89

THE GENERAL STATUTES

OF THE

STATE OF MINNESOTA

As Amended by Subsequent Legislation, with which are Incorporated All General Laws of the State in Force December 31, 1894

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Sections 1 to 4821 of the General Statutes

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[CHAPTER 45a.]

[PROBATE CODE, AND ALLIED ACTS.*]

*See §§ 5912-5946, for actions by or against executors, administrators, or heirs.

[TITLE 1.]

[PROBATE COURT.]

4408
55-M . 401

§ 4408. Title.

This act shall be known as the probate code of Minnesota.

(1889, c. 46, § 1.[1])

This act is not obnoxious to the constitutional provision that "no law shall embrace more than one subject, which shall be expressed in the title." Johnson v. Harrison, 47 Minn. 575, 50 N. W. Rep. 923.

The act was properly passed. Ellis v. Ellis, (Minn.) 56 N. W. Rep. 1056.

§ 4409. Probate court in each county.

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

(1889, c. 46, § 2.)

General powers and jurisdiction of probate courts. Sitzman v. Pacquette, 13 Wis. 291; Chase v. Whiting, 30 Wis. 544; Tryon v. Farnsworth, Id. 577; Melia v. Simmons, 45 Wis. 335.

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§ 4410. Exclusive jurisdiction.

The jurisdiction required by any probate court over a matter or proceeding is exclusive of that of any other probate court, except when otherwise provided by law; and when a guardian is appointed, or any other proceeding

[1] An act to establish a probate code. Approved April 24, 1889.

is commenced, in the probate court of a particular county, all further proceedings in respect to the same shall be continued in that court.

(1889, c. 46, § 3.)

Extent of the jurisdiction which the court by proof of a will, or appointment of an administrator, acquires over subsequent proceedings for administration. Culver v. Hardenbergh, 37 Minn. 225, 33 N. W. Rep. 792.

§ 4411. Administration, when granted.

Wills must be proved and letters testamentary or of administration granted.

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

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

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

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

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

(1889, c. 46, § 4.)

When it appears that a probate court has jurisdiction of the subject of the appointment of an administrator of the estate of a person deceased, the letters of administration issued by such court are, in a collateral proceeding, conclusive evidence of the due appointment of the person therein named as administrator. Moreland v. Lawrance, 23 Minn. 84.

Where a county "established," but not organized, nor authorized to have a probate court, is attached for judicial purposes to an "organized" county, the probate court of the latter has jurisdiction over the former. State v. Wilcox, 24 Minn. 143.

An administrator may be appointed to prosecute an action for causing the decedent's death, though he was not a resident of the state, and left no property therein. Hutchins v. St. Paul, M. & M. Ry. Co., 44 Minn. 5, 46 N. W. Rep. 79.

See Culver v. Hardenbergh, 37 Minn. 225, 233, 33 N. W. Rep. 792: Putnam v. Pitney, 45 Minn. 242, 244, 47 N. W. Rep. 790; In re Southard's Will, cited in note to § 4439.

The place of the intestate's domicile at the time of his death, and not the place of his death, determines which is the principal administration. Price v. Mace, 47 Wis. 23, 1 N. W. Rep. 336.

A debt due deceased from a citizen of the state is estate to be administered so as to authorize the issue of letters here. Ex parte Picquet, 5 Pick. 65. And this, where the debtor removes into the state after the creditor's death. Pinney v. McGregory, 102 Mass. 186. And see, further, as to administration upon estates of non-residents, Bowdoin v. Holland, 10 Cush. 17; Harrington v. Browne, 5 Pick. 519; Crosby v. Leavitt, 4 Allen, 410.

Jurisdiction must appear affirmatively on the face of the petition. Shipman v. Butterfield, (Mich.) 11 N. W. Rep. 283.

Sufficiency of petition to give the probate court jurisdiction, see In re Sargent, (Wis.) 22 N. W. Rep. 131.

As to letters granted by a judge of probate of a county of which decedent was not an inhabitant, whether void or voidable, see Cutts v. Haskins, 9 Mass. 543; Holyoke v. Haskins, 5 Pick. 20.

Administration granted by a judge of probate, who is interested as creditor, see Ex parte Cottle, 5 Pick. 483, 9 Pick. 287; Sigourney v. Sibley, 21 Pick. 101, 22 Pick. 507.

A grant of administration originally void, and not merely voidable, acquires no validity by acquiescence for any period of time. Holyoke v. Haskins, 5 Pick. 20, 9 Pick. 259. And see Sigourney v. Sibley, 21 Pick. 101.

Settlement without administration. Taylor v. Phillips, 30 Vt. 238; Babbit v. Bowen, 32 Vt. 437.

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§ 4412. When judge of adjoining county shall act.

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When the judge of probate of any county, his wife, child, or other lineal descendant, parent, brother or sister shall be an heir, devisee or legatee or as a material witness, or when such judge shall be an executor, administrator or guardian of any ward or interested as creditor or otherwise

in any question to be decided, he shall be disqualified to act in relation to that estate, or in the decision of such question, as the case may be. The judge of probate so disqualified shall enter in his records the grounds of his disqualification, and shall make an order reciting said grounds of disqualification, and requiring the judge of probate of an adjoining county to attend at the office of the judge of probate so disqualified, and administer said estate or so much thereof as the said judge is so disqualified from doing. And it shall be the duty of such [judge] of probate to hear, try and determine such matters in the same manner and with like effect as the judge of probate of said court might have done, had he not been so disqualified.

(1889, c. 46, § 5.)

§ 4413. Office to be at county seat.

The judge of probate shall keep his office at the county seat, and the same shall be kept open at reasonable hours, suitable and convenient for the inspection and examination of the records therein; the court shall always be open for the transaction of business. He shall on the first Monday of each month hold a general term of the probate court therein; he may hold special terms at such times and in such places in the county as he may deem advisable.

(Id. § 6.)

§ 4414. Books of record to be kept.

The probate court shall keep the following books of record.

1. [Repealed by Laws 1893, c. 116, § 1.]

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

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

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

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

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

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

(Id. § 7.)

The records of the probate court import absolute verity as respects a party to the proceedings of which they are records, subject to amendment and correction in a direct proceeding for that purpose, and not otherwise; and they are therefore conclusive upon such party in a collateral proceeding. Dayton v Mintzer, 23 Minn. 393.

Letters of guardianship are proper to be recorded upon the record-books of the probate court, and when recorded the records are, as records, competent evidence without the production of the original letters, and without accounting for their absence. Davis v. Hudson, 29 Minn. 28, 11 N. W. Rep. 136.

§ 4415. Books to have an index.

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

(1889, c. 46, § 8.)

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§ 4416. Salary of probate judge.

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

(Id. § 9.)

See § 534.

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§ 4417. Method of computing salary.

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

(1889, c. 46, § 10.)

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§ 4418. Clerk hire.

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

(Id. § 11.)

§ 4419. Prohibited from taking fees—Exception.

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

(Id. § 12.)

G. S. 1878, c, 7, § 8, as amended by Laws 1885, c. 103, § 1, requiring fees arbitrarily graduated according to the value of estates, as a condition precedent to their settlement, was unconstitutional. State v. Gorman, 40 Minn, 232, 41 N. W. Rep. 948.

As to the recovery of such fees illegally collected, see Mearkle v. County of Hennepin, 44 Minn. 546, 47 N. W. Rep. 165; De Graff v. County of Ramsey, 46 Minn. 319, 48 N. W. Rep. 1135; Rand v. Board of Com'rs, 50 Minn. 391, 52 N. W. Rep. 901.

§ 4420. Judge or clerk not to act as attorney.

No judge of probate or his clerk shall be counsel or attorney in any action or proceeding for or against any legatee, heir, creditor, executor, administrator, guardian or ward, in any matter, which would by law come before such probate court. Nor shall such judge or clerk be required to counsel, advise or draw or prepare any paper relating to any estate which is or may be brought before such court; except orders, citations, decrees, executions, warrants, and subpoenas issuing out of such court.

(1889, c. 46, § 13.)

§ 4421. Law partner not to practice before judge of probate.

No attorney who is a law partner of any judge of probate, shall appear or practice as an attorney in any action or proceeding before such judge of probate.

(Id. § 14.)

§ 4422. Clerk prohibited from practicing before judge of probate.

No clerk of any probate court shall appear or practice as an agent or attorney in any action or proceeding in the probate court of which he is such clerk.

(Id. § 15.)

[TITLE 2.]

[WILLS AND THE PROBATE THEREOF.]

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§ 4423. Who may make will.

Any person of full age and sound mind may dispose by will of all or any part of his property, subject to the payment of his debts, except as otherwise provided in this code; and all estate of a testator not so disposed of shall descend as the estate of an intestate, and shall be administered by the executor or the administrator with the will annexed in the same manner as if he had been appointed administrator. And any married woman may devise and dispose of any real or personal property held by her, or to which she is entitled in her own right, by her last will and testament in writing, and may alter or revoke the same, in like manner as if she was unmarried except as otherwise provided in this code.

(1889, c. 46, § 16, as amended 1893, c. 116, § 2.)

See Washburn v. Van Steenwyk, 32 Minn. 336, 20 N. W. Rep. 324.

TESTAMENTARY CAPACITY. See Fraser v. Jennison, (Mich.) 3 N. W. Rep. 882; In re Stewart, (Wis.) 22 N. W. Rep. 392; Freeman v. Easley, (Ill.) 7 N. E. Rep. 656; Lamb v. Lamb, (Ind.) 5 N. E. Rep. 171; American Bible Society v. Price, (Ill.) 5 N. E. Rep. 125; Estate of Dalrymple, (Cal.) 7 Pac. Rep. 906; Delaney v. City, (Kan.) 9 Pac. Rep. 271; Estate of Lang, (Cal.) 2 Pac. Rep. 491; Hoban v. Piquette, (Mich.) 17 N. W. Rep. 797; Rice v. Rice, (Mich.) 15 N. W. Rep. 545, 19 N. W. Rep. 132; In re Ames' Will, (Iowa,) 2 N. W. Rep. 408. Burden of proof, see Stephenson v. Stephenson, (Iowa,) 17 N. W. Rep. 456. Opinions of witnesses, see Porter v. Throop, (Mich.) 11 N. W. Rep. 174; In re Pinney's Will, 27 Minn. 280, 6 N. W. Rep. 791, 7 N. W. Rep. 144; Severin v. Zack, (Iowa,) 7 N. W. Rep. 404; American Bible Society v. Price, *supra;* Burley v. McGough, (Ill.) 3 N. E. Rep. 738; Parsons v. Parsons, (Iowa,) 21 N. W. Rep. 570.

UNDUE INFLUENCE. See Bradford v. Vinton, (Mich.) 26 N. W. Rep. 401; In re Farnsworth, (Wis.) 22 N. W. Rep. 523; In re Armstrong, (Wis.) 23 N. W. Rep. 407; In re Disbrow's Estate, (Mich.) 24 N. W. Rep. 624; Baylies v. Spaulding, (Mass.) 6 N. E. Rep. 62; In re Convey's Will, (Iowa,) 2 N. W. Rep. 1084; Fraser v. Jennison, (Mich.) 3 N. W. Rep. 882.

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63-NW 1028

§ 4424. Construction of devise.

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

(1889, c. 46, § 17.)

See In re Oertle, 34 Minn. 173, 24 N. W. Rep. 924.

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§ 4425. Devise passes after-acquired lands.

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

(1889, c. 46, § 18.)

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§ 4426. Wills, how to be executed.

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

(Id. § 19.)

Where erasures and interlineations are made by the testator in an executed will, the attestation of the original will is not an attestation of the will as altered; and if there-

is no other sufficient attestation of the will as altered, it cannot be sustained, since it is not attested as imperatively required by the statute. In re Penniman, 20 Minn. 253, (Gil. 227)

The attestation of a will is sufficiently proved, if it be shown to have been in the conscious presence of the testator. No formal request need be proved. In re Allen's Will, 25 Minn. 39. That the testator actually saw the attesting witnesses subscribe their names as such to the will need not be shown when it appears that it was done in his immediate and conscious presence, so that he could have seen it if he had felt so disposed. Evidence held sufficient in this case to support the findings. Id.

Mere knowledge by the testator that another is signing or has signed, and assent or acquiescence, without previous direction, are not enough. Waite v. Frisbie, 45 Minn. 361, 47 N. W. Rep. 1069.

As to the formalities attending the execution of a will, see In re Hulse's Will, (Iowa,) 3 N. W. Rep. 734; In re Convey's Will, (Iowa,) 2 N. W. Rep. 1084; In re Smith's Will, (Wis.) 8 N. W. Rep. 616, 9 N. W. Rep. 665; Bradford v. Vinton, (Mich.) 26 N. W Rep. 401; Johnson v. Johnson, (Ind.) 7 N. E. Rep. 201; Worthington v. Klemm, (Mass.) 10 N. E. Rep. 522.

Competency of witnesses, see Bates v. Officer, (Iowa,) 30 N. W. Rep. 608; Hawkins v. Hawkins, (Iowa,) 6 N. W. Rep. 699; Quinn v. Shields, (Iowa,) 17 N. W. Rep. 437.

§ 4427. Nuncupative wills.

No noncupative or unwritten will, bequeathing personal estate shall be valid, unless made by a soldier while in actual military service, or by a mariner while at sea.

(1889, c. 46, § 20.)

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§ 4428. Legacies to subscribing witnesses.

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

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(Id. § 21.)

§ 4429. Share of estate saved to subscribing witnesses.

If any witness to whom a beneficial devise is made or given would be entitled to any share of the estate of the testator in case the will is not established, then so much of the share that would have descended or been distributed to such witness as will not exceed the devise or bequest made to him in the will, shall be saved to him and he may recover the same of the devisees or legatees named in the will, in proportion to and out of the parts devised or bequested to them.

(Id. § 22.)

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§ 4430. Revocation of wills.

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

(Id. § 23.)

Interlineations and erasures by the testator in an executed will, will not operate as a revocation, even *pro tanto*, unless the will be thereafter re-executed and attested as required, in case of a revocation by some "other writing," by this section. In re Penniman, 20 Minn. 254. (Gil. 228.)

A later will, with a clause revoking former wills, held effectual as a revocation, though by reason of its loss or destruction, and inability to prove its contents, except the revocatory clause, it cannot be allowed as a will. In re Cunningham, 38 Minn. 169, 36 N. W. Rep. 269.

Express revocation must be by some of the acts designated. It is not enough that the failure to comply with the statute is due to the fraud of an interested party. Graham v. Burch, 47 Minn. 171, 49 N. W. Rep. 697.

A conveyance of a devised estate, executed by one mentally incapacitated, or adjudged void for fraud or undue influence, is ineffectual as a revocation. Id.

Drawing a scroll through the signature, but not so as to render it illegible, is not a cancellation. Gay v. Gay, (Iowa,) 14 N. W. Rep. 238.

A will was wholly written on the first page of the sheet, and on the fourth page testatrix wrote, "I revoke this will," adding her signature and the date, but such writing was not attested. Under a similar statute, held, not effectual to revoke the will. In re Ladd's Will, (Wis.) 18 N. W. Rep. 734.

Implied revocation by the subsequent marriage of testatrix, see Blodgett v. Moore, (Mass.) 5 N. E. Rep. 470; Osgood v. Bliss, (Mass.) 6 N. E. Rep. 527; Nutt v. Norton, (Mass.) 7 N. E. Rep. 720; Noyes v. Southworth, (Mich.) 20 N. W. Rep. 891.

Subsequent birth of a child to testator as an implied revocation, see Alden v. Johnson, (Iowa,) 18 N. W. Rep. 696; Milburn v. Milburn, (Iowa.) 14 N. W. Rep. 204.

§ 4431. Custodian of will must deliver to probate court.

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

(1889, c. 46, § 24.)

§ 4432. Who may petition for probate of will.

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

(Id. § 25.)

See Putnam v. Pitney, 45 Minn. 242, 244, 47 N. W. Rep. 790.

§ 4433. Contents of petition.

A petition for the probate of a will must be verified and must show:

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

2. The probable value of the personal property of the estate, and also the probable value of the real property and its character;

3. The name of the executor or executors named in the will, if any, and his or their residence, if known, and the name of the person for whom letters testamentary or of administration are prayed.

(1889, c. 46, § 26.)

§ 4434. Defect in petition not to invalidate probate, when.

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No defect of form or in the statement of facts contained in the petition shall invalidate the probate of a will.

(Id. § 27.)

§ 4435. Hearing of petition—Notice.

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

(Id. § 28.)

To whom notice should be addressed. Greenwood v. Murray, 28 Minn. 123, 9 N. W. Rep. 629; Spencer v. Sheehan, 19 Minn. 345, (Gil. 298.)

Sufficiency of notice. Chase v. Ross, 36 Wis. 267. Insufficient notice, jurisdiction. O'Dell v. Rogers, 44 Wis. 136.

After personal notice or publication, (as the case may be,) the court has complete jurisdiction, notwithstanding the failure to appoint a guardian *ad litem* for minors interested in the estate. No provision is made for such appointment. In re Mousseau's Will, 30 Minn. 202, 14 N. W. Rep. 887.

The judgment creditor of an heir may contest the probate of a will of real estate. In re Langevin, 45 Minn. 429, 47 N. W. Rep. 1133.

§ 4436. Probate granted on testimony of one witness, when.

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If no person appears to contest the probate of a will at the time appointed for that purpose, the court may, in its discretion, grant probate thereof on the

testimony of one of the subscribing witnesses only, if such witness testifies that such will was executed according to law, and that the testator had testamentary capacity to make the same at the time of the execution thereof.

(1889, c. 46, § 29.)

The burden of establishing the testator's sanity is on the proponent. Order of proof in such case. In re Layman's Will, 40 Minn. 371, 42 N. W. Rep. 286.

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§ 4437. Others than subscribing witnesses admitted to prove will, when.

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

(1889, c. 46, § 30.)

See In re Layman's Will, 40 Minn. 371, 42 N. W. Rep. 286.

§ 4438. Will not effectual to pass estate unless proved—Effect of probate.

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

(1889, c. 46, § 31.)

Effect of allowance of a will. Greenwood v. Murray, 26 Minn. 259, 2 N. W. Rep. 945; Graham v. Burch, 47 Minn. 171, 49 N. W. Rep. 697.

See In re Layman's Will, 40 Minn. 371, 42 N. W. Rep. 286.

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§ 4439. Allowance of wills proved in other states.

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

(1889, c. 46, § 32, as amended 1893, c. 116, § 3.)

An executor in another state, the will not being proved nor letters issued in this state, although an authenticated copy of the letters and appointment in such other state be filed in the proper probate court in this state, cannot maintain an action in this state for trespass upon real estate here. Pott v. Pennington, 16 Minn. 509, (Gil. 460.)

See Crippen v. Dexter, 13 Gray, 330.

The allowance and probate of a will in this state is sufficient evidence of the testator's death and of the devise of land. Lyon v. Gleason, 40 Minn. 434, 42 N. W. Rep. 286.

See, also, Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7, 41 N. W. Rep. 232.

A nonresident creditor of a nonresident testator, whose will was proved in the state of his domicile, applied for probate, alleging that the testator left personal property in this state. Held, that the creditor should pursue his claim where the principal administration was being had. Putnam v. Pitney, 45 Minn. 242, 47 N. W. Rep. 790.

To prove a foreign will, it is not necessary that proceedings in administration of the estate as intestate, which have terminated in a decree of distribution, be first vacated. Stackhouse v. Berryhill, 47 Minn. 20, 49 N. W. Rep. 392.

It must appear that there is property of the estate in the county. In re Southard's Will, 48 Minn. 37, 50 N. W. Rep. 932.

