THE LAW

OF

PROBATE AND ADMINISTRATION

FOR

NEBRASKA,

INCLUDING

GUARDIANSHIP AND ADOPTION OF CHILDREN,

WITH

FORMS

SECOND EDITION

ADAPTED TO OREGON

BY

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PREFACE TO SECOND EDITION.

The many new questions in regard to wills and settlements of estates that have been decided by our supreme court during the last thirteen years, as well as changes in statutory law, seem to demand a new edition of Probate and Administration. With but one exception these cases merely apply old and well-established rules to new conditions without overruling earlier cases. The courts have made no radical changes in probate law. The legislature has made some sweeping changes providing for dispensing with administration in some cases, abolishing dower and curtesy, and substituting an interest in fee by virtue of the marital relation in place of such estates. The latter act has been pretty thoroughly construed by the supreme court.

The first edition has been cited and approved by the courts of other states as well as of Nebraska.

The entire work has been revised and rewritten and much new matter added. A few changes in arrangement will be noticed, particularly in Chapter II, which has been given a more appropriate title, "Preparation of Wills," and forms of clauses most frequently used in drafting wills added.

At the suggestion of the publisher, I made a careful study of Oregon probate and guardianship law and practice, and finding that the substantive law was substantially the same in both states, and that the differences in practice were confined to but few matters,

guardianship law being identical with our own, I have adapted or, perhaps more properly speaking, annotated the book to Oregon by including the Oregon statutes where they differed from those of Nebraska, citing the Oregon cases, and inserting a few special Oregon forms. The new edition, therefore, containing a general statement of the principles governing the execution and probate of wills, the various matters and proceedings connected with the settlement of estates, the appointment, powers and duties of guardians, and adoption of children, with a systematic arrangement of the statutory law of both states on the different topics, will be of value to the Oregon as well as the Nebraska lawyer. All distinctively Oregon matter is "set solid," so that its local character can be told at a glance, and appears in the index, which gives both page and section number. The forms are indexed in connection with the different subheads.

A brief summary of the laws passed at the last session of the legislature affecting probate and guardianship matters has been added as an Appendix.

I wish to extend my thanks to the members of the profession for the many valuable suggestions I have received from them in regard to the revision, and I trust that the new edition will be of great help in the solution of questions arising in the settlement of estates and guardianship matters.

Fremont, May 3, 1915.

ARTHUR K. DAME.

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§ 1. Establishment of courts of probate jurisdiction.

The literal definition of the word "probate" is formal legal proof used, especially in reference to wills.[1] Its meaning, however, has become broadened

1 Cyclopedic Law Dict.; Bouvier's Law Dict.; Webster's Dict.

by usage, until even in statutes and judicial opinions it includes the appointment of administrators and proceedings generally in a court of first instance for the distribution of the property of a decedent to the parties such court shall find entitled to the same.

At the first session of the territorial legislature laws were passed establishing a probate court with original plenary jurisdiction, within the limits of the county, over all matters pertaining to the settlement of the estates of decedents, including sales of real estate for the purpose of paying debts and expenses of administration, and guardianship matters.[2] With the adoption of the constitution of 1875 the old probate court ceased to exist, and a county court vested with full probate and guardianship jurisdiction in each organized county in the state took its place.[3] It also possesses an extensive jurisdiction over civil and criminal cases.

In the exercise of its jurisdiction over probate and guardianship matters it is a court of record, whose judgments and recitals are entitled to the same presumptions as those of a court of general jurisdiction.[4] All of its sessions are held at the county seat. It is deemed always open, and any cause, matter or proceeding may be proceeded with therein at any time after the giving of notice or the service of process in the mode prescribed by law,[5] but for the purpose of cor-

2 Gen. Sess. Laws, vol. 1, p. 176.

3 Const., art. 18, § 15; Martin v. Grover, 9 Neb. 265, 2 N. W. 354.

4 Beer v. Plant, 1 Neb. Unof. 372, 96 N. W. 348; Scott v. Flowers, 61 Neb. 620, 85 N. W. 857; Genau v. Roderick, 4 Neb. Unof. 436, 94 N. W. 523; Kolterman v. Chilvers, 82 Neb. 216, 117 N. W. 405.

5 Rev. Stats., c. 16, § 77, [1204].

recting and modifying its decrees, it is considered as holding four terms of three months each per year.[6]

It is presided over by one judge, who is elected by the duly qualified voters of his county, at the general election held on the first Tuesday in November of each even-numbered year, and holds his office for two years and until his successor is elected and qualified.[7] Although many complicated legal questions come before this court, the legislature has not seen fit to demand any special qualifications of the judge who presides over it, and any person eligible to a county office may be chosen to fill it.

In Oregon, like powers are vested in a county court of each county, which in the exercise of the same is also a court of record, and of general and superior powers.[8] It holds regular terms on the first Monday of each month,[9] and is deemed always open for the transaction of such probate and guardianship matters as may be had without the presence of or notice to another.[10] It is presided over by one judge elected by the voters of his county for a term of four years,[11] and, as in Nebraska, it is not necessary that he be a lawyer.

§ 2. Bond and oath of county judge.

Before entering upon the duties of his office, the county judge is required to give a bond conditioned

6 Civ. Code, § 656.

7 Const., art. 8, § 20; Rev. Stats., c. 20, [1954].

8 Const., art. 7, p. 1; Russell v. Lewis, 3 Or. 389; Tustin v. Gaunt, 4 Or. 305; Monastes v. Catlin, 6 Or. 119.

9 Laws 1913, p. 467.

10 L. O. L., §§ 936, 946, 947.

11 Const., art. 8, § 11.

upon the faithful discharge of all the duties required of him by law, for the use of any person injured by a breach of the same. He is also required to take the constitutional oath of office, which must be indorsed upon his bond.[12]

The bond must be executed by at least two sufficient sureties, freeholders of the county, or by a surety company authorized to do business in the state,[13] and in a penal sum as follows: In counties having a population of less than six thousand, five thousand dollars; in counties having a population of over six thousand and less than twenty thousand, ten thousand dollars, and in counties of over twenty thousand population, fifty thousand dollars; and no person can become surety for the same officer for more than two successive terms.[14]

It must be approved, both as to form and sufficiency of sureties, by the county board, and filed and recorded in the office of the county clerk, with a certificate of approval indorsed thereon, on or before the first Thursday after the first Tuesday in January next succeeding the election, that being the date on which the newly elected officer enters upon his duties.[15]

A county judge re-elected or reappointed to that office is upon the same footing as one for the first time elected,—he must qualify by taking the constitutional oath, giving bond and rendering an account of all public funds in his possession, and, should he be holding over by reason of a failure to elect or appoint his suc-

12 Const., art. 1, § 8; Duffy v. State, 60 Neb. 812, 80 N. W. 264; Rev. Stats., c. 58, § 177, [5707].

13 Rev. Stats., c. 58, § 185, [5715].

14 Rev. Stats., c. 58, §§ 185, 194, [5715], [5724].

15 Rev. Stats., c. 58, §§ 194, 187, 181, [5724], [5717], [5701].

cessor, or the failure of such elected or appointed successor to qualify, he must qualify anew within ten days from the date on which his successor should have qualified.[16]

The failure of the officer-elect to qualify within the time limited by law creates a vacancy, *ipso facto*. The provision of the statute is self-acting, and unless the person elected files his bond within the time required, and takes the oath, he loses all right to the office, and the vacancy can be filled without any previous judicial determination of the fact.[17]

Form No. 1.

OATH OF COUNTY JUDGE.

I do solemnly swear (or affirm) that I will support the constitution of the United States and the constitution of the state of Nebraska, and will faithfully discharge the duties of county judge of ——— county according to the best of my ability, and that at the election to which I was chosen to fill said office I have not improperly influenced in any way the vote of any elector, nor will I accept or receive, directly or indirectly, any money or other valuable thing from any company, corporation or person, or any promise of office, for any official act or influence.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

§ 3. Liability of sureties.

Sureties upon the bond of a county judge undertake to answer for the acts of their principal by virtue of his office only, and not for those done under color of office. They are not liable for assets of an estate which

16 Rev. Stats., c. 57, §§ 192, 193, [5722], [5723].

17 State v. Lansing, 46 Neb. 514, 64 N. W. 1104; Holt County v. Scott, 53 Neb. 176, 73 N. W. 681.

came into the possession of the judge before letters of administration issued, and which were converted by him.[18] A conversion under such circumstances and failure to deliver the property to the administrator is a felony.[19]

Form No. 2.

BOND OF COUNTY JUDGE.

Know all men by these presents, that we, J. K., as principal, and C. D. and E. F., all of ——— county, Nebraska, as sureties, are held and firmly bound unto the county of ——— and state of Nebraska in the penal sum of ten thousand dollars, for which payment well and truly to be made we do hereby jointly and severally bind ourselves, our heirs, executors, administrators, and assigns, by these presents.

Whereas, on the ——— day of ———, 19—, said J. K. was duly elected to the office of county judge of said county of ———;

Now, therefore, the condition of this obligation is such that, if the above bond, J. K., shall pay over, according to law and to the persons entitled thereto, all moneys which shall come into his hands by virtue of his office, and shall faithfully discharge all the duties required of him by law, then these presents to be null and void, otherwise to be and remain in full force and effect.

(Signed) J. K.
C. D.
E. F.

The foregoing bond approved both as to form and sufficiency of sureties.

(Signed) L. M.,
O. P.,
R. D.,
Commissioners.

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18 Stephens v. Hendee, 80 Neb. 754, 115 N. W. 283.

19 Hendee v. State, 80 Neb. 80, 113 N. W. 1050.

Form No. 3.

JUSTIFICATION OF SURETY.

State of Nebraska,
——— County,—ss.

C. D., of said county, being first duly sworn, on oath says that he is the owner of the following described real estate situated in said county (describe real estate), and is worth the sum of ——— dollars over and above all legal exemptions, debts, and demands of every description.

(Signed) C. D.

Subscribed in my presence, and sworn to before me this ——— day of ———, 19—.

(Signed) V. S.,
Justice of the Peace.

An official bond is not required of a county judge in Oregon. He qualifies by taking an oath or affirmation to support the constitution of the United States and the constitution of the state of Oregon, and also an oath of office.[20]

§ 4. Vacancies.

The office of county judge is a constitutional one.[21] It becomes vacant by the death of the incumbent, his removal from the state, resignation, conviction of a felony, impeachment or becoming of unsound mind.[22] A vacancy also occurs when the duly appointed or elected officer neglects to have his official bond executed, approved and recorded as required by law. Such neglect vacates the office *ipso facto*, and the vacancy is filled as in other cases.[23] A vacancy may exist although the duties pertaining to the office are

20 Const., art. 15.

21 Const., art. 6, § 1.

22 Const., art. 3, § 20; L. O. L., § 3433; Or. Const., art. 8, § 11.

23 Rev. Stats., c. 58, § 111, [5721]; State v. Lansing, 46 Neb. 514, 64 N W. 1104.

being discharged by a person temporarily appointed by proper authority, as where the county judge removes permanently from the county while a person appointed by the county board is occupying the position. As soon as such temporary absence becomes permanent, and the judge becomes a resident of another state or county within this state, the authority of the appointee ceases, and a vacancy occurs which must be filled in the manner provided by the statute.[24]

A county judge cannot be removed from office for misconduct or maladministration, except by impeachment in the same manner as other judicial officers and state officers.[25]

Vacancies occurring by reason of the judge removing from the county, or failure of the elected or appointed officer to qualify, require no judicial determination. Should it appear *prima facie* that events have occurred which subject the office to a judicial declaration of being vacant, the authority having power to fill it may proceed at once to elect or appoint a successor in the manner provided by law.[26]

§ 5. How vacancies are filled.

If the vacancy occurs more than one year before the next regular election, the unexpired term exceeding one year, it must be filled by special election; if less than one year, by appointment by the county board.[27] There is no provision in the statute for the appoint-

24 Prather v. Hart, 17 Neb. 598, 24 N. W. 282.

25 Conroy v. Hallowell, 94 Neb. 794, 144 N. W. 896.

26 Prather v. Hart, 17 Neb. 598, 24 N. W. 282; State v. Lansing, 46 Neb. 514, 64 N. W. 1104.

27 Rev. Stats., c. 20, § 339, [2278], [2279].

ment of a temporary or acting county judge to hold the office when the vacancy must be filled by a special election, between the time when the vacancy occurs and the date when the newly appointed officer qualifies. An appointee under such circumstances would probably be held a *de facto* county judge and his acts as such valid.[28]

In Oregon, the vacancy is filled by appointment by the governor, and the appointee holds the office until the next general election when his successor is elected for the full term of four years.[29]

§ 6. Disqualification of county judge.

A county judge is disqualified by statute from acting in any case or matter in which he is next of kin of the deceased, or where he is devisee or legatee under a will, or is one of the subscribing witnesses thereto, or where he is named as executor or trustee therein, or where he is related to any party in interest in any proceeding before him, by consanguinity or affinity, or has such an interest therein as would preclude him from acting as a juror in such case or matter, or where he has acted as attorney or counsel in any case or matter before him.[30] These restrictions, which are more stringent than those of the common law, would bar him from sitting on the probate of a will which he has drafted.[31]

Under the Oregon practice he is disqualified by direct interest, relationship by consanguinity or affin-

28 See Dredla v. Bache, 60 Neb. 655, 83 N. W. 916.
29 Const., art. 5, § 16; State v. Johns, 3 Or. 536.
30 Rev. Stats., c. 16, § 79, [1206].
31 Moses v. Julian, 45 N. H. 52.

ity within the third degree, or having been attorney in the proceeding for either party.[32]

§ 7. Effect of disqualification.

The disqualification of a county judge does not bar him from performing mere ministerial acts, requiring no exercise of judicial discretion, such as filing papers or issuing process or notice of hearing,[33] but whenever a matter arises in which his judicial discretion must be exercised, his disqualification completely deprives him of jurisdiction over such proceeding.[34] Not only are judicial acts performed by a disqualified judge void, but they are so opposed to the American standards of fairness and impartiality demanded of its judges that the parties cannot, either by waiver or agreement, vest the court with jurisdiction.[35]

Form No. 4.

OBJECTIONS TO COUNTY JUDGE ON ACCOUNT OF RELATIONSHIP.

In the County Court of ——— County, Nebraska.

In the Matter of the Estate of A. B., Deceased.

Comes now C. D. and respectfully represents unto the court that on the ——— day of ———, 19—, he filed his petition in said court for the probate of the will of said A. B., and for the appointment of G. H. as executor of said will; that said matter was set for hearing by said court for the ——— day of ———, 19—, and notice thereof ordered published in the ———, a newspaper published at and within the county aforesaid; that J. K., the judge of said court,

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32 L. O. L., § 956.

33 State v. Gurney, 17 Neb. 523, 23 N. W. 524.

34 Moses v. Julian, 45 N. H. 52; Gay v. Minot, 3 Cush. (Mass.) 352; Schoonmaker v. Clearwater, 41 Barb. (N. Y.) 200.

35 Walters v. Wiley, 1 Neb. Unof. 235, 95 N. W. 456; Edwards v. Russell, 21 Wend. (N. Y.) 63; People v. De La Guerra, 24 Cal. 77.

is disqualified from acting in any proceeding in the settlement of said estate, for the reason that the said J. K. was a son-in-law of said A. B. (is an heir at law of said A. B.) (legatee under the will of said A. B.) [state other grounds of disqualification, if any such exist].

Your petitioner therefore requests that L. M., of said county, or some other competent person, be appointed, acting county judge for the purpose of hearing and determining all matters pertaining to the settlement of said estate that may come before said court.

Dated at ———, Nebraska, this ——— day of ———, 19—.

(Signed) C. D.

Form No. 5.

VERIFICATION.

State of Nebraska,
——— County,—ss.

C. D., being first duly sworn, on oath says that he has read the foregoing petition by him subscribed, and knows the contents thereof, and that the facts therein set forth are true, as he verily believes.

(Signed) C. D.

Subscribed in my presence, and sworn to before me, this ——— day of ———, 19—.

(Signed) E. F.,
Notary Public.

Form No. 6.

OBJECTIONS TO COUNTY JUDGE ON ACCOUNT OF BIAS AND PARTIALITY.

In the County Court of ——— County, Nebraska.

In the Matter of the Estate of A. B., Deceased.

Comes now C. D. and respectfully represents unto the court that he is a grandson and heir-at-law of said A. B.; that on the ——— day of ———, 19—, E. F. filed his petition in said court for the probate of an alleged will of said A. B., and for the appointment of him, said E. F., as executor thereof; that said matter was set for hearing by said court for the ——— day of ———, 19—, and notice thereof ordered published in the ———, a newspaper printed and published in said county; that J. K., the judge of said court, is disqualified from acting in said matter, for the following reasons: That the said J. K. is the attorney for said proponent, said E. F.; that said J. K. drafted said alleged will, and was present when the same

was signed by said A. B.; that your petitioner has filed objections to the probate of said alleged will on the ground that said E. F. exerted undue influence over said A. B., and said instrument is not the will of said A. B., and that the signature of said A. B. to said instrument was obtained by the fraud of said proponent E. F.; that said J. K. may be a material witness in said matter.

[Add prayer as in No. 4.]

Form No. 7.

REQUEST FOR APPOINTMENT FOR ACTING COUNTY JUDGE TO ACT IN A CERTAIN CASE.

To the County Board of —— County, Nebraska:

I hereby request your honorable body to appoint a competent and disinterested person to act as judge of the county court of said county, in a certain matter therein pending, entitled "In the Matter of the Estate of A. B. Deceased," for the reason that I am disqualified to act therein.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

Form No. 8.

REQUEST FOR APPOINTMENT FOR ACTING COUNTY JUDGE ON ACCOUNT OF ABSENCE OF JUDGE FROM THE COUNTY.

To the County Board of ——— County, Nebraska:

I respectfully request your honorable body to appoint a suitable and disinterested person to act as judge of the county court of said county during my temporary absence therefrom.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

§ 8. Appointment of acting county judge.

Whenever a county judge is disqualified from hearing any cause pending in his court, or is temporarily disabled by sickness or otherwise, the county board may appoint a competent person to act in his place,

who shall have the same authority and be subject to the same restrictions as the regular incumbent.[36]

In the case of the disqualification of the county judge, the duties of the appointee are limited to the particular matter which was the cause of the appointment being made. He is entitled to access to the office and the seal, papers and records whenever necessary.[37]

In the case of other temporary appointments, the power of the appointee ends when the inability of the judge to act is removed.

A county judge who is disqualified should himself request the county board to appoint someone to take his place. Any person having a legal right or beneficial interest in any probate or guardianship matter, such as a proponent, heir, devisee or legatee, may file objections to the qualification of the judge and thus secure the appointment of a disinterested person.

An acting county judge must give bond and have the same approved in the same manner and form as though he were regularly elected or appointed, and also take the oath of office. The presumption is that he was regularly appointed by competent authority, and it is not necessary, in any matter coming before him, for the records to show his right to act in the premises.[38]

In Oregon, whenever a county judge is disqualified by reason of interest, the proceedings may be certified to the circuit court and the matter proceed before the circuit judge the same as if it had remained in the county court. In case of the absence from the county,

36 Rev. Stats., c. 16, § 108, [1235].

37 Nebraska Mfg. Co. v. Maxon, 23 Neb. 224, 36 N. W. 492.

38 Taylor v. Tilden, 3 Neb. 343.

illness or incapacity of the county judge, his duties in all probate and guardianship matters may be performed by any circuit judge for the county.[39]

§ 9. Jurisdiction of county court—Statutory.

Courts of probate and administration, in so far as their control over the settlement of the estates of persons deceased and guardianship matters are concerned, derive none of their authority from common law. They are solely creatures of the constitution and legislature, with such powers only as are thereby given them.[40]

County courts have exclusive original jurisdiction within the limits of the county of the probate of wills, the administration of the estates of persons deceased and the guardianship of minors, insane and incompetent persons, and spendthrifts.[41] They have power:

First. To hear and determine claims and setoffs in the matter of the estates of deceased persons.

Second. To hear and determine questions of applications for, and to grant and issue, letters of administration, testamentary and guardianship, and revoke the same.

Third. To take the probate of wills.

Fourth. To cause to be taken, receive, file and record all inventories, sale and appraisement bills of the estates of deceased persons.

39 L. O. L., § 939; Laws 1911, p. 427.

40 Byron Reed Co. v. Kalbunde, 76 Neb. 801, 108 N. W. 133; Wheeler v. Barker, 51 Neb. 846, 71 N. W. 750; Grady v. Hughes, 64 Mich. 540, 31 N. W. 438; State v. Wilson, 38 Md. 338; Fairfield v. Gulliver, 49 Me. 360; Lee's Case, 1 Minn. 60.

41 Rev. Stats., c. 16, § 80, [1206], c. 18, § 89, [1628]; Loosemore v. Smith, 12 Neb. 344, 11 N. W. 493; Pettit v. Black, 13 Neb. 152, 12 N. W. 841; Stevenson v. Valentine, 38 Neb. 902, 57 N. W. 746.

Fifth. To require executors, administrators and guardians to exhibit and settle their accounts, and to account for the estate and property which has come into their possession as such.[42]

Sixth. To authorize guardians to sell or convey the personal estate of their wards to provide for their education and support.[43]

Seventh. To remove for cause shown executors, administrators and guardians.[44]

Eighth. To authorize suits to be brought on the bonds of executors and administrators.[45]

Ninth. To authorize and empower executors and administrators to mortgage the realty of their decedents for the purpose of paying mortgages already a lien on the property.[46]

Tenth. To assign to the surviving husband or wife or children of the deceased an allowance for their maintenance pending administration, but not for a longer time than one year.[47]

Eleventh. To assign the personal estate of an intestate to the persons the court finds are entitled thereto.[48]

Twelfth. To designate the persons to whom the real estate descends and the shares or portions of the same to which they are entitled.[49]

42 Rev. Stats., c. 16, § 80, [1207].
43 Rev. Stats., c. 18, § 115, [1654].
44 Rev. Stats., c. 17, §§ 70, 85, [1334], [1349], c. 18, § 116, [1655].
45 Rev. Stats., c. 17, § 256, [1520].
46 Rev. Stats., c. 17, § 227, [1491].
47 Rev. Stats., c. 17, §§ 3, 51, [1267], [1315].
48 Rev. Stats., c. 17, § 3, [1267].
49 Rev. Stats., c. 17, §§ 1, 2, [1265], [1266].

Thirteenth. To enter decrees for the adoption of children.[50]

In Oregon, the county court is given by the constitution [51] jurisdiction over probate matters possessed by the probate court at the time of its adoption.[52] As a court of probate it is given by statute exclusive jurisdiction, in the first instance, to take proof of wills; to grant and revoke letters testamentary, of administration and of guardianship; to direct and control the conduct and settle the accounts of executors, administrators and guardians; to direct the payment of debts and legacies, and the distribution of the estates of intestates; to order the sale and disposal of the real and personal estate of deceased persons; to order the renting, sale or other disposal of the real and personal property of minors; to take the care and custody of the person and estate of a lunatic or habitual drunkard, and to appoint and remove guardians therefor; to direct and control the conduct of such guardians and settle their accounts, and to direct the admeasurement of dower; [53] to decree specific performance by an executor or administrator of contracts made by the decedent for the sale of real estate.[54]

No other court has authority, in the first instance, to determine what constitutes the personal property of a decedent and the shares of the heirs.[55] In admeasuring dower or curtesy its jurisdiction is not exclusive, its powers being limited to estates in which no objec-

50 Rev. Stats., c. 18, § 84, [1623].

51 Const., art. 7, § 12.

52 Adams v. Lewis, 5 Saw. 229; State v. McDonald, 55 Or. 419, 104 Pac. 967.

53 L. O. L., § 936.

54 L. O. L., §§ 1269, 1270; Adams v. Lewis, 5 Saw. 229.

55 De Bow v. Wollenberg, 52 Or. 432, 96 Pac. 536, 97 Pac. 717; State v. McDonald, 55 Or. 419, 104 Pac. 967.

tions are made by the parties interested,[56] and it has no jurisdiction over actions for the partition of the real estate of a decedent,[57] and cannot authorize a guardian to mortgage the real estate of his ward.[58]

§ 10. Equitable nature of county court proceedings.

The county court possesses much more extensive powers over probate and guardianship matters than the probate courts of many states. It has equitable as well as legal jurisdiction, which is exclusive over such matters, with full authority to grant the relief to which the party is entitled,[59] excepting only those matters pertaining to its jurisdiction where the title to real estate is involved.[60]

In Oregon, the county court is a court of superior jurisdiction over those matters which are placed under its control by the constitution and the statutes.[61] It is not vested with general equity powers,[62] or a full power over its decrees with jurisdiction to set them

56 Chapter XXXIXa.

57 Hanner v. Silver, 2 Or. 336.

58 Trutch v. Bunnell, 11 Or. 58, 4 Pac. 588.

59 Lydick v. Chaney, 64 Neb. 288, 89 N. W. 801; Williams v. Miles, 63 Neb. 859, 89 N. W. 451; Id., 68 Neb. 463, 94 N. W. 705; Genau v. Abbott, 68 Neb. 117, 93 N. W. 942; Beer v. Plant, 1 Neb. Unof. 772, 96 N. W. 348; Wheeler v. Barker, 51 Neb. 846, 71 N. W. 752; Wilson v. Coburn, 35 Neb. 530, 53 N. W. 466; Glade v. White, 42 Neb. 336, 60 N. W. 536.

60 Const., art. 8, § 16; Best v. Gralap, 69 Neb. 811, 99 N. W. 837.

61 In re Slate's Estate, 40 Or. 351, 68 Pac. 399; Russell v. Lewis, 3 Or. 380; Farley v. Parker, 6 Or. 105; Tustin v. Gaunt, 4 Or. 305.

62 Dunham v. Siglin, 39 Or. 291, 64 Pac. 661; Richardson's Guardianship, 39 Or. 246, 64 Pac. 390; Hillman v. Young, 64 Or. 279, 127 Pac. 793.

aside for fraud,[63] but applies equitable rules over matters coming within the scope of its authority.[64]

§ 11. Implied or inherent jurisdiction.

The power or authority to do a thing must of necessity carry with it the right to take any and all steps necessary to a complete control over the matter, cause or proceeding before the tribunal, otherwise the effect of a large part of legislative enactments would be destroyed, or their power so crippled as to make them of little use. Therefore a court, though of limited jurisdiction, possesses such auxiliary incidental powers as are necessary and proper to carry into effect those which the legislature has seen fit to confer upon it,[65] and that inherent authority vested in all judicial tribunals which is necessary to a full control of all matters coming within their jurisdiction.[66]

The power to punish for contempt exists independent of the statute.[67] It has inherent power to construe an antenuptial contract affecting personal property and determine the rights of the parties in the property in the course of the proceedings for the division and distribution of the estate.[68]

It has power, which may be exercised in the same manner and for the same causes as in a court of general

63 Froebrich v. Lane, 45 Or. 13, 76 Pac. 351.

64 In re Morgan's Estate, 46 Or. 236, 77 Pac. 608; In re Herreen's Estate, 40 Or. 90, 66 Pac. 688.

65 Saylor v. Simpson, 45 Ohio St. 141, 12 N. E. 181; Davis v. Davis, 11 Ohio St. 386.

66 Morgan v. Dodge, 44 N. H. 255; Proctor v. Wannamaker, 1 Barb. Ch. (N. Y.) 302.

67 Baldwin v. City of New York, 42 Barb. (N. Y.) 549.

68 Winkle v. Winkle, 8 Or. 193.

jurisdiction, to correct, revise, amend or set aside its decrees, orders and judgments.[69] Other inherent powers are to assign the homestead to the widow, or surviving spouse,[70] to order the transfer of the residue of the estate in the hands of the ancillary administrator, after all debts and demands against the estate in this state have been paid to the parties entitled thereto,[71] and to dismiss an action or proceeding brought before it.[72]

By virtue of its inherent powers it has original jurisdiction of a petition by an executor or other party in interest, pending administration for the construction of a will, for the purpose of directing the representative in the discharge of his duties.[73]

It has no authority to set aside a decree on motion for a new trial for errors of law. The remedy is by taking the matter to the district court.

§ 12. Clerk of the county court.

In counties where the county judge has been authorized by the county board to employ one or more clerks, he may designate and appoint in writing one of said clerks to be a clerk of the county court. Said appointment may be revoked at his pleasure, and said appointment and revocation shall be filed in the office of the

69 Williams v. Miles, 63 Neb. 859, 89 N. W. 451; Andersen v. Andersen, 69 Neb. 565, 96 N. W. 276.

70 Guthman v. Guthman, 18 Neb. 98, 24 N. W. 435.

71 Childress v. Bennett, 10 Ala. 731; Dawes v. Boylston, 9 Mass. 337.

72 Heermans v. Hill, 4 Thomp. & C. (N. Y.) 602.

73 Youngson v. Bond, 69 Neb. 356, 95 N. W. 700; Andersen v. Andersen, 69 Neb. 565, 96 N. W. 276.

county clerk of said county.[74] Before entering upon the duties of his office the clerk must take and subscribe an oath of office and file the same with the county clerk.[75]

In Oregon, the county clerk is *ex officio* clerk of the county court.[76] He has the custody of the seal of the court and performs the usual duties of a clerk of a court of record, which are principally of a ministerial character.[77] He is elected at each general election for the term of two years,[78] and is required to give a bond in the sum of $10,000 or $15,000, if required by the county court to the state of Oregon, conditioned upon the faithful performance of his duties and the payment, according to law, of all moneys coming into his hands. His certificate of election and official oath must also be filed.[79]

Form No. 9.

OATH OF CLERK OF COUNTY COURT.

I do solemnly swear that I will support the constitution of the United States, the constitution of the state of Nebraska, and faithfully and impartially perform the duties of clerk of the county court of ——— according to law and the best of my ability. So help me God.

(Signed) C. D.

He has substantially the same powers in connection with the business of the county court as a clerk of a court of general jurisdiction, and may administer oaths

74 Rev. Stats., c. 16, § 112, [1239]; Zimmerman v. Trude, 80 Neb. 503, 114 N. W. 641; In re Creighton's Estate, 88 Neb. 107, 129 N. W. 181.

75 Rev. Stats., c. 16, § 113, [1240].

76 Const., art. 7, § 15.

77 L. O. L., § 1033.

78 L. O. L., § 2934.

79 L. O. L., §§ 2936, 2938, 2939.

and fix dates of hearing. All his acts, however, are required to be in the name of the county judge. His pay is fixed by the county board and is payable from the fees of the office.[80]

§ 13. County court practice and procedure.

Proceedings in probate and guardianship matters in the county court are similar to those in a case in equity. The court acquires jurisdiction by the filing of a petition, which should be under oath, though in some proceedings, where service of process or notice to interested parties is required, failure to verify it is not a fatal defect, or of a verified statement, and, with a few exceptions, by the issue and service of notice and citation. Interested parties, if competent, may waive service and enter their voluntary appearance as in the district court. In a few cases service of process is not required, but may be had if the court so orders; and if none is ordered, a decree may be entered on the hearing strictly *ex parte*.

The same formality is not required of county court pleadings as in cases in a court of general jurisdiction, nor do the statutes require the filing of answer or objections, though such is the usual practice. All issues are determined by the court.

The county court acts judicially in all hearings on petitions. The jurisdictional allegations of a petition must be established in the same manner as in a case in the district court, and an *ex parte* affidavit is admis-

[80] Rev. Stats., c. 16, § 114, [1241]; In re Creighton's Estate, 88 Neb. 107, 129 N. W. 181.

sible for the same purposes, and none other, in the former as in the latter court.

County court practice in Oregon differs from that in Nebraska in that there are some proceedings in which the filing of a verified petition setting out the jurisdictional facts gives the court power to grant the order prayed for, without the issue and service of process and without hearing. In other proceedings a citation must issue and service of the same, either personally or by publication, as the residence of the parties permit and as ordered by the court. Proceedings in probate and guardianship matters are not "civil cases" within the general definition of the term. The jurisdiction of the court over them is exercised in the same manner as a suit in equity, and all disputed questions of fact are determined by the court without the aid of a jury.[81] The county court exercises its powers by means of: 1. A citation to the party; 2. An affidavit or statement or verified petition of a party; 3. A subpoena to a witness; 4. Orders and decrees; 5. An execution or warrant to enforce them. Proceedings are in writing and had on the application of a party or the order of the court.[82]

The allegations of a petition to obtain like action on the part of the court are substantially the same in both states. There is some difference in the form of the process; under the Oregon practice it being a citation to a party to appear, and in Nebraska a notice of a hearing. Orders and decrees differ in their formal parts only, though in many proceedings being identical. The usual Oregon order is based on a verified petition, its formal part reciting the jurisdictional facts appearing from the petition on file, while most

81 Stevens v. Meyers, 62 Or. 411, 126 Pac. 29.

82 L. O. L., § 1135.

Nebraska decrees are based on findings at a hearing after notice, which notice and service of the same is jurisdictional.

The proper title to all papers filed in probate and administration matters is:

In the County Court of ——— County, Nebraska.
In the Matter of the Estate of A. B., Deceased.

In guardianship matters:

In the County Court of ——— County, Nebraska.
In the Matter of the Guardianship of A. B., a Minor [Incompetent Person, Spendthrift].

§ 14. Process and service.

The county court has power to issue such process to the sheriff of any county in the state as is necessary in the discharge of the powers conferred upon him,[83] all of which must be signed in the name of the county judge and bear the seal of the court.

Process, except in proceedings for contempt, may be served by personal service, by leaving a copy at the usual place of residence of the party to be served, or if the party be a nonresident, by publication. Service by publication may be had in many cases where the parties are residents, if the court so orders.[84] The court is without jurisdiction to order personal service of process outside the state, unless the statutory affidavit that service cannot be had in this state is filed.[85]

83 Rev. Stats., c. 16, §§ 98, [1225], [1226].
84 Rev. Stats., c. 16, § 99, [1226].
85 Boden v. Meier, 71 Neb. 191, 98 N. W. 701,

The court must designate the paper requested by the petitioner.[86]

§ 15. Attorneys.

The county court while acting on probate and guardianship matters being a court of record,[87] no person except a regularly licensed attorney at law, unless he be a party to the proceeding, can commence, conduct or defend any proceeding, either by using or subscribing his name, or the name of any other person, or by drawing pleadings or other papers to be signed by a party before the court.[88]

The county judge "is not permitted to practice as an attorney before himself, nor draw any paper or written instrument to be filed in his own court, except such papers as he is required by law to draw himself."[89]

The papers which should be both prepared and filed by a party or his attorney are petitions, applications, answers, replies, motions, objections, oaths, inventories, proof of claims, reports and accounts, and in many counties the practice regarding preparation of orders and decrees is the same as in the district court.

A county judge is governed by the same code of judicial ethics as is a judge of the supreme court, which forbids a judge from giving advice concerning matters before him to parties interested therein. He may, in the interests of justice, cite parties to appear of his own motion. His instructions to an executor, administrator or guardian, except by order or decree duly

86 Civ. Code, § 86.
87 Section 1, *supra*.
88 Rev. Stats., c. 5, § 1, [265]. See L. O. L., § 1075.
89 Rev. Stats., c. 5, § 11, [275].

made in the manner provided by law, are not binding, and afford such representative no protection whatever.[90]

§ 16. Guardians ad litem.

The county court has authority in all matters pending therein, in which a minor is interested and is not represented by a general guardian, to appoint a guardian *ad litem* to appear for and in his behalf.[91] Such guardian should always be an attorney of the court. He should devote the same care, skill and integrity to the case of his ward as though he were acting under an express retainer on behalf of his client.[92] He should not permit himself to become merely an assistant of the other attorneys, unless the interest of his ward is identical with that of their clients.[93] He is entitled to a reasonable compensation, payable from the estate, to be fixed by the court.[94]

Such appointment should be made, unless the minor is otherwise represented, on a hearing for the probate of a will where there are indications of undue influence, testamentary incapacity, or other grounds for a contest. It is properly made on a hearing on the final account of an executor or administrator, especially where such representative is the general guardian, and in all other proceedings pending administration, when

90 In re O'Brien's Estate, 80 Neb. 125, 113 N. W. 1001.

91 Civ. Code, § 38; Rev. Stats., c. 18, § 100, [1639]; L. O. L., § 1318.

92 Bonacum v. Manning, 85 Neb. 60, 122 N. W. 711; 83 Neb. 418, 119 N. W. 672.

93 Willms v. Plambeck, 76 Neb. 195, 107 N. W. 248.

94 Rev. Stats., c. 5, § 13, [277].

the rights of the minors seem to demand special attention.

The court should always appoint a guardian *ad litem* on the application for the appointment of a guardian of an alleged incompetent person or spendthrift, unless such person is represented by an attorney of his own selection or has already been adjudged insane.

No party to a proceeding has a right to dictate who shall be appointed, but a suggestion to the court is not improper.[95]

Under no circumstances should anyone in any way connected with the county judge's office be appointed. A clerk or assistant of the county judge is prohibited from practicing in the county court the same as the judge himself.

§ 17. Records of county court.

Consecutive file numbers are required to be assigned to each matter or proceeding filed in the probate division of the county court, which must be noted on all the record books. Such books consist of a probate record, a fee book, an inheritance tax record, an adoption record, a general index and an index to wills. The probate record contains the title to the matter or proceeding, the names of the parties, the file number, and a complete record of all petitions, notices, citations, proofs of service of same, inventories, reports, accounts, pleadings filed in contested will cases, mandates from higher courts, reports of commissioners and appraisers and all orders and decrees. Evidence should not be recorded.

95 Willms v. Plambeck, 76 Neb. 195, 107 N. W. 248.

The fee book contains the title of each probate, guardianship or adoption proceeding, the file number, a complete dated itemized statement of the fees received by the court for all services performed in regard to the particular matter, from whom the same were received, and the names of the persons to whom paid.[96]

The inheritance tax book contains the returns made by the appraisers, the cash values of annuities, life estates and terms of years and other property fixed by him, and the tax assessed thereon, and the amounts of any receipts for payments thereof filed with him.[97]

The adoption book contains a complete record of all proceedings for the adoption of children, including decrees.[98]

The general index, as its name indicates, is a complete index showing where all proceedings are recorded, and the page of the fee book where the fees charged and received are entered.

The index to wills contains a list of all the wills filed for safekeeping, with the name of the testator, the name of the party filing the same, the date of filing, and the name of the party to whom delivered.[99] A good many counties have adopted what is usually termed the "loose-leaf record system," by which the records are typewritten and bound together. The entire proceeding then appears in consecutive order, the same as a complete record in a case in the district court,

96 Rev. Stats., c. 16, § 106, [1233].
97 Rev. Stats., c. 69, § 350, [6638].
98 Rev. Stats., c. 18, § 86, [1625].
99 Rev. Stats., c. 16, § 106, [1233].

instead of being scattered through a number of pages, as under the old plan.

Under the Oregon practice the following books are kept: 1. A register, in which shall be entered a memorandum of all official business transacted by the court or a judge thereof appertaining to the estate of each person deceased, under the name of such person,—that pertaining to the guardianship of an infant under the name of the infant, and that pertaining to an insane person or drunkard under his name.

2. A record of wills, in which shall be recorded all wills proven before the court or judge thereof, with the order of probate thereof, and of all wills proved elsewhere upon which letters of administration are issued by the direction of such court or judge.

3. A record of the appointment of administrators, whether general or special, or of a partnership and of executors.

4. A record of the appointment of guardians of infants, insane persons and drunkards.

5. A record of accounting and distribution in which shall be entered a summary balance sheet of the accounts of executors, administrators and guardians, with the orders and decrees relating to the same; a memorandum of executions issued thereon, with note of satisfaction when satisfied; also orders and decrees relating to real property and to the distribution of the proceeds thereof; and notices of all money or securities paid or deposited in court as proceeds of such sales or otherwise; and a statement showing the names of creditors, and the debts established and entitled to distribution, the amount to which each person is entitled out of such funds, and the amount actually paid to each person, and when paid.

6. A record of the appointment of the admeasurer of dower, with all orders and decrees relating to the same and the admeasurer's report.

7. An order book, in which shall be entered all orders in any manner pertaining to the administration of the estate or the guardianship matter, and appointments of special guardians, appraisers or referees. To each of such books there shall be attached an index, securely bound in the volume, referring to the entries or records in alphabetical order, under the name of the person to whose estate or business they relate, and naming the page of the book where the entry is made.[100]

§ 18. Certifying records.

Every record made in the county court, excepting original orders, judgments or decrees thereof, shall have attached thereto a certificate, signed by the judge of such court, showing the date of such record and the county in which the same is made, and it shall not be necessary to call such judge or his successor in office to prove such record so certified. In any cause, matter or proceeding in which the probate court or probate judge has jurisdiction, and is required to make a record not provided for by statute, such record shall be certified in the same way and with like effect as aforesaid.[101]

§ 19. Probate books public records.

All probate books are public records, and any citizen of this state, or any person interested in the matters therein contained, may examine them free of charge at any proper time when the court is open for business.[102]

100 L. O. L., § 1136.

101 Rev. Stats., c. 19, § 107, [1234].

102 State v. Meeker, 19 Neb. 106, 26 N. W. 620.

No papers or files of any proceeding should be taken from the courtroom unless the person taking them gives his receipt therefor. The practice of taking away the files should be discouraged as much as possible.

Form No. 10.

RECEIPT FOR FILES.

In the County Court of ——— County, Nebraska.

In the Matter of the Estate of A. B., Deceased.

Received of the county judge complete files in the above action.
Dated this ——— day of ———, 19—.

(Signed) F. D.,
Attorney for ———.

§ 20. Fees and salaries of county judges.

The salary of the county judge is fixed by the statute and is payable solely from the fees of his office, and is based on the population of the county.

In counties of under 25,000 population, it is $1,500 per year; over 25,000 and under 60,000, $2,000; and over 60,000, $2,500.

In counties having a population of under 25,000, the county board may allow him one or more assistants and fix their salaries at not to exceed $1,000; in counties of over 25,000 and under 60,000, he is allowed a clerk at $1,000 a year; in counties of over 60,000 and under 140,000, a clerk at $1,200; and in counties of over 140,000, a clerk of $1,500, together with such other assistants as may be allowed him by the county board, which also fixed their salaries. In counties having a population of over 25,000 and under 60,000, all the fees in excess of his own salary are paid into

the county treasury, and the salaries of the clerk and assistants are paid from the general fund of the county. In all other counties, his own salary and the salaries of his clerk and assistants are payable from the fees received. All money retained for clerk or deputy hire must be used for that purpose, and the balance, if any, is paid into the county treasury.[103]

The county judge is required to collect fees for services as follows: Receiving, recording and filing a petition for letters of administration, testamentary or of guardianship, not exceeding two hundred words, fifty cents, and ten cents for each hundred words in excess thereof; affidavit, twenty-five cents; order of hearing, fifty cents; admitting will to probate, two dollars; approving bond, twenty-five cents; recording bond, ten cents per hundred words; granting letters testamentary, of administration or guardianship and recording same, two dollars; copy of letters, fifty cents and ten cents for each hundred words in excess of one hundred; filing account not exceeding two hundred words, fifty cents and ten cents per hundred for the excess thereof; making and recording order or decree, fifty cents and ten cents per hundred words in excess of one hundred; examining account, not exceeding fifty vouchers, one dollar, for each additional voucher, two cents; issuing commission to appraisers or commissioners, fifty cents; filing report of same, or inventory or sale bill, not exceeding two hundred words, fifty cents and ten cents for each hundred words in excess thereof; recording report of commissioners to make partition, not exceeding two hundred words, fifty cents, for each hundred

[103] Rev. Stats., c. 21, § 33, [2453].

words in excess thereof, one cent for ten; filing any petition for other purpose, fifty cents and ten cents for each hundred words in excess of one hundred; filing and approving or rejecting claim, ten cents; administering oath, ten cents; certificates, twenty-five cents; filing any other paper, ten cents, and recording same, one cent per ten words; indexing, twenty-five cents for first entry and five cents for each other entry, but not exceeding one dollar; indexing will, twenty-five cents; each day's attendance on the trial of a probate case, one dollar.[104] The statute does not authorize the county judge to tax up a dollar fee every time he performs any duty in regard to an estate, but only when he performs some judicial act on the petition or application of an interested party.

§ 21. Sheriffs' and constables' fees.

Sheriffs and constables are entitled to the following fees for service of process in probate, administration and guardianship matters: For serving any notice, or order of court, or motion, fifty cents; for making copies of same, twenty-five cents for each copy; mileage, each mile necessarily traveled, five cents. They may be collected in advance.[105]

§ 22. Printers' fees.

For publishing such legal notices as shall be required by the county court, newspapers are entitled to the following fees: For each square of ten lines, for the first insertion, one dollar; each subsequent insertion, for

104 Rev. Stats., c. 21, § 29, [2247].
105 Rev. Stats., c. 21, §§ 21, 39, [2441], [2459].

each square of ten lines, fifty cents. Each advertisement under ten lines is deemed a square, and each fractional part of a square is counted as a full square.[106] If less than the legal rate is charged, the benefit accrues to the estate.[107]

§ 23. Witnesses' and appraisers' fees.

Witnesses before the county court are allowed one dollar a day for attendance, and five cents a mile for each mile necessarily traveled.[108]

The fees of an appraiser of an estate are not fixed by statute. They should be paid a reasonable compensation for their services, to be approved by the court on the annual or final account.

Appraisers under the inheritance tax law are allowed a reasonable compensation to be fixed by the court and mileage. In determining the same it is proper for the court to consider, in addition to the time necessarily involved, the cost of reducing the testimony to writing, and the questions of law, if any, passed upon by him in making his findings. Witnesses before appraisers are allowed two dollars per day and mileage.[109]

In Oregon, the salary of the county judge of each county is fixed by the legislature.

Fees for the various services performed in connection with probate and guardianship matters are collected by the clerk and are as follows:

For issuing letters testamentary, of administration or guardianship, fifty cents; in Curry, Klatsop, Colum-

106 Rev. Stats., c. 21, § 46, [2466].

107 Phenix Ins. Co. v. McEvony, 52 Neb. 566, 72 N. W. 956.

108 Rev. Stats., c. 21, § 45, [2465].

109 Rev. Stats., c. 69, § 344, [6632].

bia, Josephine, Klamath, Lake and Tillamook counties, one dollar.

For recording any judgment, order, bill or appointment of any executor, administrator or guardian, for each folio, ten cents; in the counties above named, twenty-five cents.

For making all indices in relation to an estate, fifty cents; in the counties above named, one dollar.

For making and keeping a register in relation to an estate, fifty cents.

For making and keeping a record of accounting and distribution in relation to any estate, one dollar; in the counties above named, two dollars and fifty cents.

For recording the appointment of any admeasurer of claims, fifteen cents.

For issuing a writ, order or process except subpoena, forty cents.

For issuing subpoena for one person, fifteen cents; each additional person, five cents.

For filing papers, ten cents each.

For swearing a witness, ten cents.

For taking and approving a bond, ten cents.

For official certificate, either with or without seal, twenty-five cents.[110]

Sheriffs are allowed for serving a citation, notice or order, twenty-five cents for the first party and five cents for each additional party or witness; for making copy of same, ten cents per folio, but no charge can be made unless such copy is actually made by him.[111]

All fees of the clerk are required to be paid to the county treasurer, and the county judge, clerk of the county court, and necessary deputies are paid by warrants on the general fund of the county.

Before the filing of any proceedings in probate, including petitions for the probate of wills, for letters of

110 L. O. L., §§ 3108, 3126.

111 L. O. L., § 1310.

administration, and in will contest proceedings, the following fees must be charged and collected by the clerk: $2.50 where the estate is under $500 in value; $5, estates between $500 and $1,000; estates between $1,000 and $2,000, $7.50; between $2,000 and $4,000, $10; $4,000 to $8,000, $15; over $8,000, $20. The party filing any answer, demurrer, motion or objection is required to pay the sum of $3.

The fees of witnesses are the same as in other courts of record, two dollars per day and mileage of ten cents per mile, except in counties of over fifty thousand inhabitants, where mileage is but five cents.[112]

There is no statute in Oregon fixing the fees of a newspaper for publishing probate notices.

All fees and costs of the court and its officers may be paid into court by the executor, administrator or guardian, which payment releases the parties from liability, and disbursed to the parties entitled thereto.[113]

§ 24. Original jurisdiction of district court over probate and guardianship matters.

While the county court is the distinctively probate court in Nebraska, there are certain matters of which probate courts usually have jurisdiction which are exclusively within the control of the district court or a judge thereof. These powers are limited to matters pertaining to the transfer of the title to real estate. Such court, or a judge thereof, at chambers anywhere within the judicial district has power to grant licenses for the sales of real estate of decedents for the payment of debts and legacies, to authorize guardians to sell the

112 L. O. L., § 3145.

113 Rev. Stats., c. 16, § 115, [1242].

lands of their wards, to authorize executors or administrators to mortgage real estate, and also has exclusive jurisdiction of special proceedings for the enforcement of real estate contract made by decedents.[114]

Under the Oregon practice the county court has exclusive original jurisdiction over these matters.

The district court does not possess the general equity jurisdiction over probate matters formerly exercised by a court of chancery. There are some matters connected with the settlement of estates, like actions by an executor or administrator to recover, for the benefit of creditors, property fraudulently transferred by a decedent, and partition cases, over which it has exclusive jurisdiction.

114 Chapters XXI, XXIV, XXXVIII, *post;* Stewart v. Daggy, 13 Neb. 290, 13 N. W. 399.

CHAPTER II.

PREPARATION AND DRAFTING OF WILLS.

§ 25. Will—Definitions.
26. Elementary Rules for Drafting Wills.
27. Restrictions on Devises and Bequests.
28. Rule in Shelley's Case.
29. Devise of an Estate in Fee Simple.
30. Presumption as to Conveyance of Fee.
31. Determinable Fees.
32. Life Estates.
33. Future Estates.
34. Estates upon Condition, or Contingency.
35. Trusts.
36. Charities.
37. Particular Words and Phrases Commonly Used in Wills Defined.
38. Object of Bequest or Devise.
39. Object of Bequest or Devise—Concluded.
40. Residuary Estate.

§ 25. Will—Definitions.

A will may be defined as the legal declaration of a person's intention respecting the disposition of his property which he wills to be performed after his death.[1] It is also called a "testament," and the party who executed it a "testator."

A joint will is one which disposes of the separate estate or estates in common of two or more persons by the same instrument. In so far as the individual property interests of either is concerned, it is as valid as though in the ordinary form, and on the death of one of the testators is entitled to probate the same as though executed by him alone.[2]

1 Cyclopedic Law Dict.; Bouvier's Law Dict. —
2 Juel v. Hansen, 87 Neb. 567, 127 N. W. 879.

A codicil is an addition to or a correction or alteration of a will, and being of equal importance with the original instrument, must be executed in the same manner.[3]

In regard to the manner of their execution, three kinds of wills are generally recognized by law: the ordinary written will signed by the testator and attested by witnesses; the nuncupative will, which is an oral disposition of one's property, made by a person in his last sickness, by a soldier in actual service, or marine on shipboard, in the presence of witnesses and by them reduced to writing;[4] and the holographic will, which is an unwitnessed instrument entirely in the handwriting of the testator. Only the first two kinds of wills are entitled to probate in Nebraska, and the same is the case in Oregon.[5]

§ 26. Elementary rules for drafting wills.

In drafting a will the scrivener should keep in mind the elementary principles which govern its construction. The court, in an action involving the construction of a will, will "sit in the seat of the testator" and ascertain his intention from the instrument itself,[6]

3 Bouvier's Law Dict.; Cyclopedic Law Dict.

4 Godfrey v. Smith, 73 Neb. 756, 104 N. W. 450; Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679.

5 Montague v. Schiefflin, 46 Or. 413, 80 Pac. 654.

6 McCullough v. Valentine, 24 Neb. 215, 38 N. W. 254; St. James Orphan Asylum v. Selby, 60 Neb. 696, 84 N. W. 273; Yoessel v. Rieger, 75 Neb. 180, 106 N. W. 425; Lesieur v. Sipperd, 84 Neb. 296, 121 N. W. 104; Haywood v. Haywood, 92 Neb. 72, 137 N. W. 984; Shadden v. Hembree, 17 Or. 14, 18 Pac. 572; Portland Trust Co. v. Beattie, 32 Or. 305, 52 Pac. 89; Kaser v. Kaser, 68 Or. 158, 137 Pac. 187.

and act cautiously in the application of legal principles deduced from apparently analogous cases.[7]

Every will, to a certain extent, stands by itself. The entire instrument is considered as a complete whole, and to be construed in such a manner as will, if possible, give effect to every provision therein contained.[8]

In executing his will a testator will be presumed to have had in mind the laws of his state regulating the devolution of real and personal property,[9] unless a contrary intention clearly appears from the instrument itself,[10] and it will be construed with reference to such laws.[11]

If a devise is given to take effect at a future date, the intermediate estate must be vested, granted to someone. The fee and the right to possession must both be always vested in some party.[12]

A devise to several persons, unless otherwise specified, creates a tenancy in common, instead of a joint tenancy as at common law; it does not create survivorship, and the gift, unless otherwise disposed of in case of the death of one of them, will pass as intestate prop-

7 Albin v. Parmele, 70 Neb. 740, 98 N. W. 29; Chick v. Ives, 2 Neb. Unof. 879, 90 N. W. 751.

8 Smith v. Bell, 6 Pet. (U. S.) 68; Buerstetta v. Buerstetta, 83 Neb. 287, 119 N. W. 469; Case v. Hagerty, 91 Neb. 746, 131 N. W. 979; Jones v. Hudson, 93 Neb. 561, 141 N. W. 141; Jasper v. Jasper, 17 Or. 590, 22 Pac. 152; L. O. L., § 7347; Lane v. Walker, 59 Or. 107, 115 Pac. 300.

9 Juel v. Hansen, 87 Neb. 567, 127 N. W. 879; Keith v. Eaton, 58 Kan. 732, 51 Pac. 271.

10 Harrison v. Nixon, 9 Pet. (U. S.) 483.

11 Caulfield v. Sullivan, 85 N. Y. 153.

12 Yoesel v. Reiger, 75 Neb. 180, 106 N. W. 425.

erty.[13] If the gift is to a number of persons who compose a class, as to "my children," those who compose the class on the date of the testator's death will take,[14] or those who compose it at the date the gift vests.[15]

§ 27. Restrictions on devises and bequests.

A testator does not have an absolute right to devise and bequeath all of his property as he sees fit. He is not permitted to give his property, or any part of it, for the promotion of any cause or object that is immoral, illegal or contrary to the public policy of the state;[16] nor can he so dispose of his estate as to prevent the vesting of a full and complete title in possession for a longer period than a life or lives in being and twenty-one years thereafter.[17] Several life estates or estates for years may be created, provided the title and right to possession vest in the same party within twenty-one years from the death of a designated person, or one of a group of designated persons.[18]

A married person cannot bar the surviving spouse of the right to take under the statute instead of under the will,[19] or the widow from the allowance for her support,[20] or the surviving spouse or the children of

13 Kaser v. Kaser, 68 Or. 153, 137 Pac. 187; Smith v. Haynes, 202 Mass. 531, 89 N. E. 158; Haug v. Schumaker, 166 N. Y. 506, 60 N. E. 245.

14 Smith v. Haynes, 202 Mass. 531, 89 N. E. 158; Saunders v. Saunders, 109 Va. 191, 63 S. E. 410.

15 Allison v. Allison, 101 Va. 537, 44 S. E. 904.

16 National Christian Assn. of Ill. v. Tomas, 63 Neb. 585, 88 N. W. 688.

17 Caddell v. Palmer, 1 Clark & F. 372; Palmer v. Holford, 4 Russ. 403. See Buchanan v. Schulderman, 11 Or. 150, 1 Pac. 899.

18 Madison v. Larmon, 170 Ill. 65, 48 N. E. 556.

19 Rev. Stats., c. 17, § 5, [1269]; L. O. L., § 7303.

20 Rev. Stats., c. 17, § 3, [1267]; L. O. L., § 7349.

the decedent of the personal belongings, household furniture and exempt property given them by statute.[21]

A devise in fee cannot be given on condition that the property shall not be subject to the debts of the devisee.[22]

§ 28. Rule in Shelley's case.

In one of the oldest reported English cases,[23] the rule was laid down that if an estate for life or any other particular estate of freehold be given to one, and the remainder to his heirs, the first taker has an estate in fee simple. It has been universally recognized as a rule of law and not of construction, and consequently in force in all common-law states unless in conflict with the statutes. The Nebraska supreme court has never passed on the question, but has held in a case which did not come within the rule, that "it exists in this state in a restricted and qualified form, and is enforced in those instances in which it is not in conflict with the otherwise expressed intention of the instrument."[24] The only statute having a bearing on the question is that which requires that all instruments affecting real estate be construed to carry into effect the intention of the parties so far as such intent is consistent with the rules of law.[25] It would therefore appear to be still in force in Nebraska.

21 O'Shea v. Bruning, 85 Neb. 156, 521, 124 N. W. 114; Fletcher v. Fletcher, 83 Neb. 156, 119 N. W. 232; Gaster v. Gaster's Estate, 92 Neb. 6, 137 N. W. 900; L. O. L., §§ 1233, 7349.

22 Loosing v. Loosing, 85 Neb. 66, 122 N. W. 707.

23 1 Coke, 104a, 76 Eng. Rep. 224.

24 Albin v. Parmele, 70 Neb. 740, 98 N. W. 29.

25 Rev. Stats., c. 68, § 9, [6195].

In Oregon it is provided by a statute that an estate for life with remainder to heirs, children or right heirs, gives a life estate to the first taker and a fee in the children.[26]

§ 29. Devise of an estate in fee simple.

The common-law presumption that a life estate was intended to be conveyed by will unless words of inheritance or words of like import were used has been changed by statute.[27] The devise of an "estate," "estate property,"[28] "real effects,"[29] right, title or interest in described lands, or of lands subject to conditions that cannot be performed except by the owner of the fee, convey the entire interest of the decedent.[30]

§ 30. Presumption as to conveyance of fee.

Every devise of lands will be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall clearly appear by the will that he intended to convey a lesser estate or interest,[31] including standing crops, unless reserved.[32] The intent to convey a lesser estate must clearly appear, and any doubt will be solved in favor of a fee.[33]

26 L. O. L., § 7343.

27 Rev. Stats., c. 68, § 6, [6192]; Little v. Giles, 25 Neb. 313, 41 N. W. 186; L. O. L., § 7103; Irvine v. Irvine (Or.), 136 Pac. 19; Lane v. Walker, 59 Or. 95, 114 Pac. 294.

28 Plat v. Sinton, 37 Ohio St. 353.

29 Hogan v. Jackson, Cowp. 299.

30 Sharp v. Sharp, 6 Bing. 634.

31 Rev. Stats., c. 17, § 23, [1287]; L. O. L., § 7344; Lane v. Walker, 59 Or. 103, 115 Pac. 300; Watson v. McClinch, 57 Or. 467, 110 Pac. 484; Irvine v. Irvine (Or.), 136 Pac. 19.

32 In re Estate of Pope, 83 Neb. 723, 120 N. W. 191; In re Estate of Anderson, 83 Neb. 8, 118 N. W. 1108.

33 Little v. Giles, 25 Neb. 313, 41 N. W. 186; Chambers v. Shaw, 52 Mich. 18, 17 N. W. 223; Dew v. Kuehn, 64 Wis. 300, 25 N. W.

In case the different clauses of the will appear to be in conflict, as the devise of an estate in fee in earlier paragraphs with conditions indicating a lesser estate in later ones, such subsequent provisions may be operative to define the estate given, and show that what without them would be a fee is actually a devise of a lesser estate.[34] The general rule is that a devise in fee will not be cut down to a lesser estate by later clauses in a will, unless such intent clearly appears from the terms of the instrument.[35]

Under these rules a disposition of property so frequently occurring in wills of a devise in fee accompanied by an expression of confidence that the devisee will provide for distribution of the same to the children of the devisor is insufficient to cut down the estate first granted,[36] and a devise of a homestead to the widow followed by a direction that at her death it be "divided among our children" will be construed the same way,[37] while a devise of all one's property with entire control during the lifetime of the devisee conveys only a life estate.[38]

212; Robbins v. Robbins, 10 Ky. Law Rep. 209, 9 S. W. 254; Helmer v. Shoemaker, 22 Wend. (N. Y.) 137; Van Horn v. Campbell, 100 N. Y. 287; Schnitter v. McManaman, 85 Neb. 337, 123 N. W. 300.

34 Loosing v. Loosing, 85 Neb. 66, 122 N. W. 707; In re Sheets' Estate, 52 Pa. 263; Schaumanz v. Goss, 132 Mass. 141; Rhodes v. Rhodes, 137 Mass. 343; Wallace v. Hawes, 79 Me. 177, 8 Atl. 885.

35 Spencer v. Scoville, 70 Neb. 87, 98 N. W. 29; Martley v. Martley, 77 Neb. 183, 108 N. W. 979; Schnitter v. McManaman, 85 Neb. 337, 123 N. W. 299; Irvine v. Irvine (Or.), 136 Pac. 19.

36 Tabor v. Tabor, 65 Wis. 313, 55 N. W. 702; Kaufman v. Breckenbridge, 117 Ill. 305, 7 N. E. 66.

37 Juel v. Hansen, 87 Neb. 567, 127 N. W. 879.

38 Schimpf v. Rhodewald, 62 Neb. 105, 86 N. W. 908.

A power of sale added to a life estate will not convert it into a fee simple.[39]

§ 31. Determinable fees.

Where the entire estate of the testator in the property or an estate in fee simple is devised, accompanied by a limitation, the effect of which would be to terminate the interest of the devisee upon the happening of the particular event, the devisee takes a base or determinable fee. When the event which terminates the estate occurs, the fee reverts to the heirs or passes to other devisees.[40] Until the happening of the condition which limits the estate, a determinable fee is practically an estate in fee simple.[41]

§ 32. Life estates.

In order to devise a life estate it is necessary that apt words be used for that purpose, or the entire will show an intent to convey the lesser estate, on account of the presumption of law being against it. A gift of the use or possession of described lands, or of personal property for life, creates, in the case of lands, an estate with all the rights appertaining thereto, and not a mere charge on the property,[42] and the same is true of the gift of the sole use of property, with gift

39 Loosing v. Loosing, 85 Neb. 66, 122 N. W. 707; Little v. Giles, 25 Neb. 313, 41 N. W. 186; Savage v. Savage, 51 Or. 167, 94 Pac. 182.

40 Little v. Giles, 25 Neb. 313, 41 N. W. 186; Robert v. Lewis, 153 U. S. 367, 15 Sup. Ct. Rep. 945.

41 2 Bl. Com. 109.

42 Crandell v. Baker, 8 N. D. 263, 68 N. W. 347; Lewis v. Palmer, 48 Conn. 454; Nelson v. Nelson, 18 Ohio St. 282.

over in case of the death of the devisee or legatee without issue.[43]

The life tenant is required to pay the taxes,[44] and, as a general rule, takes an estate subject to impeachment for waste,[45] but where the gift is of the "use and full control" of lands, he is only liable to wanton injury to the estate.[46]

The beneficiary of a life interest in personal property is entitled to its possession, unless the gift is to a trustee for his use, and cannot be compelled to accept the present value of his interest.[47] He has the right to change the character of the investments when consistent with good business management,[48] and should keep the principal sum unimpaired.[49]

A bequest for life followed by a gift of the remainder of the personal property gives the first legatee the right to the principal, but that remaining undisposed of passes to the later named legatee.[50]

§ 33. Future estates.

The right of a testator to create an estate which will vest in both interest and possession at a future day has been universally recognized. Such estate, except there be an executory devise, necessarily requires the

43 Love v. Walker, 58 Or. 95, 115 Pac. 296.

44 Disher v. Disher, 45 Neb. 100, 63 N. W. 368; Speich v. Tierney, 56 Neb. 514, 76 N. W. 1090; King v. Boetcher (Neb.), 147 N. W. 836.

45 St. Paul Trust Co. v. Mintzer, 65 Minn. 124, 67 N. W. 657; Williamson v. Jones, 42 W. Va. 563, 27 S. E. 411.

46 Wiley v. Wiley, 1 Neb. Unof. 350, 95 N. W. 702.

47 Armiger v. Reitz, 91 Md. 334, 46 Atl. 990.

48 Sutphen v. Ellis, 35 Mich. 456.

49 Chase v. Howie, 64 Kan. 320, 67 Pac. 822.

50 Crandell v. Nichols, 93 Neb. 80, 139 N. W. 719.

creation of two estates: the estate in fee and a lesser estate, which may be either an estate for years or a life estate. The remainder vests at the same time as the life estate, unless it be dependent upon conditions or limitations occurring during the existence of the preceding estate, and although the remainderman cannot enter into the possession of the property until the termination of the lesser estate, the remainder is in him, goes to his heirs or devisees if he dies before coming into possession, may be sold, and is subject to his debts the same as any other part of his property.[51]

The law favors the vesting of titles rather than holding them in abeyance, and a remainder will be held as vested rather than contingent, if consistent with the terms of the will.[52]

An executory devise is a gift of an estate or interest in lands, not necessarily preceded by an estate of freehold, not vesting at the death of the devisor, but dependent on some limitation or contingency,[53] which must determine within the rule against perpetuities.[54]

A testator may also give to the devisee of a life estate the power to designate the parties who take the remainder or their shares therein.[55] A general power gives unlimited right of disposition.[56] One limited to certain beneficiaries or class of beneficiaries cannot be

51 Shackley v. Homer, 87 Neb. 146, 127 N. W. 145; Kerlin's Lessee v. Bull, 1 Dall. 175.

52 Clark v. Fleischman, 81 Neb. 445, 116 N. W. 190.

53 Burleigh v. Clough, 52 N. H. 567; Patterson v. Ellis, 11 Wend. (N. Y.) 259.

54 Patterson v. Ellis, 11 Wend. (N. Y.) 259.

55 Burbank v. Sweeney, 161 Mass. 490, 37 N. W. 669.

56 1 Sugden on Powers, 495.

extended to include others, and will be strictly construed.[57] Where the parties are designated, the donee cannot deprive them of their property by failure to appoint, and in such cases they take in equal shares on the termination of the prior estate.[58]

§ 34. Estates upon condition or contingency.

Property may be devised or bequeathed upon a condition precedent. In such case a substantial performance of the terms of the conditions is required, and ignorance of them will not excuse the devisee or legatee from carrying them out. On failure of the condition the gift passes into the residuary estate, if there be one, or to the heirs.[59]

Devises or bequests may also be on conditions subsequent, provided such conditions are reasonable and lawful, and a full compliance with them is also necessary for the vesting of the estate.[60]

A condition attached to a devise of an estate in fee simple, that the devisee shall not sell or encumber the property, is contrary to public policy and void,[61] but may be imposed upon an estate for years,[62] or a life estate.[63] Entailed estates have never been recognized in Nebraska or Oregon.[64]

57 Parks v. American Home Missionary Society, 62 Vt. 19, 20 Atl. 107; Loring v. Blake, 98 Mass. 253.

58 Loosing v. Loosing, 85 Neb. 66, 122 N. W. 705.

59 Fisher v. Fisher, 90 Neb. 145, 113 N. W. 1004.

60 Smith v. Smith, 64 Neb. 673, 90 N. W. 560.

61 Spencer v. Scoville, 70 Neb. 87, 96 N. W. 1016; Loosing v. Loosing, 85 Neb. 66, 122 N. W. 707.

62 Weller v. Noffsinger, 57 Neb. 456, 77 N. W. 1075.

63 Albin v. Parmele, 70 Neb. 740, 98 N. W. 29.

64 Rowland v. Warren, 10 Or. 129.

A condition that a devisee shall take and thereafter be known by a certain name is valid.[65]

Where a gift is made to a person absolutely, with a condition that in case of his death the property shall pass to another, the contingency referred to is the death of the first taker before the death of the testator, but special circumstances may prevent its application.[66] In the case of legacies, the contingency is the death of the first taker before the time for payment or distribution.[67]

The rule that the failure of a limitation over by way of an executory devise attached to a devise in fee vests the entire estate in the devisee of the fee, subject to the precedent estate, if any, gives a like estate to his heirs on failure of the limitation.[68]

§ 35. Trusts.

