

# MASON'S MINNESOTA STATUTES

1927

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PART III.

CIVIL ACTIONS AND PROCEEDINGS

CHAPTER 74

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**GENERAL PROVISIONS**

8690. 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. (3622) [7200]

**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; 61-444, 446, 64+48; 63-5, 11, 65+91; 68-388, 391, 71+402; 71-241, 244, 73+859; 71-371, 373, 74+148; 83-215, 218, 86+1; 84-353, 355, 87+944; 86-140, 147, 90+378; 95-455, 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. But see 113-1, 129+136). 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 (37-225, 233, 33+792; 82-324, 327, 84+1017, 86+333; 83-215, 218, 86+1). They have not the general equity powers of courts of general jurisdiction (103-325, 115+173. See, also, 105-444, 117+830). The district court as a court of chancery may not interfere with the exercise of the constitutional powers of the probate court, but in the interest of justice may exercise ancillary jurisdiction to aid that court. Held competent for the district court to restrain an executor from fraudulently disposing of testator's shares of stock (113-1, 129+136). 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; 47-527, 529, 50+698; 61-444, 447, 64+48). Jurisdiction over the estate of a deceased person attaches when general jurisdiction is invoked by presentation of a proper petition. Failure to give proper notice of hearing on petition for appointment of administrator, by publication of citation for full time required by statute, is an irregularity which renders subsequent proceedings voidable and subject to be set aside on motion or appeal. But giving such notice, by proper publication, is not necessary to confer jurisdiction over the estate, and validity of subsequent proceedings cannot be questioned in collateral proceeding (105-30, 117+235).

**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; 95-455, 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).

These claims which rest on a will or the law of descent are within the jurisdiction of the probate court. 160-276, 199+914.

If a contract is one which may be specially enforced an action to enforce comes within the jurisdiction of the district court. 160-276, 199+914.

There being no dispute as to plaintiff's legal rights, and there being nothing to litigate to establish her rights, the probate court has exclusive jurisdiction to direct the executors to do that which is necessary to comply with the demands of the contract as an incident to the distribution of the estate. 160-276, 199+914.

To determine when the executors can act "as soon after his death as possible without material injury to his estate" is essentially a matter of administration that is exclusively in the jurisdiction of the probate court. 160-276, 199+914.

**3. Nature and object of administration proceedings**—Administration proceedings are in rem, the res being the

estate of the deceased (33-176, 178, 180, 22+251; 44-5, 7, 46-79; 62-29, 36, 64+99. 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 (23-51; 24-143, 148; 30-277, 282, 15+245; 32-385, 388, 20+366; 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; 22-336, 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; 95-455, 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 (33-94, 22+10; 34-330, 336, 26+9); 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; 122-1, 141+851; 124-492, 145+378).

**8691. 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. (3623) [7201]

**8692. 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. (3624) [7202]

**8693. Books of record**—To be indexed—The court

shall keep the following books of record, each of which shall be properly indexed:

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. (3625) [7203]

Except as provided by § 8857 (61-18, 63+1; 103+885) the records import absolute verity and are not subject to collateral attack (22-393; 29-27, 11+136; 37-330, 33+907; 40-254, 41+972; 60-49, 51, 61+826; 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).

**8694. 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. (3626) [7204]

Cited (105-30, 117+235).  
130-270, 153+521.

The jurisdiction of the probate court of Minnesota is granted by the Constitution. Its exercise may be regulated but its scope cannot be limited by statute. Query—Whether the statute declaring that the wills of persons dying resident in a given county shall be probated in and their estates administered by the probate court of that county, should not be considered as one determining venue only rather than jurisdiction. 210+40.

**8695. Counties in which administration shall be had**—Wills shall be proved and administration upon the estates of decedents shall be granted:

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. (3627) [7205]

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). Deposit account in a bank held property in the state (115-73, 131+1010). Cited (105-30, 117+235). Jurisdiction to appoint special administrator to sue for non-resident's death in this state (129-280, 152+413). Jurisdiction over assets suffices regardless of domicile (141-137, 169+539). Jurisdiction in Indian allottee's heirship (155-77, 192+364).

The jurisdiction of the probate court of Minnesota is granted by the Constitution. Its exercise may be regulated but its scope cannot be limited by statute. Query—Whether the statute, declaring that the wills of persons dying resident in a given county shall be probated in and their estates administered by the probate court of that county, should not be considered as one determining venue only rather than jurisdiction. 210+40.

**8696. 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. (3628) [7206]

**8697. Judge of probate may act in any county when sitting judge is disqualified—**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 any 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 any 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. (R. L. '05 § 3629, G. S. '13 § 7207, amended '23 c. 401 § 1)

**8698. 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. (3630) [7208]

**8699. 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. (3631) [7209]

As to counties having 300,00 inhabitants. 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).

**8700. 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. Nor shall any probate judge keep or hold his official office with any practicing attorney. (R. L. § 3632, amended '11 c. 44 § 1) [7210]

**8701. Incidental duties of probate court—**In addition to their general powers under the Constitution, probate courts shall have the same powers as District Courts in the following matters:

1. To examine witnesses and parties on oath, to compel their attendance, to preserve order during any proceedings before it, and to 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 of witnesses whose testimony is wanted in any matter pending in such court, when the witness is without the state, or is within the State and lives more than one hundred miles from the place of holding such Court; or is about to go out of the State, not intending to return in time for the hearing; or is so sick, infirm or aged as to make it probable that he will not be able to attend the hearing. Provided, that if a deposition so taken is to be used in any matter on which there is a contest, then notice to the taking of the deposition and the time and place thereof, shall be given to the adverse party, the same as provided for the giving of notice for the taking of depositions to be used in any other Court of record;

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. (R. L. '05 § 3633, G. S. '13 § 7211, amended '23 c. 256 § 1)

1. **Conforming records to the facts—**84-289, 295, 87+783; 93-350, 101+496. See 65-60, 67+808; 77-533, 80+702.  
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 (§ 8933 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+733). 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 (97-150, 106+344). Power to vacate its decrees is same as in district court (138-99, 163+1031). Plenary jurisdiction (133-124, 158+234). Irregularities in procedure in revoking or amending its orders, not assailable in collateral proceeding (150-291, 185+254).

The probate courts have exclusive jurisdiction of administrators and executors, and of their accounts, and district courts have no jurisdiction to inquire into the merits of judgments rendered by the probate courts upon such accounts except upon appeals from such judgments. 163-168, 203+612

The probate courts have the same power as district courts to correct mere clerical errors and to clarify ambiguities in its judgment so as to make them read as intended. 163-168, 203+612.

**8702. Judges of probate courts to hold annual sessions—**The judges of the probate courts shall assemble at the Capitol on the second Wednesday after January 1st of each year, at ten o'clock in the forenoon, to formulate and adopt general rules of practice in such courts, and to revise and amend the same, for which purpose any twenty of them shall constitute a quorum. When so assembled such judges shall formulate and adopt such rules and make such revision and amendment thereof, as they may deem expedient, conformably to law, and the same shall take effect from and after the publication thereof. Such rules shall govern all the probate courts of the state; but in furtherance of justice they may be relaxed or modified in any case, or a party relieved from the effect thereof on such terms as may be just ('23 c. 400 § 1)

**8703. Rules published—Failure to comply with rules or give notices not to affect title to real estate after final decree—**Such rules so formulated, adopted, revised and amended shall be published as directed by the Judges so assembled. Provided, however, that a failure to comply with any such rules or give any notice provided by the rules so formulated, adopted, revised and amended, shall not affect the title to real estate after a final decree regular and legal in form shall have been made and filed in the office of the probate court. ('23, c. 400, § 2; amended '25, c. 397)

For court rules, see appendix in front of tables.

**8704. 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. (3634) [7212]

**8705. 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. (3635) [7213]

**8706. 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. (3636) [7214]

Females eighteen years old are of age (24-194; 138 Fed. 6, 70 C. C. A. 436; 166 Fed. 536).

**8707. Salaries of judges of probate in certain counties—Clerk hire—**The probate judges in all the counties in this state where compensation is not fixed by special laws shall receive in full compensation for all services rendered by them annual salaries to be paid in twelve equal monthly installments, based on the then last preceding completed state or national census, and on the then last preceding assessed valuation of real and personal property, as fixed by the Minnesota state tax commission as follows:

In counties whose population is less than six thousand, seven hundred fifty dollars; if the population is six thousand and less than nine thousand, one thousand dollars, and in addition thereto fifty dollars for every one million dollars assessed valuation not to exceed three hundred dollars; if the population is nine thousand and less than thirteen thousand, eleven hundred fifty dollars, and in addition thereto fifty dollars for every one million dollars assessed valuation not to exceed four hundred dollars; if the population is thirteen thousand and less than seventeen thousand, thirteen hundred dollars, and in addition thereto fifty dollars for every one million dollars assessed valuation not to exceed five hundred dollars; if the population is seventeen thousand and less than twenty-two thousand, fourteen hundred fifty dollars, and in addition thereto fifty dollars for every one million dollars assessed valuation not to exceed six hundred dollars; if the population is twenty-two thousand and less than twenty-eight thousand, fifteen hundred dollars, and in addition thereto fifty dollars for every one million dollars assessed valuation not to exceed seven hundred fifty dollars; if the population is twenty-eight thousand and less than thirty-six thousand, sixteen hundred dollars, and in addition thereto fifty dollars for every million dollars assessed valuation not to exceed nine hundred fifty dollars; if the population is thirty-six thousand and less than forty-five thousand, eighteen hundred dollars, and in addition thereto fifty dollars for every one million dollars assessed valuation not to exceed one thousand dollars; if the population is forty-five thousand and less than one hundred thousand, three thousand dollars.

In addition to the foregoing salaries annual compensation for clerk hire for probate judges in counties having a population of less than one hundred thousand shall be as follows:

In all counties having a population of less than eight thousand the county board may allow clerk hire in an amount not to exceed one-fourth of the salary of the probate judge; if the population is eight thousand and less than thirteen thousand, three hundred dollars, and such further sum as the county board may allow not to exceed a total of seven hundred dollars; if the population is thirteen thousand and less than seventeen thousand, four hundred dollars and such further sum as the county board may allow not to exceed a total of eight hundred dollars; if the population is seventeen thousand and less than twenty-two thousand, five hundred fifty dollars, and such further sum as the county board may allow not to exceed a total of nine hundred



dollars; if the population is twenty-two thousand and less than twenty-eight thousand, six hundred fifty dollars, and such further sum as the county board may allow not to exceed a total of twelve hundred dollars; if the population is twenty-eight thousand and less than thirty-six thousand, seven hundred dollars, and such further sum as the county board may allow not to exceed a total of fourteen hundred dollars; if the population is thirty-six thousand and less than forty-five thousand, twelve hundred dollars and such further sum as the county board may allow not to exceed a total of fifteen hundred dollars; if the population is forty-five thousand and less than fifty-five thousand, fifteen hundred dollars, and such further sum as the county board may allow not to exceed a total of two thousand dollars; if the population is fifty-five thousand and less than one hundred thousand such sum as the county board may allow not to exceed a total of four thousand dollars per annum. Provided, however, that no sums whatever shall be paid or allowed for clerk hire in excess of the amounts actually paid or due for help employed to perform necessary excess clerical labor in the respective offices of judges of probate as hereinbefore mentioned. ('17, c. 328, § 1; amended '23, c. 86, § 1; '25, c. 288, § 1; '27, c. 63; 27, c. 402)

('11 c. 334 § 1, amended '13 c. 192 § 1; '15 c. 136 § 1 is superseded by the above).

#### SALARY AND CLERK HIRE IN PARTICULAR COUNTIES.

See '07, c. 154, § 2, providing that in all counties in which the special law relating to compensation of clerk of probate court has been repealed the clerk hire of the probate court shall be same as is provided by general law for such clerk hire in counties of same class.

See '13 c. 440 §§ 16 and 17, amended '17 c. 511 §§ 10 and 11; '21 c. 133; '23 c. 419 §§ 17 and 18, providing that in counties having more than 380,000 inhabitants, the probate judge shall receive a salary of \$6000.00 per annum and shall appoint one clerk to be paid the sum of \$2940.00; one deputy clerk, \$2205.00; one deputy in charge of guardianships, \$2205.00; one register clerk, \$1980.00; one inheritance tax clerk, \$1980.00; one certificate clerk and shorthand reporter, \$1760.00; one special clerk, \$1800.00; three general clerks \$1650.00; one general clerk, \$1540.00; one stenographer, \$2205.00.

See '11 c. 145, § 13, amended '13 c. 118 § 1; '15 c. 145 § 1; '21 c. 492 § 16; '23 c. 432 § 1, providing that in counties having a population of more than 150,000 inhabitants and an area exceeding 5000 square miles, the salary of the probate judge shall be \$4800.00 and compensation for clerk hire shall not exceed \$10,400.00 per annum, of which sum not to exceed \$3000.00 may be paid for salaries of clerks and not to exceed \$2,000.00 for the salary of the deputy clerk and not to exceed \$1800.00 for the salary of the inheritance tax clerk.

See '11 c. 168; '13 c. 380; '15 c. 142; '17 c. 434; '19 c. 304 § 6; '21 c. 336 § 6; '23 c. 307 § 4, providing that in counties having not less than 220,000 inhabitants and not more than 330,000, the clerk of probate shall receive \$3500.00 per annum; deputy clerk \$2500.00; one reporter, \$2100.00; inheritance tax clerk, \$2500.00; registration clerk, \$1800.00; file clerk, \$1500.00; four general clerks, \$1500.00; one general clerk, \$1400.00; one general clerk, \$1000.00; one general clerk, \$1700.00.

See '21 c. 315, providing that in counties of not less than 225,000 or more than 325,000, the salary of the probate judge shall be \$6300.00.

See '05 c. 155, amended '17 c. 128, providing that in counties having not less than 4500 nor more than 7500 inhabitants, in which the salary of the probate judge is less than that provided for by the general laws, the county commissioners may allow him a sum not to exceed \$300.00 per annum for clerk hire.

See '15 c. 63, providing that in each county containing not less than 80 congressional townships and having an assessed valuation of more than twenty-five and less than fifty million dollars, the salary of the probate judge shall not exceed \$3000.00 per annum and he shall keep a record of all fees collected by him and of all other fees allowed by law to be collected by him and the clerk of the probate court shall receive an annual salary of \$360.00 and an allowance by the county board not to exceed a total annual salary of \$1200.00.

See '21 c. 164, providing that in counties containing not less than 22 and not more than 25 congressional townships and a population of not less than 29,000 and not more than 31,000 inhabitants, the probate judge

shall receive a salary of \$3000.00 per annum and a sum not to exceed \$5000.00 for clerk hire.

See '21 c. 351, providing that in any county containing not less than 70 nor more than 80 congressional townships and an assessed valuation of not less than three nor more than five million dollars, the probate judge shall receive a salary of \$1800.00 per annum and such allowance for clerk hire as is provided by law.

See '05 c. 81, providing that in counties where no allowance is made by law for clerk hire in counties of more than 35,000 inhabitants, the board of county commissioners may allow not to exceed \$900.00 per annum.

See '09 c. 242, providing that in counties having less than 25,000 inhabitants where the salary of the probate judge is fixed by special law, the board of county commissioners may allow not to exceed \$500.00 per annum for clerk hire.

See '09 c. 419, amended '11 c. 246 § 1 providing that all acts of judges of probate and clerks of probate collecting and retaining fees in counties having more than 200,000 inhabitants prior to the enactment of '07 c. 322 shall be lawful.

See '23 c. 84, legalizing payments of salary to judges of probate in counties where said salary is fixed by '17 c. 323.

Salary of probate judge and clerk hire in counties with not less than 41 nor more than 43 congressional townships and population of not less than 25,000 nor more than 30,000, see Laws 1925, c. 91, §§ 1, 6, 14 to 18. Salary of judge \$2,040 per annum; clerk hire not to exceed \$960 per annum, with addition allowance of not to exceed \$80 per month for clerk hire.

Salary of probate judge in counties with area of more than 380 and less than 400 square miles and more than 37,000 platted lots and population of more than 20,000, see Laws 1925, c. 181, §§ 1, 2. Salary of judge not to exceed \$3,000 per annum; clerk hire as deemed necessary by county board.

Salary of probate judge and clerk hire in counties with population of more than 150,000 and area of more than 5,000 square miles, see Laws 1925, c. 379, §§ 1 to 3. Salary of judge \$6,000 per annum; salary of clerk \$3,300 per annum; salary of deputy clerk \$2,400 per annum; salary of court reporter \$2,400 per annum; and not to exceed \$6,700 per annum for additional clerical and stenographical help; and expense allowances to be fixed by county board.