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§ 4440. Same—Notice of hearing to be given.

When a copy of such will and the probate thereof duly authenticated, is produced by the executor or other person interested in such will, to the probate court, such court shall appoint a time and place of hearing, and notice shall be given in the same manner as in the case of an original will presented for probate. If on the hearing it shall appear to the court that the order or decree admitting such will to probate was made by a court of competent jurisdiction, and it does not appear that said order or decree is not still in force, the copy and the probate thereof shall be filed and recorded, and the

will shall have the same force and effect as if originally produced and allowed in said court.

(1889, c. 46, § 33.)

A will devising lands in this state being proved in a foreign country, and thereafter allowed in the probate court of the proper county here, that court should issue letters to the resident executor named in the will, who qualified, though letters were not issued to him by the foreign probate court. Bloor v. Myerscaugh, 45 Minn. 29, 47 N. W. Rep. 311.

§ 4441. Same—Letters testamentary, etc., to be granted.

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When any will is allowed as mentioned in the preceding section, the probate court shall grant letters testamentary, or letters of administration with the will annexed, and such letters testamentary or of administration shall extend to all the estate of the testator in this state: such estate after payment of his just debts, and expenses of administration, shall be disposed of according to such will, so far as such will may operate upon it, and the residue shall be disposed of as is provided by law in cases of estates in this state, belonging to persons who are residents of any other state or country.

(1889, c. 46, § 34, as amended 1893, c. 116, § 4.)

See Bloor v. Myerscaugh, 45 Minn. 29, 30, 47 N. W. Rep. 311.

§ 4442. Lost or destroyed will, how established.

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

(1889, c. 46, § 35.)

§ 4443. Same—Must have been in existence at time of death.

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

(Id. § 36.)

§ 4444. Same—Provisions of lost will to be certified and recorded.

When such will is established the provisions thereof must be distinctly stated and certified by the probate court, and the certificate must be filed and recorded and letters testamentary or of administration with the will annexed must be issued thereon in the same manner as upon wills produced and duly proved.

(Id. § 37.)

§ 4445. Nuncupative wills, when and how admitted to probate.

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

(Id. § 38.)

§ 4446. Posthumous child—Share in estate.

When any child is [born] after the making of his parent's will and no provision is made therein for him, such child shall have the same share in the estate of the testator as if he had died intestate; and the share of such child

shall be assigned to him as provided by law in case of intestate estates, unless it is apparent from the will that it was the intention of the testator that no provision should be made for such child.

(Id. § 39.)

Testator's will contained certain specific legacies and devises, and devised and bequeathed all the remainder of his property to his wife, with this clause: "And her rights under this residuary provision shall not be affected or changed by the birth of any child of mine, if any shall be born to me before or after my decease." Held to manifest an intention not to provide for a child born after the execution of the will. Prentiss v. Prentiss, 14 Minn. 18, (Gil. 5.)

§ 4447. Share of child omitted by accident.

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

(1889, c. 46, § 40.)

See Prentiss v. Prentiss, cited in note to § 4446.

§ 4448. From what estate provision to be taken.

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

(1889, c. 46, § 41.)

§ 4449. Issue of deceased legatee shall take estate, when.

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

(Id. § 42.)

§ 4450. Provisions of will to be followed in payment of debts.

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

(Id. § 43.)

§ 4451. Same—Where such provision is insufficient.

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

(Id. § 44.)

§ 4452. 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.

(Id. § 45.)

§ 4453. Term "executor" defined.

The word "executor" in this code, shall be construed to include an administrator with the will annexed.

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(Id. § 46.)

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§ 4454. Will may be proved if executed according to the laws where made.

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

(Id. § 47.)

§ 4455. Objections to will must be in writing.

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

(Id. § 48.)

§ 4456. Proceedings when subsequent will is presented.

If upon the hearing on the petition for proof of will, another instrument in writing purported 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 administrated, the probate court shall thereupon issue letters of administration to the person or persons entitled thereto by law.

(Id. § 49.)

§ 4457. Letters testamentary to issue, when.

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

(Id. § 50.)

Non-residence of person named as executor. Cutler v. Howard, 9 Wis. 309; Humes v. Cox, 1 Pin. 551.

An executor has no authority under a will without a judgment or decree approving or allowing the will. Tucker v. Starks, Brayt. 99.

See Mumford v. Hall, 25 Minn. 347.

As to conclusiveness of letters, see notes to §§ 4481, 4535.

§ 4458. Executor to give bond—Condition of bond.

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Every executor, except such as are expressly exempted by statute or by the express provisions of a will, before entering upon the execution of his trust, and before letters testamentary are issued, shall give bonds to the judge of probate, in such reasonable sum as the probate court directs, with sufficient sureties, conditioned that the executor will faithfully execute the duties of his trust according to law, and the following conditions shall form a part of such bond, with or without being expressed therein:

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

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

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

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

(1889, c. 46, § 51.)

Validity of acts before giving bond. Probate Court v. Niles, 32 Vt. 775; Clark v. Tabor, 22 Vt. 595.

An administrator's bond, which, after reciting the issue of letters of administration upon all and singular the estate of the decedent, is conditioned that the administrator "shall well, truly, and faithfully administer upon said estate," sufficiently complies with the provisions respecting the condition of an administrator's bond. Lanier v. Irvine, 21 Minn. 447.

Liability of executors upon their joint bond. Sparhawk v. Buell, 9 Vt. 41; Marsh v. Harrington, 18 Vt. 150. Liability on their joint and several bond. Brazer v. Clark, 5 Pick. 96; Towne v. Ammidown, 20 Pick. 535; Ames v. Armstrong, 106 Mass. 15. And see Newcomb v. Williams, 9 Metc. 525.

Liability of surety for property coming into the hands of the executor before execution of the bond. Choate v. Arrington, 116 Mass. 552. Liability of sureties on the general bond for the proceeds of a sale of real estate where a special bond has been given. Robinson v. Millard, 133 Mass. 236. Liability of sureties for debt owing to decedent from the executor. Stevens v. Gaylord, 11 Mass. 269; Winship v. Bass, 12 Mass. 198.

Breach of Bond. Defending an action at the request of heirs and legatees, in which the plaintiff prevails. Brazer v. Clark, 5 Pick. 96. Neglect to apply for leave to sell real estate. Freeman v. Anderson, 11 Mass. 199. Sale of real estate for the payment of debts and legacies improperly procured by the executor. Chapin v. Waters, 110 Mass. 195. Neglect to raise an annuity fund, as directed by the will. Prescott v. Pitts, 9 Mass. 376, 9 Pick. 406. Failure to invest, as directed by the will. Hall v. Cushing, 9 Pick. 395. Failure to pay debts or legacies before decree for payment. Bank of Orange Co. v. Kidder, 20 Vt. 519; Probate Court v. Van Duzer, 13 Vt. 135; Boyden v. Ward, 38 Vt. 638; Probate Court v. Kimball, 42 Vt. 320. Failure to appropriate to the payment of a legacy to one of the owners of real estate money paid by such owner to prevent the sale of the real estate for the payment of debts and legacies. Fay v. Taylor, 2 Gray, 154. Failure to return inventory, or to account. Johannes v. Youngs, 45 Wis. 445; Golder v. Littlejohn, 30 Wis. 344. Neglect to account within the time limited by law. Coney v. Williams, 9 Mass. 114. Neglect to account in absence of assets. Walker v. Hall, 1 Pick. 20. Neglect to account for gratuity to heirs. Hooker v. Bancroft, 4 Pick. 50. Neglect of administrator *de bonis non* to return an inventory or render account. Wilson v. Keeler, 2 D. Chip. 16; Matthews v. Page, Brayt. 106. And see Probate Court v. Chapin, 31 Vt. 373; Probate Court v. Slason, 23 Vt. 306. Refusal to comply with a void decree. Hancock v. Hubbard, 19 Pick. 167; Dawes v. Head, 3 Pick. 128.

Sufficiency of the complaint in an action on an administrator's bond for non-payment of debts. Probate Court v. Saxton, 17 Vt. 623.

See Mumford v. Hall, 25 Minn. 347; Berkey v. Judd, 31 Minn. 275, 17 N. W. Rep. 618.

As to administrators' bonds, see note to § 4482.

As to guardians' bonds, see § 4544.

§ 4459. When testator exempts, executor nevertheless must give bond—Conditions.

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

(1889, c. 46, § 52.)

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§ 4460. Bond when executor is residuary or sole legatee.

When the executor is a residuary or sole legatee, instead of the bond prescribed in section fifty, he may give a bond in such sum and with such sureties as the court may direct, with conditions only, to pay all the debts and

legacies of the testator, and in such case he shall not be required to return an inventory.

(Id. § 53.)

As to effect of such bond, see Stebbins v. Smith, 4 Pick. 97; Jones v. Richardson, 5 Metc. 247; Colwell v. Alger, 5 Gray, 67.

Liability upon such bond for costs awarded to contestants of the will. Will of Cole, 52 Wis. 591, 9 N. W. Rep. 664.

§ 4461. Failure or refusal of executor to accept trust.

If any person named as an executor in any will fails to signify his acceptance of such trust, or in case he in writing refuses to accept it, the probate judge may grant letters testamentary to the other executors, if any, capable and willing to accept the trust, and if there are none such the probate court may, without further notice, grant administration with the will annexed to such person as would have been entitled to administration if the deceased had died intestate.

(1889, c. 46, § 54.)

§ 4462. Neglect of executor to qualify.

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

(Id. § 55.)

§ 4463. Proceedings when executor is a minor.

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

(Id. § 56.)

§ 4464. Administrator with will annexed — Bond and powers.

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

(Id. § 57.)

Bond, see In re Fisher, 15 Wis. 511.

Powers of administrator with will annexed. Cheever v. Converse, 35 Minn. 179, 28 N. W. Rep. 217.

§ 4465. Separate or joint bonds may be taken.

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

(1889, c. 46, § 58.)

§ 4466. Administrator de bonis non to be appointed, when.

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

(Id. § 59.)

See note to § 4705.

§ 4467. Executor of an executor not to administer.

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

(1889, c. 46, § 60.)

§ 4468. Powers of administrator de bonis non.

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

(Id. § 61.)

See note to § 4464.

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[TITLE 3.]

[TITLE TO REAL PROPERTY BY DESCENT.]

§ 4469. Descent in general.

When any person dies seized of any lands, tenements or hereditaments, or of any right thereto, or entitled to any interest therein, in fee simple or for the file [life] of another, not having devised the same, they shall descend as hereinafter provided.

(1889, c. 46, § 62.)

§ 4470. Homestead.

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77-NW 420
77-NW 551

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

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

2. If there be a child or the issue of any deceased child living and a surviving husband or wife, to such husband or wife during the term of his or her natural life, remainder to the child or children and the issue of any deceased child by right or representation.

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

4. If there be no surviving husband or wife and no children or the issue of any deceased child living, such homestead shall descend in like manner as

other property of the deceased and subject in like manner to the debts and claims against the estate of the deceased.

(Id. § 63.)

Parties in contemplation of marriage may by contract, equitable and fairly made, fix the rights which each shall have in the property of the other during life, or which the survivor shall have in the property of the other after his or her decease, and so exclude the operation of the law in respect of fixing such rights. Desnoyer v. Jordan, 27 Minn. 295, 7 N. W. Rep. 140.

Under Laws 1876, c. 37, § 2 (G. S. 1878, c. 46, § 2).

The estate or interest of the surviving husband or wife in the exempt homestead held not subject to be divested by the will of the deceased owner; following Eaton v. Robbins, 29 Minn. 329, 13 N. W. Rep. 143; Holbrook v. Wightman, 31 Minn. 168, 17 N. W. Rep. 280.

The surviving husband or wife held entitled to an unconditional life estate, without any distinct right of occupation by the minor children. McCarthy v. Van Der Mey, 42 Minn. 189, 44 N. W Rep. 53.

The fee was assets, and might be sold to pay debts by order of the probate court. Id.; McGowan v. Baldwin, 46 Minn 477, 49 N. W. Rep. 251.

Where such homestead was mortgaged, held, that the life estate bore its proportion of the incumbrance in case of a deficiency of personal assets. McGowan v. Baldwin, supra.

A general devise to a wife of "one-half of all I own," held not to require her to elect between the provisions of the will and her interest in the homestead. Id.

Where the right had been lost by removal and failure to file the notice required, the premises did not pass to the surviving husband or wife. Baillif v. Gerhard, 40 Minn. 172, 41 N. W. Rep. 1059.

Under Laws 1883, c. 58, § 1.

A surviving wife could not waive a claim to a homestead, and take a part thereof, to the injury of others interested in the estate. Mintzer v. St. Paul Trust Co., 45 Minn. 323, 47 N. W. Rep. 973.

§ 4471. Descent of other lands—Surviving husband or wife, etc.

Such surviving husband or wife shall also be entitled to and shall hold in fee simple, or by such inferior tenure as the deceased was at any time during coverture seized or possessed thereof, one equal undivided one-third of all other lands of which the deceased was at any time during coverture seized or possessed, free from any testamentary or other disposition thereof to which such survivor shall not have assented in writing, but subject, in its just proportion with the other real estate, to the payment of such debts of the deceased as are not paid from the personal estate. The residue of said other lands, or, if there be no surviving husband or wife of such intestate, then the whole of said other lands shall descend subject to the debts of the intestate, in the manner following:

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

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

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

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

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

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

7. If any person dies leaving several children, or leaving one child and the

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

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

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

(1889, c. 46, § 64.)

The act of 1875 divested lands of the wife's contingent right of dower; and the act of 1876, substituting the words "one-third of all other land of which deceased was at any time during coverture seized or possessed" for the words "one-third of all other lands of which the deceased died seized," did not affect previous grants in which the wife did not join. The rights of grantees became vested by the act of 1875, and could not be thereafter divested. Morrison v. Rice, 35 Minn. 436, 29 N. W. Rep. 168. See Cairncross v. McGrann, 37 Minn. 130, 33 N. W. Rep. 548; Roach v. Dion, 39 Minn. 449, 40 N. W. Rep. 512.

No devise by the husband, not so assented to by the wife, could of itself interrupt this law of descent. The estate so created is, however, subject to the application and ordinary effect of the equitable doctrine of election or of estoppel. When a testator by will bequeaths to his wife something to which she has no right, except by force of the will, and by the same instrument disposes of all his lands in which she is by law entitled to dower, or to an estate of inheritance, it being apparent the testator intended the bequest to be in lieu of her legal estate, and the devise being valid except for the legal right of the wife in the property, a case for an election arises on the part of the widow as to whether she will take under the will or against it. If she elects to take the bequest, she will be held to have confirmed the devise, and to have relinquished her legal estate. Washburn v. Van Steenwyk, 32 Minn. 336, 20 N. W. Rep. 324.

See note to § 4472.

As to election by devisee between deed and will. Brown v. Brown, 42 Minn. 270, 44 N. W. Rep. 250.

Rules of descent of lands under Rev. St. 1851, where the intestate left a widow, brothers and sisters, and mother, but no issue or father. Lindley v. Groff, 42 Minn. 346, 44 N. W. Rep. 196.

Where a husband alone, during coverture, conveys land, the interest therein of the surviving wife is not subject to his debts. Goodwin v. Kumm, 43 Minn. 403, 45 N. W. Rep. 853.

The contingent (one-third) interest of the husband or wife in land owned by the other is not divested by an execution sale founded on a judgment against such owner. Dayton v. Corser, 51 Minn. 406, 53 N. W. Rep. 717.

But if she thereafter joins with her husband in a conveyance of such lands, she has no further right therein. Ortman v. Chute, (Minn.) 59 N. W. Rep. 533.

The widow's one-third is, for the purpose of paying her husband's debts, part of his estate to be administered. Scott v. Wells, (Minn.) 56 N. W. Rep. 828.

See In re Swenson's Estate, (Minn.) 56 N. W. Rep. 1115.

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§ 4472. Surviving spouse of testator deemed to have elected, when—Devise not to be additional to statutory interest.

When a parent dies testate, having in and by a last will and testament made provision for a surviving husband or wife in lieu of any right or interest secured to such survivor by statute in the estate of such deceased person, unless such surviving husband or wife, by an instrument in writing made and filed in the probate court in which such will is proved, and within six months after the probate thereof, shall renounce and refuse to accept the provisions so made in such will, such surviving husband or wife shall be deemed to have elected to make [take] under the will and in accordance with the terms and conditions thereof: Provided, that no devise or bequest in any last will or testament to a surviving husband or wife, shall be taken to be in addition to the right or interest secured to such survivor by statute in the

estate of such deceased person, unless such clearly appears from the contents of the will to have been the intention of the testator or testatrix.

(1889, c. 46, § 65, as amended 1893, c. 116, § 5.)

As to election and renunciation by widow, see Washburn v. Van Steenwyk, cited in note to § 4471; In re Gotzian, 34 Minn. 159, 24 N. W. Rep. 920; Fairchild v. Marshall, 42 Minn. 14, 43 N. W. Rep. 563; McGowen v. Baldwin, 46 Minn. 477, 49 N. W. Rep. 251; Johnson v. Johnson, 32 Minn. 513, 21 N. W. Rep. 725.

Election by widow between marriage settlement and will. Sherman v. Lewis, 44 Minn. 107, 46 N. W. Rep. 318.

Election by probate court on behalf of widow in case of her insanity. State v. Ueland, 30 Minn. 277, 15 N. W. Rep. 245.

§ 4473. Illegitimate child—When considered an heir.

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

(1889, c. 46, § 66.)

See McArthur v. Craigie, 22 Minn. 353.

§ 4474. Estate of illegitimate child.

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

(1889, c. 46, § 67.)

§ 4475. Degrees of kindred, how computed—Half blood.

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

(Id. § 68.)

When resort is to be had to computation—Inheritance by kindred of the half blood. Rowley v. Stray, 32 Mich. 70.

§ 4476. "Right of representation"—Posthumous children.

4476
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Inheritance "by right of representation," takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parent would have taken, if living. Posthumous children are considered as living at the death of their parents.

(1889, c. 46, § 69.)

[TITLE 4.]

[ADMINISTRATION AND DISTRIBUTION OF ESTATES OF INTESTATES.]

§ 4477. Personal estate, how distributed.

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64-NW 47
67-NW 69
68-NW 976
69-NW 35

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66-M - 340

When any person dies possessed of any personal estate, or of any right or interest therein, the same shall be applied and distributed as follows:

1. The widow shall be allowed all the wearing apparel of her deceased husband; his household furniture, to be selected by her, not exceeding in value five hundred dollars; other personal property, to be selected by her, not

exceeding in value five hundred dollars; and such allowances shall be made as well when the widow receives the provisions made for her in the will of her husband, as when he dies intestate.

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

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

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

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

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

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

(1889, c. 46, § 70, as amended 1893, c. 116, § 6.)

* § 70 is further amended "by adding to subdivision six of said section, after the word 'estate,' in the third line thereof, the words, 'except as otherwise disposed of by the last will of any deceased person.'" (1893, c. 116, § 6.) The word "estate" occurs in the first line and in the fourth line of said subdivision, but not in the third line.

See In re Gotzian, 34 Minn. 166, 24 N. W. Rep. 920; Desnoyer v. Jordan, 30 Minn. 81, 14 N. W. Rep. 259.

Even if the legislature intended to give rights contrary to the provisions of antenuptial contracts then existing, the statute would, to that extent, by reason of the constitutional inhibition against laws impairing the obligations of contracts, be inoperative. Desnoyer v. Jordan, 27 Minn. 299, 7 N. W. Rep. 140.

A widow is entitled only to a distributive share of such personal estate of her husband as was not lawfully disposed of by his last will. In re Rausch, 35 Minn. 291, 28 N. W. Rep. 920.