Any trust in either real estate or personal property which is capable of being executed without conflicting with the public policy of the state may be created by will.[69]

65 Smith v. Smith, 64 Neb. 673, 90 N. W. 560.

66 Willets v. Conklin, 88 Neb. 805, 130 N. W. 757; Schnitter v. McManaman, 85 Neb. 337, 123 N. W. 296.

67 Hawkins on Wills, 2d ed., 254.

68 Yoesel v. Reiger, 75 Neb. 180, 106 N. W. 428. In this case there was a devise to A., B. and C. in fee, subject to an estate for years in A., with limitation over to the survivors, or their heirs in case of the death of either devisee during the term of A. B. died within the term leaving issue. The court held that on the termination of the estate for years, the heirs of the issue of B., such issue having died in the meantime, took the estate in fee which would have vested in B. had he survived.

69 McCleary v. Allen, 7 Neb. 21; Hawke v. Enyart, 30 Neb. 149, 46 N. W. 492.

The interest of a trustee who has no other duties to perform than merely hold the title is a passive trust. The *cestui que trust* may compel such trustee to deliver the estate to him or execute conveyances to such person or persons as he may direct To make a trust valid the trustee must have some actual duties and responsibilities.[70]

A spendthrift trust may be created, and during the lifetime of the *cestui que trust* the property held not liable for his debts, or subject to alienation by him, and the trustee may be given a discretion as to time and amount of payments.[71] This is the usual plan of preventing creditors from enforcing their demands against a beneficiary and the only one that is effectual.

A constructive trust may be imposed by parol upon a devise, and the devisee required to account to the *cestui que trust*.[72] In the above case, the testator at the time of the execution of the will made certain requests to the principal beneficiary concerning the disposition to be made by her of the income of the estate which was devised her to which she assented.

The beneficiary or beneficiaries of any trust not of a charitable nature must be clearly and definitely designated, the property subjected described with reasonable certainty, and the manner in which it is to be carried out plainly defined.[73]

70 Hill v. Hill, 90 Neb. 43, 132 N. W. 739; Henderson v. Adams, 15 Utah, 39, 48 Pac. 398.

71 Weller v. Nofsinger, 57 Neb. 455, 77 N. W. 1075; Mattison v. Mattison, 53 Or. 254, 100 Pac. 4.

72 Smullin v. Wharton, 73 Neb. 677, 112 N. W. 622, 106 N. W. 577, 103 N. W. 288; 83 Neb. 228, 119 N. W. 773.

73 Smullin v. Wharton, 73 Neb. 667, 103 N. W. 288.

§ 36. Charities.

There are no statutory restrictions in this state on bequests or devises to public charities. Such charities include gifts to municipalities for all classes of public improvements,[74] for the relief of poverty and sickness,[75] for the assistance of widows, orphans and children,[76] gifts for schools and colleges,[77] or for promotion and general diffusion of useful knowledge, for churches,[78] as well as for missionary and charitable purposes.

Such gifts may be made to incorporated associations or in trust for defined purposes. The beneficiaries need not be named with the same degree of exactness as in the case of other trusts. The trustee may be given power to select the objects of the charity and devise a plan for the application of the funds. The exercise of the discretion vested in him is deemed the act of the will of the testator.[79] The gift may be of a base fee determinable upon condition, or the property placed in the hands of trustees for the use of the charity.[80] In the latter case the officers of a bank were deemed proper trustees of a bequest of shares of its

74 Coggeshall v. Pelton, 7 Johns. Ch. (N. Y.) 292; Burbank v. Burbank, 152 Mass. 254, 25 N. E. 427.

75 St. James Orphan Asylum v. Selby, 60 Neb. 796, 84 N. W. 273; Derby v. Derby, 4 R. I. 414.

76 Camp v. Crocker, 54 Conn. 21, 5 Atl. 604.

77 Vidal v. Philadelphia, 2 How. (U. S.) 127.

78 Royer v. Potter, 94 Neb. 280, 143 N. W. 299.

79 St. James Orphan Asylum v. Selby, 60 Neb. 796, 84 N. W. 273, 75 Neb. 591, 106 N. W. 604; In re Nilson's Estate, 81 Neb. 809, 116 N. W. 971.

80 Royer v. Potter, 94 Neb. 280, 143 N. W. 299.

stock to a church, the income to be used for religious purposes.

The most essential element of a bequest or devise to a charity is a sufficient definition of its objects and purposes and designation of its beneficiaries; if to trustees for the purpose of establishing a charity, it should state the objects and purposes of the charity. It may contain directions for the investment of funds and direct how they shall be used. The details may be left to the trustees, and it will be upheld if sufficiently specific to establish the charity and place the general management and control in the hands of the trustees.[81]

§ 37. Particular words and phrases, commonly used in wills, defined.

The words "lands, tenements, and hereditaments" are the most comprehensive of any applicable to real estate. They include every species of realty, corporeal and incorporeal, leasehold and reversionary interests.[82]

The words "estate" and "property" are the most comprehensive terms that can be used in disposing of a man's possessions by will. They are practically identical in their meaning, and either, when used without qualifying expressions, include everything that belonged to the testator, both realty and personalty.[83]

81 In re Creighton's Estate, 91 Neb. 654, 136 N. W. 1001; St. James Orphan Asylum v. Selby, 60 Neb. 796, 84 N. W. 273; 75 Neb. 591, 106 N. W. 604; Chick v. Ives, 2 Neb. Unof. 879, 90 N. W. 751.

82 3 Kent, Com., 13th ed., 401; 1 Jarman, Wills, 177.

83 Deering v. Tucker, 55 Me. 284; Jackson v. Housel, 17 Johns. (N. Y.) 281; Spencer v. Higgins, 22 Conn. 529; Monroe v. Jones, 8 R. I. 526.

The word "house" is generally construed as synonymous with the common-law "messuage," including the lot upon which the building stands, barns, outbuildings, gardens and lawns appurtenant thereto.[84]

A "farm" is the entire tract or tracts of land owned, used and occupied as such by the testator as proprietor.[85]

"Homestead," used in referring to a farm, means the entire farm occupied as such by the testator, and is not limited to the legal homestead defined by statute.[86]

A devise of the "rents and profits" of lands has been held to pass the title to the land itself, where other parts of the will indicate an undoubted intention of the testator to give the devisee such power over the land as would require him to possess the fee.[87]

"Property," when used in connection with the words "money and effects," by reason of association with such other words, is limited to personalty alone, and would not include realty.[88]

"Goods, chattels and effects" include the entire personal estate, but if the words are goods, chattels and effects in a particular place, choses in action would not be conveyed, for they have no locality.[89]

84 Bennet v. Bittle, 4 Rawle (Pa.), 339.

85 Aldrich v. Gaskill, 10 Cush. (Mass.) 155.

86 Kennedy v. Kennedy, 105 Ill. 350.

87 Bowen v. Payton, 14 R. I. 257; Ryan v. Allen, 120 Ill. 648, 12 N. E. 65.

88 Brawley v. Collins, 88 N. C. 605.

89 Stuckey v. Stuckey, 1 Hill Eq. (S. C.) 309; Penniman v. French, 17 Pick. (Mass.) 404.

"Effects" include personalty only, and cannot be broadened to embrace realty, unless an intention to that effect clearly appears in the will.[90]

"Money" is not limited to gold, silver and paper currency, but includes bank deposits, both general time certificates and savings bank deposits.[91] A bequest of "all my moneys after paying my just debts," in a will containing no residuary clause, has been extended to include deposits in a savings bank and stock of a corporation, thus making the word almost synonymous with "personal estate." [92]

The words "keep, care for and support," as applied to a person, mean the furnishing of room, board, clothing, medical services when needed, personal necessities, and such care and ministrations as the circumstances of the party demand.[93]

"Personal property" sometimes has in a will a different meaning from that given to it in general. It may be limited in its meaning where a use of it in its broadest signification would defeat the evident intent of the testator.[94] A bequest of "personal property," with a direction to the legatee to sell the same, would not generally include bonds, notes, mortgages, or choses in action, as such property is not considered

90 Doe d. Hick v. Dring, 2 Maule & S. 448.

91 Paup v. Sylvester, 22 Iowa, 375; Dabney v. Cottrell's Admx., 9 Gratt. (Va.) 572.

92 Jenkins v. Fowler, 63 N. H. 244; Decker v. Decker, 121 Ill. 341, 12 N. E. 750.

93 Fisher v. Fisher, 80 Neb. 145, 113 N. W. 1004.

94 Kempf's Appeal, 53 Mich. 352, 19 N. W. 31; Benton v. Benton, 63 N. H. 289.

subject to sale by direction of a testator after vesting in the legatee.[95]

§ 38. Object of bequest or devise.

The term "children" as used in a will is generally limited to the direct issue of the testator,[96] and a gift to children cannot be extended to include the children of a child not living at the date of the execution of the will.[97] Where there are no persons strictly answering to that class, grandchildren may be allowed to take, that being the evident intent of the testator.[98]

A gift to nephews and nieces includes only those related by blood, and not by marriage only,[99] and not great-nephews and great-nieces,[100] unless a contrary intention appears in the will, taken as a whole.

Brothers, sisters and cousins include those of the half as well as the whole blood.[101]

The term "issue" is a word of very extensive meaning, including all the lineal descendants.[102] It may,

95 German v. German, 27 Pa. 116; Alexander v. Alexander, 41 N. C. 230.

96 Sydnor v. Palmer, 29 Wis. 226; Brown v. Brown, 71 Neb. 200, 98 N. W. 718; Cummings v. Plummer, 94 Ind. 403; Webb v. Hitchins, 105 Pa. 91; Castner's Appeal, 88 Pa. 478; Schaffer v. Eneu, 54 Pa. 304; Osgood v. Loverig, 33 Me. 469.

97 Bollinger v. Knox, 3 Neb. Unof. 811, 92 N. W. 994.

98 Ewing's Heirs v. Handley's Exrs., 4 Litt. (Ky.) 346; In re Utz's Estate, 43 Cal. 201; Beebe v. Estabrook, 79 N. Y. 246; In re Schedel's Estate, 73 Cal. 594, 15 Pac. 297.

99 Campbell v. Clark, 64 N. H. 328, 10 Atl. 702; Green's Appeal, 42 Pa. 30.

100 Campbell v. Clark, 64 N. H. 328, 10 Atl. 702.

101 Luce v. Harris, 79 Pa. 432.

102 Hall v. Hall, 140 Mass. 267, 2 N. E. 700; Wistar v. Scott, 105 Pa. 200.

by reason of the connecting sentences, be limited to children. Whenever the legatees are described as "issue," children, sons or daughters, only those of legitimate birth are meant.[103] If the parents are dead, leaving no legitimate children, or the will shows plainly that illegitimate children were intended, they will take.[104]

"An 'heir' is he upon whom the law casts the estate immediately on the death of the ancestor."[105] As used in a will, it is strictly a word of limitation. A bequest of property to one's heirs is to those who would be entitled thereto under the statutes of distribution and descent;[106] and the same is true of a devise of real property.[107] A devise to "heirs" or "heirs at law" includes those only who are heirs at the time of the death of the decedent.[108]

§ 39. Object of bequest or devise—Concluded.

The terms "next of kin," "nearest of kin," and "nearest of blood" relations have substantially the same meaning, and primarily indicate the nearest de-

103 Collins v. Hoxie, 9 Paige (N. Y.), 88; Appel v. Byers, 98 Pa. 479; Hughes v. Knowlton, 37 Conn. 429.

104 Gelston v. Shields, 16 Hun (N. Y.), 143; Gardner v. Heyer, 2 Paige (N. Y.), 11; Stewart v. Stewart, 31 N. J. Eq. 398.

105 2 Bl. Com. 201.

106 Ferguson v. Stuart's Exrs., 14 Ohio, 140; Tillman v. Davis, 95 N. Y. 17; Hascall v. Cox, 49 Mich. 435, 13 N. W. 807; Corbitt v. Corbitt, 54 N. C. 117.

107 Ireland v. Parmenter, 48 Mich. 631, 12 N. W. 883; Loring v. Thorndike, 5 Allen (Mass.), 260.

108 Hill v. Hill, 90 Neb. 43, 132 N. W. 738; Minot v. Tappan, 122 Mass. 535; Stokes v. Van Wyck, 83 Va. 724, 3 S. E. 387; Dove v. Torr, 128 Mass. 38.

gree of consanguinity, and they are perhaps more frequently used in this sense than in any other.[109]

The word "relations," when used in a will, is ordinarily construed as including relatives by consanguinity, and excluding relatives by affinity, unless a contrary intention is manifested.[110] It is a rather vague term, and generally means those who would be entitled to the property were the decedent intestate.[111] A husband is not next of kin or heir or relative of the wife, nor the wife of the husband.[112] The same rule for ascertaining who such parties are applies as for determining who are the heirs of the decedent.[113]

The term "legal representatives" has been construed to mean lawful heirs, and thus to entitle such representatives to the share which their ancestors would have taken, had they lived, in the estate.[114]

The term "family" includes a person's wife and children[115] living in the same household with him. The meaning of the term must usually be determined from the will, taken as a whole. It may include those not living under the same roof,[116] and those living with

109 Swasey v. Jaques, 144 Mass. 135, 10 N. E. 758; Redmond v. Burroughs, 63 N. C. 242; Wright v. Methodist Episcopal Church, 1 Hoff. Ch. (N. Y.) 202.

110 Bennett v. Van Riper, 47 N. J. Eq. 563, 22 Atl. 1055; Esty v. Clark, 101 Mass. 36.

111 Varrell v. Wendell, 20 N. H. 435.

112 Warren v. Englehart, 13 Neb. 283, 10 N. W. 401; Appeal of Dodge, 106 Pa. 216; Cleaver v. Cleaver, 39 Wis. 96; Wilkins v. Ordway, 59 N. H. 378.

113 Dove v. Torr, 128 Mass. 38; Letchworth's Appeal, 30 Pa. 175; Welsh v. Crater, 32 N. J. Eq. 177.

114 Marsh v. Marsh, 92 Neb. 189, 137 N. W. 1122; Rivenett v. Bourquin, 53 Mich. 10, 18 N. W. 537; Heath v. Bancroft, 49 Conn. 220.

115 Bradlee v. Andrews, 137 Mass. 50.

116 Proctor v. Proctor, 141 Mass. 165, 6 N. E. 849.

him, dependent upon him for support, who are not his children.

A gift to a class as issue, children, grandchildren, nephews, or nieces, whether of the testator or of some other person, is to those who comprise the class at the death of the testator, and, unless otherwise provided, the law favors a distribution *per capita* rather than *per stirpes;*[117] and this is true where the devise or bequest is to a person and the issue or children of another person.[118] If there is any intention to the contrary manifested, the distribution should be *per stirpes.* The law favors that construction of a will which will make a distribution as nearly conform to the general law of inheritance as the language will permit, and favors equities rather than technicalities.[119]

The effect of section 50, chapter 17, Revised Statutes, providing that the share of a legatee dying before the testator shall go to his issue, would in many cases make a distribution *per stirpes* which would otherwise be *per capita.*[120]

§ 40. Residuary estate.

No particular form of words is necessary to convey the residuary estate. It includes all the property, both

117 Losey v. Westbrook, 35 N. J. Eq. 116; Huntress v. Place, 137 Mass. 409; Campbell v. Clark, 64 N. H. 328, 10 Atl. 702.

118 Hill v. Bowers, 120 Mass. 135; McCartney v. Osburn, 118 Ill. 403, 9 N. E. 210; Burnet's Exrs. v. Burnet, 30 N. J. Eq. 595; Stevenson v. Lesley, 70 N. Y. 512.

119 Rivenett v. Bourquin, 53 Mich. 10, 18 N. W. 537; Johnson v. Ballou, 28 Mich. 392; Letchworth's Appeal, 30 Pa. 175; Eberts v. Eberts, 42 Mich. 404, 4 N. W. 172; Toms v. Williams, 41 Mich. 574, 2 N. W. 814.

120 Rivenett v. Bourquin, 53 Mich. 10, 18 N. W. 537.

real and personal, of every name, nature and description, belonging to the testator, and not effectually disposed of by the other clauses of the will;[121] and lapsed, void and illegal bequests or devises, from whatever cause produced.[122] In Williams v. Johnson,[123] the court held a will disposing of "the balance of my means," where there had been previous bequests of personalty, as not including after-acquired realty. Unless there be a contrary intention expressed, it includes reversionary interests, though created by the will itself.[124] It includes the income accruing from legacies and devises, the time for the payment of which is fixed at a future date;[125] and this is true, although the residuary bequest or devise itself does not vest until a future date. Where the legatee refuses to accept the legacy, or the widow elects to take her statutory portion, instead of according to the will, the land so devised passes to the heir of the testator, and not to the residuary estate.[126] Where the residuary legacy is to two or more persons, the death of one or the lapse of his share for any reason will not pass his share to the other, but it will become a part of the

121 Bernard v. Minshull, 1 Johns. Ch. 276.

122 Drew v. Wakefield, 54 Me. 296; Tindall v. Tindall's Exrs., 23 N. J. Eq. 244; Tongue's Lessee v. Nutwell, 13 Md. 415.

123 112 Ill. 61.

124 Geyer v. Wentzel, 68 Pa. 84; Irwin v. Zane, 15 W. Va. 646; Brigham v. Shattuck, 10 Pick. (Mass.) 308; Floyd v. Carow, 88 N. Y. 560.

125 Kerr v. Bosler, 62 Pa. 187; Page's Appeal, 71 Pa. 402.

126 James v. James, 4 Paige (N. Y.), 117.

intestate estate.[127] This rule, of course, would not apply to a residuary bequest or devise to a child of the testator, the devisee or legatee dying before the testator and leaving issue. The bequest or devise would then pass to the issue.[128]

[127] Huber's Appeal, 80 Pa. 349; Burnet's Exrs. v. Burnet, 30 N. J. Eq. 595; Garthwaite's Exr. v. Lewis, 25 N. J. Eq. 351; Kerr v. Dougherty, 79 N. Y. 327.

[128] Rev. Stats., c. 17, § 2, [1266].

CHAPTER III.

EXECUTION OF WILLS.

§ 41. Statutory Requirements Concerning Signature and Witnesses.
42. Signature.
43. Witnesses.
44. Attestation.
45. Alterations.
46. Republication.
47. How Nuncupative Will Executed.
48. Soldiers' and Marines' Wills.

§ 41. Statutory requirements concerning signatures and witnesses.

A will made within the state, other of course than a nuncupative instrument, in order to be effectual to pass the title to any estate, either real or personal, or in any way affect the same, must be in writing, signed by the testator or by some person for him in his presence and by his express direction, and attested and subscribed in the presence of the testator by two competent witnesses. If the witnesses are competent at the time of its execution, their subsequent incompetency from any cause will not prevent the probate of the will and the allowance of the same.[1]

It may be written on separate sheets of paper not fastened together,[2] and other papers already in existence and fully executed may be incorporated into it by an apt clause for that purpose identifying them

1 Rev. Stats., c. 17, § 26, [1290]; L. O. L., § 7319; Wendel v. Furst (Or.), 136 Pac. 2; In re Manser's Estate, 60 Or. 229, 118 Pac. 1022.

2 Schillinger v. Bawek, 135 Iowa, 131, 112 N. W. 210.

with reasonable certainty, and showing a clear intention to make them a part of the will.[3]

§ 42. Signature to a will.

The testator should sign his name in full at the end of the will. Any clause inserted below the signature will not be considered as a part of the instrument.[4] If he is unable to write, the words composing his name may be written by some other person, and he himself affix his mark or cross or other character intended or adopted as and for a signature.[5]

The person who writes the name of the testator must do so by his previously expressed direction and in his presence.[6] The request must be made, whether the testator immediately after the writing of the words composing the name made his mark or not. A mere knowledge by the testator that some person is signing or has signed his name to the instrument does not comply with the law, nor can he by an express act or direction ratify a signature previously made.[7]

The party who writes the testator's name must be competent to act as a witness, and should sign as

3 Hopper v. Hopper, 90 Neb. 622, 134 N. W. 235; Dodson v. Dodson, 142 Mich. 586, 105 N. W. 1110; Gerrish v. Gerrish, 8 Or. 351.

4 Glancy v. Glancy, 17 Ohio St. 134.

5 Thompson v. Thompson, 49 Neb. 157, 68 N. W. 372; McCoy v. Conrad, 64 Neb. 150, 89 N. W. 665; Pool v. Buffum, 3 Or. 438; Moreland v. Brady, 8 Or. 312.

6 Pickett's Will, 49 Or. 127, 89 Pac. 377.

7 Murray v. Hennessey, 48 Neb. 608, 67 N. W. 470; McCoy v. Conrad, 64 Neb. 150, 89 N. W. 655; Elliott v. Elliott, 3 Neb. Unof. 832, 92 N. W. 1006; Davidson's Estate, 70 Neb. 584, 97 N. W. 797; Isaac v. Halderman, 76 Neb. 823, 107 N. W. 1016.

such.[8] If the testator does not make his mark, the person who writes his name must state that he subscribed the testator's name at his request.[9]

§ 43. Witnesses.

The two witnesses to a will should be persons who are given no beneficial interest under it. Bequests or devises to a subscribing witness do not make the will void, but, unless there are a sufficient number of disinterested witnesses, invalidate the gift, except that a new charge on lands for the payment of devisor's debts does not render such creditor incompetent to act as a witness,[10] nor do devises and bequests to parties who would take were decedent intestate. Such parties take the same share as if decedent was intestate not exceeding the value of such gift, and are entitled to recover the same from the other beneficiaries.[11] A devise in trust in which the trustee has no beneficial interest, it has been held, does not disqualify such trustee from becoming a witness,[12] nor does a clause appointing "——— an attorney at law to assist the executor," being merely advisory, disqualify such attorney.[13]

Under the Oregon statute, a legatee is also a competent witness if before giving his testimony his bequest or legacy has been paid, accepted or released, or he

8 Herbert v. Berier, 81 Ind. 1; Robbins v. Coryell, 27 Barb. (N. Y.) 556.

9 Pool v. Buffum, 3 Or. 438; Moreland v. Brady, 8 Or. 312; L. O. L., § 7320.

10 Rev. Stats., c. 17, § 29, [1293]; L. O. L., §§ 7335, 7337, 7338.

11 Rev. Stats., c. 17, § 30, [1294]; L. O. L., § 7336.

12 Hogan v. Wyman, 2 Or. 304.

13 Pickett's Will, 49 Or. 127, 89 Pac. 337.

has refused to accept the same on tender thereof,[14] but his credit is subject to the consideration of the court or jury.[15] The statute does not permit him to receive any compensation from any person interested in the estate for so testifying or subsequently receiving the gift.[16]

A legatee or devisee who has attested the execution of the will and died before the death of testator or subsequently, and before he has received his bequest or legacy, or released or refused tender of the same, is also a legal witness.[17]

Any persons who at the date of the execution of the will would be competent to testify in a court may become witnesses to it,[18] and their subsequent incompetency from any cause will not prevent the probate of the will if it be otherwise proved.[19] They should be parties who are sufficiently acquainted with the testator to be sure of his testamentary capacity and identity.[20] Relatives of beneficiaries,[21] or of the testator, who are given nothing by the will and are not his heirs are competent,[22] as is also a person named as executor who is not a devisee or legatee.[23]

14 L. O. L., § 7339.

15 L. O. L., § 7340.

16 L. O. L., § 7342.

17 L. O. L., § 7341.

18 Carlton v. Carlton, 40 N. H. 14; O'Brien v. Bonfield, 213 Ill. 428.

19 Rev. Stats., c. 17, § 26, [1290]; Hiatt v. McColley, 171 Ind. 91, 85 N. E. 772.

20 Brinckerhoff v. Remsen, 26 Wend. (N. Y.) 325; Scribner v. Crane, 2 Paige (N. Y.), 147.

21 Maxwell v. Hill, 89 Tenn. 584, 15 S. W. 253.

22 Sparhawk v. Sparhawk, 10 Allen (Mass.), 115.

23 In re Holt, 56 Minn. 33, 57 N. W. 219; In re Tierney's Estate, 103 Minn. 286, 114 N. W. 838.

The witnesses should be requested to act as such by the testator, or by some relative, or the attorney who prepared the will, under the express or implied direction of the testator.[24]

The signature of the testator should be made before that of the witnesses. Such signature is the first and most important act connected with the formal execution of the instrument, and until signed it is merely an unexecuted writing.[25] The witnesses must sign in the actual presence of the testator. What constitutes actual presence has been the subject of much judicial discussion, and some very close distinctions have been drawn. The general rule is that they should subscribe their names to the will in some place in the same or adjoining room, where the testator can observe their movements, and see that they write their names on the instrument which he has just signed; in other words, within the hearing, knowledge and understanding of the testator.[26] It is not necessary that the witnesses see the testator sign, if he acknowledges to them that he has signed the will and shows them his signature

[24] Thompson v. Thompson, 49 Neb. 157, 68 N. W. 372; Luper v. Werts, 19 Or. 122, 23 Pac. 850; In re Ames' Will, 40 Or. 495, 67 Pac. 737; Wendel v. Furst (Or.), 136 Pac. 2; In re Meurer's Will, 44 Wis. 392.

[25] Dewey v. Dewey, 1 Met. (Mass.) 354; Schemerhorn v. Merritt, 123 Mich. 310, 82 N. W. 314; Smith v. Ryan's Estate, 136 Iowa, 335, 112 N. W. 8.

[26] Drury v. Connell, 177 Ill. 43, 53 N. E. 368; Cook v. Winchester, 81 Mich. 581, 46 N. W. 106; Cunningham v. Cunningham, 80 Minn. 180, 83 N. W. 60; Riggs v. Riggs, 135 Mass. 238.

thereto,[27] nor that the witnesses sign in the presence of each other, though this is the usual practice.[28]

§ 44. Attestation.

To attest a will is to know that it was signed as such and to certify the facts required to constitute a legal publication.[29] It differs from merely signing one's name as a witness. Subscription is mechanical—the act of the hand, a mere writing of one's name for the purpose of identification—while attestation is mental. The witnesses should therefore learn from the testator that the instrument which they are called upon to sign, and which bears his signature, has been signed by him as and for his will.[30] It is not necessary that he inform them in so many words that the instrument is his will. If he gives them to understand by signs, words or other manner that the instrument is intended for his last will, or if in answer to questions by them or the scrivener, or by expressly assenting to statements made by parties present, he gives the witnesses to understand that the instrument already signed is his will, the attestation is complete.[31] They need not know the terms of the will itself, but should see the

27 Haynes v. Haynes, 33 Ohio St. 598.

28 Holyoke v. Sipp, 77 Neb. 394, 109 N. W. 506; Johnson v. Johnson, 106 Ind. 475, 7 N. E. 201; In re Smith's Will, 52 Wis. 543, 8 N. W. 616.

29 Swift v. Wiley, 1 B. Mon. (Ky.) 114.

30 Abbott v. Abbott, 41 Mich. 540; Raudenbaugh v. Shelley, 6 Ohio St. 307; Adams v. Field, 24 Vt. 256.

31 Luper v. Werts, 19 Or. 122, 23 Pac. 850; Brinckerhoff v. Remsen, 8 Paige (N. Y.), 488; Harrington v. Stees, 82 Ill. 50; In re Johnson's Estate, 57 Cal. 529.

signature of the testator and the attestation clause, if there is one, besides having a personal knowledge that the testator intends the instrument for a will.[32]

A formal attestation clause is not necessary to make a will valid. It may be probated when it contains no such clause whatever—merely the signature of the testator and witnesses—provided that their evidence shows that they signed it in the presence of the testator and that all the formalities required by the statutes have been complied with.[33] An attestation clause reciting a compliance with the statutory requirements is *prima facie* evidence of a legal execution of the instrument,[34] but does not do away with ordinary proof of the will.[35]

The purposes for requiring wills to be attested are to prove the signature, obtain evidence of the capacity of the testator, and insure the identity of the will.[36]

§ 45. Alterations.

Previous to the execution of a will alterations by erasure, interlineation or addition may be made, and are valid.[37] Unless they be of a minor character, such

[32] In re Ayer's Estate, 84 Neb. 16, 120 N. W. 491; Haack v. Tobin, 79 Minn. 101, 81 N. W. 758; In re Will of McKay, 110 N. Y. 611, 18 N. E. 433; Simmons v. Leonard, 91 Tenn. 183, 18 S. W. 280.

[33] Monroe v. Hudart, 79 Neb. 569, 113 N. W. 149; Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151; Ferris v. Neville, 127 Mich. 444, 86 N. W. 960; Lautenschlager v. Lautenschlager, 80 Mich. 292, 45 N. W. 147.

[34] Holyoke v. Sipp, 77 Neb. 394, 109 N. W. 506; Skinner's Will, 40 Or. 579, 62 Pac. 523, 67 Pac. 951.

[35] Section 81, *post*.

[36] 2 Greenl. Ev. 691; Lord v. Lord, 58 N. H. 7.

[37] Holman v. Riddle, 8 Ohio St. 384.

as slight changes in wording or correction of apparent errors, they should be noted in the attestation clause. Slight corrections and interlineations are presumed to have been made previous to the execution of the instrument.[38]

The only way a will once made can be changed is by a codicil, or by an entirely new instrument executed in the same manner as the original. Alterations, though made without the expressed knowledge, permission or consent of the testator, do not invalidate it. It must be admitted to probate just as it originally stood, and parol evidence is admissible to prove what its contents were.[39]

§ 46. Republication of wills.

If a will is not executed in the manner provided by law, it is absolutely void, and has no binding effect unless re-executed in the same manner as an original will. There is, however, one apparent exception to this rule. If the original will is void because not properly executed, a codicil signed and attested in strict compliance with the statute, which in express terms confirms the will, is a republication and reacknowledgment of such will, and remedies all the defects in its execution.[40]

38 Wheeler v. Bent, 7 Pick. (Mass.) 61.

39 Monroe v. Hudart, 79 Neb. 569, 113 N. W. 149.

40 Hawke v. Euyart, 30 Neb. 149, 46 N. W. 422; McCurdy v. Neal, 42 N. J. Eq. 333, 7 Atl. 566; 1 Redfield, Wills, 288; Skinner v. American Bible Soc., 92 Wis. 209, 65 N. W. 1037; Vogel v. Lehritter, 139 N. Y. 223, 34 N. E. 914.

Form No. 11.

WILL BEQUEATHING EVERYTHING TO WIFE.

The Last Will and Testament of A. B., of ———, ——— County, Nebraska.

I, A. B., of the city of ———, ——— county, Nebraska, do hereby make, publish, and declare this my last will and testament in words and figures following:* I give, devise, and bequeath unto my wife, C. B., all my property of every description, both real and personal.

I hereby constitute and appoint my said wife, C. B., executrix of this, my last will and testament, [if testator wishes to relieve her from the necessity of giving a bond add] and request that no other bond be required of her as such executrix except her own personal obligation.

Dated at ———, Nebraska, this ——— day of ———, 19—.

(Signed) A. B.

We whose names are hereunto subscribed do hereby certify that A. B., the testator, subscribed his name to this instrument in our presence, and in the presence of each of us, and declared at the same time, in our presence and hearing, that this instrument was his last will and testament, and we, at his request, sign our names hereto in his presence as witnesses.

(Signed) E. F., of ———, Nebraska.
G. H., of ———, Nebraska.

Form No. 12.

WILL GIVING LIFE ESTATE TO WIDOW, AND REMAINDER TO HEIRS.

[As in No. 11 to *, then:] I give, devise, and bequeath unto my wife, C. B., the following described real estate [describe property] for and during her natural life; at her death, the remainder in said real estate shall vest in my children, G. B., H. B., L. N., and C. M., as tenants in common. This devise is in lieu of any distributive share in my said estate given her by law.

(2) I give and bequeath unto my son G. B. the sum of $———; unto my son H. B. the sum of $———.

(3) I give and bequeath unto my grandchildren, B. M., C. M., and F. B., the sum of $——— each.

(4) I hereby authorize and direct my said executors, provided the personal property which may come into their possession as such

executors shall be insufficient to pay the legacies in paragraphs 2 and 3 mentioned, to sell the following described real estate, [describe property] or so much thereof as they may deem necessary, execute good and sufficient deeds therefor, and from the proceeds of such sale pay said legacies; any of the proceeds of such sale or sales remaining in their hands to be invested as hereinafter directed.

(5) I give and bequeath unto my wife, C. B., all my household furniture, jewelry, clothing, and personal effects.

(6) I hereby direct, authorize, and empower my said executors to sell all the rest, residue, and remainder of my real estate, and convert the same into interest bearing securities, and from the income therefrom pay my said wife, C. B., the sum of $——— per year during her natural life, or as long as she remains my widow, and the balance of said income to the children of my daughter L. N. Should my said wife remarry, her annuity shall be treated as a part of my residuary estate.

(7) Upon the death or remarriage of my said wife, all the residue and remainder of my said estate, including any portion of the real estate in paragraph 4 mentioned which may not have been sold shall be equally divided between my children and the lawful issue of any deceased child, by right of representation.

(8) I hereby revoke any former will or wills by me made.

(9) I hereby constitute and appoint E. F. and G. H., of ———, ——— County, Nebraska, executors of this, my last will and testament.

Dated, etc.

[Add attestation, Form No. 11.]

Form No. 13.

WILL PLACING PROPERTY IN CONTROL OF TRUSTEES.

[As in No. 11 to *, then:] I give and devise to my executors and their successors in trust the following described property, [describe property] in trust, however, to receive the rents, issues, and profits thereof until my grandson C. B. shall attain the age of 25 years, when I give and devise the same to him, and direct my said executors to convey the same to him absolutely, and also to pay over to him all the rents, issues, and profits received by them therefrom after first paying the taxes on said lands and the cost of necessary repairs to the buildings thereon.

(2) The balance of my real estate, and all moneys, notes, bonds, stocks, mortgages, and other securities, I give, devise, and bequeath unto my executors and their successors in trust, to invest and keep

the same invested, and to receive the rents, issues, and profits thereof, and during the lifetime of my wife, C. B., out of said rents, issues, and profits, to first pay to her an annuity of $——— per annum, and distribute the balance of said rents, issues, and profits among all my children equally, share and share alike, the issue of any deceased child taking, by right of representation, the share thereof which his, her, or their parent would have taken if living; and, upon the death of my said wife, divide my said estate among all my children and grandchildren in the same manner in which said rents, issues, and profits are to be divided. And for the purposes of the trust hereby reposed, my executors and trustees, and their successors in trust, are authorized and empowered to sell and convey any and all the personal property, and any and all the real estate except that real estate mentioned in paragraph 1 of which I may die seised, and convert the same into money, and invest and keep invested the same for the purposes of the trust herein specified, and generally for such purposes, and, in their discretion, to convert realty into personalty and personalty into realty.

(3) For the purposes of carrying out this trust, my said executors and trustees are hereby authorized and empowered, if they think it best, to mortgage, for the sum of not more than $———, the following described real estate, ———, and use the proceeds of said mortgage in the construction of a substantial brick or stone block on said property.

(4) My clothing, jewelry, books, pictures, horses, carriages, sleighs, and household furniture and barn equipments I give and bequeath to my wife, C. B. The foregoing provisions for my said wife are in lieu of any statutory right or interest she may have in my estate.

Dated at ———, Nebraska, this ——— day of ———, 19—.

(Signed) A. B.

[Add attestation, Form No. 11.]

Form No. 13a.

RESIDUARY CLAUSE.

The residue of my estate remaining after the satisfaction of the above bequests and devises, including after-acquired property, and any devise or bequest which may fail for any cause whatsoever, I give and devise in equal shares to my children and the lawful issue of any deceased child, such issue taking by representation.

Form No. 13b.

DEVISE OF LIFE ESTATE WITH POWER OF SALE.

I give and devise unto my wife C. B. the following described real estate: ———, to have and to hold the same during the period of her natural life, but with full power and authority to sell and convey any part or portion thereof at any time when it becomes necessary for her support, said support to be such as is suitable for persons of her age and social position, and of a like character to which she was accustomed during the later years of our married life. The remainder, if any, in said above-described real estate shall become a part of my residuary estate and shall pass as hereinafter provided.

Form No. 13c.

DEVISE OF LIFE ESTATE WITH LIMITED POWER OF DISPOSITION OF THE FEE.

I give and devise unto my wife C. B. the following described real estate: ———, to have and to hold the same during the period of her natural life. Upon the death of my said wife I give and devise the remainder in said real estate to my children, and the lawful issue of any deceased child, in such shares or parts as my said wife may designate by her last will and testament.

Form No. 13d.

DEVISE OF LIFE ESTATE WITH FULL POWER OF DISPOSITION.

I give and devise unto my wife C. B. the following described real estate, to have and to hold the same during the period of her natural life. I give and devise the remainder in said above-described real estate to such person or persons and in such shares or parts as shall be designated by said wife in her last will and testament, but should she fail to appoint as herein provided, such remainder shall become a part of my residuary estate and be disposed of as hereinafter directed.

Form No. 13e.

DEVISE SUBJECT TO AN ANNUITY.

I give, devise and bequeath unto my son C. B. the following described real estate, subject, however, to the payment by him, said

C. B., to my sister L. M. of the sum of $——— per annum during her lifetime; the first payment to be made within six months from the date of my death.

Form No. 13f.

DEVISE—CONDITION PRECEDENT.

I give and devise to my son C. B. the following described real estate: ———, upon condition, however, that my said son C. B. shall at the time of my death have been actually engaged in the occupation of farming continuously for not less than five years. In the case of a failure of said devise by reason of a noncompliance with the above condition, said real estate shall become a part of my residuary estate.

Form No. 13g.

DEVISE OF DEFEASIBLE FEE.

I give and devise unto my daughter C. B. M. the following described real estate: ———; provided, however, that should she, said C. B. M., die unmarried or before attaining the age of 21 years, said real estate shall be equally divided between my children and the lawful issue of any deceased child, such issue taking by representation.

Form No. 13h.

DEVISE OF REMAINDER WITH CONDITIONAL LIMITATION OVER.

I give and devise the remainder in said above-described real estate to C. B., provided, however, that if said C. B. shall die without issue during the existence of said life estate, then and in that case I give and devise said remainder to E. F.

Form No. 13i.

GIFT TO EXECUTORS FOR THE BENEFIT OF THE CHILDREN AND WITH POWER TO SELL AND DIVIDE PROCEEDS.

I direct that my executors hereinafter named shall take charge of the residue and remainder of my estate, retain the same, except as hereinafter provided, until all of my children have attained lawful age, invest and keep invested the residue of the personal property, keep and maintain the buildings on the real estate in first-class tenantable condition, with power to make such alterations and improvements thereon as is consistent with sound business management, and divide

the income between my said children in equal shares. Should any child die before final distribution is made as hereinafter directed leaving issue or a surviving spouse, or both, such issue or spouse, or both, shall be entitled to the share of such deceased child in said income. My executors may, in their discretion, advance to any child from his or her share in the body of said residue such amounts as may seem to them desirable for his or her education.

As soon as practicable after all my children then surviving have become of lawful age, I authorize and direct my executors to sell said estate so placed in their charge and divide the proceeds thereof equally between my surviving children and the lawful issue or surviving spouse, or both, of any deceased child, such issue or spouse, or both, taking by representation, and all advancements made to any child being taken into consideration in making such distribution.

Form No. 13j.

GIFT TO WIFE OF STATUTORY SHARE.

I give, devise and bequeath unto my wife, C. B., all that right, share or interest in my estate to which she would be entitled by virtue of the marital relation should I die intestate, including a life estate in that portion of my real estate comprising my statutory homestead.

Form No. 13k.

GIFT TO A CHURCH.

I give, devise and bequeath unto the trustees of the First Congregational Church of ———, Nebraska, all the residue and remainder of my estate, in trust, for the purposes and with the restrictions herein set forth. Said sum shall be invested by said trustees and their successors in trust, and the income therefrom devoted by them, said trustees, to the uses and purposes of said church. The principal shall at all times be kept inviolate.

Form No. 13l.

GIFT TO A CHURCH WITH LIMITATION OVER ON FAILURE OF CONDITION.

I give, devise and bequeath unto the wardens and vestrymen of St. James Episcopal Church of ——— the following described real estate: ———, together with the sum of $——— for the purpose of erecting a building on said lot to be used by said church as a rectory. In case

said building or other building erected on said lot is used for any other purpose, said lot and building shall become the property of my heirs.

Form No. 13m.

DEVISE DISCHARGED FROM LIEN FOR DEBTS OF DEVISEE.

I give and devise unto my son C. B. the following described real estate, to have and to hold the same during the period of his natural life, provided, however, and this devise is upon this express condition, that said devise shall not be chargeable with any debts, claims or demands now existing or which may hereafter exist against the said C. B. The remainder in said real estate, unencumbered as herein expressly provided, shall at his death vest in his issue.

Form No. 13n.

BEQUEST TO TRUSTEE FOR REASONS WHICH TERMINATE THE TRUST WHEN THEY OCCUR.

I give and bequeath unto my son C. B. the sum of $———, in trust for the use and benefit of my daughter L. M., and I hereby authorize and direct my said trustee to invest said sum in proper securities or otherwise and pay the income and such part or portion of the principal sum as may be needed for the suitable support and maintenance of my said daughter and her children, and if any sum remains at her death, pay the same to her said children. My reason for this bequest in trust is that it is my wish that my said daughter have the benefit of said bequest for herself and children without any interference on the part of her husband G. H. M., and that no part or portion of the same shall ever come into his control.

[This bequest gives the *cestui que trust* the right to the entire fund remaining on the termination of the marriage by divorce or death of the husband. To insert a clause to that effect is improper.]

Form No. 13o.

SPENDTHRIFT TRUST.

I give, devise and bequeath unto C. D., of ———, the following described property: ———, in trust, however, with full power and authority to devote the income of said property, or such portion thereof as may be necessary for the support and maintenance of my son C. B. in manner and form suitable to his rank and social standing, during his lifetime. Said trust shall be administered under the control of

the ——— court of ———, ———, in the event that said trustee or his successor or successors and said *cestui que trust* are unable to agree on the amount necessary for his support or the times and manner of payment of the same.

Upon the death of said C. D. the estate of remainder in said property, together with the unexpended income, shall become the property of his lawful heirs.

Form No. 13p.

BEQUEST IN TRUST FOR INVALID SON.

I give and bequeath unto C. D., of ———, in trust for the use and benefit of my invalid son C. B., the sum of $———. I direct my said trustee to devote the income of said bequest, or such portion of the principal as may be for the best interest of my said son, for his care, support, maintenance and general welfare. Any residue remaining on the termination of this trust shall become the property of the heirs of my said son.

Form No. 13q.

DEVISES TO CHILDREN VESTING WHEN THEY ATTAIN FIXED AGES.

I give and devise to my son C. B. the following described real estate: ———; provided, however, that this devise shall not vest in possession in said C. B. until he becomes of lawful age, and that my wife M. B. shall have the use, control and possession of said property until said C. B. becomes of age.

I give and devise unto my daughter L. B. the following described real estate: ———; provided, however, that this devise shall not vest in possession in said L. B. until she attains the age of 21 years. Should my said daughter L. B. die without issue before attaining the age of 21 years, said devise shall vest in her brothers and sisters, but possession by each of his or her share shall be postponed until he or she becomes of the age of 21 years. Until said devise or devises vest in possession my said wife, M. B. shall have the use, control and possession of said property.

Form No. 13r.

DEVISE WITH RESTRICTION AGAINST SALE OF LIQUORS ON THE PREMISES.

I give and devise unto my sons A. B. and C. B. the following described real estate: ———; subject, however, to the following condi-

tions and restrictions, which said conditions shall be strictly construed in favor of the state of Nebraska, with limitation over in case of failure of condition. This devise is upon these express conditions: No malt, spirituous, vinous or intoxicating liquor shall ever be manufactured, sold, stored, kept, bargained, traded or given away on said real estate or in any building or structure which now is or may hereafter be erected on said premises. Every instrument of conveyance of said real estate or of any part or portion thereof, or of any right or interest therein, executed by any devisee, heir or grantee of said real estate, or any part or portion thereof, or any right, title or interest therein, shall set out this paragraph numbered ——— of this my said will in full.

Upon any breach of conditions and restrictions in this devise contained, the ownership and right to the possession of the lot or tract on which such breach occurs, or of the tract or lot the title to which or any right or interest therein is attempted to be conveyed without reciting this said paragraph ——— of this my said will, with all the improvements thereon, shall at once vest in the state of Nebraska, and be held or disposed of as escheated property.

Form No. 13s.

DEVISE TO WIDOW OF LIFE ESTATE OR ESTATE FOR YEARS CHARGED WITH SUPPORT AND EDUCATION OF CHILDREN.

I give and devise unto my said wife C. B. the following described real estate: ———; to have and to hold the same during the period of her natural life or as long as she remains my widow ———; provided, however, that my minor children shall be entitled to their support, maintenance, and an education equivalent to that afforded by the ordinary high schools of the state from the income of such devise. Upon the death or remarriage of my said wife the remainder in said real estate shall vest in my heirs.

Form No. 13t.

GIFT TO WIDOW WITH POWER OF SALE FOR SPECIFIC PURPOSES.

I give, devise and bequeath unto my wife C. B. the following described property, to have and to hold the same in trust for the use and benefit of my minor children: ———. Said bequest and the income from said devise shall be used for the support, maintenance and education of said children. Should said bequest and said income prove in-

sufficient therefor, I hereby grant unto said trustee full and complete power and authority to sell and convey, provided said bequest be exhausted, any part or portion of said devise for the purpose of creating a fund, which shall be invested by her, and the income therefrom, with such part of the principal as she may deem for the best interest of my children, shall be used for the purposes above set forth. For the purpose of carrying out the provisions of this paragraph I grant unto my said wife full power and authority to execute and deliver necessary deed or deeds of conveyance of any part or portion of said real estate. I direct that an accurate account be kept by my said wife of the amounts expended from this gift for the purpose of defraying the expenses of the education of any child at any other than the public schools of this county. When all my children are of lawful age, this trust shall cease and determine, said trust property shall be sold by said trustee and the proceeds divided between my children and the lawful issue of any deceased child, such issue taking by representation; payments for the purpose of defraying the expenses of the education of any child at other than the public schools of this county to be treated as an advancement in determining the share of such child or his or her issue.

Form No. 13u.

APPOINTMENT OF SOLE TRUSTEE WITH PROVISIONS FOR A SUCCESSOR.

I hereby constitute and appoint E. F., of the city of ———, sole trustee for the purpose of carrying out the provisions of the trust provided for in paragraph No. ——— of this will. In case of the death, resignation or removal from office of said trustee, I hereby appoint such person as may be designated by the county court of ———, ———, as his successor, and such successor shall, on the approval of bond in such amount as may be required by said court have and possess the same powers and authority as I have granted said E. F.

Form No. 13v.

APPOINTMENT OF JOINT TRUSTEES WITH POWERS TO SURVIVOR OR SURVIVORS.

I hereby constitute and appoint C. D., E. G. and F. H., of the city of ———, joint trustees for the purpose of carrying out the provisions of the trust provided for in this my said will. Should any of said trustees fail to qualify, or die, resign or be removed from office, the remaining trustees or trustee shall have and possess the same power and authority as is granted to them jointly.

§ 47. How nuncupative will executed.

A nuncupative will must be executed in the presence of at least three witnesses. One of whom the testator must request to bear witness that such was his will, or words to that effect. It must be made at the time of the last sickness of the deceased, and in the place of his or her habitation, or where he or she had resided for the space of ten days or more next before the making of such will, except when such person was unexpectedly taken sick away from home, and died before he or she had returned to his or her habitation.[41]

The essential element of a nuncupative will is a testamentary intention, expressed verbally, during the "last sickness" in the presence of the lawful number of competent witnesses, one of whom has been especially requested by the testator to bear witness as to the disposition to be made of the estate. The witnesses must possess the same qualifications as the witnesses to a written will, and it cannot, therefore, be established by the oaths of persons who take a beneficial interest thereunder.[42]

By "last sickness" is meant the illness immediately preceding death, when the physical, and oftentimes the mental, powers are fast waning, and there is no expectation of recovery. Unless death follow very soon thereafter, or the testator immediately lapse into an unconscious state, and so remain until final dissolution takes place, his nuncupative will should be

41 Rev. Stats., c. 17, § 27, [1291].

42 Godfrey v. Smith, 73 Neb. 756, 103 N. W. 450.

refused probate. Death or unconsciousness must follow immediately its execution.[43]

After six months have elapsed since the speaking of any testamentary words, the will cannot be proved unless the words or their substance were reduced to writing within six days after they were spoken, nor shall letters testamentary be issued, or the probate of any nuncupative will be granted, until at least fourteen days have elapsed since the decease of the testator.[44]

If the estate bequeathed or devised is under $150 in value, a strict compliance with the rule as to the place where made and number of witnesses is not necessary.[45] If the estate so attempted to be bequeathed exceeds $150 in value, the will is void only as to the excess.[46]

Nuncupative wills are not favored by law, and a strict compliance with the statutory provisions therefor is essential to their validity.[47]

A nuncupative will cannot revoke a written will,[48] nor convey real estate.[49] A nuncupative will of the above kind is not recognized by the Oregon statutes; the same formalities being required for a bequest as

43 Carroll v. Bonham, 42 N. J. Eq. 625, 9 Atl. 371; Yarnall's Will, 4 Rawle (Pa.), 46, 26 Am. Dec. 115.

44 Rev. Stats., c. 17, § 28, [1292].

45 Rev. Stats., c. 17, § 27, [1291].

46 Mulligan v. Leonard, 46 Iowa, 692.

47 Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; Godfrey v. Smith, 73 Neb. 756, 103 N. W. 450; Maurer v. Reifschneider, 89 Neb. 173, 132 N. W. 197.

48 McCune v. House, 8 Ohio, 154.

49 Maurer v. Reifschneider, 89 Neb. 173, 132 N. W. 197.

for a devise,[50] with one exception mentioned in the succeeding section.[51]

§ 48. Soldiers' and mariners' wills.

A soldier in actual service or a mariner at sea may dispose of his wages or other personal property by a nuncupative will.[52] If it be established by a preponderance of testimony that the disposition of the property is according to the intent of the testator, and that it was reduced to writing within thirty days, it may be probated. The term "soldier" in actual service or in military service means one serving in a place where actual warfare is going on,[53] and mariner, any person employed on sea-going vessels.[54] Under the Oregon statutes a holographic will executed by a mariner at sea or soldier in actual service would be entitled to probate as a will of personal property.[55]

Form No. 14.

NUNCUPATIVE WILL.

State of Nebraska,
——— County,—ss.

C. D., being first duly sworn, on oath says that he is a physician and surgeon residing and engaged in the practice of his profession in the city of ———, in said county; that he was well acquainted with A. B., late of said county, in his lifetime, and was his physician during his last illness; that said A. B. departed this life at the city of ———, in said county, on the ——— day of ———, 19—, at

50 L. O. L., § 7316.
51 See Montague v. Schieffelin, 46 Or. 413, 80 Pac. 654.
52 Rev. Stats., c. 17, § 28, [1292]; L. O. L., § 7329.
53 Leathers v. Greenacre, 53 Me. 561.
54 Bouvier's Law Dict.
55 Montague v. Schieffelin, 46 Or. 413, 80 Pac. 654.

about the hour of ———, —M., of said day; that about the hour of ———, —M., of said day, affiant, G. M., and L. M., each of said county, were present in the room with said A. B.; that said A. B. was then and there in a very weak condition, and knew that death was imminent, and then and there said to affiant and said G. M. and L. M., in the presence of each of them, the following words: "This is my will. I give my wife, C. B., all my property, and I appoint her executor of my estate. I want you to bear witness that this is my will."

(Signed) C. D.

Subscribed in my presence and sworn to before me this ——— day of ———, 19—.

(Signed) H. C. M.,
Notary Public.

CHAPTER IV.

TESTAMENTARY CAPACITY.

§ 49. Who may Make Wills.
50. Sound Mind.
51. Physical Weakness.
52. Old Age.
53. Insanity.
54. Insane Delusions and Eccentricities.
55. Will Executed During Lucid Interval.
56. Drunkenness.
57. Lawful Influence.
58. Lawful Influence—Concluded.

§ 49. Who may make wills.

Any person of lawful age and of sound mind may dispose of his real and personal property by will,[1] even though he may be blind,[2] or deaf and dumb.[3]

In Oregon a testatrix must be twenty-one years of age.[4]

The common-law restrictions on the right of married women to make wills have been entirely removed. A testatrix cannot bar her surviving husband of his right to elect to take under the statute.[5]

§ 50. Sound mind.

"Sound mind" which is essential to the execution of a valid will is hard to define, for it has a somewhat

1 Rev. Stats., c. 17, §§ 22, 25, [1286], [1289].

2 Elliott v. Elliott, 3 Neb. Unof. 832, 99 N. W. 1006; In re Pickett's Will, 49 Or. 127, 89 Pac. 377.

3 Brown v. Brown, 3 Conn. 299.

4 L. O. L., § 7316.

5 Rev. Stats., c. 17, § 5, [1269]; L. O. L., §§ 7318, 7315; Runyon v. Winstock, 55 Or. 203, 105 Pac. 895.

different meaning when used in reference to testamentary capacity than in regard to general mental ability. Unimpaired mental vigor, a mind strong and able to comprehend any matter within the understanding of the average person, is not required of a testator. To establish an exact standard with which all minds must comply is impossible, and the law does not undertake to measure a testator's intellect and define the precise quality of mind and memory he must possess in order to lawfully dispose of his property at his death. A person of almost every grade of capacity above that of an idiot or lunatic may make a will.

The rule deduced from the great mass of authority is that he must have sufficient mental capacity to know what property he possesses, where it is, its comparative values, what disposition he wishes to be made of it, and who are the natural objects of his bounty, and that he have sufficient memory to keep these matters in his mind until a will is prepared to carry these intended dispositions of his estate into effect.[6]

The memory he is required to possess must be active, and sufficient to enable him to collect in his mind the

[6] Mollering v. Kinnerberg, 78 Neb. 758, 111 N. W. 788; In re Nelson's Estate, 75 Neb. 298, 106 N. W. 326; In re Sweeny's Estate, 94 Neb. 834, 144 N. W. 903; Thompson v. Thompson, 46 Neb. 157, 68 N. W. 372; Elliott's Estate, 3 Neb. Unof. 832, 92 N. W. 1006; Hubbard v. Hubbard, 7 Or. 42; Rothrock v. Rothrock, 22 Or. 551, 30 Pac. 453; Frank v. Shipley, 22 Or. 194, 29 Pac. 268; In re Hart's Will (Or.), 132 Pac. 529; In re Buren's Will, 47 Or. 307, 83 Pac. 530; In re Ames' Will, 40 Or. 495, 67 Pac. 737; Stevens v. Myers, 62 Or. 372, 121 Pac. 437, 126 Pac. 29; Bundy v. McKnight, 48 Ind. 502; Hampton v. Westcott, 49 N. J. Eq. 522; Kinne v. Kinne, 9 Conn. 104; Delafield v. Parrish, 25 N. Y. 9; Mulholland's Estate, 217 Pa. 65, 66 Atl. 150.

particular elements of the business to be transacted, and to hold them there a sufficient length of time to perceive their obvious relations to each other, and to form a rational judgment concerning them.[7]

Ability to transact ordinary business is not, according to the weight of authority, a test of testamentary capacity, as is the almost universal opinion among laymen. The courts confine the ability to the particular business of making a will. A person may not be able, either by reason of age or mental weakness, to enter understandingly into a business contract, and be obliged to intrust such matters to a guardian, but at the same time have sufficient mind and memory to know and thoroughly understand the amount and extent of his property and the disposition he wishes to make of it.[8] Mental weakness or a pronounced lack of mental capacity are not, of themselves, inconsistent with testamentary capacity,[9] unless they go so far as to disqualify the party from knowing or appreciating the act in which he is engaged.[10]

A lesser degree of mental ability is permitted where the estate is small or the will simple than in cases of

[7] In re Downing's Will, 118 Wis. 581, 95 N. W. 876; Burney v. Torrey, 100 Ala. 157, 14 South. 685; Prather v. McCleland, 76 Tex. 574, 13 S. W. 543.

[8] In re Ames' Will, 40 Or. 495, 67 Pac. 737; In re Cowdery, 77 Vt. 539, 60 Atl. 149; Rice v. Rice, 50 Mich. 448, 15 N. W. 545; Frazer v. Jennison, 42 Mich. 220, 3 N. W. 882; Jackson v. Hardin, 83 Mo. 175; Draper's Estate, 215 Pa. 314, 64 Atl. 520; Hathorne v. King, 8 Mass. 371; Comstock v. Hadlyme, 8 Conn. 254.

[9] Pierce v. Pierce, 38 Mich. 412; Frazer v. Jennison, 42 Mich. 220, 3 N. W. 882.

[10] Manatt v. Scott, 106 Iowa, 203, 76 N. W. 717.

large estates or a complicated distribution of the property is attempted.[11]

§ 51. Physical weakness.

The law recognizes the fact that many people delay making their wills until warned by sickness that the end is at hand. The rule is that when the testator has not reached old age, and there is no evidence of undue influence exerted upon him, or any circumstances tending to show the same, physical weakness, provided it is not such as to prevent him from expressing his intentions, so that they can be understood, will not affect his testamentary capacity.[12] A testator who is very weak and fast losing strength, but still possessed of sufficient mental and physical ability to intelligently discuss questions relating to the condition and amount of his estate and his domestic relations, and then dictate the terms of his will, has undoubted testamentary capacity.[13]

§ 52. Old age.

Old age, *per se*, is not inconsistent with unquestioned testamentary capacity.[14] Age and physical and mental weakness which sometimes accompany it may destroy such capacity where each standing by itself would be

[11] Sheldon v. Dow, 1 Dem. Sur. (N. Y.) 502; Dillman v. McDaniel, 222 Ill. 276, 78 N. E. 591; In re Silverthorne's Will, 68 Wis. 372, 32 N. W. 287.

[12] Rothrock v. Rothrock, 22 Or. 551, 30 Pac. 453; Stackhouse v. Horton, 15 N. J. Eq. 202.

[13] Stackhouse v. Horton, 36 Neb. 393, 54 N. W. 670; In re Hobbins, 41 Mont. 39, 108 Pac. 7; Mullan's Will, 140 Wis. 291, 122 N. W. 723.

[14] Chrisman v. Chrisman, 16 Or. 127, 18 Pac. 6; Clark v. Ellis, 9 Or. 129; Collins v. Townley, 21 N. J. Eq. 353; In re Humphrey, 26 N. J. Eq. 513.

entirely insufficient,[15] and it is an important element in connection with undue influence, requiring a close scrutiny of all the surroundings and conditions.[16] The fact that the aged testator is suffering from a stroke of paralysis or apoplexy[17] does not necessarily affect his mental condition.

Though the mental capacity of the testator may be weakened by age, or age and disease, if he yet have sufficient capacity to comprehend the act which he is performing, and strength of mind to form a fixed intention in regard to the disposition of his property, and vigor to carry out that intention, his will would be valid.[18] Forgetfulness of recent events is not incapacity.[19]

It often happens that aged and infirm persons, who seem to have lost nearly all recollection of different subjects, when their attention is fixed on their business, property or family relations, have an exceptionally clear, fixed and distinct understanding of their property and what they want to do with it.[20]

It was said by Chancellor Kent that "the will of an aged man ought to be regarded with great tenderness

15 Hall v. Perry, 87 Me. 569, 33 Atl. 160.

16 Wilson v. Mitchel, 101 Pa. 495; Jackson v. Hardin, 83 Mo. 175; Schneider v. Vosburgh, 143 Mich. 476, 106 N. W. 129.

17 In re Wilson, 78 Neb. 758, 111 N. W. 788; In re Wheaton, 68 N. J. Eq. 562, 59 Atl. 886.

18 Thompson v. Thompson, 46 Neb. 157, 68 N. W. 372; Elliott v. Elliott, 3 Neb. Unof. 832, 92 N. W. 1006; In re Nelson, 75 Neb. 298, 106 N. W. 326; Stull v. Stull, 1 Neb. Unof. 380, 96 N. W. 196; Ames' Will, 40 Or. 595, 67 Pac. 737; Perkins v. Perkins, 116 Iowa, 253, 90 N. W. 55; In re Buren's Will, 47 Or. 397, 83 Pac. 530; Cline's Will, 24 Or. 178, 33 Pac. 542.

19 Eddy's Case, 32 N. J. Eq. 701.

20 Taylor, Med. Jur., 336.

when it appears not to have been obtained by fraudulent acts, but contains those very dispositions which the circumstances of his situation and the course of the natural affections dictated."[21]

§ 53. Insanity.

Insanity may be defined as "derangement of intellect." A distinction exists between insanity and idiocy. The former embraces those unfortunate persons who have lost either in whole or part the reasoning faculties they once possessed, while the latter never had any reasoning faculties. The term *"non compos mentis"* applies to both.

The statement is frequently made in the books that the will of an insane person is worthless. This is not strictly true. The medical profession recognizes different varieties and phases of mental derangement, many of which are only partial and affect certain acts. A person may be partially deranged and yet possess unquestioned testamentary capacity. The true test of that insanity which renders a will invalid is the existence of delusions which prevent the testator from intelligently comprehending his estate, and the persons who would be naturally expected to be the objects of his bounty. An insane delusion is a state of facts existing in the mind of a person which have no actual existence except in his imagination, and which cannot be removed by any amount of reasoning and argument.[22]

21 Van Alst v. Hunter, 5 Johns. Ch. (N. Y.) 148.

22 Bundy v. McKnight, 48 Ind. 503; Stanton v. Weatherax, 16 Barb. (N. Y.) 259; Florey's Exrs. v. Florey, 24 Ala. 241; Middleditch v.

If these delusions are in regard to other matters than his family relations and those who would be the probable objects of his bounty or his estate generally, they would not incapacitate him from making a valid will. The delusion must be in regard to some particular matter which directly affects the testamentary act.[23]

A believer in some occult or speculative form of so-called religious doctrine is not incompatible with testamentary capacity,[24] unless the effect of it is to unseat the judgment and dethrone the reasoning powers, in which event his will should be denied probate.[25]

§ 54. Insane delusions and eccentricities.

As a result of the rule that insanity, in order to vitiate a will, must be in regard to the testamentary act itself, it follows that an undoubted monomaniac may be capable of disposing of his property by will,[26] and

Williams, 45 N. J. Eq. 726, 17 Atl. 826; Smith v. Smith, 48 N. J. Eq. 566; Haines v. Hayden, 95 Mich. 332, 54 N. W. 911.

23 McClary v. Stull, 44 Neb. 175, 62 N. W. 501; Potter v. Jones, 20 Or. 239, 25 Pac. 765; Rice v. Rice, 50 Mich. 448, 15 N. W. 545; Lee v. Scudder, 31 N. J. Eq. 633; Chaffin's Will, 32 Wis. 557.

24 Robinson v. Adams, 62 Me. 369; McClary v. Stull, 44 Neb. 175, 62 N. W. 501; Connor v. Skaggs, 213 Mo. 334, 111 S. W. 1132.

25 Taylor v. Trich, 165 Pa. 586, 30 Atl. 1053; White's Will, 121 N. Y. 406, 24 N. E. 935; Orchardson v. Cofield, 171 Ill. 14, 59 N. E. 197.

26 Dunham's Appeal, 27 Conn. 192; Benois v. Murrin, 58 Mo. 307; Johnson v. Johnson, 105 Md. 81, 65 Atl. 918; In re Segur, 71 Vt. 224, 44 Atl. 342; Fraser v. Jennison, 42 Mich. 231, 3 N. W. 882; Stull v. Stull, 1 Neb. Unof. 389, 96 N. W. 200; Smith v. Smith, 48 N. J. Eq. 566, 25 Atl. 11; Tawney v. Long, 76 Pa. 106; Lee v. Scudder, 31 N. J. Eq. 633; Ballantine v. Proudfoot, 62 Wis. 217, 22 N. W. 392.

that a man who has displayed judgment, skill and foresight in the management of a large business, whose mental ability has never been questioned, may be wholly incompetent to make a will on account of insane delusions in regard to the disposition of his property.[27]

Eccentricities, either in belief or conduct, which cannot be considered as sufficient of themselves to prove insanity, do not vitiate a will. A person of that character has power to change his conduct or opinion, while an insane person has not the ability to do so. Hobbies, marked peculiarities of habit, thought and conduct, and moral delinquencies may result from a person's surroundings, ignorance, or lack of opportunity, and are consistent with mental capacity.[28]

A careful distinction should be drawn between delusions and prejudice. An undue and unjust prejudice which has some reason for its existence is not sufficient to invalidate a will.[29] Such prejudice, based on no facts whatever, and without any apparent reason for its existence, is a delusion.[30]

27 American Bible Society v. Price, 115 Ill. 623, 5 N. E. 126; American Seaman's Friend Society v. Hopper, 33 N. Y. 619; Denson v. Beasley, 35 Tex. 191.

28 Winn v. Grier, 217 Mo. 420, 117 S. W. 48; Bennett v. Hibbert, 88 Iowa, 154, 55 N. W. 93; Lee v. Lee, 4 McCord (S. C.), 183; Archambault v. Blanchard, 198 Mo. 384, 95 S. W. 834.

29 In re Clapham's Estate, 73 Neb. 492, 103 N. W. 61; Stevens v. Myers, 62 Or. 351, 121 Pac. 434, 126 Pac. 29; Skinner's Will, 40 Or. 571, 67 Pac. 951; Potter v. Jones, 20 Or. 239, 25 Pac. 769; Clausenius v. Clausenius, 179 Ill. 545, 53 N. E. 1006.

30 Bean v. Bean, 144 Mich. 599, 108 N. W. 369; Fulton v. Freeland, 219 Mo. 494, 118 S. W. 12.

§ 55. Will executed during lucid interval.

When insanity affecting all the mental faculties has been proved to exist, it is generally presumed to have continued until evidence is introduced to the contrary.[31] The medical profession has known it to be a fact that in many of apparently the worst cases of insanity, the result of certain diseases of the brain, the patient has lucid intervals when his mind is capable of comprehending his property and understanding the nature and character of the testamentary act. A will which shows on its face no evidence of mental derangement, rational in its terms and provisions, evincing a knowledge of testator's property and of those who would naturally be the objects of his bounty, and prepared according to the directions of the testator, will be upheld.[32]

§ 56. Drunkenness and use of drugs.

A person while under the influence of intoxicating liquors or narcotics to such an extent as to be incapable of knowing what he is doing cannot make a valid will. The use of intoxicating liquors to excess will not deprive one of testamentary capacity unless such intemperance be long continued, impairing the mind,

31 State v. Reddick, 7 Kan. 143; Carpenter v. Carpenter, 8 Bush (Ky.), 283.

32 Crowninshield v. Crowninshield, 2 Gray (Mass.), 524; Little v. Little, 13 Gray (Mass.), 264; Chandler v. Barrett, 21 La. Ann. 58; Bitner v. Bitner, 65 Pa. 347; In re Johnson's Estate, 57 Cal. 529; Clarke (Cartwright) v. Cartwright, 1 Phill. 90. In the latter case the testatrix was violently insane and had to be kept under close restraint. During a lucid interval she wrote out her will, which was so rational in its terms and displayed such an accurate knowledge of the character of her estate and just disposition of it, that the will was allowed.

destroying its faculties, and producing a permanent derangement.[33]

The rule in regard to the drug habit is the same.[34]

§ 57. Lawful influence.

