

1934 Supplement  
To  
**Mason's Minnesota Statutes**  
1927

(1927 to 1934)  
(Superseding Mason's 1931 Supplement)

Containing the text of the acts of the 1929, 1931, 1933 and 1933-34 Special Sessions of the Legislature, both new and amendatory, and notes showing repeals, together with annotations from the various courts, state, federal, and the opinions of the Attorney General, construing the constitution, statutes, charters and court rules of Minnesota



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## Part III. Civil Actions and Proceedings

## CHAPTER 74

## Probate Courts

**8690. Establishment, Sessions, etc.**

## PROBATE COURTS GENERALLY

**1. Jurisdiction in general.**

Claims against executor and by executor against creditor must be enforced in district court. 172M68, 214NW 895.

District court has jurisdiction to determine title to homestead pending proceeding in probate court to administer estate of decedent. 171M182, 213NW736.

**2. Jurisdiction of estates of deceased persons.**

Judgments are not subject to collateral attack and district court cannot in an independent action in equity amend a decree of distribution for mere errors in making up the final account by the administrator. 175M68, 220NW406.

Laws 1925, c. 262 (§8080-1) is cumulative and not a bar to administration by the probate court upon the estate of one absent for seven years. 175M493, 221NW 876.

Administration of an estate of a decedent is a proceeding in rem and jurisdiction is not obtained if there are no assets of decedent within the territorial jurisdiction of the probate court. 176M445, 223NW633.

Cause of action under Federal Employers' Liability Act is transitory and probate court of this state has jurisdiction to appoint special administrator to bring suit here, even though next of kin reside in another state and injury and death of employee occurred there. Peterson v. C., 187M228, 244NW823. See Dun. Dig. 6022c.

District court has no jurisdiction to enjoin administrator from selling land under license of probate court. Mundinger v. B., 248NW47. See Dun. Dig. 7770, 7770c.

District court has no jurisdiction to require accounting of administrator concerning affairs of estate. Id.

**7. Held not to have jurisdiction.**

While court has jurisdiction to determine title for purpose incident to administration it has no jurisdiction to determine title as between persons interested in estate and outsiders. Op. Atty. Gen., May 16, 1930.

**8691-1. Bond of Probate Judge.**—Every Probate Judge shall give bond in the amount provided by Section 8691, Mason's Minnesota Statutes of 1927, and any law or part of law, either general or special, inconsistent herewith, is hereby repealed. (Act Mar. 16, 1933, c. 88.)

**8694. Court first acquiring jurisdiction has exclusive jurisdiction.**

A conflict between probate courts of two counties as to which shall exercise jurisdiction over the estate of a person deceased held a question of venue rather than jurisdiction. Martin v. M., 247NW515. See Dun. Dig. 7773(94).

Jurisdiction of a probate court over an estate, once properly invoked, precludes subsequent exercise of jurisdiction over same matter by another probate court, unless and until first proceeding is dismissed or discontinued. Id.

**8695. Counties in which administration shall be had.**

Martin v. M., 247NW515; note under §8694.

**8701. Incidental duties of probate court.**

§9283 applies to an order of the probate court admitting a will to probate, and limits the time within which such order may be vacated. In re Butler's Estate, 183M 591, 237NW592. See Dun. Dig. 7784, 10255.

Petition and affidavit presented to the probate court, asking for the vacation of an order admitting a will to probate, liberally construed, prima facie showed sufficient grounds for her objections to the will. In re Butler's Estate, 183M591, 237NW592. See Dun. Dig. 7784, 10255.

Court did not abuse its discretion in denying application to vacate the order of probate court on the ground of laches and long acquiescence in the order after having actual notice thereof. In re Butler's Estate, 183M591, 237NW592. See Dun. Dig. 7784, 10255.

**1. Conforming records to the fact.**

Probate court, like district court, is authorized by Constitution and common law to correct at any time clerical error, to clarify ambiguities, and to make its judgments read as they were intended. Simon, 187M399, 246NW31. See Dun. Dig. 7784.

Probate court, like district court, may, within one year after notice thereof, correct its records and decrees and relieve a party from his mistake, inadvertence, surprise, or excusable neglect. Simon, 187M399, 246NW31. See Dun. Dig. 7784.

**2. Vacating orders, judgments and decrees.**

Real estate assigned by final decree passes out of the control of the court and is discharged from further administration, and thereafter neither the probate court nor the district court on appeal has authority to vacate the decree without notice to the persons who then hold title to such real property. 175M524, 222NW68.

The probate court has power to vacate its final decree on the ground of fraud, mistake, inadvertence or excusable neglect upon proper application seasonably made. 175M524, 222NW68.

Application to vacate decree of descent rendered by probate court on ground of mistake in both judicial discretion, and on appeal the district court exercises a like discretion. 179M315, 229NW133.

Section 9283 governs the vacation of judgments and orders of the probate court as well as those of the district courts for mistake, inadvertence and excusable neglect. Walker's Estate v. M., 183M325, 236NW485. See Dun. Dig. 7784.

Inadvertent neglect of attorneys for executors in failing to ascertain the filing of a claim and the date of hearing was excusable. Walker's Estate v. M., 183M325, 236NW485. See Dun. Dig. 7784.

In determining whether judicial discretion should relieve executor against a claim allowed as on default, it is proper to consider the statement of claim as filed and the objections or defense proposed thereto. Walker's Estate v. M., 183M325, 236NW485. See Dun. Dig. 7784.

In absence of fraud and mistake of fact, power of probate court to amend, modify, and vacate an order or decree is exhausted when time to appeal therefrom has expired. Simon, 187M399, 246NW31. See Dun. Dig. 7784.

After one year and after expiration of time for appeal, probate court could not modify or vacate its final order settling account on showing that deceased personal representative had embezzled money. Simon, 187M399, 246NW31. See Dun. Dig. 7784(4).

In case of fraud or mistake of fact probate court has jurisdiction to vacate or set aside orders or judgments, or to correct its own clerical mistakes or misprision, even after time allowed for appeal. Simon, 187M399, 246NW31. See Dun. Dig. 7784(5).

**8702. Judges of probate court, etc.**

Probate judge is not entitled to reimbursement from the county for his expenses in attending a convention of the Probate Judge's Association. Op. Atty. Gen., Feb. 9, 1931.

**8704. Certified copies.**

This section does not warrant a fee for making return on appeal to district court under Mason's Stat. 1927, §8986. Op Atty. Gen., Apr. 30, 1929.

**8706. Definitions.**

174M354, 219NW286; note under §9251.

Legislature may fix the age at which a delinquent child shall attain majority different from that fixed for other children. State v. Patterson, 247NW573, 249NW187. See Dun. Dig. 4431.

**8706-1. Salary of Judge of Probate in certain counties.**—That from and after January 1, 1929, the compensation of the judges of the Probate Court in all counties of this state now or hereafter having a population of 240,000 or more inhabitants, shall be \$7,500 per annum, which salary shall be paid in equal monthly installments out of the county treasury of such counties upon warrants of the county auditor out of any funds of the county not otherwise appropriated. (Act Mar. 28, 1929, c. 96, §1.)

**8706-2. Salaries and clerk hire not to be affected by decrease in valuation.**—Neither the salary nor allowance for clerk hire of any judge of probate shall be decreased during the term for which he was elected or appointed by reason of any decline in the population of the county or by a decrease in the valuation of the county, but such salary and clerk hire shall be paid during the balance of such term of office in the

amounts authorized prior to such reduction in population, or by a decrease in valuation of the county. (Act Feb. 26, 1931, c. 30.)

See §997-1, Mason's Minn. Stat. 1927.

This act did not operate so as to keep salary of probate judge at old figure where probate judge resigned and other was appointed for the remainder of the term after there was a decrease in valuation. Op. Atty. Gen., Dec. 29, 1931.

### 8707. Salaries of judges of probate in certain counties—Clerk hire.

#### SALARY AND CLERK HIRE IN PARTICULAR COUNTIES

Counties of 38 to 42 congressional townships and assessed valuation of \$8,000,000 to \$12,000,000. Laws 1929, c. 37, §3, fixes salary of probate judge at \$2,000, and clerk hire as now provided by law.

Counties with 60 to 80 congressional townships and 45,000 to 75,000 inhabitants. Act Mar. 9, 1929, c. 69, fixes salary of judge of probate at \$3,000.

Counties with 60 to 80 congressional townships and population of 45,000 to 75,000. Act Mar. 9, 1929, c. 69, authorizes an allowance of not more than \$1,500 per year for clerk hire.

Counties with 38 to 42 congressional townships and assessed valuation of \$8,000,000 to \$12,000,000. Act Mar. 22, 1929, c. 82, fixes salary of judge at \$2,400, and clerk hire as now allowed by law.

Counties with assessed valuation of \$4,500,000 to \$6,000,000 and 28 to 29 congressional townships. Act Mar. 22, 1929, c. 83, fixes salary of judge at \$1,700.

Counties with population of not less than 220,000 and not more than 330,000. Laws 1929, c. 391, authorizes total salary appropriation of \$19,500, clerk to receive not more than \$4,000, deputy not more than \$2,500 and inheritance tax clerk not more than \$3,000, balance for additional clerical and stenographic help.

Counties containing between 200,000 and 250,000 and having population between 12,000 and 18,000. Laws 1931, c. 20, fixes salary of judge at \$2,400, and allows \$400 per year for clerk hire, with increase to \$1,200 on order of county board.

Counties having 22 to 25 organized towns, not including cities and villages, and population of 29,000 to 33,000. Laws 1931, c. 25, fixes salary of judge at \$3,000, clerk \$2,100, deputy clerk \$1,500, shorthand reporter \$1,200, and \$200 for additional clerical and stenographic help. Payments theretofore made validated.

Counties containing 16 to 18 townships, with tax valuation of \$3,000,000 to \$10,000,000. Laws 1931, c. 141, fixes salary of probate judge at \$2,150, with allowance for clerk hire as provided by law.

Counties with population of 29,000 to 31,000, and containing city of third class. Laws 1931, c. 142, fixes salary of judge at \$2,700, and \$2,700 for clerk hire, of which \$1,300 shall be paid to the clerk, \$1,000 to deputy clerk, and additional sum to be allowed by the county board not exceeding total of \$1,500 for the clerk and \$1,200 for deputy clerk.