Laws 1925, c. 398, § 4, amending Laws 1923, c. 419, § 18 (which amended Laws 1921, c. 133, § 18), to read as follows: "The Judge of Probate shall appoint and employ one Clerk of Probate Court who shall be paid the sum of thirty-six hundred (\$3,600.00) dollars per annum; one deputy clerk who shall be paid the sum of two thousand two hundred and five (\$2,205.00) dollars per annum; one deputy in charge of guardianships who shall be paid the sum of two thousand two hundred five (\$2,205.00) dollars per annum; one register clerk who shall be paid the sum of nineteen hundred eighty (\$1,980.00) dollars per annum; one inheritance tax clerk who shall be paid the sum of nineteen hundred eighty (\$1,980.00) dollars per annum; one certificate clerk and shorthand reporter who shall be paid the sum of seventeen hundred sixty (\$1,760.00) dollars per annum; one special clerk who shall be paid the sum of eighteen hundred (\$1,800.00) dollars per annum; three general clerks who shall each be paid the sum of sixteen hundred fifty (\$1,650.00) dollars per annum; one general clerk who shall be paid the sum of fifteen hundred forty (\$1,540.00) dollars per annum; one stenographer who shall act as Secretary to the Judge of Probate who shall be paid the sum of twenty-two hundred five (\$2,205.00) dollars per annum." This section was again amended by Laws 1927, c. 377, § 1, to read as follows: "The Judge of Probate shall appoint and employ one Clerk of Probate Court who shall be paid the sum of thirty-six hundred (\$3,600.00) dollars per annum; one deputy clerk who shall be paid the sum of two thousand two hundred and five (\$2,205.00) dollars per annum; one deputy in charge of guardianships who shall be paid the sum of two thousand two hundred and five dollars (\$2,205.00) per annum; one register clerk who shall be paid the sum of nineteen hundred eighty (\$1,980.00) dollars per annum; one inheritance tax clerk who shall be paid the sum of nineteen hundred eighty dollars (\$1,980.00) per annum; one certificate clerk and shorthand reporter who shall be paid the sum of seventeen hundred sixty (\$1,760.00) dollars per annum; one special clerk who shall be paid the sum of eighteen hundred (\$1,800.00) dollars per annum; three general clerks who shall each be paid the sum of sixteen hundred fifty (\$1,650.00) dollars per annum; one general clerk who shall be paid the sum of fifteen hundred forty (\$1,540.00) dollars per annum; one stenographer who shall act as secretary to the judge of Probate who shall be paid the sum of twenty-two hundred five (\$2,205.00) dollars per annum; one clerk in charge of inheritance tax adjustments who shall be paid the sum of twenty-eight hundred (\$2,800.00) dollars per annum; two general clerks who shall each be paid the sum of sixteen hundred and fifty (\$1,650.00) dollars per annum." Section 2 of said



Laws 1927, c. 377, reads as follows: "The salaries increased by the provisions of this act shall be effective as to such increases, when approved by the Board of County Commissioners in counties affected by the provisions of this act." Section 3 of said Laws 1927, c. 377, reads as follows: "That Section 26 of Chapter 419, Laws of 1923, as amended by Section 6 of Chapter 398 of the Laws of 1925, be and the same is hereby amended to read as follows: 'Sec. 26. This act shall be in force and effect from and after the 1st day of May, 1927.'"

Laws 1927, c. 37, which reads as follows: "In all counties of the state having a population of less than 8,000 inhabitants and not less than 15 nor more than 18 townships and a valuation of not less than \$2,500,000 and not more than \$4,000,000, the judge of probate is authorized to employ a clerk, who shall devote such time as may be required by the judge to the keeping of the records of the court and the entry of such orders as are required to be recorded. The clerk so employed shall receive as compensation for his services an amount equal to one-fourth of the salary of the judge of probate, to be paid in monthly installments in the same manner as the salary of the judge is paid."

Laws 1927, c. 65, amending Laws 1921, c. 164, which reads as follows: "Section 1. That in all counties in this state now or hereafter containing not less than 22 and not more than 25 organized towns, (not intending cities and villages), and which counties now have or hereafter may have a population of not less than 29,000 and not more than 31,000 inhabitants, according to the last preceding Federal or state census, the salary and compensation of the Judge of Probate and the assistants, deputies, clerks and other help thereof, and their compensation, shall be as hereinafter provided by this act.

"Sec. 2. The salary of the Judge of Probate of any such county shall be \$3,000.00 per annum. In addition to said salary the actual compensation for clerk hire in the office of said Judge of Probate shall not exceed \$5,000.00 per annum, of which sum \$2,100.00 shall be paid for the salary of the clerk of probate; \$1,500.00 shall be paid for the salary of the deputy clerk of probate; the balance of said sum, \$5,000.00, may be paid for additional clerical and stenographic help upon an application and showing by the Judge of Probate to the county board; all of said salaries shall be paid in equal monthly installments out of the county treasury of such counties upon the warrants of the county auditor.

"Provided, however, that any additional clerk hire that is allowed by the county board shall be paid out of the county treasury upon the certificate of the Judge of Probate. Provided further that in case the county board of any county shall refuse to allow such additional clerk hire as may be necessary, the probate judge may appeal to the district court within 30 days by filing with the county auditor a notice thereof. The district court, either in term or vacation and upon eight days' notice to the chairman of the county board, shall hear such appeal and summarily determine the amount of compensation needed for such additional clerk hire for the term of office by an order, a copy of which shall be filed with the county auditor.

"Sec. 3. Whenever according to the then last state or national census the population of any county of this state, which now has a population of less than 29,000 inhabitants, shall acquire not less than that number, such county shall at once become subject to the provisions of this act, and whenever, according to such census the population of any county shall exceed 31,000 inhabitants, or fall under 29,000 inhabitants, the provision of this act at the expiration of 90 days from the final filing of the enumeration of such county shall no longer apply thereto.

"Sec. 4. Payment of salaries and clerk hire validated.—In each county of this state containing not less than 22 and not more than 25 organized towns, and having a population of not less than 29,000 inhabitants and not over 31,000 inhabitants, in which during the years 1921, 1922, 1923, 1924, 1925, 1926 and 1927 the Judge of Probate, clerks, deputies, and other assistants were each actually paid salaries and compensation in excess of the amount allowed by law, but not exceeding the amounts provided by said Chapter 164, Laws 1921, such payments of salaries and compensation are hereby legalized and made valid.

Sec. 5. All acts or parts of acts inconsistent with this act are hereby repealed."

Laws 1927, c. 74, which reads as follows: "Section 1. That in any county in this state now or hereafter having a population of over 200,000 inhabitants and an area of over 5,000 square miles, the county board is hereby authorized to audit and allow the traveling expenses of the county surveyor and his deputy, the county attorney and his assistants, county auditor and his deputies and the judge of probate for necessary travel within said county on the official business of the county, whenever traveling by common carrier or by motor vehicle owned by any such official or his deputy, or assistants, and said county board may authorize any such official, where he is not now authorized by law, to travel on the

official business of the county outside the limits of said county but within the limits of the State of Minnesota. That if such travel trips be made by any such official or his deputy or assistant by using his own automobile, the county board may allow the reasonable value of the use of such motor vehicle on a mileage basis not exceeding ten cents per mile of the necessary travel, when said board is satisfied that said travel trip could not well be made by common carrier, and any such traveling expenses by use of such official's own motor vehicle shall be in addition to any expense of said office now allowed by law. Any such travel expense by use of such official's own motor vehicle shall be allowed only on duly itemized and verified bill showing the places or places to and from which such travel trips were made.

"Sec. 2. Any such county board shall have authority to provide that any necessary travel on the official business of any such county shall be made by common carrier instead of by motor vehicle owned by any such official whenever said board shall deem it to be more economical for said county for any such official to travel by common carrier instead of by the use of his own motor vehicle.

"Sec. 3. This act shall be supplemental to the existing law authorizing reimbursement of any of said officials or any deputy or assistants while traveling on the official business of any such county."

## PROBATE PRACTICE

**8708. 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. (3638) [7227]

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).

Cited (105-30, 117+235).

128-116, 150+387.

209+640, note under § 8924.

**8709. 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. (3639) [7228]

An order of the probate court, consenting to the compounding of a claim due from an insolvent debtor of the decedent, is not invalid because the order was made without notice to the persons interested in the decedent's estate. 210+85.

**8710. 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. (3640) [7229]

**8711. Clerk of probate court authorized to issue citations**—The judge of the probate court of any county in this state in which county there is a clerk of the probate court may by written authorization duly recorded in the office of the clerk of said probate court authorize said clerk to issue the following orders and citations and sign the same in the name of the clerk

instead of having the same signed in the name of the judge to-wit:

1st. Citation for hearing of petition for letters of administration.

2nd. Citations for hearing petition for the admission of a will to probate and the issuance of letters testamentary or of administration with will annexed.

3rd. Citation for hearing petition for decree of descent.

4th. Orders limiting the time to file claims and fixing the date of hearing of said claims.

5th. Citations for hearing petition to sell, lease or mortgage land.

6th. Citations for hearing petition for settlement and distribution in estates of deceased persons. ('15 c. 286 § 1, amended '17 c. 216 § 1)

**8712. Designation of newspaper for publication of probate notices or citations**—Whenever published notice or citation is required to be given in any proceeding in probate court, the judge of probate shall order such notice or citation to be published in such legal newspaper within the county as shall be designated by the petitioner in such proceedings, or by his attorney; provided, that a notice to creditors to present claims against an estate shall be published in such legal newspaper within the county as shall be designated by the representative of the estate in which such notice is given, or by his attorney. If such designation is not made, a judge of probate may order the notice to be published in any legal newspaper within the county. Provided further, that whenever and wherever a city or village is situated in more than one county and the decedent whose estate is being administered was at the time of his death a resident of such city or village, any notice or citation in such proceeding may be published in any legal newspaper within such city or village and such publication shall be of the same force and effect as if published in any legal newspaper within the county in which such proceeding is pending. ('17, c. 151, § 1; amended '25, c. 225)

**8713. 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. (3641) [7230]

**8714. Will of alien—Notice**—Whenever application is made to the Probate Court for letters of administration of an intestate estate by any person other than the widow or next of kin of a decedent; or whenever application is made to the Probate Court to prove a will; and the decedent in either case was a native of a foreign country, the Probate Court shall cause notice of the time and place of hearing to 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.

And in case such facts as to the nativity of the decedent, or as to the place of residence of his heirs, legatees or devisees are not stated in the petition, but upon the hearing of such petition it appears to the Court that such decedent was a native of a foreign country, or that his heirs, legatees or devisees, or any or either of them, reside in a foreign country, and such notice to the consular representative above provided for, has not been given, the Probate Court shall thereupon continue the hearing to a certain day, and cause the notice of such hearing to be given to such consular

representative as hereinabove provided. (R. L. '05 § 3642, G. S. '13 § 7231, amended '23 c. 166 § 1)

Where application is made for administration on intestate estate of a foreigner dying in this state, the notice should be given (139+300). (120-122, 139+300).

**8715. 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. (3643) [7232]

**8716. 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. (3644) [7233]

Notice is not one limiting the time of appeal (133-20, 157+709).

**8717. 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. (3645) [7234]

76-323, 79+176; 83-366, 368, 86+351.

Cited (118-514, 137+291).

See '05 c. 254 § 1, '19 c. 241 § 1, '19 c. 2 curative.

#### AUDITOR

**8717-1. Power to appoint—Service on interested parties**—The probate court shall have power on its own motion, or upon the petition of an heir, legatee, devisee, or claimant, to appoint an auditor, with or without notice, in any matter in an estate or guardianship involving an annual, partial or final account of a representative or guardian or the amount due on a claim or an offset thereto, and to direct what service shall be made upon the interested parties. ('27, c. 355, § 1)

**8717-2. Compensation of auditor—Place for hearing of accounting**—In the order of appointment the court shall fix the compensation of said auditor and the place where said accounting shall be held. ('27, c. 355, § 2)

**8717-3. Acceptance and oath filed by auditor**—Before beginning his work said auditor shall file in the probate court his acceptance and oath to impartially and faithfully audit the account or claim referred to him. ('27, c. 355, § 3)

**8717-4. Powers of auditor**—The auditor so appointed shall have the same power as the court to set hearings, grant adjournments, compel the attendance of witnesses and the production of books, papers and documents, and to hear any and all proper evidence relating to the account or claim. ('27, c. 355, § 4)

**8717-5. Report by auditor**—The auditor shall report his findings of facts upon which the court shall make its order allowing, amending or disallowing the account or claim as filed within ten days after the last date of hearing thereon unless further time is granted by the court. ('27, c. 355, § 5)

**8717-6. Fees and expenses of auditor**—All fees and expenses of the auditor shall be audited by the court and be paid by the representative of the estate as expenses of administration. ('27, c. 355, § 6)

## DESCENT OF PROPERTY

**8718. 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. (8646) [7236]

See 105-444, 117+830.  
122-1, 141+851; 131-56, 154+741.

**8719. 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:

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. (3647 [7237])

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 (31-168, 17+280; 50-264, 52+862; 71-108, 73+639). 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 children, be executed after the decease of the testator. An antenuptial contract, cutting off homestead right of husband and his statutory one-third interest in his wife's property, not prohibited (100-408, 111+305). See 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 § 8722 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 § 8722 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 (95-343, 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 (61-552, 554, 64+47; 62-135, 137, 64+165; 66-209, 212, 68+974; 66-327, 340, 69+31; 105-444, 117+830). Disposition within subd. 3 (140+337).

See 122-113, 142+16; 122-203, 142+133; 129-442, 152+845; 133-466, 153+876; 137-240, 163+286; 140-300, 168+13; 143-38, 172+914.

Widow's life estate in homestead not subject to inheritance tax (146-421, 178+1003; 179-728); see 151-196, 178, 186+305; 155-46, 192+342; 155-230, 193+304.

166-269, 207+618; 158-402, 197+852, note under § 8726.  
Upon death the homestead descended, a life estate to his wife and the remainder in fee to his children. 157-266, 196+258.

**8720. Distribution and descent of property**—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 transferred or sold by judicial partition proceeding or 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 land 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:

First—in equal shares to his surviving children, and to the lawful issue of his deceased children, by right of representation.

Second—if there is 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.

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

Fourth—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 or representation.

Fifth—if the intestate leaves neither issue, spouse, father, mother, brother nor sister his estate shall descend to his next 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.

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

Seventh—if, at the death of such child, who dies under age and not having been married, all the other children of his said parent being also dead, and any of them having left issue, the estate that came to such child by inheritance from his said parent shall descend to all the issue of the other children of the same parent, according to the right of representation.

Eighth—if the intestate leaves no spouse nor kindred, his estate shall escheat to the state. (R. L. '05 § 3648, amended '07 c. 36 § 1; '17 c. 272 § 1) [7238]

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+419; 102-253, 113+632). 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 free-hold estate if such was the estate of the husband (85-83, 89, 88+419). The right which a wife has by virtue of 1875 c. 40 and 1876 c. 37 in the lands of her husband during coverture is inchoate and contingent, and may, at any time before it becomes consummate by death of husband, be diminished or entirely taken away by the legislature (102-114, 112+1020, 113+382). Wife is not necessary party to action against husband for purpose of having determined that he held title to land as mortgagee, and not as owner, and is bound by judgment (102-253, 113+632). Signature of wife as witness to contract by husband for sale of his real estate held not written consent. Such contract may be specifically enforced as to him (107-177, 119+948).

158-231, 197+277; 166-269, 207+618; 158-402, 197+852, note under § 8726.

There being no surviving issue of the deceased, and neither spouse, father nor mother, brother nor sister, the estate descends to the "next kin in equal degree," who in this case are the nieces and nephews, and who take to the exclusion of children of deceased nieces and nephews. 156-366, 194+766.

Chapter 272, Gen. Laws 1917, construed to amend the former statute concerning the descent of personal as well as that relative to real property 156-389, 194+765.

**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). See 100-408, 111+305.

**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). Whether a widow, who has murdered her husband for purpose of acquiring his real property, may inherit quaere. Decree of probate court assigning to widow her statutory interest in the real estate held final (105-444, 117+830).

**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 unaffected 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 creditors (62-135, 138, 64+155). 1901 c. 33 excepting lands divested by execution or judicial sale, by assignment for creditors, or by insolvency or bankruptcy proceedings, applies to cases in which marriage and seisin occurred prior to its enactment (102-114, 112+1020, 113+382).

**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 (37-452, 59+533). Interest of spouse subject to equitable doctrine of election or estoppel (32-336, 20+324. See 96-202, 104+958).

**7. Election.**—The provisions of § 8722 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. Subd. 7—**Under G. S. 1894 § 4471 subd. 7, real property inherited by a child from his father's estate

descended, where the child died unmarried, without issue, and under age, to his surviving brothers and sisters (97-150, 106+344).

**11. Cited.**—61-552, 554, 64+47; 66-327, 340, 69+31; 92-527, 529, 100+366; 105-444, 117+830. 122-191, 142+129; 123-486, 144+223; 125-358, 147+278; 125-217, 152+269; 129-442, 152+845; 130-462, 153+876; 135-148, 160+254; 137-240, 163+286; 146-421, 178+1003; 151-196, 186+305; 194+766.

**8720-1. Inheritance by step-parents of deceased World War veterans in respect of war risk insurance.**—In every case where a resident of the State of Minnesota shall have served in the military or naval forces of the United States during the recent World war, and shall either during such service or thereafter have died while his life was insured by the United States by War Risk Insurance, and at the time of such death heretofore or hereafter occurring shall have left surviving him a step-parent but no spouse, children, father, mother, grandchildren, brothers or sisters, nieces, nephews or other natural heirs, such step-parents shall, in case the decedent shall have left surviving him no natural or adoptive parent or upon the death of such natural or adoptive parents, succeed to and be vested with all of the rights of inheritance and otherwise of a natural parent of such decedent in respect of such insurance and the proceeds therefrom in the same manner and to the same extent as if such step-parents were the natural and legitimate parent of such decedent at the time of such death. ('27, c. 206)

**8721. Title of land to become vested in heirs under certain conditions.**—Where patents for public lands have been or may be issued, in pursuance of any law of the state of Minnesota, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentees as if the patent had issued to the deceased person during life. ('19 c. 287 § 1)

**8722. 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. (3649) [7239]

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; 105-310, 117+518). Widow held not put to an election by provisions of a will (32-513, 21+725). See (105-310, 117+518). Election by court or guard-

ian for insane widow (30-277, 15+245; 32-336, 354, 20+324; 37-225, 233, 33+792; 88-404, 93+314; 114-329, 131+323). Under former statutes (32-336, 20+324; 34-159, 24+920; 46-477, 49+251). Right to renounce is personal to survivor, and does not pass to his or her personal representative or heirs (114-329, 131+323).  
122-191, 142+129; 129-442, 152+845; 135-300, 100+1016; 136-83, 161+395, 161+1056; 140-298, 168+13; 145-253, 177+126.

158-402, 197+352, note under § 8726.

**8723. 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. (3650) [7240]

Sufficiency of acknowledgment (97-491, 106+958). Declaration of paternity (130-256, 153+324, 593; 143-328, 173+665).

An adopted child inherits from his natural parent. 160-140, 199+531.

The marriage of the mother of an illegitimate child to its father under the statute legitimates the child; and a child so legitimated is an heir of the other children born to its parents.

The fact of legitimacy or illegitimacy is provable by family history, reputation and tradition, and by declarations of deceased members of the family. 160-463, 200+742.

The evidence sustains a finding that the appellant, an illegitimate child, whose mother afterwards married, was not a daughter of the man whom her mother married. 160-463, 200+742.

**8724. 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. (3651) [7241]

**8725. 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. (3652) [7242]

122-191, 142+123.