Allowance to widow without the previous authority of the court. Sawyer v. Sawyer, 28 Vt. 245. See, as to widow's allowance, Phelps v. Phelps, 16 Vt. 73; Sawyer v. Sawyer, 28 Vt. 245; Johnson v. Johnson, 41 Vt. 467; Thayer v. Thayer, 14 Vt. 120; Holmes v. Bridgman, 37 Vt. 38; Frost v. Frost, 40 Vt. 625; Hackley v. Muskegon Circuit Judge, (Mich.) 25 N. W. Rep. 462; In re Henry, (Wis.) 27 N. W. Rep. 351; In re Dennis, (Iowa,) 24 N. W. Rep. 746; Tomlinson v. Nelson, 49 Wis. 679, 6 N. W. Rep. 366; Application of Wilber, 52 Wis. 295, 9 N. W. Rep. 162; Wilber v. Wilber, Id. 298, 9 N. W. Rep. 163; Miller v. Stepper, 32 Mich. 194.

Title of next of kin before administration and distribution. Cullen v. O'Hara, 4 Mich. 132.

A widow having selected such property as the statute provided, and having sold it, and the court, after her death, having "allowed" the property to the buyer, held, that he was entitled to it. Benjamin v. Laroche, 39 Minn. 334, 40 N. W. Rep. 156.

Construction of clause in will disposing of all the testator's real and personal property, "subject to the right of dower or other legal right of my wife." Redford v. Redford, 45 Minn. 48, 47 N. W. Rep. 308.

See In re Swenson's Estate, (Minn.) 56 N. W. Rep. 1115.

§ 4478. Who entitled to administration.

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

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First. The widow, or next of kin, or both, as the judge of probate may

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

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

Third. If none of the persons mentioned in the preceding subdivision of this section, apply for administration as therein provided within four months after the death of the intestate, the same shall be granted to any suitable and competent person, upon application being duly made to the probate court of the proper county, by any person interested in the estate of the deceased by purchase from any of the heirs of the deceased, or otherwise.

(1889, c. 46, § 71, as amended 1893, c. 116, § 7.)

As to the title of the widow and next of kin, and as to their suitableness to execute the trust, see McGooch v. McGooch, 4 Mass. 348; Stearns v. Fiske, 18 Pick. 24, Stebbins v. Lathrop, 4 Pick. 33; Cobb v. Newcomb, 19 Pick. 336.

Before the creditor can be appointed, the renunciation of the widow and next of kin must appear of record. Arnold v. Sabin, 1 Cush. 525.

If the widow and next of kin refuse administration, a creditor having a cause of action which survives against the estate is entitled to administer. Stebbins v. Palmer, 1 Pick. 71. Otherwise, if the cause of action does not survive. Id.; Smith v. Sherman, 4 Cush. 408.

Appointment of one not next of kin within the 30 days. Brunson v. Burnett, 2 Pin. 185. See Hunt v. Holden, 2 Mass. 168.

§ 4479. What petition must show.

A petition for letters of administration must be verified and must show:

1. The jurisdictional facts;

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

3. The probable value of the personal property of the estate and also the probable value of the real property and its character;

4. The name and address of the person for whom administration is prayed.

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

(1889, c. 46, § 72.)

§ 4480. Notice of hearing.

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

(Id. § 73.)

See note to § 4435.

§ 4481. Contest, how made.

Any person may contest the petition, or may oppose the appointment of the person for whom letters are prayed on the ground of incompetency, or he may assert his own rights to administration under said petition, by filing written objections, stating the ground thereof. Such objection may be made and filed at any time prior to the order for the appointment of the administrator. On the hearing, it being proved that notice has been given as required, the court upon hearing the allegations and proof of all the parties shall order the issuing of letters of administration.

(1889, c. 46, § 74.)

Letters of administration, granted by a probate court having jurisdiction, are, in a collateral action, conclusive evidence of the due appointment of the administrator. Moreland v. Lawrence, 23 Minn. 84.

See, also, Mumford v. Hall, 25 Minn. 347.

In all cases in which the administrator, as such, is a party, for the purpose of showing his representative capacity and his authority, the letters of administration are at least prima facie evidence of every fact upon which such capacity and authority de-

pend, including the death of his intestate. Pick v. Strong, 26 Minn. 303, 3 N. W. Rep. 697.

See, also, Davis v. Hudson and Minnesota Loan & Trust Co. v. Beebe, cited in note to § 4535.

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§ 4482. Administrator to give bond.

Every administrator, except such as are expressly exempted by statute, before he enters upon the execution of his trust, and before letters of administration are granted him, shall give a bond to the judge of probate in such reasonable sum as he may direct, with sufficient sureties, to be approved by the probate court, with substantially the same conditions as required in case of an executor as provided in section fifty-one, with such variations as are necessary to make it applicable to the case of an administrator. When two or more persons shall be appointed administrators of any estate, the probate court may take a separate bond from each, or a joint bond from all.

(1889, c. 46, § 75, as amended 1889, c. 116, § 8.)

The appointment of an administrator is not void because the oath of office was taken, and the bond signed before the appointment. Morris v. Railroad Co., (Iowa,) 23 N. W. Rep. 143.

Granting letters without approval of bond. Cameron v. Cameron, 15 Wis. 1.

A bond not signed by the administrator is not binding on the sureties. Wood v. Washburn, 2 Pick. 24.

See notes to §§ 4458, 4544.

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75-NW 699

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§ 4483. Special administrator appointed, when.

When there shall be delay in granting letters testamentary or of administration, from any cause, or when it shall appear to the satisfaction of the court to be necessary, the probate court may appoint a special administrator to act until the matter causing the delay shall be disposed of, or the necessity therefor cease to exist, and an executor or administrator is appointed. Such special administrator may be appointed without notice, and no appeal shall be allowed from the appointment of such special administrator.

(1889, c. 46, § 76.)

See Dutcher v. Culver, 23 Minn. 415.

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§ 4484. Powers and duties of special administrator.

Such special administrator shall have power to collect all the goods, chattels and credits of the deceased and to care for, gather and secure crops, and preserve all the property of the deceased, for the executor or administrator who may afterwards be appointed, and may for such purposes commence and maintain actions as an administrator; and with leave of the court may lease for a term not exceeding one year the real property of the deceased, and may sell such personal property and do such other things as the court shall direct. Such special administrator shall not be liable to an action by any creditor, or be called upon in any way to pay the debts against the deceased.

(1889, c. 46, § 77.)

See Basset v. Shepardson, (Mich.) 24 N. W. Rep. 182.

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§ 4485. Special administrator to give bond.

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

(1889, c. 46, § 78.)

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§ 4486. Powers of special administrator cease, when.

Upon granting letters testamentary or of administration on the estate of the deceased, the power of such special administrator shall cease, and he shall forthwith deliver to the executor or administrator, all the goods, chat-

tels, moneys or effects of the deceased in his hands; and the executor or administrator may be admitted to prosecute to final judgment any action commenced by such special administrator, and may have execution on any judgment recovered in the name of such special administrator.

(Id. § 79.)

§ 4487. First administration to be revoked on proving will.

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

(Id. § 80.)

See Stackhouse v. Berryhill, 47 Minn. 20, 22, 49 N. W. Rep. 392.

§ 4488. Powers of executor in such cases.

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

(1889, c. 46, § 81.)

[TITLE 5.]

[INVENTORY AND COLLECTION OF THE EFFECTS OF DECEASED PERSONS.]

§ 4489. Inventory, when and when not required.

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

(1889, c. 46, § 82.)

But one inventory is required. If additional property afterwards comes into the hands of the administrator, he is bound to account for it, but not to inventory it. Hooker v. Bancroft, 4 Pick. 50. If no property comes into the hand of executor or administrator, he is not bound to return any inventory or account. Walker v. Hall, 1 Pick. 20. The inventory of the administrator of a deceased partner should only refer to his interest in the partnership, without undertaking to give the items of the property belonging to the partnership. Loomis v. Armstrong, (Mich.) 29 N. W. Rep. 867. The administrator has nothing to do with decedent's interest in the partnership, except to see that no waste or fraud is committed in its management. Id.

An inventory made by an administrator is not conclusive upon him as to the assets, or their value. Hilton v. Briggs, (Mich.) 20 N. W. Rep. 47; Peckham v. Hoag, (Mich.) 23 N. W. Rep. 818.

Title of the administrator, and effect of his acts before appointment. Wiswell v. Wiswell, 35 Minn. 371, 29 N. W. Rep. 166. Title of administrator—Estoppel as against him. Gilkey v. Hamilton, 22 Mich. 283.

An administrator has no control over choses in action where the debtor resides in another state. Bullock v. Rogers, 16 Vt. 294.

Validity of sale of property by next of kin as against administrator. Morton v. Preston, 18 Mich. 60.

As to the maintenance of an action in Vermont against a non-resident, by an administrator appointed in that state, decedent having also been a non-resident, see Abbott v. Coburn, 28 Vt. 663. See, also, Bullock v. Rogers, 16 Vt. 294.

See Wilkinson v. Estate, 15 Minn. 167, (Gil. 127;) Bryant v. Livermore, 20 Minn. 320, (Gil. 275.)

Adverse possession by an administrator, for 20 years, of land which the decedent occupied under a contract of purchase, held, to justify the court in refusing to grant a petition by the heirs to have the land inventoried and administered on. Davis v. Townsend, 45 Minn. 523, 48 N. W. Rep. 405.

§ 4490. Appraisers to be appointed.

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

(1889, c. 46, § 83.)

§ 4491. Classification of estate.

The property inventoried shall be classed under the following heads:

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

(Id. § 84.)

§ 4492. Appraisal, how made.

The appraisers shall class the different items under their respective heads, and shall set down opposite to each item, in figures, the value thereof in money, and shall foot up the amount of each class. The appraisers shall forthwith deliver said inventory, certified to by them, to the executor or administrator.

(Id. § 85.)

§ 4493. Petition for setting apart homestead and personal property.

On or after the return of the inventory and appraisement as provided in section eighty-four, the surviving husband or wife, or in case there is no surviving husband or wife, the children, or in case the children are minors, the guardian, shall petition the probate court for the setting apart of the homestead of the deceased, and for the allowance of the personal property. Such petition shall show the right of the parties, and if made by or for the children, their names and ages, the description of the homestead claimed, and a description of the personal property which is desired to be selected, and the value thereof, according to the appraisements.

(Id. § 86.)

§ 4494. Order setting apart homestead and personal property.

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

(Id. § 87.)

See Benjamin v. Laroche, cited in note to § 4477.

§ 4495. Property not selected.

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

(1889, c. 46, § 88.)

§ 4496. Rights and duties of executors, etc., in possession of estate.

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65-NW 464

The executor or administrator shall have the right to the possession of all the residue of the real and personal estate of the decedent, and to receive the rents and profits of the real estate, until the estate is settled, or until delivered over by order of the probate court to the heirs or devisees, and must

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keep in good, tenantable repair, all houses, buildings, and fixtures thereon, which are under his control.

(Id. § 89.)

See Jordan v. Secombe, 33 Minn. 224, 22 N. W. Rep. 383.

Rights of administrator as to real estate. Campau v. Campau, 25 Mich. 127; Holbrook v. Campau, 22 Mich. 288; Streeter v. Paton, 7 Mich. 341; Marvin v. Schilling, 12 Mich. 356; Kline v. Moulton, 11 Mich. 370.

An administrator has a right to the possession of the real estate of his intestate, without regard to the fact of the sufficiency of personal estate for the payment of the debts, and the order of the probate court is not necessary to enable him to maintain an action to recover such possession. Miller v. Hoberg, 22 Minn. 249.

Authority of administrator as to decedent's contracts for the purchase of land. Hunt v. Thorn, 2 Mich. 213; Baxter v. Robinson, 11 Mich. 520.

An administrator may lease the real property of the estate, but only for the term of the administration. Smith v. Park, 31 Minn. 70, 16 N. W. Rep. 490.

Redeeming lands from mortgage. Goodrich v. Leland, 18 Mich. 110.

An administrator cannot maintain an action for trespass upon real property, committed after the death of an intestate, unless he has first asserted his right, under the statute, by taking possession of such real property. But if he takes possession, he may then maintain an action for a trespass committed thereon before he took possession, and after the death of his decedent. In such case his possession as well as his letters of administration relate back to the death of his intestate. Noon v. Finnegan, 29 Minn. 418, 13 N. W. Rep. 197.

An executor in another state, the will not being proved, nor letters issued in this state, although an authenticated copy of the letters and appointment in such other state be filed in the proper probate court in this state, cannot maintain an action in this state for trespass upon real estate here. Pott v. Pennington, 16 Minn. 509, (Gil. 460.)

See State v. Ramsey County Probate Court, 25 Minn. 22, 25.

Upon the death of one in adverse possession, his possession is deemed to continue without interruption during the time reasonably necessary for the appointment of a personal representative. Ricker v. Butler, 45 Minn. 545, 48 N. W. Rep. 407.

Enforcement of a mechanic's lien under a contract made with four of five executors. Ness v. Wood, 42 Minn. 427, 44 N. W. Rep. 313.

§ 4497. Right to maintain action for possession, etc.

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

(1889, c. 46, § 90.)

See Paine v. First Div. St. P. & P. R. Co., 14 Minn. 65 (Gil. 49).

§ 4498. Proceedings on 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 deceased, or that such person has in his possession or knowledge, any deeds, conveyances, bonds, contracts, or other writings which contain evidence of or tend to disclose the right, title, interest or claim of the deceased to any real or personal estate, or any claim or demand, or any last will and testament of the deceased, the said probate court may cite such suspected person to appear before it, and may examine him on oath upon the matter of such complaint.

(1889, c. 46, § 91.)

§ 4499. Persons cited refusing to appear, etc., may be committed.

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

(Id. § 92.)

§ 4500. Embezzlement before letters issue.

If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels or effects of any deceased person, such person shall stand chargeable, and be liable to the,

action of the executor or administrator of such estate for double of the value of the property so embezzled or alienated to be recovered for the benefit of such estate.

(Id. § 93.)

§ 4501. Compounding claim.

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55-M . 32

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

(Id. § 94.)

§ 4502. Interest of mortgagee to be personal assets.

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

(Id. § 95.)

See Loy v. Home Ins. Co., 24 Minn. 319; Albright v. Cobb, 30 Mich. 355.

§ 4503. Release by executor, etc., on redemption — Purchaser on foreclosure.

In case of the redemption of any such mortgage, or the sale of the mortgaged premises, by virtue of a power of sale contained therein or otherwise, the money paid thereon shall be received by the executor or administrator, and he shall thereupon give and execute all necessary satisfactions, releases and receipts; and if, upon a sale of the mortgaged premises, the same is bid in by the executor or administrator for such debt, he shall be seized of the same, for the same persons, whether creditors, next [of] kin or others, who would have been entitled to the money if the premises had been redeemed, or purchased at such sale by some other person.

(1889, c. 46, § 96.)

§ 4504. Sale of real estate so purchased.

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

(Id. § 97.)

§ 4505. Disposition of such land if not sold.

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

(Id. § 98.)

§ 4506. Recovery of property conveyed in fraud of creditors.

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73-NW1099

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79-M - 300
82-NW 589

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

or credits which may have been so fraudulently conveyed by the deceased in his lifetime.

(Id. § 99.)

Where there is a deficiency of assets in the hands of an administrator, for the payment of the debts of the intestate, he may maintain claim and delivery for property transferred by his intestate in fraud of creditors, and taken from his lawful possession, and need not first bring an action to vacate such conveyance. Bennett v. Schuster, 24 Minn. 383.

A similar statute held not to confer the right to maintain a bill *quia timet* to clear title to intestate's real estate from a claim of dower. Paige v. Fagan, (Wis.) 21 N. W. Rep. 786.

If the grantee has disposed of the property by warranty deed, he must be made a party to the action brought by the administrator. Fraser v. Passage, (Mich.) 30 N. W. Rep. 334.

See Little v. Simonds, 46 Minn. 380, 49 N. W. Rep. 186.

4507
79-M - 300
82-NW 589

§ 4507. Same — Application of creditors — Security for costs.

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

(1889, c. 46, § 100.)

4508
73-NW1099

4508
71-M - 454

§ 4508. Same—Disposal of recovered property.

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

(Id. § 101.)

[TITLE 6.]

[CLAIMS.]

4509
63-NW 1071
56-M . 256

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61-M - 366
63-M - 299
68-NW 18

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99 - 82
65-M - 247
70-M - 142

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77-M - 61
79-M - 377
82-NW 669

§ 4509. Time allowed creditors to present claims.

At the time of granting letters testamentary or of administration, the court shall make an order limiting the time in which creditors may present claims against the deceased for examination and allowance, which shall not be less than six months nor more than one year from the date of such order; said order shall fix the time or times and place in which the court will examine and adjust claims and demands of all persons against deceased. No claim or demand shall be received after expiration of the time so limited, unless for good cause shown the court may in its discretion receive, hear and allow such claim upon notice to the executor or administrator, but no claim shall be received or allowed unless presented within one year and six months from the time when notice of the order is given, as provided in the next section, and before final settlement, and the allowance or disallowance of any claim shall have the same force and effect as a judgment for or against the estate: Provided, that where it appears from the petition for letters to the satisfaction of the judge of probate that the deceased left no more property than the homestead and such personal property as is mentioned in subdivision one of section seventy of this code, then the order fixing a time and place for hearing claims against said deceased, need not be made.

(1889, c. 46, § 102, as amended 1893, c. 116, § 9.)

Good cause must be shown by one who seeks relief from failure to present his claim within the time originally fixed. As to matters of form, he must comply with the provisions of § 4511. Gibson v. Brennan, 46 Minn. 92, 48 N. W. Rep. 460; St. Croix Boom Corp. v. Brown, 47 Minn. 281, 50 N. W. Rep. 197.

See Massachusetts Mut. Life Ins. Co. v. Elliott, 24 Minn. 134; Wilkinson v. Winne's Estate, 15 Minn. 159 (Gil. 123); In re Mills, 34 Minn. 296, 25 N. W. Rep. 631.

Under G. S. 1878, c. 53.

G. S. 1878, cc. 53 and 57, are to be read together as one body of law, pertaining to the same subject-matter. Bryant v. Livermore, 20 Minn. 313, (Gil. 271.)

G. S. 1878, c. 53, seems to contemplate two classes of claims,—one, of those for which the liability is absolute and fixed, including those not yet due; the other, of those the liability for which depends upon some future contingent event. The latter are designated "contingent claims," and in this class falls a penal bond, the condition of which has not been broken. McKeen v. Waldron, 25 Minn. 468.

Proceedings to establish a claim need not be formally entitled. Any description which will identify them is sufficient. In re Jefferson, 35 Minn. 215, 28 N. W. Rep. 256. A personal tax is a debt for the purpose of proof against and payment from a decedent's estate. Id. And see Comstock v. Smith, 26 Mich. 306.

See, also, Riley v. Mitchell, 38 Minn. 9, 35 N. W. Rep. 472; In re Brown, 35 Minn. 307, 29 N. W. Rep. 131; Cummings v. Halsted, 26 Minn. 151, 1 N. W. Rep. 1052.

4510
01 - 28

§ 4510. Notice to creditors.

The order prescribed in section one hundred and two shall be published according to law, and shall be notice to all creditors and persons interested.

(1889, c. 46, § 103.)

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95 . . 223
63-NW 1069
63-NW 1073
55-M . 112

4511
61-M - 361
61-M - 522
63-NW1064

4511
66-M - 246
75-NW 221
78-NW 98

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79-M - 147
81-NW 767

4511
72-M - 234
75-M - 489
79-M - 377
78-NW 98
82-NW 669

4511 89-M . 305

§ 4511. Claims, how presented, proved, or barred.

