenever a guardian's annual account is adjusted and settled, and it appears that the proceeds of any sale or mortgage of real estate have been included in such account, if the original general bond given on his appointment is found to be then sufficient, or, if insufficient, upon the filing and approval of a new and sufficient general bond, the court, by its order, may cancel any sale bond previously given, provided that when a new bond is given the sureties thereon shall be liable for the full amount of personalty shown by such account as settled to be in the guardian's hands.

3814. Bonds, run to whom—How approved and prosecuted—All bonds authorized or required by law in proceedings in the probate court, or in respect of any estate under administration therein, save as otherwise expressly provided, shall be approved by the probate judge, and shall run to such judge and his successors in office; and, in case of breach of any condition thereof, such bond may be prosecuted by leave of said court in the name and for the benefit of any person interested. (4699)

Statute of limitations runs on bond from final decree of distribution (83–199, 86+18). Leave of court a prerequisite to an action against sureties on a guardian's bond (104+833). Leave of court not a part of the cause of action and need not be alleged in complaint (61–361, 369, 63+1069; 83–199, 201, 86+18). Who may maintain action on bond (See 16–494, 447; 22–261; 23–295; 24–116; 26–93, 1+841; 28–150, 9+626; 31–271, 17+618). An administrator de bonis non is an "interested" person and may sue on his predecessor's bond (32–158, 20+124). Legatees cannot sue on bond until after order of court directing payment of legacies (32–163, 20+127). When a bond is joint and several an action will lie against only one of the obligors (26–93, 1+841). Right to present claim on bond to probate court for allowance (26–433, 4+1113).

3815. Additional bonds—Whenever any probate court becomes satisfied that the bond of any representative is insufficient, it may require an additional bond on its own motion or upon the petition of any one interested in the estate of the decedent or ward; and a refusal or failure to furnish such bond within a reasonable time shall be sufficient cause for removal. (4700)

104+833.

3816. Sureties on bonds, how and when discharged—Upon application of any surety on a probate bond to be discharged from further liability as such, the court shall order the principal therein to furnish a new bond within ten days after service upon him of such order. On failure to furnish such new bond, such principal shall be removed, and required to render and settle his account at the earliest practicable time. When the new bond has been given and approved, the surety shall be discharged from liability for any subsequent act or omission of such principal, and the court shall so order. Upon application of such surety, the court shall require the principal, as soon as practicable, to render and settle an account of all his prior doings. (4700)

3817. Probate court to examine bonds, when—At least once in each year every probate judge shall carefully examine all bonds on file in his office and in force pending the settlement of estates, for the purpose of ascertaining the solvency of the sureties thereon, and, if satisfied that any such bond is insufficient, he shall order an additional bond to be given. (4572, 4700)

GUARDIANS AND WARDS

3818. Appointment of guardians—Whenever it appears necessary or convenient, the probate court may appoint a guardian for either the person or estate, or both, of any minor who has no guardian appointed by will, and who is a resident of the county, or who resides without the state and has property within the county. (4535)

Letters of guardianship issued by a court having jurisdiction are not subject to collateral attack (29–27, 11+136; 40–7, 11, 41+232; 40–254, 41+972). Trust companies as guardians (40–7, 41+232).

3819. By whom nominated and appointed—If the minor be under the age of fourteen years, such appointment may be made on petition of a relative or of some other person on behalf of the minor. If above the age of fourteen years, he may nominate his own guardian, who, if approved by the court, shall be appointed. If not so approved, or if the minor resides out of the state, or if, after being duly cited by the court, he neglects for ten days to nominate a suitable person, the court may appoint his guardian in the same manner as if he was under the age of fourteen years. A minor may make such nomination before a justice of the peace, a notary public, or a city or town clerk, who shall certify the fact to the probate court. (4535–4537)

Nominations by minors over fourteen (77–70, 74, 79+598; 86–224, 231, 90+360, 1133). Appointment when minor is under fourteen may be without notice (81–370, 84+120).

3820. When ward attains age of fourteen—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, unless such guardian is a testamentary guardian, may select his own guardian, subject to the approval of the court. (4538)

77-70, 74, 79+598.

3821. Testamentary guardians—The father, with the written consent of the mother, and the mother with the written consent of the father, may by will appoint a guardian to their minor children, whether born at the time of making the will or afterwards, to continue during their minority or a less time, and if either parent dies without having appointed a testamentary guardian, the survivor may by will appoint such guardian. Such guardian, within thirty days after probate of the will, or after he has knowledge of his appointment, and in case of appeal within thirty days after final determination of such appeal, shall file with the probate court his acceptance of the trust and give bond to be approved by the court. Thereupon a certificate shall be issued to him, under the hand and seal of the court, reciting his appointment by will, his acceptance and qualification. He shall then have the same powers and perform the same duties, with respect to the person and estate of the ward, as a guardian appointed by the probate court. Such guardian shall at all times be subject to the jurisdiction, direction and orders of the probate court, and may be removed by such court for good cause. If any guardian so appointed by will does not accept the trust and qualify within the time limited, he shall be deemed to have renounced the appointment, and the probate court may then appoint a guardian as in other cases. (4539)

83-366, 368, 86+351. See 1905 c. 256

3822. Guardian of estate only—The probate court, in its discretion, may 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 the custodian such sums of money for the maintenance and education of such ward as it shall deem reasonable and proper. (4541)

3823. Married women may be guardians—A woman shall not be disqualified by reason of her marriage from acting as guardian, and the marriage of a female guardian shall not terminate her guardianship. (4542)

3824. Marriage of female ward terminates guardianship—The marriage of a female ward under guardianship as a minor shall terminate such guardianship. (4543)

3825. Guardian ad litem—Nothing contained in this chapter shall affect or impair 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. (4548)

See note to § 4057.