**8726. Minor children to receive such allowances as selected by guardian—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 spouse, 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; and such reasonable allowance may be made by the court when the husband or father has left a will, as well as when he dies intestate.

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 Sec. 9235, subdivision 1-6; provided, however, that if the intestate leaves no spouse nor kindred, his personal property, if any, shall escheat to the State.

7. All the provisions of this Section shall apply as well to a surviving husband as to a surviving wife. (R. L. '05 § 3653, G. S. '13 § 7243, amended '15 c. 331, § 1; '15 c. 350 § 1; '21 c. 173 § 1; '23 c. 347 § 1)

**Explanatory note**—The reference in par. 6 of this section to "Sec. 9235" should be to "Sec. 8720."

166-269, 207+618; 166-315, 207+629; 162-291, 202+732, notes under § 9657.

A husband, not a parent, made a bequest to his wife, who died eight days after his decease, without consenting to the testamentary disposition he made of his property or receiving any portion of the bequest, and without electing to take under the statute instead of under the will. Held, that the wife's administrator is entitled to the share in the husband's estate which she would have received under the statute. 158-402, 197+852.

An order of the probate court, consenting to the compounding of a claim due from an insolvent debtor of the decedent, is not invalid because the order was made without notice to the persons interested in the decedent's estate. 210+85.

**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). Her abandonment of the husband does not forfeit her rights. Right of selection survives to her personal representative (103-448, 115+265). Widow has no right to select money or other property in lieu thereof (119-325, 133+428).

130-462, 153+876.  
Right to elect surviving to personal representative (132-409, 157+648).

**2. Subd. 2**—Allowance may be made before inventory and appraisal (95-304, 104+535), and before election under § 8722 (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). See 100-384, 111+278; 129-442, 152+845; 137-239, 163+285; contract as waiver of allowance (141-103, 109+478; 145-163, 176+177); applicable to foreign widow (152-149, 188+207; 194+768).

**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; 106-484, 119+217; 125-353, 147+278; 127-223, 149+303.

**8727. Providing for distribution of property of deceased persons without known heirs**—When any person who has died within the past fifteen years in the State of Minnesota, or shall hereafter die being a resident of the State of Minnesota at the time of his death or owning property in said state, and his estate having

been duly administered upon in the probate court of the county having jurisdiction thereof, and leaving no known spouse or kindred, and said estate having been fully administered upon, and the balance in the hands of the representative of said estate having by order of said court escheated to, and been paid to the State of Minnesota, and if it shall be made to appear that said deceased person, in fact, left heir or heirs to his estate, then, upon the proper presentation of proofs of such heirship and amount so escheated to the district court of the county wherein such probate proceedings were had, either in term time or vacation, upon notice of at least twenty days to the attorney general in said state of the time and place of hearing such proofs, and if upon such hearing the said district court shall find that such deceased person left heir or heirs, said court shall determine who such heir or heirs are and the amount so escheated, and file its decision to that effect and a certified copy of said decision shall be forthwith filed with the state auditor. ('17 c. 72 § 1)

141-151, 169+529.

**8728. Money to be paid out of state treasury after heirs have been found**—When the said court has filed its decision in an escheated estate as aforesaid, and it was determined in said decision that certain heir or heirs are entitled to money or property heretofore escheated to the State of Minnesota, it shall be the duty of the state auditor of the state to recommend an appropriation, in writing, by the state legislature, if in session, or, if not in session, then to the next legislature for the repayment or the reimbursement of said money, or the transfer of said property to such heir or heirs, or to his or their attorney in fact, upon the recording of his power of attorney in the office of the state auditor, and the state auditor shall draw his warrant on the state treasurer of said state for the payment of the amount so escheated, if in money; and if in property the state auditor under his seal shall duly execute a proper transfer thereof. ('17 c. 72 § 2)

**8729. 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. (3654) [7245]

86-140, 113, 90+378; 98-118, 107+148.

Heirship of Indian allottee's land (155-77, 192+363).

The probate court does not have jurisdiction to act upon a petition to determine descent, under G. S. 1923, §§ 8729-8732, where the estate has previously been completely administered. 211+578.

**8730. 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. (3655) [7246]

**8731. Hearing, notice, etc.**—Upon the filing of said petition the court, by its order, shall require all per-

sons 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. (3656) [7247]

**8732. 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. (3657) [7248]

211+578, note under § 8729.

**8733. Homesteads and tree-claims patented to "heirs"**—Whenever any person holding a homestead or tree claim entry under the laws of the United States dies before making final proof and final proof has afterwards been made by his heirs, devisees or personal representatives, and by reason thereof a patent shall afterwards be granted to "the heirs" or to "the devisees" of such person, the District Court of the County in which the lands so patented are situated may, in a civil action brought for that purpose, determine who are such heirs or devisees, and may determine their respective shares in said homestead or tree claim. (R. L. '05 § 3658, G. S. '13 § 7249, amended '19 c. 244 § 1; '21 c. 36 § 1)

122-190, 142+132.

**8734. Persons guilty of felonious homicide precluded from inheriting property of persons whose lives they take**—No person who feloniously takes or causes or procures another so to take the life of another shall inherit from such person or receive any interest in the estate of the decedent as surviving spouse, or take by devise or legacy from him any portion of his estate, and no beneficiary of any policy of insurance, or certificate of membership issued by any benevolent association or organization, payable upon the death or disability of any person, who in like manner takes or causes or procures to be taken the life upon which such policy or certificate is issued, or who causes or procures a disability of such person, shall take the proceeds of such policy or certificate; but in every instance mentioned in this act, all benefits that would accrue to any such person upon the death or disability of the person whose life is thus taken or who is thus disabled, shall become subject to distribution among the other heirs of such deceased person according to the law of descent and distribution in this state, in case of death, and in case of disability the benefits thereunder shall be paid to the disabled person.

Provided, however, that an insurance company shall be discharged of all liability under a policy issued by it upon payment of the proceeds in accordance with the terms thereof, unless before such payment the company shall have knowledge that such beneficiary has taken or procured to be taken the life upon which such policy or certificate is issued, or that such beneficiary has caused or procured a disability of the person upon whose life such policy or certificate is issued. ('17 c. 353 § 1)



## WILLS—EXECUTION, EFFECT, ETC.

**8735. 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. (3659) [7250]

**In General.**

158-402, 197+852, note under § 8726.

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; 105-88, 117+155. See 97-491, 106+598; 103-286, 114+838). 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; 97-348, 107+141). 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). Signature by mark (103-286, 114+838). 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" (27-280, 6+791, 7+144; 38-112, 35+726; 39-204, 39+143; 42-273, 44+61; 57-307, 311, 59+199; 83-324, 86+408; 86-163, 90+319; 97-349, 107+141; 103-286, 114+838). A will, void because testator was not of sound mind, cannot be held invalid as to personal property and valid as to real estate (96-484, 105+677). Undue influence (97-181, 106+898). Though a will, prepared from instructions and signed by testator upon assurance that it expresses his wishes, is invalid if the language does not in legal effect make the provisions intended, it is not necessarily invalid if by the will, construed in connection with the statutes of inheritance, the property passes to the persons intended (97-349, 107+141).

122-194, 142+130.

Testamentary capacity (123-259, 143+726). Mental capacity (124-27, 144+412; 126-275, 148+117; 129-248, 152+541). Trust deed not of testamentary character (125-190, 145+1067). Undue influence (128-277, 150+914; 130-92, 153+131; 132-379, 157+505; 141-376, 170+349). Test determining gift or will (130-320, 153+606). Attesting witnesses not knowing of will or its contents (138-324, 164+1024). Execution and attestation (149-391, 183+958).

Where a testator produces an instrument which he executes in due form as his last will he is presumed to know its contents, although he did not read it while the subscribing witnesses were present. 164-377, 205+271.

**Mental Capacity and Undue Influence.**

Evidence considered and held to sustain the findings of the trial court to the effect that the will in contest was not induced by the undue influence of the beneficiaries therein named or others, and that testatrix was of sound and disposing mind when the same was executed. 156-100, 194+318.

The evidence sustains the finding of the jury that a will made by the testatrix in 1911 was destroyed in 1916 through the undue influence of the appellant, the proponent of a later will, made in 1916, and that the 1916 will, made at the time of the destruction of the 1911 will, was induced by the undue influence of such proponent. 156-144, 194+330.

The court erred in charging the jury that where one who receives a gift "occupies a position of trust and confidence towards the one who makes the gift, that fact will warrant an inference or a presumption that such gift or such will was induced by undue influence." 156-144, 194+330.

Evidence examined, and held sufficient to warrant a

finding that when a will was executed the testator was of sound mind. 160-480, 200+632.

A medical expert may upon a properly framed hypothetical question give an opinion as to testamentary capacity of the person involved. Such question may be based upon the facts adduced in evidence most favorable to the theory of the party calling the expert. 163-389, 204+52.

The evidence sufficiently supports the verdict to the effect that testatrix did not have testamentary capacity when she signed the will. 163-389, 204+52.

Where a new will is executed, and an old one destroyed at the same time and as parts of the same transaction, a verdict (on the special question) that the new will was the result of undue influence held, under the circumstances stated in the opinion, to control decision as to the destruction of the old will and so compel a finding that it was caused by the same undue influence. 166-65, 207+189.

The findings of the due execution of the will, by testator, when he possessed testamentary capacity, and was not under undue influence, were made upon conflicting testimony and cannot be disturbed by this court. 166-374, 208+22.

The findings that the will offered for probate was duly executed, that the testator then possessed testamentary capacity, and that he was not under undue influence when making it, are sustained by the evidence. 167-63, 208+425.

**Construction of Disposition.**

A will appointed executors, directed the payment of debts and funeral expenses, revoked all former wills, and provided further as follows: "After the payment of such funeral expenses and debts, I give, devise and bequeath to my legal heirs according as the law provides." Held effectual as a disposition of the estate to those who would have taken in case of intestacy. 156-389, 194+765.

After several specific legacies, the residuary clause of a will was an attempt to appoint two persons "a commission to divide anything not bequeathed to societies and institutions in New Ipswich, N. H.," Held, fatally indefinite and incapable of being made definite or certain by parol. 162-433, 203+225.

Extrinsic evidence or parol testimony may be received to disclose a latent ambiguity as to the identity of a legatee or beneficiary in a will, and the same sort of evidence is admissible to remove the ambiguity disclosed. The ambiguity may arise where the will names a legatee not in existence, or where there is a misnomer of the one named. 163-176, 203+778.

**Contract to Make Will.**

The uncorroborated testimony of a single witness, though only remotely interested in the result, properly held insufficient to prove a contract to make a will. In such a case the evidence is given close scrutiny, and in order to warrant a recovery the proof must be clear, satisfactory, and convincing. *Greenfield v. Peterson*, 141 Minn. 475, 170 N. W. 696, followed and applied. 156-307, 194+637.

**8736. 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. (3660) [7251]

56-33, 57+219.

**8737. 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. (3661) [7252]

**8738. 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 domicile, 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. (3662) [7253]

122-194, 142+129.

**8739. 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 en-



titled 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. (3663) [7254]

56-33, 57+219; 67-335, 69+1090.

One named as executor is competent witness (103-286, 114+338. See, also, 117-247, 135+980). Competency of attesting witnesses (144-111, 174+617).

**8740. 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. (3664) [7255]

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; 33-509, 511, 24+301; 45-429, 47+1133; 47-171, 176, 49+679; 144-457, 175+913).

**8741. 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. (3665) [7256]

20-245, 220; 38-169, 36+269; 47-171, 49+697; 76-237, 79+104; 88-386, 93+109; 96-147, 104+825.

Common-law rule of implied revocation by changed conditions and circumstances adopted by this section. Settlement between husband and wife, in anticipation of divorce, by which he made over to her one-third of all his property, coupled with divorce, revoked a will by him in which he gave to her the amount of property she received on settlement (106-502, 119+219).

135-377, 160+1025; 145-257, 177+128.

Existence of will in contemplation of law unrevoked (194+633).

156-253, 194+633, note under § 8765.

**8742. Will revoked by marriage or divorce**—If, after making a will, the testator marries the will is thereby revoked, and if the testator after making the will is divorced from the bonds of matrimony, all provisions in such will in favor of the testator's spouse, so divorced, are thereby revoked. (R. L. § 3666, amended '09 c. 53 § 1) [7257]

This provision is new (see 66-327, 69+31; 85-247, 88+739; 106-502, 119+219).

**8743. 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. (3667) [7258]

138-279, 158+396.

**8744. Child born after death of testator to take same share unless omission was intentional**—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 unless it appears that such omission was intentional. (R. L. '05 § 3668, G. S. '13 § 7259, amended '15 c. 343 § 1)

125-43, 145+625.

**8745. 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. (3669) [7260]

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

125-40, 145+623; 131-59, 154+742.

160-276, 199+914.

**8746. 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 §§ 8744, 8745, 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. (3670) [7261]

**8747. 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. (3671) [7262]

92-448, 451, 100+235; 144-213, 175+107.

**8748. 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. (3672) [7263]

34-173, 178, 24+924; 145-256, 177+128.

**8749. 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. (3673) [7264]

65-361, 362, 68+41; 145-257, 177+128.

**8750. 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. (3674) [7265]

#### PROBATE OF WILLS

**8751. 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. (3675) [7266]

Possession of will not essential (45-242, 244, 47-790. Cited (117-247, 135+980).

133-280, 158+396; 144-457, 175+914.

**8752. 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. (3676) [7267]

**8753. 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. (3677) [7268]

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 (45-429, 430, 47+1133; 47-171, 49+697). The legal effect of the will is not before the court (25-259, 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 (40-371, 42+286; 79-101, 106, 81+758). 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; 47-527, 529, 50+698; 61-444, 447, 64+48). Where petitioner for probate of will assumed position of contestant, the others assumed position of proponents, and such contest resulted in order admitting will to probate from which contestant appealed to district court, proponents were estopped from raising question that contestant had elected to take under will and was estopped from contesting it (97-491, 106+958).

132-380, 157+505.

160-56, 199+438, note under § 8756.

**8754. 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. (3678) [7269]

40-371, 374, 42+286; 71-250, 254, 73+966. .  
160-56, 199+438, note under § 8756.

**8755. 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. (3679) [7270]

144-458, 175+914.

Vacating order admitting will to probate (154-147, 191+410).

160-56, 199+438, note under § 8756.

Where there is no issue raised as to the validity of a prior will, it is to be assumed that the purpose and intention of the testator regarding the disposition of his property are truly reflected therein, and testimony of his declarations touching such purpose and intention previous to its execution is properly excluded. 167-63, 208+425.

The plans of the chief beneficiary in such prior will, formed in reliance of the making of that will, are immaterial in a contest upon the probate of the subsequent will. 167-63, 208+425.

**8756. 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. (3680) [7271]

122-464, 142+729; 128-17, 143-726.

The presumption is that the contents of a properly executed will were known to the testator. The wills of the blind are no exception. There being no proof of imposition by fraud or undue influence, a blind testatrix, in the full possession of her faculties otherwise, will not be presumed ignorant of the contents of her duly executed and attested will. 160-56, 139+438.

Showing opportunity and motive for undue influence without showing that it was exerted is not enough to sustain the burden of proof. 164-377, 205+271.

To establish "undue influence," the evidence must warrant the conclusion that the mind of the testator was subjected to that of another so that the will is that of the other and not of the testator. 164-377, 205+271.

A will executed by a person of sound mind, in the manner required by law, is presumed to be valid, and one who attacks it on the ground that its execution was procured by undue influence has the burden of proving that fact. 164-377, 205+271.

In a will contest on the ground of undue influence, the burden of proof is on the contestant throughout the case. When it is made to appear that a beneficiary of a substantial portion of the estate sustains a fiduciary or confidential relation with the testator, and acts as the scrivener in drawing the will or controls its drafting, such facts alone will make a prima facie case, and will sustain a finding of undue influence. 167-120, 208+535

**8757. 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. (3681) [7272]

**8758. 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 thereupon said hearing shall be adjourned to a day to be appointed by the court, and notice shall be given to all persons interested, which notice shall set forth the reason of said adjournment and the grounds of opposition to said will, and shall be served personally or by publication, or both, as the court may direct; at which time proof shall be taken upon all of said wills, codicils, or revocations, and all matters pertaining thereto, and the court shall determine which of said instruments, if either, should be allowed as the last will and testament of the deceased. If, upon said hearing, it shall appear that neither of said instruments should be allowed as the last will and testament of the deceased, and that said estate should be administered, the probate court shall thereupon issue letters of administration to the person or persons entitled thereto by law. (3682) [7273]

129-460, 152+872.

#### FOREIGN WILLS

8759. 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. (3683) [7274]

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 domicile (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).

122-193, 142+130.

There being no statute in the state of testator's domicile forbidding bequests to foreign religious or charitable organizations, the courts of that state will award a bequest to such foreign organization whenever it appears by proper proof that, under the law of the domicile of such legatee, the legatee is competent to take and use the bequest for the purposes intended by the testator. 163-176, 203+778.

8760. 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. (3684) [7275]

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

8761. 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. (3685) [7276]

45-29, 47+311.

8762. Letters testamentary, etc., to be granted—When any will is allowed as provided in §§ 8760, 8761,

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. (3686) [7277]

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

8763. 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 domicile. Or the court, in its discretion, may direct that it be transmitted to the personal representative of the decedent at the place of such domicile, 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. (3687) [7278]

45-242, 244, 47+790.

Cited (119-325, 138+428).

122-190, 142+129.

#### LOST OR DESTROYED WILLS

8764. 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. (3688) [7279]

133-421, 158+703; 194+633.

'21 c. 360, validates probate proceedings in cases of lost or destroyed will had and completed prior to 1912, and validates the final decree entered therein.

156-253, 194+633, note under § 8765.

8765. Wills to be proved by clear and satisfactory evidence.—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 clear and satisfactory evidence. (R. L. '05 § 3689, G. S. '13 § 7280, amended '17 c. 334 § 1)

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

194+633.

It is not necessary, in order to admit to probate a lost or destroyed will, that the same should have been in physical existence at the testator's death. Existence of the will in contemplation of law, unrevoked, is all that is required. 156-253, 194+633.