The very nature of a will requires its execution to have been a free, voluntary act, consequently any fraudulent trick or device practiced upon the testator in the execution of his will, or an influence exerted upon him which prevents him from exercising a free and untrammeled discretion, invalidates his will.[35] Not all influence exerted upon a testator in the making of his will is undue or unlawful, provided such influence does not subvert the free agency of the testator. Influence obtained by appeals to one's judgment, sympathies, discretion, better nature, his sense of charity and religious principles is legitimate unless it has become so persistent as to entirely destroy his powers of discretion.[36] Lawful influence, which may be defined as that which arises from legitimate family and social relations, cannot but exert a powerful influence over the mind of the testator, and show itself in the terms of his will. Such influences often produce great

[33] Howe v. Richards, 112 Iowa, 220, 83 N. W. 911; Lang's Estate, 65 Cal. 19, 2 Pac. 491; Pierce v. Pierce, 38 Mich. 418.

[34] In re Gilham, 64 N. J. Eq. 715, 52 Atl. 690; Miller v. Oestrich, 157 Pa. 264, 27 Atl. 742.

[35] Children's Aid Soc. v. Loveridge, 70 N. Y. 387; McMahon v. Ryan, 20 Pa. 329; Rollwagen v. Rollwagen, 63 N. Y. 519; Clyde v. Anderson, 49 Mo. 37.

[36] Schofield v. Walker, 58 Mich. 96, 24 N. W. 624; Wise v. Foote, 81 Ky. 10; Bundy v. McKnight, 48 Ind. 502; Sunderland v. Hood, 84 Mo. 293; Monroe v. Barclay, 17 Ohio St. 302; Orr v. Pennington, 93 Va. 268, 24 S. E. 928; Mullon v. Walker, 69 Iowa, 92, 28 N. W. 452.

irregularities in the disposition of property, and work apparent hardships, but the law cannot criticise and measure their actual effect, and therefore allows them.[37] Neither advice, argument or persuasion will avoid a will made freely from conviction, though it may conclusively appear that it would never have been made were not such means adopted to bring about its execution, as where a will was obtained, by the arguments of a clergyman, disinheriting a person's immediate family, and giving the entire estate to a deserving charitable institution, it appearing that neither the clergyman nor any member of his family profited thereby.[38]

§ 58. Lawful influence—Concluded.

A wife may legitimately use her influence to cause her husband to make a will in her favor, unless such influence is so exerted as to secure advantages to herself, to the injury of others, and practically substitute her will for his. The confidential relation of husband and wife does not *per se* raise a suspicion of undue influence; but a will obtained through the influence of one living in unlawful relations with another is invalid, even though the degree of influence is not as great as that of a husband over a wife, or of a wife over a husband.[39] In the Kessinger case, the court say that: "We are of opinion that * * * an influ-

[37] Dean v. Negley, 41 Pa. 312; Latham v. Udell, 38 Mich. 238; Pierce v. Pierce, 38 Mich. 412.

[38] Maynard v. Vinton, 59 Mich. 139, 26 N. W. 401; McCullock v. Campbell, 49 Neb. 367, 5 N. W. 590.

[39] Dean v. Negley, 41 Pa. 313; Boggs v. Boggs, 62 Neb. 274, 87 N. W. 39; Kessinger v. Kessinger, 37 Ind. 341; Waters v. Reed (Mich.), 88 N. W. 394.

ence, when exercised by a wife, might be lawful and legitimate, but which, if exercised by a person occupying merely an adulterous relation, might be undue and illegitimate. This must be so from the very nature of civilized human society." The two classes of influence are often distinguished by the means of which they are obtained. That which is obtained by honest intercession and persuasion, arguments addressed to the understanding, appeals to one's better nature, is always lawful,[40] "that which is obtained by flattery, importunity, superiority of will, mind or character, or by any art soever that human thought, ingenuity or cunning can employ, which would give dominion over the will of the testator to such an extent as to destroy free agency, or constrain him to do, against his will, what he is unable to refuse, is undue."[41]

40 1 Jarman, Wills, 37.

41 Schofield v. Walker, 58 Mich. 106, 14 N. W. 624.

CHAPTER V.

REVOCATION OF WILLS.

§ 59. Definition.
60. How Wills Revoked—Statutory Provisions.
61. Revocation of Will by Destroying It.
62. Revocation by Executing New Will.
63. Implied Revocations.
64. Changes in the Estate.
65. Death of Devisee or Legatee.
66. Revocation by Marriage.
67. Revocation by Birth of Issue.
68. Revocation by Divorce.
69. Revivor of Wills.

§ 59. Definitions.

The revocation of a will is the annulling or repealing of it, thereby depriving it entirely of any power or effect. The one peculiarity which distinguishes it from other legal instruments is that the testator is not precluded from making any other disposition of his property, either by sale, gift or subsequent will. A man may make as many wills and codicils, provided he is of sound mind, as he wishes, but no contract or agreement making a will previously executed irrevocable can be enforced.[1]

§ 60. Statutory provisions for revocation of wills.

No will or any part thereof can be revoked unless by burning, tearing, canceling or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence and by his express direction, or by some other will or codicil in writing, signed,

[1] Mandelebam v. McDonnell, 29 Mich. 78.

attested and subscribed in the same manner provided by law for the execution of wills, and by such changes in the circumstances and conditions of the testator as constitute an implied revocation.[2]

Revocation by changes in the family relations in Oregon are mostly governed by statute.[3]

§ 61. Revocation of will by destroying it.

In order to revoke a will by destroying it there must be a manual act of destruction, either burning, tearing, canceling or obliterating of the will itself by the testator or under his direction, practically putting it out of existence. If the destruction is not complete, some necessary or material portion of it, such as the signature of the testator or witnesses, or the names of the devisees or legatees, must be completely obliterated or destroyed. Throwing a will into a waste basket or leaving it with worthless papers is not sufficient.[4] Cutting out the names of only a part of the beneficiaries or of the executor only is not a total revocation.[5]

Canceling by drawing lines through a material part but leaving it so it can still be read, *animo revocandi*, works a revocation.[6] If the will consists of several pages fastened together, a tearing out of one, without

2 Rev. Stats., c. 17, § 31, [1295]; L. O. L., § 803.

3 Sections 65, 66, 67, *post*.

4 Hoit v. Hoit, 63 N. H. 475, 3 Atl. 504; Fellows v. Allen, 60 N. H. 439.

5 In re Brown, 1 B. Mon. (Ky.) 56, 35 Am. Dec. 174; Wells v. Wells, 4 T. B. Mon. (Ky.) 152, 16 Am. Dec. 150.

6 Townsend v. Howard, 86 Me. 285, 29 Atl. 1077; McIntyre v. McIntyre, 120 Ga. 67, 47 S. E. 501.

destroying it, will not revoke the will.[7] The intent of the testator is a most important element to be considered in determining whether the tearing, canceling or obliterating was done by him for the purpose of destroying the will, but of itself is not sufficient. It must be accompanied by some manual act.[8]

If he is prevented from destroying the will by force and violence, it remains valid unless supplanted by a new one.[9] If he directs another party to destroy the will, but by reason of fraud practiced upon him it is preserved, it is revoked unless he subsequently ascertains the facts and apparently acquiesces in its preservation.[10]

Under the Oregon statute the consent of the testator to the destruction of his will by another party and the fact of such destruction must be proved by two witnesses.[11]

The fact that a will known to have been in the possession of the testator cannot be found raises a presumption that he destroyed it *animo revocandi*,[12] but evidence of his condition, surrounding circumstances, and of declarations by him are admissible to show a contrary intention.[13]

7 Woodruff v. Hundley, 127 Ala. 640, 29 South. 98.

8 In re Frothingham, 75 N. J. Eq. 205, 71 Atl. 695; McNagle v. Parker, 75 N. H. 139, 71 Atl. 637.

9 Kent v. Mahaffy, 10 Ohio St. 204; Runkle v. Gates, 11 Ind. 95; Andrew v. Motley, 12 Com. B., N. S., 514, 524.

10 Graham v. Burch, 53 Minn. 17, 55 N. W. 64.

11 L. O. L., § 803.

12 In re Miller's Will, 49 Or. 456, 90 Pac. 1002.

13 In re Miller's Will, *supra;* Steel v. Price, 5 B. Mon. (Ky.) 58.

§ 62. Revocation by executing new will.

Unless a former will has been revoked by destroying it, it is not entirely revoked by a later one, unless such later will contains a revocation clause, or its provisions be entirely inconsistent with those of the older instrument.[14] If the two instruments are only partially conflicting, the later revokes the former only in so far as the two are inconsistent.[15] Both are entitled to probate.[16] If it disposes of the entire estate in an entirely different manner than the former will, it works a complete revocation of the older instrument, though it contains no revocation clause, and the older will is still in existence.[17]

It therefore follows that not only must the execution of the later will be proved, but it must also be shown that it contained a revocation clause or was entirely inconsistent with the older will.[18]

§ 63. Implied revocations.

Implied revocations are those that arise by operations or implication of law upon the happening of certain events. The statutes do not specify or designate

[14] Brant v. Wilson, 8 Cow. (N. Y.) 56; Lane v. Hill, 68 N. H. 275, 44 Atl. 393.

[15] Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 96 N. W. 501.

[16] Marston v. Marston, 17 N. H. 503; Nelson v. McGiffert, 3 Barb. Ch. (N. Y.) 170.

[17] Kern v. Kern, 154 Ind. 29, 55 N. E. 1004; Schillinger v. Bawek, 135 Iowa, 131, 112 N. W. 210.

[18] Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 96 N. W. 501; 73 Neb. 193, 205, 206, 102 N. W. 482, 106 N. W. 769; 89 Neb. 455, 127 N. W. 904, 121 N. W. 1135; Hayes v. Nicholas 72 Tex. 481, 10 S. W. 588; Stevens v. Hope, 52 Mich. 65, 17 N. W. 698; Pickens v. Davis, 134 Mass. 252; Wallis v. Wallis, 114 Mass. 510; Lane v. Hill, 68 N. H. 175, 49 Atl. 493; In re Cunningham, 38 Minn. 169, 36 N. W. 269.

all the subsequent changes in the condition and circumstances of the testator that will produce a revocation of his will; but it is for the court and not a jury[19] to determine, from the facts of each particular case, under the rules and forms of law, whether the testator intended the will to stand, notwithstanding the changes in his conditions and circumstances. The doctrine of revocation by implication is based upon a presumed alteration of intention arising from the changed conditions and circumstances of the testator, or on the presumption that the will would have been different had it been executed under the altered conditions and circumstances. An entire revocation by implication of law extends to but few cases. Changes in circumstances and family relations often work a partial revocation, and the will in other respects stands as it was written.[20] They are of two kinds: First, those arising from changes in the estate of the testator; second, those arising from a change in his family or domestic relations.

§ 64. Changes in the estate.

A will which disposes of all of testator's estate by specific bequests and devises is entirely revoked by an absolute sale of such property, for there is nothing left for the legatees or devisees to receive.[21] A sale of a

19 Dickinson v. Aldrich, 79 Neb. 198, 112 N. W. 293.

20 Baacke v. Baacke, 50 Neb. 18, 69 N. W. 303; 4 Kent, Com., 521; Greenleaf, Ev., 684.

21 In re Sprague's Estate, 125 Mich. 357, 84 N. W. 293; Hawes v. Humphrey, 9 Pick. (Mass.) 360; Adams v. Winne, 7 Paige (N. Y.), 97; Bowen v. Johnson, 6 Ind. 110; Collup v. Smith, 89 Va. 258, 15 S. E. 584.

part of the property devised or bequeathed is a revocation *pro tanto* only.[22] Such sale, in order to work an entire or partial revocation, must be absolute. If any interest or equity remains, it passes to the legatees or devisees. The beneficiaries take subject to the bond, covenant or agreement for conveyance,[23] or if the property has been encumbered by a mortgage subsequent to the execution of the will, subject to such mortgage.[24] The same rule applies to a deed of trust containing a power of revocation, which is subsequently exercised and the deed revoked.[25] It has been held that a deed of gift of property, without consideration, to the devisee under the will, will not revoke the will unless the contents of the deed itself show such intention.[26]

If the will contains a residuary clause, the proceeds of the sale of the specified property, if still belonging to the testator, pass as a part of the residuary estate, as a general rule.[27]

Any change in the testator's estate, such as a general increase or decrease in the value of the same, conversion of realty into personalty, or of personalty into realty, never operates to wholly set aside a will, since the testator, by permitting it to remain uncanceled, in effect reaffirms it from day to day as long as he has

22 Brown v. Thorndike, 15 Pick. (Mass.) 388; Terry v. Edminster, 9 Pick. (Mass.) 355; Fellows v. Allen, 60 N. H. 439; Warren v. Taylor, 56 Iowa, 182, 9 N. W. 128; Forney's Estate, 161 Pa. 209, 28 Atl. 1086.

23 Watson v. McClench, 57 Or. 457, 110 Pac. 484; L. O. L., § 7323.

24 Kyger v. Riley, 2 Neb. 28; Hurley v. Estes, 6 Neb. 391; Union Mutual Life Ins. Co. v. Lovitt, 10 Neb. 301, 4 N. W. 986.

25 Morey v. Sohier, 63 N. H. 507, 3 Atl. 636.

26 Aubert's Appeal, 119 Pa. 48, 12 Atl. 810.

27 Doe d. Cholmondley v. Maxey, 12 East, 589; Ballard v. Carter, 5 Pick. (Mass.) 112; Holt v. Holt, 63 N. H. 475, 3 Atl. 604.

testamentary capacity;[28] nor can a revocation be implied from the acquisition by the testator of property not disposed of by the instrument.[29] Revocation of a will by parting with the property devised or bequeathed is, as a general rule, absolute, and a subsequent acquisition of the property, it has been held, does not revive or republish it. It depends, however, on the terms of the instrument itself.[30]

A bond, covenant or agreement made for a valuable consideration by a testator to convey any property devised or bequeathed does not revoke the devise or bequest. The property passes subject to the provisions of such bond, covenant or agreement which the holder thereof may enforce by specific performance,[31] nor is a charge or encumbrance on either real or personal estate for the purpose of securing the payment of money or the performance of an agreement, the property passing subject to the same.[32]

§ 65. Death of devisee or legatee.

The death of a devisee or legatee who is a child or other relation of the testator before his death does not revoke the gift unless the deceased left no issue, or other provisions of the will govern. The gift passes to the issue or descendants of the devisee or legatee, and the will remains in full force and effect.[33]

28 Hoit v. Hoit, 63 N. H. 475, 3 Atl. 604.
29 Baldwin v. Spriggs, 65 Md. 373, 5 Atl. 385.
30 Runkle v. Gates, 11 Ind. 95.
31 L. O. L., § 7323.
32 L. O. L., § 7324.
33 Rev. Stats., c. 17, § 50, [1314]; L. O. L., § 7327; Baacke v. Baacke, 50 Neb. 18, 69 N. W. 303.

§ 66. Revocation by marriage.

Marriage revokes a will to the extent that it excludes the surviving spouse of his or her statutory share, should the survivor elect to take under the statute, instead of under the will.[34] Whether the marriage of a man entirely revokes his will is an open question in Nebraska. At common law marriage and birth of issue were necessary to effect a revocation.[35] The weight of authority appears to be that when a widow can inherit property from her husband, or succeeds to the same by virtue of the marital relation, marriage effects the same changes in his condition and circumstances as marriage and birth of issue; consequently marriage alone revokes his will.[36] There is considerable authority on the other side of the proposition.[37] In many states it is regulated by statute.

Under the Oregon statute, the will of a man is revoked by marriage and birth of issue,[38] and that of a woman by her marriage, as at common law.[39]

At common law the will of a *feme sole* was revoked by her marriage, and a married woman could not, by herself, make a valid will,[40] the rule being based on the right of the husband to the personal property of the

[34] Rev. Stats., c. 17, § 8, [1272]; Vandever v. Higgins, 59 Neb. 333, 80 N. W. 1043.

[35] 4 Kent, Com., 13th ed., 527.

[36] Scherrer v. Brown, 21 Colo. 481, 42 Pac. 688; Brown v. Scherrer, 5 Colo. App. 255, 38 Pac. 427; Morgan v. Ireland, 1 Idaho, 786; Tyler v. Tyler, 19 Ill. 151; In re Toepfer, 12 N. M. 372, 78 Pac. 53.

[37] Hulet v. Carey, 66 Minn. 327, 69 N. W. 31; Hoy v. Hoy, 93 Miss. 782, 48 South. 903.

[38] L. O. L., § 7321.

[39] L. O. L., § 7322.

[40] Forse & Hembling's Case, 4 Coke, 60b.

wife, and her inability to devise real estate, excepting only those cases in which the right to dispose of her separate property was preserved to her by a power of appointment, or an antenuptial agreement.[41] In most states where she has the same testamentary rights as a man, it has been held that the common-law rule was abrogated, and her will is valid.[42]

§ 67. Revocation by birth of issue.

Birth of issue, though occurring after the death of the testator, does not entirely revoke a will,[43] but revocation may be partial. A posthumous child is entitled to the same share in the estate of the testator which he would receive had such testator died intestate, unless the will shows an intention to disinherit him,[44] and a child omitted in the distribution made by the will is entitled to a like share, unless such omission was intentional.[45]

Under the Oregon statute, such child takes the same share as if the decedent were intestate,[46] unless he has received an equal proportion in his lifetime.[47]

§ 68. Revocation by divorce.

The granting of a decree of divorce, and consequent settlement of property rights of the parties, does not

41 Waterman, Wills, 129; Brandish v. Gibbs, 3 Johns. Ch. (N. Y.) 523; Cutter v. Butler, 25 N. H. 343; Miller v. Phillips, 9 R. I. 143.

42 Ward's Will, 70 Wis. 251, 35 N. W. 731; In re Hunt, 81 Me. 275, 17 Atl. 68; In re Tuller's Will, 79 Ill. 99; Roane v. Hollingshead, 76 Md. 369, 25 Atl. 307.

43 Brush v. Wilkins, 4 Johns. Ch. (N. Y.) 506.

44 Rev. Stats., c. 17, § 47, [1311].

45 Rev. Stats., c. 17, § 48, [1312]. Sections 440, 441, *post.*

46 L. O. L., § 7325.

47 L. O. L., § 7326.

revoke the will of either former husband or wife,[48] but a settlement of property rights in anticipation of divorce, followed by a decree, revokes, by implication, a will by which the woman was given property which she received on the settlement.[49]

§ 69. Revivor of wills.

A will which has been revoked is a nullity. It may be revived by an instrument expressly executed for that purpose and with the same formalities as a will, or by a codicil, except so far as its terms are changed by that instrument.[50]

Whether the destruction of a later will has the effect of reviving an earlier will still in existence depends, in Nebraska, on the facts and circumstances of each case. The doctrine of Lord Mansfield[51] that it was revived by such act of destruction has not been fully approved. Intent alone may revive the former will, though the presumption, if any, is against revivor. The Nebraska rule is to look to the intention of the testator in every case. "Whether the former will is revived, depends upon his intention, which is to be deduced from all the circumstances."[52]

In Oregon, the destruction or canceling or revocation of the second will does not revive the first, unless it

48 Baacke v. Baacke, 50 Neb. 18, 69 N. W. 303.

49 Donaldson v. Hall, 106 Minn. 502, 119 N. W. 219.

50 Hawke v. Euyart, 30 Neb. 149, 46 N. W. 422.

51 Harwood v. Goodright, 1 Cowp. 87.

52 Williams v. Miles, 68 Neb. 463, 94 N. W. 705. The weight of authority is strongly opposed to the doctrine of revival by intention, which is practically the meaning of the last cited case. both in cases where the destroyed will contained a revocation clause and where it revoked the older instrument by implication only.

appears by the terms of such revocation that it was the intention of the testator to revive and give effect to the first will, or unless he shall duly republish such first will.[53]

If the later will is refused probate for any reason, it is considered as never having had an existence, and the earlier will, if not destroyed or otherwise revoked, is valid and entitled to probate.[54]

53 L. O. L., § 7328.

54 Lyon v. Dada, 127 Mich. 495, 86 N. W. 946; Laughton v. Atkins, 1 Pick. (Mass.) 542; Rudy v. Ulrich, 69 Pa. 177; Reid v. Borland, 14 Mass. 208.

CHAPTER VI.

LOST WILLS.

§ 70. Presumption from Failure to Find Will.
71. Jurisdiction of County Court Over Lost Wills.
72. Evidence Necessary to Establish Lost or Destroyed Will.

§ 70. Presumption from failure to find will.

The loss or fraudulent destruction of a will did not affect its validity at common law. It could be established in a court of general equity jurisdiction.[1] When it is known to have been in the possession of the testator and cannot be found after his death, the law presumes that he destroyed it *animo revocandi*,[2] and though having no force as a will, it may be necessary to prove its former existence on account of its effect upon an earlier will.

If it was last known to be in the possession of another, there is no presumption that it was revoked by the testator,[3] and if its execution and contents can be proved, it may be admitted to probate.[4]

The presumption of the revocation of a will on account of failure to find it is *prima facie* only, and if its loss can be fairly accounted for by reason of other causes than the act of the decedent, it also may be probated.[5]

[1] Martin v. Laking, 1 Hagg. Ecc. 244; Cowper v. Cowper, 2 P. Wms. 720.

[2] Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 96 N. W. 751; 73 Neb. 193, 102 N. W. 582, 105 N. W. 181, 106 N. W. 769; 87 Neb. 455, 127 N. W. 904; In re Miller's Will, 49 Or. 456, 90 Pac. 1002.

[3] Snyder v. Burke, 84 Ala. 503, 4 South. 225; Lane v. Hill, 68 N. H. 275, 44 Atl. 393.

[4] Sugden v. St. Leonards, 1 Prob. Div. 154.

[5] Gavitt v. Moulton, 119 Wis. 35, 96 N. W. 395; Southworth v. Adams, 11 Biss. 256, Fed. Cas. No. 13,194.

§ 71. Jurisdiction of county court over lost wills.

The county court of the county in which decedent was a resident at the time of his death has jurisdiction to establish and admit to probate his lost or fraudulently destroyed will.[6]

Jurisdiction to establish the will was formerly vested, at common law, in courts possessing general equity powers, but the exclusive jurisdiction over wills given the county court by the constitution vests it with full power both to establish and to admit to probate a will which has been lost or destroyed by accident or fraud. It may be done on the hearing for its probate, the petition, notice and hearing being the same as in other cases.[7] If the will has been destroyed by the testator *animo revocandi,* it may be proved and its contents determined in an application for the probate of a former will, or in an action for revocation of probate of the same, inasmuch as the later will annuls the former one to the extent that its provisions are at variance with those of the former instrument. If it contains a revocation clause, such annulment is complete.[8]

§ 72. Evidence necessary to establish lost or destroyed will.

In order to prove a lost or fraudulently destroyed will, it is incumbent on the proponent, or the party who sets it up as a defense to the probate of a former will, or as a ground for the revocation of the probate thereof, to show what became of the original instrument, whose

6 Williams v. Miles, 63 Neb. 859, 89 N. W. 451; L. O. L., § 1139.

7 Williams v. Miles, 63 Neb. 859, 89 N. W. 451.

8 Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151; 73 Neb. 193, 102 N. W. 482, 105 N. W. 181, 106 N. W. 789.

custody it was last known to be in, account for its non-production, and prove its execution and contents.[9]

Evidence of its execution and contents must be clear, positive and convincing.[10] Its execution may be proved by the testimony of the subscribing witnesses and draftsman, and declarations of the testator,[11] and its contents by a copy of the original draft properly identified,[12] by the testimony of witnesses who knew, or might be presumed to have known, the contents of the will from their own inspection of it,[13] and by declarations of the testator.[14] Such declarations are not sufficient, standing alone, to establish the contents, but tend to prove the existence of the instrument and corroborate more direct evidence of what it contained.[15]

A person who merely heard the will read cannot testify as to what it contained.[16] Heirs or next of kin are competent to testify in regard to personal transactions or conversations with the testator about the will and its contents.[17]

A part of its contents,—for instance, a revocation clause,—may be proved even though the balance of the instrument cannot be determined.[18]

9 Strong v. Potts, 94 Neb. 742, 144 N. W. 789.

10 Williams v. Miles, 68 Neb. 493, 94 N. W. 795; 73 Neb. 193, 105 N. W. 482; 87 Neb. 455, 127 N. W. 904; Clark v. Turner, 50 Neb. 290, 69 N. W. 843.

11 Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151; In re Miller's Will, 59 Or. 456, 90 Pac. 1002; McKenna v. McMichael, 189 Pa. 440, 42 Atl. 14; McNeeley v. Pearson (Tenn. Ch.), 42 S. W. 165.

12 Ewing v. McIntyre, 141 Mich. 506, 104 N. W. 787.

13 Chisolm's Heirs v. Ben, 7 B. Mon. (Ky.) 408.

14 Williams v. Miles, 68 Neb. 473, 94 N. W. 705.

15 Clark v. Turner, 50 Neb. 290, 69 N. W. 843.

16 Clark v. Turner, 50 Neb. 290, 69 N. W. 843.

17 Williams v. Miles, 68 Neb. 463, 94 N. W. 705.

18 Sugden v. St. Leonards, 1 Prob. Div. 154; Davis v. Sigourney, 8 Met. (Mass.) 487.

CHAPTER VII.

PROCEEDINGS TO COMPEL PRODUCTION OF WILL IN COURT.

§ 73. Deposit of Will in County Court.
74. Duties of Other Person to Deliver Will.
75. Proceedings to Bring a Will into Court.
76. Liability for Failure to Deliver Will.

§ 73. Deposit of will in county court.

After a will has been duly executed, it may be retained by the testator in his possession, delivered to any person, or deposited in the county court, that court being especially authorized to receive and preserve wills of testators residing within the county. Any person desiring to avail himself of the privilege of having his will kept in the county court must inclose the same in a sealed wrapper, indorse thereon his name and place of residence, and the date when and the person by whom it is delivered to the court. The county judge must give him a certificate of deposit thereof, and should keep a record of all wills delivered into court for safekeeping. He is not obliged to keep and preserve wills of nonresidents of the county.[1]

The fact of a will being so deposited gives it no more binding force than if it were retained in the possession of the testator. He may revoke it by another instrument executed in the same manner, without withdrawing it from the court.

During the lifetime of the testator, a county judge has no authority or right to deliver a will so deposited

[1] Rev. Stats., c. 17, § 32, [1296].

to any other person than the testator, except upon a written order, duly proved by the oath of a subscribing witness.[2]

Whenever the county judge learns of the death of a party whose will has been deposited in his court for safekeeping, it is his duty to publicly open the envelope containing the will and give notice to the person named therein as executor, or if none be named, to the persons interested.[3]

Form No. 15.

INDORSEMENT OF WRAPPER CONTAINING WILL.

The last will of A. B., of the city of ———, ——— county, Nebraska, sealed by said A. B., and delivered by him (C. D. for said A. B.) to the county judge of said county for safekeeping this ——— day of ———, 19—.

(Signed) A. B.

Form No. 16.

CERTIFICATE OF DEPOSIT OF WILL.

———, Neb., ———, 19—.

Received of A. B., of ———, Nebraska (C. D. for A. B., of ———, Nebraska), for safekeeping, sealed wrapper purporting to contain last will of said A. B.

(Signed) J. K.,
County Judge.

Form No. 17.

ORDER FOR DELIVERY OF WILL.

To the Hon. J. K., County Judge of ——— County, Nebraska:

You are hereby requested to deliver to the bearer, C. D., the instrument executed by me as and for my last will and testament, now deposited in your court.

(Signed) A. B.

Witness:
. . . (Signed) C. D.

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2 Rev. Stats., c. 17, § 33, [1297].

3 Rev. Stats., c. 17, § 34, [1298].

State of Nebraska,
——— County,—ss.

C. D., of lawful age, being first duly sworn, on oath says that he is the same person whose name is subscribed to the foregoing order as a witness thereto, that he is acquainted with said A. B., and that said order was signed by said A. B. in his presence.

(Signed) C. D.

Subscribed in my presence and sworn to before me this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

§ 74. Duties of other persons to deliver will into court.

Every person other than the county judge having custody of any will is required, within thirty days after he has knowledge of the death of the testator, to deliver the same into the county court having jurisdiction of the case, or to the person named in the will as executor,[4] and any executor, within thirty days after his testator's death, or within thirty days after he has knowledge that he is named executor, if he obtains such knowledge after the death of the testator, must also, unless the will has been otherwise delivered, file the same in the county court.[5]

§ 75. Proceedings to bring a will into court.

If the person having the will in his possession refuses to file the will, or produce it in court, the executor, heir or other person believing himself to be beneficially interested in the estate may file a petition for subpoena to produce the will.

On the filing of the petition the court issues a summons which is in the nature of a subpoena *duces tecum*,

[4] Rev. Stats., c. 17, § 35, [1299].
[5] Rev. Stats., c. 17, § 36, [1300]; L. O. L., § 1133.

ordering the party alleged to be unlawfully detaining the will in his possession to produce it in court.

The only defense a party has to a proceeding of this kind is that the will is not in his possession or under his control. He has no excuse for failing to deliver it, except that circumstances make it impossible for him to do so. He cannot set up as a defense that the will has been revoked by implication, or is not properly executed, or is void for any reason. These are matters to come before the court on objections to probate.

If the party charged with having the will in his possession fails to appear, the county judge may issue an attachment or warrant against him for contempt. If, then, it appears on the return of the attachment or warrant with the party in custody that he has the will in his possession or control, and he refuses to turn it over to the court, an order of commitment for contempt may issue forthwith.[6]

Form No. 18.

PETITION FOR THE DELIVERY OF A WILL INTO COURT.

To the County Court of ———, County, Nebraska:

Your petitioner, C. D., respectfully represents unto the court that on or about the ——— day of ———, 19—, one A. B., a resident of ———, in said county, died, having previously executed, in manner and form prescribed by law, his last will and testament; that on or about the ——— day of ———, 19—, he delivered said will to E. F., of said city of ———, for safekeeping; that on the ——— day of ———, 19—, said E. F. received notice of the death of said A. B., and it thereupon became his duty to deliver said will into said court; that more than thirty days have elapsed since said E. F. was informed of the death of said A. B., and he has neglected and refused, and still neglects and refuses, to deliver said will into court.

Your petitioner is a son of said A. B., and has good reason to believe that he is named as executor in said will.

[6] Rev. Stats., c. 17, § 38, [1302]; L. O. L., § 1140.

Your petitioner therefore prays that a subpoena issue out of and under the seal of this court commanding said E. F. to bring said will into court.

(Signed) C. D.

[Add verification, Form No. 5.]

Form No. 19.

SUMMONS TO PRODUCE WILL IN COURT.

The State of Nebraska, ——— County.

To the Sheriff or Any Constable of Said County:

You are hereby commanded to summon E. F. to appear before the county court of said county on the ——— day of ———, 19— (forthwith), and bring with him and produce at the time and place an instrument deposited with him by A. B., late of said county, deceased, and purporting to be the last will and testament of said A. B.

Dated this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

§ 76. Liability for failure to deliver will.

Any person, having custody of the will of another, who, after the death of the testator, without reasonable cause, neglects to deliver the same to the county court having jurisdiction, after he has been duly notified by the court for that purpose, may be committed to the jail of the county by warrant issued by such court, and there kept in close confinement until he shall deliver the will as directed, and shall also be liable in damages.[7]

In addition to being imprisoned in the county jail for contempt, a person who unjustly refuses to deliver up a will is guilty of a misdemeanor, and liable in an action for damages to each and every person who may have sustained a loss thereby.[8]

[7] Rev. Stats., c. 17, §§ 37, 38, [1301], [1302].

[8] Rev. Stats., c. 17, § 38, [1301]; L. O. L., § 1139.

Form No. 20.

ORDER OF COMMITMENT FOR CONTEMPT.

In the County Court of ——— County, Nebraska.

In the Matter of Proceedings against A. B., for Contempt of Court.

In this cause, it appearing to the court that, on the ——— day of ———, 19—, C. D. filed his petition herein, the object and prayer of which were to require E. F. to produce and deliver into court the instrument purporting to be the last will and testament of said A. B.; that on the ——— day of ———, 19—, a summons *duces tecum* was issued commanding him, said E. F., to be and appear before the county court of said county on the ——— day of ———, 19—, and produce and deliver into court said will; that personal service of said summons has been had on said E. F.; that on said ——— day of ———, 19—, said E. F. appeared in said court, and refused to deliver said will, and gave no reasonable excuse, or reason for his failure to so deliver it.

Upon consideration whereof, the court finds that said E. F. has possession of said will, and has neglected and refused to deliver the will of said A. B. into court for more than thirty days after he had been informed of the death of said A. B., and still neglects and refuses to deliver said will into court.

It is therefore ordered and adjudged that said E. F. be committed to the county jail of said county, and there be kept in close confinement until he complies with the order of this court, and delivers said will into court, and that he pay the costs of this proceeding, taxed at $———.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

Form No. 21.

WARRANT FOR CONTEMPT.

The State of Nebraska, ——— County.

To the Sheriff of Said County:

You are hereby commanded to forthwith arrest E. F., and bring him before the county court of said county to show cause why he should not be punished for contempt of this court for his refusal to deliver to this court the will of A. B., late of said county, deceased, after being duly notified to produce the same as required by law.

Given under my hand, and the seal of the court affixed thereto, this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

Form No. 22.

COMMITMENT FOR CONTEMPT.

The State of Nebraska, ——— County.

To the Keeper of the Jail of Said County:

Whereas the following is a true copy of an order duly made and entered by the county court of said county on the ——— day of ———, 19—: [Here copy order in full.]

You are therefore commanded to receive said E. F. into your custody in said jail, and him safely keep in close confinement until he comply with the order of this court, and produce and deliver into court an instrument purporting to be the last will and testament of A. B., late of said county, deceased, and pay the costs herein, taxed at $———, or be duly discharged according to law.

Given under my hand, and the seal of the court affixed thereto, this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

CHAPTER VIII.

PROBATE OF WILLS.

§ 77. Definition of the Term "Probate" as Applied to Wills.
78. Statute of Limitations.
79. Petition for Probate of a Will.
80. Notice of Hearing.
81. Facts Necessary to be Proved on Probate of Will.
82. One Witness Only Required When Will not Contested.
83. Testamentary Character of Instrument Proposed as a Will.
84. Contestants of Wills.
85. Evidence of Mental Capacity.
86. Expert Evidence.
87. Undue Influence—Definition.
88. Conditions Constituting Undue Influence.
89. Undue Influence and Mental Capacity.
90. Unjust Provisions Evidence of Undue Influence.
91. Undue Influence of Person Holding Special Relation of Trust.
92. Undue Influence of Draftsman of Will.
93. Execution of Will Obtained by Fraud.
94. Evidence of Undue Influence and Fraud.
95. Will of Person Under Guardianship.
96. Declarations of Testator.
97. Fraud and Undue Influence—By Whom Shown.
98. Effect of Will Obtained by Fraud.
99. Invalid Bequest or Devise.
100. Omitting Reference to Children.
101. Probate of Foreign Wills.
102. Probate of Nuncupative Wills.
103. Probate of Wills Executed Outside the State by a Resident Thereof.
104. Costs in Will Contests.
105. Reducing Testimony on Probate of Wills to Writing.
106. Order Admitting Will to Probate.
107. Certificate of Probate of Will.

§ 77. Probate of wills—Definition.

Probate of a will is the proof before an officer authorized by law that an instrument offered to be proved or

recorded is the last will and testament of the deceased person whose testamentary act it is alleged to be.[1] In the case of a domestic will, or one offered for original probate in this state, it is proving the same to have been signed by the testator and attested by him in the presence of two witnesses, who, at his request, have signed their names thereto as witnesses, and that at the time of the execution thereof he was of sound mind.[2] In the case of a foreign will it is proving it to have been duly probated according to the laws of the state or country where it was originally propounded.[3]

Until probated in this state, either a foreign or domestic will is a nullity.[4]

At common law there were two methods of probating wills: common form, which consisted in presenting the instrument to the officer, and proving it by *ex parte* evidence, usually an affidavit, without notice to any party,[5] and in solemn form, in which notice was given and a full hearing had; and any will probated in common form could be, on application, thereafter probated in solemn form.[6]

In Nebraska, probate of wills is regulated by statute and is analogous to the solemn form; notice must be given and a formal hearing had.

1 Bouvier's Law Dict.

2 Section 41 et seq., *supra*.

3 Rev. Stats., c. 17, § 43, [1307].

4 Pettit v. Black, 13 Neb. 142, 12 N. W. 841; Roberts v. Flannagan, 21 Neb. 509, 32 N. W. 563; Jones v. Dove, 6 Or. 188; Stevens v. Myers, 62 Or. 392, 126 Pac. 29, 121 Pac. 434.

5 Hubbard v. Hubbard, 7 Or. 42; Luper v. Werts, 19 Or. 122, 23 Pac. 850; Waters v. Stickney, 12 Allen (Mass.), 1.

6 Noyes v. Parker, 4 N. H. 403; Brown v. Anderson, 13 Ga. 171.

In Oregon, wills are probated in common form, but if their validity is attacked, they must be re-probated by original proof the same as if no probate had been had, after notice.[7] Probate in common form does not dispense with proof of the will. The burden of proof is on the proponent, and he must establish the same facts, though *ex parte,* as in the case of probate in solemn form.[8]

The county court of the county in which decedent resided at the time of his death, or that in which he left assets either real or personal, if a nonresident of the state, has exclusive original jurisdiction.[9]

Under the Oregon practice, the county court of the county in which the deceased actually dwelt at the time of his death, or in which he died seised of real estate, or if he did not dwell in the state, a county within which there are assets at the time the application is made, has such jurisdiction.[10]

§ 78. Statute of limitations not a bar to probate.

As the probate of a will is not an action, or an adversary proceeding, but strictly a proceeding *in rem*, no statute of limitation bars an original application for its probate. It matters not how long a time has elapsed since the death of the testator; it is the duty of the court to admit it to probate on proof of its validity,[11]

7 L. O. L., § 1143; Hubbard v. Hubbard, 7 Or. 42.

8 Clark v. Ellis, 9 Or. 128; In re Mendenhall's Will, 43 Or. 542, 72 Pac. 318, 73 Pac. 1033; In re Pickett's Will, 49 Or. 127, 89 Pac. 377.

9 Brown v. Webster, 87 Neb. 788.

10 L. O. L., § 1141; Holmes v. Oregon & Cal. Ry. Co., 9 Fed. 229.

11 Shumway v. Holbrook, 1 Pick. (Mass.) 115; Waters v. Stickney, 12 Allen (Mass.), 1; Haddock v. Boston & M. R. Co., 146 Mass. 155, 15 N. E. 456.

and it is no defense that the estate has been settled by an administrator.[12]

An unexplained delay in presenting it for probate is looked upon with suspicion, especially where it is alleged that the will is lost, and some good reason therefor should be shown.[13]

§ 79. Petition for probate of will.

It is the duty of any person on being notified that he is named as executor in a will, or when such fact comes to his knowledge, to take steps toward probating it.[14] The law does not demand that he do this at his own expense, but ordinarily gives him the right to reimbursement from the estate for his costs, expenses and attorney fees.[15] He should either proceed to have the will probated or renounce the trust.[16]

The statutes do not, in express terms, require the filing of a petition for its probate, but from an early date to the present the courts have treated it as jurisdictional.[17]

If the executor neglect or refuse to take any action, any person who takes a beneficial interest under the

12 Rev. Stats., c. 17, § 87, [1351]; L. O. L., § 1158.

13 Strong v. Potts, 94 Neb. 742, 144 N. W. 789.

14 Zimmer v. Saier, 158 Mich. 170, 119 N. W. 435; Converse v. Starr, 23 Ohio St. 491; Stark v. Parker, 58 N. H. 581.

15 Clark v. Turner, 50 Neb. 290, 69 N. W. 843; In re Hentges' Estate, 86 Neb. 75, 124 N. W. 929.

16 Clark v. Turner, 50 Neb. 290, 69 N. W. 843.

17 Loosemore v. Smith, 12 Neb. 345, 11 N. W. 493; Kirk v. Bowling, 20 Neb. 260, 29 N. W. 982; Seebrook v. Fedawa, 30 Neb. 424, 46 N. W. 650; Kolterman v. Chilvers, 82 Neb. 216, 117 N. W. 405; Strong v. Potts, 94 Neb. 742, 144 N. W. 789.

will may file the petition.[18] It should allege the domicile of the testator, the date of his death, that he left a will, and give the names and residences, so far as known, of his next of kin and beneficiaries.[19]

The statute does not require the party named as executor to take any further steps than the preliminary proceeding for the probate of the will. In the case of a contest, the beneficiaries, as the parties who will be benefited, ought to assume the burden of the case. The nominee cannot be assured that the court will allow him more than court costs.[20] He has no rights in the matter until letters issue.[21] If he turns the case over to the beneficiaries, leaving them to bear the burden of the contest, the parties who will receive the benefits are the ones who pay the expenses.[22]

Under the Oregon practice, the filing of a petition is necessary to give the court jurisdiction. It may be filed by an executor, devisee, or legatee named in the will, or by any other person interested in the estate, at any time after the death of the testator, whether the will be in his possession or not or is lost or destroyed, or beyond jurisdiction, or is a nuncupative will.[23] It should state the date of the death of decedent, the county in which he was an inhabitant at the time of his death, the existence of an estate together with the location and estimated value of the same, the names, ages and residences, so far as known, of his heirs, and also

18 Stebbins v. Lathrop, 4 Pick. (Mass.) 33; Keniston v. Adams, 80 Me. 290, 14 Atl. 203.

19 Hathaway's Appeal, 46 Mich. 327, 9 N. W. 435.

20 Section 104, *post*.

21 Schoenberger's Exr. v. Institution, etc., 28 Pa. 465.

22 In re Mullenshclader's Estate, 137 Wis. 32, 118 N. W. 209; McCormick v. Elsea's Estate, 107 Va. 472, 59 S. E. 411.

23 L. O. L., § 1139.

set up the execution of the will,[24] and should be verified.[25] The petition is therefore substantially the same as in Nebraska.

Form No. 23.

PETITION FOR PROBATE OF WILL.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that A. B., late of said county, departed this life at his residence in said county on the ——— day of ———, 19—, leaving a last will and testament, in which your petitioner is named as executor, which will he now offers for probate, and that said will relates to both real and personal estate.

Your petitioner further shows that said A. B was at the time of his death a resident of ———, in said county, and that he left surviving him a widow, C. B., who now resides at ———, in said county, and children as follows: [Give name, age, and residence of each child as far as known; if not known, so state. If he left no children, give names, ages, if minors, and residences, as far as known, of his heirs at law.]

Your petitioner therefore prays that the court will appoint a time and place for hearing said will, and that notice in due form may be issued and given to all persons interested in said estate, requiring them to appear and attend the probate of said will, and for such other proceedings as may be necessary and proper in the premises to admit said will to probate, and for letters testamentary.

(Signed) C. D.

[Add verification, Form No. 5.]

§ 80. Notice of hearing.

Whenever any will shall have been delivered into, or deposited in, any probate court having jurisdiction of the same, it is the duty of the court to fix a time and

[24] Moore v. Willamette Trans. Co., 7 Or. 359; Holmes v. Oregon & C. Ry. Co., 5 Fed. 232; Sappingfield v. Sappingfield, 67 Or. 156, 135 Pac. 333.

[25] L. O. L., § 82.

place for hearing, when all persons interested may appear and contest its probate.[26]

Hearing is usually held about three weeks after the petition is filed, but may be set for an earlier date. The method of service rests in the discretion of the court irrespective of the residence of the parties. It may be by personal service upon all parties interested, or by publication in such newspaper, printed in this state as the court may direct, for three successive weeks previous to the time appointed. The notice must appear in three successive publications of the paper designated. It is not necessary for the last publication to be twenty-one days from the first. The practice generally prevailing is to give notice by publication, and thus avoid the necessity of the court passing upon the question, without having the evidence before it, of who are interested in the estate.[27] The proceeding is *in rem*, and personal notice is not necessary to give jurisdiction.[28]

Form No. 24.

ORDER FOR HEARING.

[Title of Matter and Court.]

Now, on this ——— day of ———, 19—, C. D. having filed his petition, under oath, for the probate of an instrument purporting to be the last will and testament of A. B., deceased, and for the issue of letters testamentary to him, said petitioner, it is ordered that said petition be set for hearing on the ——— day of ———, 19—, at the hour of — A. M. of said day, that notice thereof be given all persons interested by publication thereof for three successive weeks in the ———, a legal newspaper of said county, by personal service on E. F.,

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26 Rev. Stats., c. 17, § 39, [1303].

27 In re Seiker's Estate, 89 Neb. 216, 131 N. W. 204; Alexander v. Alexander, 26 Neb. 75, 41 N. W. 1065.

28 In re Miller's Estate, 69 Neb. 441, 95 N. W. 1010.

and by sending a true copy thereof to G. H., by registered mail addressed to ———, his last known postoffice address, within ten days of the date set for said hearing.

(Signed) J. K.,
County Judge.

Form No. 25.

NOTICE OF HEARING.

In the County Court of ——— County, Nebraska.
In the Matter of the Estate of A. B., Deceased.

Notice is hereby given that on the ——— day of ———, 19—, at the county court room in the city of ———, said county, at the hour of — A. M. of said day, the following matter will be heard and considered, to wit, the petition of C. D. for the probate of a certain written instrument now on file in said court, and purporting to be the last will and testament of A. B., deceased, for the grant of letters testamentary thereon, to said petitioner.

Dated ———, 19—.

(Seal)

J. K.,
County Judge.

§ 81. Facts necessary to be proved on probate of will.

To entitle a will executed within this state to probate, it must be shown that all the requirements of the statutes in regard thereto have been fully complied with. The rights of the heirs at law to take the property according to the laws of distribution and descent can only be affected by a strict compliance with the provisions of the laws which bar such right. The proponent must establish the following facts: First, that the testator was of full age, and of sound and disposing mind; second, that the will is in writing, signed by the testator or by some one for him in his presence; third, that it was attested and subscribed by two competent witnesses in the actual presence of the testator,

and signed by him in their presence, or, if not signed by him in their presence, that he informed them that he had signed it.[29]

The general presumption of law that every person is considered of sound mind until the contrary is shown does not apply in Nebraska in a proceeding for the probate of a will. It must affirmatively appear that the deceased was of "sound mind" when he executed the instrument, and such testimony is equally as essential when all parties assent to its probate as when it is contested.[30]

In Oregon, the usual presumption is the rule,[31] but if there is evidence introduced attacking the mental capacity of the testator, the burden of proof is on the proponent.[32]

If he has been adjudged insane, the presumption is that such condition continues.[33]

The signature of the testator must be proved,[34] and unless the testimony shows that he either signed the will in the actual presence of the witnesses or acknowledged to them that he had signed it,[35] and that they knew the paper was intended as a will and learned such

29 Seebrock v. Fedawa, 30 Neb. 424, 46 N. W. 650; Crowninshield v. Crowninshield, 2 Gray (Mass.), 527; Aikin v. Weckerly, 19 Mich. 482; Kempsey v. McGinniss, 21 Mich. 123; Williams v. Robinson, 42 Vt. 658.

30 Seebrock v. Fedawa, 30 Neb. 424, 46 N. W. 650.

31 Greenwood v. Cline, 7 Or. 17.

32 Chrisman v. Chrisman, 16 Or. 127, 18 Pac. 6.

33 Buford v. Gruver, 223 Mo. 231, 122 S. W. 717; Gates v. Cole, 137 Iowa, 613, 115 N. W. 236; Kirsher v. Kirsher, 124 Iowa, 337, 94 N. W. 846.

34 Wendel v. Fuerst (Or.), 136 Pac. 2.

35 Mendenhall's Will, 43 Or. 542, 73 Pac. 1033.

fact from the testator, either directly or by implication or assent, it should be refused probate.[36]

The same rules govern the admissibility of evidence as though the case were being tried on appeal in the district court. The witnesses must either be examined orally or their depositions taken on due notice. Affidavits of witnesses are inadmissible, as they are not testimony.[36a]

§ 82. One witness only required when will not contested.

If no person shall appear to contest the will at the time and place appointed for that purpose, the court may, in its discretion, grant probate thereof on the testimony of one of the subscribing witnesses only, if such witness shall testify that such will was executed in all particulars as required by the statute, and that the testator was of sound mind at the time of the execution thereof.[37] If none of the subscribing witnesses reside in this state at the time of the proving of the will, the court may, in its discretion, admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will, and, as evidence of the exe-

[36] McCoy v. Conrad, 64 Neb. 150, 89 N. W. 665; In re Davidson's Estate, 70 Neb. 584, 97 N. W. 797; In re Powers' Estate, 79 Neb. 680, 113 N. W. 198. Cases cited in § 44, *supra*.

[36a] Columbia Nat. Bank v. German Nat. Bank, 56 Neb. 803, 77 N. W. 342. Affidavits, even though prepared by filling in printed blanks with names and dates, and necessarily based principally on hearsay, were sufficient to probate a will in "common form," for the reason that such probate was not binding on the interested parties, and could be set aside at any time and the proponent required to prove the will by competent evidence.

[37] Rev. Stats., c. 17, § 40, [1304].

cution of the will, may admit proof of the handwriting of the testator and of the subscribing witnesses.[38] If the witnesses were competent at the time of the execution of the will, their subsequent incompetency, from whatever cause, will not prevent the probate and allowance of the will if it be otherwise satisfactorily proved.[39] In cases of this kind, the appearance of the will itself may be strong evidence of its validity. If it appears to have been properly signed, the attestation clause purporting to show that all legal requirements have been complied with, and nothing irregular or suspicious on the face of it, the law raises a presumption that it was properly executed.[40] The same presumption has been applied where, the attestation clause being regular, the subscribing witnesses, while admitting their signatures, through lapse of time or defective memory are unable to testify to any other material fact in regard to the execution of the instrument, the law supplying the defect of proof on this question only, unless there be affirmative evidence that the law has not been complied with.[41]

Probate of a will in common form, as provided in Oregon, is a strictly *ex parte* proceeding. No notice of any kind is required. The party who is entitled to petition for its probate, if he has the will in his pos-

[38] Rev. Stats., c. 17, § 41, [1305].

[39] Rev. Stats., c. 17, § 26, [1290].

[40] Isaac v. Halderman, 76 Neb. 823, 107 N. W. 1016; Barnes v. Barnes, 66 Me. 286; Abbott v. Abbott, 41 Mich. 540, 2 N. W. 810; In re Sullivan's Will, 114 Mich. 189, 72 N. W. 136.

[41] In re Peterson's Estate, 76 Neb. 411, 109 N. W. 506; Skinner's Will, 40 Or. 579, 62 Pac. 523, 67 Pac. 951; McCurdy v. Neall, 42 N. J. Eq. 333, 7 Atl. 566; Allaire v. Allaire, 37 N. J. L. 312; Ex parte Brock, 37 S. C. 348, 16 S. E. 38; Welch v. Welch, 9 Rich. (S. C.) 133; Barnes v. Barnes, 66 Me. 286.

session, may file it with such petition, and if the witnesses are present, the court may proceed to take their testimony and probate the will.[42] The usual practice is to take the testimony of the two witnesses in the form of affidavits, sometimes called the "formal proof."[43] Oral testimony may be taken to supplement such proof. If the evidence clearly establishes the allegations of the petition, the will should be probated.

Probate of a will in common form, though frequently, on account of the use of printed forms of proof, resulting in the probate of an instrument which was never legally executed, is of the same effect as probate after a contest, until a petition is filed within the statutory time to contest the probate or the validity of the will, or until set aside after that time by an action in equity.

§ 83. Testamentary character of instrument proposed as a will.

In a proceeding for the probate of a will the court has no authority to construe it only to the extent of determining whether the paper is a will or deed.[44] The common-law rule is that no particular set terms are necessary for a will. If it is executed in compliance with the statute, and appears from its contents to have been intended as an instrument making a disposition of his property, to take effect at his death, it is a will.[45]

The test for determining its character is, does it convey a present right or interest, absolute or contin-

[42] Malone v. Cornelius, 34 Or. 196, 55 Pac. 536.

[43] See Mendenhall's Will, 40 Or. 547, 73 Pac. 1033; Hubbard v. Hubbard, 7 Or. 42.

[44] Dudley v. Gates, 124 Mich. 440, 83 N. W. 97, 86 N. W. 959; Cox v. Cox, 101 Mo. 168, 13 S. W. 1055.

[45] Ross v. Ewer, 3 Atk. 960.

gent? If by its terms any right or interest passes at once, though subject to a contingency over which the party executing it has no control, it is a deed,[46] but if the right or interest does not pass by its execution and delivery, it is a will.[47] It is not necessary that the entire instrument be of a testamentary character. If any part or portion of it becomes operative only on the death of the party who executed it, it should be probated.[48]

§ 84. Contestants of wills.

A will may be contested by any person interested in the estate. Such persons include not only heirs or next of kin, but also a creditor and a judgment creditor of an heir of one seised of realty at the time of his death, provided the heir is not a devisee,[49] legatee or person named as executor under a prior will, still in existence, or any person who would take an interest in the estate under the statute or under a prior will still in existence.[50] If an infant is disinherited, it is proper for the mother or any near relative to file a contest in his behalf.[51] When a contest has been instituted by a party who would otherwise take a vested

46 Jackson v. Jackson (Or.), 135 Pac. 200.

47 Culy v. Upham, 135 Mich. 131, 97 N. W. 405; Thomas v. Williams, 105 Minn. 88, 117 N. W. 155; Beebe v. McKinzie, 19 Or. 296, 24 Pac. 236; Deckenbach v. Deckenbach, 65 Or. 165, 137 Pac. 724.

48 Palmer v. Bradley, 142 Fed. 193; Shaw v. Camp, 163 Ill. 144, 43 N. E. 211.

49 In re Langevin's Will, 45 Minn. 429, 47 N. W. 1133; Murry v. Hennesey, 48 Neb. 608, 67 N. W. 470; Colt v. DuBois, 7 Neb. 396; Christianson v. Talmage (Or.), 138 Pac. 453.

50 In re Hunt's Will, 122 Wis. 460, 100 N. W. 874.

51 Everson v. Hurn, 89 Neb. 716, 131 N. W. 1130.

interest, upon his death his personal representative may be substituted.[52]

Heirs who have made an agreement, for a valuable consideration, with their ancestor not to contest his will, are precluded from filing a contest unless the interests of other parties may be affected thereby. Such agreement does not relieve the proponent from establishing the necessary facts, but merely bars the parties from taking any action in the proceeding.[53] Naming an heir as executor does not prevent him from contesting.[54]

A stipulation entered into between all the heirs and legatees and devisees under a will that the testator was incapable of executing a valid will is insufficient to defeat its probate.[55]

There are no statutory provisions regulating the contest of wills in county courts. The usual practice is to file objections on or before the day set for the hearing, specifically setting out the grounds of the contest. No reply is necessary. An adjournment may be had to such time as the court may determine or the parties agree upon to enable them to obtain their evidence.

52 In re Wiltsey's Will, 122 Iowa, 423, 98 N. W. 294.

53 Grochowski v. Grochowski, 77 Neb. 506, 109 N. W. 742.

54 In re Estate of Berry, 154 Iowa, 301, 130 N. W. 867.

55 In re Dardis' Will, 135 Wis. 457, 115 N. W. 332, in which the court held the rule to be that if the evidence showed the testator to be of sound mind, any stipulation or agreement was inadmissible to prove him otherwise.

Form No. 26.

OBJECTIONS TO THE PROBATE OF A WILL.

[Title of Cause and Court.]

Comes now C. B., a son of A. B., and objects to the probate of the instrument purporting to be the last will and testament of said A. B. for the following reasons:

First. Said instrument is not executed as required by law.

Second. Said instrument is not properly attested.

Third. Said A. B., at the time alleged in said instrument, was not possessed of sufficient mental capacity to make a will, by reason of old age [insanity, idiocy, long-continued use of intoxicating liquors to excess].

Fourth. Said instrument was executed by said A. B. by reason of improper and undue influence exerted upon him by B. H., who is a devisee thereunder, and said instrument is not the will of said A. B., but of said B. H.

Fifth. Said instrument has been revoked by implication of law [state what changes in the family or circumstances of testator it is claimed have revoked the will].

Contestant therefore prays that said instrument may be set aside, and that an administrator of said estate may be appointed to take charge thereof.

Dated this ——— day of ———, 19—.

(Signed) C. B.

Under the Oregon practice, a person desiring to contest the probate of a will or its validity may at any time within one year after its probate in common form file a petition for that purpose in the court in which it was probated. Citation thereupon issues to the executor, or administrator with the will annexed, and a hearing had for the probate in solemn form. A party entitled to contest who is laboring under a legal disability may file such petition within one year after the removal of such disability.[56] The result of filing such petition is to suspend the administration, except so far as is necessary to conserve the estate, until the final order of the county court in the matter.

[56] L. O. L., §§ 1143, 1135.

The petition should set out the various objections to the will, pointing out the particular matters on which defendant relies for defeating its probate. Its allegations should be broad enough and specific enough to call in question the validity of the will and the sufficiency of the proof as to its execution.[57] It may admit necessary facts and formalities regarding its execution, and as to such admissions evidence on the part of the proponent is unnecessary.[58] The burden of proof is on the proponent, and it is his duty to establish the will by original proof in the same manner as though this were the first proceeding or action to prove it.[59]

§ 85. Evidence of mental capacity.

While it is always incumbent on the proponent in a proceeding for the probate of a will, whether contested or not, to prove that the testator was of sound mind at the time of its execution, he is only required in his opening to introduce sufficient testimony to make a *prima facie* case on this particular branch of his case. After the contestant has introduced evidence attacking testator's sanity or mental ability or capacity, he can then go as fully into the facts as could a plaintiff on his opening, and is not limited to rebutting testimony.[60] The contestant must establish his defense to the *prima facie* case on his opening, and after the proponent has closed, is limited to rebutting testimony.

57 In re Mendenhall's Will, 43 Or. 547, 73 Pac. 1033.

58 Hubbard v. Hubbard, 7 Or. 42; Luper v. Werts, 19 Or. 42, 23 Pac. 850; In re Mendenhall's Will, 43 Or. 547, 73 Pac. 1033.

59 Hubbard v. Hubbard, 7 Or. 42; Pickett's Will, 49 Or. 140, 89 Pac. 377; Simpson v. Durbin, 68 Or. 518, 136 Pac. 47.

60 Powers v. Peters, 79 Neb. 680, 113 N. W. 198; Seebrock v. Fedawa, 30 Neb. 424, 46 N. W. 650; Kerr v. Lundsford, 31 W. Va. 659, 8 S. E. 493; Perkins v. Perkins, 39 N. H. 163.

The proponent is entitled to open and close the case under the general rule of law and provision of the code that a party who would be defeated were there no evidence introduced shall first produce his evidence, and is entitled to open and close the argument.[61] The issue of testamentary capacity, including insanity and mental ability, being a broad one, a greater latitude is permitted in the introduction of testimony than on the trial of many other issues.

Such weaknesses and delusions as preclude testamentary capacity are the offsprings of a deficient or diseased mind, and manifest themselves in a person's appearance, conduct and demeanor. Evidence of absurdities of speech or conduct, eccentricities of dress, chimerical or impracticable theories, lapses of memory, erroneous ideas in regard to the condition of one's property, though none of them standing by themselves may be sufficient to show that the testator lacked mental capacity, are admissible in evidence for the purpose of showing his state of mind, and because when considered with the will itself and all the circumstances and conditions connected with it and the family relations and circumstances of such testator, they tend to prove that his mental condition was such that he did not knowingly and understandingly dispose of his property.[62]

61 Brooks v. Dutcher, 22 Neb. 644, 36 N. W. 128.

62 Morris v. Morton's Exrs. (Ky.), 20 S. W. 287; Lowder v. Lowder, 58 Ind. 538; Hathorn v. King, 8 Mass. 371; Kerr v. Lundsford, 31 W. Va. 659, 8 S. E. 493; Haines v. Hayden, 95 Mich. 332, 54 N. W. 911; Halley v. Webster, 21 Me. 461; Lane v. Moore, 151 Mass. 87, 23 N. E. 828; Frazer v. Jennison, 42 Mich. 220, 3 N. W. 882; Smith v. Smith, 48 N. J. Eq. 566, 25 Atl. 11; American Bible Society v. Price, 115 Ill. 623, 5 N. E. 126.

Where delusions are shown to exist, the proponent may show that they have an apparent cause, namely, an external fact, for their existence, and so do not deprive the party of testamentary capacity.[63]

In will cases in which the mental ability is questioned the courts will generally permit a review of transactions, conduct, habits and manner of life of a testator which contestants allege make him incompetent to make a valid will for years previous to the execution of the instrument.[64] Declarations, admissions and the general conduct, manner and appearance of the testator after the execution of the instrument are admissible for the purpose of showing his mental capacity, but must be confined to a short period to be fixed by the court according to the circumstances of the party.[65]

§ 86. Expert evidence.

The testimony of experts on mental diseases—those who have made a study of the subject, and are able by reason of experience to detect symptoms which a less experienced eye would overlook—is of much value. Such witnesses can distinguish between the symptoms indicative of the natural physical decline incident to advanced age, and which are consistent with testamentary capacity, and those of senile *dementia*, which is recognized as a disease of the mind, and which are

63 Skinner's Will, 40 Or. 671, 62 Pac. 523, 67 Pac. 951; Wade v. Northrup (Or.), 140 Pac. 454; Fulton v. Freeland, 219 Mo. 494, 118 S. W. 12.

64 Isaac v. Halderman, 76 Neb. 283, 107 N. W. 1016; 84 Neb. 251, 120 N. W. 116; In re Frederick's Estate, 83 Neb. 818, 119 N. W. 667; In re Winch's Estate, 84 Neb. 251, 120 N. W. 116.

65 In re Winch's Estate, 84 Neb. 251, 120 N. W. 116.

inconsistent with such capacity.[66] Testimony of this character will not prevail over established facts. Positive evidence of actual facts showing a knowledge and understanding of a testator's affairs and of his relatives and dependents, though medical experts agreed that he could not at the time of the execution of the will have had mental power sufficient to transact a business affair requiring a continuous exercise of the judgment and reasoning faculties, will admit it to probate.[67]

Nonexperts, provided they have observed the person in question, frequently, and for a considerable period, may be permitted to state whether in their opinion he was sane, after first detailing the facts on which they base their opinions.[68]

Subscribing witnesses to a will are competent to testify to his mental capacity[69] without qualifying as experts, or other foundation testimony than that of their being such witnesses.[70]

The opinion which the witness, whether expert or nonexpert, may give is as to the degree of intelligence actually possessed by the testator, and not as to the direct matter in issue as to whether he had testamen-

66 Kerr v. Lundsford, 31 W. Va. 659, 8 S. E. 493; Kempsey v. McGinnis, 21 Mich. 123; Garrus v. Davis, 234 Ill. 811, 84 N. E. 924; White v. McPherson, 183 Mass. 533, 67 N. E. 643.

67 Pickett's Will, 49 Or. 127, 89 Pac. 377.

68 Isaac v. Halderman, 76 Neb. 823, 107 N. W. 1016; Mollering v. Kinneburg, 78 Neb. 758, 111 N. W. 788; Schlenker v. State, 9 Neb. 241, 1 N. W. 857; Pfluegger v. State, 46 Neb. 493, 64 N. W. 1094.

69 Parsons v. Parsons, 66 Iowa, 754, 21 N. W. 570; In re D'Avignon, 12 Colo. App. 489, 55 Pac. 936.

70 Titlow v. Titlow, 54 Pa. 216, 95 Am. Dec. 691.

tary capacity.[71] The following questions regarding mental ability in will cases have been approved by a long line of Michigan authorities, proper foundation having been laid therefor: "Was the testator, in your opinion, at the time, etc., capable of planning and executing such a paper as is here offered as his will?" "Was he in a mental and physical condition to transact business requiring an exercise of the judgment, the reasoning faculties, and a consecutive continuation of thought?" [72]

§ 87. Undue influence—Definition.

Undue influence may be defined as such influence as destroys the free agency of the testator, prevents the exercise of that discretion he naturally possesses, and substitutes another person's will for his own.[73] Where such influence is once shown to exist, and the mind of one person has acquired such a power over another's mind as to be practically substituted for it, a gift by will, by the weaker to the stronger, is presumptively void, and the burden of upholding the fairness and validity of it rests upon the party benefited thereby.[74]

The Nebraska supreme court lays down a very stringent rule on the question of undue influence. It holds that "influence, to vitiate a will, must amount to force and coercion, destroying the free agency of the tes-

71 Cheney v. Cheney, 78 Neb. 274, 110 N. W. 731.

72 Page v. Beach, 134 Mich. 51, 95 N. W. 981.

73 Johnson v. Armstrong, 97 Ala. 731, 12 South. 72; Boggs v. Boggs, 62 Neb. 274, 87 N. W. 39.

74 Garvin's Admr. v. Williams, 44 Mo. 465; Gay v. Gillilan, 92 Mo. 264, 5 S. W. 7; Harvey v. Sullens, 46 Mo. 147; Cudney v. Cudney, 68 N. Y. 152; Marx v. McGlynn, 88 N. Y. 357.

tator, and there must be proof that the will was obtained by this coercion, and it must be shown that the circumstances of its execution are inconsistent with any other hypothesis but undue influence, which cannot be presumed, but must be proved, and in connection with the will, and not with other things.'' [75] The court, in Latham v. Schaal, followed the Michigan case of Maynard v. Vinton,[76] a case which has been expressly overruled by the Michigan supreme court in Bush v. Delano,[77] as laying down a rule of law obviously incorrect. The Missouri supreme court, in Gay v. Gillilan,[78] held that that portion of the above requiring it to be shown that the circumstances attending the execution of the will ''were inconsistent with any other hypothesis than undue influence'' required more than a preponderance of evidence to establish the contestant's case, and therefore stated an incorrect principle of law.

§ 88. Conditions constituting undue influence.

It is absolutely impossible to lay down a rule defining just what combination of facts and circumstances attending the execution of a will establish undue influence, for the mental and physical organizations of no two persons are alike. Different minds are actuated by different motives and desires. Circumstances and surroundings, treatment by relatives and those likely to be the objects of one's bounty, threats and im-

[75] Latham v. Schaal, 25 Neb. 535, 41 N. W. 354; McClary v. Stull, 44 Neb. 175, 62 N. W. 501; Boggs v. Boggs, 62 Neb. 274, 87 N. W. 39.

[76] 59 Mich. 139, 26 N. W. 401.

[77] 113 Mich. 321, 71 N. W. 628.

[78] 92 Mo. 264, 5 S. W. 7.

portunities may not have the slightest effect upon the testamentary capacity of one person, or entirely destroy that freedom of volition and ability to voluntarily make a disposition of one's property and estate without the existence of which no instrument can be sustained as a will. Every case of undue influence, therefore, must stand or fall on its own merits, and the term is more of a relative than an absolute one.[79] Pressure of whatever character, whether acting on the fears or hopes, if so exerted as to overpower the volition, without convincing the judgment, is a species of influence and restraint under which no valid will can be made. Importunity or threats such as the testator has not the strength or courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distresses of mind and social discomfort,—all these, if carried to a degree in which the testator's judgment, discretion, or wishes are overborne, constitute undue influence, though no force is used or threatened.[80] In the absence of fraud, there must be such a degree of urgent solicitation that, under the circumstances, and considering the condition of testator's mind and body, he was too weak to resist it, and acted under constraint and fear, desire for peace, or some motive other than affection or important sense of duty, contrary to his real intention.[81] In order to invalidate a will, it must have been an active vital force at the time the instrument was exe-

79 Boyd v. Boyd, 66 Pa. 293; Moore's Exrs. v. Blauvelt, 15 N. J. Eq. 367.

80 Hall v. Hall, 1 Prob. Div. 481; Darley v. Darley, 3 Bradf. Sur. (N. Y.) 508; Small v. Small, 4 Greenl. (Me.) 220; Boyse v. Rossborough, 6 H. L. Cas. 6.

81 Boggs v. Boggs, 62 Neb. 274, 87 N. W. 39.

cuted, though it may be proved to have existed at a previous time.[82]

Fraudulent intent is not an essential element of undue influence, although almost invariably accompanying it. Undue influence may be established by any competent testimony showing that the volition of the testator was overpowered, without his judgment being convinced. A person may therefore exert such a power over the mind of another, overruling his discretion with only the best and most disinterested of motives, as to render his will executed while under such influences void.[83]

§ 89. Undue influence and mental capacity.