All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented to the probate court within the time limited in said order, and any claim not so presented is barred forever; such claim or demand may be pleaded as an offset or counterclaim to an action brought by the executor or administrator. All claims shall be itemized, and verified by the claimant, his agent or attorney, stating the amount due, that the same is just and true, that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of affiant. If the claim be not due, or be contingent, when presented, the particulars of such claim must be stated. The probate court may require satisfactory vouchers or proofs to be produced in support of any claim.

(Id. § 104.)

Failure to present a claim not only bars the claim against the estate, but precludes a recovery against an heir. Hill v. Nichols, 47 Minn. 382, 50 N. W. Rep. 367.

As to the law under prior statutes. Bryant v. Livermore, 20 Minn. 313 (Gil. 271); Commercial Bank v. Slater, 21 Minn. 172, 174; Bunnell v. Post, 25 Minn. 376; Fern v. Leuthold, 39 Minn. 212, 39 N. W. Rep. 399; Pray v. Rhodes, 42 Minn. 93, 96, 43 N. W. Rep. 838; Hill v. Townley, 45 Minn. 167, 47 N. W. Rep. 653.

As to matters of form. Gibson v. Brennan, cited in note to § 4509.

Funeral charges are payable by the administrator out of any funds in his hands, without being presented to the judge for allowance. Dampier v. St. Paul Trust Co., 46 Minn. 526, 49 N. W. Rep. 286.

Power to allow claims of a purely equitable nature. Brown v. Sumner, 31 Vt. 671; Sparhawk v. Buell, 9 Vt. 41; Herrick v. Belknap, 27 Vt. 674.

See, as to claims of the executor against the estate, French v. Winsor, 24 Vt. 408, note.

Claims depending upon a contingency which may never happen. Harding v. Smith, 11 Pick. 478.

A claim in favor of creditors of a corporation against the estate of a deceased stockholder before the assets of the corporation have been fully administered is a contingent claim. Hospes v. Northwestern Manuf'g & Car Co., 48 Minn. 174, 50 N. W. Rep. 1117.

Proof of contingent claim under G. S. 1866, c. 53. McKeen v. Waldron, 25 Minn. 466.

What is a contingent claim. See Palmer v. Pollock, 26 Minn. 433, 440, 4 N. W. Rep. 1113.

The individual liability of a deceased stockholder under G. S. 1878, c. 34, § 9 (§ 2600), may be proved. Nolan v. Hazen, 44 Minn. 478, 47 N. W. Rep. 155.

In a suit to foreclose a mortgage, the heirs of the deceased mortgagor are necessary, and the executor or administrator proper, parties; but any claim for deficiency must be presented for allowance in the probate court. Hill v. Townley, 45 Minn. 167, 47 N. W. Rep. 653.

A claim arising on tort may be brought against the personal representative in the district court. Comstock v. Mathews (Minn.) 56 N. W. Rep. 583.

A claim against the estate of a deceased stockholder for corporate debts under Const. art. 10, § 3, cannot be presented to the probate court. National German-American Bank v. Tapley (Minn.) 57 N. W. Rep. 1065.

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§ 4512. Offset against claims.

The executor or administrator shall, on or before the time set for hearing claims, file in the probate court a statement in writing of all offsets which

he claims in favor of the estate against any of the claims filed, and the probate court may in its own discretion allow the executor or administrator additional time for so filing an offset and may set a day for hearing both the claim against the estate and the offset claimed.

(1889, c. 46, § 105.)

§ 4513. Claims barred by statute not allowed.

No claim or demand shall be allowed that is barred by the statute of limitation, nor shall any offset that is barred by the statute of limitation be allowed.

(Id. § 106.)

In the absence of a statute limiting the time for presenting claims against an estate, the equitable doctrine of laches applies, and the limitation of an action on such claim will furnish a limit of time after the death for presenting a claim. O'Mulcahey v. Gragg, 45 Minn. 112, 47 N. W. Rep. 543.

See State v. Probate Court, cited in note to § 4576; Davis v. Townsend, cited in note to § 4489.

§ 4514. Limitation of actions against executor or administrator.

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

(1889, c. 46, § 107.)

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63-NW 1069
63-NW 1073
55-M . 112

4514
61-M - 361
61-M - 522
68-NW 18

4514
65-M - 247
74-NW 148
75-NW 220

4514
71-M - 371
72-M - 232

4514 89-M . 303

See Hill v. Nichols, 47 Minn. 382, 383, 50 N. W. Rep. 367.

A judgment debtor having died after the judgment had become a lien on real estate, the creditor may enforce his judgment by sale on execution, after the period fixed by statute, though he had presented his judgment for payment in course of administration. Fowler v. Mickley, 39 Minn. 28, 38 N. W. Rep. 634.

See Fern v. Leuthold, 39 Minn. 212, 217, 39 N. W. Rep. 399.

Cf. Cummings v. Halsted, 26 Minn. 151, 1 N. W. Rep. 1052; Wilkinson v. Winne's Estate, 15 Minn. 159 (Gil. 123).

§ 4515. Claims allowed to draw interest.

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

(1889, c. 46, § 108.)

4515
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72-NW 966

§ 4516. Balance against claimant, how collected.

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

(Id. § 109.)

§ 4517. Order allowing or disallowing claim—Contents.

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

(Id. § 110.)

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63-NW 1073

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61-M - 522

After the allowance of a claim, the validity of the claim cannot be questioned collaterally. Lewis v. Welch, 47 Minn. 193, 48 N. W. Rep. 608, and 49 N. W. Rep. 665; Barber v. Bowen, 47 Minn. 118, 49 N. W. Rep. 684; State ex rel. Beals v. Probate Court of Ramsey Co., 25 Minn. 22; State ex rel. Dana v. Same, 40 Minn. 296, 41 N. W. Rep. 1033.

§ 4518. Proceedings in action pending against deceased.

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

(1889, c. 46, § 111.)

A similar section held not applicable to actions pending in another state. Commercial Bank v. Slater, 21 Minn. 172.

A foreign administrator may be admitted to defend an action pending against intestate at the time of his decease. Brown v. Brown, 35 Minn. 191, 28 N. W. Rep. 238.

Where, after verdict or decision upon an issue of fact, and before judgment, the unsuccessful party died, and judgment on the verdict or decision was afterwards entered without substituting the executor, held, that neither the judgment, verdict, or decision, nor the claim involved in the action, need be presented to the commissioners; and that, upon a certified copy of such judgment being filed in the probate court, it was entitled to be paid with the other debts allowed against the estate; and that an action could not be maintained on the judgment against the executor. Berkey v. Judd, 27 Minn. 475, 8 N. W. Rep. 383.

See Lough v. Flaherty, 29 Minn. 295, 296, 13 N. W. Rep. 131.

An action pending in the United States circuit court for Minnesota, or in the United States supreme court on appeal, is within this section. In re Kittson, 45 Minn. 197, 48 N. W Rep. 419.

Every claim proper to be allowed by the probate court, and not presented within the time limited, is barred unless in litigation in an action pending at the decedent's death. Fern v. Leuthold, 39 Minn. 212, 39 N. W. Rep. 399.

See note to § 5171.

4519
79-M - 386
82-NW 632

§ 4519. Executor or administrator may prosecute action.

4519 92-M . 110

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

(1889, c. 46, § 112.)

An administrator cannot sue for money payable on contract to the heirs. Bomash v. Supreme Sitting, 42 Minn. 241, 44 N. W. Rep. 12.

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79-M - 386
82-NW 632

§ 4520. Proceedings in such case—Set-off.

4520 92-M . 110

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

(1889, c. 46, § 113.)

It is not necessarily error to allow the defendant to interpose a set-off or counterclaim after a final order of distribution. Gerdtzen v. Cockrell, 52 Minn. 501, 55 N. W. Rep. 58.

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73-NW 722
75-NW 220

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72-M - 282

§ 4521. Joint debtor—Estate, how liable.

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

(1889, c. 46, § 114.)

See Ernst v. Nau, (Wis.) 23 N. W. Rep. 492; U. S. v. Spiel, 8 Fed. Rep. 143.

§ 4522. Judgment on appeal to be certified to probate court.

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

(1889, c. 46, § 115.)

[TITLE 7.]

[PAYMENT OF DEBTS AND LEGACIES.]

4523
70-M - 143

§ 4523. Time limited for settlement of estate.
The probate court at the time of granting letters testamentary or of administration, shall make an order allowing to the executor or administrator a reasonable time, not exceeding one year and six months, for the settlement of the estate.

(1889, c. 46, § 116.)

§ 4524. Time extended, when.
The probate court may, upon good cause shown by the executor or administrator, extend the time for the settlement of the estate not exceeding one year at a time, unless in the judgment of the court a longer time be necessary.

(Id. § 117, as amended 1893, c. 116, § 10.)

See State v. Probate Court, 40 Minn. 296, 300, 41 N. W. Rep. 1033; In re Kittson, 45 Minn. 197, 202, 48 N. W. Rep. 419.

§ 4525. Same—When another administrator 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 allowed to the original executor or administrator, not exceeding one year at a time, and not exceeding one year beyond the time which the court might by law allow to such original executor or administrator as provided in section one hundred and seventeen.

(1889, c. 46, § 118.)

§ 4526. 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.

(Id. § 119.)

§ 4527. Real estate may be sold, when.
When there is not sufficient personal estate in the hands of the executor or administrator to pay all the debts and legacies and the allowance to the widow and minor children, the probate court, may on petition of the executor or administrator order the sale of the real estate or so much thereof as may be necessary to pay the same.

4527
61-NW . 673

4527
67-NW 70

(Id. § 120.)

See note to § 4576.

§ 4528. Debts and legacies paid in full, when.
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.

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(1889, c. 46, § 121.)

§ 4529. Order of payment in case of insolvent estates.
If the assets which the executor or administrator has received and which can be used for the payment of debts and are not sufficient therefor, he shall, after paying the expenses of administration pay the debts against the deceased in the following order:

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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.

(Id. § 122.)

Liability of administrator for funeral expenses. Dampier v. St. Paul Trust Co., 46 Minn. 526, 49 N. W. Rep. 286.

As to funeral expenses, see McNally v. Weld, 30 Minn. 209, 214, 14 N. W. Rep. 895.

A personal tax may be proved against the estate. In re Jefferson, 35 Minn. 215, 28 N. W. Rep. 256.

§ 4530. No preference to be given.

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63-NW 1074

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

(1889, c. 46, § 123.)

§ 4531. No payment in case of an appeal from allowance.

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

(Id. § 124.)

§ 4532. Further order of distribution, when.

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

(Id. § 125.)

Decree for payment of debts and distribution of assets prior to the Probate Code. Lanier v. Irvine, 24 Minn. 116.

See Huntsman v. Hooper, 32 Minn. 163, 20 N. W. Rep. 127.

§ 4533. Payment of mortgage or other 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 probate court, pay such debt or the interest thereon, as the same shall mature, but no such payment shall be made unless the same shall appear to be for the best interests of the estate and the probate court after hearing application therefor shall so order. Such order may be made with or without notice, as the court may deem best.

(1889, c. 46, § 126, as amended 1893, c. 116, § 11.)

[TITLE 8.]

[GUARDIANS AND WARDS.]

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99 210

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01 - 364

§ 4534. Who are minors.

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

(1889, c. 46, § 127.)

It is legally competent for a *feme sole*, 18 years of age, to make and execute within this state a valid deed of lands belonging to her, and situate therein. Cogel v. Raph, 24 Minn. 194.

4535
84-NW 120

§ 4535. The probate court may appoint guardians.

The probate court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will, and who are residents of the county, or who reside without the state and have estate within the county. Such appointment may be made on the petition of a relative or

other person on behalf of the minor, or on the petition of the minor, of fourteen years of age.

(1889, c. 46, § 128.)

A probate court of this state may properly appoint a guardian for a non-resident minor, as respects any estate which the minor may have in the county where such probate court is established. If a general guardian be appointed in such circumstances, the appointment is good to the extent of the minor's estate within the jurisdiction in which it is made. Davis v. Hudson, 29 Minn. 27, 11 N. W. Rep. 136; West Duluth Land Co. v. Kurtz, 45 Minn. 380, 47 N. W. Rep. 1134.

It is not necessary that there should first be a general guardian in the state of the minor's domicile. West Duluth Land Co. v. Kurtz, supra.

Trust companies may act as guardians of estates. Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7, 41 N. W. Rep. 232.

In a collateral action, letters of guardianship are conclusive of the regularity of the proceedings resulting in their issuance. Davis v. Hudson, supra; Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7, 11, 41 N. W. Rep. 232; Menage v. Jones, 40 Minn. 254, 256, 41 N. W. Rep. 972.

§ 4536. Guardian of minor—By whom nominated.

4536
84-NW 120

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

(1889, c. 46, § 129.)

§ 4537. Minor may nominate—Before whom.

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

(Id. § 130.)

§ 4538. Minor over fourteen years may appoint.

4538
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79-NW 600

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

(Id. § 131.)

§ 4539. Testamentary guardians.

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A father may, by his last will and testament, appoint guardians for his children, whether born at the time of making the will or afterwards, to continue during the minority of the child, or a less time. Such testamentary guardian shall have the same powers and perform the same duties, with regard to the person and estate of the ward, as a guardian appointed by the probate court.

(Id. § 132.)

§ 4540. Powers of guardians—Custodian of person.

4540
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65-NW 272

4540 89-M . 198

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

(Id. § 133.)

A guardian may sell to a *bona fide* purchaser the personal property of his ward without any leave of court. Humphrey v. Buisson, 19 Minn. 221, (Gil. 182.)

When funds are held as executor and when as guardian in case of same person acting in both capacities. Conkey v. Dickinson, 13 Metc. 51. And see Bennett v. Overing, 16 Gray, 267.

§ 4541. Guardian of estate and custodian of person may be appointed.

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

(1889, c. 46, § 134.)

§ 4542. Married women not disqualified.

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

(Id. § 135.)

§ 4543. Marriage of female ward terminates guardianship.

The marriage of a female under guardianship as a minor shall terminate such guardianship.

(Id. § 136.)

§ 4544. Guardian to give bond—Conditions.

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72-M - 429

Before the order appointing any person guardian under the provisions of this chapter takes effect, and before letters issue, the court must require a bond, with sufficient sureties, to be approved by the probate court, and in such sum as the court shall order, conditioned that the guardian will faithfully execute the duties of his trust according to law, and the following conditions shall form a part of such bond with or without being expressed therein:

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

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

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

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

(Id. § 137.)

Where the guardian is also administrator, he may charge himself as guardian with the funds to which the heir is entitled on distribution, though without an order of the probate court, and will thereby bind his sureties upon his guardian's bond. Scott's Account, 36 Vt. 297.

The theory of the law of guardianship is that the guardian shall settle with the judge of probate, or with the ward, if of full age, or with his legal representatives, and, upon settlement, pay over and deliver all the property in his hands belonging to the ward, including all moneys due; or that the ward shall have his action upon his guardian's bond for breach of the condition to settle and pay over and deliver. Jacobs v. Fouse, 23 Minn. 51.

See Peel v. McCarthy, 38 Minn. 451, 38 N. W. Rep. 205.

See notes to §§ 4458, 4482.

§ 4545. Guardian to take oath.

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

(1889, c. 46, § 138.)

§ 4546. Additional conditions may be inserted in order of appointment.

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

(Id. § 139.)

§ 4547. Education of minor—When paid out of estate.

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

(Id. § 140.)

§ 4548. Guardian ad litem may be appointed, when.

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

(Id. § 141.)

§ 4549. Guardian of insane or incompetent person—Notice.

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The probate court may appoint a guardian or guardians of any person who, by reason of old age, or loss or imperfection of mental faculties, is incompetent to have the charge or management of his property, or person who, by excessive drinking, gaming, idleness or debauchery, so spends, wastes or lessens his estate as to be likely to expose himself or his family to want or suffering, either upon the application of the county commissioners of the county where such person resides, or upon the petition of any relation or friend of such person, which petition shall set forth the facts, and be verified by the affidavit of the petitioner to the effect that he believes the facts as so stated are true. The petitioner, or any person interested, may, as soon as the notice mentioned in section one hundred and forty-three of this code, shall have been given to the person proposed to be put under guardianship, cause a copy of the petition and of the notice and proof of service thereof on the person to be served therewith, to be filed in the office of the register of deeds of the county in which such petition is pending, and recorded therein; and if a guardian or guardians shall be appointed on such petition, all contracts except for necessaries and all gifts, sales or transfers of real or personal property made by the person put under guardianship after the filing of such papers in the office of the register of deeds, and before the termination of the guardianship shall be void.

(Id. § 142, as amended 1893, c. 116, § 12.)

The jurisdiction of probate courts in the matter of the guardianship of insane persons is as indisputable as its jurisdiction in the matter of the guardianship of minors or any other class. State v. Wilcox, 24 Minn. 148.

A petition alleging that the party for whom the guardian is desired "is mentally incompetent," "and has been for some time past," is sufficient to give the court jurisdiction. Norton v. Sherman, (Mich.) 25 N. W. Rep. 510.

See Knox v. Haug, 48 Minn. 58, 50 N. W. Rep. 934.

§ 4550. Same.

Upon the presentation of such application or petition, the probate court shall fix the time and place for the hearing of the same, and shall cause notice

of such hearing, and of the time and place thereof, to be given to the person proposed to be put under guardianship, at least fourteen days prior to the time fixed for such hearing. Provided, that if such person is an inmate of a state hospital for the insane then a like notice shall be given to the superintendent of such hospital.

(1889, c. 46, § 143.)

§ 4551. Same—How appointed.

At the hearing, the court shall consider all competent evidence that may be produced in support of and against the application or petition; and if, after a full hearing, it appears that the person so proposed to be put under guardianship comes within the description of persons mentioned in section one hundred and forty-two of this chapter, the court shall appoint a guardian or guardians, not exceeding two in number, of his person and estate.

(Id. § 144, as amended 1893, c. 116, § 13.)

As to a finding of the jury sufficient to sustain the appointment of a guardian, see Norton v. Sherman, (Mich.) 25 N. W. Rep. 510.

§ 4552. Same—Power and bonds of.

Every guardian appointed as provided in the preceding section, has the care and custody of the person of his ward, and the management of all his estate until such guardian is legally discharged; and he must give bond in like manner as prescribed in section one hundred and thirty-seven, except that the provision relating to the education of the ward shall not apply.

(1889, c. 46, § 145, as amended 1893, c. 116, § 14.)

§ 4553. Insane or incompetent person, how restored.

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

(1889, c. 46, § 146, as amended 1893, c. 116; § 15.)

§ 4554. Debts of ward, how paid.

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

(1889, c. 46, § 147.)

A creditor of a spendthrift, under guardianship, has a right to be heard in the matter of allowing the guardian's account, and, if aggrieved, has a right to appeal from the judgment of the probate court upon such accounting. No previous allowance of his claim by the probate judge or by commissioners is required in order to give him the *status* of creditor. In re Hause, 32 Minn. 155, 19 N. W. Rep. 973.

§ 4555. Guardian must collect debts due his ward.

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

(1889, c. 46, § 148.)

See Perine v. Grand Lodge A. O. U. W., 48 Minn. 82, 87, 50 N. W. Rep. 1022.

§ 4556. Powers and duties of guardian as to estate of ward.

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

(1889, c. 46, § 149.)

As to discretion of the guardian in respect to board for, and education of, the ward, see Gott v. Culp, (Mich.) 7 N. W. Rep. 767. See, also, In re Mells, (Iowa,) 20 N. W. Rep. 486.