Counties having 70 to 80 congressional townships and assessed valuation of \$2,000,000 to \$5,000,000. Laws 1931, c. 284, amends Laws 1921, c. 351, §1, by making the act apply to counties described above.

Act Feb. 9, 1933, c. 16, provides that in counties having 81 to 85 congressional townships and 18,000 to 30,000 population, the probate judge shall receive \$1,800 per year, and clerk hire as fixed by county board. Laws 1925, c. 7, repealed.

Act Mar. 9, 1933, c. 76, §9, effective Jan. 1, 1934, provides that in counties with area of 35 to 55 congressional townships, and assessed valuation of not more than \$2,000,000, exclusive of moneys and credits, the probate judge shall receive \$750 in addition to his fees. Salary payable monthly. Clerk hire fixed by county board.

Act Mar. 20, 1933, c. 96, provides that in counties having 55,000 to 70,000 population, and 35 to 45 congressional townships, the county board may fix the salary of the probate judge at not to exceed \$3,500, and require fees to be paid into general fund.

Act Apr. 1, 1933, c. 143 amends Laws 1929, c. 69, §1, to provide that probate judge shall receive \$2,500 per annum.

Act Apr. 8, 1933, c. 178, amends Laws 1929, c. 83, to provide that in counties having assessed valuation of \$3,500,000 to \$4,500,000, and area of 28 or 29 congressional townships, the probate judge shall receive \$1,500 per annum.

Act Apr. 11, 1933, c. 212, effective May 1, 1933, authorizes county board in counties having 50 to 70 congressional townships and assessed valuation, exclusive of moneys and credits, of less than \$1,500,000, to fix salaries of county officers and require their fees to be paid into the county treasury.

Act Apr. 13, 1933, c. 219, §1, provides that in counties having assessed valuation of not more than \$6,000,000 and population of not more than 12,500 the county board shall fix the salaries of subordinate county employees. This section seems to be invalid as not expressed in the title of the act. Section 2 authorizes the county board, in counties having assessed valuation, excluding moneys and credits, of \$2,500,000 to \$3,000,000, population of 9,000

to 10,000, and area of 29 to 31 congressional townships, to fix the salaries of all subordinate county employees.

Act Apr. 15, 1933, c. 231, provides that in counties having 100 or more congressional townships and assessed valuation, including moneys and credits, of \$4,000,000 to \$6,000,000 the probate judge shall receive \$1,400 per annum, and clerk hire to be fixed by the county board.

Act Apr. 15, 1933, c. 284, §7, amending Laws 1921, c. 437, Laws 1927, c. 225, and Laws 1931, c. 192, provides that in counties having 44 or 45 townships and assessed valuation, exclusive of money and credits, of \$9,000,000 to \$12,000,000, the judge of probate shall receive \$1,965 per year and fees for certified copies, with maximum of \$2,880, and clerk hire of \$1,020 per year.

Act Apr. 21, 1933, c. 432, §4, effective May 1, 1933, amends §6 of Laws 1925, c. 91, by making the salary of the probate judge \$1,908 per year, with not exceeding \$780 for clerk hire, fees to belong to county.

The amendment by Laws 1927, c. 402, did not affect the amendment by Laws 1927, c. 63, and both must be given effect. Op. Atty. Gen., Jan. 17, 1929.

Laws 1931, c. 30, Mason's Minn. Stat. 1931 Supp. §8706-2 did not operate to keep salary at old figure where probate judge resigned and a new judge was appointed for the remainder of his term. Op. Atty. Gen., Dec. 29, 1931.

Fees provided for may be retained by judges of probate in counties which come within provision of this section. Op. Atty. Gen., Apr. 13, 1932.

Moneys and credits are to be considered part of assessed valuation in determining salary of probate judge. Op. Atty. Gen., Apr. 13, 1932.

Legislature possesses right to change salaries of county officers at any time. Op. Atty. Gen., Feb. 21, 1933.

Probate judge is neither required to nor authorized to make charge for acknowledgments when they relate and pertain to his office as such, but if charge is made, fee should be turned into county. Op. Atty. Gen., June 22, 1933.

Probate judge performing marriage ceremonies is not required to turn over fee to county. Id.

Probate judge is obligated to account to county for fees received for taking acknowledgments only where such services are part of duties with respect to matters pending before him. Op. Atty. Gen., July 24, 1933.

Fraction of million assessed valuation should be treated as a million in computing compensation. Op. Atty. Gen., Aug. 1, 1933.

#### PROBATE PRACTICE

##### 8708. Proceedings, how begun.

Probate court acquired jurisdiction even though the person making petition was not a person interested in the estate; the petition upon its face stating that she was. 174M28, 218NW235.

##### 8709. Notice of hearing, when required.

Real estate assigned by final decree passes out of the control and is discharged from further administration, and thereafter neither the probate court nor the district court on appeal has authority to vacate the decree without notice to the persons who then hold title to such real property. 175M524, 222NW68.

##### 8710-1. Certain probate proceedings legalized.—

That any hearing or proceeding heretofore had or held in any probate court in this state, under the provisions of the probate code relating to the probating of a will, the appointment of an executor or administrator, or the issuance of a final decree, where the notice of such hearing or proceeding was published the requisite number of times in a legal and proper newspaper, but such hearing or proceeding was prematurely held, and no action or proceeding has heretofore been instituted to set aside or invalidate the action of the probate court in such hearing or proceeding, is hereby legalized, validated and given the same force and effect as if proper notice thereof had been given and such hearing or proceeding has been held at the proper time; provided, that nothing herein contained shall be construed to apply to any action or proceeding heretofore brought or which shall be brought within one year from the passage of this act to test the validity of any such probate hearing or proceeding, or in which a defense alleging the invalidity thereof has been interposed; or to any action heretofore brought or which shall be brought within one year from the date of the passage of this act involving any right, title or estate in lands situate within this state derived under said will. (Act Apr. 21, 1933, c. 394.)

##### 8714. Will of alien—Notice.

When a naturalized citizen dies within this state leaving property therein, it is not necessary to serve a notice of the time and place of hearing upon the consular representative of the county of his birth. 174 M28, 218NW235.

**8716. Notice of filing orders.**

The notice required by this section does not affect the time for appeal. 180M570, 231NW218.

**REFEREES**

**8717-7. Appointment, Qualifications.**—Upon the taking effect of this act the judge of the probate court of any county, in this state, now or hereafter having a population of not less than four hundred thousand inhabitants, is hereby authorized to appoint one referee in probate who shall be a resident of said county and an attorney at law duly admitted to practice before the courts of this state. (Act Apr. 22, 1929, c. 271, §1.)

**8717-8. Term, revocation of appointment, vacancies.**—Such appointment shall be by the order of said court for a term to expire at the date of the expiration of the term of office for which the judge of said court was last elected, but such appointment may be revoked at any time by the judge of said court and unless so revoked shall stand for the full term thereof. Any vacancy in said office shall be filled in the same manner as the original appointment. (Act Apr. 22, 1929, c. 271, §2.)

**8717-9. Compensation, offices.**—Such referee shall receive from the county as compensation for his services a salary at the rate of Three Thousand, Six hundred dollars per annum, payable at the same time, and in the manner, and from the general funds of the county, not otherwise appropriated, and subject to the same provisions of law as the compensation of the judge of said court, and shall be furnished by the county board or other board or commission having charge of the courthouse with a suitable office in the county court house, or in some other suitable place or places in said county to be designated by the judge of said court, and the judge of said court may assign to said referee, from the clerical help now provided for said court and the officers thereof, such clerical help as may be necessary to enable said referee properly to discharge the duties of his said office. (Act Apr. 22, 1929, c. 271, §3.)

**8717-10. Reference.**—After the appointment of such referee as herein provided the court may by special order refer to said referee for the respective hearings thereon, each and every issue, other than those issued therein which are heard and decided by the judge of said court, of any matter, cause or proceeding then pending in said court, and the court may by general order refer to said referee for the respective hearings thereon each and every issue, other than those issues which are heard and decided by the judge of said court of any and all matters, causes, and proceedings thereafter coming on for hearing or had before said court during such referee's term of office and each and every such issue of any and all such matters, causes, and proceedings not heard and decided by or had before the Judge of said court, shall without any further order of said court, be thereby referred to such referee. (Laws 1929, c. 271, §4; Apr. 21, 1931, c. 302, §1.)

**8717-11. Trial and hearing by referee—powers—duties.**—In all matters so referred to him the referee shall find the facts and report the same to the judge of said court. The said referee shall have no power to decide any of the issues involved in the matter so referred to him but shall hear the evidence and report the facts thereof to the judge who shall decide the issue. The referee shall not rule on the admissibility of any testimony but shall make a note of all objections made by either of the parties to the introduction of any testimony and report the same to the judge who shall rule on the admissibility thereof. (Laws 1929, c. 271, §5; Apr. 21, 1931, c. 302, §2.)

This section automatically makes the decision of the referee that of the court, and appealable as such. Parcker's Estate, 183M191, 236NW206. See Dun. Dig. 7786.

**8717-12. Completion or matters pending.**

Laws 1929, c. 271, §6, was repealed by Laws 1931, c. 302, §3.

**8717-13. Limitations, disqualification.**—The limitations upon the powers of the judge of said court shall apply as well to said referee in probate and matters which under the law disqualify the judge of said court from acting in any matter before the said court shall likewise disqualify said referee. (Act Apr. 22, 1929, c. 271, §7.)

**8717-14. Referee or law partner not to act as counsel or attorney.**—No such referee in probate shall be counsel or attorney in any action or proceeding for or against any legatee, devisee, heir, creditor, executor, administrator, guardian or ward over whom, or whose estate or accounts, said probate court has jurisdiction by law, nor shall he give counsel or advice, or draw or prepare any paper relating to any estate, which is or may be brought before such court, except citations, orders, decrees, executions, warrants, or subpoenas issuing out of such court. Nor shall such referee in probate or the law partner of such referee, appear or practice as attorney in any matter or proceeding before such probate court. Nor shall such referee keep or hold his official office with any practicing attorney. (Act Apr. 22, 1929, c. 271, §8.)