Undue influence is generally exercised upon those people whose mental capacity and vigor has been impaired by age, disease or dissipation, and upon those unfortunates who are victims of monomania or partial insanity, and its effect is frequently to produce monomania or insane delusions in the mind of the testator in regard to his family or estate.[84] In all cases where it is alleged to have been the moving cause of the execution of the will, the mental capacity of the testator should be carefully considered, for the one usually involves the other. It is often difficult to draw the line between the two issues. The acts done by a person of sound mind are presumed to be of his own volition, though he is, of course, influenced more or

82 Pooler v. Christman, 145 Ill. 405, 34 N. E. 57.

83 Stewart v. Elliott, 2 Mackey (D. C.), 307.

84 In re Paisley's Estate, 91 Neb. 139, 135 N. W. 435; Purdy v. Howe, 134 Ill. 298, 28 N. E. 643; Haines v. Hayden, 95 Mich. 324, 54 N. W. 912.

less by the opinions of his friends and of the public generally, and by surrounding circumstances and conditions. The fact that a person has, by any means whatsoever, overcome his volition without convincing his judgment, may be justly considered as evincing a lack of mental capacity.

It has been held, in cases where it is alleged that the pretended will is the result of delusions fostered by another, and therefore void, the issue is, not strictly speaking, the sanity of the testator, but undue influence, and an instruction defining undue influence was proper.[85]

A person of enfeebled mental vigor has less strength with which to resist the importunities, threats or coercion of a person of strong mind who works adroitly and shrewdly to influence him in making a disposition of his property.[86]

Undue influence being a defense, the contestant must establish it by a preponderance of the evidence.[87]

§ 90. Unjust provisions evidence of undue influence.

The terms of a will often present strong evidence why it should not be treated as a valid instrument. While a testator has a right to dispose of his property by his will as he wishes, subject to certain restrictions,[88] and is under no obligation to his children,[89] the

85 McLary v. Stull, 44 Neb. 175, 62 N. W. 501; Thompson v. Hawks, 14 Fed. 902; Mann. Med. Jur. Insan. 165.

86 In re Paisley's Estate, 91 Neb. 139, 135 N. W. 435; Cadwallader v. West, 48 Mo. 483; Dye v. Young, 55 Iowa, 433, 7 N. W. 678.

87 Webber v. Sullivan, 58 Iowa, 260; Baldwin v. Parker, 99 Mass. 79; Hardy v. Merrill, 56 N. H. 227; Rankin v. Rankin, 61 Mo. 295.

88 Section 27, *supra*.

89 In re Goldthorpe's Estate, 115 Iowa, 430, 88 N. W. 944.

law presumes that he will not entirely overlook those of his own family.

A will unjust in its provisions, and inconsistent with the duties of the testator with reference to his property and his family, standing by itself, and without the light of other testimony, is evidence of undue influence, on the theory that it shows the mental condition of the testator at the time it was executed.[90]

These unjust and inequitable provisions do not, as a general rule, raise a conclusive presumption of undue influence or want of testamentary capacity. They are considered as important circumstances in connection with other facts bearing on the testator's mind, and an element tending to establish it.[91] The inequality or inequity of the provisions need not appear on the face of the will, but may be shown by evidence of the relationship of alleged testator to the contestant, and his financial conditions and circumstances.[92] The unjust and inequitable provisions of a will executed by a testator of advanced age, of weak mental and physical condition, when an opportunity for the exercise of undue influence was shown, would invalidate a will, a less degree of proof being required than where the

90 In re Paisley's Estate, 91 Neb. 134, 135 N. W. 435; In re Frederick's Estate, 83 Neb. 318, 119 N. W. 667; Latham v. Schaal, 25 Neb. 540, 41 N. W. 354; Knox v. Knox, 95 Ala. 495, 11 South. 125; Crandall's Appeal, 63 Conn. 365, 28 Atl. 531; Hammond v. Dike, 42 Minn. 273, 44 N. W. 61; Lynch v. Clements, 24 N. J. Eq. 431; Henrich v. Saier, 124 Mich. 86, 82 N. W. 879.

91 In re Hess' Will, 48 Minn. 504, 51 N. W. 614; Maddox v. Maddox, 114 Mo. 35, 21 S. W. 499; Manatt v. Scott, 106 Iowa, 203, 76 N. W. 717.

92 Sim v. Russell, 90 Iowa, 656, 57 N. W. 601; Manatt v. Scott, 106 Iowa, 203, 76 N. W. 717.

testator is of strong mental and physical vigor.[93] In some instances, unjust and inequitable provisions will, of themselves, raise a strong presumption of undue influence. Gross inequalities in the provisions of the instrument, where no reasons for it are suggested, either in the will or otherwise, may be more than evidence only tending to show the existence of undue influence,—they may be so rank as to change the burden of proof, and require an explanation on the part of those who support the will to establish that it was the free and unbiased expression of a rational and clearly disposing mind.[94]

It has been held that a will made by a person in his last illness, his mental capacity being enfeebled by age and disease, containing provisions wholly at variance with his former expressed intentions, giving his property to comparative strangers, who have no claims upon his bounty, is *prima facie* invalid, the law presuming undue influence from his surroundings, and putting upon the beneficiary the burden of showing affirmatively that he did not exercise his power over the testator to his own advantage, and to the disadvantage of those having an equal or superior claim upon the testator's bounty.[95]

93 Wilson's Appeal, 99 Pa. 545; Clark v. Stansbury, 49 Md. 346; Rollwagen v. Rollwagen, 63 N. Y. 504.

94 Farrell v. Farrell, 1 Duv. (Ky.) 203; Higgins v. Carlton, 28 Md. 115; Eastis v. Montgomery, 93 Ala. 293, 9 South. 311; Moore's Exrs. v. Blauvelt, 15 N. J. Eq. 367; Sears v. Shafer, 6 N. Y. 268.

95 Dale v. Dale, 38 N. J. Eq. 274; Carroll v. House, 48 N. J. Eq. 269, 22 Atl. 191.

§ 91. Undue influence of person holding special relation of trust.

The courts always view with suspicion any apparent attempt of any person to use the trust or confidence another reposes in him for his own personal aggrandizement; therefore, a will in favor of one occupying a fiduciary or trust relation to the testator, and partially or wholly excluding the natural objects of his bounty, such as a will in favor of one's attorney, or spiritual or medical adviser, is viewed by the courts with suspicion, and, in connection with other facts, raises a presumption of invalidity, though, standing by itself, it is not conclusive. In New York it has been held that, where a will was offered for probate which devised practically all testator's property to his spiritual adviser, proof of the execution of the will was not sufficient to entitle it to probate,—evidence should be introduced to show that the testator acted voluntarily and without persuasion.[96] Courts do not generally carry the rule so far as in the Marx Case. In order to establish undue influence, they require evidence of other facts and circumstances which show a domination of one will over that of another, overcoming the volition, without convincing the judgment.[97]

The larger the gift in proportion to the residue of the estate, the stronger the presumption of the use of improper means. If it be shown that the person holding the position of trust has exercised a strong influence over the testator in the transaction of his ordinary

[96] Marx v. McGlynn, 88 N. Y. 357.

[97] Waddington v. Buzby, 45 N. J. Eq. 173, 16 Atl. 690; In re Bromley's Estate, 113 Mich. 53, 71 N. W. 523; Post v. Mason, 91 N. Y. 539; Adair v. Adair, 30 Ga. 102.

business, and that circumstances indicate an intention on his part to dominate and control the will of the testator generally, it would establish such a corroborating circumstance as would justify a court or jury in finding the will to be in effect the product of another mind than that of the testator.[98] In all cases of this nature a less degree of proof is necessary to set aside the will, where it appears that the testator was by nature of a weak mind, or, by reason of disease or old age, did not possess his former mental and physical vigor;[99] and if a codicil or a new will is prepared by a confidential adviser, cutting down legacies and making extensive changes which inure to the benefit of such adviser, and to the injury of the legatees in a former will, executed while the testator was in good health and possessed of a strong mind, these facts have been held to raise such a presumption of wrongful influence as to lay upon the proponent the burden of showing affirmatively that the testator's mind was free from undue influence, and that he was not controlled by his adviser.[100] The same rule also applies when one or more of the children or heirs of the testator are the recipients of his bounty, to the exclusion of the others. The books are full of cases in which the courts have set aside wills for the reason that a favorite son or daughter or other relative has abused the trust reposed in him, and by crafty insinuations and devices, and

98 Horah v. Knox, 87 N. C. 483; Seiter v. Straub, 1 Dem. Sur. (N. Y.) 264; Wilson v. Moran, 3 Bradf. Sur. (N. Y.) 180.

99 Eckert v. Flowry, 43 Pa. 46; In re Paisley's Estate, 91 Neb. 139, 135 N. W. 435.

100 Delafield v. Parish, 25 N. Y. 35; Yardley v. Cuthbertson, 108 Pa. 395.

sometimes even by force, obtained the execution of a will to his own liking.

§ 92. Undue influence of draftsman of a will.

The fact that the person who drafted the will is the principal beneficiary may or may not raise a presumption of undue influence. It depends on whether he is or not a person who, on account of relationship or otherwise would most likely be the recipient of the testator's bounty.[101] Thus, a will drafted by a son for his father, which devised the greater portion of the estate to the son, raises *per se* no presumption of undue influence. A will drafted by a person not related to the testator, and to whom he is under no obligation, as, for instance, his attorney, giving him all or nearly all of his estate, does raise such a presumption, but not a conclusive one.[102] Where the person, not an heir, who drafts the will or assists in procuring its provisions from the testator also occupies a relation of especial confidence toward him, the fact that he is especially benefited by the terms of the instrument, to the injury of the heirs, casts upon him the burden of showing that he has acted fairly.[103]

§ 93. Execution of will obtained by fraud.

Fraud, of course, vitiates a will, as it does all other instruments. If the signature of the testator was obtained by any fraudulent trick or device, as by reading

101 Stirling v. Stirling, 64 Md. 138, 21 Atl. 273; King v. Holmes, 84 Me. 219, 24 Atl. 819; Appeal of Richmond, 59 Conn. 226, 22 Atl. 82.

102 In re Bromley's Estate, 113 Mich. 53, 71 N. W. 523.

103 Chandler v. Jost, 96 Ala. 596, 11 South. 636; Dale v. Dale, 38 N. J. Eq. 274; Carroll v. House, 48 N. J. Eq. 269, 22 Atl. 191.

it incorrectly, or by misrepresenting its conditions, or by substituting another instrument in the place of the one the testator supposed he was signing, the will should be set aside.[104] Circumvention by means of fraud is considered in the same light as restraint by force, and will have the same effect as restraint in setting aside a will.[105] If no question is raised as to the testator's possessing a sound mind, the presumption arising from a regular execution of his will is that he was acquainted with its contents, and no evidence upon that fact need be adduced on the opening, or, where there is no contest. A contestant seeking to impeach the will on this ground must show conclusively that the testator was imposed upon;[106] but if the will was executed while he was *in extremis,* and was not read to him or explained to him afterward, the proponent must show affirmatively that the testator had a knowledge of the contents of the instrument.[107] Such knowledge may be established by evidence that the provisions of the will are in accord with the instructions given by the testator to the draftsman, or by any other circumstances going to show the same.[108]

Where it appears that the will was signed by the testator without being read to or by him, but on the assurance that it expressed his desires, the fact that its provisions are different from the instructions given by him to the draftsman is sufficient to set it aside;

104 Potter's Appeal, 33 Mich. 106, 18 N. W. 575.

105 Miller v. Miller, 3 Serg. & R. (Pa.) 267.

106 Pettes v. Bingham, 10 N. H. 514; Day v. Day, 3 N. J. Eq. 549, 551.

107 Blume v. Hartman, 115 Pa. 32, 8 Atl. 219.

108 Day v. Day, 3 N. J. Eq. 549; In re Reed's Will, 20 N. Y. Supp. 91.

and this is true, although no wrongful or fraudulent intent is shown on the part of any person interested, but only a misunderstanding of the facts.[109]

§ 94. Evidence of undue influence and fraud.

Undue influence and fraud usually go hand in hand, and are seldom capable of direct proof. Both must be proved; they can never be presumed. They are almost invariably exercised secretly, in a clandestine manner, and are established by facts and circumstances, taken together, and from the natural inferences which are drawn from the general character of the transactions, and will satisfy an ordinary, unprejudiced mind that they existed.[110]

It is a difficult matter to draw the line on the admissibility of evidence in cases where undue influence is set out by a contestant, for the reason that a combination of facts and circumstances which might have had an important influence over the mind of one person would in no wise affect another. The court must determine in each particular case, and from the general nature of the evidence, whether facts and circumstances sought to be introduced throw any light on the transaction, or are wholly irrelevant.[111]

To set aside an instrument executed as will on the ground that the mind of the testator was so completely

109 Waite v. Frisbie, 45 Minn. 361, 47 N. W. 1069.

110 Ross v. Miner, 67 Mich. 410, 35 N. W. 60; Porter v. Throop, 47 Mich. 313, 11 N. W. 174; Howe v. Howe, 99 Mass. 88; Armstrong v. Armstrong, 63 Wis. 162, 23 N. W. 407; In re Humphrey, 26 N. J. Eq. 513; Clapp v. Fullerton, 34 N. Y. 197; Rivard v. Rivard, 109 Mich. 111, 66 N. W. 686.

111 Heath v. Page, 63 Pa. 108; Zerbe v. Miller, 16 Pa. 488; Boylston v. Carver, 11 Mass. 515.

under the control of another as to deprive him of his volition without convincing his judgment, two elements must be established: First, the actual existence of the influence or deception; second, that such influence or deception was effective in producing the act alleged,—overcoming the volition of the party so far as this particular act is concerned.[112]

These elements are established by evidence of testator's general character, habits, business and domestic relations, physical and mental condition, surroundings and circumstances, both previous to the execution of the will and for a short period thereafter.[113]

In all cases where the testamentary capacity of the testator is attacked or undue influence is alleged as a moving cause for the will, the proponent should produce the evidence of all the subscribing witnesses, if living, competent and within the jurisdiction of the court.[114] The rule forbidding a party to impeach his own witnesses does not apply in such cases, and a will may be sustained though the subscribing witnesses swear that he is incompetent.[115]

[112] Shailer v. Bumstead, 99 Mass. 112.

[113] In re Winch's Estate, 84 Neb. 251, 112 N. W. 116; In re Paisley's Estate, 91 Neb. 139, 135 N. W. 435; McCoy v. Conrad, 64 Neb. 105, 89 N. W. 665; Thompson v. Thompson, 49 Neb. 157, 68 N. W. 372; Latham v. Schaal, 25 Neb. 535, 41 N. W. 354; Manatt v. Scott, 106 Iowa, 203, 76 N. W. 717; Bever v. Spangler, 93 Iowa, 603, 61 N. W. 1080; In re Goldthorp's Estate, 94 Iowa, 336, 62 N. W. 845; In re Morgan's Will, 110 Wis. 7, 85 N. W. 644; Betts v. Betts, 113 Iowa, 111, 84 N. W. 975.

[114] Jackson v. Vickery, 1 Wend. (N. Y.) 414; Severance v. Carr, 42 N. H. 65.

[115] Brown v. Buckley, 14 N. J. Eq. 294; Howell v. Taylor, 50 N. J. Eq. 428, 26 Atl. 656; Whitman v. Morey, 63 N. H. 448, 2 Atl. 899.

§ 95. Will of person under guardianship.

Though it is an established rule that the fact that a person has been adjudged incompetent does not prevent his making a valid will,[116] such record, if made previous to the date of the will, is *prima facie* evidence of testamentary incapacity,[117] but may be rebutted by showing that the will was executed during a lucid interval,[118] or by evidence showing testamentary capacity.[119] In Re Cowdery,[120] it was held that the appointment of a guardian of a person lacking mental capacity to care for his property was not even *prima facie* evidence of want of testamentary capacity.

The appointment of a guardian or commitment to an insane asylum some time after the will was executed is immaterial.[121]

§ 96. Declarations of testator.

Statements or declarations of the testator previous to the date of the will, in regard to his proposed disposition of his estate and his family relations, are admissible for the purpose of showing testamentary capacity, and whether the disposition of the property as made by the will was the result of undue influence.[122]

116 Sections 50, 53, *supra.*

117 Lewis v. Jones, 50 Barb. (N. Y.) 645.

118 Section 55, *supra.*

119 In re Ayer's Estate, 84 Neb. 16, 120 N. W. 491; King v. Gilson, 191 Mo. 307, 90 S. W. 367; Draper's Estate, 215 Pa. 314, 64 Atl. 520.

120 77 Vt. 359, 60 Atl. 341.

121 Entwistle v. Meikle, 180 Ill. 9, 54 N. E. 217; Schmidt's Succession, 125 La. 1065, 52 South. 160.

122 Beaubien v. Cicotte, 12 Mich. 459; Harring v. Allen, 25 Mich. 508; Bush v. Delano, 113 Mich. 321, 71 N. W. 628; Mooney v. Olson, 22 Kan. 69; In re Will of Hollingsworth, 58 Iowa, 527, 12 N. W. 509;

Those made after the will was executed to the effect that he was controlled by others, or that the will was not exactly as he wished, or that he finally yielded to persuasion, are admissible for the purpose of showing the force and extent of the influence exerted upon him and whether or not it was such as to overcome his volition without convincing his judgment.[123]

Letters and diaries of the testator both before and after the date of the will are admitted not as evidence of the facts therein contained but for the purpose of showing the condition of testator's mind and the influences that operated upon it,[124] and former wills of the testator are also admissible.[125]

The length of time which may be covered by such statements and admissions depends upon the conditions of the particular case.[126]

§ 97. Fraud and undue influence—By whom shown.

The provision of the Civil Code restricting the testimony of a party when the opposing party is the representative of a decedent does not apply to heirs and next of kin in will contests. They may testify

In re Goldthorp's Estate, 94 Iowa, 336, 62 N. W. 846, 99 N. W. 944; Kerrigan v. Leonard (N. J.), 8 Atl. 503.

123 Rusling v. Rusling, 36 N. J. Eq. 603; Stephenson v. Stephenson, 62 Iowa, 163, 10 N. W. 456; Parsons v. Parsons, 66 Iowa, 754, 21 N. W. 570; Potter v. Baldwin, 133 Mass. 427; Nelson v. McClanahan, 55 Cal. 308.

124 Marx v. McGlynn, 88 N. Y. 357; In re Blakeley's Will, 48 Wis. 494, 4 N. W. 337.

125 Whitman v. Morey, 63 N. H. 448, 2 Atl. 889.

126 Haines v. Hayden, 95 Mich. 332, 54 N. W. 914; Porter v. Troop, 47 Mich. 313, 11 N. W. 174.

to transactions and conversations with the testator.[127] But a party not an heir, though a legatee or devisee, cannot testify as to such conversations or transaction, but becomes a competent witness when they occurred in his presence between decedent and a third party and he took no part therein.[128]

Declarations by a devisee or legatee that he had exercised a strong influence over the testator are admissible as declarations against interest.[129] Statements made by such party previous to the death of testator that he was incapable of making a valid will are conclusions of law and inadmissible.[130]

An attorney who drafted a will and gave advice concerning it,[131] and any person who becomes a witness to a will at testator's request, are always competent to testify to all the facts, circumstances and surroundings attending its execution, as well as on the question of testamentary capacity.[132]

A devisee or legatee is a competent witness as to the appearance, habits and manner of life of the tes-

127 McCoy v. Conrad, 64 Neb. 150, 89 N. W. 655; Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151.

128 Powers v. Peters, 79 Neb. 680, 113 N. W. 198.

129 Carlton v. Patterson, 29 N. H. 596; Carpenter v. Hatch, 64 N. H. 573; Atkinson v. Sanger, 1 Pick. (Mass.) 192.

130 Renaud v. Pageot, 102 Mich. 568, 61 N. W. 3; O'Connor v. Madison, 98 Mich. 183, 57 N. W. 105.

131 In re Downing's Will, 118 Wis. 581, 95 N. W. 876.

132 In re Will of Coleman, 11 N. Y. 229, 19 N. E. 73; Doherty v. O'Callaghan, 157 Mass. 90, 31 N. E. 726; Scott v. Harris, 113 Ill. 454; Pence v. Waugh, 135 Ind. 143, 44 N. E. 863; Denning v. Butcher, 91 Iowa, 425, 59 N. W. 71.

tator when such knowledge is obtained from observation, rather than personal transactions.[133]

§ 98. Effect of will obtained by fraud or undue influence.

A will obtained by fraud or undue influence is void at its inception. Subsequent acknowledgments of it, either verbal or written, do not make it valid. Evidence of such statements are admissible for the purpose of showing its execution, but to convey real or personal property, it must be re-executed and re-acknowledged,—in effect made a new will.[134]

§ 99. Invalid bequest or devise.

It is no objection to the probate of a will containing one or more valid bequests that a particular bequest or devise is invalid on the ground that the beneficiary thereof is incapable of taking or holding the property thereby sought to be disposed of. The will in such case should be proved for the purpose of giving effect to the valid bequests,[135] or to the clause revoking all former wills, if it contain such clause.[136]

133 Denning v. Butcher, 91 Iowa, 425, 59 N. W. 71; Smith v. James, 72 Iowa, 516, 34 N. W. 309; Sankey v. Cook, 82 Iowa, 125, 47 N. W. 1077.

134 Chaddock v. Haley, 81 Tex. 617, 17 S. W. 233; Haines v. Hayden, 95 Mich. 832, 54 N. W. 911.

135 McClary v. Stull, 44 Neb. 175, 62 N. W. 501; Sumner v. Crane, 155 Mass. 483, 29 N. E. 1151; Farmer v. Sprague, 57 Wis. 324, 15 N. W. 382; In re Merriam, 136 N. Y. 58, 32 N. E. 621; Dudley v. Gates, 124 Mich. 440, 83 N. W. 97.

136 Powell, Devises, 116; Dudley v. Gates, 124 Mich. 440, 83 N. W. 97.

A county court is not empowered to construe wills when they are presented for probate.[137] Their construction is a matter of after consideration, after it has been determined that they were executed by competent testators in the manner required by law.

§ 100. Omitting reference to children.

The fact that a testator makes no provision for some of his children in his will, and even neglects to name them, affords no ground for refusing probate of the will; neither does the birth of a posthumous child, for whom the will makes no provision.[138] The latter is given the same share in the property of his parent which he would have received had the parent died intestate, and, if the former can establish that his name was omitted by mistake or inadvertence, he is entitled to the same right.[139] Of course, the failure of a parent to mention his child's name in his will may be presumptive evidence of undue influence or of incapacity, requiring but little other evidence to make the instrument void.

In Oregon, both take the same share they would if decedent had died intestate.[139a]

§ 101. Probate of foreign wills.

Any will which has been duly probated and allowed in any of the United States, or in any foreign country or state, according to the laws of such state or country,

137 In re John's Will, 30 Or. 494, 47 Pac. 341, 50 Pac. 226; Byrne v. Hume, 84 Mich. 185, 47 N. W. 679.

138 McIntire v. McIntire, 64 N. H. 609, 15 Atl. 218.

139 Rev. Stats., c. 17, §§ 47, 48, [1311], [1312].

139a L. O. L., § 7325.

may be allowed, filed, and recorded in the county court of any county in which the testator may have real or personal estate on which the same may operate.[140] An authenticated copy of the will and probate thereof, together with a petition for the probate of the same, may be filed in the county court by the executor or other person interested in the estate. The court thereupon appoints a time and place of hearing and notice thereof is given in the same manner as in cases of wills executed in the state by a resident thereof.[141]

The petition should allege that the decedent died seised or possessed of property within the county in which it is filed, should show the interest of the petitioner in the estate, and have attached to the same an authenticated copy of the will and probate thereof. The foreign statute need not be alleged.[142] The proof and allowance of the will, duly authenticated, will be presumed to be in accordance with the laws of the foreign state, and if the court finds that the instrument ought to be allowed as the last will and testament of the deceased, the copy shall be filed and recorded, and the will have the same force and effect as if it had been originally proved and allowed in the same court.[143] Decrees of foreign courts admitting wills to probate without the authenticated copy of the foreign probate of the same being filed, and which

140 Rev. Stats., c. 17, § 43, [1307].

141 Rev. Stats., c. 17, § 44, [1308]; Fremont, E. & M. V. R. Co. v. Setright, 34 Neb. 253, 51 N. W. 833.

142 Martin v. Martin, 70 Neb. 207, 97 N. W. 289; Koopman v. Carroll, 50 Neb. 284, 70 N. W. 395.

143 Rev. Stats., c. 17, § 46, [1310]; Martin v. Martin, 70 Neb. 207, 97 N. W. 289; F. E. & M. V. R. Co. v. Setright, 34 Neb. 253, 51 N. W. 883.

were made previous to March 5, 1885, are made legal and valid by chapter 48, Session Laws of 1885.

In Oregon, a foreign will conveying either real or personal estate, if previously regularly admitted to probate in the state where executed, need not be probated in Oregon. Copies of the same with the probate thereof, certified by the clerk of the court in which such will was probated, with the seal of the court affixed thereto, if there be a seal, together with a certificate of the chief judge or presiding magistrate that the certificate is in due form and made by the clerk or other person having legal custody of the record, shall be recorded in the same manner as wills executed and proved in Oregon, and admitted in evidence in the same manner and with like effect.

Where such will has been filed or recorded in any other state or territory of the United States or foreign country without probate thereof, and probate is not required by the law of the place where the same is filed or recorded, a certified copy of the will may be filed in the county court of competent jurisdiction in Oregon, and the testimony of the subscribing witnesses taken upon deposition issued as in other cases for taking testimony of witnesses outside the jurisdiction of the court. In such cases the court shall designate the commission before whom the testimony shall be taken, and if it shall appear that the will was executed according to the laws of the state of Oregon, and that the testator was competent to execute the same, such certified copy of the will and testimony of the witnesses shall be recorded in the same manner and with like effect as wills executed and proven in Oregon.[144]

Any such will may be contested and annulled within the same time and in the same manner as wills executed and proven in Oregon.[145]

144 L. O. L., § 7333.

145 L. O. L., § 7334.

Form No. 27.

PETITION FOR PROBATE OF FOREIGN WILL.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto said court that A. B., late of the county of ——— and state of ———, departed this life at the city of ———, in said county and state last aforesaid, leaving a last will and testament, which said will relates to both real and personal property, and a portion of said real estate, to wit, [describe real estate], is located in said ——— county, Nebraska; that on the ——— day of ———, 19—, said will was admitted to probate in the ——— court of the said county of ———, and state of ———, a copy of which said will and the probate thereof, duly authenticated, is hereto attached marked "Ex. A," and made a part of this petition; that your petitioner is interested in said will as a devisee [legatee, executor thereof]; and that said decedent left him surviving [state names of widow and heirs as in original petition for probate].

Your petitioner therefore prays that said court will appoint a time and place for hearing on said will, that notice in due form issue and be given to all persons interested in said estate to appear and attend the probate of said will, and for such other proceedings necessary to admit the same to probate, and that letters of administration, with the will annexed, issue to said petitioner.

Dated this ——— day of ———, 19—.

C. D.

[Add verification, Form No. 5.]

§ 102. Probate of nuncupative wills.

Nuncupative wills must be probated the same as other wills. They are creatures of the statutes, and not favored by the law. If possible, all the witnesses to them should testify on the hearing in regard to the condition of the testator and the circumstances surrounding the speaking of the testamentary words.[146] Special opportunities exist for the exercise of fraud and undue influence on account of the weak physical condition of the testator, and, though the burden of

146 Godfrey v. Smith, 73 Neb. 756.

proof is the same as in other will hearings, slight circumstances showing that the volition of the testator was overcome would place the burden of proof on the proponent.

§ 103. Probate of wills executed outside the state by a resident thereof.

The Michigan supreme court in an early case [147] construed their probate statute, which the Nebraska territorial legislature adopted about ten years later, as permitting any instrument executed without the state by a resident thereof, which at common law was a last will and testament, to be admitted to probate in that state. Therefore, under a strict application of the rule of construction of statutes adopted from another state, an instrument, testamentary in character, signed by the testator, attested or unattested by witnesses, if executed outside the state by a resident of this state, may be probated.

The Michigan case appears to be contrary to the great weight of authority that at common law a will, in order to be effectual to convey personal property, must be executed according to the law of testator's domicile, at the time of his death,[148] and to pass the title to real estate, according to the law of the jurisdiction where it is situated.[149]

147 In re High, 2 Doug. (Mich.) 517.

148 Wood v. Wood, 5 Paige (N. Y.), 596.

149 Matter of Stewart, 11 Paige (N. Y.), 398. The will declared entitled to probate was a holographic instrument unwitnessed and unattested, and not executed in compliance with any law of the state of Michigan. The case is a bad precedent, and if the question is clearly raised in this state it will probably be not followed.

§ 104. Costs in will contests.

Costs in will contests are awarded in the discretion of the court.[150]

Under this rule a person nominated as executor is ordinarily entitled to reasonable attorney fees incurred in procuring its probate,[151] and in cases where the will was not sustained the award of costs, including attorney fees, should depend largely on the nature and character of the objections.[152]

Such rule, however, it has been held, will not warrant the court, solely on the ground of good faith, in awarding such costs and fees to an unsuccessful contestant.[153] A successful contestant is entitled to costs, and the court might be justified in awarding him his reasonable attorney fees.

Such fees paid by a legatee or devisee in securing the probate of a will are not a proper charge against the estate, whether the will was proved or not.[154]

Attorney fees which are properly chargeable in a will contest are a part of the costs of administration, and may be allowed on the final account.[155]

150 Wallace v. Sheldon, 56 Neb. 55, 76 N. W. 418; In re Clapham's Estate, 73 Neb. 492, 103 N. W. 61.

151 In re Hentges' Estate, 86 Neb. 75, 124 N. W. 929; In re Bowman's Estate, 133 Wis. 494, 113 N. W. 956.

152 Page v. Williamson, 87 L. T., N. S., 146; Lassiter v. Travis, 98 Tenn. 330, 39 S. W. 226; Dodd v. Anderson, 197 N. Y. 466, 90 N. E. 1137; In re Blair, 59 N. Y. Supp. 1090; Gardner v. Moss, 123 Ky. 334, 96 S. W. 461.

153 Wallace v. Sheldon, 56 Neb. 55, 76 N. W. 418; overruling Mathis v. Putnam, 32 Neb. 191, 49 N. W. 182, and Seebrock v. Fedawa, 33 Neb. 413, 50 N. W. 270.

154 Atkinson v. Mays, 57 Neb. 137, 77 N. W. 343; St. James' Orphan Asylum v. McDonald, 76 Neb. 630, 107 N. W. 979, 110 N. W. 626.

155 Clark v. Turner, 50 Neb. 290, 69 N. W. 843.

§ 105. Reducing testimony to writing.

There is nothing in the statute requiring the testimony taken on the hearing for the probate of a will to be reduced to writing and filed, or filed and recorded. In some counties this practice, which is probably a survival of the old common-law "proof of will in common form," prevails, though wills could never be proved in common form in this state. It is entirely unnecessary.

§ 106. Order admitting will to probate.

If the court finds that the allegations of the petition are sustained and that the instrument is the last will and testament of the testator, an order should be made and entered admitting it to probate. Though jurisdictional, the courts adopt a very liberal view as to what it should contain. A recital that it appeared from the testimony that the instrument was the last will and testament of the testator, that he was competent, setting out a copy of the will and directing that it be admitted to probate, has been held sufficient in a collateral proceeding.[156] It need not be signed by the judge.[157]

If probate is refused, an order for that purpose should be entered. If no appeal be taken within thirty days from the date of the order, it is conclusive, and if the record shows that the petition is in proper form, presented to a court having jurisdiction, and that all the statutory steps have been complied with, it cannot

156 Kirk v. Bowling, 20 Neb. 260, 29 N. W. 931.
157 Beer v. Plant, 1 Neb. Unof. 372, 96 N. W. 348.

be attacked in a collateral proceeding,[158] even though proceedings to contest it are pending at the time.[159]

Form No. 28.

ORDER ADMITTING WILL TO PROBATE AND FOR LETTERS TESTAMENTARY.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this matter came on for hearing on the petition of C. D. for the probate of the will of A. B., deceased, and for the issue of letters testamentary thereon to him, the said C. D. C. D. appeared in person and by J. F. R., his attorney [state appearances by other parties, if any].

It appearing to the court from the proof on file that notice of the pendency of this petition has been given to all parties interested in said estate as by order of said court heretofore made and entered;* whereupon E. F. and G. H., subscribing witnesses to said instrument, were sworn and testified [if but one witness is called so state; give names of all witnesses called].

On consideration whereof the court finds that said A. B. died ———, 19—; that he was immediately preceding his death a resident of said county;* that said will was duly executed as required by law, that said A. B. at the time of making said will was of sound mind and memory, not under any restraint or undue influence, and in all respects competent to devise real and personal estate; that said will has been duly proven, and should be allowed as and for the last will and testament of said A. B.

It is therefore considered by the court that said last will and testament was duly executed, that the same is genuine and valid, and that said last will and testament be admitted to probate,* and established as a will and testament of real and personal estate; and it is further ordered that letters testamentary issue thereon to said C. D. upon his giving bond in the sum of $———, and taking the oath required by law.

(Signed) J. K.,
County Judge.

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158 Loosemore v. Smith, 12 Neb. 345, 11 N. W. 493; Kirk v. Bowling, 20 Neb. 260, 29 N. W. 931; Byron Reed Co. v. Klabunde, 76 Neb. 801, 108 N. W. 133; Kolterman v. Chilvers, 82 Neb. 216, 117 N. W. 405.

159 Brown v. Burdick, 25 Ohio, 260.

Form No. 28a—Oregon.

ORDER ADMITTING WILL TO PROBATE.

[Title of Cause and Court.]

At a session of said court held at the county court room in said county on the ——— day of ———, 19—, Present, the Honorable J. K., County Judge. It appearing from the petition, duly verified, of C. D. on file therein that one A. B. departed this life on the ——— day of ———, 19—, that he was immediately preceding his death an inhabitant of said county, that he left an estate therein consisting of real estate of the estimated value of $——— and personal property of the estimated value of $———, and the following heirs at law: C. B., of lawful age, residence, ——— etc.; whereupon E. F. and G. H., subscribing witnesses to said instrument, were sworn and testified. Said testimony was reduced to writing and filed in said court.

[Balance as in Form No. 28.]

Form No. 29.

ORDER ADMITTING FOREIGN WILL TO PROBATE.

[Follow Form No. 28 to *, then:]

Whereupon C. D. was sworn and testified.

It appearing to the court from a copy of said will and the probate thereof, duly authenticated by the ——— of the ——— court of ———, state of ———, that said will has been duly admitted to probate in said ——— court of said ———, state of ———, that said A. B. died seised of real estate in said ——— county, Nebraska, and that said instrument ought to be allowed as the last will and testament of the said A. B.:

It is therefore considered by the court that said authenticated copy of said will of said A. B. be allowed and admitted to probate within the court and given the same force and effect as if originally probated in said county court of said ——— county; and it is further ordered that letters testamentary issue to said C. D. upon his giving bond in the sum of $———, and taking the oath required by law.

(Signed) J. K.,
County Judge.

Form No. 30.

ORDER REFUSING PROBATE OF WILL.

[Follow Form No. 28 to *, then:]

On consideration whereof the court finds that said instrument is not the last will and testament of said A. B.

It is therefore considered and adjudged by the court that said instrument be refused probate, and it is further ordered that the costs of this proceeding, taxed at $———, be a charge against the estate of said A. B.

(Signed) J. K.,
County Judge.

§ 107. Certificate of probate of will.

If the court admits the will to probate, a certificate of such fact is required to be indorsed thereon or annexed thereto, signed by the county judge and attested by the seal of the court.[160] The certificate is not a part of the probate, but simply evidence that the will has been probated, and, when so certified, a transcript thereof is entitled to record in the office of the register of deeds, and is competent evidence in all courts.[161] In the latter case it was held that where the judge neglected to attach his certificate, a certified copy of the records and files of the court could be used to show that the will had been actually probated.

Form No. 31.

CERTIFICATE OF PROBATE OF WILL.

State of Nebraska,
——— County,—ss.

I, J. K., judge of the county court of said county, do hereby certify that the foregoing instrument was filed in this office on the ———

160 Rev. Stats., c. 17, § 59, [1323].

161 Rev. Stats., c. 17, § 60, [1324]; Roberts v. Flannagan, 21 Neb. 509, 32 N. W. 563; Kolterman v. Chilvers, 82 Neb. 216, 117 N. W. 405.

day of ———, 19—, together with the petition for probate of the same; that notice of the pendency of said petition was given by publication of the same for three weeks in the ———, a newspaper printed and published in said county; that on the ——— day of ———, 19—, the execution of said will was duly proven, and also that the said testator, at the time of its execution, was of full age and of sound mind; that an order of said court was thereupon entered admitting said instrument to probate as and for the last will and testament of said A. B., and that letters testamentary thereupon issued to C. D., the executor therein named.

In witness whereof I have hereunto set my hand and affixed the seal of said court this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

CHAPTER IX.

REVOCATION OF PROBATE.

§ 108. Revocation of Probate—Definition.
109. Grounds for Revoking Probate of Will.
110. Power of County Court to Revoke Probate of Wills.
111. Procedure for Revoking Probate.
112. Facts Necessary to be Established.
113. Effect of Order of Revocation.
114. Revocation Because Testator is Living.

§ 108. Revocation of probate—Definition.

Revocation of probate may be defined as the recalling or canceling of the probate of the will by a court of competent authority for sufficient cause shown. It is the reopening of the order or decree by which the will was established, thus giving the parties in interest an opportunity to come in and prove the facts which would invalidate the instrument, the same as on an original hearing, unless the ground of revocation is one that of itself precludes the fact of the instrument being a will.[1]

§ 109. Grounds for revoking probate of a will.

Probate of a will may be revoked for the following causes: 1. Fraud, mistake, collusion or conspiracy;[2] 2. Failure to execute the will according to law;[3] 3. Failure to give legal notice;[4] 4. Disqualification of the

1 Waters v. Stickney, 12 Allen (Mass.), 1.

2 Miller v. Miller's Estate, 69 Neb. 441, 95 N. W. 1010; In re Paige, 62 Barb. (N. Y.) 476; Gaines v. Chew, 2 How. (U. S.) 641; Brown v. Mitchel, 75 Tex. 9, 12 S. W. 606.

3 Sowell v. Sowell's Admr., 40 Ala. 243.

4 O'Dell v. Rogers, 44 Wis. 136; Randolph v. Hughes, 89 N. C. 428.

county judge;[5] 5. For the reason that the alleged testator is living.[6]

§ 110. Power of county court to revoke probate decrees.

The county court has power under the statutes to vacate or modify a final order after the term at which it was entered for mistake, neglect or omission of the clerk or irregularity in obtaining the order, and for fraud practiced by the successful party.[7]

Such court also has exclusive original jurisdiction, in the same manner as a court of general equity jurisdiction, to revoke the probate of a will for any of the causes mentioned in the above section.[8] The validity of the decree cannot be attacked in any other court,[9] excepting on grounds which would render any decree subject to collateral attack.[10]

Under the Oregon practice the statutory provisions for the contest of a will which has been admitted to probate in common form are, to a certain extent, a substitute for the proceedings under the Nebraska practice for revocation of its probate. Such provisions do not, however, in all cases, afford a party an adequate remedy. The rule is that whenever a lawful and sufficient cause exists for revoking a decree admitting a will to probate, a party injured thereby, who is not estopped by his own acts or guilty of laches, may

5 Sigourney v. Sibley, 21 Pick. (Mass.) 101.
6 Morgan v. Dodge, 44 N. H. 259.
7 Civ. Code, §§ 648, 656.
8 Williams v. Miles, 63 Neb. 859, 89 N. W. 451.
9 Loosemore v. Smith, 12 Neb. 343, 11 N. W. 493.
10 Section 106, *supra*.

maintain an action for that purpose,[11] and that where the powers of a probate court are complete and exclusive, and not limited by statute, but are as complete over the matters within the jurisdiction conferred on it by the constitution and the legislature as of a court of general jurisdiction, it has inherent power to vacate such decree.[12]

The Oregon county court does not possess general equity powers over matters within its exclusive jurisdiction.[13] Power to revoke the probate of a will, in any other manner than by a contest, is nowhere given it by statute, nor does it appear, as far as the records of the supreme court are concerned, that it was a power ever exercised by the probate court previous to the adoption of the constitution. The circuit court has been held to possess jurisdiction of an action to set aside the final account of a representative for fraud,[14] and though the question is not entirely free from doubt, it would seem that the power to vacate the decree admitting a will to probate after the expiration of the time for a contest was in the circuit court.

§ 111. Proceedings for revoking probate.

The proceeding under the code for revoking the probate of a will must be commenced within two years from the date of the order, unless the party be an infant or person of unsound mind, and then within two years after the removal of such disability.[15] It is begun by the filing of a verified petition setting out

11 Boyse v. Rossborough, 52 Eng. Ch. 646; Tudor v. James, 53 Ga. 302; Anderson v. Anderson, 112 N. Y. 104, 19 N. E. 427.

12 In re Hause, 32 Minn. 157, 19 N. W. 973; Langdon v. Blackburn, 109 Cal. 19, 41 Pac. 814; Protestant Episcopal Church v. Eells, 68 Vt. 497, 35 Atl. 463; Vincent v. Vincent, 70 N. J. Eq. 272, 62 Atl. 700.

13 Section 10, *supra*.

14 Froebich v. Lane, 45 Or. 13, 76 Pac. 351.

15 Civ. Code, § 655.

the entry of the order and the grounds to vacate it, and issue of summons as in other cases.[16] The petition must set out in full the grounds upon which the petitioner relies for defeating the probate of the will; in the case of fraud in procuring the will, mental incapacity or undue influence, the facts pertaining to the same must be alleged, and it must also appear that the petitioner had no notice of the proceedings or notice of facts sufficient to put him on inquiry in regard to the death of the testator, his estate, the existence of a will or proceedings for its probate. A petitioner under the code must act as soon as he has sufficient knowledge to put himself on inquiry.[17]

The action to set aside the probate of a will is a suit in equity for the purpose of obtaining purely equitable relief. The right to maintain it does not depend on any statute, but on the general principle of granting relief where the common law and the statutes afford no remedy.[18] It may be brought by the heirs of the decedent, or the executor, legatee or devisee under an alleged subsequent will. A person who has with knowledge of fraud or irregularities in the matter of its probate received and retained a beneficial interest under the will then in force is not entitled to bring the action.[19]

The executor of the will which has been probated is a necessary defendant, and the devisees and legatees thereunder must be made parties.[20]

16 Civ. Code, § 655.

17 Miller v. Miller's Estate, 69 Neb. 441, 95 N. W. 1010.

18 Williams v. Miles, 63 Neb. 859, 89 N. W. 451.

19 Hyde v. Baldwin, 7 Pick. (Mass.) 303; Leeks v. Patten, 18 Me. 42; Smith v. Guild, 34 Me. 448.

20 Williams v. Miles, 63 Neb. 859, 89 N. W. 451.

The petition is in the nature of a bill in equity to set aside a decree,[21] but broader in its scope. If it is claimed that the will has been superseded by another instrument, it is proper to include an application for its probate.[22]

Form No. 32.

PETITION FOR REVOCATION OF PROBATE OF A WILL.

In the County Court of ——— County, Nebraska.

E. F.,

Plaintiff,

v.

C. D., Executor of the Estate of A. B., Deceased, G. H. and L. M.,

Defendants.

Comes now said plaintiff and for cause of action against said defendants avers that one A. B., late a resident of said county, departed this life at the city of ———, in said county, on the ——— day of ———, 19—; that on the ——— day of ———, 19—, one C. D presented to said court an instrument purporting to be the last will and testament of said deceased, and on the same date filed a petition for his appointment as executor of said estate, and the ——— day of ———, 19—, was fixed by said court for the hearing on said petition; that notice of said hearing was given by publication in the ———, a newspaper printed and published at and within the county aforesaid, the first publication being on the ——— day of ———, 19—, and the last one the ——— day of ———, 19—, and no personal service of notice of said hearing was had on your petitioner; that on said ——— day of ———, 19—, a decree was entered by said court admitting said instrument to probate as and for the last will and testament of said A. B., deceased; that said C. D. thereupon gave a bond in due form, which was approved by said court, and letters testamentary were issued to him as executor of the estate of said A. B., and said C. D. is now the duly qualified and acting executor of said estate, and G. H. and L. M. sole beneficiaries under said instrument.

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21 Ryno's Exr. v. Ryno's Admr., 27 N. J. Eq. 522; Hotchkiss v. Ladd's Estate, 62 Vt. 209; Franks v. Chapman, 61 Tex. 576.

22 Williams v. Miles, 63 Neb. 859, 89 N. W. 451.

Second. That said A. B. died seised of the following described real estate situated in said county: ———, and possessed of personal property therein of the value of, to wit, $———, the exact nature of which is unknown to said plaintiff.

Third. That said plaintiff is a brother of said A. B., and his sole heir at law; that he is not a beneficiary under said will, and has received no beneficial interest thereunder, or any property of any kind or description from said estate.

Fourth. That said plaintiff is a resident of the city of ——— and state of ———, and has resided in said city for the period of seventy years last past, and his place of residence was well known to said C. D.; that he had no knowledge of the death of said A. B., or of the existence of any last will and testament of said A. B., or of the filing of any petition for the probate of said will, or of the date fixed by the court for the hearing on said will, or of any proceedings whatever in regard to said estate before the ——— day of ———, 19—, and on said day last aforesaid he received through the mails a copy of said ———, and which said paper contained a notice of the hearing on the probate of said will.

Fifth. That on the day said will purports to have been executed, and for a long time prior thereto, said A. B. was in feeble health; that his eyesight was impaired, so that he was wholly unable to read, and was seventy-nine years of age; that said C. D. had been for more than ten years last past the bookkeeper and confidential agent of said A. B., and was intrusted by him with the management, control, and investment of the property of said A. B., and said A. B. had entire confidence in the honor and integrity of the said C. D.; that on or about the ——— day of ———, 19—, said A. B., while sick and unable to leave his room, and unable to read on account of impaired eyesight, dictated to said C. D. a memorandum or direction as to what disposition he wished made of his estate, and directed him, said C. D., to deliver said memorandum to one R. J. S., an attorney, and to employ said attorney for him, said A. B., to draft his will according to said directions; that said R. J. S. did draft an instrument in accordance with the instructions in said memorandum contained, and delivered the same to said C. D.; that said C. D. fraudulently and willfully caused to be prepared the instrument probated in this court on the ——— day of ———, 19—, and did fraudulently obtain the signature of said A. B. to the said instrument probated in this court by falsely and fraudulently representing to him, said A. B., that the instrument so executed and declared by him, said A. B., was the instrument drafted by said attorney, and which said instrument

he, said C. D., had read to said A. B., and that said instrument probated in this court was executed by said A. B. solely by reason of the false and fraudulent representations so made as aforesaid by said C. D., and was not intended by said A. B. as and for his last will and testament, and is not his, said A. B.'s, last will and testament.

Sixth. Plaintiff therefore prays that said decree admitting said instrument to probate be opened, that the letters testamentary issued to said C. D. be revoked and annulled, that a hearing be had at a date to be fixed by the court upon the petition for the probate of said instrument filed by said C. D. on the ——— day of ———, 19—, and that upon said hearing said instrument be adjudged not the last will and testament of said A. B.

Dated this ——— day of ———, 19—.

(Signed) E. F.

[Add verification, Form No. 5.]

§ 112. Facts necessary to be established.

On the trial of an action to revoke the probate of a will, or on the hearing on the proceeding under the code to revoke the decree, the questions to be determined are, did the plaintiff, or petitioner, know or have such means of knowledge as would put a reasonably prudent man on inquiry of the existence of the will and of the pendency of proceedings for its probate, in time to have appeared and contested it,[23] or was the decree obtained by fraud or the intentional production of false testimony,[24] and did the plaintiff or petitioner use reasonable diligence in bringing the action or proceeding after he obtained knowledge of the fraud, or of the want of jurisdiction of the court.[25]

The burden of proof is on him, but he is not required, as in the case of a contest, to show that the instrument

23 Miller v. Miller's Estate, 69 Neb. 441, 95 N. W. 1010.

24 Miller v. Miller, *supra;* Secord v. Powers, 61 Neb. 615, 85 N. W. 846.

25 Willms v. Plambeck, 76 Neb. 195, 107 N. W. 248.

is not the last will of the testator. He must show facts sufficient to make out a *prima facie* cause of contest, prejudicial irregularities which were sufficient grounds for refusing it probate.[26]

Form No. 33.

DECREE REVOKING PROBATE.

[Title of Cause and Court.]

This cause came on for hearing on the petition of said plaintiff (of E. F., an heir of said decedent) for the revocation of the decree admitting the will of said decedent A. B. to probate, the answer of said defendant (of C. D., executor), and was submitted to the court. On consideration whereof the court finds that the averments of said petition are sustained, and plaintiff (said petitioner) has *prima facie* cause for the contest of said will on the ground of fraud of said defendant E. F.

It is therefore adjudged and decreed, that the said order, heretofore, to wit, ———, made and entered, admitting said will to probate, be and the same hereby is revoked and the letters testamentary issued to said C. D. on said date be and the same hereby are revoked and annulled. It is further ordered that a hearing be had on the petition of said defendant C. D. for the probate of said instrument as the will of said A. B. on the ——— day of ———, 19—.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

§ 113. Effect of order of revocation.

The effect of an order opening the decree admitting a will to probate is to place the estate in nearly the same condition that it was in before the will was probated, regard being had to the rights and liabilities of innocent third parties, and this is true where but one of the parties interested in the estate other than the administrator appeared in court on the hearing.

26 Willms v. Plambeck, *supra*.

Probate proceedings cannot be set aside as to one person and held good as to another.[27] It terminates the authority of the executor, but all acts previously done by him within the scope of his employment are valid.[28]

The hearing on the probate of the will should be held as soon as practicable after it is opened, for during the *interim* there is no person authorized to attend to the business of the estate. Should a long delay occur on account of taking depositions or other reason, the court would no doubt have authority to appoint a special administrator to collect and preserve the assets of the estate. If the will is set aside on the rehearing, an administrator should, of course, be appointed to complete the settlement of the estate, if no decree of distribution has been made.

§ 114. Revocation because testator is living.

The application to revoke probate proceedings on account of the alleged testator being still on earth may be made by any person interested in the estate. As he was living when the will was filed, the proceedings of the court are, of course, without jurisdiction, but, there being a judicial determination that he was dead, there should also be another one that he is alive.

27 In re Freud's Estate, 73 Cal. 555, 15 Pac. 135.

28 Gaines v. Hennen, 23 How. (U. S.) 553; Bigelow's Exrs. v. Bigelow's Admrs., 4 Ohio. 138.

CHAPTER X.

COLLECTION AND MANAGEMENT OF THE ASSETS OF THE ESTATE BEFORE THE APPOINTMENT OF AN EXECUTOR OR ADMINISTRATOR.

§ 115. Special Administrator—When Appointed.
116. Jurisdiction of Court to Issue Letters.
117. Evidence—Notice.
118. Bond of Special Administrator.
119. Powers and Duties of Special Administrator.
120. Accounting by Special Administrator.
121. Discharge of Special Administrator.

§ 115. Special administrator—When appointed.

In a great many cases, the first step taken in the settlement of the estates of deceased persons is the appointment by the court of someone to take charge of and collect the assets and look after the welfare of the estate until an executor or administrator is appointed. Such an official is termed in Nebraska a "special administrator." As the statute requires notice to be given of the hearing on the petition for the appointment of a permanent personal representative, from three to four weeks must necessarily elapse before he can enter upon the duties of his trust. When an appeal is taken from decision of the court on the probate of a will, the delay may extend over a period of months, and perhaps years. If, in the opinion of the court, the estate comprises property of such a nature as to require immediate care and attention, and it be deemed for the best interests of the legatees, devisees, heirs or next of kin that some special measures be taken to look after and collect the goods, chattels, credits and effects of the deceased, it could appoint a person for that

purpose.[1] The application for the appointment may be made when the petition for the probate of the will or for letters of administration is filed.

§ 116. Jurisdiction of court to issue letters.

If the deceased was a resident of Nebraska at the date of his death, the county court of the county in which he at that time resided has exclusive authority to appoint a special administrator. If the decedent was a nonresident of this state, a special administrator may be appointed in any county of the state in which there is property belonging to the estate, and the jurisdiction of the special administrator first appointed extends to all the property of the deceased within the state.[2] The appointment is valid, although the will of the decedent was subsequently probated in another county. The application should be by petition in writing, under oath, to the county court. It may be made by a legatee, devisee, heir, creditor or next of kin at any time before the executor or administrator receives his letters. It should set out the right of the petitioner to make the application, state the nature of the estate, and the necessity of the appointment of someone to collect and care for the assets.

Form No. 34.

PETITION FOR APPOINTMENT OF SPECIAL ADMINISTRATOR.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that he is [state interest of petitioner in the estate] of said A. B., and

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1 Rev. Stats., c. 17, § 77, [1841]; Keegan's Estate v. Welch, 83 Neb. 166, 119 N. W. 252; L. O. L., § 1156.

2 Cadman v. Richards, 13 Neb. 389, 14 N. W. 159.

as such legatee, [etc.] is interested in said estate; that on the ——— day of ———, 19—, one E. F. filed his petition in said court for the probate of the instrument purporting to be the last will and testament of said A. B.; that said court thereupon issued an order for the giving of notice of the pendency thereof by causing the same to be published in a newspaper of said county for the period of three weeks, and that by reason thereof the issue of letters testamentary will be delayed for one month [if delay caused by objections to the probate of the will or other cause, so state]; that said A. B. died seised of the following described real estate [describe real estate, give condition thereof, and state reasons why it is necessary some one should be appointed to look after the crops or income therefrom], and personal property consisting of [state nature of personal property, and the necessity for the appointment of some one to look after it], of the value of about ——— dollars; that on account of the aforesaid delay in the issue of letters testamentary [of administration] there is no one to take charge of said estate, and there is cause to believe that a portion of said personal property will be lost or become depreciated in value, and your petitioner and others interested in said estate delayed and defrauded of their just rights and dues unless some one is appointed to take charge of the same.

Your petitioner therefore prays that special letters of administration may issue to him upon said estate, giving him authority to collect and care for the same until the issue of letters testamentary [of administration].

(Signed) C. D.

[Add verification, Form No. 5.]

§ 117. Evidence—Notice.

The petition should be supported by competent evidence showing the condition of the estate, the amount of the personalty, and the necessity of having someone appointed to take charge of it pending the appointment of an executor or administrator. No notice of its pendency is required by the statute, and none need be given. The appointment rests solely in the discretion

of the court, and there is no appeal from his decision thereon to any higher tribunal.[3]

If the delay is not caused by objections to the probate of the will or the appointment of a particular person as administrator, the administration of the estate will be greatly facilitated and the expenses of administration lessened by the appointment of the same person to whom general letters will probably be subsequently issued.

Under the Oregon statute the bond of a special administrator is in the same form as that of one acting under regular letters.[4]

Form No. 35.

ORDER FOR APPOINTMENT OF SPECIAL ADMINISTRATOR.

[Title of Cause and Court.]

On this ——— day of ———, 19—, this cause came on for hearing upon the petition, duly verified, of C. D., for his appointment as special administrator of the estate of A. B., deceased, and upon the evidence.

Upon consideration whereof the court finds that it is necessary that a special administrator should be appointed for the purpose of collecting and taking care of the assets of said estate until an executor is appointed.

It is therefore ordered that letters of special administration upon the estate of the said A. B. issue to the said C. D. upon his filing in this court a bond in the penal sum of $———, with sureties to be approved by the court.

(Signed) J. K.,
County Judge.

§ 118. Bond of special administrator.

Before entering upon the duties of his office, a special administrator is required to give a bond in such sum as the court shall direct, conditioned to make a true inventory of the goods, chattels, rights, credits

[3] Keegan's Estate v. Welch, 83 Neb. 166, 119 N. W. 252.
[4] L. O. L., § 1156.

and effects of the deceased which may come into his possession or knowledge, and that he will truly account for all the goods, chattels, credits and effects of the deceased which shall be received by him whenever required by the county court, and that he will deliver the same to the executor or administrator of the estate, or to the person who may be legally authorized to receive them.[5] The county judge has the right, which he should not hesitate to exercise, to require all sureties to justify under oath. The statute does not require them to be freeholders of the county, though this is the usual practice. The bond should run to the county judge. It is not necessary that his name appear therein.[6]

Form No. 36.

BOND OF SPECIAL ADMINISTRATOR.

Know all men by these presents, that we, C. D., as principal, and E. F. and G. H., as sureties, are jointly and severally held and firmly bound unto the county judge of ——— county in the penal sum of $———, for which payment well and truly to be made we do hereby bind ourselves, our heirs, executors, administrators, and assigns by these presents.

Whereas, on the ——— day of ———, 19—, an order of said court was entered for the appointment of C. D. as special administrator of the estate of A. B., deceased, upon his filing a bond with sureties to be approved by the court in the penal sum of $———:

Now, therefore, the condition of this obligation is such that, if the said C. D. shall make and return a true inventory of all the goods, chattels, rights, credits, and effects of the said A. B., deceased, which shall come into his possession or knowledge, and will truly account for all the goods, chattels, credits, and effects of said deceased received by him whenever required by said court so to do, and deliver the same to the person or persons who shall afterward be appointed

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5 Rev. Stats., c. 17, § 80, [1344].

6 *Post*, § 454.

executor [administrator] of said estate, or such other person as shall be legally authorized to receive the same, then this obligation to be null and void; otherwise to be in full force and effect.

Dated this ——— day of ———, 19—.

(Signed) C. D.
E. F.
G. H.

I hereby approve of the foregoing bond both as to form and sufficiency of sureties.

(Signed) J. K.,
County Judge.

Form No. 37.

LETTERS OF SPECIAL ADMINISTRATION.

State of Nebraska, ——— County.

To C. D., of said County:

Whereas, A. B., late of said county, departed this life on the ——— day of ———, 19—, being at the date of his death a resident of said county, by reason whereof the administration of his estate doth devolve upon the county court of said county, and it appearing necessary that a special administrator be appointed thereon:

Now, therefore, you are hereby appointed special administrator of said estate, with authority only to act in collecting and taking charge of the assets of said estate. You are required, within two weeks, also to make and return to this court a true inventory of all the rights, chattels, goods, credits, and effects of the said estate which may come into your possession or be within your knowledge, to have the sole custody and management of said estate under the direction of this court, to make and render unto this court an account of your doings in regard to said estate whenever required by this court, and to perform such other duties as may be required of you by law and the directions of this court.

In testimony whereof I have hereunto set my hand and affixed my official seal this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

Form No. 37a—Oregon.

LETTERS OF SPECIAL ADMINISTRATION.

State of Oregon,
County of ———,—ss.

To all persons to whom these presents shall come, greeting:

Know ye that it appearing to the court aforesaid that A. B. has died leaving an instrument purporting to be a last will and testament, and was at the date of his death seised and possessed of real and personal property within this state, and that by reason of delay in the issue of letters testamentary, the court finds that it is necessary that a special administrator be appointed to take charge of said estate, pending the proceedings for the issue of regular letters, such court has duly appointed C. D. special administrator of the estate of said A. B.; this therefore authorizes said C. D. to take charge of and administer said estate as such special administrator according to law.

In testimony whereof, I, E. F., clerk of the county court, have hereunto subscribed my name and affixed the seal of said court this ——— day of ———, 19—.

§ 119. Powers and duties of special administrator.

A special administrator is an officer of the court possessing such powers and authority as is conferred on him by the statute. His duties are more like those of an agent or conservator than an administrator.[7] They are to collect the goods, chattels, rights, credits and effects of the deceased, and preserve the same until an administrator is appointed, for which purposes he may commence and maintain suits as such administrator, including special proceedings, and sell such perishable and other property as the court may order.[8] His power extends over the real estate of his decedent and he may collect rents and execute a valid lease of the same.[9]

7 Long v. Burnett, 13 Iowa, 33.
8 Rev. Stats., c. 17, § 78, [1342]; Kaminer v. Hope, 9 S. C. 258.
9 Keegan's Estate v. Welch, 83 Neb. 166, 119 N. W. 251.

It is his duty to appear, the same as a person acting under regular letters, and defend against all suits pending or claims filed against the estate, and may set up any lawful counterclaim or setoff,[10] but cannot be called on in any other way to pay the debts of the deceased.[11]

His powers and duties in Oregon are identical with those of a regular administrator, except that he has nothing to do with the debts and demands against the estate and no power to discharge any obligation of the deceased.[12]

If he deems it necessary to sell any of the personal property he should make application therefor by verified petition to the county court in substantially the same manner as an administrator. A sale may be ordered without notice of the application and may be either a private sale or in the usual course of business or at public auction. He should within ten days from the date of his letters file a complete inventory of all the assets collected by him. An appraisement is not necessary.[13]

Under the Oregon practice he is governed by the same rules regarding the filing of his inventory and the appraisement as an administrator.[14]

10 Cadman v. Richards, 13 Neb. 384, 14 N. W. 159; Sullivan v. Nicoulin, 113 Iowa, 76, 84 N. W. 978.

11 Rev. Stats., c. 17, § 79, [1343].

12 L. O. L., § 1156.

13 Rev. Stats., c. 17, § 97, [1361].

14 L. O. L., § 1356.

Form No. 38.

PETITION OF SPECIAL ADMINISTRATOR FOR LEAVE TO SELL PERSONALTY.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that on the ——— day of ———, 19—, letters of special administration upon said estate issued to him out of and under the seal of said court, and that he is now special administrator of said estate; that on the ——— day of ———, 19—, he filed his inventory of said estate; that, as appears from said inventory, a portion of the assets of said estate consists of [here set out a description of personalty administrator seeks leave to sell, and reasons why the best interests of said estate will be subserved by said sale].

Your petitioner therefore prays that an order may be made by said court granting him permission to sell the following described personalty belonging to said estate [describe property] for the highest market price, and upon such terms as the court may deem advisable.

Dated this ——— day of ———, 19—.

(Signed) C. D.,
Special Administrator.

[Add verification, Form No. 5.]

Form No. 39.

ORDER GRANTING SPECIAL ADMINISTRATOR LEAVE TO SELL PERSONALTY.

[Title of Cause and Court.]

This cause came on for hearing on this ——— day of ———, 19—, upon the petition, duly verified, of C. D., special administrator of said esfate, for leave of the court to sell the following described personalty belonging to said estate [describe personalty], and was submitted to the court. The court finds from the evidence that the best interests of said estate will be subserved by said proposed sale.

It is therefore ordered that said special administrator be, and he hereby is, authorized and empowered to sell at public auction to the highest bidder for cash or secured notes the above-described personalty, and that he cause notice of the time and place of said sale to be given by posting notices thereof, and by causing the same to be published ——— times in the ———, a newspaper printed and published in said county.

(Signed) J. K.,
County Judge.

§ 120. Accounting by special administrator.

Upon the issue of letters testamentary or of administration, his authority at once ceases, and he should forthwith deliver to the executor or administrator all the goods, chattels, credits and effects of the deceased which have come into his hands, and surrender to him the control of any suits pending, in which the estate is either plaintiff or defendant.[15]

Special administration accounts should be kept separate from those of the executor or administrator, even though letters subsequently issued to the special administrator on account of the liability of the sureties on the special administration bond. His account should be a full statement of all the transactions pertaining to the estate, with a list of the property in his hands to be turned over to the executor or administrator. He should charge himself with all moneys received and other assets collected, and credit himself with expenses necessarily incurred in the prosecution of suits, collection of assets, sales of personalty, fees of the county court, and other legitimate expenses, and with the effects turned over to the executor or administrator. He is entitled to compensation for his services, to be fixed by the court, usually commissions on the same basis as an executor or administrator. Where he acts in both capacities, he is not entitled to double commissions. The account should be under oath. Notice of the hearing should be given the executor or administrator.[16] The executor or administrator of a

[15] Rev. Stats., c. 12, § 86, [1345]; Cadman v. Richards, 13 Neb. 384, 14 N. W. 159.

[16] Reed v. Whipple, 140 Mich. 7, 103 N. W. 548.

special administrator is the proper party to render the account when such special administrator dies before his duties are completed.[17]

Form No. 40.

ACCOUNT OF SPECIAL ADMINISTRATOR.

[Title of Cause and Court.]

C. D., Special Administrator,
In Account with
Estate of A. B., Deceased.

Charges.

19—. To cash received from accounts collected [items]..$
To cash received from notes collected [items].....
To cash received from sales of property per.....
Order of the county court [items].....

Total cash received.....$

Disbursements.

19—. By county judge's fees [items].....$
By expenses of sales, costs paid and other expenses paid [items] .....
By commissions on $———.....

Total disbursements .....$

Balance on hand .....$

I have charged myself with the following described articles of personalty, goods, credits, and effects of said estate [describe same], and turned the same over to E. F., executor of said estate, and hold his receipt therefor. I have in my possession, to be turned over to said E. F., executor, the sum of $———, cash.

State of Nebraska,
——— County,—ss.

C. D., special administrator of the estate of A. B., deceased, being first duly sworn, on oath says that the foregoing is a true statement of his account as special administrator of the estate of A. B., deceased.

(Signed) C. D.

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17 Reed v. Whipple, *supra*.

Subscribed in my presence and sworn to before me this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

Form No. 41.

ORDER APPROVING ACCOUNT OF SPECIAL ADMINISTRATOR.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the account of C. D., special administrator of said estate. Upon consideration whereof, the court finds said account to be just and correct. It is therefore ordered that said account be allowed, and the said C. D., having filed the receipt of E. F., executor, for the specific articles of personalty remaining in his hands unsold and upon the said C. D. filing in this court the receipt of E. F., executor of said estate, for the amount of money due him as per said account, he be granted his discharge.

(Signed) J. K.,
County Judge.

Form No. 42.

RECEIPT TO SPECIAL ADMINISTRATOR.

Received of C. D., special administrator of the estate of A. B., deceased, the sum of ——— dollars, being the amount found by the county court of ——— county, Nebraska, to be due said estate from C. D. on his final account, and the balance of the assets collected by him and belonging to said estate.

Dated this ——— day of ———, 19—.

(Signed) E. F.,
Executor of the Estate of A. B., Deceased.

§ 121. Discharge of special administrator.

The appointment of an executor or administrator operates *per se* as a discharge of the special administrator.[18] It is, however, the usual practice to issue to him a formal discharge upon the filing of the receipt from the personal representative.

[18] Cadman v. Richards, 13 Neb. 384, 14 N. W. 159; Malone v. Cornelius, 34 Or. 196, 55 Pac. 536.

Form No. 43.

DISCHARGE OF SPECIAL ADMINISTRATOR.

[Title of Cause and Court.]

Whereas, C. D., special administrator of the estate of A. B., deceased, has faithfully performed all the duties required of him by law and the orders of this court in connection therewith, and has duly accounted for all the property of said estate received by him as such administrator, he is hereby discharged from any and all liability connected with the special administration of said estate.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

CHAPTER XI.

LETTERS TESTAMENTARY.

§ 122. Executors—Administrators With the Will Annexed.
123. To Whom Letters may Issue.
124. Right to Act as Executor not Assignable.
125. Joint Executors.
126. Grant of Letters and Bond.
127. Oath of Executor.
128. Bond of Residuary Legatee.
129. Appointment of Administrator With the Will Annexed.
130. Preferences.
131. Procedure.

§ 122. Executors—Administrators with the will annexed—Definitions.

An executor is he to whom is intrusted the carrying out of the provisions of a will. His power is founded upon the special confidence of, and actual appointment by the deceased,[1] and confirmed by the issue of letters testamentary out of and under the seal of a court of probate jurisdiction.[2]

A testator should designate or appoint his executor, or designate a party to make the appointment. His failure to do so does not invalidate his will. Our statute makes no provision for the appointment of a person to administer the estate of a testator unless someone is named for that purpose in the will, though showing no intention, either expressly or by implication, of abrogating the common-law right of appointment. The court therefore has power to appoint an administrator with the will annexed.[3]

1 2 Bl. Com. 494.