As to a charge by a guardian for the support of the ward whom he had taken into his family, see Moyer v. Fletcher, (Mich.) 23 N. W. Rep. 198; Latham v. Myers, (Iowa,) 10 N. W. Rep. 924; In re Besondy, 32 Minn. 385, 20 N. W. Rep. 366.

§ 4557. Support of ward, how settled for and enforced.

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

(1889, c. 46, § 150.)

§ 4558. Guardian to make inventory of estate.

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

(Id. § 151.)

As to correction of inventory, see Martin v. Sheridan, (Mich.) 8 N. W. Rep. 822. See Jacobs v. Fouse, 23 Minn. 51.

§ 4559. Guardian of non-resident, how appointed.

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

(1889, c. 46, § 152.)

The notice is jurisdictional, and it is only upon notice that the judge of probate is authorized to appoint. Davis v. Hudson, 29 Minn. 27, 11 N. W. Rep. 136.

A probate court of this state may properly appoint a guardian for a non-resident minor, as respects any estate which the minor may have in the county where such probate court is established. If a general guardian be appointed in such circumstances, the appointment is good to the extent of the minor's estate within the jurisdiction in which it is made. Id.

Under G. S. 1866, c. 59, § 13, notice to the infant himself was not necessarily required, but it was sufficient if such notice was given to persons interested, as natural guardians and next of kin, in the person and estate of the infant, as in the discretion of the judge, would be most likely to protect his interests. Kurtz v. St. Paul & D. R. Co. 48 Minn. 339, 51 N. W. Rep. 221.

§ 4560. Powers and duties of such guardian.

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

(1889, c. 46, § 153.)

See Davis v. Hudson, cited in note to § 4559.

§ 4561. Bonds of such guardian.

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

(1889, c. 46, § 154.)

§ 4562. Removal of property when guardian and ward are non-residents.

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

(Id. § 155.)

Cf. Jordan v. Secombe, 33 Minn. 220, 22 N. W. Rep. 333; Menage v. Jones, 40 Minn. 254, 41 N. W. Rep. 972; Burrell v. Chicago, M. & St. P. Ry. Co., 43 Minn. 363, 45 N. W. Rep. 849.

§ 4563. Real estate to be sold—Same provisions relating to estate of decedents.

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

(1889, c. 46, § 156, as amended 1893, c. 116, § 16.)

§ 4564. Partition of real estate of ward.

Whenever real estate is owned by any ward in this state jointly or in common with any other person or persons, the guardian of such ward may have partition thereof, either by proceedings in court for that purpose, or, except when he has an adverse interest to that of the ward in the estate to be divided, by amicable agreement with the joint or common owner or owners, with the consent of the probate court in writing thereto; upon such amicable

agreement for partition, the guardian shall have the right to release and quitclaim, to such joint or common owner or owners, all the right, title and interest of such ward in and to the portion of the property to be taken by such joint or common owner or owners, pursuant to such agreement, upon receiving from such joint or common owner a like release and quitclaim to such ward of all the rights, title and interest in and to the portion of the property to be taken by said ward.

(1889, c. 46, § 157.)

See §§ 5811-5813.

§ 4565. Platting land of ward.

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

(1889, c. 46, § 158.)

§ 4566. Improvement of real estate — Erection of party wall.

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

(Id. § 159.)

§ 4567. Guardian may sell estate of ward, when.

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

(Id. § 160.)

The land of minors under guardianship having been sold and conveyed, an action to recover the price is within the jurisdiction of the district court, but not of the probate court. Peterson v. Baillif, 52 Minn. 386, 54 N. W. Rep. 185.

§ 4568. Same—For reinvestment, how.

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

(1889, c. 46, § 161.)

§ 4569. Investment of funds, how made.

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

(Id. § 162.)

§ 4570. Petition for investment.

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

(Id. § 163.)

§ 4571. Order for investment, how made.

If it shall satisfactorily appear to the court from such petition that it would be for the best interests of the ward to invest such moneys, the court

shall make its order granting the prayer of such petition, which petition may be heard in a summary manner without notice, and such guardian shall so invest such funds.

(Id. § 164.)

Petition held to state facts sufficient to entitle a ward to have set aside an order authorizing his guardian to invest in a certain real-estate mortgage, the guardian being interested. In re Granstrand, 49 Minn. 438, 52 N. W. Rep. 41.

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§ 4572. Guardian shall account annually.

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

(1889, c. 46, § 165.)

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§ 4573. Final account to be rendered, when—Hearing and notice.

When any minor ward under guardianship arrives at full age, or when a female ward under full age marries, or when any person under guardianship as an insane or other incompetent person has been restored to capacity, or when any person under guardianship dies, the guardian of such ward shall render his final account of his guardianship to the probate court and turn over all the property in his possession belonging to the ward, to said ward. Upon the filing of said final account of his guardianship with the probate court, with a petition for final settlement and allowance, the court shall make an order fixing a time and place of hearing on said petition and the settlement and allowance of said account; a copy of said order shall be served upon such ward at least fourteen days before said day of hearing, if he be within the state, if not within the state, or if deceased, by publishing the same according to law.

(Id. § 166, as amended 1893, c. 116, § 17.)

A guardian of an infant having died without rendering an account, the court may require the representative of the deceased to appear, and render an account of moneys of the ward. Peel v. McCarthy, 38 Minn. 451, 38 N. W. Rep. 205.

As to notice to the guardian of order appointing time and place for examination of account. Brown v. Huntsman, 32 Minn. 466, 21 N. W. Rep. 555.

Appointment of a guardian ad litem for infant legatee upon accounting held unnecessary, under G. S. 1878, c. 59, § 47. Balch v. Hooper, 32 Minn. 162, 20 N. W. Rep. 124.

§ 4574. Order allowing final account.

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

(1889, c. 46, § 167.).

[TITLE 9.]

[SALES OF LANDS BY EXECUTORS, ADMINISTRATORS AND GUARDIANS.]

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§ 4575. License to sell, how obtained.

To obtain a license to sell real estate, the executor or administrator shall present a petition to the probate court from which he received his appointment, setting forth the amount of the personal estate that has come into his hands, the disposition thereof, and how much, if any, remains undisposed of; the debts outstanding against the deceased as far as the same can be ascertained; the legacies unpaid, if any; a description of all the real estate excepting the homestead of which the testator or intestate died seized; the

condition and value of the respective portions of lots, the persons interested in said estate, with their residences if known, and if unknown, that fact shall be stated.

(1889, c. 46, § 168.)

If there are several executors or administrators, all must join in the petition, and a license granted on the petition of one is invalid. Hannum v. Day, 105 Mass. 33.

The petition need not show that there are no mortgages or incumbrances on the land, that it is not cultivated or improved, or that there are no water privileges or other natural advantages thereon. Spencer v. Sheehan, 19 Minn. 338, (Gil. 292.)

The statement of outstanding debts of the deceased need not be in detail. A statement of such indebtedness in the aggregate is sufficient to confer jurisdiction. State v. Probate Court Ramsey Co., 19 Minn. 117, (Gil. 85.)

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§ 4576. Order to show cause on petition.

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If it appears by such petition that there is not sufficient personal estate in the hands of an executor or administrator to pay the debts outstanding against the deceased, the legacies or the expenses of administration, and that it is necessary to sell the whole or some portion of the real estate for the payment of such debts, legacies or expenses, or if it shall appear to the satisfaction of the court that it would be for the best interests of the estate of said decedent, and of all parties interested therein, to sell all or any part of the real estate belonging to said estate and not specifically disposed of by the will of said decedent, and to use the proceeds of such sale or sales or any part thereof in the payment of such debts, legacies, or expenses, or to reinvest the said proceeds, or any part thereof, for the benefit of said estate and those interested therein, the probate court shall thereupon make an order directing all persons interested in the estate to appear before it, at a time and place therein to be specified, to show cause why a license should not be granted to the executor or administrator applying therefor, to sell so much of the real estate of the deceased as shall be necessary to pay such debts, legacies or expenses.

(1889, c. 46, § 169, as amended 1889, c. 116, § 18)

Where there are debts against an estate duly allowed, and there is no personal property in the hands of the administrator to pay such debts, it is the duty of the probate court, on a proper application by the administrator, to grant license to sell real estate for that purpose. State v. Probate Court, 25 Minn. 22.

A final decree discharging the administrator operates to discharge the lien of creditors upon real estate which might previously have been sold to pay debts. State v. Probate Court, 40 Minn. 296, 41 N. W. Rep. 1033.

An application to sell real estate for the payment of debts must be made within a reasonable time after the allowance of the claims. Such application, made after 10 years, held properly refused. Id.

See, also, O'Mulcahey v. Gragg, cited in note to § 4513; Davis v. Townsend, cited in note to § 4489.

§ 4577. Proceeding on hearing.

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

(1889, c. 46, § 170.)

Necessity of notice to the wife of the devisee. Harrington v. Harrington, 13 Gray, 513.

Necessity of notice to one wrongfully in possession by disseizin. Yeomans v. Brown, 8 Metc. 51. To tenants in possession under a fraudulent conveyance from decedent. Id.

Where an executor made application for license to sell real estate, and the court directed notice thereof to be given, causing a copy of the order for hearing to be published, etc., held that, under G. S. 1878, c. 57, §§ 3 and 4, such service was good as against a devisee of the deceased, though not named in the notice or personally served. Spencer v. Sheehan, 19 Minn. 338 (Gil. 292); followed, Greenwood v. Murray, 28 Minn. 124, 9 N. W. Rep. 629.

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§ 4578. License to sell may be granted, when.

If it appears to the court that it is necessary to sell a part of the real estate and that by a sale of such part, the residue of the estate or some specific part or piece thereof, would be greatly injured, said court may license a

sale of the whole estate, or of such part thereof as may be judged necessary, and most for the interest of all concerned.

(1889, c. 46, § 171.)

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§ 4579. License to be refused, if bond be given.

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

(Id. § 172)

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§ 4580. Court shall make order of sale, when.

If the probate court is satisfied after a full hearing upon the petition, and examination of the proofs and allegations of the parties interested, that

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sale of the whole or some portion of the real estate is necessary for the payment of debts, legacies or expenses of administration, it shall thereupon make an order of sale authorizing the executor or administrator to sell the whole, or so much and such part of the real estate described in the petition as it deems necessary or beneficial.

(Id. § 173.)

A sale cannot be made by one not executor or administrator. Culver v. Hardenbergh, 37 Minn. 225, 33 N. W. Rep. 792.

Sale of equitable title. Woods v. Monroe, 17 Mich. 238.

The averment of the administrator in his petition and his oral admission that a certain debt is due are not evidence to establish the same on the hearing. Chamberlin v. Chamberlin, 4 Allen, 184.

Effect of failure to appoint guardian *ad litem* of infant heir. Holmes v. Beal, 9 Cush. 223.

Necessity of recitals in the order or record of such facts as warrant the order. Clapp v. Beardsley, 1 Aiken, 168, 1 Vt. 151.

Validity of license to sell the whole of the real estate granted upon a petition for the sale of specific portion. Verry v. McClellan, 6 Gray, 535.

License to sell sufficient to pay a larger sum than that represented in the petition to be the amount of debts and charges. Tenney v. Poor, 14 Gray, 500.

License to a stranger to make the sale. Crouch v. Eveleth, 12 Mass. 503.

Conclusiveness of order as to compliance with prerequisites. Chase v. Ross, 36 Wis. 267; Sitzman v. Pacquette, 13 Wis. 291.

Sufficiency of the notice as to the time of the sale. Wellman v. Lawrence, 15 Mass. 326.

Misdescription of the premises. New England Hospital v. Sohier, 115 Mass. 50.

Where the executor, under a license to sell sufficient real estate to raise a certain sum, sold one parcel with the privilege of a foot-pass over another, held, that the conveyance of the foot-pass was unauthorized, and created no incumbrance upon the second parcel, a license to sell not authorizing the creation of an incumbrance. Brown v. Van Duzee, 44 Vt. 529.

See note to § 4576.

§ 4581. May subdivide and plat, when.

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

(1889, c. 46, § 174.)

§ 4582. Contents of order.

The order shall describe the lands to be sold, and may direct the order in which several tracts, lots or parcels shall be sold, and shall direct whether they shall be sold at private sale or at public auction; and if it appears that any

part of such real estate has been devised and not charged in such devise with the payment of debts, the probate court shall order that part descended to heirs to be sold before that so devised; and if it appears that any lands devised or descended have been sold by the heirs of devisees, then the lands in their hands remaining unsold shall be ordered to be first sold.

(Id. § 175.)

In an order to sell, a general description held not limited by a particular description. Middleton v. Wharton, 41 Minn. 266, 43 N. W. Rep. 4.

§ 4583. Sale of interest of deceased under contract.

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

(1889, c. 46, § 176.)

See Paine v. First Div. St. Paul, etc., R. Co., 14 Minn. 65 (Gil. 49).

§ 4584. Sale, how made—Purchaser to give bond.

Such sale shall be made subject to all payments that may thereafter become due on such contract; and if there are any such payments thereafter to become due, such sale shall not be confirmed by the probate court until the purchaser executes a bond to the executor or administrator for his benefit and indemnity and for the benefit and indemnity of the persons entitled to the interest of the deceased in the lands so contracted for, in double the whole amount of payments thereafter to become due on such contract, with such sureties as the court approves.

(1889, c. 46, § 177.)

§ 4585. Bond, how conditioned.

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

(Id. § 178.)

§ 4586. Confirmation—Assignment—Rights of assignee.

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

(Id. § 179.)

§ 4587. Proceeds of sale, how disposed of.

The proceeds of every such sale of the interest of the deceased person in the lands under contract, as hereinbefore mentioned, shall be disposed of in all respects in the same manner as the proceeds of the sale of lands of which the deceased died seized.

(Id. § 180.)

§ 4588. Sale and conveyances subject to charges, etc.

Sales and conveyances of land made by executors and administrators, pursuant to the provisions of this chapter, may be made subject to all charges thereon, by mortgage or otherwise, existing at the time of the death of the testator or intestate; and in case the estate of the deceased is in any way liable for the amount secured by such mortgage, or for any such charge, the sale shall not be confirmed by the probate court until the purchaser executes a bond to the executor or administrator, as required in the case of a sale of a contract for the purchase of lands on which payments are to be-

come due, or unless the land or interest therein so sold shall be first released, discharged and made clear from such incumbrance or charge, by the owner or holder thereof, upon the payment to him of the proceeds of the sale or so much thereof as may be necessary to satisfy such incumbrance or charge; or the executor or administrator may sell the whole or any part, subdivision, or portion of the interest and estate of the deceased in any lot or tract of land charged with any lien or incumbrance, and upon the release of the lot, tract, or part so sold from such lien or incumbrance, apply the proceeds of such sale or sales towards the payment of such charge, lien or incumbrance, until the same is fully paid; and the executor or administrator shall account for any balance remaining after such payment as proper proceeds of the estate, and in all such cases the purchaser shall not be required to give any bond.

(Id. § 181.)

In an order of sale of the remainder in fee of homestead property, it is error to charge the same with the entire incumbrance of a subsisting mortgage for which the entire estate is liable. McGowan v. Baldwin, 46 Minn. 477, 49 N. W. Rep. 251.

The administrator has no power to bind the estate by any covenants that may be contained in the deed. Hall v. Marquette, (Iowa,) 28 N. W. Rep. 647.

See Curran v. Kuby, 37 Minn. 330, 33 N. W. Rep. 907; Culver v. Hardenbergh, 37 Minn. 225, 33 N. W. Rep. 792.

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§ 4589. Sale by foreign executors and administrators—Filing copy of appointment.

An executor or administrator appointed in another state, upon any estate where there is no executor or administrator appointed in this state, may file an authenticated copy of his appointment in the probate court for any county in which there is real estate of the deceased, after which he may be licensed by the same probate court to sell real estate for the payment of debts, legacies and charges of administration, in the same manner, and upon the same terms and conditions as are prescribed in the case of an executor or administrator appointed in this state except as hereinafter provided. And such foreign executor or administrator may act by his attorney in fact, thereto by him duly appointed by power of attorney under his hand and seal and executed and acknowledged in the same manner as is required for the conveyance of real estate, which power of attorney shall be recorded in the office of the register of deeds for the county in which the real estate is situated.

(1889, c. 46, § 182.)

See Brown v. Brown, 35 Minn. 191, 192, 28 N. W. Rep. 238.

Cf. Jordan v. Secombe, 33 Minn. 230, 23 N. W. Rep. 383; Menage v. Jones, 40 Minn. 254, 41 N. W. Rep. 972; Burrell v. Chicago, M. & St. P. Ry. Co., 43 Minn. 363, 365, 45 N. W. Rep. 849.

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§ 4590. Contract for right of way, how made.

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

(1889, c. 46, § 183.)

The approval and confirmation is no proof that the person who executed the conveyance was guardian. Burrell v. Chicago, M. & St. P. Ry. Co., 43 Minn. 363, 45 N. W. Rep. 849.

See, also, Dawson v. Helmes, 30 Minn. 107, 14 N. W. Rep. 462.

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§ 4591. Contract, how and when approved.

Such approval may be obtained upon filing in the probate court a verified petition of the railroad company and the executor, administrator, or guardian.

setting forth the name of the decedent or ward, the corporate name of the railroad company, a description of the land to be used or taken, and for what purpose, the amount to be paid, and that such amount is the full value of the lands so taken, and the damages to the remainder of the lands. To such petition shall be attached or endorsed thereon the agreement mentioned in section one hundred and eighty-three.

(1889, c. 46, § 184, as amended 1893, c. 116, § 19.)

§ 4592. Filing of petition—Contract—Approval.

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

(1889, c. 46, § 185.)

§ 4593. Executor, administrator, and guardian may mortgage, when.

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

(Id. § 186, as amended 1893, c. 116, § 20.)

§ 4594. How to obtain license to mortgage.

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

(1889, c. 46, § 187, as amended 1893, c. 116, § 21.)

§ 4595. What decree for license shall contain.

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

(1889, c. 46, § 188, as amended 1893, c. 116, § 22.)

§ 4596. How mortgage may be extended or renewed.

The probate court may in like manner authorize an executor, administrator, or guardian to make an agreement for the extension or renewal of an existing mortgage on the estate of a deceased person. No license to mortgage real estate shall be granted to an executor, administrator, or guardian until he shall have executed and filed with the probate court before whom the matter is pending, a bond with sufficient sureties to be approved by the probate judge, conditioned that he will apply the funds realized by such mortgage to the purposes specified in the decree of the court.

(1889, c. 46, § 189, as amended 1893, c. 116, § 23.)

§ 4597. Bond before sale.

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

(1889, c. 46, § 190.)

Bond in case of lands situated in different counties. Sitzman v. Pacquette, 13 Wis. 291. Neglect to file bond. Reynolds v. Schmidt, 20 Wis. 374.

Whether the proper or any bond was given or not is a question for the jury or the trial court. The supreme court will not consider that matter, in the absence of a finding thereon in the court below. Jordan v. Secombe, 33 Minn. 222, 22 N. W. Rep. 383.

Where the order of license required a bond in a specific sum, and after appraisal, and before sale, the court approved a satisfactory bond in a less amount, held that the variance was not fatal to the validity of the sale. In re Winona Bridge Ry. Co., 51 Minn. 97, 52 N. W. Rep. 1079.

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§ 4598. License to sell—Its contents.

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

(1889, c. 46, § 191.)

See Culver v. Hardenbergh, 37 Minn. 225, 33 N. W. Rep. 792.

§ 4599. When order is for public sale—Direction.

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

(1889, c. 46, § 192.)