**8717-15. Contempt.**—Every person who shall behave in a disorderly, contemptuous or insolent manner in the presence of such referee, while actually engaged in a trial or hearing hereunder, of who shall commit a breach of the peace, noise or other disturbance directly tending to interrupt the proceedings of such referee, or wilfully disobeys or resists the lawful process or mandate of said court acting through such referee or refuses contumaciously and unlawfully to be sworn as a witness, or, after being sworn so refuses to answer any legal and proper interrogatory, or publishes a false or grossly inaccurate report of any proceeding before such referee, shall be guilty of a misdemeanor.

But no person shall be punished as herein provided for publishing a true, full, and fair report of a trial, argument, or other proceeding had before, or decision by, such referee. (Act Apr. 22, 1929, c. 271, §9.)

**8717-16. Bond and Oath.**—Before entering upon the duties of his office, such referee shall take and subscribe the oath defined in Section 8 of Article 5 of the Constitution and shall execute a bond to the county board in the penal sum of One Thousand Dollars, to be approved by said board, but such approval shall not be arbitrarily withheld, conditioned for the faithful discharge of his duties and for the faithful application of all moneys and effects that may come into his hands in the execution of the duties of his office, which bond, with his oath of office, shall be filed with the register of deeds of said county. (Act Apr. 22, 1929, c. 271, §10.)

**8717-17. To turn over books, etc., to judge or successor referee.**—Whenever the term of office of a referee in probate expires or is terminated, he shall turn over to his successor in office or to the judge of said court all books and papers in his possession relating to his office, and upon the failure so to do within five days after demand by his successor or the judge of the probate court, he shall be guilty of a gross misdemeanor. (Act Apr. 22, 1929, c. 271, §11.)

**8717-18. Validity.**—If any section or clause or part of this act shall be found invalid, the validity of the remainder shall in no way be affected thereby. The act shall be liberally construed. (Act Apr. 22, 1929, c. 271, §12.)

**8717-19. Effective May 1, 1929.**—This act shall take effect and be in force from and after May 1, 1929. (Act Apr. 22, 1929, c. 271, §13.)

DESCENT OF PROPERTY

**8719. Homestead.**

A devise of homestead by will, duly consented to in writing by spouse, conveys homestead free from claims of general creditors, unless will expressly makes homestead subject to payment of debts. *Overvold v. N.*, 186 M359, 243NW439. See Dun. Dig. 4211.

A general provision in a will directing executor to pay all testator's just debts does not make such debts a charge upon homestead where estate disposed of by will consists both of homestead and other real and personal property. *Overvold v. N.*, 186M359, 243NW439. See Dun. Dig. 4211.

Where surviving spouse, at time will was executed, duly consented in writing to disposition of homestead as made in will, such consent validates disposition made, and it is immaterial then whether or not will makes any provision for such spouse. *Overvold v. N.*, 186M359, 243NW439. See Dun. Dig. 10206a.

**8720. Distribution and descent of property.**

**½. Priority of death.**

Evidence held to justify special verdict to effect wife survived husband, though wife was shot first. 171M475, 214NW469.

**1. Nature of wife's interest in husband's realty.**

Where an intestate leaves no surviving issue, spouse, father, mother, brothers or sisters, the next of kin is to be determined by beginning with the intestate and ascending from him to a common ancestor and descending from the ancestor to the claimant, reckoning a degree each generation, as well in the ascending as in the descending line. Op. Atty. Gen., Sept. 9, 1930.

**10a. Distribution of damages for wrongful death.**

176M130, 222NW643.

**8720-1. Inheritance by foster brothers and foster sisters of deceased world war veterans in respect of War Risk Insurance.**—In every case where a resident of the State of Minnesota shall have served in the military or naval forces of the United States during the recent World War, and shall either during such service or thereafter, have died while his life was insured by the United States by War Risk Insurance, and who shall have been placed as an infant with a married couple, under written agreement whereby said married couple should keep, treat and maintain him as if he were their own natural and legitimate child, and that if said couple should die intestate, that said child shall inherit from said couple, and that if said couple shall execute wills, such wills shall contain a provision giving to said child the same share of their property as if they died intestate, and at the time of such death heretofore or hereafter occurring shall have left surviving him foster brothers and foster sisters, but no step-parents, spouse, children, father, mother, grandchildren, brothers or sisters, nieces, nephews or other natural heirs, such foster brothers and foster sisters, the children of said couple, shall in case the decedent shall have left surviving him no natural or adoptive parents, step-parents, spouse, children, father, mother, grandchildren, brothers, or sisters, nieces, nephews or other natural heirs, succeed to and be vested with all of the rights of inheritance and otherwise of natural brothers and sisters of such decedent, in respect of such insurance, and the proceeds therefrom in the same manner and to the same extent as if such foster brothers and foster sisters, the children of said couple, were the natural and legitimate brothers and sisters of such decedent at the time of such death. ('27, c. 206; Feb. 27, 1931, c. 33, §1.)

Supersedes Laws 1927, c. 206. Sec. 2 of Laws 1931, c. 33, makes act effective from its passage.

Where soldier holding war risk insurance certificate died testate, and brother named as beneficiary was also named as residuary legatee, and brother died later testate, and present value of unpaid monthly installments was paid to administrator of soldier's estate, fund must be distributed as if soldier had died intestate to those entitled to be distributees at time of soldier's death, as it could not have been intention of soldier to bequeath to brother fund that could only come into existence through brother's death. *Sponberg v. L.*, 245NW636.

**8722. Election—Interpretation, etc.**

*Overvold v. N.*, 186M359, 243NW439; notes under §8719. Election to accept will, held effective, in view of this section though there was attached copy of contract making election conditional on contract being held valid. 180M134, 230NW575.

District court, in suit in equity by trustees for instructions, had jurisdiction to determine validity of con-

tract under which widow made her election under will. 180M134, 230NW575.

Statute requiring a surviving spouse to elect within six months whether she will take under the will of her deceased husband or pursuant to the statute has no application where the testator has no lineal descendants. Op. Atty. Gen., May 28, 1931.

**8723. Illegitimate child.**

One claiming rights as heir by reason of acknowledgment of parentage, held barred by laches from asserting his rights. 179M315, 229NW133.

Award in bastardy proceedings made without defense and subsequent agreement by defendant to pay lump sum in lieu of periodic payments, held not to establish right of child to inherit. 180M202, 230NW483.

**8725. Degrees, how computed.**

Op. Atty. Gen., Sept. 9, 1930; note under §8720.

**8726. Minor children to receive allowances.**

Minnesota probate court had complete jurisdiction over property of estate of a non-resident in the hands of an ancillary administrator appointed by it and could dispose of the same in accordance with the provisions of Minnesota Statutes. *Fults' Estate*, 225NW152.

War risk insurance becoming part of estate of an intestate, is to be distributed according to applicable laws of descent, subject to claims of creditors. *Hallbom*, 249 NW417. See Dun. Dig. 2719a.

**8732. Action by the court.**

179M315, 229NW133.

**8733. Homestead and tree-claims, etc.**

See §8733-1.

**8733-1. Civil Code shall govern.**—The provisions of the code of civil procedure relating to the determination of adverse claims to real estate insofar as the same may be applicable, shall pertain and govern the procedure in the action provided for in section 1 [§8733]. ('19, c. 244, §2; '21, c. 36, §2.) Omitted by mistake from G. S. 1923.

WILLS—EXECUTION, EFFECT, ETC.

**8735. Who may make a will—How executed.**

Laws 1931, c. 259, validates holographic wills bearing date between Mar. 29 and Mar. 31, 1927, and transmitting personal property.

**1. In general.**

Evidence held not to justify a finding of testamentary capacity. 172M217, 214NW892.

Where will bears the genuine signature of the testator and the attestation clause is full and complete, it is presumed to have been duly executed. 174M13, 218NW 447.

Where will bears the genuine signature of the testator and of the witnesses and the attestation clause is full and complete it is presumed to have been duly executed and the testimony of a subscribing witness may not be sufficient to overcome this presumption. 174M13, 218NW 447.

Testator must know contents of his will. In re *Eklund's Estate*, 186M129, 242NW467. See Dun. Dig. 10206b.

One who is wholly or partially deaf may make will. Effect of deafness is to add to difficulty of execution. In re *Eklund's Estate*, 186M129, 242NW467.

Provision in will: "And it is my will and I do hereby direct that my executor, hereinafter named, shall handle my estate in his own way, but for the best interest of all of my heirs," did not add to or detract from duties and responsibilities imposed by law upon executor. *Marchildon v. M.*, 246NW676. See Dun. Dig. 3565a.

**1a. Signature.**

Will need not be signed at bottom of end, it being sufficient if signature appears elsewhere, 177M437, 225 NW398.

**2. Mental capacity and undue influence.**

The medical certificate of death provided for by statute is admissible in evidence to prove prima facie, the immediate cause as well as the fact of death. 176M360, 223NW677.

Direct proof of undue influence procuring the execution of a will is not required. 176M360, 223NW677.

Without any foundation laid, attesting witnesses are competent to give in evidence their opinion as to the testamentary capacity of the testator. 176M360, 223NW 677.

Finding of testamentary capacity and lack of undue influence sustained. 176M456, 223NW771.

Findings against undue influence and testamentary incapacity sustained. 177M226, 225NW102.

Evidence held to negative testamentary incapacity and undue influence. 180M70, 230NW275.

Undue influence must have subjected mind of testator to that of some other person. 180M256, 230NW781.

Contestant has burden of proving undue influence, such burden does not shift, and must be established by clear and convincing evidence. 181M217, 232NW1. See Dun. Dig. 10240.

Evidence held to sustain finding that doctor obtained will by undue influence. Lande's Estate, 183M419, 236 NW705. See Dun. Dig. 10243(11).

Finding that testator was incapable of making a will by reason of illness and heavy doses of morphine, held sustained. Lande's Estate, 183M419, 236NW705. See Dun. Dig. 10212(89).

Evidence held to sustain finding of testamentary capacity. Jensen v. M., 185M284, 240NW656. See Dun. Dig. 10212.

Finding of testamentary capacity held justified. Conway's Estate, 185M376, 241NW42. See Dun. Dig. 10212.

Finding that there was no undue influence upon testatrix, held sustained by evidence. Conway's Estate, 185M376, 241NW42. See Dun. Dig. 10243.