2 Holladay v. Holladay, 16 Or. 147, 19 Pac. 81.

3 Brown v. Just, 118 Mich. 678, 77 N. W. 263; Hartnet v. Wandell, 60 N. Y. 346; Woodward v. Darcy, Plowd. 185.

An administrator with the will annexed is a person appointed by the court to carry out the provisions of the instrument when the person named is dead, refuses to qualify, is a minor or otherwise legally incompetent, or when none is named.[4]

An administrator *de bonis non* with the will annexed is a person appointed by the court to complete the administration of the estate when the executor previously appointed shall die, resign or be discharged before the administration is finished.[5]

§ 123. To whom letters may issue.

The rule laid down by Blackstone is that any person may be appointed executor of a will who is himself capable of making such an instrument.[6] At common law, also, a minor,[7] a married woman[8] and an alien were competent.[9] In the case of a minor, administration with the will annexed was committed to another during minority.

Statutes have considerably modified the common-law rule by requiring that the nominee be legally competent[10] or qualified,[11] which of course bars those physically or mentally incapable of transacting their business affairs and minors. Courts do not act as

4 Stebbins v. Lathrop, 4 Pick. (Mass.) 33; Leavitt v. Leavitt, 65 N. H. 102, 18 Atl. 920.

5 Chamberlin's Appeal, 70 Conn. 363, 39 Atl. 734.

6 2 Bl. Com. 503.

7 Piggott's Case, 5 Coke, 29a.

8 In re Stewart, 56 Me. 300; English's Exr. v. McNair's Admr., 34 Ala. 40.

9 Co. Litt. 129.

10 Rev. Stats., c. 17, § 62, [1326].

11 L. O. L., § 1142.

strictly in passing on the qualifications of an executor as an administrator, but approve the nomination unless the party is clearly within the statutory prohibition.[12]

In Oregon letters cannot issue to a nonresident, but if such nonresident moves into the state and applies for the appointment within thirty days, letters may issue.[13]

In this state nonresidence is not a bar, though a cause for removal, but a matter to be considered by the court in determining whether the party is competent.[14] Letters may issue to a trust company duly authorized by its charter, and having its principal place of business in the county in which the will is probated;[15] in Oregon, to any authorized trust company.[16]

The weight of authority is that if the nominee can give a satisfactory bond, though somewhat lacking in integrity, business experience or even moral character, the wishes of the testator should be complied with and letters granted him.[17]

In the case of minors, letters of administration with the will annexed are issued to another party, who performs the duties until the minor becomes of age. If two are named, one of whom is a minor, letters issue to the one who is competent and to the minor when his disability is removed.[18]

12 Holladay v. Holladay, 16 Or. 147, 19 Pac. 81.

13 L. O. L., § 1155.

14 Hammond v. Wood, 15 R. I. 566, 10 Atl. 623.

15 Rev. Stats., c. 14, § 185, [743].

16 Laws 1913, p. 722.

17 Berry v. Hamilton, 12 B. Mon. (Ky.) 193; Saxe v. Saxe, 113 Wis. 557, 97 N. W. 187; Li Po Tai's Estate, 108 Cal. 484, 41 Pac. 486.

18 Rev. Stats., c. 17, § 67, [1331]; L. O. L., § 1155.

§ 124. Right to act as executor not assignable.

The office of executor is a personal trust, and the person named by the testator must either accept or reject it. He has no authority to assign or transfer the right to any person or corporation, nor in any way by himself confer on another the rights or liabilities belonging to him.[19] If he does not wish to accept the position, he should file a formal renunciation in the county court.[20] If he changes his mind, he may retract the same at any time before the order for letters of administration with the will annexed is entered by filing a written notice thereof with the court.[21]

Form No. 44.

RENUNCIATION OF EXECUTOR.

I, C. D., named as executor in a certain instrument purporting to be the last will and testament of A. B., late of ———, do hereby refuse to accept the appointment as executor of said instrument.

Dated this ——— day of ———, 19—.

(Signed) C. D.

Witness:

E. F.

Form No. 45.

RETRACTION OF RENUNCIATION.

I, C. D., named as an executor of an instrument purporting to be the last will of A. B., late of ———, now on file in the county court of said county, do hereby retract and withdraw my renunciation of the appointment as executor of said instrument filed by me in said court on the ——— day of ———, 19—.

Dated this ——— day of ———, 19—.

(Signed) C. D.,

Witness:

(Signed) E. F.

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19 Ellicott v. Ellicott, 38 N. J. Eq. 604; Nelson v. Boynton, 54 Ala. 368.

20 Stebbins v. Lathrop, 4 Pick. (Mass.) 33.

21 Robertson v. McGeoch, 11 Paige Ch. (N. Y.) 640.

§ 125. Joint executors.

Where two or more persons are nominated executors and some renounce the trust or refuse to give bond, letters may issue to such as do qualify,[22] and he or they will have the same authority to perform every act and discharge every trust required and allowed by the will, and their acts shall be as valid and effective for every purpose as if all were authorized and act together,[23] and such is the rule irrespective of the statute.

§ 126. Grant of letters and bond.

The person named as executor is allowed twenty days from the grant of letters in which to give a bond, which must be in such penal sum as may be fixed by the court, conditioned that he make and return to the county court within three months a true and perfect inventory of all the goods, chattels, rights and credits of the deceased which shall have come into his knowledge or possession, or to the possession of any other person for him; and out of the same to pay and discharge all debts, legacies and charges chargeable on the same or such dividends thereon as shall be ordered and decreed by the county court; to render a true and just account of his administration to the county court within one year, and at any other time when required by such court, and to perform all orders and decrees of the county court by the executor to be performed in the premises.[24]

22 Rev. Stats., c. 17, § 66, [1310].
23 Rev. Stats., c. 17, § 72, [1336]; L. O. L., § 1142.
24 Rev. Stats., c. 17, § 63, [1327].

In Oregon the penalty is fixed by the county court at double the estimated value of the personal property plus double the estimated value of the annual rents and profits from the real estate, and is conditioned upon the faithful performance of the duties of his trust according to law.[25]

When two or more executors are appointed, they execute a joint or separate bond, each with sureties, at their option.[26]

A good many wills contain the direction that "no bond" or "no other bond than his personal obligation" be given by the executor. In such cases it has been held within the discretion of the court to accept such obligation or require a regular bond.[27] The usual practice is to require a regular bond.

In Oregon, where a testator expressly declares that no bonds shall be required of his executor, he may qualify by taking the official oath, but the court may at any time require a bond as in other cases. Qualifying without giving a bond does not release him from any civil or criminal liability.[28]

A state or county officer required by law to give a bond should not become a surety, nor should an attorney practicing within the district,[29] but should an attorney become a surety and the bond be approved, he cannot escape liability on the ground that he is made incompetent by the statute.[30] A surety com-

25 L. O. L., § 1153.
26 Rev. Stats., c. 17, § 90, [1354].
27 Felton v. Sowles, 57 Vt. 382.
28 L. O. L., § 1153.
29 Rev. Stats., c. 58, § 170, [5720].
30 Tessier v. Crowley, 17 Neb. 209, 22 N. W. 422; Luce v. Foster, 42 Neb. 818, 60 N. W. 1027.

pany authorized to do business within the state may be accepted.[31]

In Oregon, when the penal sum of the bond exceeds two thousand dollars, three or more sureties may become severally liable for portions for said sum, if the aggregate for which such sureties become liable shall equal the penal sum required in the undertaking.[32]

If the person named as executor shall refuse to accept the trust or neglect for twenty days to give the bond required by law, he forfeits his rights to the trust.[33]

No time within which the bond must be given is fixed by the Oregon statute; hence a reasonable time should be allowed by the order, which should not exceed twenty or thirty days. The form of bond required by the Oregon law is exclusive, and there is no provision for a residuary legatee's bond.

Form No. 46.

BOND OF EXECUTOR.

Know all men by these presents, that we, C. D., of the county of ———, state of Nebraska, as principal, and E. F., of said county, as surety, are held and firmly bound unto the county judge of ——— county in the penal sum of ——— dollars ($———), for the payment of which well and truly to be made we do hereby jointly and severally bind ourselves, our heirs, executors, administrators, and assigns.

Dated this ——— day of ———, 19—.

Whereas, C. D. has been named in the last will and testament of A. B., deceased, as executor, and has accepted said trust:

Now, therefore, the condition of this obligation is such that, if the said C. D. shall make and return to the county court of said county, within three months, a true and perfect inventory of all

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31 Rev. Stats., c. 58, § 198, [5728]; L. O. L., § 4678.

32 L. O. L., § 1154.

33 Rev. Stats., c. 17, § 65, [1329].

the goods, chattels, rights, credits, and estate of the deceased which shall come to his knowledge or possession, or to the possession of any other person for him; administer according to law and the will of the testator all his goods, chattels, rights, credits, and estate which shall at any time come to his possession, or to the possession of any other person for him, and out of the same to pay and discharge all debts, legacies, and charges chargeable on the same, or such dividends thereon as shall be ordered and decreed by the county court; render a just and true account of his administration to the county court within one year, and at any other time when required by said court; and perform all orders and decrees of the county court by said executor to be performed in the premises,—then this obligatiou to be null and void; otherwise to be and remain in full force and effect.

(Signed) C. D.
E. F.

Form No. 46a—Oregon.

UNDERTAKING OF EXECUTOR.

Whereas, on the ——— day of ———, 19—, the will of A. B. was admitted to probate in the county court of ——— county, Oregon, and an order of said court was thereupon made and entered for the issue of letters testamentary thereon to C. D., who was named therein as executor upon his filing an undertaking in the sum of $———, to be approved by the judge of said county court;

Now, therefore, we, said C. D., as principal, and E. F. and G. H., both of said county, as sureties, do hereby undertake to the estate of said A. B., for the use of all persons interested therein in the sum of $———, that said C. D. shall faithfully perform the duties devolving upon him as such executor according to law.

(Signed) C. D.
E. F.
G. H.

Witness:
(Signed) L. M.

I hereby approve the above undertaking both as to form and sufficiency of sureties.

J. K.,
Judge of the County Court.

The penalty of the bond may be reduced by a deposit, under order of the court, of a portion of the assets with a legally authorized surety company, for safekeeping. An application may be made for such purpose to the court, notice given to the parties interested as the court may direct, and after a hearing the court may order such part of the assets as may be proper deposited with such company, and the bond to be given adjusted to cover only the property remaining in the hands of the representative, thereby reducing the premium, in case a surety bond is given. The property so deposited is held by the trust company under the orders and direction of the court.[34]

Form No. 46b—Oregon.

APPLICATION FOR REDUCTION OF PENALTY OF BOND.

[Title of Cause and Court.]

Comes now G. B., named as executor in the last will and testament of A. B., which said will was duly admitted to probate in said court on the ——— day of ———, 19—, and letters testamentary ordered issued to said applicant upon his filing a bond in the sum of $———; that among the personal assets of said estate are [a certificate of ——— shares of stock in the ——— company, of the value of $———], [a note of one G. H., secured by mortgage on real estate, of the value of $———], that said applicant desires to deposit said certificate of shares of stock and said note and mortgage in the ———, a legally authorized surety company of the state of Oregon, to the end that his bond as such executor may be reduced to the sum of $———.

Applicant therefore prays that notice be given the parties interested as the court may direct, and an order of said court be made on the hearing of this application directing said executor to deposit said shares of stock and said note and mortgage with said surety company for safekeeping, and fixing the amount of said bond at the sum of $———.

Dated this ——— day of ———, 19—.

(Signed) C. B.

[Add verification.]

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34 Laws 1913, p. 726.

§ 127. Oath of executor.

The usual practice is for the executor to execute and file an oath of office in the county court. None, however, is required by the statute, and an executor cannot escape liability on the ground that none was given.[35]

Under the Oregon statute no oath is required when a bond is given. When the executor is relieved from giving bond by the terms of the will, and none is required of him by the court, he may qualify by taking an oath to faithfully fill his trust.[36]

Form No. 46c—Oregon.

OATH OF EXECUTOR.

I, C. D., do solemnly swear that I will faithfully fulfill the trust devolving upon me as executor of the estate of A. B. according to law and to the best of my ability. So help me God.

(Signed) C. D.

Subscribed and sworn to before me this ——— day of ———, 19—.

(Seal) ———————,

Clerk County Court.

§ 128. Bond of residuary legatee.

If the executor be a residuary legatee, he may, at his option, in place of the foregoing bond, give a bond in such sum and with such sureties as the court may direct, conditioned only to pay all the debts and legacies of the testator, and in such case he shall not be required to return any inventory.[37] The effect of such bond is to pay the entire estate to the legatee, and

35 Leahy v. Haworth, 141 Fed. 850, 73 C. C. A. 84.

36 L. O. L., § 1153.

37 Rev. Stats., c. 17, § 64, [1328]; Conant v. Stratton, 107 Mass. 474.

practically terminate the administration.[38] He becomes liable for all fees and allowances due from the estate, and all allowances to the widow or minor children for their support, and all debts of the estate.[39] His liability on the bond for all the debts, fees and allowances of the estate is absolute.[40]

At the same time it does not entirely release the assets of the estate from the lien of debts, expenses of administration and legacies. It only releases such real estate and personal property as has passed into the hands of *bona fide* purchasers. Legatees and creditors are not limited to an action on the bond, but assets of the estate in his hands may be subjected to their claims by the same proceedings as in cases where the ordinary executor's bond was given.[41]

The advantage accruing to the executor in giving such bond is that it reduces the penal sum to the minimum of satisfying claimants and saves him the labor and expense of making an inventory. An executor may incur considerable risk in giving a bond of this character, and should satisfy himself that the condition of the estate will warrant it before doing so.

38 Buell v. Dickey, 9 Neb. 285, 2 N. W. 884; In re Cole's Will, 52 Wis. 591, 9 N. W. 664; Haydock v. Duncan, 40 N. H. 45; Thompson v. Brown, 16 Mass. 172.

39 Buell v. Dickey, 9 Neb. 285, 2 N. W. 884; Stebbins v. Smith, 4 Pick. (Mass.) 97; Colwell v. Alger, 5 Gray (Mass.), 67; Hatheway v. Weeks, 34 Mich. 237; McElroy v. Hatheway, 44 Mich. 399, 6 N. W. 867.

40 Buel v. Dickey, 9 Neb. 285, 2 N. W. 884; Jones v. Richardson, 5 Met. (Mass.) 247.

41 Thompson v. Pope, 77 Neb. 308, 109 N. W. 498; Caulton v. Pope, 83 Neb. 723, 120 N. W. 191.

Form No. 47.

BOND OF RESIDUARY LEGATEE.

Know all men by these presents, that we, C. D., of the county of ——— and state of Nebraska, as principal, and E. F. and G. H, of said county, as sureties, are held and firmly bound unto the county judge of ——— county, said state, in the penal sum of ——— dollars ($———), for which payment well and truly to be made we do hereby jointly and severally bind ourselves, our heirs, executors, administrators, and assigns.

Dated this ——— day of ———, 19—.

Whereas, C. D. has been named in the last will and testament of A. B., deceased, as executor thereof, and is also the residuary legatee in said will, and has accepted the trust and the conditions of said will:

Now, therefore, the condition of his obligation is such that if the above-bounden C. O. shall administer according to law all the goods, chattels, rights, credits, and effects of the estate of said A. B., deceased, which shall come into his possession, or to the possession of any other person for him, and shall pay all the debts and legacies of said A. B., said testator, together with the costs and expenses of administration and allowances to the widow and minor heirs of said deceased, and shall render a just and true account of the payment of said debts, legacies, charges, fees, and allowances to the county court of said county of ——— within one year from this date, then this obligation to be null and void; otherwise to be and remain in full force and effect.

(Signed) C. D.
E. F.
G. H.

The foregoing bond approved by me both as to form and sufficiency of sureties this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

An executor or administrator with the will annexed cannot, after having given a residuary legatee's bond, withdraw it, and give one in the usual form.[42]

42 Alger v. Colwell, 2 Gray (Mass.), 404.

Form No. 48.

LETTERS TESTAMENTARY.

State of Nebraska,
County of ———,—ss.

County Court of said County.

In the Matter of the Estate of A. B., Deceased.

By J. K., County Judge for said County.

To G. D., of said County, Greeting.

Whereas, A. B. lately departed this life testate, being at or immediately previous to his death an inhabitant of the county of ———, and having while he lived and at the time of his decease estate within the said county of ——— to be administered:

And whereas, at a session of said county court, holden at ———, in said county, on the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, the last will and testament of said deceased was duly proved, approved, and allowed, and wherein you are appointed executor thereof, whereby the power of committing administration and full disposition of all and singular, the goods, chattels, rights, credits and estate whereof the said deceased died possessed, in the state of Nebraska, and also the hearing, examining, and allowing the account of such administration doth appertain unto me; and you have given a bond in the premises, which has been duly approved and filed, as required by law in that behalf:

Now, therefore, trusting in your care and fidelity, I do by these presents commit unto you the said full power and authority to administer and faithfully dispose of, according to law and the will of said testator, all and singular the goods, chattels, rights, credits, and estate of said deceased, within the state of Nebraska, which shall at any time come to your possession, or to the possession of any other person for you, and to ask, gather, levy, recover and receive all goods, chattels, rights, credits, and estate whatsoever, of said deceased, which to him while he lived and at the time of his death did belong; and to pay and discharge all debts, legacies, and charges chargeable on the same, or such dividends thereon as shall be ordered and decreed by said court. Hereby requiring you to make and return to said court, within three months, a true and perfect inventory of all the goods, chattels, rights, credits, and real estate of said deceased, which shall come to your possession or knowledge, or to the possession of any other person for you, and also to render a just and true account of your administration to said court, within one year, and at any other time when required by said court, and to per-

form all orders and decrees of said court by you to be performed in the premises.

In testimony whereof, I have hereunto set my hand and the seal of said county court at ———, the ——— day of ———, in the year of our Lord one thousand nine hundred and ———.

(Seal) ———————————,
County Judge.

Form No. 48a—Oregon.

LETTERS TESTAMENTARY.

State of Oregon,
County of ———,—ss.

To all persons to whom these presents shall come, greeting:

Know ye, that the will of A. B., deceased, a copy of which is hereto annexed, has been duly proven in the county court for the county aforesaid, and that C. D., who is named as executor therein, has been duly appointed such executor by the court aforesaid; this therefore authorizes the said C. D. to administer the estate of said A. B., deceased, according to law.

In witness whereof I, E. F., clerk of said court, have hereunto subscribed my name and affixed the seal of said court this ——— day of ———, 19—.

(Seal) (Signed) E. F.,
Clerk County Court.

§ 129. Appointment of administrator with the will annexed.

No person named as executor in any will who shall refuse to accept the trust, or shall neglect to give bond as prescribed for twenty days after the probate of such will, shall intermeddle or act as executor.[43]

If the nominee renounces his trust, is a minor, is found incompetent, or fails to give bond, or if no one is designated, the court may commit the administration of the estate with the will annexed to such person as would have been entitled to administration had the

[43] Rev. Stats., c. 17, § 65, [1329].

testator died intestate.[44] The records must show the existence of such facts as give the court jurisdiction to make the appointment.[45] The validity of the appointment cannot be questioned collaterally.[46]

Such administrator has the same rights, powers and duties as an executor, except that when appointed on account of the minority of the nominee, the coming of age of the minor terminates his trust *per se*.[47] He may give a general bond or one as residuary legatee.

§ 130. Preferences—Right to appointment.

Those who are entitled to preference as administrators are entitled to letters of administration with the will annexed.[48] Under this rule, which differs from that of the common law, the surviving spouse is entitled to the first preference, then the nearest of kin and then creditors.[49] A residuary legatee is also regarded as having a right to the appointment on the ground that the costs of administration may be thereby considerably lessened.[50]

§ 131. Procedure.

Where it is known at the time the will is filed for probate that the appointment of an administrator with the will annexed is necessary, the petition for probate should contain sufficient allegations to give the court

44 Rev. Stats., c. 17, § 66, [1330]; L. O. L., § 1142.

45 Landers v. Stone, 45 Ind. 404; Vick v. City of Vicksburg, 2 How. (Miss.) 209.

46 Peebles v. Watts' Admr., 9 Dana (Ky.), 102, 33 Am. Dec. 531.

47 Rev. Stats., c. 17, §§ 67, 68, [1331], [1332]; L. O. L., § 1155.

48 Rev. Stats., c. 17, § 66, [1330]; L. O. L., § 1142.

49 Sections 143, 144, *post*.

50 Mallory's Appeal, 62 Conn. 218, 25 Atl. 109.

jurisdiction to make the appointment. Where objections to the appointment of the nominee on account of incompetency are filed, the objector should add a prayer for the appointment of some designated person or other competent person.

If the party to whom letters are ordered neglects to qualify, a petition should be filed by someone interested in the estate for such appointment. No notice or citation is required by the statute.

Form No. 49.

PETITION FOR LETTERS OF ADMINISTRATION WITH THE WILL ANNEXED.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that A. B., late of said county, departed this life at his residence in said county on the ——— day of ———, 19—, leaving a last will and testament, in which one L. M. was named as executor; that on the ——— day of ———, 19—, said L. M. filed in this court his renunciation of said trust [that said L. M. is a minor of the age of ——— years; that said L. M. is insane, and incapable of accepting said trust, or is of unsound mind], which said will he now offers for probate, and that said will relates to both real and personal estate. [Balance of petition same as form No. 24, except prayer should be for appointment of some designated person as administrator with the will annexed, if the executor named is a minor during his minority.]

[For notice of hearing, see Form No. 25.]

Form No. 50.

ORDER ADMITTING WILL TO PROBATE, AND FOR APPOINTMENT OF ADMINISTRATOR WITH THE WILL ANNEXED.

[Follow Form No. 28 to*, then say that] L. M., who is named as executor in said will, has renounced the trust [is a minor of the age of ——— years; is not a suitable and competent person to administer said estate; is dead], and that E. F. is a suitable and competent person to administer said estate [during the minority of said L. M.], it is therefore considered by me that the said last will and testament was duly

executed, and the same is genuine and valid, and that the said last will and testament be admitted to probate and established as a will of real and personal estate. It is further ordered that letters of administration with the will annexed issue to said E. F. upon his giving bond and taking the oath required by law, the trust thereby conferred upon said E. F. to terminate with the minority of said executor.

(Signed) J. K.,
County Judge.

[For bond of administrator with the will annexed, see Forms Nos. 46, 47, pages 190, 195.]

Form No. 51.

ORDER FOR APPOINTMENT OF ADMINISTRATOR C. T. A. ON ACCOUNT OF FAILURE OF EXECUTOR NAMED TO GIVE BOND.

[Title of Cause and Court.]

Now on this ——— day of ———, 19—, this matter came on for hearing on the petition of C. B. for her appointment as administrator with the will annexed of A. B., on account of the failure of C. D., the executor therein named, to give bond. C. B. appeared in person and by H. C. M., her attorney. G. H. was sworn and testified.

It appearing to the court that said C. D. has neglected and refused for twenty days to give bond as executor of said estate, as directed by order of said court heretofore, to wit, ———, 19—, made and recorded, and that C. B., the widow of said A. B., is a suitable and competent person, it is ordered that letters of administration with the will annexed issue to said C. B. upon her giving bond in the sum of $——— and taking the oath of office.

(Signed) J. K.,
County Judge.

Form No. 52.

LETTERS OF ADMINISTRATION WITH THE WILL ANNEXED.

[Title of Cause and Court.]

To C. D., of said County, Greeting:

Whereas A. B. lately departed this life testate, being at or immediately previous to his death an inhabitant of said county of ———, and having while he lived and at the time of his decease estate within the said county of ——— to be administered;

And whereas at a session of said court held at the county seat of said county on the ——— day of ———, 19—, the last will and testament of said A. B. was duly proven and allowed, and wherein E. F. was appointed executor of said estate;

And whereas said E. F. has neglected and refused for more than twenty days from said ——— day of ———, 19—, to execute and file in said court a bond in the sum of ——— dollars, with good and sufficient surety as provided by the order of said court heretofore made and entered.

[Balance as in Form No. 48.]

(201)

CHAPTER XII.

DETERMINATION OF HEIRSHIP WITHOUT ADMINISTRATION.

§ 132. When Administration may be Dispensed With.
133. Procedure.
134. Hearing—Decree.
135. Determining Right of Succession Without Administration.
136. Petition for Decree Determining Succession.
137. Citation—Hearing.
138. Decree Determining Succession.

§ 132. When administration may be dispensed with.

Administration of the estate of an intestate which is wholly exempt from payment of his debts may be dispensed with and a decree obtained determining in whom the estate vests, in the case of both residents and nonresidents, by special proceedings.[1] When an estate consists of real property either wholly or partially, administration is the usual, proper and most satisfactory method of determining the rights to its succession.

In cases where there are no heirs and the property consequently escheats to the state, though there is authority to the effect that administration is unnecessary,[2] administration should be had for the purpose of paying the debts and determining the fact of there being no heirs.[3] It is also held that estates consisting entirely of personalty left by an infant who died so

1 Rev. Stats., c. 17, § 92, [1356].

2 Smith v. Gentry, 16 Ga. 31.

3 State v. McDonald, 55 Or. 419, 104 Pac. 967; State v. O'Day, 41 Or. 495, 69 Pac. 542.

young as to be incapable of contracting debts, pass immediately to the parties designated by the statute without administration.[4]

When all the heirs are of full age and competent, they may, if they choose, settle the estate by paying the debts and dividing the property among themselves. They are bound by the settlement and there is no creditor to complain.[5] There are a number of objections to such a procedure. It transmits no record title to real estate; the holder of a *chose* in action which he took in the division has no power to enforce it, nor can such holder of a mortgage note execute a valid release, as the title to personalty of a decedent can only be traced through an executor or administrator.[6]

In cases where no administrator has been appointed and there are no debts, a court of equity may adjust mutual accounts between the parties and divide the personal property between them.[7]

Estates the administration of which may be dispensed with, and at the same time a good title transmitted to the parties in whom they vest under the statute, include those consisting of a homestead not exceeding two thousand dollars in value and exempt personal property, and lands held by Indians under federal patent free from liability for their debts.

[4] McCleary v. Menke, 109 Ill. 294; Hargroves v. Thompson, 31 Miss. 211.

[5] Taylor v. Phillips, 30 Vt. 241; Brown v. Forsche, 63 Mich. 500, 25 N. W. 1011; Roberts v. Messinger, 134 Pa. 299; Amis v. Cameron, 54 Ga. 449.

[6] Sections 193, 204, *post*.

[7] Robertson v. Robertson, 120 Ind. 333, 22 N. E. 310; Watson v. Byrd, 53 Miss. 480; Marshall v. Grow's Admr., 29 Ala. 278.

No procedure is provided by the Oregon statutes for dispensing with administration and determining heirship without the appointment of an administrator.

§ 133. Procedure.

Any person may file a verified petition in the county court of the county in which the estate is situated, giving the names, ages and residence of the heirs at law of the deceased, a description of the property, and a showing that the same is wholly exempt from attachment, execution or other mesne process, and is not liable for the payment of the debts of the decedent, and praying for an order or decree dispensing with administration and a determination of heirship.

The court thereupon enters an order fixing the time and place for hearing on said petition, which must be not later than thirty days from its date, and notice is given to all persons interested by publication of the order for three weeks in a legal newspaper of said county.[8]

Form No. 53.

PETITION FOR DISPENSING WITH ADMINISTRATION AND DETERMINATION OF HEIRSHIP.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that one, A. B., departed this life in said county on the ——— day of ———, 19—; that he was immediately preceding his death a resident and inhabitant of said county; that he left him surviving a widow, C. B., and the following named heirs at law [state names, residences and ages of widow and heirs], that no last will of said decedent has been discovered, and your petitioner verily believes that said A. B. died intestate, that said A. B. died seised of an estate of inheritance in the following described real estate ———, which said real estate was at the date of his death

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[8] Rev. Stats., c. 17, § 92, [1356].

occupied by himself and family as and for a homestead and is wholly exempt from attachment, execution, or other mesne process and not liable for the debts of said deceased (was held by him under the terms of a patent issued to him by the United States of America by virtue of the terms of which, and of the act of Congress under which the same was granted, said lands were at the date of the death of said A. B., not liable for any debts of said decedent). That the personal estate of said A. B. is not liable for the debts of said estate.

Your petitioner therefore prays that an order may be made fixing a time and place for hearing on this petition, that notice thereof be given in the manner provided by law, and that upon said hearing a decree may be entered dispensing with administration of said estate and determining who are the heirs of said A. B.

Dated this ——— day of ———, 19—.

(Signed) C. D.

[Add verification, Form No. 5.]

Form No. 54.

ORDER FOR HEARING.

[Title of Cause and Court.]

To all persons interested in the estate of A. B., deceased:

C. D. having filed his petition, under oath, in this court, praying that administration of the estate of said A. B. be dispensed with and for a decree determining who are the heirs of said A. B.; it is ordered that a hearing be had on said petition at the county courtroom in said county on the ——— day of ———, 19—, at the hour of — A. M., and that notice of the time and place fixed for said hearing be given to all persons interested in said estate by publication of this order for thirty days in the ———, a newspaper printed and published in said county.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

§ 134. Hearing—Decree.

The evidence on the hearing must be reduced to writing and filed with the other papers. Any person interested may appear and contest the allegations of the petition, and, if it appears that the assets are liable for the debts, regular administration must be had. If

the allegations are sustained, a finding of fact must be made setting out specifically the name of the decedent, date of his death, the fact of his intestacy, the names of all his heirs at law, a correct description of his property and the character thereof, and a decree thereupon entered naming the sole heirs at law and giving their ages and residences, which decree is conclusive upon the heirs and all persons interested.[9]

On applications for dispensing with administration of the estates of Indians, the court should always appoint a guardian *ad litem* for the minor heirs on account of the many complicated questions arising over Indian marriages and consequent heirship.

Any of the proceedings under the act dispensing with administration may be reviewed or appealed the same as in regular administration.[10]

Form No. 55.

ORDER DISPENSING WITH ADMINISTRATION.

[Title of Cause and Court.]

Now on this ——— day of ———, 19—, this matter came on for hearing on the petition of C. D. for a decree dispensing with administration of the estate of said A. B. and for determination of heirship, and the evidence which was reduced to writing and now on file in said court was submitted to the court.

Upon consideration whereof the court finds that notice of the time and place fixed for the hearing on said petition has been given by publication thereof for thirty days in the ———, as ordered by the court, that said A. B. died at ——— in said county on the ——— day of ———, that said A. B. died intestate, that the following named persons are the sole heirs at law of said A. B. [give names, ages, residences and relationships of each heir], that said A. B. died seised of an estate of inheritance in the following described real estate ———,

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9 Rev. Stats., c. 17, §§ 93–95, [1357], [1358], [1359].

10 Rev. Stats., c. 17, § 96, [1360].

that said real estate was at the date of the death of said A. B. occupied by himself and his family as a homestead and does not exceed in value two thousand dollars, that the said A. B. died possessed of personal property consisting of household furniture of the value of not to exceed one hundred dollars, and that both the real and personal estate of said A. B. are not liable for the payment of any of the debts of his said estate and pass to the heirs at law free from all liens and encumbrances save and except such as existed thereon prior to and at the date of the death of said A. B.

It is therefore considered and adjudged by me that administration of said estate be dispensed with and said estate be awarded to the following named persons: The sole heirs at law of said A. B., as tenants in common; to C. B., a son of said A. B., of the age of ——— years and residing at ———, Nebraska; the undivided one ——— part thereof, etc.

(Signed) J. K.,
County Judge.

§ 135. Determining right of succession without administration.

A special proceeding is provided by statute for determining the right of succession to real estate when the decedent has been dead two years, left no will, and no debts payable to residents of this state, and no county court of this state has acquired jurisdiction of his estate for purposes of administration. It binds no one except heirs and parties who appear, and does not bar administration of the estate in legal form, and though providing for the issue of a citation, does not direct how it shall be served.[11]

§ 136. Petition for decree determining succession.

The county court of the county in which the decedent last resided, or if a nonresident, of the county within which the land, or a part of it, is situated, ac-

11 Rev. Stats., c. 17, §§ 272, 273, [1536], [1537].

quires jurisdiction by the filing of a petition, which may be made by an heir or person claiming by or through an heir. It must set out the residence of the decedent, date of his death, that he was intestate, that no county court of this state has acquired jurisdiction of his estate, give a particular description of his property, and the interest of the petitioner, and the interest or share of each heir according to his relationship to the deceased, and pray for a decree determining the right of succession to the property.[12] The statute does not require it to be verified.

Form No. 56.

PETITION FOR DECREE DETERMINING SUCCESSION TO REAL ESTATE.

[Title of Cause and Court.]

Comes now C. D. and respectfully represents unto the court that heretofore, to wit, ———, 19—, said A. B. departed this life at ———; that he was at the date of his death the owner of the following described real estate situated in the said county of ——— and state of Nebraska: ———; that said A. B. died intestate and that no proceedings have been had in any county in this state for the administration of this estate, and that there are no debts of decedent payable to residents of this state.

That said A. B. left him surviving the following named heirs at law: C. D., said petitioner, who is a son of said A. B., and resides at ———, and E. F. and G. H., sons of said A. B., who reside at ———, that your petitioner has purchased the interest of said E. F. and G. H. in said real estate and is now the owner in fee of the said property.

Your petitioner therefore prays that a decree of said court may be made and entered determining the right of succession to said above-described real estate.

(Signed) C. D.

§ 137. Citation—Hearing.

Upon the presentation of the petition a citation issues to all the heirs. The service appears to be left

12 Rev. Stats., c. 17, § 372, [1536].

to the discretion of the court. The statute does not mention it.[13] It ought to be served personally on all heirs within the state, and on nonresidents by publication for at least thirty days unless service is waived. Some form of service must be had, for it is elementary that a party cannot be deprived of valuable rights without some kind of notice.

Any person interested may appear and answer the petition, setting up any valid defense or any right, interest or claim in the property. "The allegations of the petition must be established by competent testimony before a decree can be entered, although no issue be joined by the answer."[14]

§ 138. Decree determining succession.

If the facts set out in the petition are established to the satisfaction of the court, a decree is entered specifying who are the heirs of the decedent and what are the interests or shares of the parties, respectively, in the property, and declaring the succession accordingly.[15] There is no regulation for an appeal from the decree to the district court, and the remedy of a party aggrieved would be clearly by administration proceedings, or bill in equity, to establish his interests, entirely disregarding the proceeding. Dispensing with administration in the manner above described may be desirable in some cases, but does not clear up a title like a legal administration.

13 Rev. Stats., c. 17, § 272, [1537].
14 Rev. Stats., c. 17, § 273, [1538].
15 Rev. Stats., c. 17, § 275, [1538].

CHAPTER XIII.

APPOINTMENT OF ADMINISTRATORS.

§ 139. Administration—Definitions.
140. When Administrator Appointed—Resident Estates.
141. Who is Capable of Administering an Estate.
142. Who Entitled to the Appointment.
143. Next of Kin.
144. Right of Creditor to Administer.
145. Administration of Estates of Nonresidents.
146. Appointment of Administrator When Assets Consist of Cause of Action for Death of Decedent.
147. Petition for Appointment.
148. Notice of Hearing.
149. Hearing on Petition for Letters.
150. Hearing—Selection of Administrator.
151. Order Granting Letters.
152. Bond of Administrator.
153. Oath of Administrator.
154. Letters of Administration cannot be Attacked Collaterally.

§ 139. Administration—Definitions.

Administration of an estate is the collection and management of its assets, and their application according to law in payment of debts and in distribution to the parties entitled thereto.[1] Its object and purposes are to pay the debts of the decedent, distribute the personal assets of his estate, determine who the parties are who take the real estate and the share to which each is entitled by virtue of heirship or marriage.

An administrator is a person appointed by a court of competent jurisdiction to settle and adjust the estate of one dying intestate, or such estates as have no com-

1 Bouvier's Law Dict.; Herndon v. Moore, 18 S. C. 339.

petent executor appointed by the testator. His title rests solely upon the grant of letters.[2]

§ 140. When administrator appointed.

There is no statute in Nebraska, or common-law rule, limiting the time within which an administrator of an estate may be appointed, except when the application is made by a creditor, in which case letters must issue within two years from the date of the death of the decedent.[3]

In Oregon there is no statutory limitation.

There may be special reasons, such as the discovery of personal property, or completing the chain of title to real estate, which would make administration necessary after all the claims against the estate were barred by the statute of limitations.[4]

The county court of the county of which decedent was a resident at the date of his death, if a resident of this state, has original jurisdiction of the administration of his estate, the rule being the same as in case of the probate of wills,[5] and such jurisdiction is exclusive.[6]

A man is presumed to be dead and his property subject to administration[7] when he has been absent from his residence and nothing can be heard of him for

2 2 Bl. Com. 503, 505.

3 National Bank of Superior v. Bradshaw, 91 Neb. 714, 136 N. W. 1015.

4 Todhunter v. Stewart, 39 Ohio St. 181.

5 Rev. Stats., c. 17, § 74, [1338]; L. O. L., §§ 1150, 1141.

6 Slate's Estate, 40 Or. 352, 68 Pac. 399.

7 Jochumsen v. Savings Bank, 3 Allen (Mass.), 87; Devlin v. Commonwealth, 101 Pa. 273.

seven years,[8] and there are cases in which death will be presumed when the circumstances clearly show that the party must have died at the time of his disappearance.[9] When the application is made in disappearance cases the petitioner should set out and prove the circumstances connected with his disappearance and the efforts made to locate the party. Absence alone does not raise a conclusive presumption.[10]

§ 141. Who is capable of administering an estate.

The law shows more care in examining into the qualifications of an administrator than of an executor. This is because the court presumes that the testator knew the character and business capacity of the person he designated to administer his affairs, and appointed him because he had confidence in him. It is a general rule that all persons who are incapable of being executors are also incapable of being administrators. In all cases, in making the appointment, the suitableness or competency of the person whose appointment is sought should be considered by the court. A minor is incompetent, as is also a person of depraved moral character, an habitual drunkard, a professional gambler, a male or female inmate of a house of prostitution, and a person of disreputable character generally. It makes no difference if the heirs and distributees are of the same class of people as the person

[8] Thomas v. Thomas, 16 Neb. 555, 20 N. W. 846; Cox v. Ellsworth, 18 Neb. 669, 25 N. W. 460; Mitchell v. Kaufman (Neb.), 145 N. W. 247.

[9] Coe v. Knights and Ladies of Security (Neb.), 147 N. W. 112.

[10] Magness v. Modern Woodmen of America, 146 Iowa, 1, 123 N. W. 169.

whose appointment is sought, and the intestate of the same class, the courts will see that the estate is administered by a competent reputable person.[11] A bitter enemy of one or more of the heirs is not a proper person to receive the appointment;[12] nor is a person who has heavy claims or demands against the estate, which would tend to conflict with his official duties.[13] Indebtedness to the estate is not of itself sufficient reason to withhold an appointment; but if the person whose appointment is sought was very heavily indebted to the decedent, it would be more satisfactory to all parties that some other person, not having any personal interest at stake, should receive the letters.[14]

Personal unsuitableness is never overcome by the fact that the applicant is a person of great wealth, of good character and standing, and fully able to give ample security for the performance of the trust.[15] The issue of letters of administration by a county judge to his own son is not void.[16]

In Oregon, a nonresident, judicial officers, except justices of the peace, minors, persons of unsound mind, or who have been convicted of a felony or misdemeanor involving moral turpitude, are disqualified.[17]

11 Emerson v. Bowers, 14 N. Y. 449; McMahon v. Harrison, 6 N. Y. 443; Plaisance's Estate, Myr. Prob. (Cal.) 117; Coraw v. Mowatt, 2 Edw. Ch. (N. Y.) 57.

12 Pickering v. Pendexter, 46 N. H. 69; Pike's Estate, 45 Wis. 391; Drews' Appeals, 58 N. H. 319; Bridgman v. Bridgman, 30 W. Va. 212, 3 S. E. 580.

13 Wright v. Wright, 72 Ind. 49; State v. Reinhardt, 31 Mo. 95; Thayer v. Homer, 11 Met. (Mass.) 104.

14 Succession of Chaler, 39 La. Ann. 308, 1 South. 820; Territory v. Valdez, 1 N. M. 539.

15 Stearns v. Fiske, 18 Pick. (Mass.) 24.

16 Plowman v. Henderson, 59 Ala. 559.

17 L. O. L., § 1173.

Nonresidence is not, in Nebraska, an absolute disqualification, but a matter to be considered by the court, the same as in the case of an executor, in determining the fitness of the appointment,[18] and as between persons between whom the right of preference is equal, the resident should receive the appointment in preference to a nonresident.[19] An alien is capable of holding the appointment, as is also a corporation or a married woman.[20]

§ 142. Who entitled to the appointment.

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

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

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

18 Hammond v. Wood, 15 R. I. 566, 10 Atl. 623.

19 Williams on Executors, 515; Bridgman v. Bridgman, 30 W. Va. 212, 3 S. E. 580; Pickering v. Pendexter, 46 N. H. 69.

20 Guyer's Estate, 65 Pa. 311.

"Third. If there be no such creditor competent and willing to take administration, the same may be committed to such other person or persons as the county judge may think proper."[21]

A husband is always entitled to administer the estate of his deceased wife,[22] subject, however, to the usual rule of competency.[23] His right is defeated by divorce or agreement made during her lifetime.[24]

A widow is usually given preference over the next of kin though she ranks with them,[25] and some courts have favored her so strongly as to hold that her illiteracy or poverty should not deprive her of such right if she was otherwise a suitable person.[26]

Any party entitled to the appointment may nominate a trust company empowered by its articles of incorporation to act as administrator of an estate within the county where it has its principal office.[27]

In Oregon such company may act anywhere in the state.[28]

If the widow or next of kin fail to make their application for thirty days, they lose their right of preference.[29]

21 Rev. Stats., c. 17, § 75, [1339]; L. O. L., § 1150.

22 Ozmun v. Galbraith, 131 Mich. 577, 92 N. W. 101; L. O. L., § 1152. In Oregon his application must be made within thirty days, unless a marriage settlement or other testamentary disposition of her property makes it necessary that some other person be appointed.

23 Section 141, *supra.*

24 2 Bishop, Marriage and Divorce, § 725.

25 Atkinson v. Heasty, 21 Neb. 663, 33 N. W. 206; O'Brien's Estate, 63 Iowa, 622, 19 N. W. 797.

26 Bowersox's Appeal, 100 Pa. 434.

27 Rev. Stats., c. 14, § 195, [743].

28 Laws 1913, p. 722.

29 Spencer v. Wolf, 49 Neb. 8, 67 N. W. 859; In re Miller, 32 Neb. 480, 49 N. W. 427; L. O. L., § 1151.

§ 143. Next of kin.

The term "next of kin" means nearest blood relations, and embraces none not included in the statutes of distribution and descent, those who take the estate by inheritance.[30] It includes and is limited to those persons to whom at common law administration of estates could be granted in case of intestacy.[31]

An illegitimate child is next of kin of his mother,[32] and of his father, provided the latter has acknowledged him in the manner provided by statute.[33]

§ 144. Right of creditor to administer.

A creditor has no right of preference to be appointed administrator of the estate of his debtor, unless the widow or next of kin neglect to make application within thirty days from the death of decedent.[34]

In Oregon, if the widow or next of kin neglect to apply for administration within the thirty days and a creditor apply within ten days thereafter, the county judge may, in his discretion, direct that a citation issue to them if they reside in the county, requiring them to apply for or renounce their right, and if they fail to apply within forty days from the death of the decedent, they are deemed to have renounced their rights.[35]

30 Perry v. Scaife, 126 Wis. 405, 105 N. W. 120. See, also, Tables of Next of Kin.

31 2 Bouvier's Law Dict.; Warren v. Englehart, 13 Neb. 284, 13 N. W. 401.

32 Rev. Stats., c. 10, [1274]; L. O. L., § 7351.

33 Rev. Stats., c. 17, § 9, [1273]; In re Pico's Estate, 56 Cal. 413. Sections 437, 438, *post*.

34 Atkinson v. Hasty, 21 Neb. 663, 33 N. W. 206.

35 L. O. L., § 1151; Ramp v. McDaniel, 12 Or. 115, 6 Pac. 456; Cusick v. Hammer, 25 Or. 473, 36 Pac. 525.

He must be a party who at the date of the death of the decedent was the owner of a *bona fide* demand then due or becoming due thereafter. He acquires no rights by purchasing a claim against the estate.[36] The question as to who is a principal creditor is for the court to determine.[37]

§ 145. Administration of estates of nonresidents.

If a nonresident of this state die leaving an estate to be administered in this state, administration thereof shall be granted by the county court of any county in which there shall be an estate to be administered, and the administration first legally granted shall extend to all the assets of the estate within this state, and shall exclude the jurisdiction of the county court of every other county.[38] The statute has fixed no limitation upon the size of the estate to be administered, and the courts have no right to do so. Jurisdiction is not determined by the value of the estate.[39] In the Bradley case, the estate consisted of a pocketbook containing four dollars in money, a suit of clothes worn by the intestate at the time of his death, an account against a party for twenty-five dollars, and a claim against the Missouri Pacific Railway Company for injuries which caused his death. In Horton v. Trom-

36 Lentz v. Pilert, 60 Md. 296; Wilkinson v. Conarty, 65 Mich. 614, 32 N. W. 841.

37 Atkinson v. Hasty, 21 Neb. 663, 33 N. W. 206; Cusick v. Hammer, 25 Or. 472, 36 Pac. 525.

38 Comp. Stats., c. 23, § 177; Spencer v. Wolfe, 49 Neb. 8, 67 N. W. 858; Missouri Pac. Ry. Co. v. Bradley, 51 Neb. 596, 71 N. W. 283.

39 Missouri Pac. Ry. Co. v. Bradley, 51 Neb. 596, 71 N. W. 283; City of Horton v. Trompeter, 53 Kan. 150, 35 Pac. 1106; Union Pac. Ry. Co. v. Dunden, 37 Kan. 1, 14 Pac. 501.

peter the assets consisted of two dollars and twenty-five cents in cash, and a cause of action for injuries which resulted in death. The removal of the property to another state before the hearing on the application for appointment does not deprive the court of jurisdiction. If the personalty was in the county at the time of his death, it vested in the administrator, when appointed, by relation from the death of the intestate, and the fact that it was removed to another state is immaterial.[40]

Administration may be granted of the estate of either a resident or nonresident whose sole assets are real estate.[41] The right of preference, when demanded, should be allowed the same as in cases of residents, and the procedure is the same.

§ 146. Appointment of administrator when assets consist of a cause of action for death of intestate.

When the death of the intestate was caused by the wrongful act, neglect or default of another party, and a cause of action would accrue therefor under the statutes,[42] this cause of action, of itself, is such an asset as gives a county court jurisdiction to appoint an administrator to prosecute the same.[43] Any other rule might prevent the enforcement of the provisions of said act, and the fact that the chapter gives such right

40 Bradley v. Missouri Pac. Ry. Co., 51 Neb. 653, 71 N. W. 282.

41 Moore's Estate v. Moore, 33 Neb. 509, 50 N. W. 443.

42 Section 203, *post*.

43 Missouri Pac. Ry. Co. v. Lewis, 24 Neb. 848, 40 N. W. 401; Missouri Pac. Ry. Co. v. Bradley, 51 Neb. 596, 71 N. W. 283; Findlay v. Chicago & G. T. R. Co., 106 Mich. 700, 64 N. W. 732; Hutchins v. St. Paul, M. & M. Ry. Co., 44 Minn. 5, 46 N. W. 79.

of action to the personal representative, and to him alone, implies the right to appoint, if necessary, an administrator to enforce it and administer the proceeds in accordance with the statute. Although the intestate may have received the injuries which caused his death, and death itself occurred in another state, such facts would not deprive the county courts of this state of jurisdiction to issue letters of administration.[44]

§ 147. Petition for appointment.

The application for appointment of an administrator must be by petition to the county court. It may be filed by anyone interested in the estate, such as an heir, the surviving spouse or a creditor.[45] A county to which the decedent died indebted for taxes is not a lawful petitioner.[46] The petition is necessary to give the court jurisdiction.[47] It must allege the death of the decedent and his residence at the time thereof;[48] that he left an estate to be administered,[49] or if a nonresident of the state that he died seised of real estate or possessed of personal property within the county in which application was made.[50] It should set up the names of the widow and next of kin and the ages of

44 Missouri Pac. Ry. Co. v. Lewis, 24 Neb. 848, 40 N. W. 401.

45 Shipman v. Butterfield, 47 Mich. 487, 11 N. W. 283.

46 Board of Commrs. Dawes Co. v. Furay, 5 Neb. Unof. 507, 99 N. W. 271.

47 Rev. Stats., c. 17, § 91, [1355]; L. O. L., § 1157; In re Burk's Estate, 66 Or. 286, 134 Pac. 12.

48 Spencer v. Wolfe, 49 Neb. 8, 67 N. W. 858; Moore's Estate v. Moore, 33 Neb. 509, 50 N. W. 443; Moore v. Willamette C. Co., 7 Or. 359.

49 Larson v. Union Pacific R. R. Co., 70 Neb. 261, 97 N. W. 313.

50 Spencer v. Wolfe, 49 Neb. 8, 67 N. W. 858.

those, if any, who are minors. A particular description of the property is not necessary.[51]

When it is filed more than thirty days after the date of the death of the intestate, it need not allege that the widow and next of kin are unsuitable or incompetent to discharge the trust, or that they have failed to petition for letters.[52] If filed more than two years after such death, and the appointment of "some other suitable person as the court might think proper" is prayed for, it should allege that there are no creditors competent or willing to accept the trust.[53] It should be verified by the petitioner, but failure to do so does not deprive the court of jurisdiction.[54]

In Oregon verification is necessary.[55]

Form No. 57.

PETITION FOR LETTERS OF ADMINISTRATION.

[Title of Cause and Court.]

Your petitioner, C. B., widow of said A. B., late of said county, deceased, respectfully represents unto the court that said A. B. departed this life at his residence in said county on the ——— day of ———, 19—; that he was, immediately preceding his death, a resident and inhabitant of said county, and was possessed of real and personal estate in said county of about the value of ——— dollars ($———). Your petitioner further shows that no last will and testament of said A. B. has been discovered, nor is your petitioner aware of the existence of any such instrument, and your petitioner believes that said A. B. died intestate; that said A. B. left, him surviving, a widow, your petitioner, who now resides at ———, and children as follows: [Give names and ages of all the children. If deceased left no widow or chil-

51 Spencer v. Wolfe, *supra.*

52 In re Miller, 32 Neb. 489, 49 N. W. 427.

53 Atkinson v. Hasty, 21 Neb. 663, 33 N. W. 206.

54 In re Miller, 32 Neb. 480, 49 N. W. 427.

55 L. O. L., § 82.

dren surviving, give names, ages, if minors, and residences, as far as known, of his heirs at law. If not known, so state.]

Your petitioner therefore prays that letters of administration may be granted to her upon the goods, chattels, rights, and credits of said deceased.

Dated this ——— day of ———, 19—.

(Signed) C. B.

[Add verification, Form No. 5.]

§ 148. Notice of hearing.

Upon the filing of a petition containing the required jurisdictional allegations, it is the duty of the court to fix a time and place for hearing and give notice thereof.[56] Service of the notice is made on all persons interested the same as on petition for the probate of wills, by publication in some newspaper of the county designated by the court on the request of the petitioner, or by personal service, as the court may direct.[57] The usual practice is for the court to make a formal order fixing the time and place for hearing, and directing how service shall be made. The order may constitute the notice and be served as directed, or notice prepared and served according to such order.

If the order is defective, but the proof of publication shows that the notice was actually published as the law provides, the service is good.[58]

56 Larson v. Union Pacific R. R. Co., 70 Neb. 261, 97 N. W. 313.

57 Rev. Stats., c. 17, § 91, [1355].

58 Brusha v. Hawke, 87 Neb. 254, 126 N. W. 1079.

Form No. 58.

NOTICE OF HEARING ON PETITION FOR LETTERS OF ADMINISTRATION.

[Title of Cause and Court.]

To all persons interested in said estate:

Notice is hereby given that at the county courtroom in the city of ———, said county, on the ——— day of ———, 19—, at the hour of — A. M., the following matter will be heard and considered: The petition of C. D. for letters of administration upon the estate of A. B., deceased.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

§ 149. Hearing on petition for letters.

The hearing should be held on the date given in the notice, unless for good reason a continuance is granted. Where the application is neither heard nor postponed, the court treats it as abandoned. The proceedings must be commenced again, the same as though no petition had been filed or notice given. In a case in which, two years after the date set for the hearing, a new application was filed, which was defective in substance, and was acted upon by the court at once, without any notice being given, the whole proceeding was treated as an absolute nullity, entirely worthless for administration, and the appointment as subject to collateral attack in an action brought by the administrator.[59]

The burden of proof on the hearing is on the petitioner,[60] and the following facts must be established by competent testimony:

First. The death of the decedent intestate.

59 Elgutter v. Missouri Pac. Ry. Co., 53 Neb. 748, 74 N. W. 255.
60 Weeks v. Sego, 9 Ga. 199.

Second. That at the date of his death he was a resident of the county, and left an estate to be administered; or that he was a nonresident, and left an estate within the county. The value of the estate is immaterial.[61]

Third. That the party whose appointment is sought is competent, whether entitled to preference or not.[62]

Any person having any interest in the estate may appear and contest any of the material allegations of the petition, may object to the appointment of the proposed administrator for any sufficient reason, and set up his own right to the same. Such persons are limited to the widow, next of kin and creditors. A debtor has no authority or right to object to the appointment of any person as administrator of his creditor.[63] Heirs who appear on the hearing waive any right to afterward raise the question of insufficient notice.[64]

§ 150. Hearing—Selection of administrator.

The rule governing the appointment of an administrator is that the right to administer upon an estate should as far as possible follow the right of property therein, thereby keeping its avails in the control of those entitled to share in them under the laws of distribution and descent.[65] At the same time the court is not compelled to issue letters to any of the next of

61 Bradley v. Missouri Pac. Ry. Co., 51 Neb. 653, 71 N. W. 282.

62 Larson v. Union Pacific R. R. Co., 70 Neb. 261, 97 N. W. 313.

63 Bradley v. Missouri Pac. Ry. Co., 51 Neb. 653, 71 N. W. 282; Chicago, B. & Q. Ry. Co. v. Gould, 64 Iowa, 343, 20 N. W. 464.

64 Spencer v. Wolfe, 49 Neb. 8, 67 N. W. 858.

65 Goods of Gill, 1 Hagg. Ecc. 341; Leverett v. Dismukes, 10 Ga. 98; Hall v. Thayer, 105 Mass. 219.

kin or their nominees. If he does not find them competent he may appoint an outside party.[66]

A common-law widow is entitled to letters, but if her right is questioned, she must prove her marriage and competency. She cannot testify to conversations between herself and the decedent constituting a verbal contract of marriage,[67] the opposing parties being representatives of the estate within the terms of the code.[68]

In the case of a contest between two parties of the same degree of kinship to the decedent, the court may solve the problem by appointing the two as coadministrators,[69] and as between an heir and a nominee of an heir not related to the decedent by appointing the nominee.[70] The court should be governed by sound discretion rather than abstract rules of law in appointing an administrator. His action in making the selection is not subject to review when he acted within his jurisdiction, unless it clearly appears that the right has been abused.

Under the Oregon practice notice to interested parties is not required. The court acquires jurisdiction by the filing of a verified petition, and if it appears therefrom that the estate is one which is subject to administration in the county and that the applicant is entitled to letters, it is the duty of the court to fix the amount of the bond and order the issue of letters. There is no time fixed by the statute within which the

66 Spencer v. Wolfe, 49 Neb. 8, 67 N. W. 858; Brown v. Harmon, 76 Neb. 28, 106 N. W. 1003, 107 N. W. 1004.

67 Sorenson v. Sorenson, 56 Neb. 729, 77 N. W. 68.

68 Kroh v. Heins, 48 Neb. 691, 67 N. W. 771.

69 Taylor v. Delancey, 2 Caines Cas. (N. Y.) 143.

70 Brown v. Harmon, 76 Neb. 28, 106 N. W. 1003, 107 N. W. 1004.

bond must be filed, and as in the case of letters testamentary, a reasonable time should be allowed for that purpose.

This power should not be used to reward his friends and relations or to advance his social and political position, but exercised solely for the good of the estate, and so used as will most conduce to the highest good of those interested therein. Other things being equal, a person of good business capacity is preferred, and in all cases one of known integrity should be selected.[71]

§ 151. Order granting letters.

The appointment of an administrator should be preceded by a finding of fact, and based thereon,[72] but if it appears that a proper petition was filed, and due service of the notice of the same had,—in fact, that the court had jurisdiction,—an appointment of an administrator without a proper finding to support it is, at most, merely erroneous, and not void.[73]

Form No. 59.

ORDER FOR APPOINTMENT OF ADMINISTRATOR.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this matter came on for hearing on the petition of C. B. for his appointment as administrator of the estate of A. B., deceased, and it appearing to the court from the records and files that notice of said hearing has been given to all per-

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71 Atkinson v. Hasty, 21 Neb. 663, 33 N. W. 206; Brown v. Harmon, 76 Neb. 28, 106 N. W. 1003, 107 N. W. 1004; Lareon v. Union Pacific R. R. Co., 7 Neb. 261, 97 N. W. 313.

72 In re Miller, 32 Neb. 480, 49 N. W. 427.

73 Doty v. Sumner, 12 Neb. 378, 11 N. W. 464; Lewis v. Watrus, 7 Neb. 477; Hansen v. Bergquist, 9 Neb. 278, 2 N. W. 858; In re Miller, 32 Neb. 480, 49 N. W. 427.

sons interested in said estate by publication thereof for three weeks in the ———, a newspaper published in said county, as ordered by said court, C. B. and G. H. were sworn and testified. Upon consideration whereof, the court finds that A. B. departed this life intestate on the ——— day of ———, 19—; that he was, at the date of his death, a resident of said county, and that he left an estate consisting of personalty of the estimated value of $———;* that said C. B. is a son and next of kin of said A. B., and is entitled to be appointed administrator of said estate.

It is therefore ordered that letters of administration upon said estate issue to said C. B. upon his giving bond in the sum of $———. and taking the oath required by law.

(Signed) J. K.,
County Judge.

If there is a widow, and she has waived her right of preference, insert at * that C. D., widow of said A. B., has waived her preference as administratrix, and requested the court to appoint her son, C. B., as administrator. If there are other sons, any one of whom is entitled to the appointment, the order should show that they consented to the appointment, and the same is true of other next of kin of the same degree.

§ 152. Bond of administrator.

An administrator must give a bond, before entering upon the discharge of his duties, in such sum as the county judge may direct, with surety or sureties as he may approve, with the same conditions therein as is required in the case of an executor, and with such variations only as may be necessary to make it applicable to the case of an administrator.[74] The amount of the bond is fixed by the court. It should be large enough to protect the estate from loss, and should never be less than the estimated value of the assets of the estate, including income from the realty, that may be at any time in the hands of the administrator.[75] In

74 Rev. Stats., c. 17, § 76, [1340]; L. O. L., § 1153.

75 Normand's Admr. v. Grognard, 17 N. J. Eq. 425.

fixing the amount, the value of the realty need not be taken into consideration, as the administrator cannot dispose of it, but the income from it should be.[76]

Form No. 60.

ADMINISTRATOR'S BOND.

Know all men by these presents, that we, A. B., as principal, and ———, as suret—, are held and firmly bound unto the county judge of ——— county, Nebraska, in the penal sum of ——— dollars, for the payment of which well and truly to be made we jointly and severally bind ourselves.

Dated this ——— day of ———, 19—.

Whereas, ——— has been named in the last will and testament of ———, deceased, as executor, and has accepted said trust:

Now, the condition of this obligation is such that, if the said ——— shall make and return to the county court of said county, within three months, a true and perfect inventory of all the goods, chattels, rights, credits, and estate of the deceased which shall come to his possession or knowledge, or to the possession of any other person for him; to administer according to law all the goods, chattels, rights, credits, and estate which shall at any time come to his possession, or to the possession of any other person for him, and out of the same to pay and discharge all debts and charges, or such dividends thereon as shall be ordered and decreed by the county judge; to render a true and just account of his administration to the county judge within one year, and at any other time when required by said court; and to perform all orders and decrees of the county court by said administrator to be performed in the premises,—then this obligation to be null and void; otherwise to be and remain in full force and effect.

A. B.,
Principal.

———,
Surety.

When two or more persons are appointed, a joint bond with sureties or separate bonds may be given.[77]

[76] Ellis v. Witty, 63 Miss. 117.

[77] Rev. Stats., c. 17, § 90, [1354].

The bond must strictly comply with the terms of the statute.[78]

Under the Oregon practice the amount of the bond is fixed by the same rule as that of an executor, and its amount can be reduced by application to the county court and a deposit of assets with a surety company in the same way.[79] It is in the same form as the bond of an executor.[80]

§ 153. Oath of administrator.

The uniform practice in Nebraska is to require of the administrator an oath of office before entering upon his duties. It has been held, however, by the federal court that a failure to take and file the usual oath did not deprive him of power to discharge the duties of his office.[81]

Form No. 61.

OATH OF ADMINISTRATOR.

State of Nebraska,
County of ———,—ss.

I do solemnly swear that I will well and truly administer all and singular the goods, chattels, rights, credits and effects of A. B., deceased, and pay all just claims and charges against his estate, so far as said goods, chattels and effects shall extend, and law charge me, and that I will do and perform all other acts required of me by law to the best of my knowledge and ability. So help me God.

C. D.

Subscribed and sworn to before me this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

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78 Tidball v. Young, 56 Neb. 261, 78 N. W. 507.
79 L. O. L., § 1153; Laws 1913, p. 726.
80 See § 46a.
81 Leahy v. Haworth, 141 Fed. 850.

Form No. 62.

LETTERS OF ADMINISTRATION.

State of Nebraska,
County of ———,—ss.

The people of the state of Nebraska to C. D., of said county, greeting:

Whereas, A. B., lately departed this life intestate, being at or immediately previous to his death an inhabitant of the county of ———, in the state of Nebraska, and having, while he lived, and at the time of his decease, estate within the county of ——— to be administered, by means whereof the ordering and granting administration of all and singular the goods, chattels, rights, credits, and estate whereof the said deceased died possessed in the state of Nebraska, and also the auditing, allowing and final discharging the account thereof, doth appertain unto said county court for said county of ———; and being desirous that the goods, chattels, rights, credits and estate of said intestate may be well and faithfully administered, applied and disposed of, do grant unto you, the said C. D., full power, by these presents, to administer and faithfully dispose of, according to law, all and singular the goods, chattels, rights, credits, and estate of said deceased, within the state of Nebraska, which shall at any time come to your possession, or to the possession of any other person for you, and to ask, gather, levy, recover and receive all the goods, chattels, rights, credits and estate whatsoever of said deceased, which to him, while he lived, and at the time of his death did belong, and to pay and discharge all debts and charges chargeable on the same, or such dividends thereon as shall be ordered and decreed by said county court. Hereby requiring you to make and return to said court, within three months, a true and perfect inventory of all the goods, chattels, rights, credits, and real estate of said deceased, which shall come to your possession or knowledge, or to the possession of any other person for you, and also to render a just and true account of your administration to said court, within one year, and at any other time when required by said court, and to perform all orders and decrees of said court by you to be performed in the premises. And do by these presents, depute, constitute and appoint you, the said C. D., administrator of all and singular the goods, chattels, rights, credits, and estate of the said A. B., deceased.

In testimony whereof, I have hereunto set my hand and have caused the seal of said county court to be hereunto affixed, at the city of ———, Nebraska, this ——— day of ———, 19—.

(Seal)

(Signed) J. K.,
County Judge.

Form No. 62a—Oregon.

LETTERS OF ADMINISTRATION.

State of Oregon,
County of ———,—ss.

To all persons to whom these presents shall come, greeting:

Know ye, that it appearing to the court aforesaid, that A. B. has died intestate, leaving at the time of his death property in this state, such court has duly appointed C. D. administrator of the estate of said A. B.; this therefore authorizes the said C. D. to administer the estate of said A. B., deceased, according to law.

In testimony whereof I, E. F., clerk of the county court, have hereunto subscribed my name and affixed the seal of said court this ——— day of ———, 19—.

(Signed) E. F.,
Clerk County Court.

§ 154. Letters of administration cannot be attacked collaterally.

If the petition for appointment alleges the necessary facts to confer jurisdiction, and the order for appointment shows that the statutory notice has been given, the order is not subject to collateral attack, and can only be set aside on appeal.[82] Courts have held that, where the order or finding of the county judge recites that due service of notice of the hearing has been had upon the parties interested, the proceedings thereunder cannot be collaterally attacked, even though it appear from the records that sufficient notice has not been given.[83] The court is presumed to have acted

82 Moore's Estate v. Moore, 33 Neb. 509, 50 N. W. 443; Missouri Pac. Ry. Co. v. Lewis, 24 Neb. 848, 40 N. W. 401; Jackson v. Phillips, 57 Neb. 189, 77 N. W. 683; Larson v. Union Pac. R. R. Co., 70 Neb. 261, 97 N. W. 313.

83 Shawhan v. Loffer, 24 Iowa, 217; Pursley v. Hayes, 22 Iowa, 11; Tharp v. Brenneman, 41 Iowa, 251.

on sufficient evidence.[84] If the petition insufficiently state the material facts, and there is not entire omission to state them, the appointment would still not be subject to collateral attack.[85] So strictly is this rule adhered to, that in Roderigas v. East River Savings Institution,[86] the court held that an administratrix could not recover from a bank money deposited there by her intestate, but which had been paid by the bank to a person who had been appointed administrator of his estate while he was still alive, the first appointment having been made on a petition and evidence showing that he had been absent for more than seven years.

Where the records show on their face that the court never had jurisdiction to make the appointment, it will be held void, even though attacked collaterally.[87]

The appointment of a person out of the order of preference before the right of the widow or next of kin has expired is erroneous and not void. They are the only parties who can take advantage of it.[88]

84 Moore's Estate v. Moore, 33 Neb. 848, 40 N. W. 401; Johnson v. Johnson's Estate, 66 Mich. 525, 33 N. W. 413.

85 Hyde v. Redding, 74 Cal. 493, 16 Pac. 380; Chase v. Ross, 30 Wis. 267.

86 63 N. Y. 460.

87 Elgutter v. Missouri Pac. Ry. Co., 53 Neb. 748, 74 N. W. 255.

88 Ramp v. McDaniel, 12 Or. 108, 6 Pac. 456.

CHAPTER XIV.

REMOVAL OF EXECUTORS AND ADMINISTRATORS.

§ 155. Ending of Authority Pending Administration.
156. Removal of Revocation of Letters.
157. Personal Representative cannot be Removed Except for Cause.
158. Removal on Account of Nonresidence.
159. Removal for Failure to Observe Statutory Requirements.
160. Removal for Mismanagement.
161. Removal for Incapability and Unsuitableness.
162. Removal of Administrator by Subsequent Probate of Will.
163. Removal of Executrix or Administratrix by Marriage.
164. Removal on Account of Insufficiency of Bond.
165. Proceedings to Remove Personal Representative.
166. Who may File Petition.
167. Hearing on Charges.
168. Order of Removal.

§ 155. Ending of authority pending administration.