As to publication of notice under former statutes, see Montour v. Purdy, 11 Minn. 384 (Gil. 279); Dayton v. Mintzer, 22 Minn. 393; Greenwood v. Murray, 28 Minn. 123, 9 N. W. Rep. 629; Wilson v. Thompson, 26 Minn. 299, 3 N. W. Rep. 699; Hartley v. Croze, 38 Minn. 325, 37 N. W. Rep. 449.

A notice designating the place of sale as "Duluth, in said county of St. Louis," is insufficient. Hartley v. Croze, supra.

Defective notice. Blodgett v. Hitt, 29 Wis. 169; Chase v. Ross, 36 Wis. 267; McCrubb v. Bray, Id. 333.

Within 30 years there is no presumption as to notice in the absence of evidence that such notice was given. Thomas v. Le Baron, 8 Metc. 355.

The determination by the court of the publicity of the places of posting under G. S. 1878, c. 57, § 39, held conclusive against collateral attack. Hugo v. Miller, 50 Minn. 105, 52 N. W. Rep. 381.

As to the sufficiency of the description. Richardson v. Farwell, 49 Minn. 210, 51 N. W. Rep. 915; In re Winona Bridge Ry. Co., 51 Minn. 97, 52 N. W. Rep. 1079.

§ 4600. When made at private sale, may be appraised.

If upon the hearing of a petition for the sale of land, it shall satisfactorily appear to the court, that it would be for the best interest of the estate or ward, to sell the whole or some part thereof at private sale, the court shall direct such sale to be made at private sale by the executor, administrator or guardian; the court shall also direct the executor, administrator or guardian to have the land or any part thereof reappraised, and the land so directed to be appraised shall not be sold until such appraisement is made. Such reappraisement shall be made by two or more competent persons appointed by the court for that purpose; the appraisers before entering upon their duties, shall take and subscribe an oath to faithfully and honestly appraise such land at its full cash value, which oath and their appraisement shall be filed in the probate court; and no such land shall be sold at private sale for less than its appraised value. The probate court may also direct the executor, administrator or guardian, to give notice of such sale

as it may direct, and in case the court directs notice to be given, the executor, administrator or guardian, shall not sell until such notice is given.

(1889, c. 46, § 193.)

§ 4601. Part sold at public sale and part private sale, when.

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

(Id. § 194.)

§ 4602. Husband or wife must join in certain cases.

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

(Id. § 195.)

§ 4603. Husband or wife of insane person may sell.

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

(Id. § 196.)

§ 4604. Oath before sale.

Every executor, administrator or guardian licensed to sell real estate, as provided in this chapter, shall, before fixing on the time and place of sale, and if the sale is at private sale, before making the sale, take and subscribe an oath in substance as follows: That in disposing of the estate which he is licensed to sell, he will use his best judgment in fixing on the time and place of sale, and will exert his utmost endeavors to dispose of the same in such manner as will be most for the advantage of all persons interested; which oath shall be filed in the probate court before confirmation of the sale. When any executor, administrator or guardian, so licensed to sell real estate, resides out of this state, he may take and subscribe such oath before any notary public, or clerk of a court of record, of the state where he resides, and the same, with the seal of the officer before whom the same was taken attached, shall have the same force and effect as if taken before any officer within this state authorized to administer oaths.

(Id. § 197.)

A pleading, alleging an oath taken at the date of the license to sell, that "in conducting the sale of the real estate of said minors, under the order of the probate court, that I will, in all respects, conduct the same according to law, and for the benefit and best interests of the wards," held sufficient. Montour v. Purdy, 11 Minn. 384, (Gil. 279.)

An oath by an administrator that he would "exert his best endeavors to dispose of the real estate * * * in such manner as will be most advantageous to the persons interested," held sufficient. Hugo v. Miller, 50 Minn. 105, 52 N. W. Rep. 381.

See Jordan v. Secombe, 33 Minn. 222, 22 N. W. Rep. 383; West Duluth Land Co. v. Kurtz, cited in note to § 4612.

§ 4605. Executor, etc., not to be purchaser.

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No executor, administrator or guardian making the sale, shall directly or indirectly purchase, or be interested in the purchase of any part of the real estate so sold; and all sales made contrary to the provisions of this section shall be void.

(1889, c. 46, § 198.)

See Davis v. Hudson, 29 Minn. 39, 11 N. W. Rep. 136.

At a guardian's sale the real estate was bid in by one H., and, after the sale was confirmed, was conveyed by the guardian to him. About six months after H. conveyed

the property to the guardian. Both deeds were recorded on the same day. Held, that this alone was not sufficient to charge a purchaser from the guardian with notice that the property was bid in for the benefit of the guardian. If, at a sale of real estate by an executor, administrator, or guardian, he purchases through another, or is interested in the purchase of the real estate, the sale is not absolutely void, but is only voidable by the parties interested in the estate sold, and cannot be avoided by them as against a bona fide purchaser. White v. Iselin, 26 Minn. 487, 5 N. W. Rep. 359.

The law will not infer fraud in an administrator's sale from the fact that the purchaser is a son of the administrator. Cain v. McGeenty, 41 Minn. 194, 42 N. W. Rep. 933.

The rule disabling a trustee to buy does not apply to the guardian of minor heirs, buying at an administrator's sale for payment of a debt duly allowed. Barber v. Bowen, 47 Minn. 118, 49 N. W. Rep. 684.

See Lewis v. Welch, 47 Minn. 193, 48 N. W. Rep. 608, and 49 N. W. Rep. 665.

§ 4606. Proof of notice of sale, how made.

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

(1889, c. 46, § 199.)

As to the sufficiency of affidavits. Hugo v. Miller, 50 Minn. 105, 52 N. W. Rep. 381.

§ 4607. Sale may be adjourned.

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

(1889, c. 46, § 200.)

§ 4608. Notice in case of adjournment, how made.

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

(Id. § 201.)

See Dayton v. Mintzer, 22 Minn. 396.

§ 4609. Report of sale—Resale.

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

(1889, c. 46, § 202.)

§ 4610. Confirmation of sale.

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

(Id. § 203.)

Refusal of joint administrator to execute conveyance—Giving deed before the purchase money is paid—Collateral attack. Osman v. Traphagen, 23 Mich. 80.

The deed need not recite the authority for executing it. Langdon v. Strong, 2 Vt. 234; Pierce v. Brown, 24 Vt. 173.

The order of confirmation passes on nothing but the acts of the executor or administrator in making the sale, and the sufficiency of the bid. Culver v. Hardenbergh, 37 Minn. 225, 33 N. W. Rep. 792.

See Dawson v. Helmes, 30 Minn. 107, 14 N. W. Rep. 462.

Where the guardian obtained license to sel. at private sale, and no such sale was made under the license, but a report was made showing a sale to the defendant, which

was confirmed, and a deed ordered to be executed, and the plaintiff executed and tendered to the purchaser a guardian's deed, *held*, that such deed was invalid. Williams v. Schembri, 44 Minn. 250, 46 N. W. Rep. 403.

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§ 4611. Limitation of action to recover estate sold.

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

(1889, c. 46, § 204.)

The provisions of G. S. 1878, c. 57, §§ 50, 51, 53 (which are similar to §§ 4611-4613), construed together, and held, that the legislature did not intend that in any case of sale by the trustees named the validity of the sale should be open to attack at any time, however remote, by any person, even though not interested; but that a stranger might question the sale only if there was no license by the proper court, or no deed of conveyance by the executor, administrator, or guardian; and a person claiming under the deceased or the ward, or a person claiming under him, should question it only if one or more of the conditions mentioned in § 51 be wanting. White v. Iselin, 26 Minn. 487, 5 N. W. Rep. 359.

This provision does not necessarily require a party desiring to avail himself of such limitation to establish a valid sale. Spencer v. Sheehan, 19 Minn. 338 (Gil. 292).

This provision is not, in terms, applicable to the case of a party in possession *defending* a title derived from a ward against the affirmative attack of one relying on a guardian's sale. Dawson v. Helmes, 30 Minn. 113, 14 N. W. Rep. 462.

The exception is general, and applies as well to those who have always resided abroad as to those who have been residents of or been in the state, and returned after absence therefrom. Jordan v. Secombe, 33 Minn. 220, 22 N. W. Rep. 383. The grantee or heir of a ward is not within the exception, but the time limited commences to run as to him immediately on the transfer of the estate; but if the ward continued to be entitled thereto, such grantee or heir succeeds to his right therein, unaffected by previous lapse of time. Id.

Upon a sale by a guardian, under proper license, however irregular or erroneous the proceedings, the limitation applies to an action by the ward. Smith v. Swenson, 37 Minn. 1, 32 N. W. Rep. 784.

Such limitation is constitutional. Rice v. Dickerman, 47 Minn. 527, 50 N. W. Rep. 698.

See West Duluth Land Co. v. Kurtz, 45 Minn. 380, 383, 47 N. W. Rep. 1134.

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§ 4612. Sale not to be avoided, when.

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

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

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

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

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

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

(1889, c. 46, § 205.)

Substantial compliance with the statutory provisions will support the sale as between the grantee and the heirs at law. Jackson v. Astor, 1 Pin. 137.

Irregularities in proceedings. Coon v. Fry, 6 Mich. 506; Howard v. Moore, 2 Mich. 226; Palmer v. Oakley, 2 Doug. (Mich.) 433; Woods v. Monroe, 17 Mich. 238.

The words "probate court of competent jurisdiction" signify "the probate court whose jurisdiction it is proper to invoke in the particular case in hand," and do not refer to the steps preliminary to the obtaining of license. So, where the license is granted by the probate court which appointed the guardian, it is immaterial whether such preliminary steps were taken or not. Montour v. Purdy, 11 Minn. 384, (Gil. 279.) The license to sell having been granted by the probate court which appointed the ad-

ministrator, it is immaterial that there was or was not a proper petition for license to sell. Following Montour v. Purdy, 11 Minn. 384, (Gil. 278;) Rumrill v. First National Bank St. Albans, Vt., 28 Minn. 202, 9 N. W. Rep. 731.

Under this provision the proceedings of a probate court in reference to a guardian's sale may be drawn in question by a ward in an action collateral to such proceedings. Davis v. Hudson, 29 Minn. 27, 11 N. W. Rep. 136. The appointment of a guardian not being a proceeding in reference to a guardian's sale, its validity is not collaterally assailable under this section, but its proof is governed by the rules of evidence applicable in other analogous cases. Id.

The fact that no bond was given may be proved by showing that the record is silent as to such bond, and, by the administrator, that none was executed. Babcock v. Cobb, 11 Minn. 347, (Gil. 247.)

The general presumption in favor of the jurisdiction and verity of the records of the courts of probate, enjoyed by them in common with other courts of record and superior jurisdiction, appears to be somewhat modified by this provision. Davis v. Hudson, 29 Minn. 28, 11 N. W. Rep. 136. See, also, Dayton v. Mintzer, 22 Minn. 393; Streeter v. Wilkinson, 24 Minn. 288.

A writ of prohibition will issue to restrain the probate court from reviewing the proceedings for a sale, after a confirmation, at the instance of any one claiming under the sale. State v. Probate Court Ramsey Co., 19 Minn. 117, (Gil. 85.)

See White v. Iselin, 26 Minn. 487, 5 N. W. Rep. 359.

An executor's or administrator's sale cannot be made by one not executor or administrator. Culver v. Hardenbergh, 37 Minn. 225, 33 N. W. Rep. 792.

An administrator's sale to a bona fide purchaser under license of a probate court having jurisdiction of the administration cannot be impeached collaterally by showing contrary to the petition for license, that there were no debts. Curran v. Kuby, 37 Minn. 330, 33 N. W. Rep. 907.

The fact that a guardian filed the required oath is proved by such an oath, dated before the sale, and found in the files, though without file mark. West Duluth Land Co. v. Kurtz, 45 Minn. 580, 47 N. W. Rep. 1134.

See Hartley v. Croze, 38 Minn. 325, 334, 37 N. W. Rep. 449; Richardson v. Farwell, 49 Minn. 210, 51 N. W. Rep. 915; In re Winona Bridge Ry. Co., 51 Minn. 97, 52 N. W. Rep. 1079.

§ 4613. Validity of sale not affected by irregularity, when.

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

(1889, c. 46, § 206.)

See White v. Iselin, cited in note to § 4611; Hartley v. Croze, 38 Minn. 325, 334, 37 N. W. Rep. 449.

§ 4614. Certified copies from probate court.

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

(1889, c. 46, § 207.)

§ 4615. Register of deeds may record such copies.

The register of deeds of the county where such real estate is situated may record any such certified copy.

(Id. § 208.)

There appears to be no statute authorizing the recording of a certified copy of an order of a probate judge made before the passage of Laws 1873, c. 57. Dawson v. Helmes, 30 Minn. 107, 14 N. W. Rep. 462.

§ 4616. Such copies to be evidence.

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

(1889, c. 46, § 209.)

[TITLE 9a.]

[MORTGAGING REAL ESTATE BY EXECUTORS, ADMINISTRATORS, AND GUARDIANS.]

§ 4617. Executors, etc., may mortgage real estate, when. When the personal estate of a deceased person is insufficient to pay his debts, with the charges of administration, and to pay any taxes, assessments or other charges which are an existing lien upon his estate; or whenever the personal estate of such deceased person is insufficient to pay for any improvements which are necessary for the preservation of his real estate or any part thereof, his executor or administrator may mortgage his real estate for the purpose of obtaining funds for the payment of such debts, charges, taxes, assessments or liens, or for the making of such necessary improvements, upon obtaining a license therefor and proceeding as herein provided.

(1889, c. 40, § 1.[2])

§ 4618. Same—Procedure. To obtain such license the executor or administrator shall proceed in the manner now provided by law for the obtaining of a license to sell real estate, and in his petition the executor or administrator shall particularly describe the tract or tracts which it is proposed to mortgage.

(Id. § 2.)

§ 4619. Same—License. Whenever it appears to the satisfaction of the probate court that it is necessary for an executor or administrator to mortgage real estate for any of the purposes aforesaid, and that it will be for the benefit of all persons interested, such license shall be granted, and the decree of the court in granting such license shall fix the amount for which the mortgage may be given, and the rate of interest which may be paid thereon, and for what purposes the money shall be used.

(Id. § 3.)

§ 4620. Same—Extension or renewal. The probate court may in like manner authorize an executor or administrator to make an agreement for the extension or the renewal of an existing mortgage on the estate of a deceased person.

(Id. § 4.)

§ 4621. Same—Bond. No license to mortgage real estate shall be granted to an executor or administrator until he shall have executed and filed with the probate court, before whom the matter is pending, a bond with sufficient sureties to be approved by the probate judge, conditional that he will apply the funds realized by such mortgage to the purposes specified in the decree of the court.

(Id. § 5.)

§ 4622. Foreign guardian may mortgage or sell real estate, when. Whenever a minor or other person residing out of this state is under guardianship in the state or county in which he resides, and has no guardian appointed in this state, the foreign guardian may file a duly authenticated copy of his appointment as such guardian in the probate court for any county in this state in which there is real estate of the ward, after which he may be licensed to sell or mortgage the real estate of his ward in any county in the same manner and upon the same terms and conditions as are prescribed in this code in the case of a guardian appointed in this state. And such foreign guardian may act by his attorney in fact thereto by him duly appointed

[2] An act to provide for the mortgaging of lands by executors and administrators. Approved April 23, 1889.

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

(1893, c. 116, § 27.)

[TITLE 10.]

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

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§ 4623. Court may decree conveyance of land, when.

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

(1889, c. 46, § 210.)

§ 4624. Petition—Notice of hearing.

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

(Id. § 211.)

§ 4625. Proceedings on hearing.

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

(Id. § 212.)

§ 4626. Decree for conveyance—Dismissal of petition.

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

(Id. § 213.)

If not satisfied that the conveyance ought to be made, the court cannot decide against the applicant on the merits, but must dismiss the petition, leaving him to his remedy by action. Mousseau v. Mousseau, 40 Minn. 236, 41 N. W. Rep. 977.

§ 4627. Appeal—Decree to be recorded.

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

(1889, c. 46, § 214.)

§ 4628. Effect of decree and conveyance.

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

(Id. § 215.)

§ 4629. Effect of recording copy of decree in register of deeds' office.

A copy of the decree of conveyance made by the probate court and duly certified, and recorded in the office of the register of deeds in the county where the lands lie, shall give the person entitled to such conveyance a right to the possession of the lands contracted for, and to hold the same according to the terms of the intended conveyance, in like manner as if they had been conveyed in pursuance of the decree.

(Id. § 216.)

§ 4630. Heirs of purchaser may prosecute proceedings.

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

(Id. § 217.)

§ 4631. Chapter applies to guardians of insane persons, etc.

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

(Id. § 218.)

[TITLE 11.]

[SETTLEMENT OF EXECUTORS' AND ADMINISTRATORS' ACCOUNTS, AND ASSIGNMENT OF THE RESIDUE OF THE ESTATE.]

§ 4632. Executor, etc., is chargeable with what.

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

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(1889, c. 46, § 219.)

ASSETS—LIABILITY OF EXECUTORS AND ADMINISTRATORS. Buildings erected on lands belonging to wife of deceased. Washburn v. Sproat, 16 Mass. 449. Personal property applied by administrator to repairs and improvements of real estate in executing an agreement of intestate. Cobb v. Muzzey, 13 Gray, 57. Money paid by the heirs to avoid a sale of real estate for payments of debts. Fay v. Taylor, 2 Gray, 154. Rents and profits of real estate afterwards sold for payment of debts. Towle v. Swasey, 106 Mass. 100. Interest upon the proceeds of lands sold for payment of debts. Jennison v. Hapgood, 14 Pick. 345. Money received by the executor for a deed made by testator, and delivered after his death. Loring v. Cunningham, 9 Cush. 87. Money paid as compensation for land taken for public use. Phillips v. Rogers, 12 Metc. 405; Boynton v. Peterborough & S. Ry., 4 Cush. 467; Moore v. Boston, 8 Cush. 274; Chapin v. Waters, 116 Mass. 147. Money recovered of principal for whom decedent was surety, the administrator having previously paid the debt. Mowry v. Adams, 14 Mass. 327.

§ 4633. Not to make profit or suffer loss.

Every executor and administrator shall account for the personal estate of the deceased, as the same is appraised. An executor or administrator shall not make profit by the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the personal estate; and he shall account for the excess when he sells any part of the personal estate for more than the

appraisal; and if he sells any for less than the appraisal, he is not responsible for the loss, if it appears to be beneficial to the estate to sell it.

(1889, c. 46, § 220.)

§ 4634. Not liable for uncollected debts, when.

No executor or administrator is accountable for any debts due to the decedent, if it appears that they remain uncollected without his fault.

(Id. § 221.)

§ 4635. Not to purchase claims against the estate.

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

(Id. § 222.)

§ 4636. Fees and expenses allowed, how.

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

(Id. § 223.)

§ 4637. Accountable for loss from neglect.

When an executor or administrator neglects or unreasonably delays to raise money by collecting the debts or selling the real or personal estate of the deceased, or neglects to pay over the money he has in his hands, and the value of the estate is thereby lessened, or unnecessary costs or interest accrues, or the persons interested suffer loss, the same shall be deemed waste, and the discharge sustained may be charged against the executor or administrator in his account.

(Id. § 224.)

See State v. Probate Court, 25 Minn. 25; Bryant v. Livermore, 20 Minn. 337 (Gil. 271).

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§ 4638. Account to be rendered, when.

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

(1889, c. 46, § 225.)

Purpose of statute requiring an accounting. Hall v. Grovier, 25 Mich. 428.

Estoppel to deny representative character. Damouth v. Klock, 29 Mich. 289.