3826. Guardian for insane or incompetent persons—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 management of his property, or one who by excessive drinking, gaming, idleness, or debauchery so spends or wastes his estate as to be likely to expose himself or his family to want or suffering. Such appointment may be made upon the petition of the county board, or of any relative or friend of such person, which petition shall set forth the facts, and be verified by the affidavit of the petitioner that he believes the facts stated to be true. (4549)

Jurisdiction of probate courts over insane persons (See § 3622 Note 5). Evidence held sufficient to sustain order of appointment (90-366, 96+1134). Order of appointment held conclusive on habeas corpus. Authority of guardian to take ward out of jurisdiction of court (86-310, 90+769).

3827. Notice of hearing—Upon the presentation of such petition the court shall make an order fixing a time and place for hearing the same, and cause personal service thereof to be made upon the person for whom a guardian is sought at least fourteen days prior to the date of such hearing. If such person

is an inmate of a state hospital for the insane, a like notice shall be served upon the superintendent of such hospital. (4550)

48–58, 60, 50+934.

3828. Hearing—Appointment—At the time fixed the court shall consider all competent evidence offered for and against the petition, and if it appears that a guardian should be appointed the court shall appoint not exceeding two persons as guardian or guardians of his person and estate. (4551, 4552)

48–58, 60, 50+934.

3829. Filing copy of petition, notice, etc.—Effect—As soon as the required notice shall have been given to the person for whom a guardian is asked, the petitioner or any person interested may cause a copy of the petition, and of the notice and proof of service thereof, to be filed for record with the register of deeds in any county in which real estate owned by the person proposed to be put under guardianship is situated; and, if a guardian be appointed on such petition, all contracts except for necessaries, and all gifts, sales, and transfers of real or personal property, made by the ward after such filing before the termination of the guardianship, shall be void. (4549)

48–58, 60, 50+934; 64–201, 204, 66+1.

3830. Insane persons—Special guardian—The judge before whom any person examined on a petition for inquiry as to sanity is found to be insane, shall make special inquiry as to his property, and, when he has property within the jurisdiction of the court needing care and attention, shall appoint a special guardian of such property until he is discharged from the hospital for the insane, or a guardian is duly appointed by petition and qualified as required by law. Such guardian, in the performance of his duties, shall be governed by the general laws relating to guardians. ('99 c. 44)

3831. How restored—Any person who has been so declared insane or incompetent, or his guardian, relative, or friend, may petition the probate court in which he was declared insane or incompetent to have his right to be restored to capacity judicially determined. Upon filing such petition the court shall fix a day for hearing, and cause personal notice thereof to be given to the guardian, if there be one in the state. Such guardian, relative, or friend, or any other person permitted by the court, may contest the right to the relief demanded. Witnesses may be called and examined at the request of any party interested or by the court on its own motion. If it be found that such person is of sound mind and capable of taking care of himself and his property, the court shall adjudge him restored to capacity; and unless it be a minor, the guardianship shall thereupon cease. (4553)

72–19, 74+899; 83–58, 85+917.

3832. Guardian for non-resident—Whenever a person liable to be put under guardianship is a non-resident and has property in this state, any friend of such person, or any one interested in his estate, in expectancy or otherwise, may petition the probate court of any county in which there is any estate of such non-resident for the appointment of a guardian for such absent person; and after such notice to all persons interested as the court shall order, and a full hearing and examination, the court may appoint a guardian. Such guardian shall have the same powers and duties with respect to any estate of the ward within this state, and to the person of the ward, if he comes to reside therein, as are prescribed for other guardians. (4559–4561)

29–27, 11+136; 45–380, 47+1134; 48–339, 51+221.

3833. Bond and oath—Every person appointed guardian, before letters are issued to him, shall give bond as hereinbefore provided, and, before entering upon the duties of his trust, he shall take and subscribe an oath to faithfully perform all the duties of such guardian according to law. (4544, 4545)

Liability on bond (23–51, 55; 72–426, 75+607).

3834
99-M - 54
108-NW 812

3834. Guardians of minors—General powers—The guardian of a minor shall have the custody of his ward and charge of his education, and the care

3834
99-M - 58

and management of his estate, unless otherwise specified in his appointment. Unless sooner discharged according to law, he shall continue as such guardian until the minor arrives at full age. But the father and mother are the natural guardians of their minor children, and, being themselves competent to transact their own business and not otherwise unsuitable, they are equally entitled to their custody and the care of their education. If either dies or is disqualified to act, the guardianship devolves upon the other. (4540)

May sell personal property of ward without order of court (19–221, 182; 75–12, 77+552). The revision changes the relative rights of the father and mother as to the custody and education of the minor (See G. S. 1894 § 4540; 63–187, 65+272; 84–203, 87+489; 89–198, 94+681).