The authority of an executor or administrator over the estate of the decedent may be ended before the administration is finished, by the acceptance of his resignation,[1] by revocation of the probate of the will[2] or of letters of administration,[3] and by his removal for cause.[4]

It was formerly held that an executor who had once qualified and entered upon the discharge of his duties could not voluntarily resign his trust.[5] The rule now is that his resignation and its acceptance by the court

1 Trumble v. Williams, 18 Neb. 148, 24 N. W. 716.

2 Section 113, *supra.*

3 Moore v. Moore's Estate, 33 Neb. 509, 50 N. W. 443.

4 Section 158 et seq.

5 Washington v. Blunt, 43 N. C. 253; Webb v. Keller, 35 La. Ann. 55, 1 South. 423.

from whence the letters issued is in effect his removal for apparently sufficient cause.[6]

Under the Oregon practice, before making his application, he must publish a notice of his intention to apply therefor in some newspaper in general circulation in the county, for the period of four weeks prior thereto, and it is further made to appear that he is not in default in any matter connected with the duties of his trust. He is also required to pay the cost of the proceeding, and if his application is allowed, shall surrender his letters, and his powers cease.[7] A compliance with the terms of this statute is necessary.[8]

The executor or administrator should file an account of his administration, and the same should be allowed before the resignation is accepted.

§ 156. Removal by revocation of letters.

Revocation of the probate of a will revokes, *per se*, the letters testamentary issued thereon.[9] Letters of administration may be revoked for lack of jurisdiction or for fraud. If the records show that the court failed to acquire jurisdiction by reason of a defective petition, or other cause, they are void, and the court which granted them has power to revoke the apparent authority of the administrator.[10]

Where they were obtained by fraud or collusion, the right of the parties interested to have them annulled and the administrator removed is generally recog-

6 Trumble v. Williams, 18 Neb. 148, 24 N. W. 716.

7 L. O. L., § 1176.

8 Ramp v. McDaniel, 12 Or. 108, 6 Pac. 456.

9 Section 113, *supra*.

10 Moore v. Moore's Estate, 33 Neb. 509, 50 N. W. 443.

nized.[11] If on account of lapse of time such revocation cannot be made at the term at which they were granted, it would seem that the general original jurisdiction given the county court by the constitution over administration of estate would give it jurisdiction over a petition to revoke administration.[12] Revocation is an attack on the right of the executor or administrator to administer the estate. Proceedings for removal admit that right but would end it for good and sufficient cause.

§ 157. Personal representative cannot be removed except for cause.

When the court has regularly issued letters testamentary or of administration, it cannot remove the appointee except for the causes recognized by the statute as sufficient, and in the manner therein prescribed.[13] The power of removal is vested by statute in the court under the seal of which the officer receives his appointment and to which he is accountable.

If an executor or administrator shall reside out of this state, or shall neglect after due notice by the county judge to render his account and settle the estate according to law, or perform any decree of such court, or shall abscond or become insane, or otherwise unsuitable or incapable to discharge the trust, the court may, by an order therefor, remove him.[14] It is a power of great importance, and should not be arbitrarily or

11 Wernse v. Hall, 101 Ill. 423; McCabe v. Lewis, 76 Mo. 298.
12 See Williams v. Miles, 63 Neb. 859, 89 N. W. 451.
13 In re People's Estate, 38 S. C. 41, 16 S. E. 286.
14 Rev. Stats., c. 17, § 84, [1248].

capriciously exercised, but only when the best interests of the estate demand it.[15]

Conviction of a felony, or of a misdemeanor involving moral turpitude or unfaithfulness or neglect of his trust, and becoming a nonresident, are grounds for removal in Oregon.[16] On account of there being no available opportunity for a party to object to the appointment of an executor or administrator in Oregon, applications for their removal are necessarily more frequent than in Nebraska.

§ 158. Removal on account of nonresidence.

The nonresidence of an executor or administrator, in order to furnish sufficient cause for his removal, must be permanent. He must have actually removed his residence or domicile from the state. Absence from the state alone is not sufficient.[17] Removal from the state does not, *eo instanti*, remove him from his office; an adjudication of the court is necessary.[18] If letters were issued to a person who was on the date of their issue a nonresident, his continued residence without the state is not a ground for his removal.[19]

§ 159. Removal for failure to observe statutory requirements.

A strict compliance with all the statutory provisions defining his duties is required of an executor or administrator, and he may be removed from office for failure

15 Dalyrmple v. Gamble, 66 Md. 298, 8 Atl. 468.

16 L. O. L., §§ 1159, 1160.

17 Griffith v. Frazier, 8 Cranch (U. S.), 25; Succession of McDonough, 7 La. Ann. 472.

18 Yarborough v. Ward, 34 Ark. 204; State v. Rucker, 59 Mo. 17; Hardaway v. Parham, 27 Miss. 103.

19 Wiley v. Brainerd, 11 Vt. 107.

to perform any of them; as where he qualified and did nothing else;[20] for failure to make and file an inventory within the time required by law, no sufficient cause being shown for such neglect, and no effort made to do so;[21] for failure to make and file his annual or final account after being cited by the court to do so, there being money in his hands belonging to the estate;[22] for paying creditors of an inferior class before those of a superior class, the assets being insufficient to pay all in full;[23] and for failure to make a final settlement and distribution of the estate.[24]

§ 160. Removal for mismanagement.

The usual remedy for mismanagement, neglect or unfaithfulness to the duties of the trust by which a loss results to the estate is by an action on the bond after the final account has been heard and allowed. The law affords a more summary procedure by making such acts a cause for removal. Mismanagement of an estate consists of such acts or neglects as indicate a willful disregard of the duties and responsibilities of the office and which either have resulted or probably will result in a loss to those interested in the estate.[25]

20 Luich v. Medin, 3 Nev. 93; Marsh v. People, 15 Ill. 384.

21 McFadden v. Ross, 93 Ind. 134; In re Holladay's Estate, 18 Or. 164, 22 Pac. 750; Mills v. Mills, 22 Or. 210, 29 Pac. 444; In re Barnes' Estate, 36 Or. 202, 69 Pac. 464; In re Mark's Estate, 66 Or. 244, 133 Pac. 778.

22 Evans v. Buchanan, 15 Ind. 438; Taylor v. Biddle, 71 N. C. 1; Armstrong v. Stowe, 77 N. C. 360; Succession of Head, 28 La. Ann. 800.

23 Foltz v. Allen, 17 Ill. 487.

24 Hussey v. Coffin, 1 Allen (Mass.), 354.

25 In re Partridge's Estate, 31 Or. 307, 51 Pac. 82.

Acts of this character consist, among others, of a failure to obey a lawful order or decree of the court which has jurisdiction to make the same;[26] in making false reports to the court,[27] of a general neglect of his duties,[28] of mingling the funds of the estate with those of his own and not keeping a strict and accurate account of his dealings with the estate, and of the business affairs of the estate generally;[29] in loaning money belonging to the estate when there were claims against the estate allowed and unpaid, the money so loaned not being repaid;[30] of having transferred to himself, in behalf of the estate, stock of a corporation, and then selling the same without leave of the court, certificates being taken in his own name;[31] of refusing to defend against claims, although notified that the demands made were unjust and not a proper charge against the estate, and colluding and conspiring with the claimants to enforce such claims, to the detriment of the estate;[32] of failure to reduce to possession assets of the estate transferred by deceased in fraud of his creditors, when the creditors have given him a sufficient bond of indemnity;[33] of intentionally omitting items of assets with which he should have been charged rendering a false account of sales, turning

26 Mills' Estate, 40 Or. 428, 67 Pac. 107; Aldridge v. McClelland, 34 N. J. Eq. 237.

27 In re Mills' Estate, 40 Or. 428, 67 Pac. 107.

28 In re Holliday's Estate, 18 Or. 168, 22 Pac. 750; In re Mark's Estate, 66 Or. 344, 133 Pac. 777.

29 Hake v. Stott's Exrs., 5 Colo. 140.

30 State v. Johnson, 7 Blackf. (Ind.) 529.

31 Levering v. Levering, 64 Md. 399, 2 Atl. 1.

32 Cox v. Chalk, 57 Md. 569.

33 Andrews v. Tucker, 7 Pick. (Mass.) 250.

over assets of the estate to a third party, with an evident intent of having him sell the same; of committing waste, and in fact in any serious misapplication of the funds of the estate, where it appears that the parties interested therein have been injured thereby.[34]

A personal representative cannot be removed for errors of judgment which may have resulted disastrously to the estate, it appearing that he acted in good faith and without wrongful intent; nor for mistake and error in his accounts which are not intentional;[35] nor for failure to attempt the collection of doubtful claims;[36] nor for delay caused by litigation, it appearing that he has acted in good faith.[37]

§ 161. Removal for incapability or unsuitableness.

The term "incapable" as used in reference to the qualifications of an executor or administrator means a lack of sufficient knowledge, education or experience, or of physical and mental ability to attend to the business of the estate.[38]

The term "unsuitable" does not necessarily imply a lack of either character, ability or experience, but is such a condition arising from the circumstances of the estate, and conditions existing between the parties, as prevent him from acting impartially in the interests of all. Such conditions may arise from in-

34 Gray v. Gray, 39 N. J. Eq. 332; Edwards v. Cobb, 95 N. C. 4; Succession of Decuir, 23 La. Ann. 166.

35 McFadden v. Council, 11 N. C. 105; Succession of Sparrow, 39 La. Ann. 696.

36 In re Stow, Myr. Prob. (Cal.) 97.

37 Andrews v. Carr, 2 R. I. 117.

38 Emerson v. Bowers, 14 Barb. (N. Y.) 658.

debtedness to the estate, an interest in claims or being at enmity with the heirs, devisees or legatees.[39]

An executor or administrator who is alleged to be the fraudulent grantee of his decedent would be clearly unsuitable, should it be necessary to bring an action to set aside the transfer.[40]

§ 162. Removal by subsequent probate of will.

The subsequent probate of the will of a decedent acts *per se* as a removal, or perhaps, more properly speaking, a revocation of the letters of the executor or administrator. The order admitting the will to probate does not immediately deprive him of all power over the assets of the estate. Until letters testamentary or of administration with the will annexed issue, he has charge of the estate as before.[41]

This matter is governed by statute in Oregon, which provides that if the will be subsequently proven, the letters of administration shall be revoked, and that revocation of the probate of a will has the same effect on letters testamentary or of administration with the will annexed.[42]

§ 163. Removal of executrix or administratrix by marriage.

The marriage of a *feme sole* executrix or administratrix is a ground which requires the revocation of

39 Melberg's Appeal, 86 Pa. 129; Kimball's Appeal, 45 Wis. 391; Thayer v. Hosmer, 11 Met. (Mass.) 104; Gray v. Gray, 39 N. J. Eq. 332.

40 Marks v. Coats, 37 Or. 611, 62 Pac. 488; In re Manser's Estate, 60 Or. 244, 118 Pac. 1024; In re Mark's Estate, 66 Or. 256, 133 Pac. 777.

41 State v. Rucker, 59 Mo. 19; Elwell v. Universalist Church, 62 Tex. 220; Dwight v. Simon, 4 La. Ann. 490.

42 L. O. L., § 1158.

her letters. Her husband cannot act for her.[43] Until her successor is appointed and qualified she is entitled to the possession of the estate. Application to the court for her removal should be made as in other cases.[44]

In Oregon marriage is not by express statute made a ground for removal as in Nebraska, and the proviso in section 1173, L. O. L., that nothing in that act or any other act or law of the state of Oregon should be held to disqualify a married woman from acting as executrix or administratrix, would seem to indicate that she could not be removed should she marry after the receipt of letters.

§ 164. Removal on account of insufficiency of bond.

The county court also has authority to remove a personal representative if his bond shall become insufficient, and he neglect, when called upon, to give a new one. If it shall appear to the court, by the application under oath of any party interested in the bond of an executor or administrator, appointed by the court, that there is a reasonable doubt as to the solvency or sufficiency of the sureties upon any such bond, such court shall cause such executor or administrator to show cause why he shall not execute a new bond in the premises, with sureties to be approved by the court as provided by law.[45] Such insufficiency may arise from the death or insolvency of a surety,[46] or by the finding of property belonging to the estate after the

[43] Rev. Stats., c. 17, § 69, [1333].

[44] Teschemacher v. Thompson, 18 Cal. 11; Buckley v. Buckley, 16 Nev. 180.

[45] Rev. Stats., c. 16, § 81, [1208]; L. O. L., §§ 1161, 1162.

[46] Renfro v. White, 23 Ark. 195; State v. Stroop, 22 Ark. 328.

inventory is made.[47] "If upon the hearing of any such matter the court shall require a new bond with sureties, and such executor or administrator shall fail to comply with the order of the court, he shall be removed from his said trust, * * * and another executor or administrator appointed in his place."[48]

His failure to file the bond within the time fixed by the court operates as a removal from the trust without further action.[49]

Under the Oregon practice, if a new bond is required by the court, an order is entered directing the representative to file a new security within five days or within such further time as the court may direct. The approval of the new undertaking discharges the sureties on the original undertaking from any liability on account of their principal arising from his acts or omissions subsequent thereto.[50]

If an executor has qualified without giving bond, any person interested in the estate who has grounds to believe that the estate has been or will be fraudulently administered or mismanaged may make application to the county court for an order requiring the executor to give the statutory undertaking.[51] The application should be by verified petition and the executor be given an opportunity to be heard. A failure to comply with the order would be a good ground for revoking his letters and removing him.

47 Calhoun v. McKnight, 36 La. Ann. 414.
48 Rev. Stats., c. 16, § 82, [1209].
49 Levy v. Tiley, 4 Or. 393.
50 L. O. L., § 1162.
51 L. O. L., § 1153; Bellinger v. Thompson, 26 Or. 340, 37 Pac. 714.

§ 165. Application for removal of personal representative.

Proceedings to remove an executor or administrator are commenced by the filing of a verified petition setting up the reasons why removal is sought, and the issue of a citation thereon.[52] The application may be made by any person interested in the estate,—devisee, legatee, heir or creditor,[53] the assignee of a legatee,[54] or the guardian of a minor heir,[55] a party who has performed services for the estate, his claim for which has been allowed.[56] When filed by a creditor, it must show that his claim has been allowed, and that he has been or will be injured by the maladministration of the estate.[57]

A surety on the administration bond has such an interest in the estate as to give him power to bring the action.[58] A party entitled to administer and has never waived his right is the only party entitled to petition to remove the administrator on the ground that letters should have been issued to him.[59]

The right of a debtor of the estate to petition for removal has been denied by every court except one

52 Rev. Stats., c. 17, § 84, [1348]; L. O. L., § 1159.

53 Hake v. Stott's Exrs., 5 Colo. 140; Brown v. Ventress, 24 La. Ann. 187; White v. Spaulding, 50 Mich. 22, 14 N. W. 684.

54 Yeaw v. Searle, 2 R. I. 164.

55 Yearkes v. Broom, 10 La. Ann. 94.

56 In re Mills' Estate, 40 Or. 428, 67 Pac. 107.

57 Knight v. Hamaker, 33 Or. 154, 54 Pac. 277, 659; In re Mills' Estate, 40 Or. 428, 67 Pac. 107; In re Patten's Estate, 18 D. C. 592.

58 Allen v. Sanders, 34 N. J. Eq. 203.

59 Estate of Wooten, 56 Cal. 322; Mullanphy v. St. Louis Co., 6 Mo. 553; Garrison v. Cox, 95 N. C. 353; Pace v. Openheim, 12 Ind. 533.

that has ever passed upon it, on the ground that he has no interest in the estate.[60]

§ 166. Procedure for removal.

On the filing of a proper petition a citation issues to the executor or administrator.[61]

Under the Oregon practice, the general supervision over administration of estates given the county court by the statute,[62] gives the court power of its own motion, whenever it shall appear that the interests of the estate require it, to issue a notice of his own motion directing the executor or administrator to appear and show cause why he should not be removed, and the court may remove him without such notice where it appears on a hearing on his account that he has been guilty of misconduct such as would demand his removal.[63] No notice to the representative is required when the cause alleged is his removal from the estate.[64]

Personal service of the notice or citation should be had, but where the cause set up is nonresidence and the party is without the state, service by publication is the only kind available.

The notice should set out the reasons why removal is sought. There is no statutory provision for the filing of an answer or forming an issue to be decided by the court. It has been held that the same rule of

60 Missouri Pac. R. R. Co. v. Bradley, 51 Neb. 565, 71 N. W. 283; Missouri Pacific R. Co. v. Jay's Estate, 53 Neb. 747, 74 N. W. 259; White v. Spaulding, 50 Mich. 22, 14 N. W. 684; C. B. & Q. Ry. Co. v. Gould, 64 Iowa, 343, 20 N. W. 464; Penniman v. French, 2 Mass. 140.

61 Rev. Stats., c. 17, § 84, [1348].

62 L. O. L., §§ 1159, 1165.

63 In re Partridge's Estate, 31 Or. 306, 51 Pac. 82.

64 Moore v. Willamette Trans. Co., 7 Or. 386.

laches applies to this as other judicial proceedings, and that the petition should be filed within a reasonable time after the facts have come to the knowledge of the petitioner.[65]

Form No. 63.

PETITION TO REMOVE EXECUTOR OR ADMINISTRATOR.

[Title of Cause and Court.]

Your petitioner, E. F., respectfully represents unto said court that he is a son and an heir at law of said A. B.; that C. D. is the administrator of said estate under letters issued out of and under the seal of said court.

Second. That said C. D. has been guilty of gross maladministration of said estate, and of willful negligence in administering the affairs thereof, in this, that the said C. D., administrator as aforesaid, on, to wit, the ——— day of ———, 19—, paid out from the assets of said estate to one L. M., he, the said L. M., not being an heir or legatee of said estate, the sum of five hundred dollars ($500), which sum said C. D. paid to said L. M. as aforesaid in settlement of his, said C. D.'s individual debt; that said C. D., administrator, has failed to keep the house and other buildings situated upon the following described real estate [describe real estate], he having possession of said real estate as such administrator, in a tenantable state of repair, as required by law, and that, by reason of such failure, said buildings have been vacant for the space of ———, and said estate has sustained damages in the sum of ——— dollars.

Third. That said C. D. has neglected and refused, and still neglects and refuses, to reduce to possession a certain claim of said estate against the B. & M. R. Co., the amount of which is unknown to your petitioner, but which claim can, with due diligence, be enforced by suit.

Fourth. That said C. D. has, since his appointment as aforesaid, become an habitual drunkard.

Your petitioner therefore prays that order may issue to the said C. D., administrator, commanding him to appear and show cause, at a time and place to be therein specified, why the letters of administration on the estate of A. B., deceased, granted to him on the

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65 Hanifan v. Needles, 108 Ill. 403; Schroeder v. Superior Court, 70 Cal. 343, 11 Pac. 651; Murray v. Oliver, 3 B. Mon. (Ky.) 11.

——— day of ———, 19—, by said court, should not be annulled, and that letters of administration *de bonis non* upon said estate be granted to some suitable and competent person, to be determined upon by the court.

Dated this ——— day of ———, 19—.

(Signed) E. F.

[Add verification, Form No. 5.]

§ 167. Hearing on the charges.

An executor or administrator is entitled to be heard in defense of the charges preferred against him.[66] By entering an appearance he waives technical objections, and if the case proceeds to hearing on the merits cannot afterward attack the sufficiency of the petition.[67] Where he personally appeared on the hearing at which letters were granted, he cannot attack the regularity of the proceedings, unless they were absolutely void, and the action should be dismissed.[68]

The burden of proof is on the petitioner, and he must establish one or more of the statutory causes to the satisfaction of the court.[69] Where the cause is such a one as cannot well be contested, like the marriage of a *feme sole,* the proceedings may be less formal,[70] and if gross jurisdictional irregularities appear on the face of the records, the court may set aside the letters of its own motion.[71]

66 In re Partridge's Estate, 31 Or. 297, 51 Pac. 82; Hanifan v. Needles, 108 Ill. 403.

67 In re Barnes' Estate, 36 Or. 278, 59 Pac. 464.

68 Morgan v. Dodge, 44 N. H. 262.

69 Gregg v. Wilson, 24 Ind. 227.

70 Wiley v. Brainerd, 11 Vt. 107.

71 Watson v. Glover, 77 Ala. 323; Broughton v. Bardley, 34 Ala. 694.

Form No. 64.

ORDER TO PERSONAL REPRESENTATIVE TO SHOW CAUSE WHY HE SHOULD NOT BE REMOVED.

[Title of Cause and Court.]

To C. D., Administrator of said Estate:

You are hereby commanded to appear before the county court of said county on the ——— day of ———, 19—, at the hour of 9 A. M. of said day, and show cause why you should not be removed from your office as administrator of said estate for the following reasons as set out in the petition of E. F. therefor: [State substance of charges.]

Dated this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

Form No. 65.

ORDER REMOVING PERSONAL REPRESENTATIVE.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this matter came on for hearing on the petition of E. F. for the removal of C. D. as administrator of said estate for malfeasance in office, the answer of said C. D. and the evidence, and was submitted to the court. Upon consideration whereof the court finds: [State findings of court in substance.]

It is therefore ordered and decreed by said court that said C. D. be removed from his trust as such administrator.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

Form No. 66.

APPLICATION FOR ADDITIONAL SECURITY UPON EXECUTOR'S, ADMINISTRATOR'S OR GUARDIAN'S BOND.

[Title of Cause and Court.]

Your petitioner, L. M., respectfully represents unto said court that on the ——— day of ———, 19—, an order of said court was entered appointing one C. D. administrator of the estate of said A. B., deceased; that on the ——— day of ———, 19—, said C. D. executed a bond as such administrator in the penal sum of ——— dollars

($———), with E. F. and G. H. as sureties, which bond was, on the ——— day of ———, 19—, duly approved as to form and sufficiency of sureties by said court, and filed therein, and thereupon letters of administration upon said estate issued under seal of said court to said C. D.; and that said C. D. is now, and ever since said ——— day of ———, 19—, has been, the duly qualified and acting administrator of the said estate of A. B., deceased; that said E. F., bondsman as aforesaid, is insolvent, and on the ——— day of ———, 19—, filed his voluntary petition in bankruptcy in the district court of the United States for the district of Nebraska, ——— division; that said administrator's bond of said C. D. is therefore impaired, and does not afford adequate security to those interested in said estate of said A. B.

Third. That your petitioner is a son of said A. B., and therefore entitled to a distributive share of said estate.

Fourth. Your petitioner therefore prays that an order to show cause may issue out of and under the seal of this court to the said C. D., commanding him to show cause why an order of said court should not be entered requiring him to execute a new bond in the premises with good and sufficient surety, to be approved by the court, and that, in default of his complying with such order and executing such bond, he be removed from said trust, and that some suitable person, to be designated by the court, be appointed administrator of the estate of said A. B.

Dated this ——— day of ———, 19—.

(Signed) L. M.

[Add verification, Form No. 5.]

Form No. 67.

ORDER TO SHOW CAUSE WHY NEW BOND SHOULD NOT BE GIVEN.

[Title of Cause and Court.]

To C. D., Administrator of the Estate of A. B., Deceased:

You are hereby cited to show cause on the ——— day of ———, 19—, at 9 o'clock A. M., at the county courtroom in said county, why an order of said court should not be entered requiring you to execute a new bond in the premises, with sufficient surety, to be approved by this court, as provided by law.

Dated this ——— day of ———, 19—.

(Seal)

(Signed) J. K.,
County Judge.

Form No. 68.

ORDER REQUIRING NEW BOND.

[Title of Cause and Court.]

Now on this ——— day of ———, 19—, this matter came on for hearing on the application, under oath of E. F., praying that C. D., administrator of said estate, be required to give an additional bond with surety to be approved by the court, and the evidence, and was submitted to the court.

Upon consideration whereof the court finds that personal service of the order to show cause heretofore issued in said matter was made on said C. D. on the ——— day of ———, 19—; that G. H., one of the sureties on said bond, is a bankrupt, and that the security of said bond is impaired. It is therefore ordered that said C. D., administrator, file an additional bond in the sum of $———, with surety to be approved by this court within ten days from and including this date, and that in default thereof he be removed from his trust as such administrator.

(Signed) J. K.,
County Judge.

Form No. 69.

ORDER REMOVING EXECUTOR OR ADMINISTRATOR FOR FAILURE TO STRENGTHEN BOND.

[Title of Cause and Court.]

Whereas, on the ——— day of ———, 19—, an order of this court was duly made and entered requiring C. D., administrator of said estate, within ten days from the date thereof, to file a new bond as such administrator, and more than ten days have elapsed since the date thereof, and said C. D. has neglected and refused to file a new bond as required by said order:

The court doth hereby order and decree that the letters of administration heretofore, on the ——— day of ———, 19—, issued to said C. D., be and the same hereby are revoked and annulled, and the said C. D. removed from his trust as administrator.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

Form No. 70.

ORDER TO FORMER EXECUTOR OR ADMINISTRATOR TO RENDER AN ACCOUNT.

[Title of Cause and Court.]

To C. D., Late Administrator of Said Estate:

You are hereby ordered to forthwith deliver to E. F., administrator *de bonis non* of said estate, all the goods, chattels, credits, and effects thereof in your possession. You are further ordered to render an account of your transaction in regard to said estate within ten days from date.

Dated this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

§ 168. Order of removal.

The decree or order removing an executor or administrator is a final one, and an appeal lies therefrom to the district court.[72] It should recite all the facts necessary to give the court jurisdiction. Its regularity will not be presumed.[73] When entered the court should appoint an administrator *de bonis non,* and issue a citation to the former representative to turn over to him all the goods, chattels, credits and effects of the estate in his possession, and file his account.[74] If he fail to comply with such order, he may be proceeded against for contempt.[75]

The rule usually prevails that when the authority of an executor or administrator is revoked, or he is removed for cause, all acts done by him within the scope of his authority, and in good faith on his part,

72 Pope v. McEndree, 75 Neb. 550, 106 N. W. 659.

73 Scott v. Crews, 72 Mo. 261.

74 Rev. Stats., c. 17, § 85, [1349]; L. O. L., § 1164; Rutenic v. Hamaker, 40 Or. 453, 67 Pac. 200.

75 Tome's Appeal, 50 Pa. 285; Biddison v. Story, 57 Md. 96.

and on the part of those dealing with him, remain valid and in full force,[76] except that if he is removed for the reason that the court was without jurisdiction in making the appointment, he should be treated as an executor *de son tort*.[77]

An order requiring an additional bond is also treated as appealable. While the appeal is pending the representative is without authority unless he gives security. The appeal does not suspend the order.[78]

76 Allen v. Dundas, 3 Term Rep. 125.

77 Bigelow's Exr. v. Bigelow's Admr., 4 Ohio, 138; Kittredge v. Folsom, 8 N. H. 98; Tidball v. Young, 58 Neb. 261, 78 N. W. 507.

78 Bills v. Scott, 49 Tex. 430; Knight v. Hamaker, 33 Or. 154, 54 Pac. 277, 659.

CHAPTER XV.

APPOINTMENT OF ADMINISTRATOR DE BONIS NON.

§ 169. Definition—When Appointed.
170. Jurisdiction—Petition.
171. Notice—Hearing.

§ 169. Definition—When appointed.

An administrator *de bonis non* is a person appointed by the county court in the place of a former executor or administrator whose authority has terminated before the administration of the estate has been completed.[1] In every case he has the same rights, powers and duties as were granted by the court to his predecessor, besides such additional powers as are necessary in order to obtain possession of the assets of the estate in the hands of such predecessor or his agents.[2]

At common law the right to administer passed to the executor of an executor,[3] but that right did not pass to an administrator of either an executor or administrator.[4]

Whenever a vacancy occurs by reason of the death, acceptance of the resignation, or removal of an executor or administrator,[5] before his final account is filed,[6]

1 Prusa v. Everett, 78 Neb. 250, 113 N. W. 571; Ellyson v. Lord, 124 Iowa, 125, 99 N. W. 582.

2 Prusa v. Everett, 78 Neb. 250, 113 N. W. 571; Rutenic v. Hamaker, 40 Or. 444, 67 Pac. 196; Knight v. Hamaker, 33 Or. 154, 54 Pac. 277, 659.

3 2 Bl. Com. 506.

4 Crafton v. Beal, 1 Ga. 322.

5 Rev. Stats., c. 17, §§ 71, 85, [1335], [1349]; L. O. L., § 1163.

6 Jarnagin v. Frank, 59 Miss. 393; Herren's Estate, 40 Or. 96, 67 Pac. 194.

or after the discharge of the personal representative it appears that there are unadministered assets of the estate, whether the same were known to the executor or administrator or not,[7] an administrator *de bonis non* should be appointed.

If the final account is contested on the ground that there is property of the estate not accounted for, and the personal representative dies before a hearing on it has been had, such administrator should be appointed.

§ 170. Jurisdiction—Petition.

The court which issued the original letters testamentary or of administration has exclusive authority to appoint an administrator *de bonis non.*[8] No person has any preferential right to the appointment.[9]

In Oregon, administration is granted to those next entitled, if they are competent and qualified to act.[10]

When a personal representative is removed for cause, no other application than that contained in the petition for removal is necessary. In all other cases a formal application must be made. There is no time fixed by the statute within which it must be made, but lapse of time raises a presumption that the estate has been fully administered.[11]

7 Owen v. Ward's Estate, 127 Mich. 693, 87 N. W. 70; Wilcoxon v. Reese, 63 Md. 542.

8 Byerly v. Donlin, 72 Mo. 270; Beasley v. Howard, 117 Ala. 499, 22 South. 989.

9 Rev. Stats., c. 17, §§ 73, 85, [1337], [1349]; Russell v. Hoar, 3 Met. (Mass.) 187.

10 L. O. L., § 1163.

11 Bancroft v. Andrews, 6 Cush. (Mass.) 493; In re Holmes, 33 Me. 577.

The necessary allegations of the petition are that some act or duty remains to be performed by an executor or administrator, or that there are unadministered assets.[12]

§ 171. Notice—Hearing.

The proceedings for the appointment of an administrator *de bonis non*, when begun after death or discharge of the executor or administrator, are substantially the same as on an original application for letters. Notice must be issued and served on the parties interested as the court may direct. On the hearing it must be shown by competent testimony that something remains to be done to settle the estate—either some action must be brought before distribution can be had, a showing that there is property actually belonging to the estate never reduced to possession by the representative, or that there are assets which he has received and not accounted for.[13] The order is a final one and subject to appeal.[14]

The appointee qualifies by giving a bond in the same manner as an executor or administrator.

Under the Oregon practice notice is not required.

12 Owen v. Ward's Estate, 127 Mich. 693, 87 N. W. 70; Hinton v. Bland's Admr., 81 Va. 588; San Roman v. Watson, 54 Tex. 254.

13 Chamberlin's Appeal, 70 Conn. 363, 39 Atl. 734; Ratcliff v. McGee, 165 Mo. 461, 65 S. W. 713.

14 Cases cited under § 171.

Form No. 71.

PETITION FOR APPOINTMENT OF ADMINISTRATOR DE BONIS NON ON ACCOUNT OF DEATH, RESIGNATION OR REMOVAL OF EXECUTOR OR ADMINISTRATOR.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that on the ——— day of ———, 19—, G. H. was duly appointed administrator of the estate of said A. B., and thereupon executed his bond in manner provided by law, and entered upon the duties of said office; that on the ——— day of ———, 19—, said G. H. resigned [died; was removed from said office by an order of said court, duly made and entered]; that said estate is not entirely administered upon; that there is now due said estate credits estimated to be worth the sum ——— dollars, and there are claims reported by the commissioners to be due from said estate of the amount of ——— dollars ($———); that your petitioner is a nephew and heir at law of said A. B. [said estate is indebted to your petitioner in the sum of ——— dollars ($———) for goods, wares, and merchandise sold and delivered to said A. B. in his lifetime].

Wherefore, your petitioner prays that letters of administration may be granted to him upon the goods, chattels, rights, credits, and effects of said A. B. not already administered upon.

Dated this ——— day of ———, 19—.

(Signed) C. D.

[Add verification, Form No. 5.]

Form No. 72.

PETITION FOR APPOINTMENT OF ADMINISTRATOR DE BONIS NON AFTER DISCHARGE OF ADMINISTRATOR.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that on the ——— day of ———, 19—, one E. F., was duly appointed administrator of said estate by letters of administration issued out of and under the seal of said court, and thereupon entered upon the duties of his said office; that on the ——— day of ———, 19—, the final report of said E. F. was allowed, and on the same date an order was entered discharging him as such administrator; that said estate has not been entirely administered; that said A. B. was at the date of his death the owner of an undivided half interest in a herd of cattle,—the exact number of cattle is unknown to your petitioner,

but he alleges that they numbered at least 500 head, branded M; that the interest of said estate in said cattle was not included by said E. F. in his inventory or in any account, and said assets have not been administered upon. [Continue as in previous form.]

Form No. 73.

ORDER FOR APPOINTMENT OF ADMINISTRATOR DE BONIS NON.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on to be heard upon the petition of C. D. for his appointment as administrator of the estate of A. B., late of said county, deceased, not already administered upon, and it appearing to the court that due notice of this proceeding has been given to all persons interested in said estate [if notice has been given by publication, say: By publication thereof for three weeks in the ———, a newspaper printed, published, and circulated in said county, as appears by the files in this proceeding], whereupon C. D. was sworn and testified; on consideration whereof, and of the records and files in this proceeding, the court finds that there are assets of said estate not administered upon of the probable value of $———.

It is therefore ordered that letters of administration of the goods and estate of the said A. B. not already administered upon issue to said C. D. upon his giving bond in the sum of $———, and taking the oath required by law.

Form No. 74.

LETTERS OF ADMINISTRATION DE BONIS NON.

State of Nebraska,
——— County,—ss.

To C. D., of said County:

Whereas, on the ——— day of ———, 19—, letters of administration upon the estate of A. B., deceased, were issued out of and under the seal of the county court of said county to E. F.; and whereas, on the ——— day of ———, 19—, said E. F. was discharged as such administrator, was removed from said trust [or the resignation of said E. F. was accepted], and there yet remain goods, credits, and effects of said A. B. not administered upon, by reason whereof the granting of administration of the estate of the said A. B. not already administered upon doth devolve upon the county court of ——— county, Nebraska: Now, therefore [balance as in Form No. 62].

CHAPTER XVI.

INVENTORY AND APPRAISEMENT.

§ 172. First Duty of Personal Representative.
173. What Property must be Inventoried.
174. Personalty Generally.
175. Emblements.
176. Fixtures.
177. Personal Property not in Possession of Representative.
178. Property the Title to Which is Questioned.
179. Real Estate.
180. What Need not be Inventoried.
181. Failure of Executor or Administrator to File Inventory.
182. Appointment of Appraisers.
183. Duties of Appraisers.
184. Inventory of Administrator *De Bonis Non*.
185. Inventory not Conclusive.

§ 172. First duty of personal representative.

The first duty of a personal representative is to make and file a complete inventory of all the assets of the estate. It should be filed within three months from the date of letters, include all the goods, chattels, credits and effects of the deceased which have come into his possession or knowledge, and be verified by his oath. A residuary legatee who has given bond as such is not required to file an inventory.[1]

Under the Oregon practice, it should be filed within thirty days from the date of the letters, but the representative may obtain further time by leave of the court, if necessary.[2]

1 Rev. Stats., c. 17, § 97, [1361].

2 L. O. L., § 1177; In re Manser's Estate, 60 Or. 240, 118 Pac. 1024; Wells v. Applegate, 10 Or. 520.

Property is generally inventoried under three heads: Real estate, negotiable instruments and accounts, and other property. Household furniture, personal belongings, wearing apparel and ornaments of the deceased, and such property as passes absolutely to the widow and children and are not subject to debts, should be listed as a separate group.[3]

It should be definite and specific, give an accurate and full description of all real estate, and fully enumerate all the items which make up the personal property.[4]

The Oregon statute provides that if no money has come into the possession of the representative he shall so state, and that the statement of the debts due the deceased shall contain the written evidence thereof, and the security therefor, if any exist, specifying the name of each debtor, the date of each written evidence of debt, and the security therefor, the sum originally payable, the indorsements thereon, if any, and their dates and the sum appearing then to be due thereon.[5]

§ 173. What property must be inventoried.

All the assets of the estate must be included in the inventory. The term "assets" as used in the statute is given its broadest meaning, as including all the property of the decedent of every description, that is, in any manner liable for his debts, the charges and expenses of the administration of his estate, and the allowances for the support of his family, wherever the same may be situated,[6] except in cases where he is an

[3] Rev. Stats., c. 17, § 100, [1364].

[4] Van Meter v. Jones, 3 N. J. Eq. 520.

[5] L. O. L., § 1178; In re Holladay's Estate, 18 Or. 179, 22 Pac. 750.

[6] Schultz v. Pulver, 11 Wend. (N. Y.) 361; Sherman v. Page, 85 N. Y. 123.

ancillary administrator, when the assets in other states should not be included.[7]

Cash on hand, notes, bonds, bank certificates of deposit, book accounts, stocks of merchandise, farming implements,[8] a legacy due decedent in his lifetime, but unpaid at his decease, or a distributive share of an estate which has not come into his possession,[9] all rights or causes of action which accrued to the decedent under an express or implied contract, as for work and labor,[10] fees or salary as an employee of a corporation, either private or municipal,[11] a claim against the federal government for property taken, or damages for any action, or for money to the government by the terms of a treaty with a foreign power, to be distributed by it as indemnity, and rights of action for torts which accrued to the decedent in his lifetime, and which, by statute or common law, survive, all pass to the personal representative, and therefore must be inventoried. An annuity granted to a party with words of inheritance, as to A. B. and his heirs, passes directly to such heirs, and the personal representative has nothing to do with it.[12]

§ 174. Personalty generally.

A contingent or executory interest in personalty, provided it is of such a nature as to be of value to the

7 Section 267, *post.*

8 2 Williams, Executors, 703; Bullock's Admr. v. Rogers, 16 Vt. 294,

9 Lappin v. Mumford, 14 Kan. 9.

10 Loring v. Cunningham, 9 Cush. (Mass.) 87.

11 Manning v. Leighton, 65 Vt. 84, 26 Atl. 258; Thurston v. Doane, 47 Me. 79; Foster v. Fifield, 20 Pick. (Mass.) 67.

12 Co. Litt. 2a; Turner v. Turner, 2 Amb. 782.

estate, or any valuable incorporeal right of that nature,[13] a partnership interest, or any right or share in any business enterprise,[14] and personalty which has accrued by increase, such as the offspring or produce of livestock, accruing after the death of decedent, or the wool sheared from a flock of sheep,[15] should be included under this head. The stock of a railroad, realty, or other corporation, the property of which consists principally of realty, is a personal asset,[16] and therefore it and any dividend declared upon the same during the lifetime of the decedent, but not collected by him, or dividends accruing after his death, together with state, county, municipal and school bonds and public securities of every description, should be included.[17] The goodwill of a business constitutes such a tangible asset as may be of much value to an estate, and is properly included.[18] An estate for years is personalty, though for ninety-nine years, and renewable forever;[19] and so is a contract for the payment of royalties for coal to be mined.[20]

The indebtedness of the executor to the estate is an asset and must be included in the inventory,[21] as is

13 Ladd v. Wiggin, 35 N. H. 421; Dunn v. Sargent, 101 Mass. 336; Clapp v. Inhabitants of Stoughton, 10 Pick. (Mass.) 468.

14 Schenkl v. Dana, 118 Mass. 236.

15 In re Merchant, 39 N. J. Eq. 506.

16 Weyer v. Second Nat. Bank, 57 Ind. 198.

17 1 Schouler, Pers. Prop., 616 et seq.

18 Howe v. Searing, 19 How. Pr. (N. Y.) 14, citing Hitchcock v. Cohen, 6 Ad. & E. 438.

19 Mulloy v. Kyle, 26 Neb. 313, 41 N. W. 1117; Taylor v. Taylor, 47 Md. 295; Thornton v. Mehring, 117 Ill. 55, 25 N. E. 958; Co. Litt. 46b.

20 In re Hancock's Estate, 7 Kulp (Pa.), 36.

21 Section 217, *post;* L. O. L., § 1182.

also a debt due from an heir or legatee, unless it appears from the will that it was the intention of the testator to release the same.[22]

In Oregon it must always be included in the inventory.[23]

§ 175. Emblements.

Natural products of the soil which do not need to be sown or planted, but renew themselves from year to year, like grass, growing timber or cultivated fruits, are in all cases a part of the real estate, and consequently should not be inventoried.[24] Those products which must be sown or planted—not produced spontaneously—like small grain, corn, vegetables and cane, come under a different rule, though always recognized as chattels, and pass to the devisee unless they are expressly reserved or excepted by the will or a contrary intention appears therein.[25] When so excepted, in intestate estates,[26] and in all cases when severed from the real estate,[27] they must be accounted for by the personal representative.

§ 176. Fixtures.

The law in regard to inventorying fixtures is that as between heir or devisee and executor or administrator, the rule as to severance obtains with the utmost rigor

22 Springer's Appeal, 29 Pa. 208.

23 L. O. L., § 1183.

24 Fetrow's Exr. v. Fetrow, 50 Pa. 253; Kain v. Fisher, 6 N. Y. 597.

25 Anderson v. Bogaard, 83 Neb. 8, 118 N. W. 1108; Caulton v. Pope, 83 Neb. 723, 120 N. W. 191.

26 Penhallow v. Dwight, 7 Mass. 34; Humphrey v. Merritt, 51 Ind. 197.

27 Edwards v. Rainers' Exrs., 17 Pa. 597.

in favor of the inheritance, and against the right to disannex therefrom, and consider as a personal chattel anything which has been affixed thereto.[28] It has been considerably relaxed in favor of what is known as "trade fixtures" placed on the realty by a tenant of the decedent during his term, and he has been permitted to remove them before his rights under the lease expired, but not afterward;[29] but such improvements cannot be removed if such removal will injure the premises, or put them in a worse plight than they were before.[30] Steam engines, boilers and mill machinery of all kinds which are so annexed to the freehold as to become a permanent part thereof, no matter by whom put in, unless the right to remove them is expressly given, go with the land.[31]

§ 177. Personal property not in possession of representative.

An executor is required to account for all assets of the estate wherever situated, and should inventory all property which appears to belong to the estate whether in his possession or not.[32] A special summary pro-

28 Walmsey v. Milne, 7 Com. B., N. S., 115.

29 Weathersby v. Sleeper, 42 Miss. 732; Dingley v. Buffum, 57 Me. 381; Treadway v. Sharon, 7 Nev. 37; Wilgus v. Gettings, 21 Iowa, 177; Free v. Stuart, 39 Neb. 220, 57 N. W. 991.

30 Whiting v. Brastow, 4 Pick. (Mass.) 310; Lanphere v. Lowe, 3 Neb. 131; Friedlander v. Ryder, 30 Neb. 783, 47 N. W. 83.

31 Coliss v. McLagin, 29 Me. 115; Sweetzer v. Jones, 35 Vt. 317; Baker v. Davis, 19 N. H. 325; Prescott v. Wells, 3 Nev. 82; Hill v. Hill, 43 Pa. 531; Alford Carriage Mfg. Co. v. Gleason, 36 Conn. 86; Richardson v. Borden, 42 Miss. 71; Theurer v. Nautre, 23 La. Ann. 749.

32 Palmer v. Palmer, 55 Mich. 293, 21 N. W. 352; Tuttle v. Robinson, 33 N. H. 104.

ceeding is provided by statute for finding out where property is.[33]

The law requires him to use due diligence in trying to locate the assets of his decedent, as well as in trying to collect them after he has found them. What constitutes such diligence must necessarily depend upon the facts and circumstances connected with each estate and the means at his disposal. If he is guilty of culpable negligence, and it appears that by reasonable exertion he could have learned of the existence of such assets, and the estate thereby be benefited, he would be liable therefor.[34] He should not exhaust the estate by an aimless search, but exert the same diligence and discretion a man would use in his own business.

§ 178. Property the title to which is questioned.

Though the executor or administrator has no power to pass on the right of his decedent to property, there are cases where he should inventory assets claimed by another and thus require him to obtain possession of the same by judicial process. Property found among the effects of a decedent and over which he has exercised acts of ownership are presumed to be his though claimed by another.[35]

Bonds or other securities standing in the name of another party, found among his papers, which were purchased with his money and from which he received the income belong to his estate.[36]

33 Section 197 et seq., *post.*

34 Ruggles v. Sherman, 14 Johns. (N. Y.) 446; Palmer v. Palmer, 55 Mich. 293, 21 N. W. 352.

35 Bourne v. Stevenson, 58 Me. 504; Waterhouse v. Bourke, 14 La. Ann. 358.

36 Cummings' Estate, 153 Pa. 397, 25 Atl. 1125.

Under the old rule property purchased by a wife during coverture was not deemed her separate property unless there was affirmative proof that it was paid for from her separate estate and therefore was not a part of her estate.[37] As the Nebraska statutes give her the same control over her separate property the husband has over his, it necessarily follows that there is no such presumption here. It is the same as in other cases, except that when the rights of creditors are involved, transactions between husband and wife will be closely scrutinized.

If there appears to be some doubt about the ownership of any personal property, the representative may note it in the inventory.

§ 179. Real estate.

Every tract of real estate the title to which was in the decedent at the date of his death should be included, also every tract in which he had an equitable interest,[38] such as an interest by virtue of a tax title,[39] as a vendee in a contract and bond for title,[40] in public lands by virtue of the public land laws,[41] in a mining claim,[42] or a contract for the purchase of state school land.[43] The interest which a man has in a federal homestead on his death before patent issues passes to

37 In re Brown's Estate, 65 Vt. 331, 26 Atl. 638.

38 Bolton v. Ohio Nat. Bank, 55 Ohio St. 290, 33 N. E. 115.

39 Rice's Lessee v. White, 8 Ohio St. 216.

40 Solt v. Anderson, 67 Neb. 103, 93 N. W. 205; Myrick's Heirs v. Boyd, 3 Hayw. (Tenn.) 179.

41 Bond's Lessee v. Swearingen, 1 Ohio St. 395.

42 Keeler v. Trueman, 15 Colo. 143.

43 Grandjean v. Beyl, 78 Neb. 349, 110 N. W. 1108.

his widow or heirs, and the executor or administrator has nothing to do with it.[43a]

If he has reason to believe any property, real or personal, has been fraudulently transferred by the decedent, it should also be included.[44]

Land sold under a contract should be inventoried, the fee passing to the heirs or devisees subject to the rights of the vendee therein.[45] If the land is mortgaged the amount of the encumbrance should be noted.

§ 180. What need not be inventoried.

A life insurance policy payable to the widow or any other person passes immediately to such person, without the intervention of a personal representative. He has no authority over it unless it is payable to the estate, in which event it should be inventoried.[46]

A claim against an insurance company for loss or damages to buildings by fire, if occurring after the death of the decedent, the title to the buildings having vested in the heirs or legatees, though they have not the right of immediate possession, should not be enumerated as personal assets, but included in the receipts from the realty.[47] If the fire occurred prior to the death of the decedent, a different rule applies, and it should be inventoried.

[43a] Walker v. Ehresman, 79 Neb. 775, 113 N. W. 218.

[44] Marks v. Coats, 37 Or. 611, 62 Pac. 488; Andrews v. Tucker, 7 Pick. (Mass.) 770; In re Mills' Estate, 22 Or. 210, 29 Pac. 443.

[45] Moore v. Burrows, 34 Barb. (N. Y.) 173; Teneick v. Flagg, 29 N. J. L. 25.

[46] Douglass v. Parker, 84 Me. 522, 24 Atl. 956.

[47] Wyman v. Wyman, 26 N. Y. 253; Harrison v. Harrison's Admr., 4 Leigh (Va.), 371.

Damages recovered in an action of ejectment, coming from the realty, would naturally be included in the rents and profits therefrom, and not in the inventory, and any damages obtained from injuries to the freehold would follow the same rule.[48] Damages for lands taken under the right of eminent domain, if awarded by the judgment of a court or commission before the death of the owner, are personal assets which the executor or administrator should include in his inventory. If the land is taken after his death, they should be accounted for as income accruing from the realty.[49]

Unpaid rent of realty accruing and due before the death of the decedent should be accounted for as personal assets, but that accruing thereafter, as income from the realty.[50]

A claim for damages for causing the death of the decedent through negligence need not be inventoried.[51]

Form No. 75.

INVENTORY AND APPRAISEMENT.

In the County Court of ——— County, Nebraska.

In the Matter of the Estate of A. B., Deceased.

The following is a true inventory of the real estate and of all the goods, chattels, credits, and effects of A. B., deceased, which have come into my possession or knowledge:

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48 Dundas v. Carson, 27 Neb. 634, 43 N. W. 399; Ford v. Livingston, 70 Hun, 178, 24 N. Y. Supp. 412.

49 Goodwin v. Milton, 25 N. H. 458; Neal v. Knox & Lincoln R. Co., 61 Me. 298.

50 Leatherwood v. Sullivan, 81 Ala. 458.

51 Chicago, B. & Q. R. Co. v. Healy, 76 Neb. 783, 111 N. W. 598.

REAL ESTATE.

Des. of Lands	Sec.	Twp.	Range	Acres	Value
.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....

BILLS AND NOTES.

Item	From Whom Due	When Due	Int.	Amount	Value
Account	John Doe	Dec. 1, '00	8%	$ 100.00	$ 108.00
Note	Wm. Jones	Jan. '03	7%	1,000.00	1,000.00

GOODS, CHATTELS, ETC.

Description	Value
.....	.....
.....	.....

State of Nebraska,
——— County,—ss.

I, C. D., executor of the last will and testament of A. B., deceased, do solemnly swear that the above is a true inventory of all the estate, real and personal, of said deceased, so far as the same has come into my knowledge or possession.

(Signed) C. D.

Subscribed in my presence and sworn to before me this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

Form No. 76.

PETITION TO COMPEL AN EXECUTOR OR ADMINISTRATOR TO RETURN AN INVENTORY

[Title of Cause and Court.]

Your petitioner, G. H., respectfully represents unto the court that he is one of the next of kin of said A. B., deceased [is a legatee named in the will of said A. B., deceased]; that letters of administration upon the estate of said deceased [letters testamentary upon the will] were duly issued out of and under the seal of said court on the ——— day of ———, 19—, to one C. D., and that said C. D. now is the ad-

ministrator of said estate [executor], and that, notwithstanding that more than ——— days have elapsed since the issue of said letters, said C. D. has neglected, and still neglects, to file an inventory of the personal estate of the said deceased in the county court, as he is required by law to do.

Wherefore your petitioner prays that a citation may issue to the said C. D., executor as aforesaid, commanding him to appear before this court and file an inventory both of the estate to be allowed the widow of said A. B., and a general inventory as required by law, and for such other and further relief as may be just and equitable.

Dated this ——— day of ———, 19—.

(Signed) G. H.

[Add verification, Form No. 5.]

Form No. 77.

CITATION TO ADMINISTRATOR TO RETURN AN INVENTORY.

State of Nebraska,
——— County,—ss.

To C. D., Administrator of the Estate of A. B., Deceased:

You are hereby cited to appear before the county court of ——— county, Nebraska, at the county courtroom therein, on the ——— day of ———, 19—, at 9 o'clock A. M. of said day, then and there to return an inventory of the goods, chattels, credits, and effects of the said A. B., deceased, according to law, or to show cause why an attachment should not issue against you.

Dated this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

§ 181. Failure of executor or administrator to file inventory.

The failure of an executor or administrator to file an inventory within the time required is a sufficient cause for his removal in the discretion of the court.[52] Before proceeding to this extreme remedy the usual practice is for a citation to be issued on the petition

[52] Section 159, *supra*.

of a party interested in the estate directing him to show cause why he has not filed the same. A delay of six months, no efforts being made toward settling the estate, would justify a party in at once petitioning for his removal instead of directing him to file it.[53]

§ 182. Appointment of appraisers.

All the assets of the estate, both real and personal, are required by the statutes to be appraised, under oath, by two or more competent persons who are appointed by the court.[54] The usual practice in Nebraska is when letters issue for the court, on motion of the attorney for the estate, to make what is termed a "general order," appointing the appraisers, fixing the time allowed the representative to settle the estate, the dates for hearings on claims, and directing the publication of the notice to creditors in such paper as may be designated by the executor or administrator.[55]

In Oregon three appraisers are appointed, but when any part of the property is situated in another county than that in which administration is granted, the appraisers thereof may be appointed by the judge or court of either county. An oath is required the same as in Nebraska.[56] Such appointment is usually made on motion, but if made in such other county, a petition may properly be filed, which should show the necessary jurisdictional facts.

53 In re Barnes' Estate, 38 Or. 279, 59 Pac. 464; In re Bolander's Estate, 38 Or. 493, 63 Pac. 689; Marks v. Coats, 37 Or. 610, 62 Pac. 488.

54 Rev. Stats., c. 17, § 98, [1362].

55 Rev. Stats., c. 17, § 98, [1362].

56 L. O. L., §§ 1179, 1180.

Form No. 77a—Oregon.

PETITION FOR APPOINTMENT OF APPRAISERS.

In the County Court of ——— County, Oregon.

In the Matter of the Estate of A. B., Deceased.

To the County Court of ——— County, Oregon:

Comes now O. D., administrator of said estate, and shows unto the court that the estate of said A. B. is seised and possessed of property in said county of ———, an inventory of which said property so situated in said county of ——— is presented herewith, and that no part of said property has been appraised by appraisers appointed by the said county court of said ——— county.

Petitioner prays that appraisers of said estate be appointed in said ——— county as provided by law.

(Signed) C. D.

[Add verification.]

Form No. 78.

GENERAL ORDER.

State of Nebraska,
County of ———,—ss.

At a session of the county court, held at the county courtroom, in and for said county, in ———, on the ——— day of ———, A. D. 19—.

Present the Honorable J. K., County Judge.

In the Matter of the Estate of A. B., Deceased.

Whereas, letters ——— have this day been granted to ——— as ——— of the estate of A. B., deceased:

Ordered, that six months be allowed for creditors to present their claims against said estate for adjustment and allowance, and one year be allowed said ——— to settle up said estate from the ——— day of ———, A. D. 19—.

And it is further ordered, that E. F. and G. H., disinterested persons of said ——— county, Nebraska, be appointed appraisers of the estate of said deceased.

And it is further ordered, that notice be given to the creditors of said estate to appear before me at the county courtroom, in said county, on the ——— day of ———, 19—, and on the ——— day of ———, 19—, at — o'clock — M., each day, by publication in the ———, a newspaper printed in said county, four weeks successively

prior to the ——— day of ———, 19—, and by posting up notices to said creditors in four public places in said county on or before ———, 19—, for the purpose of presenting their claims for adjustment; and

Ordered further, that all claims against said estate not presented on or before ———, 19—, shall be and remain forever barred.

(Seal) (Signed) J. K.,
County Judge.

[Posting notices to creditors is not required, and is unnecessary, though a usual practice.]

Form No. 79.

APPOINTMENT OF APPRAISERS.

State of Nebraska,
——— County,—ss.

To C. D. and E. F., of Said County:

You are hereby appointed to appraise on oath the estate and effects of A. B., late of said county, deceased, which may be in said county, and when you have performed that service you are required to deliver this order and your doings in pursuance thereof to ——— executor [administrator] of said deceased.

Given under my hand this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

Form No. 80.

OATH OF APPRAISERS.

I do solemnly swear that I will well and truly appraise each item of the estate and effects of A. B., deceased, included in the inventory thereof, at its true value in money, and deliver the same, duly verified, together with my appointment, to L. M., executor [administrator] of said estate. So help me God.

(Signed) C. D.

§ 183. Duties of appraisers.

The appraisers should set down opposite each item, in distinct figures, the value of the same in money, and deliver the same when certified to the executor or administrator.[57] In fixing these values, they should

[57] Rev. Stats., c. 17, § 99, [1363].

be governed by a sound discretion. The valuation which they should place upon the property is not what it would sell for at forced sale, but its fair and reasonable market value. Bonds, corporate stocks, and other investment securities should be appraised at what they are quoted on the market or stock exchange, whether above or below par. Debts or choses in action should be appraised at that sum which in the judgment of the appraiser may be realized in an action at law.[58] Accrued interest up to the date of the inventory should be estimated, when practicable.[59] When any of the property is encumbered by mortgage, the amount of the mortgage lien, as near as the same can be estimated, may be deducted from the value of the property so mortgaged, and the balance put down as the interest of the estate in the property. If any of the debts due the estate are secured by chattel or real estate mortgage, this fact should be considered in making the appraisement, and the estate given the additional benefit which would accrue by reason of such security. Such security or collateral vests in the executor or administrator to the extent of the lien or interest he may have in them by reason of the debt they were given to secure.[60]

The appraiser's certificate should be indorsed upon the inventory.

[58] L. O. L., § 1181.
[59] Pease v. Walker, 20 Wis. 603; Storer v. Blake, 31 Me. 289.
[60] Sain v. Bailey, 97 N. C. 566.

Form No. 81.

CERTIFICATE OF APPRAISERS.

We, C. D. and E. F., appraisers appointed by the county court of ——— county, Nebraska, having first taken the oath required by law, do hereby certify that we have appraised the personal estate and effects in the foregoing inventory contained, and have set opposite to each item therein, distinctly in figures, the value of the same in money.

(Signed) C. D.
E. F.

§ 184. Inventory of administrator de bonis non.

An administrator *de bonis non* should make and file his inventory in the same manner as an original representative. It must include all assets collected by the predecessor and not converted into money, and also the amount due from such predecessor.[61] Where an accounting has previously been had and it appeared that he was indebted in excess of his bond, his sole surety who was appointed his successor must charge himself with the full amount of the penalty of the bond.[62]

§ 185. Inventory not conclusive.

The inventory is the basis of the administration account. It is not conclusive or binding on either the representative or other parties interested in the estate,

61 Rev. Stats., c. 17, §§ 86, 257, [1350], [1521]; Gatch v. Simpson, 40 Or. 96, 66 Pac. 688; Davis v. Clark, 58 Kan. 54, 49 Pac. 665. For the method of ascertaining the amount due, see § 428, *post*.

62 Jacobs v. Morrow, 21 Neb. 233, 31 N. W. 739; Brown v. Jacobs' Estate, 24 Neb. 714, 40 N. W. 137.

but merely *prima facie* evidence of the amount and value of the real and personal estate it enumerates.[63]

If after filing the inventory the executor or administrator learns of property not included, it is his duty to make an inventory thereof and cause the same to be appraised in the same manner as that in the first inventory.[64]

63 Fletcher v. Fletcher, 80 Neb. 156, 119 N. W. 232; Morrill v. Foster, 33 N. H. 379; Conover's Exrs. v. Conover, 1 N. J. Eq. 403; Lynch v. Divan, 66 Wis. 490, 29 N. W. 213; McBabb v. Wixom, 7 Nev. 163.

64 L. O. L., § 1184; In re Conser's Estate, 40 Or. 142, 66 Pac. 607.

CHAPTER XVII.

ALLOWANCES FOR THE SUPPORT OF THE FAMILY.

§ 186. Allowances of Specific Articles.
187. Persons Entitled to Allowance.
188. Nature and Object of the Allowance.
189. How Allowance Barred.
190. Amount of Allowance.
191. Payment of Allowance.
192. Allowance—How Obtained.

§ 186. Allowances of specific property.

The exempt property and other property of the value of two hundred dollars, which together with the household furniture and personal belongings pass to the surviving spouse and children of a decedent whether he was testate or intestate,[1] are in the nature of provisions for the support of the family, in addition to other appropriations allowed by a decree of the county court, and must be obtained by application in the same manner. While their right to this property is absolute, actual possession by them is necessary, and failure to apply for them waives the right to their possession.[2] Permitting the family to retain such property is the usual practice, but in all cases, at some stage in the proceedings, an order should be made formally assigning it to them.

In Oregon wearing apparel, household furniture and exempt property only pass to the widow and minor children.[3]

1 Section 443, *post.*
2 In re Bayer's Estate, 95 Neb. 488, 115 N. W. 1030.
3 L. O. L., § 1233.

§ 187. Persons entitled to an allowance.

The county court has power to grant to the widow and minor children, constituting the family of the decedent, suitable and necessary allowances for their support pending administration, except where such allowance to a widow is barred by her own act,[4] and the surviving husband of an intestate is entitled to an allowance for his support the same as a widow. There is no statute or rule of the common law imposing on the estate of a testatrix the duty of supporting a surviving husband. The allowance ceases after the shares of a testator's estate are assigned to the devisees and legatees, and with the assignment of the personal estate of an intestate, or in one year if the estate is not settled within that period.[5]

A like allowance to the widow and minor children, according to their circumstances and condition in life, where the property is sufficient to pay the same, together with the debts and administration charges, is given them by the Oregon statute.[6]

Children under fourteen years of age who are without parents, when the last surviving parent died intestate, are entitled to their support from the estate of the last survivor which their father or mother would have inherited, if living, until they attain the age of fourteen.[7] Minor children are entitled to an allowance for their support from their father's estate, though

[4] Section 189, *post.*

[5] Rev. Stats., c. 17, §§ 3, 51, [1267], [1316].

[6] L. O. L., § 1235.

[7] Rev. Stats., c. 17, § 3, [1267].

their mother may have an estate of her own, the mother having charge of procuring and disbursing the same.[8]

§ 188. Nature and object of allowance.

The right of the widow to her support for a limited time after the death of her husband is of common-law origin, as is also the right of the minor children. The purpose of the statute which, except so far as the surviving husband is concerned, is declaratory of the common law, is to provide means of support pending administration.[9]

In Nebraska it does not depend upon the solvency of the estate, nor does it appear to be absolute, but depends largely on the discretion of the court.[10]

In Oregon it is treated as an absolute right only when the estate is solvent, unless barred by some act of the widow.[11]

If the widow is possessed of an estate in her own right and a regular income sufficient for her support in accordance with her previous circumstances and conditions, a court would be justified in declining to grant it.[12]

8 Thompson v. Thompson's Admr., 51 Ala. 493; Walla v. Walla, 41 Miss. 657.

9 Newans v. Newans, 79 Iowa, 32, 44 N. W. 213.

10 Bonacum v. Manning, 85 Neb. 60, 122 N. W. 711, in which an insane widow confined in a state asylum for the insane and consequently supported by the state was held not entitled to an allowance on application of her guardian.

11 In re Dekum's Estate, 28 Or. 99, 41 Pac. 159.

12 Kersey v. Bailey, 52 Me. 198; Hollenbeck v. Pixley, 3 Gray (Mass.), 521.

§ 189. How allowance barred.

The right of a surviving husband or wife to an allowance for support may be barred by an antenuptial agreement, provided there are no minors, issue of the marriage, surviving,[13] and by express contract executed after marriage.[14] The right of the widow is barred by her election to accept the provisions of the will of her husband which are given her in lieu of all allowances and appropriations the law would give her. She may elect to take under the statute, but when she has once decided to take under the terms of the will, she cannot ask for an allowance when such terms expressly bar her of that right.[15] It has been held that an unexplained delay until after the expiration of the time for which the allowance could be granted, and until after a partial distribution of the estate has been made, would operate as an estoppel.[16]

It is not barred by a release of her distributive share in her husband's estate, unless by express intention.[17] The question whether a widow is barred of her allowance by willful misconduct and a violation of the common rules of morality and propriety is one on which there is a diversity of opinion. It is held in North Carolina that such conduct is an absolute bar.[18] In Massachusetts, the court considers such misconduct an element to be taken into consideration in fixing the amount, or in changing it after it has once been fixed,

13 Reiger v. Schaible, 81 Neb. 58, 116 N. W. 953.
14 Speodel's Appeal, 107 Pa. 18.
15 Godman v. Converse, 43 Neb. 463, 61 N. W. 756.
16 Miller v. Miller, 82 Ill. 463.
17 Pulling v. Durfee, 35 Mich. 34, 48 N. W. 48.
18 Cook v. Sexton, 79 N. C. 305.

and if, under all the circumstances surrounding the case, it seems that the ends of justice will be best subserved by granting such an allowance, or fixing the amount at a lower rate than originally determined, the court has authority to do so.[19]

The right of minor children to support cannot be waived by any act of the surviving parent.[20] Abandonment of the wife by the husband, whether with or without cause, does not work a forfeiture, and in no way affects her absolute interests in his property.[21]

The allowance for the support of the widow alone abates with her death.[22] If she have minor children, the issue of the decedent, her death will not abate the payment of the allowance. It would go to her personal representatives for the benefit of the minor children. The court would have the right to reduce the amount or change the directions of its payment upon a proper cause shown.[23]

§ 190. Amount of allowance.

The amount of the allowance rests peculiarly within the discretion of the court, depending upon the size of the estate, the conditions and surroundings of the family, the individual property possessed by them,—not, however, including their share in the estate,—and

19 Slack v. Slack, 123 Mass. 443.

20 Godman v. Converse, 43 Neb. 463, 61 N. W. 756.

21 Clark v. Clement, 71 N. H. 5, 51 Atl. 256; Welch v. Welch, 181 Mass. 37, 62 N. E. 982; Sammons v. Higbie's Estate, 103 Minn. 448, 115 N. W. 265.

22 Tarbox v. Fisher, 50 Me. 236; Simpson v. Cureton, 97 N. C. 112, 2 S. E. 668.

23 Dorah's Admr. v. Dorah's Exr., 4 Ohio St. 92; Bane v. Wick, 14 Ohio St. 505.

the manner and style of living of people of their social rank and station,[24] it not being in any manner dependent upon the final share of either widow or children, and is not a charge against such final share.[25] The county judge should not lose sight of the fact, in deciding what is a proper amount, that it is not the purpose of the law to furnish the family with funds to use in business ventures, for that would defeat the will and the statutes of distribution, but enough to support them properly. The amount fixed is not considered a permanent one, and the court has authority, upon cause being shown by any person interested in the estate, to modify the allowance as the circumstances of the parties and condition of the estate may require,[26] upon notice given in such manner as the court may require, but such order is not retroactive, applying only to future amounts.[27]

If the estate is insolvent the allowance should be very moderate, sufficient only for actual necessities of the family.[28]

§ 191. Payment of allowance.

The allowance for the support of the family of a decedent pending administration ranks as a debt of the estate, but with preference over all claims of gen-

24 Freeman v. Washtenaw Probate Judge, 79 Mich. 390, 44 N. W. 856.

25 Woodbury v. Woodbury, 58 N. H. 44; Foster v. Foster, 36 N. H. 437; Hollenbeck v. Pixley, 3 Gray (Mass.), 521.

26 James' Estate v. O'Neil, 70 Neb. 132, 97 N. W. 22; Fletcher v. Fletcher, 83 Neb. 156, 119 N. W. 232.

27 Baker v. Baker, 51 Wis. 538, 8 N. W. 289.

28 Brazer v. Dean, 15 Mass. 183; Johnson v. Corbett, 11 Paige (N. Y.), 265.

eral creditors,[29] and is payable only from such assets as are liable for such claims,[30] but is of course subordinate to demands secured by specific liens.[31] It should be paid from the personal estate and income from real estate; if decedent left a will, from assets designated for that purpose, if a designation is made,[32] and if the personal estate is insufficient, it is a charge upon the realty of both testate and intestate estates.[33]

§ 192. Allowance—How obtained.

The right of a surviving spouse or minor children to an allowance from a decedent's estate is not a vested one. Until there is a judicial determination awarding the same, the amount is contingent, and no right can vest until such amount is determined.[34] Unless the applicant applies before the final order of distribution is made, all claim thereto is waived. The application should therefore be by sworn petition to the county court. It may be filed at any time before distribution, and should be before any part of the assets of the estate are assigned or disposed of to the heirs or legatees,[35] but the court cannot well act until the inventory is filed or he has some knowledge of the amount of the indebtedness of the estate.

A citation may then issue and service had as the court may direct. The court acquires jurisdiction by

29 Rev. Stats., c. 17, § 3, [1167], [1493].
30 Hadsall v. Hadsall, 82 Neb. 587, 118 N. W. 331.
31 In re Estate of Dennis, 67 Iowa, 110, 24 N. W. 746.
32 Comp. Stats., c. 23, § 153.
33 Fletcher v. Fletcher, 83 Neb. 156, 119 N. W. 232.
34 Zunkel v. Colson, 109 Iowa, 695, 81 N. W. 175.
35 Estate of Henry, 65 Mich. 551, 27 N. W. 351.

the filing of the petition, and service of the same is not necessary.[36] If there appears to be an intention to contest the application, a time should be set for a hearing and notice given; but where the amount asked for appears a reasonable one, considering the value of the estate and the standing and circumstances of the parties, especially where the executor or administrator consents, it may be entered at once.