One of foreign birth may make will written in English if he understand its contents though he cannot read or understand English to any considerable extent. In Re Eklund's Estate, 186M129, 242NW467. See Dun. Dig. 10206b.

### 3. Construction of will.

Will held not to create a gift in trust for perpetual care of cemetery lot under §1016. 174M568, 219NW919.

When will gives an absolute title in fee and by later clauses expressed in terms of wish or direction makes inconsistent or repugnant dispositions, it will be held that the title in fee is in the devisee first named and that the other provisions are void. 176M445, 223NW783.

Will providing for equal distribution except that certain beneficiaries were to receive a certain amount more than "one-sixth thereof" construed. 177M466, 225NW17.

Weight of inferences and findings of fact by court in a proceeding involving construction of ambiguous will. 177M311, 225NW156.

Disposition in case of death of devisee before will was made. Kittson's Estate, 177M469, 225NW439.

Leader of orchestra in department store, held not entitled to benefit of bequest to employees. 178M572, 227NW898.

Will held to contemplate monthly payments to widow out of the principal of the estate where income of trust estate proved insufficient. Wheaton v. W., 182M212, 234 NW14. See Dun. Dig. 9888a, 10257.

Will interpreted to subject the proceeds of testator's homestead to the payment of debts. Chase's Estate, 182M271, 234NW294. See Dun. Dig. 10257.

In construing wills, the intent of the testator is to be ascertained from the will as a whole. Turle's Estate, 185M490, 241NW570. See Dun. Dig. 10259.

In construing a will, the words "and" and "or" may be substituted for one another to carry out the obvious intention. Turle's Estate, 185M490, 241NW570. See Dun. Dig. 10264a.

Under Mason's U. S. C. A., Title 38, §514, insured veteran's will must be construed and given effect according to law of state where he resided at his death. Sponberg v. L., 247NW679. See Dun. Dig. 10301t.

Courts favor construing wills so as to avoid partial intestacy. Id. See Dun. Dig. 10259a.

Intention of testator should prevail, notwithstanding rules of construction. Id. See Dun. Dig. 10257.

Where a bequest is accompanied by a direction that inheritance tax be paid out of residue, it is in effect a bequest of specified sum, plus such an amount that, when the tax is computed on aggregate and deducted therefrom, specified legacy remains. Bowlin, 248NW741. See Dun. Dig. 10274.

### 4. Persons taking and their respective shares.

A bequest to wife with directions to divide it between the children as the widow should see fit and proper permitted her to give all of it to one of two children. Turle's Estate, 185M490, 241NW570. See Dun. Dig. 10274.

### 8738. Wills made out of the state.

Where will bears the genuine signature of the testator and of the witnesses and the attestation clause is full and complete it is presumed to have been duly executed, and the burden is on contestants to prove the contrary. 174M13, 218NW447.

Where a testator executes a will in another state while a resident therein and dies a resident of this state, it is valid here if executed as required by the laws of either state. 174M13, 218NW447.

### 8741. Written wills, how revoked or cancelled.

Where circumstances raise inference that testator meant revocation of old will to depend on efficacy of the new disposition intended to be substituted, such will be the effect of the legal transaction, and if new will is inoperative and fails because of formal defects, the original will remains in force. Nelson's Estate, 183M295, 236NW459. See Dun. Dig. 10227.

Revocation rests upon intent and is an act of the mind which must be demonstrated by some outward and visible sign of revocation. Nelson's Estate, 183M295, 236NW459. See Dun. Dig. 10227.

Evidence held insufficient to invoke doctrine of "dependent relative revocation." Nelson's Estate, 183M295, 236NW459. See Dun. Dig. 10227.

Revocation of will held to have resulted from testator's own acts. Nelson's Estate, 183M295, 236NW459. See Dun. Dig. 10226.

Evidence held sufficient to prove revocation of a will. Nelson's Estate, 183M295, 236NW459. See Dun. Dig. 10226.

### 8743. Duty of custodian of will.

Correction—"138M279" should be "133M279."

### 8745. Child not provided for in will.

When the name of an adopted child is omitted from the will of the parent the presumption is that the omission was not intentional and was occasioned by accident or mistake. 175M193, 220NW601.

Finding that omission was intentional, sustained. 177 M169, 225NW109.

Communications between testator and attorney who drew and attested the will were properly received in evidence and were not privileged. 177M169, 225NW109.

### 8747. Devisee or legatee dying before testator.

Disposition in case of death of devisee before will was made. Kittson's Estate, 177M469, 225NW439.

It may be assumed that testator knew whether objects of his bounty were living or dead when the will was made and had in mind this situation. Kittson's Estate, 177M469, 225NW439.

## PROBATE OF WILLS

### 8751. Who may petition for.

Probate court acquired jurisdiction even though the person making petition was not a person interested in the estate, the petition upon its face stating that she was. 174M28, 218NW235.

### 8753. Filing petition—Notice—Proof and allowance of will.

The proponent being required to call the subscribing witnesses is not concluded by their testimony, and may prove due execution of the will by any available evidence. 174M13, 218NW447.

Where a subscribing witness impeaches the recitals of the attestation clause subscribed by him, the proponent has the right to cross-examine him. 174M13, 218NW447.

Where the testator himself produces the will and asks the witnesses to sign as such, it may be presumed that he has signed it, although he does not so state and the witnesses do not see his signature. 174M13, 218NW447.

### 8755. Objections, when filed.

Petition and affidavit presented to the probate court, asking for the vacation of an order admitting a will to probate, liberally construed, prima facie showed sufficient grounds for her objections to the will. In re Butler's Estate, 183M591, 237NW592. See Dun. Dig. 7784, 10255.

### 8756. Proof required in case of contest.

Through a misapprehension of the applicable law, the right of cross-examination was unduly restricted, the testimony of subscribing witnesses was deemed controlling and other evidence was not given due consideration. 174M13, 218NW447.

Direct proof of undue influence procuring the execution of a will is not required. 176M360, 223NW677.

The medical certificate of death provided for by statute is admissible in evidence to prove prima facie, the immediate cause as well as the fact of death. 176M360, 223NW677.

Without any foundation laid, attesting witnesses are competent to give in evidence their opinion as to the testamentary capacity of the testator. 176M360, 223NW677.

Proponents must establish due execution of will, and contestant must prove undue influence. 180M256, 230NW781.

On the issue of testamentary competency, it is proper to show the relationship of the testator and his beneficiary as tending to show that disposition was natural. Jensen v. M., 185M284, 240NW656. See Dun. Dig. 10210.

Where physician witnessed will but testified in contest that testator was lacking in testamentary capacity, it was competent for the beneficiary supporting will to introduce in evidence a letter written by the physician which stated that the testator was of sound mind. Jensen v. M., 185M284, 240NW656. See Dun. Dig. 10211, 10246d.

The testimony of an attesting witness to a will impeaching the testamentary capacity of the testator is subject to close scrutiny, and should be viewed and weighed with caution. Jensen v. M., 185M284, 240NW656. See Dun. Dig. 10246d.

In probate of a will, the law requires the calling of the attesting witnesses if within the state. Jensen v. M., 185M284, 240NW656.

Burden is upon contestant of will to show undue influence. Conway's Estate, 185M376, 241NW42. See Dun. Dig. 10240.

### 8758. When subsequent will is presented.

Where a later will is on file in the probate court of another county the earlier will cannot be admitted to probate until it has been determined which is the last will. 179M538, 229NW875.

## FOREIGN WILLS

### 8763. Ancillary administration.

Minnesota probate court had complete jurisdiction over property of estate of a nonresident in the hands of ancillary administrator appointed by it and could dis-

pose of the same in accordance with the provisions of Minnesota statutes. *Fults' Estate*, 177M334, 225NW 152.

#### GRANTING LETTERS TESTAMENTARY

##### 8768. When granted.

Erroneous order refusing to appoint executor will not be reversed where it appears that widow could immediately petition for removal for causes shown by litigation. *Betts' Estate*, 185M627, 240NW904. See Dun. Dig. 3564(94).

That executor named is a debtor or creditor of testator, or that he has interests hostile to others, are not grounds for refusing to appoint him. *Betts' Estate*, 185M627, 240NW904. See Dun. Dig. 3564(97).

Section is mandatory that immediately upon the allowance of a will the executor named therein be appointed, if legally competent and willing to accept and give the required bond. *Betts' Estate*, 185M627, 240NW 904. See Dun. Dig. 3564.

##### 8772. Persons entitled to letters of administration.

When a naturalized citizen dies within this state leaving property therein, it is not necessary to serve a notice of the time and place of hearing upon the consular representative of the country of his birth. 174M 28, 218NW235.

Heir already having assigned her share of estate to one in possession and enjoyment of it, a mere creditor of the heir has no standing to petition for administration. 176M223, 223NW133.

#### GRANTING LETTERS OF ADMINISTRATION

##### 8778. Special administrator.

Cause of action under Federal Employers' Liability Act is transitory and probate court of this state has jurisdiction to appoint special administrator to bring suit here, even though next of kin reside in another state and injury and death of employee occurred there. *Peterson v. C.*, 187M228, 244NW823. See Dun. Dig. 3560c.

#### REPRESENTATIVES—GENERAL PROVISIONS

##### 8786. General powers and duties.

Judgment in state court in action between administrator and heir held conclusive in subsequent action in federal courts involving title to the same real estate. 26F(2d)47.

Judgment in an action brought by an administrator within scope of his statutory power is binding on the heirs. Rule applied where administrator sued one in possession of land for an accounting of rents and profits and the defendant by cross-bill had a deed from himself to the deceased declared a mortgage. 171M423, 214NW267.

Where administrator forecloses mortgage and buys at the sale in his own name as administrator, and action to set aside the foreclosure and sale on the ground that no default had occurred is properly brought in the district court and against the administrator as sole defendant. 171M469, 214NW472.

The estate of a deceased person is not an entity. The personal representatives are officers of the court, not agents of the estate, and have no principal whom they can bind. They cannot set off claims in their favor against a claim which a creditor of the decedent has filed in the probate court. 172M68, 214NW895.

In the absence of special circumstances the representative of the estate of a deceased person is the only one who may maintain an action to recover a debt owing the estate, as, for instance, collusion between the representative and the debtor and refusal of the representative to act. 172M274, 215NW176.

Where guardian of insane person died without having accounted for money, administrator of his estate must account for the funds. *Donlin v. W.*, 176M234, 223NW98.