8766. 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. (3690) [7281]

#### NUNCUPATIVE WILLS

8767. 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. (3691) [7282]

#### GRANTING LETTERS TESTAMENTARY

**8768. 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. (3692) [7283]

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

**8769. 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. (3693) [7284]

**8770. 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. (3694) [7285]

**8771. Executor of an executor**—The executor of an executor shall not, as such, administer on the estate of the first testator. (3695) [7286]

#### GRANTING LETTERS OF ADMINISTRATION

**8772. Persons entitled to letters of 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. If the decedent was born in any foreign country and left no known surviving spouse or next of kin residing in the United States, and the surviving spouse or 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 in which the decedent was born, 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. But the court in any case arising under this subdivision shall have the discretion to appoint one or more creditors, or other persons interested, or to appoint any suitable or competent person interested in the estate by purchase or otherwise.

3. 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 entitled to administer such estate. Such person may be appointed without notice. (R. L. '05, § 3696; G. S. '13, § 7287; amended '17, c. 513, § 1; '25, c. 135, § 1)

Application by creditor (45-242, 245, 47+790; 89-303, 306, 94+869; 139+300). Subd. 3 construed (139+300). Application by foreign consul (139+300). "Neglect" synonymous with "fail" (139+300).

Cited (118-514, 137+291).

129-279, 152+413.

Defective petition may render proceedings voidable (136-333, 162+454).

Our probate law does not give the consul of a foreign country the right to be appointed administrator of the estate of a person born in the foreign country, but who became a naturalized citizen of this country. 160-217, 199+910.

Chapter 513, Laws of 1917, authorizes the court to grant administration to a creditor or other person interested, in all cases arising under subdivision 2. 160-217, 199+910.

**8773. Petition, what it must show**—A petition for letters of administration shall show:

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. (3697) [7288]

136-333, 162+456; 152-251, 188+283.

**8774. 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. (3698) [7289]

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 25-347; 29-27, 38, 11+136). 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 juris-

diction continues over the administration, as one proceeding, until its close (37-225, 33+792; 47-527, 529, 50+698; 61-444, 447, 64+48). Where time of hearing was improperly set for two days previous to expiration of publication, and on date named administrator was appointed, appointment was only irregular, and question of validity of subsequent proceedings could not be raised in collateral proceeding (105-30, 117+235).  
122-1, 141+851.

**8775. 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. (3699) [7290]

47-20, 22, 49+392.

**8776. 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. (3700) [7291]

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

**8777. 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. (3701) [7292]

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).

123-165, 143+255; 128-112, 150+385.

**8778. 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. (3702) [7293]

Special administrator pending appeal (23-415; 96-142, 104+765). Cited (105-30, 117+235). Order appointing special administrator is not appealable (129-280, 152+413).

**8779. Special administrator**—Whenever it shall be made to appear satisfactorily to the judge of any probate court that the personal property of an intestate de-

ceased person over the administration of whose estate said judge of probate would be entitled to jurisdiction under existing laws, consists only of such property as by existing law would be exempt from application towards the payment of debts and does not exceed in value six hundred and fifty dollars (\$650.00) such judge may appoint a special administrator, with or without notice, who shall proceed to speedily administer said estate according to the provisions of this chapter. Before entering upon his duties such special administrator shall file in the court appointing him his bond with sufficient sureties in such sum as the court may order and his oath to faithfully and lawfully administer said estate according to law. ('17 c. 251 § 1)

**8780. Final account**—Within fourteen days following the issuance of letters to such special administrator he shall file in the probate court a duly verified inventory of the property belonging to the estate of the decedent and a statement of the liabilities of said estate so far as known, together with an appraisal by two disinterested parties, who shall be appointed by the court, of the property belonging to said estate. If from such inventory and appraisal and any further evidence before court it appears that the estate of the deceased does not exceed in valuation the amount of claims for funeral bills and last sickness, taxes, expenses of administration and statutory allowance to surviving spouse and family of deceased and any other property exempt by law from application towards the payment of debts said special administrator shall immediately file his final account of the administration of said estate. ('17 c. 251 § 2)

**8781. Personal service of notice**—Upon the filing of such account the court may require personal service of notice of hearing of said account on all heirs at law and persons interested in said estate. ('17 c. 251 § 3)

**8782. Final account**—Upon the hearing of said account if it shall satisfactorily appear to the court that the estate of the deceased does not exceed in valuation the amount of claims for last sickness and funeral bills, taxes, expenses of administration, allowance to surviving spouse and family of deceased and any other property exempted by law from application towards the payment of debts of deceased the court shall enter its order adjusting and allowing said account as adjusted. ('17 c. 251 § 4)

**8783. Administrator discharged**—Upon the filing in such court of vouchers for all disbursements subject to payment paid by said special administrator, the court shall enter its order discharging such special administrator and the sureties on his bond from further liability. Provided, however, that where there is a claim for the alleged wrongful death of the decedent no such special administrator or the sureties on his bond shall be discharged until he shall have filed in the probate court a certified copy of the order of the district court approving such settlement as may be made of such wrongful death claim, and also a certified copy of the order of the district court distributing the moneys received for wrongful death to the persons thereunto entitled. ('17 c. 251 § 5)

**8784. 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. (3703) [7294]

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 (96-484, 105-677). See (108-129, 121-606).

Where a special administrator brings an action for an accounting and while it is pending becomes administrator with the will annexed and thereafter prosecutes the action to final judgment, he cannot thereafter claim as such administrator that the judgment is void because he had no authority to bring the action as special administrator. 166-330, 207-639.

An order of the probate court, consenting to the compounding of a claim due from an insolvent debtor of the decedent, is not invalid because the order was made without notice to the persons interested in the decedent's estate. 210-85.

**8785. 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. (3704) [7295]

166-320, 207-639, note under § 8784.

#### REPRESENTATIVES—GENERAL PROVISIONS

**8786. 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 tenable 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. (3705) [7296]

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 (81-121, 97-648; 97-509, 104-962). He may sue for the possession of realty without an order of court (22-249; 33-220, 224, 224-383). In action to determine adverse claims, plaintiff's administrator properly substituted as plaintiff (102-256, 113-689). 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 (14-65, 49; 25-22, 25; 26-259, 261, 2-945. See 29-418, 13-197; 34-330, 336, 26-9; 38-179, 183, 36-451; 85-152, 156, 84-433; 91-121, 123, 97-648; 92-310, 100-47). 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). Jurisdiction of district court to restrain execu-

tor from fraudulently disposing of shares (113-1, 129-136). Cited (63-296, 298, 65-464; 72-441, 75-699). Rights as to eminent domain (121-233, 141-170). Estate Indian allottee (126-303, 144-223). Incompetent decedent (137-94, 162-1071). Jurisdiction over administrator (145-163, 176-178). Power to bind for permanent improvements (148-177, 181-109). Administrator's power to cancel instrument (149-86, 182-916).

166-320, 207-639, note under § 8784.

Taxes constituting a lien on land should have been deducted in arriving at federal transfer tax. 8 F (2d) 175.

The terms of the contract for the exchange of land described in the opinion made plaintiff's intestate the owner of the land in equity, with the right of possession after a given date. 161-248, 201-311.

Personal representatives are entitled to possession of personalty and devisees and legatees are without power to pledge it. 163-209, 203-620.

**8787. 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. (3706) [7297]

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). Loss of assets (133-422, 158-703).

**8788. 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, administrator or guardian, 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; whenever a person named as executor in any will or codicil defends such will or codicil, either for the purpose of having it admitted to probate, sustained as the will of decedent making lawful disposition of his estate, or establishing the intent of the testator, such court may allow out of the estate of decedent to such person, whether successful or not, his reasonable fees and expenses, reasonable attorneys' fees and the necessary disbursements of such proceeding.

Provided, that costs, disbursements 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. (R. L. '05 § 3707, G. S. '13 § 7298, amended '21 c. 210 § 1).

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). Apportioning compensation of joint executors (136-204, 161+497).

**8789. 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. (3708) [7299]

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

**8790. 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. (3709) [7300]

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.

Cited (118-514, 137+291; 139+509).  
120-305.

**8791. 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. (3710) [7301]

76-132, 78+1039.

**8792. 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. (3711) [7302]

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

**8793. Certain foreclosures legalized**—Every mortgage foreclosure sale heretofore made under a power of sale in the usual form, contained in any mortgage executed under the laws of the state of Minnesota, and recorded in the office of the register of deeds of the proper county, of real property in this state, is, together with the record of such sale, legalized and made valid and effective to all intents and purposes as against the following objections, viz.:

First. That the foreclosure was made by an executor or administrator appointed in another state who did not file an authenticated copy of his letters or other record of his appointment with the register of deeds of the proper county prior to the foreclosure, provided, that such copy has been filed in such office prior to the passage of this act.

Second. Where a foreign executor or administrator failed to file for record with the register of deeds of the proper county, an authenticated copy of his letters or other record of his appointment, prior to the foreclosure, but did file such authenticated copy in said office subsequent to the foreclosure and prior to the passage of this act. ('13 c. 255 § 1) [7303]

**Explanatory note**—Laws '13 c. 255, § 2 (G. S. '13, § 7304) provides that the act shall not apply to pending proceedings.

## INVENTORY AND APPRAISAL OF ESTATES

**8794. Inventory to be returned**—Within three months after his appointment, every executor and administrator shall make and return to the court a verified inventory and appraisal 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. (R. L. '05 § 3712; G. S. '13 § 7305, amended '19 c. 385 § 1)

**8795. 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. (3713) [7306]

## SETTING ASIDE HOMESTEADS, ETC.

**8796. 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. (3714) [7307]

Allowance for support pending administration may be granted before the inventory is returned (95-304, 104+535). Cited (119-325, 138+428). Homestead exemption under Federal law (122-1, 141+851; 122-199, 142+129). Segregating homestead (130-462, 153+876). Not part of residue to be distributed (137-239, 163+285). Aid of probate court in determining homestead boundaries (143-33, 172+914; 145-163, 176+178). Inheritance tax as to homestead (146-418, 179+729). Widow resident abroad within statute (152-149, 188+207).

Following *In re Murphy's Estate*, 146 Minn. 418, 178 N. W. 1063, N. W. 728, it is held that, in determining the inheritance tax to be paid by the widow of a decedent who died intestate and without issue, the value of the family homestead set over to her in fee, should not be included in ascertaining the taxable value of the property transferred to her by virtue of the intestate laws of this state. 159-231, 198+459.

A homestead willed to surviving children and set apart to them by order of the probate court, in the course of the administration of testator's estate, is not subject to a transfer of inheritance tax. 160-393, 200+353.



An order of the probate court, consenting to the compounding of a claim due from an insolvent debtor of the decedent, is not invalid because the order was made without notice to the persons interested in the decedent's estate. 210+85.

**8797. 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. (3715) [7308]

Selection of personalty by widow and sale thereof without order of court sustained (39-334, 40+156). Cited (119-325, 138+428).

146-420, 178+1003, 179+728.  
159-231, 198+459, note under § 8796; 160-393, 200+353.  
note under § 8796; 165-492, 206+929.

An order of the probate court, consenting to the compounding of a claim due from an insolvent debtor of the decedent, is not invalid because the order was made without notice to the persons interested in the decedent's estate. 210+85.

#### COLLECTION OF ASSETS

**8798. 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. (3716) [7309]

**8799. 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. (3717) [7310]

61-285, 287, 63+730; 81-454, 84+323; 85-152, 88+433.  
166-320, 207+639, note under § 8784.

**8800. 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. (3718) [7311]

**8801. Legal title of real estate to vest in guardian under certain circumstances**—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, shall be held, reported, and may be sold and conveyed as the personal estate of the decedent; 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, but the legal title of all real estate so acquired, or in any other manner whatever acquired, by a foreign executor, administrator or guardian, shall vest in such executor, administrator or guardian, who shall represent the interest of all parties concerned, and shall have full power of disposition over such real estate. (R. L. § 3719, amended '11 c. 345 § 1; '15 c. 40 § 1) [7312]

**8802. 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. (3720) [7313]

Inapplicable to special administrator (71-453, 73+1099). 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).  
Creditor may proceed independently (139+509). Cited (118-514, 137+291).  
120-311, 149-240, 183+287.

**8803. Same—Disposal of recovered property**—All real estate recovered as provided in § 8802 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. (3721) [7314]

**8804. 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. (3722) [7315]

**8805. 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. (3723) [7316]

**8806. 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. (3724) [7317]

**8807. 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. (3725) [7318]

**8808. 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. (3726) [7319]

### CLAIMS AGAINST ESTATES

**8809. 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. (3727) [7320]

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).

Sections 8809-8831 cited (103-325, 115+173). Under G. S. 1894 § 4509, held that commencement of action on claim in federal court by foreign creditor is presentation of claim (171 Fed. 1, 96 C. C. A. 107).

Liability of heirs as to homestead (136-223, 161+413; 145-346, 177+354).

**8810. 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. (3728) [7321]

**8811. 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. (3729) [7322]

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 (24-134; 34-296, 25+631; 42-54, 43+692; 46-92, 48+460; 47-281, 50+197; 67-51, 69+609, 908; 79-257, 82+580; 90-172, 175, 95+1110. See 171 Fed. 1, 96 C. C. A. 107). 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 § 8812 (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). Discretionary upon apparent merit (123-58, 142+945). Laches and no abuse of discretion (133-174, 157+1075; 145-346, 177+355; 152-279, 188+326).

162-63, 202+60, note under § 8812.

A claim against a decedent, which becomes absolute after the time limited, but before final settlement of his estate, is barred, unless presented to the probate court. 212+29.

**8812. 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. (3730) [7323]

**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). Demand for whole or part of estate is not (111-352, 127+11). Claim by third person that he is owner of property in hands of administrator is not (179 Fed. 137). 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 28-13, 8+830; 35-215, 28+256; 63-61, 65+119; 92-411, 414, 100+233).

164-57, 204+546; 212+29, note under § 8811.

The evidence will not sustain a finding that the parties understood that payment was to be made for the support furnished in the present case. 157-217, 197+671.

To overcome this presumption it must appear that when the services were performed, or the support was furnished, both parties understood that compensation was to be made therefor. 157-217, 197+671.

Where a parent becomes a member of the family of a son-in-law, it is presumed that no pecuniary compensation is to be made for services performed or support furnished. 157-217, 197+671.

Plaintiff cannot now waive the tort and recover for money had and received, for the probate court has exclusive jurisdiction of claims against the estate of decedents arising under implied or quasi contracts for the payment of money. 158-14, 196+655.

A contract to make a will, giving property to the contractee, must be established by clear and convincing proof. 160-168, 199+927.

The finding that the deceased made no such contract is sustained by the evidence. 160-168, 199+927.

These claims which rest on a will or the law of descent are within the jurisdiction of the probate court.

If a contract is one which may be specially enforced an action to enforce comes within the jurisdiction of the district court. 160-276, 199+914.

In a proceeding to recover for services rendered in the care and nurture of father, evidence held to overcome the presumption that such services were rendered gratuitously. 161-289, 201+420.

An agreement of a parent to pay for the services of his child may be established by proof of facts and circumstances. 161-283, 201+420.

Neither may he pay a secured claim and include it in his final account in disregard of the provisions of section 7342, G. S. 1913. 162-63, 202+60.

A representative cannot pay claims against the decedent arising on contract and have them allowed in his final account if they have not been filed with and allowed by the probate court as required by section 7323, G. S. 1913. 162-63, 202+60.

Respondent's claim for compensation for services rendered her deceased father, being supported by proof, not only of the rendition of the service, but of the father's promise to pay therefor, is well sustained by the evidence. 163-218, 202+958.

Action for damages for breach of a contract to exchange farms, made between plaintiff and the deceased. The answer pleads and the evidence shows that the cause of action accrued before the time had expired for filing claims against the estate; hence the claim in suit could be asserted only in the probate court. 166-200, 207+326.

Where a near relative lives in a family as a member of the household, the presumption is that no pecuniary obligation is incurred for the board and lodging furnished him while such a member. 167-417, 209+1.

By presenting his bill to the probate court for allowance against the estate of a deceased person, an undertaker does not waive his right to look for payment of the bill to the person who employed him to bury the deceased and who promised to pay for his services. 210+105.

If the person who employed the undertaker pays his bill, he may call upon the representative of the estate of the deceased to reimburse him, if the assets of the estate are sufficient. 210+105.

Evidence held sufficient to justify a finding that there was an implied agreement on the part of a mother to compensate her married daughter for services rendered in caring for the mother during her last illness. 212+815.

The evidence sustains the verdict of the jury finding

that services rendered by the plaintiff for her mother for a number of years prior to her death were under a contract whereby she was to have compensation. 212+943.

**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; 75-481, 489, 78+95; 85-134, 136, 88+439). 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). See 114-34, 129+1049. 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, 69 C. C. A. 22). 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). No action can be maintained thereon against heirs (47-382, 50+367; 65-107, 108, 67+893). After an estate is closed an action will not lie in the federal courts on a claim provable under this section (23 S. Ct. 52, 187 U. S. 211, 47 L. Ed. 147).

**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 (62-1, 53+1015). Liability of estate of surety on administrator's bond (114-34, 129+1049). Claims paid without having been allowed (130-462, 153+876). Reimbursement for necessities (137-115, 162+1060; 141-406, 170+229). What constitutes a "claim" (144-89, 174+442). Presentation (145-348, 177+356).

**8813. 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. (3731) [7324]

164-57, 204+546.

**8814. Claims barred by statute**—No claim or demand, or offset thereto, shall be allowed which was barred by the statute of limitations when filed. (3732) [7325]

**8815. 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. (3733) [7326]

Inapplicable to claims not provable in the probate

court (55-111, 112, 56+583; 61-520, 624, 63+1072; 90-172, 175, 95+1110). Liability of estate of surety on administrator's bond not affected (114-34, 129+1049). Claim of third person that he is owner of property in hands of administrator not within section (179 Fed. 137). Meaning of action (103-325, 115+173). Allowance of claim not presented within five years erroneous but not subject to collateral attack (71-371, 74+148). Five year limitation (72-232, 234, 75+220). Limitation applies though no administration had (89-303, 306, 94+869). Proviso cited (61-361, 363, 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).

158-14, 196+655, note under § 8812.

Plaintiff's demand against this estate is not a "claim" under the statute. 160-276, 199+914.

Evidence showing only an intention to make a gift, without proof of delivery of the subject-matter, actual or constructive, fails to show a gift. 210+147.