If the assets are ample, the right of the court to make the allowance to the widow, it is held in Oregon, cannot be controverted.[37]

About the only defenses available on appeal are that the petitioner is not the widow, or that she is barred by an antenuptial agreement or by taking under the terms of the will when its provisions were in lieu of such allowance. The amount rests so largely in the discretion of the court that it will be rarely disturbed.[38]

The usual practice is to apply at the same time for an order setting out the specific property to which she is entitled, and for an order to be made covering both matters. Where no allowance had been granted her previous to her husband's death, which occurred before administration was completed, though proceed-

[36] Fletcher v. Fletcher, 83 Neb. 156, 119 N. W. 232; Carlin v. Sewall, 86 Neb. 367, 125 N. W. 606.

[37] In re Dekum's Estate, 28 Or. 99, 41 Pac. 159.

[38] Piper v. Piper, 34 N. H. 563; Freeman v. Washtenaw Probate Judge, 79 Mich. 390, 44 N. W. 856. In Re Dekum's Estate, *supra*, it was held that where a widow made an agreement for a valuable consideration to receive monthly payments for her support in lieu of dower, and subsequently obtained an order for an allowance from the court, the order not containing that provision, her refusal to receipt as for dower would not justify the executor in declining to make the payments.

ings were pending, the right to such allowance does not pass to her estate.[39]

The application for an allowance to minor children for their support should be by their guardian. Service of citation is had in the same manner as in the case of a widow.

Form No. 82.

PETITION OF WIDOW FOR ALLOWANCE AND ASSIGNMENT OF PERSONAL PROPERTY.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that she is the widow of A. B., deceased, and is thirty-five years of age; that the said A. B. died leaving the following named minor children dependent upon said estate for their support [give names and ages of all the children under age], who, together with your petitioner, constitute one family; that your petitioner has no personal estate or income from personal estate [if possessed of property, give amount, character, and income therefrom], and has not sufficient means to support said family; that the value of the estate of the said A. B. is estimated at about the sum of ——— dollars ($———), of which ——— dollars is personal property, and the balance real estate; that the rents of said real estate are about the sum of ——— dollars per annum; that the debts against said estate, so far as they can be ascertained by your petitioner, are about the sum of ——— dollars ($———), and the net value of said estate is about the sum of ——— dollars ($———); that your petitioner has selected articles of apparel and ornament and the household furniture of the deceased and property not exceeding in value the sum of ——— dollars ($———), and other personal property not exceeding in value the sum of ——— dollars ($———), to all of which she is entitled by law. A list of the articles so selected, together with the valuation thereof as fixed by the appraisers of said estate, is hereto attached, marked "Ex. A," and made a part hereof.

Your petitioner therefore prays that due notice of the pendency of this petition may be given to all parties interested in said estate,

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39 In re Bayer's Estate (Neb.), 145 N. W. 1029; Ex parte Dunn, 63 N. C. 137.

and that the court may fix a day for the hearing on the same, and that, on the hearing, the court will assign your petitioner the household furniture and other personal property selected as aforesaid, and make an allowance of ——— dollars per month for the support of your petitioner and her said family, the children of said A. B.

Dated this ——— day of ———, 19—.

(Signed) C. D.

[Add verification, Form No. 5.]

Form No. 83.

PETITION FOR ALLOWANCE FOR SUPPORT OF MINOR CHILDREN.

[Title of Cause and Court.]

Your petitioner, G. H., respectfully represents unto the court that on the —— day of ———, 19—, letters of guardianship were issued to him out of and under the seal of said court upon the estates of C. B. and F. B., minors; that said C. B. is of the age of five years, and F. B. of the age of three years; that said minors are children of said A. B. and M. B.; that said M. B. was the widow of said A. B.; that said M. B. departed this life on the ——— day of ———, 19—; that the said C. B. and the said F. B. are possessed of no estate of either real or personal property except their interest as heirs [devisees, legatees] in the estate of said A. B., and have no means which can be used for their support except their interest as aforesaid; that said estate is of the estimated value of ——— dollars ($———) after all debts against the same have been paid. [If large amount of debts have been allowed, state amount of same, amount of personal estate, amount of real estate, probable income therefrom.]

Your petitioner therefore prays that a time may be fixed for the hearing of this petition, and notice thereof be given to the administrator of said estate of said A. B., deceased, and upon the hearing thereof the court will award to your petitioner the sum of ——— dollars per month for the support and maintenance of said C. B., and until he shall arrive at the age of —— years and the sum of ——— dollars per month for the support of said F. B. until she shall arrive at the age of —— years.

Dated this ——— day of ———, 19—.

(Signed) G. H.

[Add verification, Form No. 5.]

Form No. 84.

NOTICE OF APPLICATION FOR ALLOWANCE AND ASSIGNMENT OF PERSONAL PROPERTY.

State of Nebraska,
——— County,—ss.

To All Persons Interested in the Estate of A. B., Deceased:

You are hereby notified that on the ——— day of ———, 19—, C. D., widow of A. B., deceased, filed her petition in the county court of ——— county, Nebraska, praying for an allowance from said estate for the support of herself and the minor children, constituting the family of said deceased, and for the assignment to her of personal property of which she is given an absolute right by the terms of the statute, and that said petition will be heard at the county court room in said county on the ——— day of ———, 19—, at 9 o'clock A. M.

It is further ordered that notice of the pendency of this petition be given all persons interested in said estate by ———.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

Form No. 85.

ORDER GRANTING ALLOWANCE AND ASSIGNING PERSONAL PROPERTY TO WIDOW.

[Title of Cause and Court.]

And now, on this ——— day of ———, 19—, this cause came on for hearing upon the petition of C. D., widow of said A. B., for an allowance for the support of herself and C. B. and E. B., minor children of said A. B., pending the settlement of said estate, and for the assignment to her of the personal property which is given her absolutely by the terms of the statute. The court finds that notice of the pendency of said petition and of said hearing have been given by [state how notice given], and, it satisfactorily appearing that such allowance is necessary [if executor or administrator appears and consents to the allowance, so state], it is therefore ordered that the sum of ——— dollars, payable ———, be allowed for the support of said C. B., E. B., and C. D. during the time limited for the settling of said estate, or until the further order of the court; and it is further ordered that the articles of wearing apparel and ornament and household furniture of the deceased, together with the other personal property to which C. D., as widow of said A. B., is absolutely entitled by law as per schedule "A," attached to her said petition, copy of which is hereto attached and made a part hereof, be assigned and set apart to her.

(Signed) J. K.,
County Judge.

CHAPTER XVIII.

COLLECTION OF ASSETS.

§ 193. Right of Executor or Administrator to Possession of Personal Property.
194. Right to Assets Before Grant of Letters.
195. Executor *De Son Tort.*
196. Limitation on Authority of Executor or Administrator Over Assets.
197. Proceedings to Require Disclosure of Assets.
198. Examination—Nature of Proceedings.
199. Possession of Real Estate.
200. Recovery of Real Estate by Heir or Devisee.
201. Survival of Causes of Action.
202. Revivor of Actions on Death of Plaintiff.
203. Actions for Causing Death of Decedent.
204. Mortgages.
205. Suits—How Brought.
206. Degree of Diligence Required of Executor or Administrator in Reducing Assets to Possession.
207. Special Proceedings to Recover Personalty.
208. Compromising Debts With Leave of the Court.
209. Right to Compromise Debts Without Leave of the Court.
210. Right to Submit Claim to Arbitration.
211. Right to Adjust or Compromise Real Estate Contracts.
212. Actions to Recover Assets Transferred in Fraud of Creditors.
213. Suit by Creditor.
214. Indemnity Bond.
215. Nature of the Action.
216. Right of Heir or Legatee to Collect Assets.
217. Debt of Executor or Administrator to the Estate.

§ 193. Right of executor or administrator to possession of personal property.

When a man dies, the ownership of his personal property, but not the right to its immediate possession, passes to his heirs or legatees, subject with some exceptions to the payment of his debts and certain

charges against the estate. Their title is traced through the executor or administrator, and it is only the residue of the estate remaining after the payment of such debts and charges which passes to them.

The grant of letters testamentary or of administration gives to the recipient, as a trustee or representative of all parties interested therein, an immediate right to the possession of all of the personal property.[1]

There is one apparent exception to this rule. Where a party has an equitable title to the property, either under a valid contract of bailment[2] or an executory contract for its purchase,[3] or a contract to bequeath the same,[4] the representative is not always entitled to take it into his custody. In the first case he is entitled to the property after the charges against it have been satisfied, in the case of a contract to purchase he may enforce the lien, if he has one, for the balance of the purchase price due thereon,[5] and in the latter case he is only entitled to possession if it is needed for the purpose of paying the debts.[6]

§ 194. Right to assets before grant of letters.

If a special administrator has been appointed, the right to the possession of the assets is vested in him

1 Casto v. Murray, 49 Or. 57, 81 Pac. 388; In re Roach's Estate, 50 Or. 179, 92 Pac. 118; Hillman v. Young, 64 Or. 79, 127 Pac. 795; Thorsen v. Hooker, 57 Or. 578, 109 Pac. 388; L. O. L., § 1185; Beecher v. Buckingham, 18 Conn. 110; Valentine v. Jackson, 9 Wend. (N. Y.) 302; Lawrence v. Wright, 23 Pick. (Mass.) 128; Gilkey v. Hamilton, 22 Mich. 253.

2 L. O. L., § 1185.

3 Howes v. Whipple, 41 Ga. 322.

4 Koslowski v. Newman, 74 Neb. 704, 105 N. W. 295; McKinnon v. McKinnon, 56 Fed. 409.

5 Howes v. Whipple, 41 Ga. 322.

6 Koslowski v. Newman, 74 Neb. 704, 105 N. W. 295.

before the issue of regular letters.[7] If no such appointment has been made, during the time between the death of the decedent and the issue of letters testamentary or of administration, the title to the effects remains in abeyance, and then vests in the personal representative in trust, in his official capacity, as of the date of the death of the decedent, and he is entitled to the possession of such assets and the management of such property for the purposes of such trust.[8]

When no special administrator has been appointed, the near relatives or friends of a deceased person generally take charge of his estate immediately after his death, and whoever thus comes into the possession of any such personal property, or the rents or profits of the real estate, or assumes control over the same, is responsible therefor to the personal representative as soon as letters issue to him, and should at once place him in possession. Any other rule would place the personal property of a decedent "beyond reach," before administration was granted, and where no one could be found who had it or was responsible for its value.[9]

§ 195. Executor de son tort.

Any person, not an executor or administrator, who intermeddles with the goods of a decedent, either on the pretense that he is an executor or administrator or otherwise, is termed an "executor *de son tort*," and

7 Chapter X, *supra*.

8 Palmer's Appeal, 1 Doug. (Mich.) 422; Wales v. Newbould, 9 Mich. 83; Morton v. Preston, 18 Mich. 60; Parks v. Norris, 101 Mich. 71, 59 N. W. 428.

9 Cullen v. O'Hara, 4 Mich. 132; Parks v. Norris, 101 Mich. 71, 59 N. W. 428.

is subject to all the liabilities, but entitled to none of the privileges, of a personal representative.[10] It includes any person, whether acting for himself or as agent for another known to him to be without authority or right, who takes possession of the personal property of a decedent and converts it into money without administration, though, if an agent or attorney, he accounted for it to the person for whom he acted.[11] He is liable to the lawful representative, or a creditor, either in an action at law for conversion,[12] or in equity for an accounting,[13] for all the assets of the estate he received, except such as were used in payment of funeral expenses,[14] of such demands as he affirmatively shows were just claims against the estate,[15] and such payments for the use and benefit of distributees as would have been made in due course of administration.[16] The liability of an executor *de son tort* survives against his estate.[17]

The common-law doctrine of the liability of an executor *de son tort* has been changed by statute in Oregon, which provides that no person is liable to an action as executor of his own wrong for having taken, received or interfered with the property of a deceased person; but is responsible to the executors or administrators of such deceased person, for the value of all property taken or received, and for all injury caused

10 Jahns v. Nolting, 29 Cal. 507.

11 Stevenson v. Valentine, 27 Neb. 338, 43 N. W. 107.

12 Stevenson v. Valentine, 27 Neb. 338, 43 N. W. 107.

13 Simmons v. Simmons' Admr., 33 Gratt. (Va.) 451; Cheney v. Gleason, 125 Mass. 166; Craig v. Jennings, 31 Ohio St. 84.

14 Lenderink v. Sawyer, 92 Neb. 587, 138 N. W. 744.

15 Crispin v. Winkleman, 57 Iowa, 523, 10 N. W. 919.

16 Brown v. Walter, 58 Ala. 310.

17 Stevenson v. Valentine, 27 Neb. 338, 43 N. W. 107.

by his interference with the estate.[18] For conversion of such assets he can be held liable for double damages.[19]

Under the above statutes no action will lie for the recovery of such assets except at the suit of the lawfully appointed executor or administrator. A creditor cannot, as at common law, maintain the action, but must apply for and receive letters of administration.[20] The lawful representative may either bring an action for double damages for conversion, or for injury caused by the unlawful interference with the estate, and in the action for conversion must set up that it is brought under section 1190.[21]

In the action for conversion the executor *de son tort,* who was acting as administrator under a void appointment, cannot set up as a defense debts of the estate which he has paid,[22] nor is he entitled to credit, though an heir of the estate, for costs and fees paid in the course of his void administration, or attorney fees, or any commission for his services. The only expenditures for which he can be credited are such as strictly and solely pertained to the conservation of the estate, and such charges, including attorney fees and for his own time, are a proper counterclaim.[23]

§ 196. Limitations on authority of executor or administrator over assets.

The surviving spouse and the children of the decedent should be given possession of such articles of personal property as pass to them absolutely, subject

18 L. O. L., § 384.
19 L. O. L., § 1190.
20 Rutherford v. Thompson, 14 Or. 239, 12 Pac. 382.
21 Springer v. Jenkins, 47 Or. 598, 84 Pac. 479.
22 Oh Chow v. Brockaway, 21 Or. 448, 12 Pac. 382.
23 Slate v. Henkle, 45 Or. 434, 78 Pac. 325.

later to confirmation by the court.[24] It is also proper for the personal representative to permit an heir or legatee to retain possession of such personal property as growing crops, livestock, farm implements and the like, such party being held responsible to the representative therefor and obliged to turn them over if necessary.

Though entitled to possession, he has no right to enter upon the premises of another in peaceable possession of assets of the estate, and remove the same therefrom by force, especially where the person in possession is an heir or legatee or claims title thereto. He should, in case of a refusal to deliver property when its possession is necessary, bring special proceedings provided by law or an action in law or equity, as the case may demand.[25]

In the absence of creditors, the right of an equitable owner of real estate, who is in possession at the death of decedent, to retain such possession pending administration is superior to that of an executor or administrator.[26]

A debt due from a legatee or heir is a part of the assets of the estate the same as though owing by a third party, but need not be collected unless needed for payment of the debts and expenses. It should be inventoried. The discharge or bequest in a will of any claim against a person named as executor therein, or against any other person, is invalid as against the

24 Section 443, *post.*

25 Waldo v. Waldo, 52 Mich. 94, 17 N. W. 710; Bailey v. Wright, 39 Mich. 96; Daniels v. Brown, 34 N. H. 454.

26 Emery v. Darling, 50 Ohio St. 160, 33 N. E. 715; Tilson v. Holloway, 90 Neb. 48, 134 N. W. 252; Koslowski v. Newman, 74 Neb. 704, 105 N. W. 295.

creditors of the deceased. For all purposes of administration it is treated as a specific legacy for that amount.[27]

§ 197. Proceedings to require disclosure of assets.

If any person is suspected to have concealed, embezzled, carried away or disposed of any money, goods or chattels of the deceased, or of having in his possession or knowledge any deeds, conveyances, books, contracts, or other writings which contain evidence, or tend to disclose the right, title, interest or claim of the deceased to any real or personal estate, or any claim or demand, or any last will and testament of the deceased, he may be cited by the county judge to appear and make disclosure of the matter of such complaint.[28]

The proceedings may be commenced by the petition of an heir, legatee, creditor or party interested in the estate, or by the personal representative, and may be brought before regular letters issue.

Form No. 86.

PETITION FOR DISCLOSURE OF PROPERTY OF A DECEDENT.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that on the ——— day of ———, 19—, letters of administration on the estate of said A. B., deceased, were issued to him out of and under the seal of said court, and that he now is, and ever since said date has been, the administrator of said estate; [that he is an heir, legatee, or devisee of said estate, or that said estate is indebted to him in the sum of ——— dollars for ———, and that on the ——— day of

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27 L. O. L., § 1183.

28 Rev. Stats., c. 17, § 103, [1367]; Perrin v. Calhoun Co. Cir. Ct., 49 Mich. 342, 13 N. W. 767; L. O. L., § 1186.

———, 19—, letters of administration on the estate of A. B., deceased, were issued to E. F. out of and under the seal of said court, and that said E. F. is now, and ever since said date last aforesaid has been, the administrator of said estate]; that at the time of the death of said A. B., he, said A. B., was possessed, as your petitioner verily believes, of the following personal property: [Describe the property which the party is supposed to have in his possession, as nearly as possible]; that soon after the death of said A. B., one G. H., of said county, obtained possession of said above-described goods, chattels, and effects, and has concealed or disposed of them, and refuses to deliver them to the administrator of said estate; that, said G. H. has in his control and within his knowledge certain writings and books of account, the exact nature of which is unknown to your petitioner, the property of said estate, which tend to disclose the right, title, and interest of said estate in certain real and personal property, and that said G. H. has concealed or disposed of the same, and refuses to deliver them to said administrator.

Your petitioner therefore prays that a citation may issue to the said G. H. commanding him to appear before the court at a time and place to be therein specified, and a true disclosure make under oath of all the moneys, chattels, goods, credits, effects, books of account, bonds, contracts, and papers of every description of the said A. B., deceased, which are within his knowledge or control, or which at any time since the death of the said A. B. have been within his knowledge or possession, and for such other and further relief as may be just and equitable.

Dated this ——— day of ———, 19—.

(Signed) C. D.

[Add verification, Form No. 5.]

Form No. 87.

CITATION.

[Title of Cause and Court.]

State of Nebraska,
——— County,—ss.

To G. H.:

You are hereby commanded to appear before the county court at the county court room in said county on the ——— day of ———, 19—, at 9 o'clock A. M. of said day, and true answers make under oath to all interrogatories that may be put to you concerning the moneys, chattels, goods, credits and effects, books of account, deeds, bonds,

contracts, and papers of every description belonging to the estate of A. B., deceased, which are within your knowledge, possession, or control, or which may have been within your knowledge, possession, or control at any time since the death of said A. B.

In witness whereof I have hereunto caused the seal of said court to be affixed this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

§ 198. Examination—Nature of proceedings.

The party so cited is required to appear and submit to an examination touching the matter set out in the petition. The answers must be reduced to writing, signed by the party examined and filed in court. Should the party cited refuse to appear and answer the interrogatories, he may be committed to jail, there to remain until he complies with the order.[29]

Under the Oregon practice, the proceedings may be had either before the court or judge in which the administration is pending, or in the county where the person resides or may be found. In the latter case a certified copy of the written interrogatories, if any, and the examination or other proceeding thereon or connected therewith, shall be filed with the clerk of the county court where administration is granted.[30]

The proceeding is special and statutory. The power of the court is limited to compelling a discovery. It is without jurisdiction to determine the ownership or right to the possession of the property, and can make no order or decree based on the disclosure.[31]

29 Rev. Stats., c. 17, § 104, [1369].

30 L. O. L., §§ 1187, 1188.

31 Gardner v. Gilihan, 20 Or. 601, 27 Pac. 320; Dray v. Bloch, 29 Or. 353, 45 Pac. 772; Harrington v. Jones, 53 Or. 239, 99 Pac. 935; Hillman v. Young, 64 Or. 79, 127 Pac. 798; Saddington v. Hewitt, 70 Wis. 240, 35 N. W. 552; Ives' Appeal, 28 Conn. 416.

Form No. 88.

OATH OF PERSON CITED TO DISCLOSE.

You do solemnly swear that you will true answers make to all interrogatories that may be put to you touching the moneys, chattels, goods, credits, effects, books of account, deeds, bonds, contracts, and papers of every description belonging to the estate of A. B., late of ——— county, Nebraska, deceased, within your knowledge, possession, or control at any time since the death of said A. B. So help you God.

Form No. 89.

CAPTION FOR INTERROGATORIES.

[Title of Cause and Court.]

Testimony of G. H., taken pursuant to citation hereto attached:

Now, on this ——— day of ———, 19—, came G. H., and, being by the judge of said court first duly sworn to true answers make to all interrogatories which may be put to him touching the moneys, chattels, goods, credits, effects, books of account, deeds, bonds, contracts, and papers of every description belonging to the estate of said A. B., deceased, which are within his knowledge, possession, or control, or which may have been within his knowledge, possession, or control at any time since the death of said A. B., testified as follows:

Ques. ——.

Ans. ——.

[The forms for order to show cause, warrant and commitment are substantially as in contempt proceedings for failure to produce will in court. See Forms Nos. 20, 21 and 22.]

§ 199. Possession of real estate.

At common law the executor or administrator had nothing to do with the real estate; it passed directly to the heir or devisee, subject, however, to debts. By statute he is given the right to the possession of all the real estate, except the homestead, with full power to collect the rents, issues and profits therefrom until the estate has been settled and the property ordered delivered to the heirs or devisees.[32] There are two

32 Rev. Stats., c. 17, § 102, [1366]; L. O. L., § 1185.

recognized exceptions to the statutory rule. The personal representative has nothing to do with lands held by the decedent under the federal land laws where final proof has not been made or patent issued. In that case the heirs take by appointment and not by inheritance.[33] When the executor is a residuary legatee and has given bond as such, the devisee is entitled to the immediate possession of the land devised to him, and the executor is estopped from contending that its possession is necessary for paying or securing creditors.[34]

The right to possession attaches to all lands to which the decedent had a right to possession at the time of his death, whether such right was based on a legal or equitable title,[35] and should be exercised at any time when it appears that the income or the land itself may be needed for the payment of the debts.[36] His letters give him *prima facie* power to take possession, excepting of course where the land is held under a valid lease from the decedent,[37] without an affirmative showing that it is necessary for the proper administration of the estate,[38] and he can maintain an action of ejectment for that purpose[39] even against an heir

33 Walker v. Ehresman, 79 Neb. 775, 113 N. W. 218.

34 Caulton v. Pope, 83 Neb. 723, 120 N. W. 101.

35 Zeuske v. Zeuske, 62 Or. 51, 124 Pac. 205.

36 Tunnicliff v. Fox, 68 Neb. 811, 94 N. W. 1932; Humphreys v. Taylor, 5 Or. 261.

37 See L. O. L., § 1185.

38 Kern v. Cooper, 91 Minn. 121, 97 N. W. 648.

39 Tilson v. Holoway, 90 Neb. 481, 134 N. W. 232; Dundas v. Carson, 27 Neb. 634, 43 N. W. 339; Kline v. Moulton, 11 Mich. 370; McRaes v. McDonald, 57 Ala. 423.

or devisee.[40] The statutes affect only the right to possession, the title to the fee passing to the heirs or devisees in the same manner as at common law.[41]

Under the Oregon practice, where the administrator has taken possession of land as a part of the estate of his intestate, he may maintain an action under the statute to determine adverse or conflicting claims or interests.[42]

§ 200. Recovery of real estate by heir or devisee.

Unless the executor or administrator takes possession of real estate, the right of the heir or devisee therein remains unimpaired as at common law.[43] If it is in possession of parties claiming adversely, the heir may, pending administration, bring ejectment against all such persons, save and except the administrator and all persons claiming by, through or under him.[44] A devisee also has the same rights.[45]

An executor or administrator has been held a proper plaintiff in an action for trespass on real estate in a case where the injury occurred previous to the death of the owner.[46] If the cause of action accrued pending administration, the heir or devisee is the party injured, though there may be cases where the amount of

[40] Miller v. Hoberg, 22 Minn. 249.

[41] Clark v. Bundy, 29 Or. 190, 44 Pac. 282; De Bowe v. Wallenberg, 52 Or. 432, 92 Pac. 536, 97 Pac. 717.

[42] Ladd v. Mills, 44 Or. 224, 75 Pac. 141.

[43] Shellenberger v. Ransom, 41 Neb. 631, 59 N. W. 935; Johnson v. Colby, 52 Neb. 327, 72 N. W. 313; Jones v. Billstein, 28 Wis. 221.

[44] Lewon v. Heath, 53 Neb. 707, 74 N. W. 274; Jetter v. Lyon, 70 Neb. 429, 97 N. W. 596; Streeter v. Patton, 7 Mich. 341.

[45] Beer v. Plant, 1 Neb. Unof. 372, 96 N. W. 348; Lantry v. Wolff, 49 Neb. 374, 68 N. W. 494.

[46] Kernochan v. New York El. R. Co., 128 N. Y. 559, 29 N. E. 65.

the recovery is required to pay the debts when the personal representative could bring it.

§ 201. Survival of causes of action.

Causes of action which survive the death of the owner are assets. They are actions founded upon a debt, contract, covenant or agreement to perform a legal duty,[47] replevin,[48] for the enforcement of a vendor's lien[49] and for mesne profits, for injury to personal or real estate and for relief on the ground of deceit or fraud.[50]

Under the Oregon statutes, all causes of action, whether arising on contract or otherwise, survive the death of the party, excepting only the one for causing his death, which is provided for by special act, and the executors or administrators may maintain an action at law thereon against the party against whom the cause of action accrued, or after his death against his personal representatives.[51]

§ 202. Revivor of actions on death of plaintiff.

All actions brought by a plaintiff and pending at his death survive, and may be revived by his executor or administrator, except those brought to obtain some official or personal right or position.[52] He may procure an order of substitution and prosecute them in

47 Snow v. Snow, 49 Me. 159; Young v. Wells, 33 Mo. 106; Hazleton v. Bogardus, 8 Wash. 102, 35 Pac. 602.

48 Pitts v. Hale, 3 Mass. 321.

49 Robinson v. Appleton, 124 Ill. 276, 15 N. E. 761.

50 Code Civ. Proc., § 463.

51 L. O. L., § 379.

52 Code Civ. Proc., §§ 463, 464.

his representative capacity,[53] and may prosecute a writ of error without being substituted.[54]

In Oregon no action abates by the death of the plaintiff if it is one which survives his death. The court may at any time within one year on motion allow it to be continued by the executor or administrator.[55] It is not necessary that the order be made within the year. It is sufficient if the application or motion is filed within that period.[56] The suit is suspended during the time between the death of the party and the entry of the order, and that time is not included in the time limited for taking an appeal.[57] An action which determines both property and personal rights after a decree and an appeal therefrom only abates as far as the part determining personal rights is concerned, and may be prosecuted as far as such property interests is concerned.[58]

§ 203. Action for causing death of decedent.

At common law an action would not lie against a party whose willful or negligent act caused the death of another.[59] By statute, when the death of a party is caused by the wrongful act or neglect of another, the executor or administrator may maintain an action against such other party in the event the deceased could have done so had he lived, though the death be

53 Civ. Code, 465; Hendrix v. Rieman, 6 Neb. 521.

54 Webster v. City of Hastings, 56 Neb. 245, 76 N. W. 565; Ritchie v. Seeley, 36 Neb. 164, 102 N. W. 256; Long v. Thompson, 34 Or. 362, 55 Pac. 978.

55 L. O. L., §§ 38, 39.

56 Barker v. Ladd, 3 Saw. 44; Dick v. Kendall, 6 Or. 166.

57 McBride v. Northern Pac. R. Co., 19 Or. 65, 23 Pac. 814.

58 Nickerson v. Nickerson, 34 Or. 3, 54 Pac. 277.

59 Sedgwick, Damages, 644.

caused under such circumstances as amount to a felony.[60]

Such action must be brought in the names of such representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such person, and shall be distributed to them in the proportion provided by law in relation to the distribution of property left by persons dying intestate. The creditors of the estate have no interest in it.[61]

The administrator is the only party who can bring the action, and it is his duty,[62] when decedent left surviving him a widow or next of kin who have sustained a serious pecuniary loss, to do so.[63] The amount of the recovery is for the jury. It is not limited by statute and is in theory a fair and just compensation for the pecuniary injury resulting from such death to the widow and next of kin.

In Oregon the amount of the recovery is limited to seven thousand five hundred dollars.[64] It is brought by the representative in the interest of all interested in the estate, creditors as well as next of kin.[65]

60 Rev. Stats., c. 17, § 164, [1428]; L. O. L., § 380.

61 Rev. Stats., c. 17, § 165, [1429]; Wilson v. Bumstead, 12 Neb. 1, 10 N. W. 411.

62 C. B. & Q. Ry. Co. v. Healey, 76 Neb. 783, 111 N. W. 598.

63 Anderson v. Chicago B. & Q. Ry. Co., 35 Neb. 95, 52 N. W. 840; Orgall v. Chicago B. & Q. Ry. Co., 46 Neb. 4, 64 N. W. 450; Chicago B. & Q. Ry. Co. v. Oyster, 58 Neb. 1, 78 N. W. 359; City of Friend v. Burleigh, 53 Neb. 674, 74 N. W. 50.

64 L. O. L., § 380.

65 Carlson v. Oregon Short Line R. Co., 21 Or. 459, 28 Pac. 497; Olston v. Oregon Water Power Co., 52 Or. 346, 96 Pac. 1095, 97 Pac. 538; Perham v. Portland Electric Co., 33 Or. 458, 53 Pac. 14.

Such claim for damages constitutes of itself a sufficient asset to give the court jurisdiction to appoint an administrator,[66] and when the acts which caused the death of the deceased occurred in one state the statutes of which give a right of action to the representatives, representatives appointed and acting in another state may bring the action there.[67]

§ 204. Mortgages.

The interest of an estate in realty conveyed to the deceased during his lifetime by mortgage, together with the debt secured thereby, are considered as personal assets in the hands of the executor or administrator, and he may foreclose the same, or have any other remedy for the collection of such debt which the deceased would have had if living, or may continue any proceedings which may have been commenced by the deceased for such purpose.[68] A foreign executor has the same rights. In case of a redemption of the mortgage, or the sale of the mortgaged premises by virtue of a power of sale therein contained or otherwise, the personal representative has power to receive the money and give all necessary releases and receipts.[69]

In order to protect the interests of the estate he may bid in the mortgaged property on the sale,[70] or any

66 Missouri Pac. R. R. Co. v. Lewis, 24 Neb. 848, 40 N. W. 401. § 146, *supra.*

67 Missouri Pac. R. Co. v. Lewis, 24 Neb. 848, 40 N. W. 401; Dennick v. Railroad Co., 103 U. S. 11; Leonard v. Steam Nav. Co., 84 N. Y. 48; Morris v. Chicago R. I. & P. Co., 65 Iowa, 727, 23 N. W. 143.

68 Rev. Stats., c. 17, § 107, [1371]; Kyger v. Riley, 2 Neb. 26.

69 Rev. Stats., c. 17, § 107, [1371].

70 Rev. Stats., c. 17, § 108, [1372].

real estate at an execution sale on a judgment in favor of the estate.[71] He may take the deed in his own name.[72] He is seised of all lands so bid in by him for the same persons, whether creditors or next of kin or others, who would have been entitled to the money had the land been bid in by other persons. It is held subject to the same rights and liabilities as personal assets.[73]

§ 205. Suits, how brought.

An action by an executor or administrator on behalf of the estate should be brought in his representative capacity. A distinction is often made between actions accruing before the death of the decedent and those accruing pending the administration. As to the former, the rule was that they must be brought by the executor or administrator in his representative capacity; the latter could be brought by him in his own name or as a personal representative.[74]

As the personal representative of a decedent is obliged to render an account of all assets collected by him for the estate, and as all actions in this state must be brought by the real party in interest, he should bring suit in his representative capacity.[75] Actions for the recovery of specific articles of property may be either in replevin, or trover for their conversion.[76]

71 Wilson v. Miller, 30 Md. 82.

72 Fifield v. Sperry, 20 N. H. 338.

73 Rev. Stats., c. 17, § 109, [1373]; Williams v. Towl, 65 Mich. 204, 31 N. W. 835.

74 Buckland v. Gallup, 40 Hun (N. Y.), 61; Knox v. Bigelow, 15 Wis. 415; Laycock v. Oleson, 60 Ill. 30.

75 Civ. Code, § 23.

76 Ham v. Henderson, 50 Cal. 367; Manwell v. Briggs, 17 Vt. 176; Kent v. Bothwell, 152 Mass. 341, 25 N. E. 721, 9 L. R. A. 258.

The personal representative should set up in his petition the time and place of the death of the decedent, the issue of letters of administration, either special or general, as the case may be, or the probate of the will and the issue of letters testamentary, and that the plaintiff now is the duly qualified executor or administrator of said estate.[77]

In Oregon he may sue either in his representative or individual capacity, only on such actions as occurred after the death of the decedent.[78]

§ 206. Degree of diligence required of an executor or administrator in reducing assets to possession.

In performing the duty of collecting the assets of the estate of a decedent, the personal representative should be governed by the same degree of prudence that men usually exert in the management of their own business enterprises. As no two cases are precisely alike, it is impossible to lay down any rule applicable to all of them. His duty in this regard depends in a great measure upon the condition of the estate, and the means and facilities within his control. Small assets should not be jeopardized in an aimless search after personalty, or in doubtful litigation for any property, either real or personal, which is held adversely, and it is proper for the persons seeking to have such property recovered to indemnify the personal repre-

[77] Central Branch U. P. R. Co. v. Andrews, 37 Kan. 162, 14 Pac. 509; Judah v. Fredericks, 57 Cal. 389; Ralphs v. Hensler, 97 Cal. 296, 32 Pac. 243.

[78] Barrell v. Kern, 44 Or. 502, 56 Pac. 809; Sears v. Daly, 43 Or. 346, 73 Pac. 5.

sentative against loss in such cases.[79] The duty also depends upon the solvency or insolvency of the debtor and the character of the claim. A personal representative would not be justified in using the assets of the estate in pursuing claims against debtors of doubtful solvency, and he would not be chargeable with culpable negligence should he not collect them, or even make much of an effort to do so.[80] At the same time, he is bound to try to collect a debt from a solvent debtor, and, if such debt is lost by his neglect, he is liable.[81]

§ 207. Special proceedings to recover personalty.

No person, whether he be legatee, next of kin, heir, or creditor, is, as against a personal representative, entitled to the possession of the personalty pending administration; and where a residuary legatee, sole heir, or other person is permitted by the executor or administrator to retain in his possession and use the property of an estate pending administration, he will be considered as holding it as trustee for the representative, and required to deliver it up to him at any time when called upon,[82] and he cannot protect himself by transferring it to any other person.[83]

79 Andrews v. Tucker, 7 Pick. (Mass.) 250; Sanborn v. Goodhue, 28 N. H. 48.

80 Cooke v. Cooke, 29 Md. 538; Patterson v. Wadsworth, 89 N. C. 407; Anderson v. Piercy, 20 W. Va. 282.

81 Schulz v. Pulver, 3 Paige (N. Y.), 182; Holcomb v. Holcomb's Exrs., 11 N. J. Eq. 281.

82 Rev. Stats., c. 17, § 105, [1369]; L. O. L., § 1189; Carlisle v. Burley, 3 Me. 250; Eisenbise v. Eisenbise, 4 Watts (Pa.), 134; Albright v. Cobb, 30 Mich. 358.

83 Cullen v. O'Hara, 4 Mich. 132; Parks v. Norris, 101 Mich. 71, 59 N. W. 428.

On filing of a complaint under oath of a personal representative, the county court may cite any person who may have been permitted by the executor or administrator to retain any of the personalty of the estate in his possession to appear before the court and render a full account under oath of all the money, goods, chattels, bonds, accounts, records, or all other papers that have come into his possession for such administrator or executor, and his proceedings thereon, and, if he refuse to appear and account for the property, the court may proceed against him for contempt.[84]

Form No. 90.

PETITION FOR ACCOUNTING FOR PERSONALTY.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that on the ——— day of ———, 19—, letters testamentary upon said estate were issued to him out of and under the seal of said court, and that he is now, and ever since said date has been, the lawful executor of said estate; that your petitioner has intrusted to one G. H., of said county, who is an heir of said estate, certain personal property belonging to said estate, as follows: Twenty head of cattle, four head of horses [describe property in full]; that on the ——— day of ———, 19—, he demanded of said G. H. the property above described, and possession thereof was refused; that possession of said above-described property by your petitioner is necessary to enable him to pay the debts and complete the settlement of said estate.

Your petitioner therefore prays that a citation may issue out of this court to the said G. H., commanding him to appear before this court, at a time and place to be designated by said court, and a true account make under oath of all the property, moneys, goods, chattels, bonds, accounts, or other papers belonging to said estate which have come into his possession in trust for your petitioner, and of

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84 Rev. Stats., c. 17, § 105, [1369]; L. O. L., § 1189.

his proceedings thereon, and for such other and further relief as may be just and equitable.

Dated, etc.

(Signed) C. D.

[Add verification, Form No. 5.]

[For forms for citation and caption to interrogatories, see Nos. 87, 88, 89. For forms for contempt proceedings, see Nos. 20, 21, 22.]

§ 208. Compromising debts with leave of the court.

If a debtor is unable to pay his debt to the estate in full, the county judge may permit the executor or administrator to compromise with him and give him a discharge upon receiving a fair and just dividend of his effects.[84a] The words "unable to pay his debt to the estate" clearly mean that the debtor is insolvent, and thus only partially limit the common-law rule permitting compromise of debts,[85] leaving the right to compromise an unliquidated demand for damages as at common law.[86]

Under the Oregon statute, if such compounding is procured or induced by the fraudulent representations or conduct of such debtor, such payment shall only operate to discharge a like amount of the debt.[87]

Application should be by petition duly verified, and evidence adduced showing the condition of the debtor's affairs.

84a Rev. Stats., c. 17, § 106, [1370]; L. O. L., § 1294.

85 See § 209, *post*.

86 Olston v. Oregon W. & P. R. Co., 52 Or. 346, 96 Pac. 1095, 97 Pac. 538.

87 L. O. L., § 1294.

Form No. 91.

PETITION TO COMPROMISE DEBT.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that on the ——— day of ———, 19—, letters of administration issued to him out of and under the seal of said court, and that he now is the duly appointed administrator of said estate; that one G. H. is indebted to said estate upon a past due promissory note in the sum of $1,000, upon which there is no security; that said G. H. is insolvent and has not sufficient property exempt from execution with which to satisfy said debt in full; that said G. H. now offers to pay for his release and discharge from his said obligation the sum of $750 cash in hand, which offer, in the opinion of your petitioner, is the best settlement that can be obtained, and should be accepted.

Your petitioner therefore prays that an order may be made by the court authorizing and empowering him to compromise said claim or demand against the said G. H. upon the payment by said G. H. of the sum of $750.

Dated this ——— day of ———, 19—.

(Signed) C. D.

[Add verification, Form No. 5.]

Form No. 92.

ORDER PERMITTING COMPROMISE OF DEBT.

[Title of Cause and Court.]

Now, on this ——— day of ———, this cause came on for hearing upon the petition of C. D., administrator of said estate, for permission to compromise a debt due said estate from one G. H., and the court, after hearing the evidence, finds that the said G. H. is insolvent, that he is indebted to said estate upon a promissory note in the sum of $1,000, that said note is unsecured, that said G. H. proposes, with the consent of the court, to pay the sum of $750 in full settlement of said debt, and that said proposed compromise is a just and fair distribution of the effects of said G. H.

It is therefore ordered that the said C. D., administrator, accept said sum of $750 in full settlement of his indebtedness to said estate, and upon the payment of said sum he is hereby authorized and directed to deliver to said G. H. a receipt in full of all demands of said estate against him.

(Signed) J. K.,
County Judge.

§ 209. Right to compromise debts without leave of the court.

At common law it was a generally recognized doctrine that an executor or administrator had full authority to compromise or release any claim or demand belonging to the estate, without first obtaining the permission of the court to do so;[88] and it is now held by a majority of the courts that a statute which provides for compromising debts with leave of the court does not entirely do away with the common-law right of compromising debts due an estate, but is a protection to the executor or administrator.[89] The supreme court of Kansas holds that the statute completely supplants the common-law right or power to compromise.[90]

In Oregon, the statute which forbids the sale of personal property without leave of the court, unless such power is given by will, takes away the right of an executor or administrator to compromise any other than claims for unliquidated damages, which are regarded as intangible assets.[91]

Should the personal representative of a decedent compromise a claim, except for unliquidated damages, against the estate without leave of the court first had and obtained, he is responsible to the estate for any error of judgment or negligent act in regard to the

88 Weyer v. Second Nat. Bank, 57 Ind. 198; Boyd's Sureties v. Oglesby, 23 Gratt. (Va.) 684; Moulton v. Holmes, 57 Cal. 342; Bruner's Appeal, 57 Pa. 52; Wyman's Appeal, 13 N. H. 18.

89 Moulton v. Holmes, 57 Cal. 342; Wyman's Appeal, 13 N. H. 18; Chadbourn v. Chadbourn, 9 Allen (Mass.), 173; Geigers v. Kaigler, 9 S. C. 426.

90 Aetna Life Ins. Co. v. Swayze, 30 Kan. 118, 1 Pac. 36.

91 Olston v. W. P. & R. Co., 52 Or. 347, 96 Pac. 1095, 97 Pac. 538.

same,[92] and the burden of proof is upon him to show that it was for the benefit of the estate. Such an agreement to compromise a claim belonging to an estate is valid and binding both upon the debtor and personal representative, in the absence of fraud or collusion, and is a sufficient consideration for a contract.[93] A compromise which has been obtained by fraud or collusion between the personal representative and the creditor may be set aside by a bill in equity.[94] If permission to compromise has not been obtained from the county court, it must appear that the compromise was fair, beneficial to the estate, and free from fraud, and that, in making it, the personal representative acted with due diligence, in good faith, and with the same degree of prudence, care and skill that a prudent man, with the light then obtainable in regard to the entire situation of the debtor's affairs, would have exercised.[95] In California, the courts draw a distinction between a judgment and other claims. It is there held that a personal representative cannot, of his own authority, release the former for a less amount than its face, and such release so made was treated as void.[96]

§ 210. Right to submit claim to arbitration.

An executor or administrator has the right to submit a claim or demand which the estate has against

92 Chouteau v. Suydam, 21 N. Y. 184; Davenport v. First Congregational Soc., 33 Wis. 387.

93 Waring v. Lewis, 53 Ala. 631; Long v. Shackleford, 25 Miss. 566; Latta v. Miller, 109 Ind. 302; Cogswell v. Concord & M. R. R., 68 N. H. 192, 44 Atl. 293.

94 Henry County v. Taylor, 36 Iowa, 259.

95 Jacobs v. Jacobs, 99 Mo. 427, 12 S. W. 457; Bailey v. Dilworth, 10 Smedes & M. (Miss.) 404; Underwood v. Sample, 70 Ind. 448.

96 Siddall v. Clark, 89 Cal. 321.

another to arbitration. This right is based upon the fact that he has power to prosecute and defend suits.[97] The award is binding against the personal representative.[98]

Arbitration differs from compromising actions on behalf of the estate, for it is in the nature of a suit, and the award of the arbitrators has, when recorded, the effect of a judgment.

§ 211. Right to adjust or compromise real estate contracts.

The limited power given an executor, except by the express terms of the will, or of an administrator, over real estate, does not, as a general rule, authorize him to waive or release a contract for the same.[99]

In the case of executory contracts, however, where the title has not passed, he has the same rights and is entitled to the same remedies as his decedent. He may rescind or declare a forfeiture.[100] He has no inherent power to obtain a release of a widow's marital interest in lands by paying a cash amount.[101]

§ 212. Actions to recover assets transferred in fraud of creditors.

A personal representative is not bound to recover personal property transferred by the decedent with

97 Kendall v. Bates, 35 Me. 357; Eaton v. Cole, 10 Me. 137; Weston v. Stuart, 11 Me. 326; Bean v. Farnam, 6 Pick. (Mass.) 269.

98 Wheatley v. Martin's Admr., 6 Leigh (Va.), 62; Bean v. Farnam, 6 Pick. (Mass.) 269.

99 Hunt v. Thorn, 2 Mich. 213.

100 Gillilan v. Oakes, 1 Neb. Unof. 55, 95 N. W. 511; Howard v. Babcock, 7 Ohio, pt. 2. p. 73. See § 252 et seq., *post*.

101 Needham v. Bclote, 39 Mich. 487.

intent to defraud his creditors unless the assets of the estate are insufficient to pay the debts and expenses of administration. The law does not concern itself about what disposition a man of sound mind may make of his property while living, unless such disposition is fraudulent as to his creditors, or was obtained from him by fraud.[102]

Whenever there shall be a deficiency of assets in the hands of the executor or administrator, and when the deceased shall, in his lifetime, have conveyed any real estate, or any right, title or interest therein, with intent to defraud his creditors, or to avoid any right, debt, or duty of any person, or shall have so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator may, and it shall be his duty to, commence and prosecute to final judgment any proper action or suit at law or in equity for the recovery of the same, and may recover, for the benefit of the creditors, all such real estate so fraudulently conveyed, and may also, for the benefit of the creditors, sue for and recover all the goods, chattels, rights and credits which have been so fraudulently conveyed by the deceased in his lifetime, whatever may have been the manner of such fraudulent conveyance.[103]

Under the Oregon practice, it is the duty of the executor or administrator, when it appears that a transfer has been made by his decedent which he has reasonable ground to believe to be fraudulent, to petition the county court or a judge thereof for leave to commence and prosecute to final decree, the necessary

102 Hoffman v. Tucker, 58 Neb. 457, 78 N. W. 941.

103 Rev. Stats., c. 17, § 111, [1375]; L. O. L., § 1279.

or proper suits or actions to have the conveyance, transfer, judgment or decree or sale declared void and the property affected discharged from the effect thereof.[104]

If he neglect or refuse to make the application, or if he is the party to whom it is alleged the fraudulent transfer was made, or appears to be in any way interested in upholding the conveyance, judgment or decree, he may be removed from his office, and a representative appointed who will do his duty.[105] He cannot bring the action of his own motion without an order from the court.[106]

If it appears to such court or judge that the assets are insufficient for the payment of the debts, funeral charges and expenses of administration, and that it is probable that the conveyance, transfer or judgment was made, suffered, consented to or procured with intent to defraud, it shall make the order directing the prosecution of the suit as to any and all matters alleged in the petition.[107]

Form No. 92a—Oregon.

PETITION FOR ORDER TO BRING ACTION TO SET ASIDE FRAUDULENT CONVEYANCE BY DECEDENT.

[Title of Cause and Court.]

To the County Judge of said County of ——— and State of Oregon;

Comes now C. D., administrator of the estate of said A. B., and represents unto the court that heretofore, to wit, ———, 19—, said A. B. was the owner of the following described real estate situated in the county of ——— and state of Oregon, ———, which said property was of the value of $———, and of a stock of merchandise situated

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104 L. O. L., § 1279.

105 Marks v. Coats, 37 Or. 611, 62 Pac. 488.

106 King v. Boyd, 4 Or. 332; Humphreys v. Taylor, 5 Or. 362; Butts v. Purdy, 63 Or. 169, 125 Pac. 313, 127 Pac. 25; Hillman v. Young, 64 Or. 79, 127 Pac. 793.

107 L. O. L., § 1280.

in the building on said lots, and consisting of clothing, men's furnishing goods, boots and shoes, of the value of $———; and on said day and date last aforesaid was indebted to the X. Y. Co., a corporation, for merchandise sold and delivered to him, the said A. B., on ———, 19—, in the sum of $———, which said amount was then due and payable; to the L. M. Co., for merchandise sold and delivered to him, said A. B., on ———, 19—, in the sum of $———, which said amount became due and payable on the ——— day of ———, 19—; and was also indebted to the First National Bank of ——— on a promissory note for the sum of $———, which was then due and payable.

That on said ——— day of ———, 19—, said A. B. executed and delivered to one C. B., of ———, a certain pretended deed to said real estate for the pretended consideration of $———, and a certain pretended bill of sale of said stock of merchandise for the pretended consideration of $———; that said deed and bill of sale were executed and delivered by said A. B. to said C. B. for the purpose of hindering, delaying and defrauding the creditors of him, the said A. B., which intent and purpose were then and there well known by said C. B. to be fraudulent and made for the purpose of hindering and delaying the creditors of said A. B. in the collection of their just demands, and that the said A. B. continued in possession of said real estate and in charge of said stock of merchandise after the execution and delivery of said deed and said bill of sale. That said claims above set forth have been presented to said administrator for allowance and have been allowed by him as valid and subsisting demands against said estate, and that the costs and expenses of administration of said estate will amount to the sum of about $———, and that all of said amounts are due and unpaid.

That the appraised value of the estate of said A. B. which has come into the possession of said administrator, as appears from the inventory and appraisement is the sum of $———, and that no other property has come into the possession since the filing of said inventory.

Said administrator therefore prays that an order be made and entered directing him, said administrator, to commence and prosecute an action or actions against said C. B. for the setting aside of said deed and bill of sale and the recovery of possession of said property therein attempted to be conveyed.

(Signed) C. D.,
Administrator of the Estate of A. B., Deceased.

[Add verification.]

(312)

Notice of the application is not required by the statute. If the allegations are sufficient, it is the duty of the court or the judge thereof to enter the order prayed for.

Form No. 92b—Oregon.

ORDER AUTHORIZING SUIT TO SET ASIDE CONVEYANCES.

[Title of Cause and Court.]

On reading and filing the petition, duly verified, of C. D., administrator of said estate, praying for an order of the judge of said court, directing him, said administrator, to bring an action against one C. B. to set aside a certain deed to the following described real estate, ———, and also to set aside a bill of sale to the following described personal property, ———, as fraudulent and void as to the creditors of him, the said A. B.; and it appearing therefrom that said estate of said A. B. is insolvent, that said A. B. made said conveyances during his lifetime, and that there is reasonable ground to believe said conveyances to be fraudulent as to the creditors of him, the said A. B., it is therefore ordered that said C. D., administrator of the estate of said A. B., deceased, be and he hereby is authorized and directed to commence and prosecute any necessary action or actions against said C. B. to recover possession of said real estate and said personal property and set aside as fraudulent as to creditors said deed and said bill of sale.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
Judge of County Court.

Such right of action is based upon the theory that the executor or administrator represents all parties interested in the estate,—legatees, heirs and creditors,—holding the property and all rights pertaining thereto for them; and while acting as representative of the former as well as the latter, he has authority to impeach the fraudulent acts of his decedent, being in no manner bound thereby.[108]

108 Clark v. Clough, 65 N. H. 43, 23 Atl. 526.

The action being one which cannot be brought unless there are unpaid claims against the estate, and not enough funds with which to pay them,[109] it would seem that the proper time to bring it is after claims have been allowed and the amount of the indebtedness and deficiency of assets thereby determined.[110] It has been held, however, that, where the administrator is satisfied that there will be a deficiency, he need not wait until all claims have been judicially determined before bringing the action.[111]

Suit must be brought within four years from the date when the cause of action accrued. The death of the fraudulent grantee does not toll the statute of limitations.[112]

§ 213. Suit by creditor.

Where the executor or administrator is the person to whom it is alleged the deceased has fraudulently transferred his property during his lifetime, a creditor is a proper person to bring a suit to set aside the transfer, and on a proper showing an injunction will issue to restrain the personal representative from encumbering or in any manner disposing of his property.[113]

109 Hofmann v. Tucker, 58 Neb. 457, 78 N. W. 941.

110 Field v. Andrada, 106 Cal. 107, 39 Pac. 323; O'Connor v. Boylan, 19 Mich. 209, 13 N. W. 519; Estes v. Wilcox, 67 N. Y. 264; Fletcher v. Holmes, 40 Me. 364.

111 Andrew v. Hinderman, 71 Wis. 148, 36 N. W. 624.

112 Lesieur v. Simon, 73 Neb. 645, 103 N. W. 302.

113 Becker v. Anderson, 6 Neb. 499; Id., 11 Neb. 494, 9 N. W. 640. The petition in the above case was filed to set aside as fraudulent a chattel mortgage, the estate being insolvent. The court held that the mortgaged property constituted a fund for the payment of debts, and the executor could not hold them as mortgagee, the mortgage being fraudulent from its inception. A sweeping injunction was also granted.

The same rule would apply where the assets had come into the possession of a third party through fraud or collusion of the personal representative.[114]

Independent of the statute, a creditor whose claim has been allowed may bring the action in his own behalf and on behalf of other creditors, such other creditors being entitled to share proportionately in the distribution of any personalty or proceeds of real estate so recovered.[115]

§ 214. Indemnity bond.

The executor or administrator is not bound to sue for the property conveyed to defraud creditors, unless such creditors make application therefor and either pay or give security for the payment of such part of the costs and expenses of suit as the county court shall deem just and equitable.[116] He may bring suit at the request of the creditors and without first being indemnified as the statute requires.[117]

There is no statutory provision requiring a written request to be served on the executor or administrator, but, if the creditor wishes to place himself in the position where he can enforce his order, a written notice should be served when the bond which the court requires is presented to him. The personal representative may then be compelled, by proper proceedings, to bring the suit.[118]

114 McGlave v. Fitzgerald, 67 Neb. 417, 93 N. W. 692.

115 Irwin's Estate, 141 Pa. 278, 21 Atl. 604; Loomis v. Tift, 16 Barb. (N. Y.) 541; Hills v. Sherwood, 48 Cal. 386; Ohm v. Superior Court, 85 Cal. 545, 26 Pac. 244.

116 Rev. Stats., c. 17, § 112, [1396].

117 Chapoton v. Prentis, 144 Mich. 283, 107 N. W. 879.

118 Ohm v. Superior Court, 85 Cal. 545, 26 Pac. 244.

Form No. 93.

PETITION FOR ORDER REQUIRING EXECUTOR OR ADMINISTRATOR TO BRING SUIT TO SET ASIDE FRAUDULENT CONVEYANCES OF A DECEDENT.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that on the ——— day of ———, 19—, the commissioners duly appointed to examine and allow claims against said estate allowed a claim against the said estate in favor of your petitioner for the sum of $1,000; that the inventory and appraisement of said estate, as appears by the records and files thereof, show that the assets of said estate amount to the sum of $500; that said commissioners have allowed against said estate, from the allowance of which no appeal has been taken, claims aggregating the sum of $10,000; that said A. B. was, at the time of his death, seised of no real estate in his own name; that your petitioner has good reason to believe, and does believe, that the said A. B., during his lifetime, transferred the following described property [describe property alleged to have been transferred in fraud of creditors] to one L. M., with the intent on his part to hinder, delay, and defraud the creditors of said A. B. and your petitioner, which intent was then and there well known to said L. M.

Your petitioner therefore prays that the court may make an order requiring G. H., administrator of said estate, to bring a suit against L. M. for and in behalf of the said estate, to set aside said transfer as fraudulent and void as to your petitioner and the other creditors of said estate, and that said court may also determine what part and proportion of the expenses of such suit your petitioner and other creditors of said estate be required to pay or secure.

Dated this ——— day of ———, 19—.

(Signed) C. D.

[Add verification, Form No. 5.]

Form No. 94.

ORDER REQUIRING EXECUTOR OR ADMINISTRATOR TO BRING SUIT TO SET ASIDE FRAUDULENT TRANSFER.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the application of C. D. for an order requiring G. H., administrator of said estate, to bring suit to set aside transfers of realty made by said A. B. in his lifetime, and alleged to have been

made with intent to defraud the creditors of him, said A. B.; and it appearing to the court that the assets of the estate, as appears from the inventory and appraisement, are wholly insufficient for the payment of the debts and allowances against said estate, and it further appearing to the court that C. D. is a lawful creditor of said estate, and that there is probable cause for believing that an action could be maintained to set aside the transfer of the following described real estate [describe real estate alleged to have been fraudulently conveyed] as made by said A. B. with an intent to hinder, delay, and defraud petitioner and the other creditors of said estate, and that said fraudulent intent was well known to the grantee in said conveyances,—one L. M.:

It is therefore ordered that C. D. or other creditor of said estate pay or secure by proper bond one-half of the expenses and costs of prosecuting a suit to recover said real estate above described, and that said G. H., administrator as aforesaid, on receipt of said security, be and he hereby is authorized and directed to bring such suit as the circumstances of the case may require, to recover for and in behalf of said estate possession of said above-described real estate.

(Signed) J. K.,
County Judge.

Form No. 95.

BOND TO SECURE COSTS AND EXPENSES OF SUIT TO SET ASIDE FRAUDULENT CONVEYANCE MADE BY DECEDENT.

Know all men by these presents, that we, C. D., as principal, and E. F., as surety, are held and firmly bound unto G. H., administrator of the estate of A. B., deceased, in the penal sum of five hundred dollars ($500), for which payment well and truly to be made we do hereby bind ourselves, our heirs, executors, administrators, and assigns jointly and severally by these presents.

Whereas, by an order of the county court of ——— county, Nebraska, duly entered by the county judge thereof on the ——— day of ———, 19—, G. H., administrator of said estate, was authorized to bring a suit to set aside the transfer of the following described realty [describe realty alleged to have been fraudulently conveyed], as made to hinder, delay, and defraud the creditors of said estate, on condition that said creditors give a bond with proper security for the payment of one-half of the costs and expenses of said suit:

Now, therefore, the condition of this obligation is such that, if the above-bounden C. D. shall well and truly pay or cause to be paid to

said G. H., administrator, one-half of the costs and expenses of a suit to be commenced by said G. H. to recover the land above described as having been transferred by said A. B. with the intent of him, said A. B., to hinder, delay, and defraud the creditors of said A. B., then these presents shall be null and void; otherwise to be and remain in full force and effect.

Dated this ——— day of ———, 19—.

(Signed) C. D.
E. F.

Bond and surety approved by me this ——— day of ———, 19—
(Signed) J. K.,
County Judge.

§ 215. Nature of the action.

Actions either by an executor or administrator under the statute, or by a creditor, to set aside a fraudulent transfer by decedent of his property, are in the nature of creditors' bills or bills to reach assets. The allowance of the claims by the court or commissioners, and the deficiency of assets, have the same effect as the entry of a judgment, issue of execution thereon and return thereof unsatisfied.[119]

Property to which a widow or heir is absolutely entitled cannot be reached in such action.[120] In cases where the conveyance was given to secure future support and its conditions have been performed, the executor, administrator or creditor can recover the difference between the value of the support or services and the value of the property.[121]

The transfer of property by a decedent during his lifetime with intent to defraud is voidable only in so

[119] Gardner v. Gardner, 17 R. I. 751, 24 Atl. 785; Steere v. Hoagland, 39 Ill. 264; Whitney's Heirs v. Kimball, 4 Ind. 546.

[120] Pease v. Shirlock, 63 Vt. 622, 22 Atl. 661.

[121] Crane v. Stickles, 15 Vt. 252; Verplank v. Sterry, 12 Johns. (N. Y.) 536; Kelsey v. Kelley, 63 Vt. 41, 22 Atl. 597.

far as the rights of creditors and the costs and expenses of administration are concerned.[122] The judgment should direct that the transfer of personal property be set aside and the property held subject to the general demands against the estate.[123] It should subject the real estate so transferred to the claims allowed, and charges and expenses, or the deficiency, if there is some personal estate which can be applied for that purpose, order their payment within a fixed time, and for sale in default of payment.[124]

§ 216. Right of heir or legatee to collect assets.

As a general rule, no one but an executor has a right to bring a suit to collect the assets of the estate pending administration,[125] even though he be the sole heir.[126]

There are two exceptions recognized by our courts. Heirs or beneficiaries under a will may have a bill in equity against the executor or administrator and the party indebted to the estate to recover assets, provided the debts and expenses of administration are paid and the personal representative refuses to bring suit.[127]

An heir or legatee may repudiate a compromise of a pending suit, entered into between the administrator or executor and others having an interest, and the

122 Hillman v. Young, 64 Or. 79, 127 Pac. 793.

123 See Becker v. Anderson, 11 Neb. 494, 8 N. W. 640.

124 Chapoton v. Prentis, 144 Mich. 283, 103 N. W. 302.

125 Finnegan v. Finnegan, 125 Ind. 262, 25 N. E. 341; Haynes v. Harris, 33 Iowa, 516; Pritchard v. Norwood, 155 Mass. 539, 30 N. E. 80; Varner v. Johnson, 112 N. C. 570, 17 S. E. 483; Murphy v. Hanrahan, 50 Wis. 485, 7 N. E. 636.

126 Holowell v. Cole, 25 Mich. 345.

127 Prusa v. Everett, 78 Neb. 250, 113 N. W. 571.

debtor, without his consent. He may be substituted as sole plaintiff and prosecute the action for his share.[128]

If it appears that no letters of administration have been granted and that there are no debts, it has been held that the heirs may sue to recover property and distribute it among themselves.[129]

§ 217. Debt of executor or administrator to estate.

It is a well-established rule of law, running back even before the Revolution, that an executor or administrator is considered as having paid the debts due from him to the estate, and as actually having in his possession that much more cash.[130] If the personal representative is insolvent, the courts, in the interests of all concerned, modify this rule somewhat. He should still charge himself with the amount of his debt, but it does not make it actual money. The law does not require impossibilities, and there is no more reason why he should be considered as having paid what he was utterly unable to pay than any other creditor. He is held liable to the estate to the extent

128 Tecumseh Nat. Bank v. McGee, 61 Neb. 709, 85 N. W. 949. In this case the administrator and three heirs, without the consent of the fourth, compromised a suit for five thousand dollars and interest against a solvent defendant for eight hundred dollars, two hundred dollars to each heir. The fourth heir filed objections to the settlement and asked to be substituted as plaintiff and prosecute the action for her one-fourth interest, should the administrator refuse to do so. She was substituted and a judgment for her full share sustained.

129 Cox v. Yeazel, 49 Neb. 343, 68 N. W. 483; Tecumseh Nat. Bank v. McGee, 61 Neb. 709, 85 N. W. 949.

130 Waukford v. Waukford, 1 Salk. 306; Stevens v. Gaylord, 11 Mass. 256; Wheeler v. Emerson, 44 N. H. 182.

of his ability to pay the same at any time during administration.[131] It has been held, however, that a judge of probate has no authority to release him from any part of the debts on the mere ground that he is unable to perform it. He has no authority to direct the personal representative to compromise with himself, nor has he any authority to negotiate and compromise with the personal representative.[132] It would seem that the only way the indebtedness of an insolvent executor or administrator to the estate could be adjusted, and the amount which he should pay determined, is by an equity proceeding.[133]

131 Lyon v. Osgood, 58 Vt. 707, 7 Atl. 5; Howell v. Anderson, 66 Neb. 975, 92 N. W. 780; Howell v. Dodge, 140 Mich. 236, 103 N. W. 597; Ewen v. Hitchcock (Iowa), 146 N. W. 1; L. O. L., § 1182; In re Mason's Estate, 42 Or. 180, 70 Pac. 507; United Brethren v. Aken, 45 Or. 250, 77 Pac. 748.

132 Norris v. Towle, 54 N. H. 290; Judge of Probate v. Sulloway, 68 N. H. 511, 44 Atl. 720.

133 Lyon v. Osgood, 58 Vt. 707, 7 Atl. 5; Harker v. Irick, 10 N. J. Eq. 269.

CHAPTER XIX.

MANAGEMENT OF ESTATES.

§ 218. General Powers of Executor or Administrator.
219. Actions Against the Estate.
220. Management of Real Estate.
221. Power of Executor to Sell Real Estate.
222. Sales by Administrator With the Will Annexed.
225. Sales of Personal Property.
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225. *Caveat Emptor.*
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227. Assets of Estate Held by Heirs or Legatees.
228. Contribution by Heirs or Devisees for Payment of Debts.
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232. Personal Representative not Authorized to Carry on Decedent's Business.
233. Liability for Carrying on Decedent's Business.
234. *Devastavit,* Definition.
235. Liability for a *Devastavit.*
236. Rights in Regard to Negotiable Instruments.

§ 218. General powers of executor or administrator.

An executor or administrator is an officer of the court governed by the statutes, and the orders of the court but possessing large discretionary powers. He is not the agent of the heirs, legatees, devisees or creditors, though usually himself having an interest in the estate. He has no right to do any act which will benefit his interests at the expense of others or to give any preference, except that given by law, to one class above another. His management should be such as

will conserve the interests of the estate as a whole, and the rights of all parties therein.[1]

§ 219. Actions against the estate.

He represents the estate in all matters in which it has an interest, and should appear and defend against all actions pending against the decedent which were revived by the plaintiffs and actions or proceedings brought against the estate. He is the only proper party to defend, and has the right to control all actions against the estate without interference from the legatees or next of kin,[2] except that an heir or legatee may appear in a suit to protect his own rights where there is collusion between parties representing adverse interests and the legal representative.[3]

In all matters depending on his discretion, he should use the same degree of care, prudence and judgment a man of average ability exercises in the transaction of his own private business.[4]

§ 220. Management of real estate.

Such real estate of his decedent as he is required to take into his possession,[5] lands purchased on execution sale on judgments in favor of the estate, or bid

1 Henry v. Henry, 73 Neb. 746, 103 N. W. 441; Hibner v. Wilson, 83 Neb. 259, 116 N. W. 522; Thorson v. Hooper, 57 Or. 78, 109 Pac. 368; L. O. L., § 1165.

2 Sharp v. Citizens' State Bank, 70 Neb. 758, 98 N. W. 50; Buchanan v. Buchanan, 75 N. J. Eq. 274, 71 Atl. 745.

3 Rine v. Rine, 91 Neb. 248, 135 N. W. 1051.

4 Dundas v. Carson, 25 Neb. 495, 41 N. W. 449; Benjamin v. Bush, 89 Neb. 334, 118 N. W. 602.

5 Section 199, *supra*.

in on mortgage foreclosure, should be so managed as to bring in as large an income as their character and condition will permit, and he is accountable for all rents and profits received therefrom,[6] but he is not liable for rents which are uncollectible.[7]

He has power to execute a lease of the real estate, but not for a term longer than the close of the administration,[8] and may recover possession of lands from a tenant by forcible detention proceedings.[9]

His authority over the various classes of lands which come into his possession is substantially the same, except that lands taken for debts take the place of the personal assets of the estate which were a lien upon them, and as a general rule should be sold for payment of debts in preference to others. In some jurisdictions they may be sold without leave of the court.[10]

He must pay the taxes and assessments whether they became a lien after[11] or before the death of his decedent,[12] and keep the buildings insured[13] and in tenantable repair.[14]

6 Tunnicliff v. Fox, 68 Neb. 811, 94 N. W. 832; In re Holderbaum, 82 Iowa, 69, 47 N. W. 898.

7 In re Moore's Estate, 96 Cal. 522, 31 Pac. 584. See, also, §§ 414, 424, *post*.

8 Jackson v. O'Rorke, 71 Neb. 418, 98 N. W. 1068.

9 Nicrosi v. Phillips, 91 Ala. 299, 8 South. 561.

10 Stevenson v. Polk, 71 Iowa, 278, 32 N. W. 340; Little v. Lesia, 5 Mich. 119; Thomas v. Le Baron, 10 Met. (Mass.) 403.

11 Long v. Landman, 118 Mich. 174, 76 N. W. 374.

12 Chandler v. Chandler, 87 Ala. 300, 8 South. 153; Jaffrey v. Smith (N. H.), 80 Atl. 504.

13 Wiggins v. Swett, 6 Met. (Mass.) 194.

14 Rev. Stats., c. 17, § 102, [1366]; L. O. L., § 1185.

§ 221. Power of executor to sell real estate.