Credit for the payment of a claim which had been allowed by the commissioners, but which was not entered in their report. Clark v. Clark, 21 Vt. 490.

Where commissioners were appointed, and proceeded duly and regularly, an executrix who paid, out of funds not belonging to the estate, claims which were valid against the same, and which were properly allowable by the commissioners, but which had never been presented to them or allowed by them, held not entitled to have such payments allowed to her on the settlement of her account as executrix. Bunnell v. Post, 25 Minn. 376.

Credit for payment of a fictitious claim allowed by the commissioners with the assent of the administrator, no appeal having been taken. Reynolds v. McGregor, 16 Vt. 191.

Allowance of interest to administrator upon advances to the estate. Rix v. Smith, 8 Vt. 365.

An administrator who is also guardian of an heir may charge himself as guardian with the funds, to which the heir is entitled in distribution, and this will be a good accounting as administrator, though done without an order of the probate court. Scott's Account, 36 Vt. 297.

As to estoppel of heir to contest an account, see Loomis v. Armstrong, (Mich.) 29 N. W. Rep. 867.

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§ 4639. Petition for final settlement and distribution.

When the estate is fully administered, the executor or administrator shall petition the probate court for an order fixing a time and place in which it will examine, settle and allow the final account of the executor or administrator, and for the assignment of the residue of the estate to the persons

entitled thereto by law. The final account shall be filed in the probate court at the time of filing said petition.

(1889, c. 46, § 226.)

§ 4640. Order of hearing and notice thereof.

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

(Id. § 227.)

As to the notice required under G. S. 1878, c. 56, § 4, for a decree assigning the residue of the estate. Wood v. Myrick, 16 Minn. 494 (Gil. 447).

As to the sufficiency of the publication of the order appointing a hearing as notice, see Greenwood v. Murray, 28 Minn. 120, 9 N. W. Rep. 629.

See State v. Probate Court, 25 Minn. 22, 25.

§ 4641. Proceedings on hearing.

On hearing such petition, the probate court shall examine every executor and administrator upon oath as to the truth and correctness of his account before the same is allowed; but such examination may be omitted when no objection is made to the allowance of the account, and there is no reason to doubt the justness and correctness thereof; and the heirs, legatees and devisees may be examined on oath upon any matter relating to the account of any executor or administrator, whenever the correctness thereof is called in question. If from such examination the account is found just and correct the probate court shall allow and settle the same, and upon satisfactory evidence shall determine the rights of the persons to the residue of said estate and unless partition is asked for and directed as hereinafter provided, make a decree accordingly, assigning said residue to the persons thereto entitled by law.

(1889, c. 46, § 228.)

§ 4642. Assignment of residue and record thereof.

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

(Id. § 229.)

See State v. Probate Court, 25 Minn. 22, 25; Jordan v. Secombe, 33 Minn. 224, 22 N. W. Rep. 383; Huntsman v. Hooper, 32 Minn. 164, 20 N. W. Rep. 127.

An administrator will be allowed to deduct from the share of a distributee advances made by him to such distributee on account of her needy circumstances. Lyle v. Williams, (Wis.) 26 N. W. Rep. 448.

The decree of the probate court, assigning to a devisee the property devised, establishes the validity of the devise conclusively as against all interested in the estate, unless an appeal is taken. Such a decree establishes the right to the property assigned of the person to whom it is assigned the same as would the decree of any other court of competent jurisdiction; and if assigned to a devisee in trust, it establishes the validity of the trust. Greenwood v. Murray, 26 Minn. 259, 2 N. W. Rep. 945.

A decree of the probate court authorizing the distribution of the estate, cannot be attacked collaterally, and a defense setting up error therein, and conceding the jurisdiction of the court, will be demurrable. Wood v. Myrick, 16 Minn. 494 (Gil. 447).

As to "decree of heirship" under Laws 1885, c. 50, repealed by the Probate Code. Irwin v. Pierro, 44 Minn. 490, 47 N. W. Rep. 154.

A decree closing the administration on the petition of one of two administrators held a final order, and merely irregular. State v. Probate Court, 40 Minn. 296, 41 N. W. Rep. 1033.

The court has authority to determine to whom the estate passed upon the death of the decedent, and to what extent the share of such person has been affected by administration; but it has no jurisdiction to determine the rights of one claiming, through the acts of an heir or devisee, the real estate to which such heir or devisee

succeeded. Farnham v. Thompson, 34 Minn. 330, 26 N. W. Rep. 9; Dobberstein v. Murphy, 44 Minn. 526, 47 N. W. Rep. 171.

Decree of distribution held not evidence of heirship as against strangers. Backdahl v. Grand Lodge, 46 Minn. 61, 48 N. W. Rep. 454.

To close administration, or to relieve executors from their responsibility as such, or to change their possession, as such, of any part of the estate, into possession as legatees, requires the action of the probate court, evidenced by order or decree. In re Scheffer's Estate (Minn.) 59 N. W. Rep. 956.

§ 4643. Liable for neglect to account.

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

(1889, c. 46, § 230.)

§ 4644. Costs to be allowed, when.

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

(Id. § 231.)

A judgment, "and it is further determined and adjudged that the appellant above named do have and recover of said James W. Lough, administrator of the estate of William Pitman, deceased, respondent herein, the sum and amount of $51.30 costs and disbursements in this cause in this court, and that said appellant have execution for enforcement thereof," is a judgment against the administrator personally, to be enforced by execution against his property. Lough v Flaherty, 29 Minn. 295, 13 N. W. Rep. 131.

See § 5509.

§ 4645. Advancements, how construed.

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

(1889, c. 46, § 232.)

§ 4646. Same.

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

(Id. § 233.)

§ 4647. Same.

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

(Id. § 234.)

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§ 4648. Same—What are.

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

(Id. § 235.)

§ 4649. Same—Value of, how fixed.

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

(Id. § 236.)

§ 4650. Same—Death of heir before decedent.

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

(Id. § 237.)

§ 4651. Same—When to be determined.

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

(Id. § 238.)

§ 4652. Same—Value of, how determined.

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

(Id. § 239.)

[TITLE 12.]

[PARTITION.]

§ 4653. Partition of real and personal property

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

(1889, c. 46, § 240.)

The power to make partition is only given as an incident of settling the estates of deceased persons. After administration is closed, the probate court has no jurisdiction. Hurley v. Hamilton, 37 Minn. 160, 33 N. W. Rep. 912.

See Wood v. Myrick, 16 Minn. 494, (Gil. 450, 452;) State v. Probate Court, 25 Minn. 22, 25.

§ 4654. Shares, how set out.

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

(1889, c. 46, § 241.)

§ 4655. When owelty shall be paid.

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

(Id. § 242.)

§ 4656. Partition not to be established till owelty is paid or secured.

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

(Id. § 243.)

§ 4657. Guardians for minors and agents for non-residents—Notice to be given.

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

(Id. § 244.)

§ 4658. Report of commissioners and proceedings thereon.

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

(Id. § 245.)

§ 4659. Decree of distribution.

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

(Id. § 246.)

§ 4660. Expenses of partition and distribution paid by executor, etc., when.

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

(Id. § 247.)

§ 4661. When expenses of partition to be paid by parties in interest.

But if there are no effects in the hands of the executor or administrator which may be lawfully applied to that purpose, the expenses and charges of the partition, being ascertained by the probate court, shall be paid by all

the parties interested in the partition, in proportion to their respective shares or interests in the premises; and the proportion shall be settled and allowed by the probate court; and if any one neglects to pay the sum assessed on him by the court, an execution may be issued therefor against him by such court, in favor of the person entitled to the same.

(Id. § 248.)

§ 4662. Agents for non-resident heirs.

When any estate is assigned by decree of the court, as provided for in this chapter, to any person residing out of this state, and having no agent therein, and it is necessary that some person shall be authorized to take possession and charge of the same, for the benefit of such absent person, the court may appoint an agent for that purpose, and authorize him to take charge of such estate, as well as to act for such absent person in the partition and distribution.

(Id. § 249)

§ 4663. Bond and compensation of agent.

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

(Id. § 250.)

§ 4664. Bond of heir in case of distribution before final settlement.

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

(Id. § 251)

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[TITLE 13.]

[APPEALS.]

§ 4665. In what cases allowed.

An appeal may be taken to the district court from a judgment, order or decree of the probate court, in the following cases:

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

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decree made or rendered, alleged to have been procured by fraud, misrepresentation or through surprise or excusable inadvertence or neglect.

10. An order or decree directing or refusing a conveyance of real estate.

(1889, c. 46, § 252.)

See Mousseau's Will, 30 Minn. 204, 14 N. W. Rep. 887; Rumrill v. First Nat. Bank, 28 Minn. 203, 9 N. W. Rep. 731; Dutcher v. Culver, 23 Minn. 415.

SUBD. 2. An order appointing an executor, unless appealed from, is a conclusive adjudication that the executor is entitled to letters testamentary, and that the issuance thereof to him is proper, notwithstanding the fact that the executor's bond is not such as is required by statute, and is therefore insufficient. Mumford v. Hall, 25 Minn. 347.

SUBD. 3. See State v. Probate Court of Ramsey Co., 19 Minn. 128, (Gil. 95.)

SUBD. 4. See State v. Probate Court, 28 Minn. 382, 383, 10 N. W. Rep. 209; Labar v. Nichols, 23 Mich. 310.

An order of a probate court, denying the application of a creditor for further time within which to present a claim against the estate of a deceased person to the commissioners upon said estate, may be brought to this court for review upon a writ of *certiorari*. Massachusetts Mut. Life Ins. Co. v. Elliot, 24 Minn. 134.

The Probate Code does not allow an appeal from an order directing, or refusing to direct, payment of a claim against the estate; therefore certiorari will lie. State v. Probate Court, 51 Minn. 241, 53 N. W. Rep. 463.

Conclusiveness of order allowing claim, see note to § 4517.

SUBD. 5. Cf. Capehart v. Logan, 20 Minn. 442 (Gil. 395).

SUBD. 6. An appeal lies from an order determining the rights of a surviving wife in a homestead. Mintzer v. St. Paul Trust Co., 45 Minn. 323, 47 N. W. Rep. 973.

SUBD. 9. See In re Gragg, 32 Minn. 142, 19 N. W. Rep. 651.

After a probate court has made an order for the sale of real property of an estate, and it has been accordingly sold, the sale confirmed by the court, and a deed executed to the purchaser as directed by the order of confirmation, and the administrator has been discharged, the matter is out of the jurisdiction of the probate court, and it cannot entertain an application to review and set aside the sale proceedings. State v. Probate Court, 33 Minn. 94, 22 N. W. Rep. 10.

As to the power of the court to vacate a final decree of distribution. Fern v. Leuthold, 39 Minn. 212, 215, 39 N. W. Rep. 399.

Power to relieve against probate. Holden v. Meadows, 31 Wis. 284; Archer v. Meadows, 33 Wis. 166.

Power to annul and revoke orders and correct proceedings. Brunson v. Burnett, 2 Pin. 185; In re Fisher, 15 Wis. 511; Betts v. Shotton, 27 Wis. 667.

§ 4666. Who may appeal.

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

(1889, c. 46, § 253.)

Where, upon the refusal of the executor or administrator, a creditor, devisee, or heir appeals from the allowance of a claim, the notice of appeal should be that such creditor, devisee, or heir appeals. Proof of the refusal may be made when the right is questioned. Schultz v. Brown, 47 Minn. 255, 49 N. W. Rep. 982.

Appeal by payee of a note given for the benefit of another. Lake v. Albert, 37 Minn. 453, 35 N. W Rep 177.

See State v. Probate Court, 25 Minn. 22.

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84-NW 653

§ 4667. Same—All others who may.

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

(1889, c. 46, § 254.)

One against whom an administrator may bring suit, under § 5913, for the killing of intestate, is not entitled to appeal from an order of the probate court appointing such administrator. In re Hardy, 35 Minn. 193, 28 N. W. Rep. 219.

"Opportunity" here means such opportunity as the party is entitled to by law. Want

of opportunity is some act or omission in the proceedings which denies or abridges the party's legal rights. Hence the mere fact that notice duly served by publication did not convey *actual* notice to a party does not amount to a want of opportunity, within the meaning of the statute. In re Hause, 32 Minn. 155, 19 N. W. Rep. 973.

What allegations in the affidavit for an appeal will be deemed sufficient to show that appellant "had not notice or opportunity to be heard," as to the subject of the order appealed from, see In re Brown, 32 Minn. 443, 21 N. W. Rep. 474.

See Auerbach v. Gloyd, 34 Minn. 500, 27 N. W. Rep. 193; State v. Probate Court, 51 Minn. 241, 53 N. W. Rep. 463, 464.

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79-NW 176

§ 4668. 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, viz:

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

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

(1889, c. 46, § 255.)

See Washburn v. Van Steenwyk, 32 Minn. 354, 20 N. W. Rep. 324; State v. Probate Court, 28 Minn. 382, 10 N. W. Rep. 209; Auerbach v. Gloyd, 34 Minn. 500, 27 N. W. Rep. 193.

Notice of appeal by a contestant of a will may properly be served upon the attorney of the proponent. In re Will of Brown, 32 Minn. 443, 21 N. W. Rep. 474.

Under G. S. 1878, c. 49, § 15, held, that an undertaking might be filed in lieu of a recognizance. In re Brown, 35 Minn. 307, 29 N. W. Rep. 131.

As to sufficiency of the bond, and the effect of a defect therein. Riley v. Mitchell, 38 Minn. 9, 35 N. W. Rep. 472.

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§ 4669. Return on appeal.

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

(1889, c. 46, § 256.)

§ 4670. Appeal suspends order appealed from.

Such appeal shall suspend the operation of the order, judgment or decree appealed from and stay proceedings, until such appeal is determined or the district court to which such appeal is taken shall otherwise order. The district court in which such appeal may be pending shall have power in the exercise of a sound discretion upon good cause shown, to require the appellant, to give such further bond with surety, or such further security to be filed or deposited with the clerk of such district court, for the payment of damages in consequence of such suspension or stay which may be awarded against such appellant, in case he fails to obtain a reversal of the order, judg-

ment or decree so appealed from, as such district court may deem proper under the circumstances.

(Id. § 257.)

See Dutcher v. Culver, 23 Minn. 415.

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73-NW. 145

§ 4671. Notice of trial—Placed on calendar, when.

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

(1889, c. 46, § 258.)

§ 4672. Trial in district court.

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

(Id. § 259.)

As to the provisions in respect to trial prior to the enactment of the Probate Code, Marvin v. Dutcher, 26 Minn. 407, 4 N. W. Rep. 685; In re Post, 33 Minn. 478, 24 N. W. Rep. 184; Schmidt v. Schmidt, 47 Minn. 451, 50 N. W. Rep. 598.

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§ 4673. Proceedings in certain cases—Trial.

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

(1889, c. 46, § 260.)

§ 4674. Other cases, how tried.

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

(Id. § 261.)

On an appeal from an order refusing or granting probate, neither party has a constitutional right to a jury trial. Schmidt v. Schmidt, 47 Minn. 451, 50 N. W. Rep. 598. See Marvin v. Dutcher, 26 Minn. 407, 4 N. W. Rep. 685.

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§ 4675. When judgment affirmed.

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

(1889, c. 46, § 262.)

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§ 4676. When reversed—Proceedings.

In case the order, judgment, or decree of the probate court appealed from is reversed or modified in whole or in part by the final judgment of the district court, the district court shall make such order or decree as the probate court should have done, if it can do so, or if it cannot, then it shall remand the case to the probate court, with direction that the probate court make such order or decree, or proceed further in compliance with such final decision of the district court. Such final decision and judgment shall be certified by the district court to the probate court, and upon filing the same in the probate court, such court shall proceed to make any order or proceeding directed by such district court, if any directions are made. In case the decision and judgment of the district court requires no action of the probate court, then such order or decision shall be substituted in place of the orig-

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

(Id. § 263.)

See Berkey v. Judd, 31 Minn. 271, 17 N. W. Rep. 618; Graham v. Burch, 47 Minn. 171, 49 N. W. Rep. 697.

§ 4677. Prevailing party to recover costs.

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82-NW 670

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

(1889, c. 46, § 264.)

§ 4678. Judgment, execution, etc.

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

(Id. § 265)

[TITLE 14.]

[COMMITMENT OF INSANE PERSONS.]

This title was superseded by certain sections of Laws 1893, c. 5 (§ 3447 et seq.), but those sections of the law of 1893 have been held unconstitutional by the supreme court, which declares that these sections of the Probate Code are still in force. See State v. Billings (Minn.) 57 N. W. Rep. 794, on rehearing.

§ 4679. Information in insanity—Warrant.

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

(1889, c. 46, § 266.)

Legislation authorizing the judge of probate to examine and commit insane persons to the hospital for the insane is a mere regulation of the exercise of the general jurisdiction of such courts over the subject of guardianship, and is valid. State v. Wilcox, 24 Minn. 143.

Proceedings committing a person to the hospital for insane are not evidence of mental incapacity to convey. Knox v. Haug, 48 Minn. 58, 50 N. W. Rep. 934.

Procedure on examination of person alleged to be insane. State v. Billings (Minn.) 57 N. W. Rep. 206.

A warrant of commitment to an insane asylum, stating that a person ordered committed was found insane by probate judge, instead of by jury, after due examination, is void. Id.

§ 4680. Jury to determine, how appointed.

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

(1889, c. 46, § 267.)

§ 4681. Jury to be sworn.

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

(Id. § 268.)

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§ 4682. Examination of witnesses.

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

(Id. § 269.)

§ 4683. Report of jury.

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

(Id. § 270.)

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§ 4684. Warrant of committal issued.

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

State of Minnesota, } ss.
County of ——— }

In Probate Court.

In the matter of the insanity of ———.

To the superintendent of the ——— hospital for the insane at ———:

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

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

[Seal.]

———,
Judge of Probate, ——— County, Minnesota.

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

(Id. § 271.)

§ 4685. Female patient, how conveyed.

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

(Id. § 272.)

§ 4686. Questions to be answered on examination.

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

1. What is the person's name?
2. Where does he or she reside?
3. What is his or her age?
4. Is he or she married or single?
5. Has he or she any children? if so, how many?
6. What is his or her occupation?
7. Is he or she a church member?
8. What has been his or her habits as regards temperance and morality?
9. Where was he or she born?
10. Is insanity hereditary in the family?
11. What relatives, if any, have been insane?
12. What is the cause of this attack?
13. What is the form of this attack: acute, chronic, exalted, depressed, paroxysmal?

14. Is there any accompanying bodily disorder?
15. When were the first symptoms of the disease manifested, and in what way?
16. Is this the first attack?
17. If not, when did the others occur, and what was the duration of each?
18. On what subject or in what way is insanity now manifested?
19. Has he or she ever shown any disposition to injure others? if so, was it from sudden passion or premeditation?
20. Has suicide ever been attempted? if so, in what way, and is the propensity now active?
21. Is there any disposition to filthy habits, destruction of clothes, etc?
22. Has he or she been subject to any bodily disease, epilepsy, suppressed eruptions, discharges or sores, or ever had any injury to the head?
23. Has restraint or confinement ever been employed?
24. If so, what kind and how long?
25. Has he or she ever been under medical treatment? if so, mention particulars and effects?
26. State any other particulars supposed to have a bearing on the case.
27. State address of relative or friend.

(Id. § 273.)

§ 4687. When discharged, probate court to be notified.

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

(Id. § 274.)

§ 4688. Bond to be required in certain cases.

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

(Id. § 275.)

§ 4689. Term "insane" defined.

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

(Id. § 276.)

§ 4690. Fees to be allowed.