Evidence sustains verdict for full amount of claim against decedent's estate for services rendered for her under express contract. 212+167.

**8816. 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. (3734) [7327]

The allowance of a claim has the effect of a judgment against the estate and is conclusive on all persons interested therein (25-22; 40-296, 300, 41+1033; 47-118, 49+684; 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). Claim defined (111-352, 127+11). 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; 96-342, 105+66). U. S. circuit court decree on claim against estate (125-363, 147+246; 141-406, 170+229; 145-346, 177+356).

**8817. 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. (3735) [7328]

**8818. 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 administrator 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. (3736) [7329]

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).

**8819. 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. (3737) [7330]

Set-off may be made after time for presenting claims has expired and estate distributed (52-501, 55+58; 79-386, 82+632). Right to set-off not dependent on having presented claim to probate court (92-110, 113, 99+780). 166-320, 207+639, note under § 8784.

**8820. 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. (3738) [7331]

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

**8821. 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. (3739) [7332]

#### PAYMENT OF DEBTS AND LEGACIES

**8822. 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. (3740) [7333]

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).

The legacy to the widow, plus her selection of \$500 under the statute, and the expenses of last sickness, funeral expenses, etc., should be paid from the corpus of the estate. 166-315, 207+629.

**8823. 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 § 8822. (3741) [7334]

**8824. 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. (3742) [7335]

**8825. 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. (3743) [7336]

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). Waiver of homestead exemption (122-1, 141+851).

**8826. Same—Contingent legacy—Trustee—**In case there is sufficient assets in the hands of the executor or administrator for that purpose he shall proceed to pay all the debts and legacies of the deceased in full. When a legacy is contingent on the event of the legatee

living to a certain age and the testator has omitted to appoint any person or persons to receive and hold said legacy until the legatee arrives at the prescribed age, the probate court may appoint some discreet person to act as trustee, who, upon giving a bond, as hereinafter prescribed, shall receive, invest and control said legacy, and the income thereof until the legatee shall arrive at the age prescribed in the last will and testament of the testator, or in case of the death of said legatee before arriving at said age, said legacy shall be disposed of according to the provisions of the last will and testament of the testator. Said trustee shall before entering upon the duties of his trust give a bond to the judge of probate with sufficient sureties in such sum as the judge of probate shall direct, conditioned that said trustee will faithfully execute the duties of his trust and will render a just and true account of his trusteeship to the probate court at any time when required by said court; that he will perform all orders and decrees of the probate court to be by him performed in the premises, and that when the legatee arrives at the prescribed age he will pay to said legatee the amount of said legacy and the income thereof, or in case of the death of said legatee before arriving at such age, that he will pay said legacy and the income thereof to the person or persons designated in the last will and testament of the testator as being entitled thereto. ('89 c. 46 § 121, amended '05 c. 234 § 1) [7337]

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).

**8827. 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. (3745) [7338]

Preferences allowed (30-209, 214, 14+895; 35-215, 217, 28+256; 61-520, 525, 63+1072). 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). Cited (139+300). 120-142, 146-6, 177+658.

**8828. 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. (3746) [7339]

61-520, 525; 63+1072; 146-6, 177+658.

**8829. 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. (3747) [7340]

**8830. 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. (3748) [7341]

**8831. 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. (3749) [7342]

Not applicable to equitable or disputed liens (103-325, 115+173).

Neither may he pay a secured claim and include it in his final account in disregard of the provisions of section 7342, G. S. 1913.

A representative cannot pay claims against the decedent arising on contract and have them allowed in his final account if they have not been filed with and allowed by the probate court. 162-63, 202+60.

**8832. 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. (3750) [7343]

162-63, 202+60, note under § 8831.

**8833. Claim for maintenance of patient in state institutions**—Whenever any patient in a state institution for the insane dies and does not leave surviving him spouse, children, grandchildren or parents, then and in such case the state shall have a claim for maintenance, treatment and support against the estate of such deceased person, which claim shall be computed at the rate of one hundred twenty dollars per year for the time such person was in such institution and be verified by the superintendent of the institution wherein such deceased person was confined. Provided, however, that the estate of such deceased insane person shall be entitled to a credit upon such claim of any sum or sums of money that may have been paid to the state for his or her maintenance, treatment or support in such institution. ('17 c. 409 § 1)

142-283, 171+928.

#### DISPOSAL OF REALTY BY REPRESENTATIVES

**8834. Real estate of decedent may be sold when**—The real estate of a decedent including the homestead of such 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; provided that such homestead shall not be sold except on the ground that it is for the best interests of all persons interested therein and with the written consent of the life tenant therein; the proceeds of any such sale of a homestead shall be considered real estate and distributed to the same persons and in the same share as if it had remained real estate.

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 interest 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. (R. L. '05 § 3751, G. S. '13 § 7344, amended '21 c. 268 § 1)

Subd 1 (64-315, 67+69; 89-253, 256, 94+679; 93-489, 101+797; 108-60, 121+229).

122-1, 141+851.

The proceeds of the sale which go to the heirs will be treated as real estate for the purpose of determining the rights of the heirs and of those claiming under them. 157-463, 196+641.

At the death of the owner intestate, title to real estate passes to his heirs, but will be divested by a sale in the administration proceedings. 157-463, 196+641.

The propriety of a sale of real estate by an executor, under a license from the probate court, may not be attacked in an action to quiet title against the purchaser at the executor's sale; the remedy being by appeal from the order granting the license to sell. 161-252, 201+422.

The probate court may authorize the sale of real estate where the court deems it for the best interest of the estate, although there be no necessity to pay debts or expenses of probation. 161-252, 201+422.

A guardian sold the undivided interests of his wards in real estate. For the greater portion of the purchase price he accepted a note and third mortgage on the property sold and other property. The evidence sustains the finding that he was negligent in so doing, though he acted in good faith; and the court properly charged him as cash with the full amount of the note and mortgage. 211+308.

**8835. 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, including the homestead of such decedent, than by selling the same, the court may, by license, authorize the mortgaging or leasing thereof, including the homestead of such decedent, and may authorize the representative to agree to the extension or renewal of an existing mortgage or lease. (R. L. '05 § 3752, G. S. '13 § 7345, amended '23 c. 295 § 1)

'19 c. 436 limits the time within which an action may be brought, up to not later than January 1, 1920, to set aside certain deeds and mortgages made by executors and administrators, and, after said time limit, as to which no action has been begun, legalizing such deeds and mortgages.

'09 c. 90 § 1 legalizes certain mortgages given prior to March 20, 1909, by guardians, administrators or executors upon real property in this state, belonging to their wards, decedents or testators, and the foreclosure of such mortgages and the record of such mortgages and the foreclosure thereof.

'09 c. 250 § 1 validates and legalizes mortgages of real estate made prior to April, 1909, under license from a probate court to guardians.

Laws 1925, c. 165 reads as follows: "Section 1 That all mortgages on real property and the records thereof made, executed and delivered by special administrators pursuant to orders of the probate court between January 1, 1921, and January 1, 1924, and heretofore duly recorded in the offices of the registers of deeds of the respective counties wherein the real property described therein is situate hereby are legalized and validated to the same effect as though the same had been duly made, executed and delivered by general administrators thereto duly authorized by orders of the probate court.

"Sec. 2. The provisions of this act shall not affect any action or proceeding now pending in any of the courts of this state."

**8836. Petition for license**—To obtain a license to sell, mortgage, or lease the real estate of a decedent including the homestead of such decedent for more than one year, the representative shall present a veri-

fied 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 including 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; if a sale, mortgage or lease of a homestead is petitioned for the petition shall set forth the grounds and reasons why it will be for the best interests of all persons interested in said homestead that the same be sold, mortgaged or leased. The Court is empowered to license the representative to mortgage the decedent's homestead to pay off existing incumbrances, but in such case the petition to mortgage must be executed, or assented to in writing by the surviving spouse, if any, and the remaindermen or their guardian in case they are minors, or their representative in case they are deceased. (R. L. '05 § 3753, G. S. '13 § 7348, '21 c. 268 § 2; '23 c. 295 § 2)

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+823). 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).

A license, issued by a probate court, to sell real estate of an incompetent will not support a sale, by the guardian, made six years after the granting of such license 161-219, 200+319.

There is no presumption that the circumstances, surrounding the ward and his estate, were the same, six years after the granting of a license to sell his real estate, as they were at the time of the granting of such license. 161-219, 200+319.

**8837. 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. (3754) [7349]

**8838. 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 interests 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. (3755) [7350]

**8839. 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. (3756) [7351]

93-489, 101+797.

**8840. 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. (3757) [7352]

**8841. License to sell, mortgage or lease—Sale on contract for deed—**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 and 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. Such license shall be and remain in force until revoked by the court; Provided, that no sale at private sale shall be made or confirmed under said license after one year from its date, unless the land so sold shall have been reappraised under order of the court within thirty (30) days next before such sale.

The Probate court may in and by said license authorize the sale of the lands to be sold on contract for deed. In such event, the initial payment shall not be less than ten per centum of the total sales price, and the deferred installments of the purchase price shall bear interest at a rate of not less than six per centum per annum. The deferred installments shall be payable in equal monthly, quarterly, semi-annual or annual payments. The final payment shall become due and payable not later than ten years from the date of said contract for deed. Such contract for deed shall provide for conveyance of the legal title by quit-claim deed upon full performance of all the conditions of said contract for deed by the purchaser. The assignment of the vendor's interest in said contract for deed, whether made by way of sale thereof, or by way of distribution of the assets of a decedent's estate to the persons entitled thereto by law, shall operate as a conveyance of the legal title of the lands by said contract for deed sold and conveyed and shall invest such assignee or distributee with all the rights, privileges and powers, and impose upon said assignee or distributee all duties and obligations granted and created by said contract for deed. (3758) [7353] (Amended '25, c. 316; '27, c. 302)

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).

**8842. 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. (3759) [7354]

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). Additional security and not a substitute bond (135-347, 160+859).

**8843. 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. (3760) [7355]

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).

**8844. 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. (3761) [7356]

**8845. 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. (3762) [7357]

**8846. Guardian may join with sane spouse for transfer of real estate—**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; provided, that if the spouse of such ward has been adjudged insane or incompetent to transact his or her business, or manage his or her estate, it shall not be necessary for such insane or incompetent spouse to join in such conveyance, but a guardian of such insane or incompetent spouse shall first be appointed by the probate court of the proper county, and such guardian shall join in such conveyance after first being authorized so to do by order of such probate court. (R. L. '05 § 3763, G. S. '13 § 7358, amended '15 c. 258 § 1)

**8847. 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. (3764) [7359]

26-437, 489, 5+359; 29-27, 39, 11+136; 41-194, 42+933; 77-

1, 7, 79+494. See 47-118, 49+684; 47-193, 48+608, 49+665; 94-433, 103+217; 149-262, 180+93.

**8848. 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. (3765) [7360]

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

**8849. 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. (3766) [7361]

**8850. 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. (3767) [7362]

**8851. 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. (3768) [7363]

37-225, 33+792; 46-477, 49+251.

'19 c. 234 provides for probate proceedings after close of original estate to authorize conveyance of land in the Dominion of Canada the grantee having performed. This act is so special in its restrictions that the conditions prescribed may never again arise.

**8852. 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. (3769) [7364]

33-220, 22+383; 40-254, 41+972.



**8853. 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. (3770) [7365]

30-107, 14+462; 43-363, 45+849.

**8854. 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. (3771) [7366]

**8855. 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. (3772) [7367]

**8856. 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. (3773) [7368]

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).

There was no error in denying the motion of the guardian to amend his report of sale and order confirming it, reciting a sale for cash, by alleging that it was understood that the deferred payment should be by note and mortgage. 211+308.

**8857. 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:

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. (3774) [7369]

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 § 8859 (95-225, 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; 95-153, 103+897). Subd. 3 (45-380, 382, 47+1134). Subd. 4 (38-325, 37+449; 49-210, 51+915; 51-97, 52+1079; 95-225, 103+885; 95-153, 103+897). Subd. 5 (26-487, 493, 5+359; 95-153, 103+897). 122-7, 141+853; 150-290, 185+252.

The propriety of a sale of real estate by an executor, under a license from the probate court, may not be attacked in an action to quiet title against the purchaser at the executor's sale; the remedy being by appeal from the order granting the license to sell. 161-252, 201+422.

**8858. 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. (3775) [7370]

26-487, 493, 5+359.

**8859. 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. (3776) [7371]

Constitutional (24-288; 47-527, 50+698). A statute of repose and retroactive (95-153, 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; 95-153, 103+897). Not limited to actions of ejectment (77-1, 7, 79+494). A conveyance held sufficient to set the statute running (95-153, 103+897). Formerly the statute included an exception in favor of non-residents (33-220, 22+383; 95-153, 103+897). What is administrator's sale (105-30, 117+235). Cited (26-487, 493, 5+359; 45-380, 383, 47+1134).

**8860. Records destroyed**—Certain deeds prima facie evidence, etc.—Whenever it shall appear that probate

court records of any estate have been destroyed by fire, and a deed purporting to convey real estate and to be made by an executor, administrator or guardian of such estate claiming to act under the jurisdiction of said court shall have been made and recorded in the office of the register of deeds of the county wherein the land thereby conveyed is situated, more than six years prior to the passage of this act, then such deed or the record thereof shall be taken and considered as prima facie evidence that the person executing such deed was at the time of such execution and delivery of deed the legal representative of said estate, duly authorized to make and deliver said deed by a court having full jurisdiction over said estate, and that all proceedings required by statute in the sales of real estate by legal representatives of estates from the time of filing of petition for license to the time of the execution and delivery of the deed have been duly complied with, and that all facts recited in said deed pertaining to the sale are true. ('07 c. 391 § 1) [7372]

Laws '07, c. 391, § 2 (G. S. '13, § 7373) provides that the act shall not affect pending proceedings.

See '09 c. 311, provides that prior to January 1, 1918, where an administrator has made an assignment of school land in office of the probate court, such assignment to be valid.

See '13 c. 169, legalizes sales of real estate by guardian, between October 25th and November 1, 1912, where publication was defective.

See '17 c. 423, legalizes certain executors' deeds of land prior to April 20, 1917, and between August 20, 1910 and September 30, 1910.

See '17 c. 457, legalizes certain decrees for the conveyance of real estate under contract, issued by probate courts, prior to April 20, 1917, and recorded in the office of the register of deeds.

**8861. Representative or guardian authorized to convey real estate in certain cases**—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 representative or guardian, or the guardian of any minor who may take the vendor's interest in such real estate or any part thereof by descent or devise from such decedent, 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. (R. L. '05 § 3777, G. S. § 7376, amended '15 c. 223 § 1)

Probate courts have no jurisdiction of actions for specific performance (40-236, 41+977). See 75-350, 364, 78+4.

**8862. Probate court to direct representative to lease lands in certain cases**—When any person has given or joined in a valid and subsisting option in writing to lease lands for a period which may extend over three years, either for the purpose of mining and removing the iron ore therefrom or otherwise, and dies or becomes insane or incompetent, or has heretofore died or become insane or incompetent, before making or joining in such lease, the Probate Court may direct the representative of his estate, or the representative of any minor who may succeed or has succeeded to his interest in such real estate or any part thereof by devise or descent from him, to make or join in such lease to the person entitled thereto, in all cases where such decedent if living or such ward, if sane or competent, might be compelled to make or join in such lease. ('21 c. 453 § 1)

**8863. Petition—Hearing**—On presentation of a petition by any person claiming to be entitled to such lease, or by the representative of any such decedent or ward, setting forth a description of the land and the facts upon which the duty or authority to make or join in such lease is based, the Probate Court shall fix a

time and place of hearing and cause three weeks' published notice thereof to be given. ('21 c. 453 § 2)

**8864. Hearing—Order**—At the time appointed for hearing after due proof of publication of said notice the court shall hear all proper evidence both for and against granting the petition and if satisfied that the lease should be made, may order or authorize the representative to execute or join in the same, and may and shall include in its order such conditions and provisions as shall properly safeguard the interests of those interested in the estate and be consistent with the terms and provisions of said option; otherwise it shall dismiss the petition. ('21 c. 453 § 3)

**8865. Holder of lease must fulfill condition**—The proceedings hereinbefore authorized may be taken either before or after the giving of notice by the holder of such option of his or its election to take a lease thereunder; but nothing herein contained shall be construed to entitle the holder of such option to a lease unless and until he or it has complied with the terms and conditions of the option entitling him thereto; provided further the Probate Court may, upon petition of the representative, authorize such representative to grant or join in granting an extension of such option from time to time, on such conditions as may be just and agreed to, and after such notice and hearing as to the court may seem proper. ('21 c. 453 § 4)

**8866. Representative shall make lease**—If no appeal is taken from such order within the time limited therefor by law, or if the same is affirmed on appeal, the said representative shall, upon compliance with the terms and provisions of said order, execute or join in executing the lease as directed; provided, if the representative is the petitioner or shall assent thereto, the court may direct the execution of such lease without awaiting the expiration of the time to appeal, but may in such event require the execution and filing of such bond or compliance with such other condition as shall adequately protect those interested in the estate who do not expressly assent thereto. Such lease shall be as effectual for all the purposes thereof as if executed or joined in by the decedent while living or by the ward while sane or competent; but nothing herein contained shall be construed to make it unnecessary for the husband or wife of any such decedent or ward to join in any such instrument. ('21 c. 453 § 5)

**8867. 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. (3778) [7377]

**8868. 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. (3779) [7378]

40-236, 41+977.

**8869. 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. (3780) [7379]

Where an heir gives a mortgage upon his interest in the real estate and such interest is divested by a probate sale, the lien of the mortgage is transferred from the lands to his interest in the proceeds thereof. 157-463, 196+641.

The foreclosure of such a mortgage will not affect the rights of purchasers at the probate sale and will not be enjoined at their instance. 157-463, 196+641.

The purchaser at such a sale takes the title of which the decedent died seized free from any claim of the heirs or of any one claiming under them. 157-463, 196+641.

Where the probate court had jurisdiction and the proceedings were regular, the sale cannot be attached collaterally. 157-463, 196+641.