3835. Conditions in order of appointment—The court, with the consent of the person to be appointed guardian of a minor, may insert in the order of appointment conditions in respect to the care, treatment, education, and welfare of the minor not otherwise obligatory. The performance of such conditions shall be a part of the guardian's duties and be covered by his bond. (4546)

3836. Education of minor—When paid out of estate—Whenever a minor child of a living parent has property sufficient for his maintenance and education in a manner more expensive than such parent can reasonably afford, under all the circumstances, the expenses of the education and maintenance of such minor may be defrayed out of his own property, in whole or in part, as shall be deemed reasonable by the court. (4547)

3837. Guardian to make and return inventory—Every guardian, within three months after his appointment, shall make and return to the probate court an inventory and appraisement of all the property, real and personal, belonging to his ward which has come to his possession or knowledge. If the ward be a non-resident at the time of the appointment, the inventory shall include only his property within this state. Such inventory and appraisement shall be made in the same manner as in estates of decedents. (4558, 4561)

3838. Guardian to collect debts and appear in actions—Every guardian shall settle all accounts of his ward, demand, sue for, and receive all debts due to him, or, with the approval of the court, he may compound for the same, and discharge the debtor on receiving a fair and just dividend of his estate. He shall appear for and represent his ward in all legal proceedings, unless another person is appointed for that purpose. (4555)

3838
102-M 363
113-NW 902

See § 4057 Note 1.

3839. Management of estate of ward—Every guardian shall manage the estate of his ward economically, applying the income and profits thereof, so far as may be necessary, to the suitable maintenance and support of the ward and his family, if he have one; and, if such income and profits be insufficient for that purpose, the guardian, under license from the court, may sell real estate therefor. (4556)

Guardian is subject to control of court in management of estate (56–358, 57+1062). Guardian may be allowed for necessary expenses incurred in the support of the ward without previous order of court (32–385, 20+366).

3840. Support and education of ward—The guardian shall pay, out of the estate of his ward, the reasonable charges of his support and education in a manner suited to his position in life and the value of his estate. If the available funds are at any time insufficient to meet such charges, the guardian may advance the same, and be allowed therefor in his account. In case the guardian shall refuse or neglect to provide such suitable support and education, any third person, at the ward's request, may do so and be reimbursed out of such estate. But all such expenditures, however or by whomsoever made, shall be approved and allowed by the probate court before they shall become a valid charge upon the ward's estate. (4557)

3841. Debts of ward, how paid—Every guardian appointed under the provisions of this chapter, whether for a minor or other person, shall pay all just debts due from his ward out of the personal property, if sufficient. If not,

then the balance shall be paid from the proceeds of his real estate sold under license from the court. (4554, 4563)

Duty to pay debts. Liability therefor on bond (32–155, 156, 19+973).

3842. Non-resident guardians and wards—Whenever the guardian of any non-resident ward, appointed as such in the state or district where said ward resides, shall have occasion to deal with property of his ward situated within this state, he may file in the probate court of the county in which such property may be an authenticated copy of his letters, and thereupon he shall be authorized to sue for and recover such property, or to receive and receipt for the same, and, if it be personalty, to remove it from the state, subject, however, to the rights therein of citizens of this state. (4562)

40–254, 255, 41+972.

3843. Partition of real estate of ward—When real estate is owned by a ward jointly or in common with others, the guardian may have partition thereof, either by proceedings therefor in the district court, or, in case the guardian and ward are not adversely interested in such real estate, by amicable agreement. In case of such partition by agreement, the probate court, upon approving the same, shall enter its order authorizing the guardian to execute all deeds and other instruments necessary to complete said agreement, and to deliver such papers upon receiving from said other joint or common owners full relinquishment of their interests in that part of said real estate apportioned to the ward. (4564, 5813)

3844. Improvement of real estate—A guardian may, with the approval of the probate court, contract for any improvement of the real estate of his ward, including the erection or maintenance of a line fence or party wall. (4566)

3845. Investment of funds—Whenever a guardian has funds in his hands belonging to his ward he may petition the probate court, setting forth the estate of his ward, real and personal, and the amount of money which he desires to invest, with the facts upon which such petition is based, and any circumstances tending to show the expediency of such investment. The court, if satisfied that such investment is advisable and for the best interest of the ward, may, without notice, order the guardian to make such investment. (4569–4571)

Guardian must be disinterested or make full disclosure of his interest to court (49–438, 443, 52+41).

3846. Guardian to account annually—Every guardian shall render to the court annually a verified account of his guardianship for the preceding year, containing an itemized statement of all property received by him at the beginning or remaining in his hands at the last settlement, what has since been received, what he has expended or invested since his last accounting, and a statement in detail of what remains in his hands, with the estimated value of each item thereof. Whenever it shall appear to the court to be for the best interest of the ward so to do, such court, upon its own motion, may, and upon the request of the guardian or any other person interested, shall, appoint a time for the hearing and settlement of such account, and cause three weeks' published notice thereof to be given. At the time and place of hearing, the court shall examine such account, hear all proper evidence offered in reference thereto, adjust and settle the same, and make an order allowing or disallowing it in whole or in part, and in such order shall specify the amount and description of the personal property remaining in the hands of the guardian. (4572)

65–335, 336, 68+44.