An heir has no right of action to annul an express trust of which deceased was settler, it not appearing that the heir is executor or devisee. 176M274, 223NW 294.

Supreme Court refused to dismiss appeal on stipulation of two out of three executors. 178M509, 227NW660.

The probate court has jurisdiction to order coadministrators to hold and distribute estate funds jointly. *Drew's Estate*, 183M374, 236NW701. See Dun. Dig. 7771, 7778.

Evidence held to justify finding that sale of shares of stock by executors to part of their number was valid and in good faith. *Davis v. S.*, 184M422, 239NW150. See Dun. Dig. 3570.

An executor has no general or implied authority to invest or loan money of estate; and if it is desirable to do either, it should be done only under authority of probate court; otherwise he is directly responsible for money invested or loaned. *Marchildon v. M.*, 246NW676. See Dun. Dig. 3571.

**8786-1. Probate Court may authorize continuance of business of decedent.**—The Probate Court, upon such notice and conditions as it considers reasonable may authorize a representative of any estate pending

in said court to continue and operate as a going concern either the individual business of the decedent or any partnership in which he was interested at the time of his decease, upon consent of the surviving members of such partnership, for the benefit of his estate for such time, and under such regulations, restrictions and other requirements as to the Court may seem appropriate in each particular case; provided that such representative shall be required to file in such court a verified statement showing the condition of the business engaged in at least once a year. (Act Apr. 15, 1929, c. 188.)

##### 8787. Liability—Collection of debts, etc.

Administrator was properly directed to collect money deposited in bank before appointment, leaving question of negligence with respect to collection for determination after administration is completed. 180M97, 230NW 272.

Right of set-off or application of securities held for payment of a depositor's indebtedness to a bank exists against administrator of debtor's estate. *Browning v. E.*, 249NW573. See Dun. Dig. 3670.

A debtor to estate, who has a set-off against his indebtedness, may interpose such set-off in a suit by administrator against him to recover on his indebtedness although he has not filed his set-off as a claim in probate court. Id.

Bank after death of debtor to it could set-off indebtedness of decedent against claim of administrator for deposits pledged as collateral, though notes were not due. Id.

##### 8788. Allowances to executors, etc.

The fact that taxes and repairs were paid by executor for surviving husband could not have prejudiced heirs. *Kaufenberg's Estate*, 182M624, 235NW379. See Dun. Dig. 3644a.

An executor who misappropriates funds forfeits right to compensation. *Marchildon v. M.*, 246NW 676. See Dun. Dig. 3646.

A guardian who mismanaged estate of his incompetent ward and misapplied proceeds thereof was properly denied compensation for his services. *Galloway v. H.*, 248NW329. See Dun. Dig. 4122.

##### 8789. Representative may resign.

Order accepting resignation, held void where no final account was presented and allowed. *Southern Surety Co. v. T.*, 179M40, 228NW326.

##### 8790. Removal.

An executor who has remained wholly inactive for three years and has done nothing to dispose of the real estate, pay the debts, or care for the real estate, may be removed. 175M619, 221NW648.

A coadministrator who fails to obey a valid order of the probate court may be removed. *Drew's Estate*, 183M374, 236NW701. See Dun. Dig. 3666(13), (18).

Erroneous order refusing to appoint executor will not be reversed where it appears that widow could immediately petition for removal for causes shown by litigation. *Betts' Estate*, 185M627, 240NW904. See Dun. Dig. 3666.

An executor may be removed for causes shown to exist through the litigation already had. This statute is permissive. *Betts' Estate*, 185M627, 240NW904. See Dun. Dig. 3666.

On appeal to district court from order of probate court refusing to appoint legally competent person executor, it is improper for district court to affirm on ground that litigation already had disclosed that there may be ground for his removal after appointed. In re *Betts' Estate*, 185M627, 243NW53. See Dun. Dig. 7795.

Widow upon whose petition special administrator was appointed to maintain action for death under Federal Employers' Liability Act cannot have such administrator removed except for good cause, there being minor children interested in proceeds. *Peterson v. C.*, 187M 228, 244NW823. See Dun. Dig. 3666.

Evidence warranted removal of an executor of an estate of a deceased person for acts of omission and commission. *Matteson v. M.*, 187M291, 246NW382. See Dun. Dig. 3666.

#### SETTING ASIDE HOMESTEADS, ETC.

##### 8796. Petition.

Minnesota probate court had complete jurisdiction over property of estate of a nonresident in the hands of an ancillary administrator appointed by it and could dispose of the same in accordance with the provisions of Minnesota Statutes, *Fults' Estate*, 177M334, 225NW 152.

##### 8797. Order.

District court has jurisdiction to determine title to homestead pending proceeding in probate court to administer estate of decedent. 171M182, 213NW736.



## COLLECTION OF ASSETS

**8798. Compounding claims.**

From the distributive share of money due a legatee from the estate of a decedent, the debt of the legatee may be deducted, even though such debt is barred by the statute of limitations. Lindmeyer's Estate, 182M 607, 235NW377. See Dun. Dig. 3661a, 5594.

**8800. Release, redemption, purchase at sale.**

See note under §8799.

**8800-1. Trustees and Guardians may foreclose mortgages.**—A testamentary trustee or guardian shall have all the powers and rights as set forth in Mason's Minnesota Statutes for 1927, Sections 8799 and 8800, to foreclose a mortgage. (Act Mar. 20, 1933, c. 97.)

## CLAIMS AGAINST ESTATES

**8809. Order limiting time to present claims.**

Claim for damages against deceased director of National Bank, under Mason's U. S. Code, tit. 12, §93, may be subject of suit in federal court without first presenting same to state probate court. 36F(2d)367.

**8811. Extension of time for cause.**

33F(2d)665.

36F(2d)367.

Court properly allowed claim to be filed after six months period. 174M102, 218NW456.

**8812. Claims, how presented or barred.****1. In general.**

Neither the probate court nor the district court on appeal has jurisdiction over a claim which a creditor of a decedent has against the personal representative, or one which the representative has against the creditor, even though the subject-matter of the claim sprang from transactions between the creditor and the personal representative while they were carrying on the business of the decedent. 172M68, 214NW895.

Divorced wife of deceased who had installments falling due her under an agreement with deceased after expiration of time for filing claims, could file supplemental statements without notice to personal representatives. 172M231, 215NW223.

A claim upon a promissory note held as collateral is a claim on contract for the recovery of money and must be filed, but where judgment is rendered against an executor or administrator in his official capacity in a state or federal court and is presented to probate court while administration is pending and before distribution by final decree, it must be allowed as a claim against the estate. 175M524, 222NW68.

Under the authority of Coulter v. Goulding, 98M68, 107NW823, 8AnnCas778, evidence was properly received showing the ability of deceased to pay the claim, the payment of which was in dispute. His business habits relative to paying his bills might also have been shown. 178M90, 225NW918.

Finding as to amount due daughter sustained. 180M 122, 230NW273.

Receiver of national bank, having no knowledge of the death of a shareholder, held not barred by this section, though he failed to file the claim before the closing of the estate. 32F(2d)665.

Payment after expiration of limitations, retention of written statement showing such payment and letters written by debtor, held to create new and binding agreement, which was properly filed in probate court. Hartnagel v. A., 183M31, 235NW521. See Dun. Dig. 5624 (46), 5647.

A creditor holding securities for his claim has the option, after the debtor's death, to enforce his securities or to file his claim in probate court as a general creditor of the estate. Browning v. E., 249NW573. See Dun. Dig. 35930.

A secured creditor, who desires to share with unsecured creditors, must file his claim as a general creditor. Id.

**2. Contingent claims.**

Claim against deceased director of National bank under Mason's U. S. Code, tit. 12, §93, held not contingent within this section. 36F(2d)367.

**8813. Offset against claims.**

172M68, 214NW895, note under §8812.

**8814. Claims barred by statute.**

From the distributive share of money due a legatee from the estate of a decedent, the debt of the legatee may be deducted, even though such debt is barred by the statute of limitations. Lindmeyer's Estate, 182M 607, 235NW377. See Dun. Dig. 3661a, 5594.

Executors could not waive the bar of the statutes of limitations as to a debt of decedent as regards computation of succession tax. In re Walker's Estate, 184M 164, 238NW58. See Dun. Dig. 35931(72).

**8815. Actions against executors or administrators.**

A claim upon a promissory note held as collateral is a claim upon contract for the recovery of money and must be filed, but where judgment is rendered against

an executor or administrator in his official capacity in a state or federal court and is presented to probate court while administration is pending and before distribution by final decree, it must be allowed as a claim against the estate. 175M524, 222NW68.

**8816. Order adjudicating claim—Effect—Interest.**

Settlement of claim in probate court having been ratified by sole heir, the authority of the attorney acting for the heir cannot be questioned by the administratrix. Parker's Estate, 178M417, 227NW426.

Claims against estates of deceased persons filed and allowed in the probate court have the status of judgments. Walker's Estate v. M., 183M325 236NW485. See Dun. Dig. 4963.

## PAYMENT OF DEBTS AND LEGACIES

**8826. Same—Contingent legacy—Trustee.**

A minor child whose parents are dead may be adopted without the consent of the legal guardian of the person and estate of said child. Op. Atty. Gen., Aug. 21, 1930.

**8827. Order of payment when estate insolvent.**

This section had no applications to claims, in the absence of a showing that the estate is insolvent. 172M 231, 215NW223.

Wisconsin statute giving right of action for tort against estate of deceased wrongdoer may be enforced in Minnesota. Chubock v. Holloway, 182M225, 234NW 314. See Dun. Dig. 1530.

**8828. No preference to be given.**

Op. Atty. Gen., Aug. 21, 1930; note under §8826.

**8829. Payment in case of an appeal.**

Op. Atty. Gen., Aug. 21, 1930; note under §8826.

## DISPOSAL OF REALTY BY REPRESENTATIVES

**8834. Real estate of decedent may be sold, when.**

This section as amended is confined to a sale as distinguished from a mortgage within the power given by §8201. 172M504, 215NW857.

**8835. Real estate mortgaged or leased, when.**

172M504, 215NW857; note under §8834.