**8870. 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. (3781) [7380]

**8871. 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. (3782) [7381]

**8872. 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. (3783) [7382]

**8872-1. Sale by personal representatives and guardians of vendor's interest in contract for conveyance of real estate**—The Probate court may on petition of any representative of a decedent, or guardian of any ward, incompetent, or insane person, authorize such representative or guardian, to sell and assign the vendor's interest in any contract in writing for the conveyance of real estate constituting a part of the assets of the estate of such decedent, ward, incompetent, or insane person, and to make conveyance of the legal title to the land embraced in said contract. Such assignment and conveyance shall be as effectual for all the purposes thereof as if made and executed by such decedent while living, or by such ward, incompetent, or insane person while sane, competent, or sui juris. ('27, c. 303, § 1)

#### ACCOUNTING—DISTRIBUTION—FINAL SETTLEMENT

**8873. 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. (3784) [7383]

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).

126-321, 148+282.

159-90, 198+141.

The probate court has exclusive jurisdiction of the settlement of the account of an administrator, and its judgment in the accounting proceedings is not subject to collateral attack. 156-231, 194+376.

If no appeal is taken, the account cannot be impeached when the final account of the executor or administrator comes before the probate court for settlement and allowance, or before the district court on appeal. 212+902.

**8874. 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. (3785) [7384]

151-374, 186+699.

212+902, note under § 8873.

**8875. 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. (3786) [7385]

Bond (75-228, 230, 77+818).

142-99, 170+916.

212+902, note under § 8873.

**8876. Attorney given lien upon legacy for services rendered**—When any heirs, devisee, or legatee has appeared by attorney, said attorney may acquire a lien upon the distributive share or legacy of such heirs, devisee or legatee in any estate for compensation for such services as he may have rendered respecting such distributive share, by serving upon the executor or administrator, before such decree is made, as 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. Either party may appeal to the district court in the manner provided by section 7492, General Statutes of 1913 [8985], from such determination of the probate court. The executor or administrator shall satisfy said lien out of any money or property so decreed, and for that purpose may, by order of the probate court, sell so much of such property as will satisfy said lien claim and the expenses of sale. (R. L. '05 § 3787, G. S. '13 § 7386, amended '19 c. 61 § 1)

**Explanatory note**—Laws '19, c. 61, § 2 repeals Laws '05, c. 21 (G. S. '13, § 7387).

Remedy of attorney desiring to establish lien upon share of alien is under § 9 of the Trading with the Enemy Act (Mason's Code, 50: 30-9). 162-226, 202+492.

**8877. 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. (3788) [7388]

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).

**8878. Notice not necessary, when—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; provided that, when death of the deceased is caused by the wrongful act or omission of any person or corporation and such deceased leaves no estate other than the claim for the injury caused by the same act or omission and a personal representative of the decedent has been appointed by the Probate Court only for the purpose of maintaining an action on said claim or recovering the same, such order or notice thereof need not be published. (R. L. '05 § 3789, G. S. '13 § 7389, amended '21 c. 62 § 1)

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).

**8879. Proceedings on hearing—**On hearing such petition, the court may examine the representative on oath and hear all proper testimony offered, touching on account, or relating to, the distribution of the estate. If all taxes, including personal property taxes, assessed against the estate, have been paid so far as there were funds to pay them, and 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. (R. L. § 3700, amended '07 c. 434, § 1) [7390]

The expenses of administration, including funeral expenses, are to be allowed hereunder (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). Surety on administrator's bond (126-445, 148+302; 136-126, 161+392).

Final decree of the probate court is conclusive as to the parties, when no appeal is taken. 158-31, 196+814.

**8880. Decree of distribution—Contents—Certified copies—Record of—**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 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. Provided further, that whenever said decree of distribution embraces real estate or other property situated in more than one county, each of the registers of deeds of said several counties shall not unless otherwise requested by the party filing the instrument, enter upon the records of his office descriptions therein contained of real estate or other property appearing from the face of said decree not to be situated in the county in which he holds office; he shall indicate omissions herein prescribed in the record by the words "and other property situated in..... County or Counties, Minnesota," inserted in the record at the points where the omissions occur. (3791) [7391] (Amended '27, c. 395)

Assignment of residue and record thereof. Finality of decree (105-444, 117+830).

**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); 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 (81-434, 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; 95-455, 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 judge (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+133; 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 personality 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 (25-22, 25; 61-91, 92, 63+255; 84-289, 294, 87+783). 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 (26-259, 262, 24+945; 62-29, 64+99; 72-32, 36, 74+1020; 75-321, 324, 78+3; 86-140, 147, 90+378; 93-233, 101+68. See 46-61, 63, 48+454; 83-98, 103, 85+937, 86+444). 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 (37-160, 33+912; 40-296, 41+1033; 61-91, 63+255; 84-289, 87+783; 23 S. Ct. 52, 187 U. S. 211, 47 L. Ed. 147).

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).

132-316, 156+349; 151-374, 186+699.  
19 c. 299, legalizes decrees of distribution of probate courts made more than 5 years prior to April 17, 1919.

8881. **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. (3792) [7392]

8882. **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. (3793) [7393]

61-335, 340, 63+880.  
132-176, 156+285.  
Laches fatal in setting aside final decree (152-249, 188+282).

8883. **New and confirmatory decree in certain cases**—In any case where a decree affecting the title to real estate has heretofore been made by a probate court without due notice being given as required by law, any person interested in the property affected by such decree, whether as heir, devisee, grantee, or otherwise, may apply to such probate court, by petition, to enter a new and confirmatory decree assigning such property to the person or persons to whom the same was assigned by such former decree, according to the terms of such former decree. ('13 c. 233 § 1) [7394]

8884. **Same—Public notice of hearing**—Upon the filing of such petition, the court shall by order or citation appoint a time for hearing said petition; notice of which shall be given by three weeks' publication of a copy of said order in the manner provided by law for the publication of other notices of proceedings in the probate court. The court in its discretion may require other or further notice of such hearing to be given to such persons as it may deem proper. ('13 c. 233 § 2) [7395]

8885. **Same—Hearing—Decree**—If upon such hearing the court shall be satisfied that the person or persons to whom such property was assigned by such former decree were in fact the persons entitled there-

to, it shall enter a new decree assigning such property to the persons to whom the same was assigned by such former decree, in the proportions and upon the conditions specified therein; subject, however, to the rights of all persons claiming under any person named in such former decree, as owner, mortgagee, or otherwise. Such former decree shall be prima facie evidence of the truth of the recitals contained therein, and of the fact that the persons named therein were entitled to the property therein mentioned, in the proportions and upon the conditions therein specified. Provided, however, that this act shall not be construed to authorize the entry of a new and confirmatory decree in any case where it shall be made to appear that the dispositions made by such former decree were erroneous in fact or in law. ('13 c. 233 § 3) [7396]

'07 c. 313 §§ 1, 2 defines the force and effect of final decrees issued by the probate court of this state, and recorded in the office of the register of deeds not less than 10 years prior to April 23, 1907, and legalizes certain of same, and limits time within which their validity may be questioned.

8886. **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. (3794) [7399]

See following section.

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).

145-163, 176+178.

8887. **Same**—That whenever an executor or administrator shall have fully complied with all the terms and conditions of the final decree of distribution and of all other decrees and orders of the probate court appointing him, and shall have paid over to the distributees named in such final decree of distribution of the said court, all moneys and funds and property to them awarded by such final decree, and when such executor shall have in all other respects fully complied with the terms and conditions of said final decree, and have fully complied with all the orders and decrees of the said court, and when it shall appear to the court that the executor or administrator has paid over all moneys to the proper parties, and that he has in all things complied with the orders of the court and the terms of the final decree in said estate, and that he has in all things, well, faithfully and fully administered his trust as such executor or administrator, the court shall enter an order and decree fully discharging the said executor or administrator and the sureties on his bond from all further liability, and from all liability by reason of said trust and by reason of said administration. ('03 c. 195 § 1, amended '05 c. 332 § 1) [7400]

123-165, 143+255; 128-3, 150+171.

8888. **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, or has not appeared and claimed and received his share of the estate according to the decree of distribution within one year after the date of the decree, or for any good and sufficient reason the same has not been paid over, 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 § 8886. (R. L. § 3795, amended '09 c. 57 § 1) [7401]

**8889. 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. (3796) [7402]

**8890. Certain decrees of heirship—Prima facie evidence**—That where decrees of heirship to real estate in the state of Minnesota were made by any of the probate courts of this state, under the provisions of chapter 50 of the General Laws of Minnesota, 1885, and said decrees were entered in the records of said courts and certified copies thereof were recorded in the offices of the register of deeds as provided by said chapter, prior to the repeal of said chapter, said decrees, and said records thereof, and certified copies of either said decrees or said records, shall be taken and held in all legal proceedings in this state, in respect to the succession of the real estate described in the decrees, as prima facie evidence of all the facts found in said decrees. ('05 c. 73 § 1) [7403]

**8891. Letters of administration or probate of will when estate is exempt from payment of debts**—Whenever any person dies leaving real or personal property within this state and all of the property and assets of said deceased are exempt from the payment of debts, any person entitled to apply for letters of administration or for the allowance of a will to probate, may petition the probate court of the proper county that the will, if the deceased died testate, be admitted to probate, or if intestate for administration, and in any event that the whole estate be closed forthwith and distribution thereof made. ('17, c. 289, § 1; amended '27, c. 335)

**8892. Contents of petition**—Such petition shall in addition to the jurisdictional facts contain a description of all the property of said deceased, both real and personal, itemizing the same together with the facts by reason of which the same is claimed to be exempt, and the names and addresses so far as known, of the creditors, and shall pray the judgment of the probate court for a distribution of said property forthwith. ('17 c. 289 § 2)

**8893. Citation by courts**—The court shall thereupon issue its citation for a hearing thereon and cause the same to be published in the manner prescribed by law. Said citation shall contain a general description of all the property of said deceased and a true copy of said citation shall be mailed to each of the heirs and to each of the creditors of said deceased so far as the same can be ascertained, at least fourteen days prior to the date of hearing. ('17 c. 289 § 3)

**8894. Same—Decrees and orders**—If upon the date set for the hearing it shall appear to the probate court that all of the property left by said deceased is exempt from the payment of debts, the probate court may in case there be a will, admit the same to probate, and make a decree distributing said property to the heirs or legatees and devisees of said deceased, and such further order providing for the payment of the expenses of administration as may be necessary in the premises. ('17, c. 289, § 4; amended '27, c. 335)

## ADVANCEMENTS

**8895. 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. (3797) [7404]

79-377, 379, 82+669.

125-115, 145+785.

In its legal sense, an advancement is an irrevocable gift in presenti, made by a parent to a child or other lineal descendant, to enable the donee to anticipate his inheritance to the extent of the gift. Whether there was an advancement or not depends on the intention of the donor. 162-159, 202+448.

**8896. 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. (3798) [7405]

**8897. 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. (3799) [7406]

**8898. 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. (3800) [7407]

148-461, 152+621.

## PARTITION

**8899. 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 be-



ing 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. (3801) [7408]

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).

**8900. 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. (3802) [7409]

**8901. 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. (3803) [7410]

**8902. 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. (3804) [7411]

**8903. 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. (3805) [7412]

**8904. 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. (3806) [7413]

**8905. 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 in-

consistent 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. (3807) [7414]

**8906. 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. (3808) [7415]

#### PROBATE BONDS

**8907. 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. (3809) [7416]

123-165, 143+255; 125-368, 147+246; 126-445, 148+302; 135-348, 160+859, 194+377.

The surety is bound by the probate judgment on an accounting though not a party to the proceeding. 156-231, 194+376.

**8908. 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 § 8907 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. (3810) [7417]

**8909. 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. (3811) [7418]

**8910. 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. (3812) [7419]

**8911. 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. (3813) [7420]

135-346, 160+859.

**8912. 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 other-



wise 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. (3814) [7421]

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 (96-161, 104+833). Leave of court not a part of the cause of action and need not be alleged in complaint (61-261, 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. See, also, 98-151, 107+961). 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). Jurisdiction of district court. Liability of the sureties. (98-151, 107+961)

137-100, 162+1054.

An order of the probate court, consenting to the compounding of a claim due from an insolvent debtor of the decedent, is not invalid, because the order was made without notice to the persons interested in the decedent's estate. 210+85.

**8913. 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. (3815) [7422]

96-161, 104+833.

**8914. 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. (3816) [7423]

**8915. 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. (3817) [7424]

#### GUARDIANS AND WARDS

**8916. Appointment of guardians not to be effective under certain conditions**—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; provided, however, that notice shall first be given in such manner as the court may direct to the parents of such minor, if living, and if no parent is living, or if the whereabouts of both parents is unknown, then to the next of kin or custodian of the person of such minor; and provided further that no appointment by the pro-

bate court of a guardian of the person of a child under the age of eighteen shall be effective, if, at the time of making the same, proceedings involving the care and custody of such child are pending in a district court in this state, acting as a juvenile court. (R. L. '05 § 3818, G. S. '13 § 7425, amended '17 c. 236 § 1)

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).

An order of the probate court, consenting to the compounding of a claim due from an insolvent debtor of the decedent, is not invalid, because the order was made without notice to the persons interested in the decedent's estate. 210+85.

**8917. 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. (3819) [7426]

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). 209+640, note under § 8924.

An order of the probate court, consenting to the compounding of a claim due from an insolvent debtor of the decedent, is not invalid because the order was made without notice to the persons interested in the decedent's estate. 210+85.

**8918. 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. (3820) [7427]

77-70, 74, 79+598.

**8919. Testamentary guardians—Same**—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 of 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. (G. S. 1894 § 4539, amended '05 c. 256 § 1) [7428]  
83-366, 368, 86+351.

**8920. 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. (3822) [7429]

**8921. 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. (3823) [7430]

**8922. When guardianship of female ward terminates by marriage**—The marriage of a female ward under guardianship as a minor shall terminate such guardianship; provided that this section shall not apply to any person under guardianship on account of delinquency by order of a juvenile court. (R. L. '05 § 3824, G. S. '13 § 7431, amended '17 c. 235 § 1)

**8923. 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. (3825) [7432]

**8924. 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. (3826) [7433]

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). Evidence held to sustain finding that person was, by infirmities of old age, incompetent to manage his property (107-130, 119+791).

124-492, 145+378; 128-327, 151+130; 137-252, 163+297; 143-235, 173+433; 144-42, 174+444.

A person claiming to be incompetent, may petition the probate court for the appointment of a guardian for himself. 209+640.

Upon such petition notice pursuant to Gen. St. 1923, § 8925, is unnecessary. 209+640.

An order appointing a guardian for such person is subject to attack by motion to vacate for want of jurisdiction or for fraud; but the question as to whether or not the person was in fact incompetent, like other essential facts stated in the petition, cannot be raised after time to appeal has expired. 209+640.

**8925. 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. Provided, that when such insane or incompetent person or such spendthrift is a resident of this state but cannot be found therein and his whereabouts are unknown and have been unknown for more than one year prior to the presentation of such petition or

when such person has been adjudged insane or incompetent by any court of any state and he has property within this state, which said facts shall be alleged in such petition, and in case of adjudication of insanity or incompetency in another state proof thereof shall be presented with said petition, the probate court may order that service of such order upon such person be made by publication in the same manner as other orders and citations of the probate court. The return of the sheriff of the county in which such property or some part thereof is situate to the probate court of said county on such order that such person cannot be found therein and that to the best of his knowledge such person has disappeared from the state and that his whereabouts are unknown, and have been unknown for more than one year, shall be evidence of such facts.

Provided further, that in case said insane or incompetent person cannot be found within the state, said petition may only be filed in the county of his residence, and shall state the names of all his known next of kin, and in addition to such service by publication, personal service of said order shall be made on such of his next of kin as reside in this state, and notice thereof shall be given the non-resident next of kin in the manner which the probate court may order. (R. L. § 3827, amended '13 c. 350 § 1) [7434]

48-58, 60, 50+934.

209+640, note under § 8924.

**8926. 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. (3828) [7435]

48-58, 60, 50+934.

124-27, 144+412; 128-324, 151+130.

**8927. 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 necessities, 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. (3829) [7436]

48-58, 60, 50+934; 64-201, 204, 66+1.

**8927-1. Transfer of jurisdiction over guardianships to courts of other counties—Petition—Notice—Orders**—When letters of guardianship have been heretofore or hereafter granted over the person or estate, or both, of a ward, by the probate court of any county in this state, and by reason of a change in the residence of said ward or other cause the convenient performance and supervision of the duties and functions of such guardianship, and the best interests of the ward, would be served by transferring jurisdiction over such guardianship to the probate court of another county, the court having such jurisdiction may, on petition of the guardian or of any person who would be entitled to petition for the appointment of a guardian for such ward, setting forth the facts, so transfer the same, by order duly made and entered as in other cases. Notice of a hearing on such petition shall be given as in other cases, and unless such transfer is assented to in writing by the guardian, his sureties, the ward, and the person having the custody of said ward, shall be

personally served upon each of them, if they can be found, at least eight day before the date of hearing. The court may at the same time, or before transferring the proceedings, require the filing of an account by the guardian, and require or take such further action in the matter as shall be required or desirable, in the interests of the ward or of any other person concerned. If a transfer is ordered by the court, it shall be to the county named in the petition, unless good cause exists to the contrary. Any order made hereunder shall be subject to appeal as in other cases. ('25, c. 315, § 1)

**8927-2. Same—Certification—Effect of transfer—** Upon the transfer being made, the court shall certify to the court to which the matter is transferred all its files and proceedings in said matter, and the proceeding shall therefore be handled under the jurisdiction of the latter court, as if originally commenced therein, but appeals from any order of the first court shall be heard in the district court of its county unless transferred by such court for any of the causes permitted or required by law in civil actions. ('25, c. 315, § 2)

**8928. 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. (3830) [7437]

**8929. 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. (3831) [7438]

72-19, 74+899; 83-58, 85+917. Applies only to persons under guardianship (116-62, 133+82).