3847. Final account—Notice—When the disability of any person under guardianship is removed, or he dies, the guardian shall render a final account of his guardianship to the probate court, and turn over all property of his ward in his possession to such ward or his legal representative. Upon the filing of such final account, with a petition for its settlement and allowance, the court shall make an order fixing a time and place for hearing thereon, and cause personal service thereof to be made upon said ward, if he is in the state,

at least fourteen days before the date of hearing, and, if the ward be not in the state or is dead, service of said order shall be made by three weeks' published notice. (4573)

Guardian cannot release himself and his sureties by turning over the estate to the court (72–426, 75+607). Court has jurisdiction to settle account of guardian after the ward has become of age (23–51). Guardian held to have sufficient notice (32–466, 21+555). When a guardian dies without an accounting his representative may be required to account (38–451, 38+205). Cited (65–335, 336, 68+44; 68–388, 390, 71+402).

3848. Order allowing final account—At the time and place so fixed for hearing the court shall examine such account, and hear all proper testimony offered for and against its allowance, and, if satisfied that such account should be allowed in whole or in part, the court shall so order. Upon such allowance the court shall make an order discharging the guardian, and, if no action upon such guardian's bond shall have been commenced within ninety days after such discharge, the court may discharge the sureties on the bond. (4574)

Order of allowance conclusive on sureties of guardian (80–413, 83+393; 72–426, 75+607). Setting aside order of allowance obtained by fraud (82–324, 84+1017, 86+333).

3849. Appointment of special guardian—When there shall be delay in appointing a guardian for the person or estate of a minor, or when it shall appear to the court to be necessary, it may appoint a special guardian for the minor until the cause of the delay or the necessity for such appointment shall cease and a guardian be appointed. Such special guardian may be appointed without notice, and no appeal therefrom shall be allowed. All provisions of law relating to guardians shall apply to such special guardian as far as applicable, and upon the filing and approval of his bond letters of guardianship shall issue to him. ('03 c. 58)

3850. Power of special guardian—Such special guardian shall have the same power and perform the same duties as other guardians, but no special guardian appointed under § 3849 shall institute any proceeding for selling or mortgaging any real estate of his ward or dispose of any of his personal property without license from the probate court. ('03 c. 58)

COMMITMENT OF INSANE PERSONS

3851. Term "insane" defined—The term "insane," as used in this chapter, includes every species of insanity except idiocy and imbecility. (4689)

3852. Petition for inquiry—Warrant—Upon filing in the probate court a verified petition, setting forth that a person in the county is insane and in need of care and treatment, or that it is dangerous for him to remain at large, and also stating therein the petitioner's relationship if any, to such alleged insane person, and the indications of insanity manifested by him, and praying the court to inquire into the matter, the court shall direct that such alleged insane person be brought before it, and when from the petition it appears necessary may issue a warrant, under its seal, directed to the sheriff or any constable of the county, or to any person named therein, requiring him forthwith to bring such person before the court for examination as to his sanity. (4679)

3852-3861
105-M - 175

See 1905 cc. 47, 85, 341

Jurisdiction of probate court over subject (24–143). Issuance of warrant unnecessary if not required to secure presence of alleged insane person. Failure of record to show presence of such person in court is not a ground for collateral attack on the judgment (68–320, 71+396). A person cannot be adjudged insane and committed without notice and an opportunity to be heard (55–467, 57+206, 794).

3853. County attorney to appear—Whenever a probate judge or court commissioner orders an examination, he shall notify the county attorney, who shall appear on behalf of the alleged insane person, and take such action as may be necessary to protect his rights, and on request of the county attorney the court shall issue subpoenas for witnesses. ('95 c. 119 s. 4)

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3854. Board of examiners—How appointed—When such alleged insane person has been produced in court, the court shall make an order directed to two reputable persons, at least one of whom shall be a duly qualified physician,

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and such persons, with the judge of probate, shall constitute a board to examine such alleged insane person, and determine as to his sanity. (4680, 4681)

Appointment of three persons instead of two held not to render proceedings subject to collateral attack on habeas corpus (68-320, 71+396).

3855

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3855. Examination of witnesses—Report—The board shall hear all proper testimony offered by any person interested, and the court may cause witnesses to be subpoenaed. When the examination is completed, said board shall determine whether the person be sane or insane, and file in court a report of their proceedings, including said findings. (4682, 4683)

3856

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3856. Report of board of examiners—Contents—Form—The report of the board of examiners shall contain answers to questions propounded, and shall be substantially in the following form:

State of Minnesota, }
County of ..... }

In the matter of the insanity of.....:

We, the board of examiners in the above-entitled matter, do hereby certify that on the.....day of....., 19...., we did personally examine the person above named. Inquiry was made and answers obtained as follows:

1. What is the patient's name and age? Single, married or widowed? If children, how many? If a mother, age of youngest child.