**8836. Petition for license.**—To obtain a license to sell, mortgage, or lease the real estate of a decedent including the homestead of such decedent for more than one year, the representative shall present a verified petition to the court appointing him, setting forth what personal estate has come into his hands; the disposition thereof; how much, if any, remains undisposed of, the debts outstanding against the decedent or ward, so far as can be ascertained, and if it be the estate of a decedent, the legacies unpaid, if any; a description of all the real estate including the homestead of a decedent, and the condition and value of the several tracts; the names and residences, so far as known, of all persons interested therein and if unknown, a statement of that fact; and facts showing grounds for such sale, mortgage or lease; if a sale, mortgage or lease of a homestead is petitioned for the petition shall set forth the grounds and reasons why it will be for the best interests of all persons interested in said homestead that the same be sold, mortgaged or leased. The court is empowered to license the representative, or representatives to renew or extend an existing encumbrance or to mortgage the decedent's homestead to pay off existing encumbrances, interest, penalties, liens and costs, but in such case the petition to mortgage must be executed, or assented to in writing by the surviving spouse, if any, and the majority in interest of the remaindermen by themselves, or their guardian, or guardians in case they are minors, or their representative or representatives in case they are deceased. (R. L. '05, §3753; G. S. '13, §7348; '21, c. 268, §2; '23, c. 295, §2; Apr. 24, 1929, c. 337, §1.)

172M504, 215NW857; note under §8834.

Probate court has no authority to license representative to mortgage homestead for any other purpose than to pay off existing encumbrance. Op. Atty. Gen., June 22, 1933.

**8841. License of Probate Court to sell real estate.**

—The license shall describe the land to be sold, mortgaged, or leased. It may specify the order in which several tracts shall be sold, and shall direct whether the land shall be sold at private sale or



public auction. If any part of such real estate has been devised, and not charged in such devise with the payment of debts, it shall direct that part not so devised to be sold first, and, if any lands have been sold by heirs and devisees, it shall direct the remainder to be sold first. When the petition is to mortgage lands, the license shall fix the maximum amount and rate of interest for which the mortgage may be given, and specify for what purpose the proceeds shall be used. Such license shall be and remain in force until revoked by the court; Provided, that no sale at private sale shall be made or confirmed under said license after one year from its date, unless the land so sold shall have been reappraised under order of the court within thirty (30) days next before such sale.

The Probate Court may in and by said license authorize the sale of lands to be sold on contract for deed. In such event, the initial payment shall not be less than ten per centum of the total sales price, and the deferred installments of the purchase price shall bear interest at a rate of not less than four per centum per annum. The deferred installments shall be payable in equal monthly, quarterly, semi-annual or annual payments. The final payment shall become due and payable not later than ten years from the date of said contract for deed. Such contract for deed shall provide for conveyance of the legal title by quit-claim deed upon full performance of all the conditions of said contract for deed by the purchaser. The assignment of the vendor's interest in said contract for deed, whether made by way of sale thereof, or by way of distribution of the assets of a decedent's estate to the persons entitled thereto by law, shall operate as a conveyance of the legal title of the lands by said contract for deed sold and conveyed and shall invest such assignee or distributee with all the rights, privileges and powers, and impose upon said assignee or distributee all duties and obligations granted and created by said contract for deed. (R. L. '05, §3758; G. S. '13, §7353; '25, c. 316; '27, c. 302; Apr. 15, 1933, c. 268.)

#### 8851. Sales, etc., subject to charges.

Plaintiff, who bought and paid earnest money, could not recover it unless he furnished the bond or the mortgage was discharged. *Breitman v. T.*, 182M98, 233 NW830. See Dun. Dig. 3632(19).

### ACCOUNTING—DISTRIBUTION—FINAL SETTLEMENT

#### 8873. Account to be rendered, when.

Executor did not prejudice the rights of an heir in paying funeral expense of surviving husband, as the heir would have had to pay them in any event. *Kaufenberg's Estate*, 182M624, 235NW379. See Dun. Dig. 3644a.

Surviving husband held entitled to ask for sufficient moneys out of estate to pay taxes and make repairs. *Kaufenberg's Estate*, 182M624, 235NW379. See Dun. Dig. 3644a.

Duty of an executor is to settle estate and make distribution without delay. *Marchildon v. M.*, 246NW676. See Dun. Dig. 3641b.

Decision on hearing of intermediate account of administrator held to constitute approval of act of bank in applying deposit of decedent to payment of notes held by it. *Browning v. E.*, 249NW573. See Dun. Dig. 3649a.

#### 8874. Partial distribution.

It was not error to credit executor for money spent in maintenance of family of decedent and schooling of minors. *Marchildon v. M.*, 246NW676. See Dun. Dig. 3644a, 3658.

#### 8879. Proceedings on hearing.

Written agreement between all heirs as to distribution of estate is valid and binding and is not nullified by a decree of distribution entered by the court which had no knowledge of the agreement. 174M192, 218NW551.

Order of probate court held final order settling account and determining amount due from personal representative, as regarded amendment and correction. *Simon*, 187M399, 246NW31. See Dun. Dig. 7784.

#### 8880. Decree of distribution.

##### 4. Effect of decree.

Judgments are not subject to collateral attack and district court cannot in an independent action in equity amend a decree of distribution for mere errors in mak-

ing up the final account by the administrator. 175M68, 220NW406.

Real estate assigned by final decree passes out of the control of the court and is discharged from further administration, and thereafter neither the probate court nor the district court on appeal has authority to vacate the decree without notice to the persons who then hold title to such real property. 175M524, 222NW68.

Decree distributing land to a person as heir is conclusive in a subsequent direct attack as against claim that such person was an illegitimate. 177M34, 224NW270.

A final decree, assigning the real property of one who was the record owner thereof at the time of his death, is evidence of title in the person to whom such property is assigned. 176M606, 225NW902.

#### 8886. Discharge of representative.

It is proper to discharge guardian without a hearing upon petition by ward after attaining majority. *Op. Atty. Gen.*, Feb. 24, 1933.

#### 8888. Deposit with county treasurer.

Money deposited with county treasurer by administrator after failure of heir to claim it is subject to garnishment by creditor of heir. 171M280, 214NW26.

#### 8889. Subsequent disposal of fund.

Money deposited with county treasurer pursuant to §8888 is subject to garnishment. 171M280, 214NW26.

### PROBATE BONDS

#### 8907. Bonds, when required, conditions.

Where defalcation occurred before bond was given, surety was liable because of guardian's failure to finally account for and pay over to his successor the amount of the defalcation. *Bromen v. O.*, 185M409, 241NW54. See Dun. Dig. 4103.

Sureties on bond of guardian of incompetent are liable for defalcation of guardian occurring before bond was executed but after resignation of predecessor and filing of final account, approved by probate court as part of same transaction wherein bond in question was approved and filed. *Lindquist v. T.*, 247NW506. See Dun. Dig. 4103.

#### 8909. Joint or separate bonds.

Where co-guardian gave separate bonds, held that there was no right of contribution between the sureties on the different bonds, and no right of subrogation to cause of action by ward against innocent guardian for negligence. *Southern Surety Co. v. T.*, 179M40, 228NW326.

#### 8910. Bond before sale.

Action on bond 18 years after sale held barred by laches. 178M401, 227NW355.

Sureties on sale bond of guardian were not liable for guardian's failure to account for interest received on purchase money mortgage taken with approval of probate court, such interest being income on general property of estate rather than receipt under license to sell. *Siewert v. A.*, 187M71, 244NW337. See Dun. Dig. 4108a (40).

#### 8912. Bonds, run to whom—Approval, etc.

The probate court has authority to direct guardians of minors and incompetents to require bonds to secure deposits of funds of their wards in banks. 176M541, 224 NW152.

Immaterial that judge, instead of guardian, was named as obligee; ward could sue on the bond. 176M541, 224 NW152.

#### 8914. Sureties on bonds, how and when discharged.

*Bromen v. O.*, 185M409, 241NW54; note under §8907.

A surety for one guardian may show that a liability incurred was a continuing one for the purpose of obtaining contributions from the sureties of the other guardian. *Southern Surety Co. v. T.*, 179M40, 228NW326.

Surety of discharged guardian, held liable for obligations which had already accrued at time of discharge, and as to such liability the surety on a subsequent bond given by the remaining guardian was entitled to contribution. *Southern Surety Co. v. T.*, 179M40, 228NW326.

On application of surety under this section probate judge should issue citation to principal, and discharge him if new bond is not given, but the order should be made so that the estate will not be left without a representative for any period of time. *Op. Atty. Gen.*, Feb. 10, 1930.

### GUARDIANS AND WARDS

#### 8924. Guardian for insane or incompetent persons.

Where guardian of insane person died without having accounted for money, administrator of his estate must account for the funds. *Donlin v. W.*, 176M249, 223NW98.

**8926. Hearing—Appointment.**—At the time fixed the Court shall consider all competent evidence offered for and against the petition, and if it appears that a guardian should be appointed the Court shall appoint not exceeding three persons as guardian or guardians of the person and/or estate of such insane

or incompetent person. (R. L. '05, §3828; G. S. '13, §7435; Feb. 18, 1931, c. 18, §1.)

Sec. 2 of 1931 act provides that act shall take effect on its passage.

#### 8929. How restored.

Conclusion that competency was not shown sustained. 171M227, 213NWW898.

Order allowing final account and discharging guardian, held not subject to collateral attack. 179M523, 229NW785.

Probate court has power to hear and determine applications for restoration to capacity by patients in insane hospitals. State v. O'Brien, 186M432, 243NW434. See Dun. Dig. 4528.

Jurisdiction conferred upon probate court by this section does not extend to the discharge of persons previously committed as insane to any of the state institutions for the insane. Op. Atty. Gen., Oct. 30, 1931.

Fees and expenses, when necessary for proper initiation and hearing of application for restoration to capacity, stand on same footing as other necessary expenses for incompetent. Collins v. M., 187M514, 246NW5. See Dun. Dig. 4528.

Probate court has jurisdiction and authority to allow attorney's fees and expenses, incurred in a proceeding for restoration to capacity of an incompetent person under guardianship, out of funds of incompetent in hands of guardian. Collins v. M., 187M514, 246NW5. See Dun. Dig. 4528.

#### 8933. Guardians of minors, etc.

A minor not emancipated cannot sue his or her parent for tort. Lund v. O., 183M515, 237NW188. See Dun. Dig. 7308.