**8930. Appointment of guardian in certain cases validated—**In all cases where a petition has been filed in the probate court of any county in this state for the appointment of a guardian for any insane or incompetent person who was at the time of the filing of such petition a resident of this state and had property therein but who could not at the time of filing said petition be found in this state and where notice of hearing upon said petition was served by publication and not by personal service, all proceedings in such probate court for the appointment of such guardian and all acts done by such guardian under such appointment are hereby validated, and such proceedings and such acts shall have the same effect as if service of the notice of hearing on said petition had been made personally upon the person for whom guardianship was sought. Evidence of the fact that said person sought to be placed under guardianship was a resident of the

state at the time of the filing of said petition and that he could not be found therein at said time, may be supplied by the affidavit of any person having knowledge of the facts residing in the county in which said proceedings were had, and may be filed in said probate court at any time within ninety (90) days after the passage of this act. ('13 c. 323 § 1) [7439]

**8931. 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. (3832) [7440]

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

**8932. 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. (3833) [7441]

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

123-13, 142+882; 135-348, 160+859.

The judgment of the probate court settling the final account of the guardian is final and conclusive upon the guardian and his sureties as to the liability of the guardian and the amount thereof. 211+314.

Evidence to show that property charged to the guardian in his final account as settled and allowed by the probate court had been dissipated before the execution of a bond given by the guardian as additional security was properly excluded. 211+314.

**8933. 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 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. (3834) [7442]

May sell personal property of ward without order of court (19-221, 182; 75-12, 71+552). See (63-187, 65+272; 84-293, 87+489; 89-198, 94+681). Cited (99-54, 108+812). 127-387, 149+664; 129-197, 151+976; 136-194, 161+525; 151-464, 185+509; 187+229.

The action cannot be maintained on the theory that the land of the minors is liable to the payment of the claim, for there was no proof that the making of this contract was sanctioned by the probate court. 157-102, 195+637.

Plaintiff failed to prove that any defect existed in the minor's title, or that he tendered the balance of the purchase price, or that the probate court had approved the sale, all necessary facts in order to maintain the action. 157-102, 195+637.

The evidence warrants the conclusion that relator and his wife, the parents of the child, Irene, temporarily placed in the custody of respondents, are morally and financially fit and able to properly rear and educate their child, and should be awarded custody of the same. 164-373, 205+267.

While the statute gives to the parent of a minor child, if a suitable person, the custody of the person and care and education of such child, yet this is not an absolute right beyond the control of the courts. 166-433, 206+131.

Under the evidence, it is held, that notwithstanding the natural right of the relator to the custody of her child, it should for the present remain with the respondent.

ents, in whose custody it has been most of the time since in birth. 211-310.

**8934. 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. (3835) [7443]

**8935. 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. (3836) [7444]

152-401, 189-124.

**8936. 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 appraisal 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 appraisal shall be made in the same manner as in estates of decedents. (3837) [7445]

**8937. Extension of power of guardians**—Every guardian shall settle all accounts of his ward, demand, sue for, and receive all debts, claims and causes of action due to or in favor of said ward, or, with the approval of the court, he may compound or compromise for the same and execute proper discharge and satisfaction thereof. He shall appear for and represent his ward in all legal proceedings, unless another person is appointed for that purpose. (R. L. '05 § 3838, G. S. '13 § 7446, amended '15 c. 110 § 1; '17 c. 425 § 1)

Under this section, action for personal injuries to minor may be brought in his name as plaintiff by his general guardian, and either course may be pursued (102-363, 113-902).

123-360, 143-973; 126-194, 148-45.

General guardians for the minor were appointed after the order was entered, and were not parties to the proceeding to determine the amount of the attorney's fees. Although they have been made parties to the appeal, the minor cannot be bound by any judgment which might be given upon the appeal. 160-122, 199-579.

**8938. 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. (3839) [7447]

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).

123-13, 142-882; 135-94, 160-187.

**8939. 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. (3840) [7448]

**8940. Aid for children of insane ward**—The duly appointed guardian of the property of any insane person who shall be pronounced incurably insane by the certificate of the superintendent of any state hospital for the insane of this state where such insane person shall be confined, shall have the power and authority to furnish aid for the support and maintenance of any female child of such insane person, who is over the age of eighteen years, or of any sick, maimed, deformed, or crippled male child of such insane person who is over the age of twenty-one years and unable to support himself in whole or in part, which aid shall be furnished in the manner and to the extent hereinafter provided.

The amount of such aid shall in no case exceed the annual rents, profits, or income derived from the property of such insane person. ('13 c. 340 § 1) [7449]

**8941. Guardians authorized to furnish aid to insane persons**—Before any such aid shall be furnished, the guardian of the property of such insane person, or any child of such insane person, shall make and file with the probate court having jurisdiction, a petition in writing, duly verified, setting forth all the facts entitling such child to such aid. Thereupon the judge of probate shall make an order fixing the time and place of the hearing on said petition, a copy of which order, with a copy of the petition, shall be personally served upon such guardian and the superintendent of the insane hospital where such insane person is confined, at least ten days prior to the time fixed for said hearing. Provided that any case of guardianship now pending before any probate court where a guardian resides in a different county, all acts and transactions therein conducted under the direction of the court are hereby declared legal, valid and effectual for all purposes. ('13 c. 340 § 2; '19 c. 312 § 1) [7450]

**8942. Aid for children of insane**—At the time and place fixed for the hearing, witnesses shall be sworn before testifying and the certificate of such superintendent shall be admissible in evidence on his signature alone; and if, after full investigation and hearing, the judge of probate shall find that such child is entitled to the aid herein provided, and that the allegations of the petition are true, he may make an order directing such guardian to furnish aid to such child for such time, and in such an amount, as the judge of probate shall deem necessary.

The aid so furnished shall be allowed in the guardian's annual or final accounts as a part of his lawful disbursements. ('13 c. 340 § 3; '15 c. 245 § 1) [7451]

**8943. 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. (3841) [7452]

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

135-94, 160-187.

District court has jurisdiction of an action on contract against a person under guardianship as an incompetent (152-278, 188-326; see '13 c. 470 repealed '15 c. 342).

**8944. Non-resident guardians and wards**—Whenever the guardian of any non-resident ward, appointed as such in the state or district where said ward re-

sides, 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. (3842) [7455]

40-254, 255, 41+972; 176 Fed. 586.

**8945. 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. (3843) [7456]

**8946. 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. (3844) [7457]

**8947. 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. (3845) [7458]

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

**8948. Annual accounts of guardians—Hearing and settlement—Notice**—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 accounts and cause three weeks' published notice thereof to be given. In all cases wherein the ward or the guardian in his behalf is or has been in receipt of compensation or other allowances or insurance payable or paid by the Federal government or its agencies, the court shall appoint a time for the hearing and settlement of such account, and cause such notice thereof to be given as may be directed by the court. 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 per-

sonal property remaining in the hands of the guardian. (3846) [7459] (Amended '27, c. 289)  
65-335, 336, 68+44.

**8949. Final account—Notice**—When the disability of any person under guardianship is removed, or he dies or the guardian resigns, 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, or in case of resignation, upon the guardian appointed in place of the guardian resigning if there be such newly appointed guardian, 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. Provided, if said nonresident ward is alive, personal service upon said ward in the state of his residence, or personal service upon the guardian of said ward appointed in the state of the residence of such ward at least fourteen days before the day of hearing shall be sufficient. The proof of the service without the state, as aforesaid, to be by the affidavit of the person making the same and made before an authorized officer having a seal. (R. L. § 3847, amended '13 c. 38 § 1) [7460]

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).

Where a ward dies, property in the hands of his guardian in which he had only a life estate does not pass to the representative of his estate, but to the remaindermen; and when the probate court has settled the final account of the guardian and directed him to turn such property over to the remaindermen, they may maintain an action to recover it. 211+314.

**8950. 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. (3848) [7461]

Order of allowance conclusive on sureties of guardian (72-426, 75+607; 80-413, 83+393). Setting aside order of allowance obtained by fraud (82-324, 84+1017, 86+333). Application to vacate judgment. 211+316.

**8951. 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. (3849) [7462]

**8952. Power of special guardian**—Such special guardian shall have the same power and perform the same duties as other guardians, but no special guard-

ian appointed under § 8951 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. (3850) [7463]

#### COMMITMENT OF FEEBLE-MINDED, INEBRIATES AND INSANE PERSONS

**8953. Definitions**—The word “defective” as used in this act shall include the feeble-minded, the inebriate and the insane. The term “feeble-minded persons” in this act means any person, minor or adult, other than an insane person, who is so mentally defective as to be incapable of managing himself and his affairs, and to require supervision, control and care for his own or the public welfare. The term “inebriate” as used in this act means any person incapable of managing himself or his affairs by reason of the habitual and excessive use of intoxicating liquors, drugs or other narcotics. The term “insane” as used in this act means any person of unsound mind other than one who may be properly described as only an inebriate or feeble-minded person. ('17 c. 344 § 1)

165-103, 205+886; 211+12.

**8954. Voluntary admission**—Any person who is defective and who desires to receive treatment at a state institution may voluntarily make application to the state board of control for admission thereto, in such form and manner as may be prescribed by the board, and the board may thereupon grant to such applicant admission to the appropriate state institution. ('17 c. 344 § 2)

209+640, note under § 8924.

**8955. Detention and examination of voluntary patients**—The superintendent of any state institution for defectives is authorized and empowered to detain any person admitted upon his own application as though he had been committed in the manner hereinafter provided, unless otherwise discharged by order of court. If any such person demands his release from such institution, the superintendent thereof shall, if he deems such release unsafe, within three days thereafter file a verified petition with the judge of probate of the county in which the institution is located, praying for the commitment of such defective as hereinafter provided. ('17 c. 344 § 3)

**8956. Petition**—When any person residing in this state shall be supposed to be defective any relative, guardian or reputable citizen of the county in which such supposed defective person resides or is found may file a verified petition in the probate court of the county, setting forth the name and residence of the supposed defective person and the facts necessary to bring such person within the purview of this act. Whereupon the probate judge shall, after investigation, if the petition be sufficient, direct that the alleged defective person be brought before him, and when necessary the court may issue a warrant directed to the sheriff or any constable of the county, or to any person named therein, requiring him to bring such defective person before the court for examination. ('17 c. 344 § 4)

Jurisdiction of the probate court was not negatived, and no relief could be given on habeas corpus. 210+14.

**8957. County attorney to appear**—Whenever a judge of probate orders an examination he shall notify the county attorney of the time and place of said examination, who shall appear on behalf of the person to be examined and take such action as may be necessary to protect his rights. The court may, and on request of

the county attorney, shall issue subpoenas for witnesses. ('17 c. 344 § 5)

**8958. Board of examiners; how appointed**—When such person is produced in court the probate judge shall designate two licensed physicians resident in the state who, with the probate judge, shall constitute a board to examine such person and determine as to his defectiveness. Where the proceeding is for the adjudication of feeble-mindedness the probate judge shall notify the state board of control of the filing of the petition and that a hearing will be had thereon not less than ten days thereafter, whereupon the board may, at its discretion, designate some person skilled in mental diagnosis to attend the hearing, examine the alleged defective and advise the board of examiners. Provided that if the alleged defective person is obviously feeble-minded or an inebriate the probate judge may dispense with the appointment of any board of examiners, with the consent of the county attorney, and may himself hear and determine the matter. ('17 c. 344 § 6)

**8959. Examination and report by board of examiners—Commitments to asylum for dangerous insane**—The board of examiners shall hear all proper testimony offered by any person interested and the court may cause witnesses to be subpoenaed. When the examination is completed, the board shall determine whether or not the person examined is a feeble-minded person, an inebriate or an insane person, and shall file in the court a report of their proceedings, including the findings, upon such forms as the state board of control may authorize and adopt. Whenever any defective shall be found to be dangerous to the public, by the board of examiners, he shall be committed by the probate court to the asylum for the dangerous insane for safe keeping and treatment, and no person when so committed shall be liberated therefrom unless and until a new board of examiners, which shall have been appointed in the same manner and with the same powers, duties and qualifications, as the board which committed him, shall, after examination and after due notice to the county attorney, find that such person if at liberty, would no longer be dangerous to the public. Such examination shall be held in the county where the original commitment was issued, and for the purpose of such hearing the person to be re-examined shall be brought to said county by order of the probate court directed to the superintendent of the hospital where the person to be re-examined is held. ('17, c. 344, § 7; amended '27, c. 136, § 1)

**Explanatory note**—Laws 1927, c. 136, § 2 repeals all inconsistent acts and parts of acts.

**8960. Commitment of feeble minded person—Discharge**—If the person examined is found to be feeble-minded, the court shall order him committed to the care and custody of the state board of control, as guardian of his person. Thereafter the board shall have power whenever advisable to place him in an appropriate institution, or in a home established or approved by the Board of Control for the purpose of giving care and supervision to a group of such feeble-minded wards engaged in gainful occupation, or to exercise general supervision over him anywhere in this state outside any institution through any child welfare board or other appropriate agency thereto authorized by said Board of Control. If at any time, after study and observation in such institution, the superintendent is of the opinion that a person so committed is not defective, or that his further residence therein is not required for his own or the public welfare, he shall so



report to the State Board of Control and the board may thereupon discharge such person from its further care and custody.

Provided, that any parent, guardian, relative or friend of a person committed, as aforesaid, to the care and custody of the State Board of Control, may at any time file a petition for a hearing in the probate court of the county in which such person resided or was found when first committed to the care and custody of said board, to establish that further guardianship of the board is not required for the welfare of such person or the public; and upon payment of the necessary traveling expenses, by said petitioner, from the place where such person then resides or the institution, if any, to which said person is then committed to the place of hearing, and giving security for the payment of necessary expenses for a return to such place or institution, if a return shall be ordered, the said probate court shall by order, require the attendance of such person upon said hearing. Upon filing with the said Board of Control, a certified copy of said order, it shall be the duty of said board to authorize and direct the attendance of such person at such hearing in compliance with the terms of said order. Notice of such hearing and proceedings thereupon shall be such as are prescribed in this chapter.

If, upon said hearing, the contention of the petitioner is sustained, the probate court shall order the discharge of such person and file a copy of such order with the State Board of Control. If such contention is not sustained, such person shall be remanded to the care and custody of said board; provided, however, that the probate court may, in lieu of such discharge or remand, permit, such person to remain in the custody of a relative or friend who shall give security, to be approved by the court, for the safe care and custody of such person and for his appearance in court whenever required, until discharged or remanded as herein provided. But no order or other action of such probate court authorizing the discharge of any person previously committed as a feeble-minded person to the care and custody of the State Board of Control shall be effective for any purpose until the lapse of thirty days after a copy thereof shall have been filed with said Board of Control as hereinabove provided. And if within said thirty days the Board of Control or its attorney shall file with said probate court a notice of appeal to the District court of said county from such order of said probate court, then the said order shall remain suspended and ineffective and such feeble-minded person shall remain under the guardianship and in the care and custody of said Board of Control until such appeal shall have been heard and determined by said District court. Whenever a person adjudged to be feeble-minded under the provisions of this act or his attorney or spouse or relative in his behalf, or the State Board of Control as the guardian of such feeble-minded person, shall be aggrieved by judgment, order or decree of the probate court entered pursuant to the provisions of this section, such person or State Board of Control may appeal to the District court in the manner hereinafter provided, which shall be the exclusive method of appeal in such cases. A notice of appeal shall be served upon the adverse party, his agent or attorney, within thirty days after written notice of the making of the order appealed from shall have been served upon the party appealing, his agent or attorney. An extra copy of such notice of appeal shall be deposited with said probate court.

The District court shall be deemed to have jurisdic-

tion of said matter from the date of filing said notice of appeal, and no other act or thing shall be necessary to be done by the appellant to make said appeal effective. But said probate court shall within five days after the receipt of said notice of appeal transmit all its original files in said proceedings to the clerk of said District court, who shall be responsible for the safekeeping and return thereof to said probate court after said appeal shall have been determined. At any time after receipt of said original files by said District court, either party to said proceedings may bring said matter on for trial upon five days' notice to the other party. And thereupon it shall be the duty of said District court, without a jury, and in or out of term, summarily to hear, try and determine said matter de novo as though no trial in said probate court had occurred; and the trial thereof shall have precedence over every other matter or proceeding whatever in said District court which shall as promptly as possible thereafter make its order or decree affirming, modifying or reversing said order of the probate court so appealed from and making such other or further provision concerning such feeble-minded person as his own or the public welfare may require.

A certified copy of such order or decree of the District court shall be immediately transmitted with said original probate files to said probate court which shall be governed accordingly. No charge shall be made nor costs allowed against the Board of Control or the state on such appeal.

Upon the request of the relatives or friends of any person alleged or found to be feeble-minded they may be permitted to take charge of such person; but in such case the State Board of Control may require and approve a bond from such relatives or friends, running to the state, in a penal sum of not less than five hundred nor more than five thousand dollars, conditioned that such feeble-minded person shall be safely and adequately cared for and kept by the said relatives or friends and that they will indemnify and hold harmless the state and all political subdivisions, institutions and agencies thereof, from expense of any nature arising or resulting from any act or misconduct of such feeble-minded person committed while in their care. ('17, c. 344, § 8; amended '19, c. 77, § 1; '23, c. 260, § 1; '27, c. 231)

A person placed under the guardianship of the state board of control may petition the proper probate court to be restored to capacity. Such a person may appeal to the district court from an adverse decision of the probate court. On the appeal, the court may submit an issue of fact to a jury for a special verdict. 211+12.