2. Where was the patient born? Where was the patient's father born? Where was the patient's mother born?

3. Where is his or her place of residence? (Legal settlement.)

4. What has been the patient's occupation? If a woman, husband's or father's occupation?

5. Is the patient a church member? If so, what church?

6. Is the patient educated? If so, to what extent?

7. Were the patient's parents or grandparents related, and if so in what degree?

8. Is this the first attack? If not, when did others occur, and what were their duration? If sent to a hospital, state where, and result of treatment.

9. When were the first symptoms of this attack manifested, and in what way?

10. Does the disease appear to be increasing, decreasing or stationary?

11. Is the disease variable, and are there rational intervals? If so, do they occur at regular intervals? (Avoid definitions, but describe conditions.)

12. On what subject, or in what way, is derangement now manifested? State fully.

13. Has the patient shown any disposition to injure others?

14. Has suicide ever been attempted? If so, in what way? Is the propensity now active?

15. Is there a disposition to filthy habits, destruction of clothing, furniture, etc.?

16. Has the patient's father or mother or any relative, on either side, been insane?

17. Did the patient manifest any peculiarities of temper, habits, disposition or pursuits before the accession of the disease; any predominant passions, religion, impressions, etc.?

18. Has the patient, or were either of his parents, ever addicted to intemperance in any form, or the habitual use of any narcotic?

19. Has the patient been subject to any severe disease, to epilepsy, to convulsions in any form, or had any injury of the head?

20. Has any constraint or confinement been employed? If so, what kind and how long?

21. What is supposed to be the cause of the disease?

22. What treatment has been pursued for the relief of the patient? (Mention particulars and effects.)

23. Describe the conduct and conversation of the patient as they indicate or have indicated insanity. How long have these conditions existed?

From the examination made by us and from the testimony introduced, we find that.....is insane and a proper person for care and treatment in a hospital for the insane.

In case of committal, a copy of this report shall be sent to the superintendent of the hospital, with the warrant. (4686)

3857. Examiners—It shall not be lawful for any physician to certify to the insanity of any person for the purpose of securing his commitment to custody unless such physician is of reputable character, a graduate of some incorporated medical college, a permanent resident of the state, and shall have been in the actual practice of his profession for at least one year next preceding the making of such certificate, and shall at the time of making the same be registered as licensed by the state board of medical examiners. The possession of such qualifications shall be certified to by the judge of probate of the county in which such examiner resides, and such certificate shall constitute said physician an examiner in lunacy for the purpose of this chapter. A copy of said certificate shall be filed in the office of the judge of probate of the county in which such physician resides. No examiner in lunacy shall certify to the insanity of any person for the purpose of committing him to a hospital or institution devoted to the custody, care and treatment of the insane, of which said examiner is either the superintendent or proprietor, an officer or regular medical attendant, or when said examiner is a near relative of the alleged insane person. ('93 c. 5 s. 18)

3858. False representations or certificate—Whosoever for any corrupt consideration or advantage, or through malice, shall make, or join in, or advise the making of any certificate aforesaid, or shall knowingly or wilfully make any false representation for the purpose of causing any such certificate to be made shall be deemed guilty of a felony. ('95 c. 119 s. 6)

3859. Detention pending examination—No alleged insane person, apprehended under the provisions of this chapter and subjected to restraint and detention, shall be confined in any public jail or prison, unless the probate judge certifies in writing that such confinement is necessary; but, pending final action upon the information, such person may be restrained and cared for in some hospital or other suitable place, to be designated by such judge. ('01 c. 299)

3860. Action of court—Warrant of commitment—When the person examined is found to be sane, he shall be discharged. When found to be insane, the court shall order him committed to the custody of the superintendent of one of the state hospitals for the insane, and issue duplicate warrants to the sheriff or other suitable person, authorizing him to convey said insane person to the hospital designated. But where the person committed is a female, she shall be accompanied while being conveyed to the hospital, either by her husband, by a near relative or by a woman, who shall be designated in the order of commitment. The warrant may be in the following form, to wit:

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State of Minnesota, }
County of ..... } In Probate Court.

To (here insert sheriff, constable, or the name of the person designated by the court), and to the superintendent of the state hospital for the insane at .....:

....., having been, upon examination, found to be insane, you (here insert name of officer or person to whom issued) are commanded forthwith to convey and deliver (name of insane person) to said superintendent, and you, the said superintendent, are hereby commanded to receive, the said ..... into the hospital and keep him there until legally discharged.

Given under my hand and the seal of the probate court of said county this ..... day of ....., 19....

[Seal]

.....,
Probate Judge,
.....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 indorsement thereon that said patient has been received by him, shall be returned to the probate court and filed therein. (4684, 4685)

Warrant irregular as to finding of insanity held void (55–467, 57+206, 794).