When a child has a guardian of the person appointed by the probate court, the consent of such guardian is necessary to permit an adoption by proceedings in the district court. In re Martinson, 184M29, 237NW596. See Dun. Dig. 99.

The parent of a minor child, not emancipated, is not liable to child for negligence causing damage. Belleson v. S., 185M537, 242NW1. See Dun. Dig. 7308.

A parent has a natural right to custody of his child, but this right yields to best interests of child. State v. Miller, 187M152, 244NW685; State v. Markson, 244NW687. See Dun. Dig. 7297.

Mother was given custody of boy 12 years old in preference to very old grandparents with whom it had lived since a baby. State v. Markson, 187M176, 244NW687.

Commitment of indigent children to custody of state under general guardianship did not release father and mother from obligation to support them. Op. Atty. Gen., June 14, 1932.

#### 8937. Extension of power of guardians.

Suit on behalf of a minor should proceed in his name, by his guardian, rather than in name of latter on behalf of minor. Borowski v. S., 246NW540. See Dun. Dig. 4461.

#### 8939. Support and education of ward.

Where the mother supports her minor children after the death of the father, she may be compensated therefor out of the estate of the children, at least where her own estate is not sufficient to provide proper support. 177M571, 225NW896.

#### 8947. Investment of funds.

When a guardian deposits money of his ward in a bank of which he is the president and active manager and afterwards trades a mortgage owing the bank for the deposit, the ward may take the mortgage, or avoid the transaction and reach the deposit, or may have an accounting. Ottawa Banking & Trust Co. v. C., 185M22, 239NW666. See Dun. Dig. 4107.

If a guardian, after a full disclosure of the facts, obtains an order permitting him to invest his ward's money, he is protected. Op. Atty. Gen., May 29, 1931.

#### 8949. Final account—Notice.

It is proper to discharge guardian without a hearing upon petition by ward after attaining majority. Op. Atty. Gen., Feb. 24, 1933.

#### 8950. Order allowing final account.

An order duly made by the probate court settling the final account of a guardian is conclusive on the guardian, and cannot be attacked collaterally by him. Trapp v. T., 182M537, 235NW29. See Dun. Dig. 4125a(21).

The presentation of a claim by the guardian in probate court against the estate of his deceased ward, after his final account as guardian had been settled, whereby the guardian seeks to recover compensation for services rendered to his ward in addition to the allowance made to him for services in the order settling his account, is a collateral attack on such order. 182M537, 235NW29. See Dun. Dig. 4125a(21).

Proof of an understanding or agreement of the parties that plaintiff's claim need not be included in the guardian's account would be permissible only in a direct attack upon the order of the probate court settling the account. 182M537, 235NW29. See Dun. Dig. 4125a(21).

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

### 8953. Definitions.

Notice of cancellation of contract served upon vendee one day before discharged as sane by decree of probate court, was valid, there being no guardian and vendee being on parole. McKinley v. S., 247NW389. See Dun. Dig. 4519, 4531, 10091.

### 8957. County attorney to appear.

Appeal may be taken from order of probate court refusing to set aside order committing person to State insane hospital if first order was procured by fraud, misrepresentation or surprise, or excusable inadvertence or neglect. Op. Atty. Gen., Apr. 7, 1932.

No appeal lies from order of probate court committing person to State insane hospital. Op. Atty. Gen., Apr. 7, 1932.

### 8959. Examination and report by board of examiners, etc.

State is not liable for damages for any act which an insane person improperly discharged from a state hospital might commit. Op. Atty. Gen., Jan. 27, 1932.

This section does not extend the jurisdiction of the probate court, and probate court has no jurisdiction to direct a discharge of a person committed upon a determination by the board of examiners that he was a dangerous insane person. Op. Atty. Gen., Jan. 27, 1932.

### 8960. Commitment of feeble-minded person—discharge.

An appeal from order committing a feeble-minded person raises all questions involved in the findings of the examiners. State ex rel. Broberg v. State Board of Control, 183M345, 236NW481.

Right of appeal is not limited to orders granting or refusing applications for the discharge of a feeble-minded person from the custody and guardianship of the board of control. State ex rel. Broberg v. State Board of Control, 183M345, 236NW481.

Right of appeal is granted to the person adjudged to be feeble-minded, to the state board of control, and to the other persons specified in the amendment of 1927. State ex rel. Broberg v. State Board of Control, 183M345, 236NW481.

This section does not apply so as to permit appeal in insane cases. Op. Atty. Gen., Apr. 7, 1932.

**8961. Commitment of insane persons.**—If the person examined is found to be an inebriate or insane, the judge shall issue duplicate warrants committing him to the custody of the superintendent of the proper state hospital or to the superintendent or keeper of any private licensed institution for the care of inebriates or insane persons; provided that, if the person so examined and found to be insane is also found to be a veteran of the Spanish-American War, the Philippine Insurrection, the Boxer Rebellion or the World War, the judge shall issue triplicate warrants committing him to the joint custody of the superintendent of the proper State hospital and the superintendent or other proper officer or authority in charge of control of any United States Veterans' Bureau Neuro-psychiatric hospital in this state in which such person will be received in his custody accepted. Provided, that if the superintendent or other officer or authority in charge or control of such United States Veterans' Bureau Neuro-psychiatric hospital is not able to receive said insane person at the time of commitment, he may be transferred to such United States Veterans' Bureau Neuro-psychiatric hospital when the superintendent of the State hospital to which said insane person has been committed shall be notified in writing that a bed is available in the United States Veterans' Bureau Neuro-psychiatric hospital, and any such transfer shall constitute a discharge of said insane patient from the State hospital and the commitment of said patient to the United States Veterans' Bureau Neuro-psychiatric hospital. ('17, c. 344, §9; '25, c. 89; Apr. 25, 1931, c. 358.)

No appeal lies from order of probate court committing person to state insane asylum. Op. Atty. Gen., Apr. 7, 1932.

Appeal may be taken from order of probate court refusing to set aside order committing person to state insane hospital if first order was procured by fraud, misrepresentation or surprise, or excusable inadvertence or neglect. Op. Atty. Gen., Apr. 7, 1932.

**8967. When resident of another county.**—Whenever the alleged defective is found to have his settle-

ment as defined in Section 3161 of the General Statutes 1923 in some other county he may nevertheless be examined and if found to be defective committed in like manner as a person having a settlement in the county. The necessary costs and expenses of such examination and commitment shall be certified by such court to the auditor of the county in which the examination is held, who shall certify the same to the county auditor where the said alleged defective is found to have a settlement and shall be paid as other claims against such county. ('17, c. 344, §15; Mar. 18, 1931, c. 68, §1.)

Expense of commitment should be charged against county in which person committed has longest resided within year previous to commitment. Op. Atty. Gen., Aug. 9, 1932.

If a person has not lost his residence for purposes of voting, he has not lost his residence for purpose of hospitalization for insanity. Op. Atty. Gen., May 11, 1933.

#### 8968. Proceedings when residence is questioned.—

Whenever the auditor of the county to which costs and expenses have been certified denies that such person has a settlement in his county, he or the auditor of the county where such examination was held shall send such certificate with a statement of his claim in reference thereto to the state board of control who shall immediately investigate and determine the question of settlement and certify its findings to the auditor of each of said counties. Such decision shall be final unless an appeal is taken therefrom within thirty days after its filing. Such appeal may be to the district court of the county from which such person was committed. ('17, c. 344, §16; Mar. 18, 1931, c. 68, §2.)

#### 8969. Court commissioner to act for Judge of Probate in certain cases.

When court commissioner commits a patient to the hospital the warrant should bear the seal of the probate court. Op. Atty. Gen., May 14, 1931.

Court commissioner is not entitled to mileage when conducting insanity hearings away from county seat. Op. Atty. Gen., Aug. 14, 1933.

8976. Support of insane persons.—For the purpose of defraying expenses and costs of maintenance of any inmate in a state asylum, detention hospital or hospital for the insane, the state of Minnesota shall have a valid claim for reimbursement to the extent of \$10.00 per month for each such inmate, for all moneys paid and expenses incurred by the state for such maintenance,—first, against the property or estate of such person so maintained, second, against the relatives of such person in the following order, to-wit: spouse, children and parents provided, that if the state board of control shall determine that the property or estate of any such insane person is not sufficient to more than care for and maintain the wife and minor children of such inmate, or that the means and property of the classes of persons herein secondarily charged with the liability and cost of the maintenance of such insane person in said institutions, is not more than sufficient to properly provide for themselves and those otherwise dependent upon them, the said board of control shall relieve the estate of such insane person and the relatives of such insane person from a portion or all of such charge or liability as they in their judgment and upon investigation may deem just and proper. In case of increase or decrease in the estate of such insane person, or in the estates of those persons herein secondarily liable for the cost of the maintenance of an insane person in such institutions, or in case of the death of such persons, or either of them, the board of control is hereby authorized to modify or cancel its previous order made in relation thereto, and from time to time make such other and further order with reference thereto as it may seem just and proper. Provided, if an inmate has not dependents the Board of Control may fix a charge in excess of \$10.00 per month but not to exceed the per capita cost for the previous fiscal year of the institution of which he is an inmate and the state shall have a valid claim against the property or estate of such inmate for the amount so fixed.

In all cases under the provision of this act, the property which under the laws of this state, is exempt from attachment or sale on any final process, issued from any court, shall be exempt also to the estates and persons charged with or upon whom any liability is imposed under the provisions of this act. ('17, c. 294, §4; Apr. 21, 1931, c. 301.)

The estate of the father of an insane pauper is liable. Op. Atty. Gen., Aug. 27, 1930.

Estate of convict inmate of insane hospital is not liable for his maintenance. Op. Atty. Gen., June 15, 1933.

## APPEALS

### 8983. In what cases allowed.

180M195, 230NW584.

If court erred in construction of will the error was one of law and not of fact and decree became binding and conclusive in absence of appeal. 174M28, 218NW235.

Fraud or misrepresentation held not shown. 174M28, 218NW235.

Real estate assigned by final decree passes out of the control of the court and is discharged from further administration, and thereafter neither the probate court nor the district court on appeal has authority to vacate the decree without notice to the persons who then hold title to such real property. 175M524, 222NW68.