The following fees shall be allowed by the probate court:

To the physician or physicians, and such other person on the jury for examining the person, and making written report thereof, three dollars each per day, and fifteen cents for each mile traveled in so doing. 4690 '05 . 57

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

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

(Id. § 277.)

§ 4691. Same—How paid.

Such fees and disbursements shall be audited by the probate court, and on written order of the probate court shall be paid by the county treasurer; such 4691 99 - 16

order shall be filed with the county auditor, who shall draw his warrant for the amount thereof on the county treasurer.

(Id. § 278.)

§ 4692. Same—When not insane.

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

(Id. § 279.)

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§ 4693. Court commissioner to act, when.

In case the probate judge is absent from the county or unable to perform his duties, or would be disqualified as a juror, or is a material witness, the court commissioner shall upon information of insanity attend at the office of the probate judge so absent or unable to act, and shall hear and determine the matters fully as provided in this chapter in the same manner and with like effect as the judge of probate of said court might have done had he not been so absent or unable to perform his duties. Such court commissioner shall cause the same records to be kept in the county where such alleged insane person is as if kept by the probate court therein and in addition the cause of his performing such duties.

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(Id. § 280.)

[TITLE 15.]

[COMMITMENT OF PERSONS UNDER GUARDIANSHIP TO THE INEBRIATE HOSPITAL.]

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§ 4694. Inebriates may be committed to hospital, when.

Any person who is, or who may hereafter become an inebriate needing medical treatment for such inebriety may be committed to the special department for the treatment of inebriates in the second hospital for insane at Rochester, Minnesota.

(1889, c. 46, § 281, as amended 1893, c. 116, § 24.)

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§ 4695. Jury to determine necessity.

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Whenever the guardian, relative, or friend of any inebriate shall present to the probate court of the county wherein such inebriate resides a petition showing that such person is a proper subject for medical treatment on account of excessive drinking, the court shall cause such person to be examined by a jury constituted and appointed in like manner as is provided for the examination of insane persons, to ascertain the fact as to whether such person is a proper subject for medical treatment on account of excessive drinking.

(1889, c. 46, § 282, as amended 1893, c. 116, § 25.)

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§ 4696. Notice to be served upon guardian.

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

(1889, c. 46, § 283.)

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§ 4697. Warrant of committal to be made.

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

State of Minnesota, } ss.
County of ———. }

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

———, having been found, upon examination, to be a proper subject for medical treatment on account of excessive drinking, you are therefore required

to receive —— into the special department of said hospital for the treatment of inebriates and keep —— there until legally discharged.

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

[Seal.]

——————,
Judge of Probate, —— County, Minnesota.

(Id. § 284.)

§ 4698. What proceedings to be had.

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

(Id. § 285.)

[TITLE 16.]

[PROBATE BONDS AND THEIR PROSECUTION.]

§ 4699. Bonds to run to judge of probate.

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

(1889, c. 46, § 286.)

The "creditors" to whom a right of action upon an executor's bond was given by G. S. 1878, c. 55, were those who had been determined to be such by an allowance of their claims against the estate, by commissioners or by the judge of probate, in the manner prescribed by statute. First Nat. Bank v. How, 28 Minn. 150, 9 N. W. Rep. 626.

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

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

As to the right of a creditor to bring an action upon a probate bond under G. S. 1878, c. 55. Wood v. Myrick, 16 Minn. 494 (Gil. 447); Waterman v. Millard, 22 Minn. 261; Forepaugh v. Hoffman, 23 Minn. 295: O'Gorman v. Lindeke, 26 Minn. 93, 1 N. W. Rep. 841; Berkey v. Judd, 31 Minn. 275, 17 N. W. Rep. 619.

As to the right of an administrator de bonis non to bring an action upon the bond. Balch v. Hooper, 32 Minn. 158, 20 N. W. Rep. 124.

When a legatee might maintain an action on the bond. Huntsman v. Hooper, 32 Minn. 163, 20 N. W. Rep. 127.

Where the bond was joint and several, held, that the action might be maintained against one obligor. O'Gorman v. Lindeke, supra.

Jurisdiction of the probate court in an action on the bond. Palmer v. Pollock, 26 Minn. 433, 4 N. W. Rep. 1113.

G. S. 1878, c. 55, § 7, authorizing suit to be brought on an administrator's bond in the name of a creditor whose claim had been ordered paid, and who had been authorized by the probate court to sue, applied as well to bonds given before as after its passage. Lanier v. Irvine, 24 Minn. 116.

The statute of limitations did not begin to run upon an action brought upon the bond of an executor or administrator by a creditor or next of kin, under G. S. 1878, c. 55, until permission to bring such action had been granted such person. Wood v. Myrick, 16 Minn. 494, (Gil. 447.)

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

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

As to leave to sue, see Forepaugh v. Hoffman, 23 Minn. 295; Palmer v. Pollock, 26 Minn. 433, 440, 4 N. W. Rep. 1113.

§ 4700. Additional bonds may be required.

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Whenever any probate court is satisfied that the bond of an executor, administrator or guardian is insufficient, it may, on its own motion, or on application of one or more of the persons interested in the estate of the deceased,

or of the ward, require an additional bond; and a refusal or failure to furnish or give the same within a reasonable length of time, shall be deemed a sufficient cause for the removal of such executor, administrator or guardian. Upon application to the probate court having jurisdiction, made by the surety of an executor, administrator, or guardian to be discharged from further liability as such surety, said court shall by order require such executor, administrator or guardian to furnish a new bond, to the satisfaction of said court, within ten days after personal service of such order. Compliance with such order shall operate to discharge such surety from liability for any subsequent act or omission of such executor, administrator or guardian, and an order shall be thereupon made to that effect; and in such case the surety so exonerated may enforce an accounting before the court by such executor, administrator or guardian concerning all his prior acts and doings. If an executor, administrator or guardian, upon being ordered to furnish a new bond as aforesaid, shall fail to comply therewith, he shall be removed, and be compelled to render and settle his account as soon as practicable. And it is hereby made the express duty of every probate court of this state to look through and examine, at least once in each year, all such bonds on file and in force pending the settlement of estates in its court with a view of ascertaining the solvency of the parties bound in such bonds, and whenever the court is satisfied that any such bond is insufficient an additional bond shall be required as above stated.

(1889, c. 46, § 287, as amended 1893, c. 115, § 1; 1893, c. 116, § 26.)

§ 4701. Copy to be received in evidence.

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

(1889, c. 46, § 288.)

§ 4702. Court to give certified copy, when.

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

(Id. § 289.)

[TITLE 17.]

[FORMS OF LETTERS.]

§ 4703. Letters testamentary.

Letters testamentary may be substantially in the following form:

State of Minnesota, } ss.
County of ——. }

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

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

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

(1889, c. 46, § 290.)

§ 4704. Letters of administration with the will annexed.

Letters of administration with the will annexed may be substantially in the following form:

State of Minnesota, } ss.
County of ——. }

The last will of ——, deceased, having been proved and recorded, in the probate court of the county of ——, and there being no executor named in

the will (or as the case may be), ——— is hereby appointed administrator with the will annexed.

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

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

(Id. § 291.)

§ 4705. Letters of administration.

Letters of administration may be substantially in the following form:

State of Minnesota, } ss.
County of ———. }

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

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

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

(Id. § 292.)

§ 4706. Letters of guardianship.

Letters of guardianship may be substantially in the following form:

State of Minnesota, } ss.
County of ———. }

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

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

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

(Id. § 293.)

[TITLE 18.]

[RESIGNATIONS AND REMOVALS OF EXECUTORS, ADMINISTRATORS, AND GUARDIANS.]

§ 4707 Executor, etc., may resign trust, when.

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

(1889, c. 46, § 294.)

A resignation by an administrator, on which was endorsed its acceptance by the probate judge, but of which no entry was made on the record, and no further act done in regard thereto, held not to effect a removal of the administrator or a revocation of his letters. Rumrill v. First Nat. Bank, 28 Minn. 202, 9 N. W. Rep. 731.

An acceptance by the probate court of the resignation of an administrator, by petition with which his account is filed, upon notice and hearing made and entered of record in the form of an order, held to have the effect of a revocation of his letters. Balch v. Hooper, 32 Minn. 158, 20 N. W Rep. 124.

§ 4708. Executor, etc., may be removed, when.

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

(1889, c. 46, § 295.)

See Marvin v. Dutcher, 26 Minn. 404, 4 N. W Rep. 685.

Revocation of irregular letters. Brunson v. Burnett, 2 Pin. 185.

Sufficiency of allegation of petitioners' interest in petition for removal. White v. Spaulding, (Mich.) 14 N. W. Rep. 684.

As to the validity of a judicial sale made by an administrator, after his removal, in proceedings commenced before, see Baldwin v. Allison, 4 Minn. 25, (Gil. 11.)

As to grounds of removal of executors and administrators, see Drake v. Green, 10 Allen, 124; Winship v. Bass, 12 Mass. 198; Newcomb v. Williams, 9 Metc. 525; Thayer v. Homer, 11 Metc. 104; Richards v. Sweetland, 6 Cush. 324; Andrews v. Tucker, 7 Pick. 250; Hussey v. Coffin, 1 Allen, 354; Troy Bank v. Stanton, 116 Mass. 435; Estate of Pike, 45 Wis. 391.

§ 4709. May be cited to show cause—Citation, how served.

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

(1889, c. 46, § 296.)

§ 4710. When absent from county, how served.

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

(Id. § 297.)

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§ 4711. Administrator de bonis non to be appointed, when.

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

(Id. § 298.)

The probate court has the power, so long as the estate remains unadministered, in whole or in part, to appoint an administrator to succeed one who has been removed. Wilkinson v. Estate of Winne, 15 Minn. 159, (Gil. 123.)

Title to letters *de bonis non*, see Russell v. Hoar, 3 Metc. 187.

Appointment of an administrator in addition to one already qualified and acting, held erroneous only, and valid unless corrected on appeal. Culver v. Hardenbergh, 37 Minn. 225, 33 N. W. Rep. 792.

[TITLE 19.]

[CORONER TO TAKE CHARGE OF PERSONAL ESTATE, IN CERTAIN CASES.]

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§ 4712. Personal property taken by coroner, when.

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

(1889, c. 46, § 299.)

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§ 4713. Property to be sold by coroner, when.

In case no one entitled to such property shall demand the same within six months, the coroner shall report such fact to the probate court who may order the property sold at public sale, upon such notice as the court may direct by such coroner, who shall sell the same as directed and report such sale to the probate court. Such coroner shall be allowed all reasonable expenses for the care of such property and selling the same, and after deducting such expenses he shall deposit the proceeds of such sale with the treasurer of the

county, in the name of the deceased or insane person; the treasurer shall give the coroner duplicate receipts for the same, one of which shall be filed by the coroner with the county auditor and one in the probate court.

(Id. § 300.)

§ 4714. Proceeds to be paid over by county treasurer.

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

(Id. § 301.)

[TITLE 20.]

[MISCELLANEOUS PROVISIONS.]

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§ 4715. Exemplification of appointment may be filed—Evidence.

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

(1889, c. 46, § 302.)

See Brown v. Brown, 35 Minn. 191, 28 N. W. Rep. 238.

§ 4716. Discharge of mortgage, etc., by such appointee.

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

(1889, c. 46, § 303.)

As to foreclosure by foreign executor, etc., see § 6053.

§ 4717. Foreign appointee may act by attorney.

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

(1889, c. 46, § 304.)

§ 4718. Petitions, how verified.

All petitions and information shall be in writing and signed by the person making the same; they shall be verified to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on his information and belief, and as to those matters that he believes them to be true; the petition or information shall be made by at least one of the parties interested; a petition may be made and verified by an agent or attorney.

(Id. § 305.)

§ 4719. Publications, where and how made.

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

(Id. § 306.)

Where the statute required a notice of sale to be published "for three weeks, successively, next before such sale," an allegation that the notice was published "for

three successive weeks previous" to the sale held not to show a compliance with the statute. Montour v. Purdy, 11 Minn. 384 (Gil. 279).

A sale after an interval of nine days from the last publication held void. Hartley v. Croze, 38 Minn. 325, 37 N. W. Rep. 449.

A provision requiring notice of sale to be published for three weeks, successively, held satisfied by three publications in a daily newspaper, at the rate of one a week, on regular publication days, separated by an interval of a week. Dayton v. Mintzer, 22 Minn. 393; followed in Greenwood v. Murray, 28 Minn. 123, 9 N. W. Rep. 629.

A notice of sale was published on the 6th, 13th, and 20th of October for a sale to be made November 1st. Held, that the three-weeks publication required by the statute became complete October 27th, and that the sale, having been made within the week following, was valid. Wilson v. Thompson, 26 Minn. 299; 3 N. W. Rep. 699.

What is a newspaper. See Beecher v. Stephens, 25 Minn. 146; Hull v. King, 38 Minn. 849, 37 N. W. Rep. 792.

What is a daily newspaper. See Tribune Pub. Co. v. City of Duluth, 45 Minn. 27, 47 N. W. Rep. 309.

What constitutes a publication. See Pratt v. Tinkcom, 21 Minn. 142.

What is a legal newspaper. See §§ 7990-7996.

§ 4720. Same—Where in certain cases.

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

(1889, c. 46, § 307.)

§ 4721. May be published in the English language in any newspaper in said county.

That all notices and publications provided for in the probate code of this state shall be printed and published in a newspaper, printed and published in the English language in the county where the proceedings are had, once in each week for three successive weeks; providing that whenever the judge of probate shall deem it for the best interest of all parties concerned, he may cause the same to be published in the English language in any paper in said county. Provided further, That this act shall only apply to the counties of Brown, Ramsey and Winona.

(1891, c. 58, § 1.[3])

As to what constitutes a "newspaper," see §§ 7990-7996.

§ 4722. Same.

No general law hereafter passed shall be construed to modify or repeal the provisions of this act unless especially provided in said act.

(1891, c. 58, § 2.)

§ 4723. Proof of publication, how made—Effect of.

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

(1889, c. 46, § 308.)

§ 4724. Fees of executors, etc.

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

(Id. § 309.)

§ 4725. Fees of appraisers.

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

(Id. § 310.)

§ 4726. Powers of probate court in certain cases.

The probate court shall have the same power to examine witnesses and parties on oath, to compel their attendance, to preserve order during any

[3] An act to provide for the publication of probate notices in the counties of Brown, Ramsey and Winona, Minnesota. Approved April 17, 1891.

proceedings before it, and punish contempts as a district judge possesses under the provisions of law.

(Id. § 311.)

§ 4727. Same.

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

(Id. § 312.)

§ 4728. Depositions, how taken.

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

(Id. § 313.)

§ 4729. Adjournments, how and when taken.

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

(Id. § 314.)

§ 4730. Probate court may correct records.

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

(Id. § 315.)

§ 4731. The word "husband" construed.

Whenever in this code the word "husband" occurs it shall be construed to apply also to wife.

(1889, c. 46, § 316.)

§ 4732. Notice of application for letters of administration with the will annexed.

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

(Id. § 317.)

§ 4733. Certified copies of files and records.

It shall be the duty of the probate court to furnish a certified copy under its official seal of any paper on file or of record in said court upon payment thereof at the rate of ten cents per folio and twenty-five cents for each certificate.

(Id. § 318.)

§ 4734. Insanity of probate judge.

Whenever the probate judge of any county becomes or is considered insane, the judge of the district court for such a county shall, upon the verified petition of five legal voters thereof, proceed to examine into such alleged insanity, substantially in and [the] manner and for the purpose prescribed in title three, chapter thirty-five, general statutes one thousand eight hundred and seventy-eight. If on such examination such probate judge is found to be insane or incapacitated to act from mental derangement, the governor shall, on presentation of the certificate of such findings or authenticated

copy thereof declare the office of such probate judge vacant and appoint a suitable person to fill such vacancy as provided by law.

(Id. § 319.)

G. S. 1878, c. 35, tit. 3, §§ 21-23, 27, are repealed by § 322 of this code (§ 4737).

§ 4735. Sheriff to execute probate process.

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

(1889, c. 46, § 320.)

§ 4736. Notice of proceedings in certain cases.

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

(Id. § 321.)

[TITLE 21.]

[REPEALS, AND WHEN THIS CODE TAKES EFFECT.]

§ 4737. Repeal of certain laws.

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

(1889, c. 46, § 322.)

§ 4738. Saving vested rights.

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

(Id. § 323.)

§ 324. Fees of probate judge.

Repealed by Laws 1891, c. 117.

§ 325. Same—Account to be filed with county auditor.

Repealed by Laws 1891, c. 117.

[TITLE 22.]

[PROBATE PROCEEDINGS LEGALIZED]

§ 4739. Will probated and recorded—Evidence—Limitation of action.

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

(1887, c. 202, § 1;[4] G. S. 1878, v. 2, c. 46, § 37.)

§ 4740. Act not retrospective.

That nothing herein contained shall be construed to apply to any action or proceeding now pending in which the validity of such probate is involved.

(1887, c. 202. § 2; G. S. 1878, v. 2, c. 46, § 38.)

§ 4741. Unapproved claims—Payment by executor or administrator.

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

(1889, c. 27, § 1.[5])

See, to same effect, Laws 1887, c. 184, and Laws 1889, c. 32.

§ 4742. Same.

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

(1887, c. 184; G. S. 1878, v. 2, c. 46, § 8a.)

[4] An act defining the force and effect of wills heretofore admitted to record, and to limit the time within which the same may be questioned. Approved March 3, 1887. In effect from and after January 1, 1888.

[5] An act relating to the allowance of the accounts of executors and administrators. Approved April 24, 1889.

§ 4743. Same—Payment by guardian of insane ward.

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

(1889, c. 34, § 1.[6])

§ 4744. Sale not invalidated, when.

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

(1889, c. 196, § 1.[7])

§ 4745. Resignation of executor or administrator—Confirmed, when.

That in all cases where any executor or administrator has heretofore resigned his trust, and the same has been accepted, and his final account of administration has been examined, allowed, and approved by the proper court, such resignation is hereby declared to be legal and binding, and to have forever discharged him from all his duties, powers, and liabilities as such executor or administrator, and he and his sureties upon any bond filed in such matter or estate are hereby forever released and acquitted.

(1887, c. 190, § 1;[8] G. S. 1878, v. 2, c. 46, § 19.)

§ 4746. Same—Exception, when.

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

(1887, c. 190, § 2; G. S. 1878, v. 2, c. 46, § 20.)

§ 4747. Construction of act—Intentional fraud.

Nothing in this act shall be construed to release an executor or administrator who has been guilty of intentional fraud or malfeasance in executing his trust, and he and his sureties shall still be liable: *provided, however*, that no action or proceeding shall be against such executor, administrator, or sureties, save by permission of the probate court upon notice to him or them, and upon proof, to the satisfaction of such court, of the probability of intentional

[6] An act relating to the allowance of the accounts of guardians of insane persons. Approved April 24, 1889.

[7] An act in relation to sale of real estate heretofore made by executors, administrators or guardians. Approved April 24, 1889.

[8] An act to discharge executors and administrators, and cancel their bonds. Approved March 7, 1887.

fraud or malfeasance in such estate; nor shall any judgments be rendered against him or them unless such intent is shown in the trial court.

(1887, c. 190, § 3; G. S. 1878, v. 2, c. 46, § 21.)

§ 4748. "Executor" defined.

The word "executor," in this act, shall be construed to include an administrator with the will annexed.

(1887, c. 190, § 4; G. S. 1878, v. 2, c. 46, § 22.)

§ 4749. Opening decree made without notice.

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

(1883, c. 113, § 1, as amended 1885, c. 49; G. S. 1878, v. 2, c. 46, § 19a.)