3861. Notice of discharge—Whenever any person committed to a hospital for the insane shall be discharged, the superintendent upon the day of such discharge shall mail to the probate judge of the county from which such person was committed a certificate, stating the fact of such discharge and the date thereof and the date of commitment, which certificate shall be filed in said court. (4687)

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3862. Fees, how paid—To the examiners in lunacy for every examination, five dollars each, and for every mile traveled by each of them in making such examination, fifteen cents, and to the family physician or examiner procuring answers to the questions specified in § 3856 the sum of five dollars. To the person authorized to convey an insane person to a state hospital, or to the place of his legal residence, three dollars per day for the time necessarily employed and all necessary disbursements for travel, and for the support of himself, the insane person and authorized assistants. Such amounts to be audited by the judge of probate or court commissioner, and judgment entered of record therefor, to be paid out of the county treasury upon the written order of the judge of probate or court commissioner under seal of the court; and upon the payment thereof said judgment shall be satisfied of record by the judge of probate or court commissioner: Provided, that the said written order shall be filed with the county auditor, who shall issue his warrant upon the county treasurer in payment of said sums. (4690–4692)

3862
09 - - 224

See 1905 c. 57

3863. When resident of another county—Whenever the alleged insane person is found to have his legal residence in some other county, he may nevertheless be examined, and, if found insane, committed to a state hospital. The necessary costs and expenses of such examination and commitment shall be certified by such court to the auditor of the county found to be his legal residence, and shall be paid as other claims against such county. ('99 c. 16)

3864. Proceeding when residence is questioned—Whenever the auditor of the county to which costs and expenses have been certified denies that such person has a legal residence in his county, he shall send such certificate, with a statement of his claim in reference thereto, to the state board of control, who shall immediately investigate and determine the question of residence, and certify its findings to the auditor of each of said counties. Such decision shall be final unless an appeal is taken therefrom within ten days after its filing. Such appeal may be to the district court of the county from which such person was committed. ('99 c. 16 s. 3)

3865. Bond required in certain cases—Upon request of the relatives or friends of any person alleged or found to be insane, or who has been committed to a hospital for the insane, they may be permitted to take charge of said person; but in such case the probate judge, or, if said person has been committed to the hospital, the superintendent thereof, may require a bond from such relatives or friends, running to the state, to be approved by such judge or superintendent, as the case may be, conditioned for the care and safe-keeping of such person: Provided, that no person charged with or convicted of crime shall be so discharged. (4688)

3866. Court commissioner to act, when—Whenever from any cause the probate judge is unable to act upon any petition for inquiry as to sanity, the court commissioner shall perform all his duties in such case. (4693; '97 c. 311)

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3867. Place of detention for alleged insane—The state board of control shall establish in every city in the state containing more than 50,000 inhabitants a place of detention for alleged insane. ('01 c. 317 s. 1)

3868. Detention in doubtful cases—Whenever a board of examiners deem it advisable, they may commit any alleged insane person brought before them for examination, where the question of insanity is doubtful, to a place of detention, in the same manner as provided in this chapter for commitment to a state hospital for insane, there to be kept until the person in charge of such place and said board of examiners shall determine that he is cured or a fit subject for a state insane hospital, but in no case longer than six weeks. When they determine that he is cured, he shall be discharged on their recommendation. If he has not been improved, and they deem him a fit subject for a state institution, they shall so indorse on the warrant of commitment, and he shall be conveyed to a state hospital for the insane by some suitable person or persons designated by the probate judge or court commissioner making the commitment, and a record of such case transmitted to such state hospital. Such person while in a place of detention shall be under the medical care of the city or county physician, and such other consulting physician as he or his relatives may designate. ('01 c. 317 s. 2)

3869. Compensation of examiners—Cost of places of detention—No examiner shall be entitled to pay as such until after the person examined has been discharged or committed to a state hospital. Then they shall be paid as provided by law in other cases. The cost of establishing such places of detention and maintaining patients therein shall be paid out of any funds in the state treasury not otherwise appropriated. ('01 c. 317 s. 3)

3870. Who deemed guardian of person in place of detention—The person in charge of any place of detention shall be deemed the guardian of all persons committed to such place, for the purpose of retaining them there; but any person confined in such place of detention shall be allowed freely to correspond with his friends and legal advisers, and may receive visits from them, except when it is deemed inadvisable by the physician in charge. ('01 c. 317 s. 4)

3871. Forms of blanks—For the purpose of securing uniformity in the practice of the commitment of the insane the board of control is hereby authorized and empowered to prescribe forms of blanks which shall be used, and the information to be contained therein.

APPEALS

3872. In what cases allowed—An appeal to the district court from a judgment, order, or decree of the probate court may be taken by any party aggrieved 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 authorizing or refusing to authorize real property to be sold, mortgaged, or leased, or confirming or refusing to confirm such sale, mortgaging, or leasing.
4. An order allowing or disallowing the claim of a creditor against the estate, or disallowing a counterclaim, in whole or in part, to the amount in either case of twenty dollars or more.
5. 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.
6. An order setting apart property, or making an allowance for the widow, the widow and children, or children, or refusing the same.
7. An order allowing the account of an executor, administrator, or guardian, or refusing to allow the same, when the amount allowed or disallowed exceeds twenty dollars.
8. An order vacating or refusing to vacate a previous order, judgment, or decree alleged to have been procured by fraud, misrepresentation, or through surprise or excusable inadvertence or neglect.
9. An order or decree directing or refusing a conveyance of real estate.