The probate court has power to vacate its final decree on the ground of fraud, mistake, inadvertence or excusable neglect upon proper application seasonably made. 175M524, 222NW68.

Sole heir having ratified settlement with claimants, authority of attorney acting for him cannot be questioned. Parcker's Estate, 178M409, 227NW426.

On appeal from order admitting will to probate there is no right to trial by jury, such a trial being discretionary. 180M256, 230NW781.

An order directing the representative of an estate to pay a certain amount of money as fees to an attorney is not appealable, but is reviewable by certiorari. Carson's Estate, 181M432, 232NW788. See Dun. Dig. 7786.

An order of the probate court directing an executor to turn over to decedent's aunt certain funds which he claimed to hold as an individual was a final order, and reviewable by writ of certiorari. Martin's Estate, 182M576, 235NW279. See Dun. Dig. 1400, 7786, 7842.

Laws 1929, c. 271, §5, ante §§8717-11, automatically makes the decision of the referee that of the court, and appealable as such. Parcker's Estate, 183M191, 236NW206. See Dun. Dig. 7786.

§9283 applies to an order of the probate court admitting a will to probate, and limits the time within which such order may be vacated. In re Butler's Estate, 183M591, 237NW592. See Dun. Dig. 7784, 10255.

An order of the probate court vacating the assent of the widow to the will of testator is not appealable; nor are parts of an order which do not finally determine or affect interests or rights in the estate. Betts' Estate, 185M627, 240NW904. See Dun. Dig. 7786, 7787.

#### Subd. 8.

Application to vacate decree of descent rendered by probate court on ground of mistake in both judicial discretion, and on appeal the district court exercises a like discretion. 179M315, 229NW133.

Statement in Savela v. Erickson, 138M93, 99, 163NW 1029, 1031, that relief from "surprise, or excusable inadvertence or neglect," might be justified under this subdivision, was an inadvertent statement, since statute merely authorizes an appeal. Simon, 187M399, 246NW31. See Dun. Dig. 7784(2).

Appeal may be taken from order of probate court refusing to set aside order committing person to state insane hospital if first order was procured by fraud, misrepresentation or surprise, or excusable inadvertence or neglect. Op. Atty. Gen., Apr. 7, 1932.

### 8984. Who entitled to appeal.

#### 1. From allowance or disallowance of claims.

230NW584.

The right of an aggrieved interested party to appeal from allowance of claim is subordinate to the right of the representative to appeal and may be exercised if the latter declines to appeal. 179M133, 228NW551.

### 8985. Appeal, how and when taken.

179M133, 228NW551.

Betts' Estate, 185M627, 240NW904; note under §8983. An appeal must comply with the provisions of this section and jurisdiction cannot be conferred on the district court by consent. 174M133, 218NW546.

Notice of appeal from decree in proceedings in one county specifying the decree as one of the probate court of another county, held fatally defective. 178M601, 228NW174.

Adverse party other than administrator appearing and contesting a claim is entitled to notice of appeal by claimant. 180M195, 230NW584.

While notice by mail, as authorized by §9242, is not applicable to the probate court, actual notice is sufficient to start the running of limitations under this section, and where a letter is actually received (the usual presumption in that respect being applicable) the requirement as to service of notice is satisfied. 180M570, 231NW218.

Language in a notice of appeal from probate court held merely descriptive of the order appealed from and as not attempting to limit the appeal to that portion of the order unfavorable to appellant. Parcker's Estate, 182M191, 236NW206. See Dun. Dig. 7789.

Statute requires that notice of appeal from probate to district court be served and filed with proof of service within 30 days after notice of decision appealed from. Otting v. P., 247NW804. See Dun. Dig. 7788(47).

Where no written notice of filing of decision is given, but notice of appeal is served, appellant must be considered as having had notice, or to have waived notice, not later than day on which notice of appeal was served. *Id.* See Dun. Dig. 7788, 7789.

#### 8986. Return.

Probate court cannot charge fee for making return. Op. Atty. Gen., Apr. 30, 1929.

#### 8988. Notice of trial, etc.

On an appeal from an order of the probate court admitting a will to probate, burden is on proponent to prove testamentary capacity of testator. 172M217, 214NW892.

Court should make findings of fact, but this may be waived where the decision necessarily decided the question of fact involved. 172M217, 214NW892.

On appeal the issue is the same as it was in the probate court. If the order was right when made, it cannot be reversed. 172M231, 215NW223.

Where appeal to district court involved order refusing to vacate decree admitting will to probate, and also order refusing to probate later will, the court on determining that the order admitting the will to probate was not a bar to probate of the later will, should have determined which will was entitled to probate. 179M538, 229NW875.

Dismissal for failure to file appeal in district court is discretionary. 181M217, 232NW1. See Dun. Dig. 7787a.

On appeal to district court from an order of the probate court amending a final decree of distribution after the time for appeal from such decree had expired the trial is de novo, and, there being no pleadings in the district court, that court must determine the right to

amendment upon the petition filed in the probate court and the proof in support thereof. 181M528, 233NW305. See Dun. Dig. 7794(76).

The recitals or findings in the order appealed from cannot serve as proof of the existence of the facts averred in the petition. 181M528, 233NW305. See Dun. Dig. 7794.

Order of district court dismissing appeal from probate court is not appealable. In re Ploetz' Will, 186M395, 243NW383. See Dun. Dig. 294.

#### 8989. Proceedings in certain cases—Trial.

Order of probate court settling account of administrator is conclusive on sureties on bond. 42F(2d)266. See Dun. Dig. 3580f.

District court is without jurisdiction of settlement of accounts of administrator except on appeal. 42F(2d)266. See Dun. Dig. 2759(28).

District court, on appeal from order of probate court, has inherent equity power and jurisdiction to permit or compel a set-off on equitable grounds. An agreement for a set-off is one ground for allowing it in equity. *Browning v. E.*, 249NW573. See Dun. Dig. 7795.

#### 8990. When judgment affirmed—When reversed.

42F(2d)266; note under §8989.  
Exercise of judicial discretion by the probate court will not be reversed on appeal, except for a clear abuse thereof. *Fults' Estate*, 177M311, 225NW152.

Weight of inferences and findings of fact by court in a proceeding involving construction of ambiguous will. 177M311, 225NW156.

Where appeal to district court involved order refusing to vacate decree admitting will to probate, and also order refusing to probate later will, the court on determining that the order admitting the will to probate was not a bar to probate of the later will, should have determined which will was entitled to probate. 179M538, 229NW875.

Practice in district court of moving for a new trial after a trial de novo and findings made affirming the probate court, and in appealing from the order denying the new trial is not commended. *Walker's Estate v. M.*, 183M325, 236NW485. See Dun. Dig. 294, 300, 7795.

## CHAPTER 75

### Courts of Justices of the Peace

#### GENERAL PROVISIONS

##### 8993. Jurisdiction limited to county.

Justice of peace may hold also office of city assessor. Op. Atty. Gen., Apr. 18, 1932.

##### 8994. Place of holding court.

Does not authorize justice to regularly hold court in another town so as to usurp the office of the local justice. Op. Atty. Gen., Mar. 19, 1929.

#### COMMENCEMENT OF ACTIONS

##### 9005. Summons—Service.

174M608, 219NW452; note under §9110.

#### PLEADINGS AND TRIAL

##### 9029. Title to real estate—Case certified.

Removal to district court from municipal court forcible entry and detainer case. 178M282, 226NW847.

#### REPLEVIN

##### 9072. Writ—When returnable.

A writ of replevin issued pursuant to Laws 1895, c. 229, §22, is valid. 178M174, 226NW405.

#### APPEALS

##### 9092. May be taken, when.

Where an appeal is taken on questions of law and the judgment is reversed, the suit is no longer pending so as to bar a second suit on the same cause of action. 173M29, 216NW252.

##### 9093. Requisites.

###### 1. Time for appeal.

Defaulting defendant in municipal court was not entitled to notice of entry of judgment as respected time for appeal. *Anderson v. G.*, 183M336, 236NW483. See Dun. Dig. 486(74).

###### 2. Notice of appeal.

Notice of appeal from municipal court cannot be served by mail. 178M366, 227NW200.

###### 3. Miscellaneous.

Though notice of appeal served by mail was ineffective, the district court obtained jurisdiction where appellee moved there for judgment against garnishee. 178M366, 227NW200.

##### 9099. Return or amendment compelled, when.

Amendment of defective record on appeal from municipal court. Op. Atty. Gen., Dec. 9, 1930.

#### CRIMINAL PROCEEDINGS

##### 9110. Jurisdiction.

Justice of the peace in Golden Valley has no jurisdiction to try a criminal case for an offense committed in Minneapolis. 174M608, 219NW452.

Waiver gives no such jurisdiction. *Id.*  
Village justices and constables have jurisdiction under criminal acts committed outside village boundaries except offenses committed within the limits of any city or village wherein a municipal court is organized and existing. Op. Atty. Gen., May 19, 1931.

##### 9111. Same—To try and determine.

A municipal court organized under the general law has no jurisdiction of gross misdemeanors punishable by a fine in excess of \$100, or by imprisonment in excess of three months. *State ex rel. Ryan v. M.*, 182M368, 234NW453. See Dun. Dig. 6900b(63).

##### 9112. Complaint—Warrant.

Labeling complaint and warrant as though state of Minnesota were plaintiff was mere irregularity that did not affect jurisdiction of justice, and additional language "against the form of the statute in such case made and provided," when charging a violation of an ordinance, was mere surplusage. 177M617, 225NW286.

It is sufficient to state the facts and identify the ordinance by number. 177M617, 225NW286.

Section is not applicable where the charge constitutes a felony. Op. Atty. Gen., Aug. 5, 1930.

##### 9117. Arraignment.

Right of defendant to appeal after plea of guilty in municipal court. Op. Atty. Gen., Dec. 9, 1930.

##### 9130. Allowance of appeal.

Where there is an appeal from conviction in justice court for violation of game and fish laws, revocation of defendants license is ineffective until conviction on appeal. Op. Atty. Gen., Dec. 19, 1929.

##### 9131. How tried.

*Roehrs v. T.*, 185M154, 240NW111; note under §9277.

##### 9142. Judgment on conviction—Commitment—Execution.

A justice of the peace has no authority to permit a defendant to defer payment of any part of the fine.