**8961. Commitment of inebriates or insane persons—War veterans**—If the person examined is found to be an inebriate or insane the judge shall issue duplicate warrants committing him to the custody of the superintendent of the proper state hospital or to the superintendent or keeper of any private licensed institution for the care of inebriates or insane persons; provided that, if the person so examined and found to be an inebriate or insane is also found to be a veteran of the Spanish-American War, the Philippine Insurrection, the Boxer Rebellion or the World War, the judge may issue duplicate warrants committing him to the custody of the superintendent or other proper officer or authority in charge or control of any United States Veterans Bureau Neuro-psychiatric hospital in this state in which such person will be received and his custody accepted. ('17, c. 344, § 9; amended '25, c. 89)

**8962. Delivery of warrant**—A copy of such warrant shall be delivered to the sheriff of the county who to-

gether with such attendants as shall be designated by the judge of probate, shall deliver the warrant and the patient to the superintendent of the institution designated in such warrant. ('17 c. 344 § 10)

**8963. Temporary detention**—The probate judge, with the approval of the county board, may provide a place of temporary detention for defectives and make the necessary contracts therefor. Provided that this shall not authorize the construction of a hospital for that purpose. All expense necessarily incurred for such temporary detention of defectives shall be paid by the county. ('17 c. 344 § 11)

**8964. Parole—Bond required**—Upon request of the relatives or friends of any person alleged or found to be insane, or inebriate, they may be permitted to take charge of such person; but in such case the probate judge, or, if such 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 the judge or superintendent, as the case may be, conditioned upon the care and safe keeping of such person; provided that no person charged with or convicted of a crime shall be so discharged. ('17 c. 344 § 12)

**8965. Notice of discharge**—Whenever any defective committed to a hospital under this act shall be discharged, or transferred to another institution, the superintendent, upon the day of such discharge or transfer, shall mail to the probate judge of the county from which such person was committed, a certificate stating the fact of such discharge or transfer and the date thereof and the date of commitment, which certificate shall be filed in said court. ('17 c. 344 § 13)

**8966.—Fees—How audited and paid**—The judge of probate shall allow and order paid the following fees for services provided for in this act: To each witness the sum of one dollar per day and actual disbursement for travel and board. To each examiner the sum of five dollars, and fifteen cents per mile for every mile traveled. To the person to whom the warrant of arrest is issued the sum of three dollars per day and actual disbursements and necessary board and lodging of himself and alleged defective while making the arrest. To the person, other than a nurse or hospital attendant, authorized to convey the defective to the place of commitment the sum of three dollars per day and all necessary disbursements for travel and for the support of himself, the alleged defective and authorized assistants. Such amounts shall be audited by the judge of probate and judgment entered of record therefor and shall be paid by the county treasurer upon the written order of the judge of probate and filed with the county auditor who shall issue his warrant on the county treasurer in payment of said sums, and upon payment thereof said judgment shall be satisfied of record by the judge of probate. The examiner designated by the board of control shall be paid by the state. ('17 c. 344 § 14)

**8967. When resident of another county**—Whenever the alleged defective is found to have his legal residence in some other county he may nevertheless be examined and if found to be defective committed in like manner as persons residing in the county. The necessary costs and expenses of such examination and commitment shall be certified by such court to the auditor of the county in which the examination is held, who shall certify the same to the county auditor where the said alleged defective is found to be a legal resident and shall be paid as other claims against such county. ('17 c. 344 § 15)

**8968. Proceedings 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 thirty days after its filing. Such appeal may be to the district court of the county from which such person was committed. ('17 c. 344 § 16)

**8969. Court commissioner to act for Judge of Probate in certain cases**—Whenever the judge of probate is unable to act from any cause or reason upon any petition concerning an alleged defective the court commissioner shall perform all his duties in such case and the authority herein granted to the judge of probate shall be exercised by the said court commissioner. ('17 c. 344 § 17, amended '21 c. 269 § 1)

**8970. Forms of blanks**—For the purpose of securing uniformity in the practice of examination and commitment of defectives, the state board of control is hereby authorized and empowered to prescribe forms of blanks which shall be used. ('17 c. 344 § 18)

**8971. Malicious petition, etc.—Punishment**—Whoever for a corrupt consideration or advantage, or through malice shall make or join in or advise the making of any false petition or report aforesaid, or shall knowingly or wilfully make any false representation for the purpose of causing such petition or report to be made shall be deemed guilty of a felony and punished by imprisonment in the state prison for not more than one year or by a fine of not more than five hundred dollars. ('17 c. 344 § 19)

**8972. Certain sections repealed**—Sections 4111 to 4126 inclusive, and sections 7464 to 7489 inclusive, General Statutes, 1913, are hereby repealed. ('17 c. 344 § 20)

**8973. Duty of superintendent of asylum or hospital**—Subdivision (1). Whenever after August 1st, 1917, any probate court of this state shall have committed any person to the superintendent of a state asylum, detention hospital or hospital for the insane, and one of the duplicate warrants issued pursuant thereto shall have been returned, with the superintendent's indorsement thereon that the person named therein has been received by him, and filed in such probate court, the clerk of such probate court, or the judge, if there is no clerk, shall make and file with the state board of control, a copy of such warrant and of the indorsements thereon together with such other information as is provided for in this act.

Subdivision (2). Whenever after August 1st, 1917, any person shall be received into any state detention hospital on his own application or pursuant to a determination that such person is mentally disturbed, and in need of treatment therein, under the provisions of chapter 224, Laws 1909, the superintendent so receiving him shall forthwith mail to the state board of control a written statement setting forth the names of the person so received, the nature, amount and location of any money or other property owned by such person, the time when received, the name and address, if known, of the relative or guardian, if any, on whose application the determination was made, together with such other information as is provided for in this act.

Subdivision (3). On, or before the 3rd day of August, 1917, the superintendent of each asylum, detention

hospital or hospital for the insane shall file with the state board of control, a statement in writing of the names of the inmates of their respective institutions committed thereto, also the names of all persons who have been received into any detention hospital without a warrant of commitment and who were inmates thereof on August 1st, 1917. Such statement shall also contain the date of commitment or reception of the inmate, his residence, any information which the superintendent may have as to any money or property which may be owned by such inmate, and the nature, amount and location thereof; the name and address of the guardian of such inmate, if known, also the names and addresses, so far as known, of the relatives of such inmate who are or may be, under the provisions of this act, liable to contribute to the support of such inmate. ('17 c. 294 § 1)

**Explanatory note**—For Laws 1909, c. 224, see §§ 4509 to 4516, herein.

**8974. Duty of superintendent on death of patient**—Whenever any person who has been committed to or received into any asylum, detention hospital or hospital for the insane, dies, or is required to leave, or is paroled, or discharged therefrom, it shall be the duty of the superintendent of the institution to at once report in writing such fact and the time of the occurrence thereof to the state board of control.

It shall also be the duty of the superintendent to forthwith report to the state board of control the time when any paroled inmate was returned to his actual custody, either because of the revocation of his parole or the expiration of the period for which he was paroled. ('17 c. 294 § 2)

**8975. Judge of probate and county attorney to inquire into property and estate of person committed**—It shall be the duty of the judge of probate and county attorney, of the respective counties in this state, upon and in connection with the proceeding and examination of any person petitioned to be committed to a state hospital to fully inquire into the property and estate of such person and the property and estate of the persons upon whom liability is imposed for his care under the provisions of this act, and, in case of commitment of such person, to report such information forthwith to the state board of control upon such blanks or forms of report as it may provide therefor. Such reports shall be accompanied by the recommendation of such officers to the board of control as to what extent the estates or relatives of the persons so committed should be charged with liability under the provisions of this act. ('17 c. 294 § 3)

**8976. State to have claim for reimbursement to the extent of \$10 per month**—For the purpose of defraying the expenses and cost of maintenance of any inmate in a state asylum, detention hospital or hospital for the insane, the state of Minnesota shall have a valid claim for reimbursement to the extent of \$10.00 per month for each such inmate, for all moneys paid and expenses incurred by the state for such maintenance,—first, against the property or estate of such person so maintained, second, against the relatives of such person in the following order, to-wit: spouse, children and parents provided, that if the state board of control shall determine that the property or estate of any such insane person is not sufficient to more than care for and maintain the wife and minor children of such inmate, or that the means and property of the classes of persons herein secondly charged with the liability and cost of the maintenance of such insane person in said institutions, is not more than sufficient to properly

provide for themselves and those otherwise dependent upon them, the said board of control shall relieve the estate of such insane person and the relatives of such insane person from a portion or all of such charge or liability as they in their judgment and upon investigation may deem just and proper. In case of increase or decrease in the estate of such insane person, or in the estates of those persons herein secondarily liable for the cost of the maintenance of an insane person in such institutions, or in case of the death of such persons, or either of them, the board of control is hereby authorized to modify or cancel its previous order made in relation thereto, and from time to time make such other and further order with reference thereto as it may seem just and proper.

In all cases under the provision of this act, the property which under the laws of this state, is exempt from attachment, or sale on any final process, issued from any court, shall be exempt also as to the estates and persons charged with or upon whom any liability is imposed under the provisions of this act. ('17 c. 294 § 4)

142-285, 171+929..

**8977. Determination of state board of control to be conclusive**—In any action brought as hereinafter provided to enforce any liability created by this act or to collect from the property or estate of any inmate or relative as herein provided, the determination of the state board of control as to the sufficiency of the property or estate of the inmate to properly care for and maintain the wife and children, if any, or either or any of such classes of persons upon whom liability is imposed under the provisions of this act, shall be conclusive unless appealed from as herein provided. ('17 c. 294 § 5)

**8978. Proceedings to be commenced by state board of control**—When the state board of control shall have determined the liability of the estate or persons herein named to defray the cost of maintenance of an insane person and no appeal taken therefrom as herein provided and shall direct the persons herein charged with the expense and cost of maintenance of insane persons cared for in state institutions as herein provided to pay and demand payment for such maintenance and such persons shall refuse or neglect to make such payment for thirty days after receiving such demand or notice, the state board of control in the name of the state of Minnesota may bring an action against any and all of said relatives and persons and the representative of such inmate and recover against them therefor, and the further sum of \$10.00 as costs of such action in addition to the disbursements in such action. ('17 c. 294 § 6)

142-285, 171+929.

**8979. Petition for release or modification or order of board**—Any person who has been ordered to make payment for the support of an inmate in the institutions referred to in this act, the guardian or relative of any such insane person may petition the state board of control for the release from or modification of such order and said board after investigation may cancel or modify its former order if it shall find the conditions warranting such action. ('17 c. 294 § 7)

**8980. Board of control given power to make certain investigations**—The state board of control shall have the power to make investigation as to the property and estate of persons therein charged with liability for the cost and expense of maintenance of insane persons in state institutions and shall have the power to subpoena witnesses, take testimony under oath and ex-

amine any public records relating to the estate of an inmate or relative liable for his or her support. The state board of control shall determine whether such relative shall be required to pay for the support of such inmates or whether such charges shall be made against the estate of such an inmate. An order shall be issued to the persons who are determined liable for such payments requiring them to pay monthly, quarterly or otherwise as may be determined by said board. The board shall make all reasonable and proper efforts to collect such amounts, and in case of inability to collect, the attorney general, upon the recommendation of such board, shall direct the prosecuting attorney of the proper county to collect or institute civil action in the name of the state of Minnesota to recover the amount due with interest. All money received, as herein provided or by suit instituted, shall be paid to the state treasurer and placed in the general revenue fund and a separate account kept thereof. The board may, if it shall find it necessary, appoint one or more competent persons to act under its direction to assist in the carrying into effect the provisions of this act and the salaries and necessary expenses of such agents and other necessary expenses incident to carrying into effect the provisions of this act, shall be paid upon the order of the state board of control out of the moneys received or collected under the provisions of this act. ('17 c. 294 § 8)

8981. Aggrieved person given right of appeal to district court—Any person or party feeling himself aggrieved by any order or determination of the state board of control under the provisions of this act may appeal therefrom to the district court of the county in which the person or party resides, but upon any such appeal where any order or determination of the board of control made under the provisions of this act be brought in question such order shall be prima facie evidence of the facts therein stated. Such appeal shall be taken within thirty days after service of notice of the filing of the order or determination of the board of control appealed from. Such appeal may be taken by serving a notice thereof upon the chairman of the said board of control or the secretary thereof and upon filing such notice, with proof of service thereof in the office of the clerk of the district court of the proper county within ten days after service thereof, the said court shall be deemed to have jurisdiction of said appeal and thereafter such proceedings shall be had as in other civil actions triable in said court. On such appeal the court shall have the power to order pleadings to be filed and make any other order necessary to the proper procedure and determination of said appeal. ('17 c. 294 § 9)

8982. Procedure for receiving and disbursing of money so paid or paid voluntarily—That whenever after August 1, 1917, any person who has committed himself or herself for treatment at any state detention hospital, or the relatives, friends, or legal representatives of any person who has been committed to a state asylum, detention hospital or hospital for the insane, desires to pay the whole or any portion of the cost of the maintenance of such person in any of said institutions, in addition to the requirements of this act, the same shall be received and disbursed as other money paid pursuant to the provisions of this act, and said board is hereby directed to establish a schedule of the cost to the state of the care and maintenance of the patients in such institutions. ('17 c. 294 § 10)

#### APPEALS

8983. In what cases allowed—An appeal to the dis-

trict 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. (3872) [7490]

Subd. 1 (32-443, 21+474; 47-171, 177, 49+697; 96-142, 104+765; 117-247, 125+980). Subd. 2 (25-347, 354; 32-466, 21+555; 83-58, 85+917; 83-366, 86+351; 96-142, 104+765, overruled by 1901 c. 147). Subd. 3 (19-117, 85; 91-115, 97+647). Subd. 4. Allowing claim (20-442, 395; 28-381, 382, 10+209; 72-434, 75+700; 111-352, 127+11). Disallowing claim (51-241, 53+463; 62-321, 64+822; 76-132, 134, 78+1039). 136-329, 162+356; 142-287, 171+930. Subd. 5 (45-323, 324, 47+973; 72-165, 166, 75+123; 192+342); Subd. 6 (79-267, 271, 82+635. See 45-323, 47+973). Subd. 7 (65-335, 336, 68+44; 84-493, 87+1012; 97-130, 106+338; 97-150, 106+344). 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; 82-324, 327, 84+1017, 86+333; 93-350, 101+496; 138-99, 163 +1031). 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 96-342, 105+66). 133-124, 155+906; 141-131, 169+539; 150-291, 185+254.

On an appeal to the district court from an order of the probate court disallowing a will, the question of the residence of testatrix at her death not being put in issue on such appeal, the findings of the probate court thereon are final and conclusive. 156-100, 194+318.

Order appointing an administrator is final and appealable. 160-217, 193+910.

Cases appealed from probate court are tried de novo in district court. 160-217, 193+910.

After the period allowed for an appeal from an order or judgment of the probate court, there can be no review on the merits by certiorari. 161-88, 200+848.

Order of probate court granting petition of executor to permit him to sign reduction agreement was not appealable. 210+85

A person placed under the guardianship of the state board of control may petition the proper probate court to be restored to capacity. Such a person may appeal to the district court from an adverse decision of the probate court. On the appeal, the court may submit an issue of fact to a jury for a specific verdict. 211+12.

The order of the probate court allowing the account rendered by an executor or administrator, upon an application for a partial distribution of the estate, may be reviewed on appeal to the district court. 212+902.

**8984. Who entitled to appeal**—An appeal under § 8983, 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. (3873) [7491]

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 (96-434, 105+677. See 106-454, 119+405). An executor, propounding will by which he is nominated, may appeal from order denying probate (117-247, 135+980).  
126-450, 148+303; 129-249, 152+541; 136-327, 162+356.

**8985. 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. (3874) [7492]

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 (96-142, 104+765). Notice construed as an appeal from the whole of the order. Notices to be construed liberally (96-342, 105+66). Defect in bond not jurisdictional (38-9, 35+473). Undertaking sufficient (35-307, 29+131). Notice of appeal from decree assigning residue to devisee properly served on executor alone (106-454, 119+405). Within what time appeal may be taken (111-352, 127+11).  
132-176, 156+285; 133-20, 157+709.

An appeal from an order or judgment of the probate court must be taken within 30 days from notice thereof, and within 6 months from the entry thereof. 159-274, 198+1001.

If the successful parties at a contest desire to limit the time of appeal, it is incumbent on them to see that those having the right of appeal be notified by and in behalf of all their opponents. 167-447, 209+267.

**8986. Return**—Upon filing such notice of appeal

and proof of service, the probate court shall forthwith make and return to the district court a certified 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. (3875) [7493]

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

Order refusing to strike case from calendar proper under facts shown by record. 212+167.

Statute imposed no duty on appellant to cause return of probate court to be filed within a certain time. 212+167.

**8987. 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. (3876) [7494]

An appeal from an order admitting a will to probate does not affect an order appointing an executor (96-142, 104+765).

149-87, 182+915.

**8988. 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. (3877) [7495]

Relief from failure to have cause entered on calendar (70-437, 73+145). Trial in district court de novo (95-304, 104+535). Scope of review on appeal from order vacating an administrator's account (97-130, 106+338). Where appeal involves issues of fact, trial court should make findings of fact and conclusions of law (107-130, 119+791).  
212+167, note under § 8986.

On appeal to the district court from an order of the probate court allowing a claim against the decedent's estate, the proceedings are virtually the same as though an action had been brought to enforce the claim in the life-time of the decedent. 164-57, 204+546.

**8989. 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. (3878) [7496]

Trial without pleadings an irregularity merely (37-453, 35+177). Issues which may be formed (70-46, 72+319; 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, 44+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. See 106-353, 119+57, cited under § 8990).

122-463, 142+729; 131-441, 155+393.  
 District court directs pleadings to be made up as in civil actions (141-348, 170+585).  
 212+408.

**8990. 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 probate court with directions, the probate court shall comply with such directions in a summary manner, without notice. (3879) [7497]

Judgment of affirmance (79-267, 272, 82+635). Remand to probate court (95-304, 104+535). On appeal from order allowing final account district court cannot determine

right of administrator to compensation for services or disbursements subsequent to filing of account. Although matter is tried de novo, court exercises appellate jurisdiction only (99-236, 108+1118, 109+229). Authorizes affirmance (1) where appellant fails to appear and prosecute appeal, and (2) where order or decree appealed from is sustained on its merit. These sections do not apply to such appeals, where appellant fails to appear when appeal is called for trial (106-353, 119+57). Application to be relieved from default in prosecution of appeal held addressed to discretion of district court (106-353, 119+57). Cited (107-130, 119+791).  
 136-132, 161+392.

New facts after trial in probate court admissible in district court, if pertinent to the issue (141-95, 169+478).  
 An order of the district court, sustaining an order of the probate court from which an appeal has been taken, is not appealable; the appeal must be taken from the judgment entered pursuant to such order. 162-379, 202+817.

On appeal of will case from probate court, district court has duty to try case de novo, and, where evidence was properly excluded, decree of probate court should have been affirmed, instead of dismissing appeal. 162-433, 203+225.

**8991. 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. (3880) [7498]

79-267, 272, 82+635; 79-377, 380, 82+669; 111-43, 126+401.

**8992. 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. (3881) [7499]

CHAPTER 75

COURTS OF JUSTICES OF THE PEACE

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