10. A final judgment or decree assigning the residue of the estate of a decedent.

11. An order denying an application for the restoration to capacity of any person under guardianship. (4665; '99 c. 27; '01 c. 147)

Subd. 1 (104+765; 32–443, 21+474; 47–171, 177, 49+697). Subd. 2 (104+765; 83–366, 86+351; 32–466, 21+555; 25–347, 354; 83–58, 85+917, overruled by 1901 c. 147). Subd. 3 (91–115, 97+647; 19–117, 85). Subd. 4 (Allowing claim: 28–381, 382, 10+209; 72–434, 75+700; 20–442, 395. Disallowing claim: 62–321, 64+822; 76–132, 134, 78+1039; 51–241, 53+463). Subd. 5 (45–323, 324, 47+973; 72–165, 166, 75+123). Subd. 6 (79–267, 271, 82+635. See 45–323, 47+973). Subd. 7 (65–335, 336, 68+44; 84–493, 87+1012). Subd. 8 (30–202, 204, 14+887; 32–142, 19+651; 32–155, 157, 19+973; 33–94, 95, 22+10; 71–250, 73+966; 93–350, 101+496; 82–324, 327, 84+1017, 86+333). Subd. 9 (See 33–94, 22+10). Subd. 10 (72–165, 75+123; 75–2; 3, 77+420, overruled by 1899 c. 27). Subd. 11 (83–58, 85+917, overruled by 1901 c. 147). Appeal from a part of a final order or judgment (20–442, 395; 84–493, 87+1012; 93–98, 100+473. See 105+66).

3873. Who entitled to appeal—An appeal under § 3872, subd. 4 may be taken by the representative or by the creditor, and when the representative declines to appeal in such case any person interested in the estate as creditor, devisee, legatee, or heir may appeal in the name of such representative and by the same proceedings: Provided, that the person appealing in such case shall give a bond, conditioned to secure the estate from damages and costs, and also to secure the intervening damages and costs to the adverse party. In all other cases the appeal can be taken only 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, did not appear and take part in the proceedings. (4666, 4667; '03 c. 27)

1. **From allowance or disallowance of claims**—Proof of the fact of the refusal of the representative to appeal need not be made prior to appeal, but may be made on motion to dismiss. Notice of appeal should be signed by the creditor, devisee, legatee or heir appealing (47–255, 49+982). Objection to right of creditor to appeal held too late in supreme court (92–411, 412, 100+233). Payee of note given for benefit of another a "creditor" (37–453, 35+177). A party held not "interested" in the estate (93–80, 100+663).

2. **In other cases**—An aggrieved party is one who, as heir, devisee, legatee or creditor, has what may be called a legal interest in the assets of the estate and their due administration (35–193, 28+219; 82–96, 97, 84+653. See 81–370, 84+120). A debtor of the estate is not such a party (35–193, 28+219). An heir may appeal although he did not appear and take part in the proceedings. Upon the death of such heir a special administrator may perfect the appeal (In re Last Will of Mary Sheeran, Filed Dec. 22, 1905).

3874. Appeal, how and when taken—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:

1. The appellant shall serve a written notice upon the adverse party, his agent or attorney who appeared in court, and, when there has been no appearance, by delivering a copy of such notice to the probate judge for such party. Such notice shall specify the order, judgment, or decree, or such part thereof as is appealed from, be signed by the appellant or his attorney, and be served in the same manner as notices in civil actions, and, together with proof of service thereof, be filed in the probate court.

2. In case any person other than the representative appeals, he shall execute a bond, with sureties, to the judge, conditioned that he will prosecute his appeal with due diligence to a final determination, pay all costs and disbursements, and abide the order of court therein. But no appeal from an order, judgment, or decree shall be taken after six months from the entry thereof. (4668)

Notice may be served on the attorney of the proponent of a will (32–443, 21+474). Amendment of notice held unauthorized (76–323, 324, 79+176). Notice must specify the order, judgment or decree appealed from (104+765). Notice construed as an appeal from the whole of an order. Notices to be construed liberally (105+66). Defect in bond not jurisdictional (38–9, 35+472). Undertaking sufficient (35–307, 29+131).

3875. Return—Upon filing such notice of appeal and proof of service, the probate court shall forthwith make and return to the district court a cer-

tified transcript of all the papers and proceedings upon which the order, judgment, or decree appealed from is founded, together with copies of the order, judgment, or decree, the notice of appeal with proof of service thereof, and the bond. The district court, when necessary, may require a further or amended return. (4669)

District court acquires jurisdiction of the subject matter when the return is filed. Subsequent proceedings are not jurisdictional (70–437, 438, 73+145).

3876. Appeal suspends order—Such appeal shall suspend the operation of the order, judgment, or decree appealed from until the appeal is determined or the district court shall otherwise order. The court shall have discretionary power, for cause shown, to require the appellant to give further security for the payment of damages which may be awarded against him in consequence of such suspension, in case he fails to obtain a reversal of the order, judgment, or decree so appealed from. But nothing herein contained shall prevent the probate court from appointing special administrators or special guardians, or to prevent special administrators or guardians appointed prior to such appeal from continuing to act as such. (4670; '03 c. 54)

An appeal from an order admitting a will to probate does not affect an order appointing an executor (104+765).

3877. Notice of trial, etc.—Upon appeal the cause may be brought on for trial by either party on eight days' notice, which shall be served upon the attorney of the adverse party, or, if he have none, shall be deposited for him with the clerk of the district court. On or before the first day of the term for which the cause is noticed, the appellant shall cause it to be entered on the calendar; otherwise the appeal shall be dismissed. When placed on the calendar, the cause shall be tried and determined in the same manner as if originally commenced in such court. (4671, 4672)

Relief from failure to have cause entered on calendar (70–437, 73+145). Trial in district court de novo (104+535). Scope of review on appeal from order vacating an administrator's account (In re Estate of James A. Bradley, Filed Jan. 19, 1906).

3878. Proceedings in certain cases—Trial—If the appeal be from the allowance or disallowance of a claim or counterclaim, the district court, on or before the second day of the term, shall direct pleadings to be made up as in civil actions, defining the issues to be tried. Such appeal shall then be heard and tried in the same manner as other issues of fact are heard and tried in such court. All other appeals shall be tried by the court without a jury, unless the court orders the whole issue or some specific question of fact involved therein to be tried by jury or referred. (4673, 4674)

Trial without pleadings an irregularity merely (37–453, 35+177). Issues which may be formed (70–46, 72+819; 83–366, 369, 86+351). Right to jury trial statutory; not constitutional (47–451, 50+598). Findings of jury conclusive on court until set aside for cause (26–391, 407, 4+685; 27–280, 6+791, 7+144). Answering and proceeding to trial without objection held to give the district court jurisdiction (65–162, 167, 67+987).

3879. When judgment affirmed—When reversed—Whenever the appellant fails to prosecute his appeal, or the order, judgment, or decree appealed from or brought up on certiorari is sustained by the district court on the merits, it shall enter judgment affirming the decision of the probate court, with costs. Upon filing in the probate court a certified transcript of the judgment of the district court, the same proceedings shall be had as if no appeal had been taken. But in case such order, judgment, or decree is reversed or modified, the district court shall make the order or decree which should have been made by the probate court, in case it can do so, and, if it cannot, it shall remand the case to the probate court, with direction to make such order or decree, or proceed as it may otherwise direct. Such final judgment shall be certified by the district court to the probate court, and upon filing the same in such court it shall proceed as directed by the district court if any direction is made. In case the judgment of the district court requires no action by the probate court, then such judgment shall be substituted in place of the original order, judgment, or decree, and like proceedings shall be had as when so ordered by the probate court. If the district court remands the case to the

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99-M - 236
109-NW 229

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99-M - 240

probate court with directions, the probate court shall comply with such directions in a summary manner, without notice. (4675, 4676; '01 c. 135)

Judgment of affirmance (79–267, 272, 82+635). Remand to probate court (104+535).

3880. Costs—The party prevailing on the appeal shall be entitled to costs and disbursements, to be taxed as in a civil action. If judgment be rendered against the estate, they shall be an adjudicated claim against it; and if the judgment be against a claimant against the estate, either for costs or on a counterclaim, execution may issue as in other cases. (4677)

79–377, 380, 82+669; 79–267, 272, 82+635.

3881. Judgment, execution, etc.—Whenever the order, judgment or decree appealed from is affirmed, judgment shall be rendered against the appellant and his sureties on the appeal bond, and execution may issue against him and his sureties. (4678)

CHAPTER 75

COURTS OF JUSTICES OF THE PEACE

GENERAL PROVISIONS

3882
99-M - 426
109-NW 827

3882
99-M - 427

3882-4035
105-M - 66

3882. Jurisdiction limited to county—The jurisdiction of justices of the peace is coextensive with the limits of the county in which they reside, except in the following cases:

1. Writs of attachment may be directed to the proper officer in any county for the purpose of causing an attachment of property therein.

2. Garnishee process may run into, and be served on the garnishee in, any county.

Provided, that this section shall not affect the jurisdiction of any city justice or justice of the peace under the charter of any city or village situated in two or more counties. (4955)

63–145, 65+261; 66–409, 69+220.

3883. Place of holding court—Every justice of the peace shall keep his office in the town, village, city, or ward for which he is elected; but he may issue process in any place in the county, and, in his discretion, for the convenience of parties, may make any civil or criminal process issued by him returnable, and may hold his court, at any place which he shall appoint in the town, village, or ward within his county adjoining the town or ward in which he resides, or in any village located within his town. (4956)

26–323, 3+991; 45–145, 47+650; 53–174, 54+1053.

3884. Not to hold office in saloon or with attorney—No justice of the peace shall hold his office or court in any saloon, nor in any room adjacent to a saloon, or connecting therewith by door or otherwise. Nor shall he hold his office in the same room with a practicing attorney unless such attorney is his law partner, and in that case such partner shall not appear or act as an attorney in any case before such justice. (4956, 4957)

26–25, 28, 1+43.

3885. Powers—Laws applicable—A justice of the peace may hold a court for the trial of all actions enumerated in § 3886, and hear, try, and determine the same; and for that purpose, where no special provision is otherwise made by law, such court shall have all the powers possessed by courts of record, and all laws of a general nature shall apply to such justice's court, so far as the same are applicable and not inconsistent with the provisions of this chapter; but no justice of the peace shall charge the jury. (4958)

1. **A court of limited powers**—A justice court is a court of limited and special jurisdiction and the record must affirmatively show jurisdiction both of the person and the subject matter. Neither the nature of the action nor the justice's jurisdiction thereof