An administrator has no inherent authority to sell the real estate of his decedent, nor has an executor, unless it has been given by the will.[15] Such power need not be given by express direction, but by implication. A direction to an executor to divide real estate, when the conditions of the same or the number of shares are such as to make a sale imperative,[16] or a provision directing that the estate be disposed of for certain purposes, and the proceeds distributed by the executor without explicitly empowering him to make the sale,[17] give him an implied power of sale; and generally when a testator, in the disposition of his estate, imposes on his executor trusts to be executed or duties to be performed which require for their execution or performance a power or right to make a sale, the executor takes such powers and authority as will enable him to execute the trust and perform the duties devolving upon him.[18]

Under a general power of sale he may sell any lands of his decedent, including the homestead property or so much thereof as may be necessary,[19] subject, of

15 Lippincott's Exr. v. Lippincott, 19 N. J. Eq. 121. See L. O. L., §§ 1248, 1263.

16 Bonacum v. Manning, 85 Neb. 60, 122 N. W. 711; Chick v. Ives, 2 Neb. Unof. 879, 90 N. W. 751.

17 Schroeder v. Wilcox, 39 Neb. 136, 57 N. W. 1031; Franklin v. Osgood, 2 Johns. Ch. (N. Y.) 19; Lindley v. O'Reiley, 50 N. J. L. 636, 15 Atl. 379; Hite's Devisees v. Hite's Exr., 93 Ky. 257, 20 S. W. 778; Peter v. Beverly, 10 Pet. (U. S.) 532; Jennings v. Smith, 29 Ill. 116.

18 Bonacum v. Manning, 85 Neb. 60, 122 N. W. 711; Lindley v. O'Reiley, 50 N. J. L. 636, 15 Atl. 379; Cook v. Cook (N. J. Ch.), 47 Atl. 732.

19 Willier v. Cummings, 91 Neb. 571, 136 N. W. 559.

course, to homestead rights,[20] or lands bid in on mortgage foreclosure, or purchased at execution sale on a judgment in favor of the estate.[21]

A sale under a general power must be for cash, or cash and note secured by mortgage on the land, for the balance. He cannot take other land in whole or part payment.[22]

If the power is limited the sale can be made only under the circumstances and conditions defined in the will.[23] If there are several executors the deed must be executed by all; but in the event of the death of one or more, the power vests in the survivor or survivors.[24]

Under the Oregon practice, an executor or administrator with the will annexed may sell real estate of his testator under a power of sale given him by the will without an order of court, but he shall be bound to conduct the sale and make a return thereof in all respects as if it were made by order of the court, unless there are special directions in the will concerning the manner and terms of sale, in which case he shall be governed by such directions in all respects. Sales so made in accordance with the provisions of the will, where the property has been sold and transferred in good faith, and the consideration paid therefor, are declared in all respects valid and binding.[25] Such

20 Section 391, *post.*

21 Battey v. Battey, 94 Neb. 729, 144 N. W. 786; Williams v. Towl, 65 Mich. 204, 31 N. W. 835.

22 Taylor v. Galloway, 1 Ohio St. 232; Ross v. Barr (Ky.), 53 S. W. 658.

23 Arlington State Bank v. Paulsen, 55 Neb. 717, 78 N. W. 303; Feaster v. Ragan, 135 Iowa, 633, 113 N. W. 479.

24 Rev. Stats., c. 17, § 72, [1336].

25 L. O. L., § 1263.

sales must therefore, unless the will otherwise directs, be made at public auction and upon notice,[26] except in cases where an order is obtained on application to the county court for a private sale.[27]

All executors' and administrators' sales of real estate must be reported to the county court and an order of confirmation entered in the same manner as sales under order of the court.[28] The rule does not apply to lands devised to an executor as a trustee with power to sell for payment of debts and express power to sell the residue for other purposes. Title vesting in him, confirmation is not necessary.[29] The sale cannot be made by the trustee while still acting as executor. He cannot perform the duties of trustee until his account as executor is settled, his discharge granted, and he qualifies as such officer.[30]

§ 222. Sales by administrator with the will annexed.

The general powers given an administrator with the will annexed by the statute give him the right to sell real estate when required by the will for the purposes of distribution and division, in the same manner as an executor, though the latter may be given a broad discretion in regard to the time, place or terms of such sale.[31] Where a sale is not necessary for the purposes of administration, and the terms of the grant clearly

26 L. O. L., § 1257.

27 See Sales of Real Estate, *post.*

28 Northrop v. Marquam, 16 Or. 173, 18 Pac. 449.

29 Brown v. Brown, 7 Or. 285.

30 In re Roach's Estate, 50 Or. 199, 92 Pac. 118.

31 Schroeder v. Wilcox, 39 Neb. 136, 57 N. W. 1031; Koopman v. Carroll, 50 Neb. 824, 70 N. W. 395; Vernor v. Colville, 54 Mich. 281, 20 N. W. 75; Davis v. Hoover, 112 Ind. 423, 14 N. E. 468; Mott v. Ackerman, 92 N. Y. 539.

indicate a personal confidence or special reliance on the judgment of the executor, it being manifest that the testator intended to leave the question whether the power should be exercised or not wholly dependent on the judgment of the donee, such power is in the nature of a personal trust, and none but the executor can execute it.[32]

Such administrator of a foreign will derives his power to sell from the statutes of this state.[33]

Form No. 96.

EXECUTOR'S DEED EXECUTED PURSUANT TO POWER.

Know all men by these presents, that I, C. D., of the county of ——— and state of Nebraska, as executor of the estate of A. B., late of said county, deceased, pursuant to the power conferred upon me as such executor by the will of the said A. B., to sell the real estate of which he, the said A. B., was seised at the time of his death, in consideration of the sum of ——— dollars to me in hand paid, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, convey, and confirm unto L. M., of the county aforesaid, the following described estate, situated in the county of ——— and state of Nebraska [describe property], together with all the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining.

To have and to hold the above-described premises unto the said L. M., and to his heirs, executors, administrators, and assigns, forever.

And I do hereby, in my capacity as executor as aforesaid, and pursuant to the power so conferred upon me by the will of said A. B. as aforesaid, covenant with the said L. M., his heirs, executors, administrators, and assigns, that I am, by virtue of the power aforesaid, lawfully seised of said above-described premises as such executor as aforesaid, that they are free from all encumbrances, and that I, in my

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32 Crouse v. Peterson, 130 Cal. 169, 62 Pac. 473; Drummond v. Jones, 44 N. J. Eq. 53, 13 Atl. 611; Naundorf v. Schuman, 41 N. J. Eq. 14, 2 Atl. 609; Belcher v. Branah, 11 R. I. 226.

33 Crouse v. Peterson, 130 Cal. 169, 62 Pac. 473. See § 267, *post.*

capacity as such executor, have lawful authority to sell the same; [and I do hereby, in my official capacity as executor of the said estate of said A. B., covenant and agree to warrant and defend the said premises against the lawful claims of all persons whomsoever].

Signed this ——— day of ———, 19—.

(Signed) C. D.

In presence of:
E. F.
G. H.

State of Nebraska,
——— County,—ss.

On this ——— day of ———, 19—, before me, B. M., a notary public in and for ——— county, Nebraska, personally appeared C. D., executor of the estate of A. B., deceased, to me personally known to be the identical person described in, and whose name is affixed as grantor to, the foregoing deed, and acknowledged said instrument to be his voluntary act and deed as such executor for the purposes therein stated.

Witness my hand and official seal this ——— day of ———, 19—.

(Official Seal)

(Signed) B. M.,
Notary Public.
Commission expires ———.

§ 223. Sales of personal property.

At common law an executor or administrator took a full title and *jus dispondendi* of the personal estate.[34] The only statutory restriction on this right is one compelling him to sell when all the heirs residing in this state request him so to do.

He may obtain an order from the county court for the sale of personalty, excepting only such as passes absolutely to the surviving spouse or children, either at public auction or private sale, as the court may direct; if at public auction, the court must direct how

[34] Edney v. Baum, 70 Neb. 159, 97 N. W. 252.

notice shall be given,[35] or he may sell without an order of the court, if he sees fit to do so.[36]

This statute is directory and not mandatory.[37] Its object is to protect the personal representative, for if he sells property without an order of the court for less than its appraised value, he is liable for the difference.[38]

He has no right to trade personal property for real estate, but if he does so and takes the title in the name of the beneficiaries, the transaction is not void.[39]

A purchase of real estate with the assets, unless authorized by the will, is a conversion of them, and the representative will be held a trustee of the creditors, heirs or legatees. The remedy in such case is by an action in equity to subject the land so purchased to the payment of the debt, legacy or distributive share, and it may be brought by any party who has an interest in the estate.[40]

In Oregon no sale of personal property of an estate is valid, except where a power of sale is given by the

35 Rev. Stats., c. 17, § 240, [1504].

36 Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 155; Rayner v. Pearsall, 3 Johns. Ch. (N. Y.) 578; Clark v. Blackington, 110 Mass. 369; Hamrick v. Craven, 39 Ind. 241; Ladd v. Wiggin, 35 N. H. 421; Marshall Co. v. Hanna, 57 Iowa, 372, 10 N. W. 745; In re Radovich's Estate, 74 Cal. 536, 16 Pac. 321.

37 Edney v. Baum, 70 Neb. 159, 97 N. W. 252; Mead v. Byington, 10 Vt. 116; Sherman v. Willett, 42 N. Y. 146; Flynn v. Chicago & Great Western R. Co. (Iowa), 141 N. W. 401.

38 Rev. Stats., c. 17, § 239, [1503]; Williams v. Ely, 13 Wis. 1; Munteith v. Rahn, 14 Wis. 210.

39 Edney v. Baum, 70 Neb. 159, 97 N. W. 252. In this case the grantees in the deed alleged fraud on the part of their grantor. The court held that the executor could affirm the sale and bring an action for damages or could rescind.

40 Blake v. Chambers, 4 Neb. 90; Griswold v. Frink, 22 Ohio St. 79; Baldwin v. Tuttle, 23 Iowa, 67.

will, without an order from the county court therefor.[41] This statute is not construed as directory. It abrogates the common-law rule but leaves with him the disposition of choses in action, which he may sell or dispose of by indorsement to another or to a distributee, without an order of the county court, and such transfer passes the title to the extent that the transferee or distributee can maintain an action on them, and the makers cannot defend on the ground of want of authority on the part of the personal representative to make such transfers,[42] and also permits the sale or transfer of intangible assets, like claims for damages.[43]

The court acquires jurisdiction by the filing of a verified petition, and no notice or citation is necessary.[44] If the court finds it for the best interests of the estate, he may order the personalty sold at either public auction or private sale.[45]

He may order a stock of goods sold in the regular course of business, and the necessary expenses, such as clerk hire, rent, heat, etc., can be adjusted as costs of administration on the final account.[46] Property specifically bequeathed should not be sold so long as any personal assets applicable to the debts remain.[47]

41 L. O. L., §§ 1248, 1263.

42 Weider v. Osborn, 20 Or. 310, 25 Pac. 715.

43 Section 268, *post.*

44 Rev. Stats., c. 17, § 240, [1504]; L. O. L., § 1248.

45 Rev. Stats., c. 17, § 240, [1504], also providing that when the sale is at public auction, the court shall direct how notice be given; L. O. L., §§ 1250, 1251, requiring public sales to be in the same form as sales on execution.

46 In re Osburn's Estate, 36 Or. 8, 58 Pac. 521.

47 L. O. L., § 1251; Howe v. Kern, 63 Or. 496, 125 Pac. 837.

Form No. 97.

APPLICATION OF EXECUTOR OR ADMINISTRATOR FOR LEAVE TO SELL PERSONALTY.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that he is the duly appointed administrator [executor] of said estate; that among the assets of said estate, as appears by the inventory thereof, are one hundred head of three year old steers, branded —N—, now on the range north of ——— in said county; that said steers are in good marketable condition, and are in such condition as to be sold at the highest market price; that the debts allowed against said estate, and the expenses of administration, as appear from the records and files in said proceeding, amount to the sum of $2,000, and that your petitioner has no money in his possession applicable to the payment of the same, and that there are also legacies unpaid of the value of $2,000.

Your petitioner therefore prays that said court may order said personalty above described to be sold at private sale [at public auction, and that notice of the time and place of said sale be given in such manner as said court may direct].

(Signed) C. D.

[Add verification, Form No. 5.]

Form No. 98.

ORDER FOR SALE OF PERSONALTY.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the petition of C. D., administrator of said estate, for leave to sell one hundred head of three year old steers, branded —N—, the personal property of said estate, and was submitted to the court, upon consideration whereof the court finds that the best interests of said estate will be subserved by said sale.

It is therefore ordered that said C. D. be and he hereby is authorized to sell said personalty above described at private sale [at public auction, and that he give notice of the time and place of said sale by causing notice thereof to be posted in —— conspicuous places in said county, and by publication for two weeks in the ———, a newspaper printed and published in said county].

(Signed) J. K.,
County Judge.

§ 224. Executor or administrator not to be a purchaser.

An executor or administrator should not purchase any personal property of his decedent, either directly or indirectly, through a third party.[48] If the sale is for a full price, and there is an entire absence of fraud, it is binding on the beneficiaries of the estate, who have notice of the same, until set aside in an action for that purpose.[49] If fraud is shown, it is void, except where the parties interested had full knowledge of the same and did not bring the action within the statutory period. Their acquiescence amounts to an approval of the act of the representative.[50]

§ 225. Caveat emptor.

The maxim *caveat emptor* applies strictly to all sales of personalty by an executor or administrator in his official capacity. He warrants nothing, and sells whatever interest the decedent may have had in the property.[51]

§ 226. Right of creditor, heir or legatee to follow assets.

In the absence of fraud, the personal assets of an estate cannot be followed by a creditor, heir or legatee

[48] Appeal of Grim, 105 Pa. 375; Clark v. Blackington, 110 Mass. 369; Stronach v. Stronach, 20 Wis. 129; Johnson v. Blackman, 11 Conn. 342; Cox v. John, 32 Ohio St. 538; Caldwell v. Caldwell, 45 Ohio St. 512, 15 N. E. 297.

[49] Shelby v. Creighton, 65 Neb. 485, 91 N. W. 369; Appeal of Grim, 105 Pa. 375.

[50] Shelby v. Creighton, 65 Neb. 485, 91 N. W. 369.

[51] Bingham v. Maxey, 15 Ill. 295; Bartholemew v. Warner, 32 Conn. 98.

into the hands of a party to whom they were sold by a personal representative, whether the sale was made by the order of the court or not.[52] As far as the purchaser is concerned, his title is completed by sale and delivery, and what price is paid, or what may become of the same, is of no concern to him,[53] except where there is actual fraud or collusion shown which is known to and participated in by the purchaser,[54] as where property is sold at a price far below its market value, or for the purpose of raising money to be used for the personal interests of the executor or administrator.[55] An administrator *de bonis non* can recover the value of them from his predecessor or his predecessor's bondsmen.[56] Any party interested may bring the action to set aside the sale, although the others are satisfied with it;[57] and a sale will be set aside where, by fraudulent devices and collusion between the personal representative and a part of the creditors, the assets of the estate were so manipulated as to shut out one of the creditors entirely.[58]

52 Thomas v. Reister, 3 Ind. 369; Speelman v. Culbertson, 15 Ind. 441; Walker v. Craig, 18 Ill. 116; Lothrop v. Wightman, 41 Pa. 297.

53 Bond v. Zeigler, 1 Ga. 324.

54 Shaw v. Spencer, 100 Mass. 382; Sherburne v. Goodwin, 44 N. H. 271.

55 Rogers v. Zook, 86 Ind. 237; Atcheson v. Scott, 51 Tex. 213; Austin v. Willson's Exrs., 21 Ind. 252; Carter v. Manufacturers' Nat. Bank, 71 Me. 448; Green v. Sargeant, 23 Vt. 466.

56 State v. Fulton, 35 Mo. 323; Cowgill v. Linville, 20 Mo. App. 138; State v. Dulle, 45 Mo. 269.

57 Litchfield v. Cudworth, 15 Pick. (Mass.) 23.

58 Carson v. Fears, 91 Ga. 482, 17 S. E. 342.

§ 227. Assets of estate held by heirs or legatees.

A personal representative should retain in his possession and take charge of all the assets of the estate, both real and personal, until ordered by the court to dispose of them for the payment of debts and allowances, and distributing them among those entitled thereto; but if a devisee, heir or legatee shall give a bond to the county judge, with such surety or sureties as he may direct, to secure the payment of the just proportion of such heir, devisee or legatee of the debt and expenses of the estate, or such part thereof as remains unpaid, and to indemnify the executor or administrator against the same, he may receive from the personal representative his proportionate share of the estate.[59]

Irrespective of the statute, a personal representative has the right to pay to a legatee or distributee the whole or a part of his share of the estate at any time pending administration, without taking a bond,[60] but by making such payments he becomes personally liable upon his own bonds should he not retain in his hands sufficient assets of the estate to pay the debts and expenses of administration.[61] If there are no debts, and the condition of the estate permits it, the settlement of the estate may be greatly facilitated, and the personal representative spared much labor, by making payments to the legatees or distributees whenever the funds in his hands warrant it. Such payments, it has been held, do not take away the right of the personal

[59] Rev. Stats., c. 17, § 232, [1496].

[60] Charlton's Appeal, 88 Pa. 476.

[61] Edmunds' Admr. v. Scott, 78 Va. 720.

representative to recover from such legatees or distributees the money so paid them, or so much thereof as is needed to pay off the debts, provided, however, such debts were known to the personal representative at the time he made the payments;[62] but the supreme court of Indiana holds that he may compel them to refund in any event.[63] The remedy of the creditor in a case of this kind, therefore, is by an action on the bond of the personal representative, and the remedy of the personal representative is by an action to recover from the legatees or distributees.

Under the Oregon practice, the court has power, at any time after the filing of the first annual account, on the application of an heir, devisee or legatee, to enter an order for the delivery to him of possession of real estate and the payment of his legacy or distributive share, or any part of the same. Notice must be given the executor or administrator ten days before the application is made. If the condition of the estate warrants it, the court may grant the petition or some part of it, upon condition that the applicant file with the clerk within a time in the order specified an undertaking with one or more sufficient sureties, for the benefit of whom it may concern, in a sum double the value of the devise, legacy or distributive share, upon condition that such devisee, legatee or heir pay, when required, his proportion toward satisfying any claims against the estate.[64] The sureties must have the same qualifications as sureties in bail upon arrest, and shall justify in the same manner. The costs of the proceeding must be paid by the applicant.[65]

62 Musser v. Oliver, 21 Pa. 362; Alexander v. Fisher, 18 Ala. 374; Walker v. Hill, 17 Mass. 380; Montgomery's Appeal, 92 Pa. 202, 37 Am. Rep. 670; Munden v. Bailey, 70 Ala. 63.

63 Smith v. Smith, 76 Ind. 236.

64 L. O. L., §§ 1305, 1306.

65 L. O. L., § 1307.

Form No. 98a—Oregon.

PETITION FOR PAYMENT OF LEGACY PENDING ADMINISTRATION.

[Title of Cause and Court.]

Your petitioner, E. F., respectfully represents unto the court that as appears from the first semi-annual account of C. D., executor of said estate, and from the records and files in said proceeding, that said executor has in his possession personal property of said estate consisting of cash on hand in the sum of $———, together with notes, secured by mortgages, bonds and other securities, as more fully appears from the inventory of said estate and said account, all of the value of $———; that all claims and demands that have been presented to said executor have been allowed and ordered paid by said court, amounting to the sum of $———, and to the best of your petitioner's knowledge and belief there are no other creditors of said estate than those whose claims have been ordered paid.

Your petitioner therefore prays that an order of said court be made and entered directing said executor to pay to him, said E. F., the amount of said legacy upon his filing in said court an undertaking to be approved by the clerk thereof as provided by law.

That by the terms of said will of said A. B. your petitioner is given a legacy of $———.

Your petitioner therefore prays that an order of said court be made and entered directing said executor to pay to him, said E. F., the amount of said legacy upon his giving an undertaking to be approved by said clerk of said court as provided by law.

Dated this ——— day of ———, 19—.

(Signed) E. F.

[Add verification.]

Form No. 99.

BOND OF HEIR OR LEGATEE ON RECEIPT OF HIS SHARE OF THE ESTATE.

Know all men by these presents, that we, E. F., as principal, and G. H. and R. T., as sureties, all of ——— county, Nebraska, are held and firmly bound unto the county judge of said ——— county, Nebraska, in the penal sum of ——— dollars, for which payment well and truly to be made we do hereby jointly and severally bind ourselves, our heirs, executors, administrators, and assigns by these presents.

Dated this ——— day of ———, 19—.

Whereas, E. F. has received from C. D., administrator of the estate of A. B., deceased, the sum of ——— dollars, being the estimated amount of the distributive share of said estate belonging to said E. F. after payment of debts, allowances, and expenses of administration:

Now, therefore, the condition of this obligation is such that, if the said E. F. shall well and truly pay or cause to be paid to the said C. D., administrator as aforesaid, his proportionate share of the debts and expenses of administration of said estate, or such part thereof as shall remain unprovided for, to the extent only of the amount of ——— dollars, so received by the said E. F. from the said C. D., administrator as aforesaid, and shall indemnify the said C. D., administrator as aforesaid, to the extent only of the amount of ——— dollars, then these presents shall be null and void; otherwise to remain in full force and effect.

(Signed) E. F.
G. H.
R. T.

Approved as to form and sufficiency of security this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

§ 228. Contribution by heirs, devisees or legatees to raise money for payment of debts.

All devisees or legatees who shall, with the consent of the executor, or otherwise, have possession of the estate given them by the will before the liability of the estate for the payment of debts, allowances, shares of posthumous child or children omitted from the will is determined, shall hold the same subject to said liability, and shall be held to contribute according to their respective liabilities, to the executor or to any devisee or legatee from whom the estate devised to him has been taken for the payment of debts and expenses, and to make up the share of a child born after the making of the will, or of a child or the issue of a child omitted from the will; and the persons who may, as heirs, have received the estate not disposed of by the will, shall

be liable to contribute in like manner as the devisees or legatees.[66] If any of the persons liable to contribute shall be insolvent and unable to pay their just share, the others shall be severally liable for the loss occasioned by such insolvency, in proportion to and to the extent of the estate they may have received; and if any of the persons so liable to contribute shall die before having paid their share, the claim shall be valid against their estate, in the same manner as if it had been their proper debt. The county court may, by decree for that purpose, settle the amount of the liabilities as above provided, and decree how much and in what manner each person shall contribute, and issue execution, as circumstances may require, and the claimant may also have a remedy in any proper action or complaint in law or equity.[67]

A provision substantially like the above, requiring a contribution to make the share owing by an insolvent, has been held not to apply to cases in which one legatee or distributee has received more than his share, at the expense of another distributee. The remedy in such cases is by bill in equity.[68]

Form No. 100.

PETITION FOR LEGATEE OR DEVISEE TO PAY SHARE OF INSOLVENT.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that on the ——— day of ———, 19—, letters testamentary upon said estate were issued to him out of and under the seal of said court; that he now is the executor of said estate; that L. M., of the county aforesaid, is a devisee under said will of the following described realty

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66 Rev. Stats., c. 17, § 56, [1320].

67 Rev. Stats., c. 17, §§ 57, 58, [1321], [1322].

68 Stephenson v. Axson, 1 Bail. Eq. (S. C.) 274.

[describe realty]; that at the time of the death of the said A. B., said L. M. was in possession of said realty, and has ever since remained in possession thereof; that said L. M. has paid to your petitioner the sum of ——— dollars, the reasonable rental value of said premises; that on the ——— day of ———, 19—, said will, with a certificate of probate attached thereto, was duly recorded in the office of the register of deeds of said county; that on the ——— day of ———, 19—, your petitioner delivered to B. M., who is legatee thereof under said will, a certificate for forty shares of stock of the First National Bank of Fremont, Nebraska; that there have been allowed against said estate debts of the amount of four thousand dollars ($4,000), and a dividend of two thousand dollars ($2,000) has been paid thereon; that the time for proving debts against said estate has expired, and that there are no assets in his possession with which to pay the balance of said debts; that neither the said L. M. nor the said B. M. have given your petitioner any bond or security to indemnify him for the property in their possession as aforesaid; that the present value of the real estate above described in the possession of said L. M. is the sum of four thousand dollars ($4,000), and the present value of said bank stock is the sum of six thousand dollars ($6,000); that on the ——— day of ———, 19—, said B. M. made a general assignment of all his property for the benefit of his creditors, and previous thereto had sold and transferred said certificate of shares of stock; that the assets of said B. M. are the sum of ——— dollars ($———), and the debts against said insolvent estate are the sum of ——— dollars ($———), including petitioner's claim, and that said insolvent estate will pay, as your petitioner is informed and verily believes, the sum of fifty cents on the dollar.

Your petitioner therefore prays that the said L. M. be required to contribute the sum of seven-tenths of two thousand dollars to your petitioner for the payment of said debts, and that the insolvent estate of said B. M. contribute the sum of three-tenths of two thousand dollars therefor, and that a decree may be entered requiring the said L. M. to pay to your petitioner the sum of one thousand four hundred dollars ($1,400), and the said B. M., insolvent, the sum of six hundred dollars ($600), and that execution may issue thereon against the said L. M., and for such other and further relief as may be just and equitable.

Dated this ——— day of ———, 19—.

(Signed) C. D.,
By F. H. B.,
His Attorney.

[Add verification, Form No. 5.]

(340)

Form No. 101.

NOTICE TO LEGATEE OR DEVISEE.

State of Nebraska,
——— County,—ss.

To L. M., and G. H., Assignee of B. M.:

Notice is hereby given that on the ——— day of ———, 19—, C. D., executor of the estate of A. B., filed his petition in this court, the object and prayer of which are that a decree may be entered requiring you and each of you to contribute, from the assets of the estate of the said A. B. in your possession, to the said C. D., for the payment of the debts of the estate of the said A. B. which now remain due and unpaid.

Said petition will be heard by the county court of said county at the county court room in the city of ———, said county, on the ——— day of ———, 19—, at the hour of 9 o'clock A. M. of said day.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

This notice should be served on the legatees or devisees in the same manner as a summons, and ample time given them to prepare for the hearing.

Form No. 102.

DECREE REQUIRING LEGATEE OR DEVISEE TO CONTRIBUTE FOR THE PAYMENT OF DEBTS AND EXPENSES.

[Tit'e of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the petition of C. D., executor of said estate, for a decree requiring L. M., and G. H., assignee of B. M., to contribute from the assets of said estate in their possession for the payment of the debts of said estate, and the evidence, and was submitted to the court. Said L. M. and G. H., assignees, each appeared in person and by attorney:

Whereupon the court finds that due notice of the pendency of said petition was given said L. M. and G. H.; that L. M. is in possession of assets of said estate, consisting of the following real estate [describe real estate], of the value of four thousand dollars, and that said G. H., assignee of B. M., is in possession of assets of the estate

consisting of personalty of the value of six thousand dollars; that the said B. M. is insolvent, and that the assets of said insolvent are sufficient to pay the creditors thereof, including the indebtedness to said executor, the sum of fifty cents on the dollar; that the debts of the estate of the said A. B. allowed by said court amount to the sum of four thousand dollars, and the sum of two thousand dollars has been paid thereon, and that there are no assets of said estate in the hands of the said C. D. to be applied upon the payment of said debts.

It is therefore ordered and decreed that the said L. M. pay to the said C. D. the sum of one thousand four hundred dollars, and that the said G. H., assignee, pay to the said C. D. the sum of six hundred dollars; that, in default of payment by the said L. M., execution issue against him thereon for the sum of one thousand four hundred dollars.

It is further ordered, the said G. H., assignee, assenting thereto, that a certified copy of this decree be filed in the case entitled, "In the Matter of the Assignment of B. M.," in this court.

(Signed) J. K.,
County Judge.

While the county judge has jurisdiction of this matter, especially conferred upon it by the statute, where there is any contest or any conflicting interest, the rights of all the parties can be better adjusted by a petition in equity in the district court.

§ 228a. Recovery of property from distributees.

Under the Oregon practice, when the distributees or legatees have come into the enjoyment of their shares in the personal property before the administration has been completed, and it subsequently appears that the amount of such shares, or a part of them, is necessary for the payment of the debts and expenses of administration, there is no authority granted the executor or administrator under the statute to bring an action or proceeding for contribution, as in Nebraska. Such right is given the creditor and may be enforced by action in equity against the next of kin or legatees in any court having jurisdiction.

The action can only be maintained by a creditor whose claim has been allowed by the administrator, referee or county court.[69] In the case of both testate and intestate estates, the next of kin or legatee is liable only for the value of the assets actually received by him, or so much thereof as may be necessary to satisfy the debt, and the action may be brought against all of them jointly, or against one or more of them severally.[70]

He is entitled to recover of the next of kin the value of all the assets received by all the defendants in the suit if necessary for the payment of his debt; and the amount of the recovery shall be apportioned among the defendants in proportion to the value of the assets received by each, and no allowance or deduction shall be made from such amount on account of there being other next of kin to whom assets have also been delivered.[71]

The liability of legatees is similar except that a plaintiff cannot recover unless he shows:

1. That no assets were delivered by the executor or administrator of the testator to his next of kin; or,
2. That the value of such assets have been recovered by some other creditor; or,
3. That such assets are not sufficient to satisfy his demand, in which case he shall recover only the deficiency.[72]

Costs are apportioned, in case a recovery is had, among the several defendants according to the respective amount each received,[73] and a decree against several may be satisfied as to any one by the payment or satisfaction of the amount recovered against him,[74] and each defendant is entitled to contribution from

69 The Grange Union v. Burkhart, 8 Or. 51.
70 L. O. L., §§ 485, 488.
71 L. O. L., § 486.
72 L. O. L., § 488.
73 L. O. L., § 489.
74 L. O. L., § 490.

those of his class who could have been brought in as defendants.[75]

§ 228b. Liability of heirs for debts.

Heirs are liable to a suit by a creditor to recover the debt of their ancestor to the extent of the value of the property inherited by them where the personal assets were insufficient to discharge it, or after due proceedings the creditor has been unable to collect the debt from the creditors of the deceased, or from his next of kin or legatees. All heirs must be made parties to the suit.[76]

An action may be brought in like manner against devisees, and they are held liable where it appears that the personal assets of the real property that descended to his heirs were insufficient to discharge the debt, or that after due proceedings the creditor has been unable to recover the debt, or any part thereof, from the personal representatives of the testator, or from his next of kin, legatees or heirs. The liability is limited to the amount of the deficiency, and may be recovered of the devisees of the testator to the extent of the value of the real property devised to them respectively.[77]

The debts for which actions against distributees, legatees, heirs or devisees may be maintained include claims for the payment of money, whether liquidated or otherwise, which survive against a personal representative without regard to priority or preference.[78] The actions do not affect liability of real estate charged with the payment of debts, or liability of devisees for a debt charged on the devise.[79]

75 L. O. L., § 487.

76 L. O. L., §§ 491, 492.

77 L. O. L., §§ 491, 498, 499.

78 L. O. L., § 494.

79 L. O. L., §§ 493, 500.

Judgment is rendered against the heirs or devisees in proportion to the value of the property which descended or was devised to them, and has preference against a debt of the defendant in his own right. It may be enforced by execution and levy on the land, or on other property of the defendant in case the land has been aliened, as if it were his own debt. Real property aliened in good faith and for a valuable consideration cannot be held for the judgment.[80] There is no occasion for a suit for contribution between heirs or devisees, for their liability is only proportionate. It is rarely necessary to resort to an action under the above law, and only one case brought under it has reached the Oregon supreme court.

§ 229. Investment of assets.

One of the most important duties devolving upon a personal representative is the investment and management of the assets of the estate. A will often contains directions to the executor as to what investments shall be made of the personal assets pending settlement of the estate, and it is his duty to strictly comply with them. An administrator is subject to no regulations or restrictions in this regard except those of the general law. Usually he has but a comparatively short time to make investments, and can rarely obtain any better than the rate of interest paid by savings banks on deposits; but there may be instances where assets remain in his possession for two or three years. No personal representative should permit assets to be unremunerative and uninvested, and, when practicable, should invest such moneys as are likely to remain in his possession for some time, so that they will be

[80] L. O. L., §§ 495–497.

adding something to the estate.[81] In making such investments, a personal representative should be guided by the same degree of prudence and diligence which men usually exercise in the management of their own individual business. If possible, moneys should be deposited in such banks as pay interest on deposits, even though it be a low rate. That form of investment which is looked upon with the most favor by the courts is real estate mortgage security on property within this state, where the security is considerably in excess of the amount loaned; and the personal representative should be more particular about the loan being a safe one than the rate of interest being large.[82]

The courts make a distinction between the loan of the funds on security and the parting of title to them and the taking of something else therefor. The latter method of investment is not generally considered a proper one for a personal representative to make unless directed by the will or the court.[83] Under certain circumstances, state or municipal bonds might be a desirable investment for an executor.

Investment of the funds in good personal securities, such as promissory notes indorsed by good, reliable parties, is proper, and will not render the representative personally liable should they subsequently prove uncollectible.[84] All deposits of money in banks, all loans made on notes and mortgages, and all bonds or other investment securities purchased, should be held

81 Wood v. Myrick, 17 Minn. 408.

82 Wilson v. Staats, 33 N. J. Eq. 524; Ormiston v. Olcott, 84 N. Y. 339.

83 Horn v. Lockhart, 17 Wall. (U. S.) 570; Tucker v. Tucker, 33 N. J. Eq. 235.

84 Lovell v. Minot, 20 Pick. (Mass.) 119.

by the executor or administrator in his representative capacity, and under no circumstances should he mingle the assets of the estate with his own.[85]

Under the Oregon practice, the executor or administrator may at any time pending administration deposit securities of the estate with a surety company, an order of the court being first obtained therefor, and thereby secure a reduction in the penal amount of his bond, and consequent release from liability. The procedure is the same as in the case of procuring a bond for a reduced amount on the grant of letters.[86] The assets deposited with the surety company are still under control of the county court, to be used for purposes of administration.[87]

§ 230. Liability on his own contracts.

A personal representative of a decedent cannot make any contract creating any debt, charge or lien against the estate not founded upon a contract or obligation of his decedent. If the contract is based on a new and independent consideration between him and the promisee, he will be bound thereby and not the estate.[88] He is therefore personally liable for the services of those whom he may employ to assist him in any capacity in attending to his duties,[89] including attorneys,[90]

85 Williams v. Williams, 55 Wis. 300, 13 N. W. 274; Perkins' Estate v. Hollister, 59 Vt. 348, 7 Atl. 605; Westover v. Carman, 49 Neb. 604, 68 N. W. 501.

86 See p. 152, *supra*.

87 Laws 1913, p. 726.

88 Craig v. Anderson, 3 Neb. Unof. 638, 92 N. W. 640; Burleigh v. Palmer, 74 Neb. 122, 103 N. W. 1068; Austin v. Monroe, 47 N. Y. 360; Merchants' Nat. Bank v. Weeks, 53 Vt. 115.

89 Byrne v. Hume, 73 Mich. 392, 41 N. W. 331; Besancon v. Wegner, 16 N. D. 240, 112 N. W. 965.

90 Rapp's Estate v. Elgutter, 77 Neb. 674, 110 N. W. 661.

bookkeepers,[91] and for needed repairs on buildings when he has taken possession of the real estate.[92] If such charges were for services for the benefit of the estate and were necessary, or were not within the line of personal duty on the part of the representative, he can be later reimbursed from the estate.

There is one exception to the rule that the estate is not bound by contract of an executor or administrator for services. Where he is a nonresident of the state, though letters issued to him in this state, the parties performing the services may bring an equitable action to establish and enforce a lien on the assets for the amounts due them.[93] New York has also held that where the representative is insolvent, judgment on such demands may be entered against the estate.[94]

An executor or administrator cannot be held liable on a promise to pay the debt of his decedent unless the contract therefor be in writing and supported by a sufficient consideration.[95]

§ 231. Contracts of the decedent.

An executor is required to carry out and perform the uncompleted contracts of his decedent except those which required his personal attention.[96]

91 Sowles v. Hall, 73 Vt. 53, 50 Atl. 550.

92 Almy v. Newport Probate Court, 18 R. I. 612, 30 Atl. 458; Rice v. Tilton, 14 Wyo. 101, 82 Pac. 577.

93 Gates v. McClenehan, 124 Iowa, 593, 100 N. W. 479; Coopwood v. Wallace, 12 Ala. 790.

94 Satorelli v. Ezagini, 64 Misc. Rep. 115, 118 N. Y. Supp. 46.

95 Davis v. French, 20 Me. 21; Sidle v. Anderson, 45 Pa. 464; Nelson v. Boynton, 3 Met. (Mass.) 396; Simpson v. Patten, 4 Johns. (N. Y.) 422; Jackson v. Rayner, 12 Johns. (N. Y.) 291.

96 Michigan Iron & Land Co. v. Nester, 147 Mich. 599, 111 N. W. 177; Marvel v. Phillips, 162 Mass. 399, 38 N. E. 1117.

Though a building contract is largely of a personal character, it has been held that a personal representative may complete it.[97] As a general rule, if the decedent was a contractor and left a number of uncompleted works, unless otherwise provided, he should not attempt to finish them, but settle for work already done and materials furnished.

§ 232. Personal representative not authorized to carry on decedent's business.

An administrator cannot, neither can an executor, unless specially authorized by will, continue to carry on the trade or business of his decedent. His duty is to close up the estate, close out the business, reduce the assets to money as soon as practicable, and not to use the assets in the business ventures in which the decedent was engaged at the time of his death.[98] At the same time it is not necessary, when decedent left, for instance, a stock of merchandise, that the store be closed at once, and remain so until a purchaser for the entire stock can be found. The executor or administrator, or a special administrator, should at once obtain leave of the court to sell as in the usual course of retail trade, or such other way as may be deemed best; and for the purpose of winding up the business and rendering the stock more salable, he has a right to purchase goods in such limited quantities as might increase the demand for, and make more salable, the rest of the stock.[99] He would also have authority to

[97] Bambrick v. Webster Grove Pres. Church, 53 Mo. App. 225.

[98] Lucht v. Behrens, 28 Ohio St. 231; Succession of Sparrow, 39 La. Ann. 696, 2 South. 501; Stephens v. James, 77 Ga. 139, 3 S. E. 160.

[99] Williams, Executors, 1794.

bind the estate to the payment of such expenses as may be necessary for the cultivating and harvesting a crop growing at the time of decedent's death.[100]

If decedent was a contractor, and left a number of uncompleted contracts at the time of his death, unless otherwise provided in the contract, the personal representative should settle up for work already performed. A contract of this class depends much upon the personal ability and knowledge of the contractor, and to permit an executor or administrator to carry it out might be a disastrous venture for the estate.

§ 233. Liability for carrying on decedent's business.

Should a personal representative, in spite of legal authority, carry on decedent's trade or business, the obligations which he incurs are his own debts,—the estate is not holden thereby.[101] He is liable to the estate for the value of the assets so used, and must account for the rental value of the real property should he have used that in the business. If, by the will, he be directed or authorized to carry on decedent's business, unless otherwise directed, he can only use in the business those assets invested therein at the date of decedent's death. He cannot use other assets for that purpose, and all parties dealing with him do so with the knowledge that he is managing and conducting the business as such executor, and under the provisions

100 Miltenberger v. Elam, 11 La. Ann. 668; Succession of Decuir, 22 La. Ann. 372; Florsheim v. Holt, 32 La. Ann. 133.

101 Succession of Sparrow, 39 La. Ann. 696, 2 South. 501; Hooper v. Hooper's Exrs., 29 W. Va. 276, 1 S. E. 280; Burwell v. Cawood, 2 How. (U. S.) 560; Lucht v. Behrens, 28 Ohio St. 231.

of the will,[102] and therefore only such portion of the assets of the estate as were invested therein at the time of decedent's death, and the proceeds of sales or income from such assets, are subject to the debts incurred by him in the business.[103]

§ 234. Devastavit—Definition.

A *devastavit* may be defined as a wasting of the assets of the estate, and consists of any act of omission or mismanagement by which the estate suffers loss, and for which executors and administrators are required to answer out of their own property as far as they had or might have had assets of the estate.[104] It may be caused by direct acts, such as the conversion of the assets, or by negligence, carelessness, and inattention to the business of the estate. In determining whether a personal representative is to be held liable for a *devastavit,* the question of good faith is an important element to be considered. If he has acted without default or fraud, with reasonable diligence, and with an honest desire to do his duty faithfully, a mere error of judgment in what was fairly a matter of judgment or opinion would not make him liable merely because subsequent events have shown that he did not pursue the wisest course.[105] He is also

102 First Nat. Bank of Clarion v. Brenneman's Exrs., 114 Pa. 315, 7 Atl. 910.

103 Jones v. Walker, 103 U. S. 444.

104 Bacon's Abr. "Executors," L. 1; Steel v. Holladay, 20 Or. 77, 25 Pac. 69.

105 Schultz v. Pulver, 11 Wend. (N. Y.) 361; Ruggles v. Sherman, 14 Johns. (N. Y.) 446; Whitney v. Peddicord, 63 Ill. 249; Spaulding v. Wakefield's Estate, 53 Vt. 660.

required to exercise such skill, prudence and diligence as men ordinarily bestow upon their own affairs.[106]

§ 235. Acts constituting a devastavit.

The following acts have been held to constitute a *devastavit:* Loss occurring by reason of neglect to collect the debts within a reasonable time after the issue of letters;[107] by failure to obey the directions of a will;[108] by the use of the assets in the "prosecution of mercantile, commercial and manufacturing enterprises of speculative adventures";[109] by borrowing money, and pledging the property of the estate in payment;[110] by failure to account for the rent of the realty;[111] by failure to pay taxes, there being sufficient assets of the estate in his hands for that purpose;[112] by paying the assets of the estate in satisfaction of his own debts, or to a third party;[113] by a loss of personal property through his carelessness and negligence;[114] by failure to resist unjust and unfounded claims;[115] by mingling the property of the estate with his own, as by depositing the money in a bank in his own name, or

106 Stevens v. Gage, 55 N. H. 175; Rubottom v. Morrow, 24 Ind. 202; Harris v. Parker, 41 Ala. 604.

107 Schultz v. Pulver, 11 Wend. (N. Y.) 363; Shaffer's Appeal, 46 Pa. 131; Sterling v. Wilkinson, 83 Va. 791, 3 S. E. 533; Neff's Appeal, 48 Pa. 501; Bryant v. Russell, 23 Pick. (Mass.) 508.

108 Weigand's Appeal, 28 Pa. 471.

109 Deobold v. Oppermann, 111 N. Y. 538, 19 N. E. 94; King v. Talbot, 40 N. Y. 86.

110 Merchants' Nat. Bank v. Weeks, 53 Vt. 115.

111 Dix v. Morris, 66 Mo. 514.

112 In re Herteman's Estate, 73 Cal. 545, 15 Pac. 121.

113 Camp v. Smith, 68 N. C. 537.

114 Tuttle v. Robinson, 33 N. H. 104.

115 Smith v. Cuyler, 78 Ga. 654, 3 S. E. 406.

with his own funds;[116] by failing to redeem property when he had money on hand sufficient to do so;[117] by selling the assets on credit, and without security;[118] and by using the assets of the estate in trade.[119] He is not held liable for failure to try to enforce bad or doubtful claims, provided he can show that payment could not have been obtained by proper measures;[120] nor for loss accruing by reason of the extension of a debt, made with the consent of the distributees;[121] nor is he liable for property lost by robbery, fire or flood, unless his own negligence or bad faith contributed thereto.[122]

§ 236. Rights in regard to negotiable instruments.

If an executor or administrator takes a note in settlement of a claim owing the estate, payable to him in his representative capacity, he may treat it as assets of the estate, or he may charge himself with the amount thereof, thereby making himself personally liable, and hold the paper as his own private property.[123]

116 Williams v. Williams, 55 Wis. 300; Robinett's Appeal, 36 Pa. 174; Gilbert's Appeal, 78 Pa. 266; Perkins' Estate v. Hollister, 59 Vt. 348, 7 Atl. 605; Ditmar's Admr. v. Bogle's Distributees, 53 Ala. 169.

117 Steel v. Holladay, 20 Or. 77, 25 Pac. 69.

118 King v. King, 3 Johns. Ch. (N. Y.) 552; Orcutt v. Orms, 3 Paige (N. Y.), 464.

119 Cases cited in section *supra*.

120 Miller's Exr. v. Simpson, 8 Ky. Law Rep. 518, 2 S. W. 171; Turbeville v. Flowers, 27 S. C. 331, 3 S. E. 542; Sanborn v. Goodhue, 28 N. H. 48.

121 Perry v. Wooton, 5 Humph. (Tenn.) 524.

122 Foster v. Davis, 46 Mo. 268; Neff's Appeal, 57 Pa. 91; Stevens v. Gage, 55 N. H. 175; Cooper v. Williams, 109 Ind. 270, 9 N. E. 917.

123 Fry v. Evans, 8 Wend. (N. Y.) 530; Sheets v. Pabody, 6 Blackf. (Ind.) 120; Dunlap v. Newman, 47 Ala. 429.

In the first instance, upon the death or resignation of the representative, the paper passes to the administrator *de bonis non*, and he alone can bring suit thereon.[124] In the latter, the right of action would pass to his personal representatives,[125] the amount of the note being treated as the indebtedness of the late personal representative to the estate of his decedent.

Whenever he sells or assigns a negotiable note, whether payable to himself as representative or to his decedent, the transfer must be made by his own indorsement,[126] and such indorsement binds him personally unless he expressly exempts himself from such liability, should payment be refused by the maker or prior indorser.[127]

A note payable to a personal representative, and once treated by him as assets, cannot be transferred by him, and, where he attempts to do this, the notes and bills thus illegally disposed of can be recovered of any indorser who takes them with notice of the fraud.[128] Proof of actual notice brought home to the indorsee is not held necessary; he is charged with knowledge of the trust by the fact that the instruments are made payable to the representative as such.[129] He cannot bind the estate of his decedent by any nego-

124 Leach v. Lewis, 38 Ind. 160; Sheets v. Pabody, 6 Blackf. (Ind.) 120.

125 Cravens v. Logan, 7 Ark. 103; Hemphill v. Hamilton, 11 Ark. 425.

126 Cahoon v. Moore, 11 Vt. 604; Makepeace v. Moore, 10 Ill. 474; Hamrick v. Craven, 39 Ind. 241; Clark v. Moses, 50 Ala. 326.

127 Forster v. Fuller, 6 Mass. 58.

128 Booyer v. Hodges, 45 Miss. 78; Makepeace v. Moore, 10 Ill. 474; Miller v. Williamson, 5 Md. 219.

129 Booyer v. Hodges, 45 Miss. 78; Miller v. Williamson, 5 Md. 219.

tiable instrument which he may execute in his representative capacity, except notes secured by mortgage upon the decedent's realty, executed pursuant to authority granted by the county court,[130] even though it is a note given in renewal of testator's or intestate's note.[131] He may, however, limit his obligation to the extent of the funds of the estate in his hands, or make it payable out of the assets. His liability would then be limited by the appropriation of such funds for the payment of the debt, but this would deprive the note of its negotiable character.[132]

130 Section 249, *post;* Rev. Stats., c. 17, § 227, [1491]; Curtis v. Farmers' Nat. Bank, 39 Ohio St. 579; Christian v. Morris, 50 Ala. 585; Lynch v. Kirby, 65 Ga. 279.

131 Cornthwaite v. First Nat. Bank of Rockville, 57 Ind. 268.

132 Kelly v. Bronson, 26 Minn. 359, 4 N. W. 607.

CHAPTER XX.

PARTNERSHIP.

§ 237. Dissolution of Partnership by Death—Rights of Surviving Partner.
238. Duty of Surviving Partner.
238a. Administrator of a Partnership.
238b. Power of Administrator of a Partnership.
239. Settlement Between Personal Representative and Surviving Partner.
240. Partnership Real Estate.
241. Settlement With Special Administrator.
242. Account of Special Administrator.
243. Sale of Interest of Estate in Partnership Property.
244. Notice—Hearing.

§ 237. Dissolution of partnership by death—Rights of surviving partner.

A partnership terminates with the death of one of its members,[1] and, in the absence of authority given by the articles of copartnership and the will of the late partner, the survivors have no authority to incur debts binding upon the estate in continuing the business.[2]

The executor or administrator does not succeed to the interests of his decedent in the assets of the firm, and has not an immediate right to their possession. The partnership property vests in the surviving partner or partners, in trust, for the settlement and winding up of the business.[3] He takes such property for

1 Jenness v. Carlton, 40 Mich. 343; Filley v. Phelps, 18 Conn. 294.

2 Lucht v. Behrens, 28 Ohio St. 231; In re Woods' Estate, 1 Pa. 368; McKean v. Vick, 108 Ill. 373.

3 Clark v. Fleischman, 81 Neb. 455, 116 N. W. 290; Lindner v. Adams County Bank, 49 Neb. 735, 68 N. W. 1028; Banks v. Steele,

the use and benefit of all persons interested in the estate—the heirs, legatees, devisees and creditors—as well as the creditors of the firm; but the creditors of the late partnership have no lien on the partnership assets, nor are such assets held by the survivor in trust for the payment of partnership debts.[4]

§ 238. Duty of surviving partner.

It is the duty of the surviving partner to collect the debts due the firm and receipt for the same, pay outstanding accounts, and wind up the business as soon as the circumstances will permit.[5] In order to do this he has power to sell and transfer the assets of the partnership, including choses in action, and, in the absence of fraud, the purchaser acquires a good title.[6] He has substantially the same powers as the firm had during its existence in so far as the disposition of the assets is concerned.[7]

Partnership debts are payable from partnership assets.[8] After they are paid the executor or administrator becomes entitled to the share of the deceased partner in the balance remaining.

27 Neb. 138, 42 N. W. 883; Brown v. Watson, 66 Mich. 223, 33 N. W. 493; Bush v. Clark, 127 Mass. 111; Oram v. Rothermel, 98 Pa. 300.

4 Fairbanks, Morse & Co. v. Welshans, 55 Neb. 362, 75 N. W. 865.

5 Heath v. Waters, 40 Mich. 457; Stearns v. Houghton, 38 Vt. 453; Heartt v. Walsh, 75 Ill. 200; Hodgkins v. Merritt, 53 Me. 208.

6 Lindner v. Adams County Bank, 49 Neb. 735, 68 N. W. 1028; Fitzpatrick v. Flannagan, 106 U. S. 648, 1 Sup. Ct. Rep. 369; Johnson v. Berlizheimer, 84 Ill. 54.

7 Bartlett v. Smith, 5 Neb. Unof. 337, 98 N. W. 687.

8 Banks v. Steele, 27 Neb. 138, 42 N. W. 883; Wright v. Barton, 34 Neb. 776, 52 N. W. 809.

§ 238a. Administrator of a partnership.

Under the Oregon statutes a surviving partner to whom letters testamentary or of administration have been granted also takes charge of the interest of the estate in the partnership property, and, under the control of the county court, including the settlement of the interest of the estate therein. If a third party is appointed, the surviving partner is entitled to the control and right of disposition of the partnership interest, if he applies for the same within five days from the date of the filing of the inventory, or within such further time as the court or a judge thereof may allow, and possesses the qualifications and competency of a general administrator.[9]

The person who administers the partnership assets is denominated the administrator of a partnership. Before entering upon his duties he is required to give a bond conditioned, the same as that of a general administrator, in double the amount of the partnership property.[10] His duties, though he may be also the executor or administrator of the estate, are entirely separate and distinct from those pertaining to the administration of the residue of the estate. The giving of the statutory undertaking is imperative, and a testator has no power to release him from the same.[11] The powers possessed by the administrator of a partnership are not as broad as those of a surviving partner at common law. In their exercise, and in the performance of his duties, he is subject to the same limitations and liabilities, and control and jurisdiction of the court, as a general administrator.[12]

The court has the same supervisory control over his acts as over those of a general administrator. He

9 L. O. L., § 1167.

10 L. O. L., §§ 1168, 1169.

11 Palacio v. Bigne, 15 Or. 142, 13 Pac. 765.

12 L. O. L., § 1168.

may be removed for the same causes and in the same manner.[13] In the case of his removal the power of the court to appoint a third party his successor is impliedly recognized by the cases above cited. It is the duty of such successor to obtain an order of the court therefor and bring an action to set aside as fraudulent any sale or transfer of the partnership property with intent to defraud the creditors of the estate.[14]

§ 238b. Powers of administrator of a partnership.

The powers of the county court over the interests of a decedent in a partnership do not include a settlement of matters in dispute in regard to the extent of the interest of the decedent in the property, the adjustment of mutual accounts between partners, or such matters as generally arise in actions for the dissolution of a partnership, or partition of partnership real estate involving the title to the property.[15] The partnership administrator has power to collect the debts due the partnership and pay the demands against it, and to raise money for such purpose may obtain a license for the sale of the interest of the estate in partnership property.[16]

Such powers are not exclusive. Letters of administration of the partnership do not take away the rights which a surviving partner had at common law to collect money and pay the debts and necessary expenses incidental to the closing out of the business, nor the rights of a creditor to the remedies granted him at

13 In re Mark's Estate, 66 Or. 344, 133 Pac. 777; In re Manser's Estate, 62 Or. 249, 118 Pac. 1024.

14 Marks v. Coats, 37 Or. 611, 62 Pac. 488; In re Mark's Estate, 66 Or. 344, 133 Pac. 777; In re Mark's & Wollenberg's Estate, 66 Or. 306, 133 Pac. 779.

15 Gardner v. Gillihan, 20 Or. 598, 27 Pac. 220; Harrington v. Jones, 53 Or. 239, 90 Pac. 935; Dray v. Bloch, 29 Or. 347, 45 Pac. 772; In re Bolander's Estate, 38 Or. 490, 63 Pac. 689.

16 Burnside v. Savier, 6 Or. 156.

common law for the enforcement of his demands against the partnership.[17]

Every surviving partner, on the demand of the executor or administrator of a deceased partner, is required to give him all the information concerning the property of a deceased partner at the time of his death, so that the same can be correctly inventoried, and if the entire administration devolve on the executor or administrator, deliver or transfer to him on demand all the property of the partnership, including books, papers and documents pertaining to the same, and afford him reasonable information and facilities for performing the duties of his trust,[18] and for failure to comply with the above requirements, may be cited before the court or judge and required to furnish the information or otherwise comply with the law.[19]

The administrator of the partnership should settle the business of the partnership and turn over to the general representative the interest of the deceased in the property within six months from the date of his appointment, unless further time is granted him by the court, should it be necessary.[20] The amount received from the partnership must be accounted for in the final account, so that the partnership estate must be closed up before the individual estate.[21]

Statutes like those of Oregon providing for administration of partnerships do not afford a remedy where there is any disputed question over the shares of the partners, or their mutual accounts; in such cases an action in equity is necessary.

17 Poppleton v. Jones, 42 Or. 26, 69 Pac. 919.

18 L. O. L., § 1171.

19 L. O. L., § 1172.

20 L. O. L., § 1168.

21 Palacio v. Bigne, 15 Or. 142, 13 Pac. 765.

§ 239. Settlement between personal representative and surviving partner.

At any time after the issue of letters to him, an executor or administrator has authority to settle with the surviving partner all the dealings and transactions of the partnership, as well as those remaining unsettled before the death of the deceased partner as of the said parties thereafter, and shall present to the county court appointing him a full statement of the matter and manner of such settlement, and, upon due notice to all parties interested, said court shall examine, review, correct, approve or disallow such settlement.[22] Under this statute he has power, subject, of course, to confirmation by the court, to fix the value of the interest of his decedent, by determining the amount of the assets and liabilities, including amounts owing to or due from his decedent and other partners to the firm. He may sell the interest of his decedent for a lump sum, including the goodwill, which is always a proper asset,[23] or after the surviving partner has disposed of the assets of the firm and paid the debts, he may make a report of the same showing the interest of his decedent in the balance.

If the assets of the partnership are not sufficient to pay its debts, the estate of the decedent is liable for its share of the deficiency. In such case the creditors may file claims against the estate for the balance due them,[24] or the surviving partner may pay it and file a claim for its payment.[25]

[22] Rev. Stats., c. 17, § 116, [1380].
[23] Lobeck v. Lee-Clark-Andreesen Co., 37 Neb. 158, 55 N. W. 650.
[24] Van Kleeck v. McCabe, 87 Mich. 599, 49 N. W. 872.
[25] Goldthwait v. Day, 149 Mass. 185, 21 N. E. 359.

The settlement may be a partial one, including only personal property.

In the absence of an agreement to the contrary, the surviving partner is entitled to no compensation for winding up the firm business.[26]

The executor or administrator may compel a surviving partner or partners to account for partnership affairs by a bill in equity, he standing on the same footing in this respect as his decedent.[27]

§ 240. Partnership real estate.

The title to the share of a deceased partner in partnership real estate passes to his devisees or heirs, as tenants in common with the surviving partners, subject to partnership debts. The right to the possession vests in the survivor or survivors, he or they holding it in trust for all parties interested, the same as if it were personalty.[28]

Where it appears to be necessary in order to pay the debts of the late firm, it has been held that the duty of a surviving partner to close up the business of the firm gives him the right without first obtaining a license from a court to sell the real estate of the partnership, accounting to the personal representative for the interest of the estate in the proceeds.[29] Other

[26] Loomis v. Armstrong, 49 Mich. 521, 14 N. W. 505; Tillotson v. Tillotson, 34 Conn. 335; Appeal of Shriver (Pa.), 12 Atl. 553; Little v. Caldwell, 101 Cal. 553, 36 Pac. 107; Porter v. Long, 124 Mich. 584, 83 N. W. 601.

[27] Bundy v. Youmans, 44 Mich. 376, 6 N. W. 851; Goldthwait v. Day, 149 Mass. 185, 21 N. E. 359; Jennings' Admrs. v. Chandler, 10 Wis. 21; Pitt v. Moore, 99 N. C. 85.

[28] Merrit v. Dickey, 38 Mich. 41.

[29] Easton v. Courtright, 84 Mo. 28; Shanks v. Kline, 104 U. S. 18.

cases hold that he only conveys an equitable title,[30] and in such cases should bring an action to subject it to the debts.[31] This would seem a safer rule.

The personal property should always be exhausted before resorting to the real estate.[32]

Form No. 103.

REPORT OF SETTLEMENT OF PARTNERSHIP INTERESTS.

[Title of Cause and Court.]

I, L. M., administrator of said estate, would respectfully report that I have made a settlement with G. H., surviving partner of said A. B., of all the dealings and transactions of said partnership of A. B. & G. H. (save and except the division of the real estate of said firm) and herewith submit my report thereof as follows:

On the ——— day of ———, 19—, I, together with G. H., made an inventory of all the assets belonging to said partnership, a copy of which is hereto attached, marked "Exhibit A"; that the books of account of said firm disclose that the indebtedness of said firm was the sum of ——— dollars, and that there was due and owing said firm the sum of ——— dollars, of which said amounts due and owing the collectible accounts amount to the sum of ——— dollars, making the net assets of said firm, over and above all liabilities, as appears from the books and inventory, the sum of ——— dollars; that the said G. H., surviving partner, then proceeded to close out said partnership by selling the goods, wares and merchandise at private sale, paying the debts thereof, and collecting the notes and accounts due said firm; that hereto attached, marked "Exhibit B," is a statement taken from the books of account of said surviving partner of the sales of merchandise, debts and expenses paid, and outstanding accounts due, collected by him, and that all the goods and stock and fixtures belonging to said late firm have been sold, and that the net cash assets of said firm are the sum of ——— dollars.

On the ——— day of ———, 19—, said G. H., paid to me, subject to the approval by the court of this account, the sum of ——— dollars, the one-half of the cash assets of said firm, and the amount of the interest of the estate of said A. B. therein.

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30 Walling v. Burgess, 122 Ind. 299, 22 N. E. 219.

31 Dyer v. Clark, 5 Met. (Mass.) 562.

32 Foster's Appeal, 74 Pa. 391.

Said administrator therefore prays that said court fix a time and place for hearing on said report and cause notice thereof to be given to all persons interested therein as the court may direct, and that on said hearing said report be approved.

Dated this ——— day of ———, 19—.

(Signed) L. M.

§ 241. Settlement with special administrator.

The laws of Nebraska do not permit an executor or administrator, who is also surviving partner of his decedent, to settle the partnership interests with himself, or make a sale of them. In such cases the county court which issued letters to such representative shall appoint a special administrator to discharge the duties of a personal representative in connection with the partnership matters only. The appointment is made upon the same proceedings as are provided by law for the appointment of special administrators where there is a delay in the issue of letters.[33]

The executor or administrator holds the partnership property as a surviving partner, liable as a personal representative for the interest of his decedent therein, until after the approval of his settlement with the special administrator, when his liability becomes the same as in other cases.[34]

If a surviving partner or partners continue to use the decedent's share in the business, they and other parties associated with them are liable to the beneficiaries of the estate for all such property, the remedy being a bill in equity for an accounting,[35] and the court

33 Rev. Stats., c. 17, § 117, [1381]

34 Grant v. Kinney, 36 Tex. 62.

35 Rowell v. Rowell, 122 Wis. 1, 99 N. W. 473.

will hold the offending representative to a strict account of firm assets and rents and profits made or which should have been made by judicious management, or it may require him to account for the amount invested by the decedent with interest.[36]

Form No. 104.

PETITION FOR APPOINTMENT OF SPECIAL ADMINISTRATOR TO ADMINISTER PARTNERSHIP ASSETS.

[Title of Cause and Court.]

Your petitioner, G. H., respectfully represents unto the court that on the ——— day of ———, 19—, letters testamentary upon said estate were issued out of and under the seal of said court to C. D., and that said C. D. is now, and ever since said date has been, executor of said estate; that said A. B., at the date of his decease, was engaged in business in partnership with said C. D., and that among the assets of said estate is the interest of said estate in said partnership; that said partnership property consists of a stock of goods of the estimated value of $10,000, and that the interest of the said estate in said property is the one-half thereof; and that your petitioner is a resident of said county and a legatee of said estate.

Your petitioner therefore prays that he may be appointed special administrator of said estate, with authority to sell at public auction the interest of said estate in said partnership property, and to settle with the said C. D., surviving partner, all the dealings and transactions of the partnership, as well those remaining unsettled before the death of the deceased partner as of the said parties thereafter, and to fully administer said interest of said estate in said partnership property in the manner provided by law.

Dated this ——— day of ———, 19—.

(Signed) G. H.

[Add verification, Form No. 5.]

Notice need not be given of the pendency of this application, and the appointment should be made as soon as practicable.

[36] Dovey v. Dovey, 95 Neb. 624, 146 N. W. 923; Killifer v. McLain, 78 Mich. 249, 44 N. W. 405.

Form No. 105.

ORDER FOR APPOINTMENT OF SPECIAL ADMINISTRATOR.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the petition of G. H. for his appointment as special administrator of the estate of A. B., deceased, and, it appearing to the court that said A. B., at the time of his decease, was a partner of C. D., to whom, on the ——— day of ———, 19—, letters testamentary out of and under the seal of this court were granted, and who is now executor of said estate, and it further appearing to the court that said estate is the owner of an interest in said partnership property, and that said interest is of the value of $5,000:

It is therefore ordered that, upon the filing by the said G. H. of a good and sufficient bond in the penal sum of $7,000, with two or more sureties to be approved by this court, said bond conditioned according to law, and upon taking the oath required by law, special letters of administration be issued out of and under the seal of this court to G. H., as special administrator of the estate of A. B., with authority to administer according to law the interest of the said estate in the partnership property belonging thereto.

In witness whereof I have hereunto set my hand and the seal of the said county court this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

Form No. 106.

BOND OF SPECIAL ADMINISTRATOR APPOINTED TO ADMINISTER PARTNERSHIP MATTERS.

Know all men by these presents that we, G. H., as principal, and S. D. and B. N., as sureties, all of ——— county, Nebraska, are held and firmly bound unto the county judge of ——— county, Nebraska, in the penal sum of seven thousand dollars, for which payment well and truly to be made we do hereby jointly and severally bind ourselves, our heirs, executors, administrators, and assigns, by these presents.

Dated this ——— day of ———, 19—.

Whereas, an order of said court was entered on the ——— day of ———, 19—, for the appointment of said G. H. as special administrator of the estate of A. B., deceased, to administer the partnership property of said estate:

Now, therefore, the condition of this obligation is such that, if the said G. H. shall well and truly administer all the goods, chattels, rights, credits, and effects and interest of the estate of the said A. B. in the partnership property of the late partnership of said A. B. and said C. D., and shall sell, in the manner provided by law, the interest of the said A. B. in the said partnership property, and, upon the same being confirmed by the court, duly account for and pay over unto the said C. D., executor, the proceeds of said sale, and if the said special administrator, G. H., shall well and truly settle with the said C. D. all the dealings and transactions of the said partnership, as well those remaining unsettled before the death of the said A. B. as of the said parties thereafter, and shall present to the court a full statement of the matter and manner of such settlement, and account for and pay the proceeds of said settlement as said court may direct and order, then this obligation shall be null and void, otherwise to be in full force and effect.

(Signed) G. H.
S. D.
B. N.

[For justification by sureties, see Form No. 3.]

Form No. 107.

APPOINTMENT OF SPECIAL ADMINISTRATOR TO ADMINISTER PARTNERSHIP MATTERS.

State of Nebraska,
——— County,—ss.

To G. H., of Said County:

Whereas, on the ——— day of ———, 19—, letters testamentary issued out of and under the seal of the county court of said county to C. D.; and

Whereas, the said C. D. is a surviving partner of the said A. B., and the estate of the said A. B. has an interest in said partnership property:

You are hereby appointed special administrator of the estate of A. B., late of said county, deceased, with power to administer only the partnership interest of the said estate, and hereby empowered to sell, in the manner provided by law, the interest of said estate in said partnership property, to settle with the surviving partner all the dealings and transactions of the partnership, as well those remaining unsettled before the death of the deceased partner as of the said parties thereafter.

You are required to make a return of said sale, or a full statement of the matter and manner of such settlement, to the said court, and, upon the same being confirmed by the court, account for and pay over the proceeds thereof, as the said court may direct and order.

In testimony whereof I have hereunto set my hand and affixed the seal of the county court this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

Form No. 108.

NOTICE OF HEARING OF REPORT OF PARTNERSHIP SETTLEMENT.

[Title of Cause and Court.]

Whereas, on the ——— day of ———, 19—, L. M., special administrator of the estate of A. B., deceased, filed his report of the matter and manner of the settlement of a partnership interest belonging to said estate in the late firm of A. B. and G. H.:

It is hereby ordered that said report be heard on the ——— day of ———, 19—, at the county court room in said county, and that notice of the time and place of hearing be given all persons interested in said estate by personal service of this notice.

(Seal) (Signed) J. K.,
County Judge.

Dated this ——— day of ———, 19—.

§ 242. Account of special administrator.

The special administrator should, on or before the date fixed for the hearing, file his special administrator's account, which may be considered immediately after the hearing on the report of settlement, and, upon the approval of the report and account, he is entitled to his discharge. He is entitled to a commission on the amount collected, or such pay for his services as the court may deem just. The usual practice is to allow him a specified sum for his services, depending upon what it was necessary for him to do.

Form No. 109.

ORDER CONFIRMING REPORT OF SETTLEMENT OF PARTNERSHIP.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the report of C. D., administrator [special administrator] of said estate, of the settlement of the partnership interests belonging thereto, and was submitted to the court; upon consideration whereof, the court finds that the terms of said settlement are just, and that the best interests of said estate will be subserved thereby. It is therefore ordered that said settlement be and the same hereby is in all respects confirmed [if made by a special administrator, add "And the said C. D. having filed in this court an account of his transactions as special administrator of said estate, and said account having been approved by the court, it is further ordered that, upon the payment by the said C. D. of the assets of said estate in his possession, as appears from the said report of settlement, less the amount allowed him in his account for his lawful commissions and pay for his services, as special administrator, to G. H., he be discharged"].

(Signed) J. K.,
County Judge.

Form No. 110.

DISCHARGE OF SPECIAL ADMINISTRATOR.

[Title of Cause and Court.]

C. D., special administrator of said estate, having this day filed in this court the receipt of G. H., administrator of said estate, for the amount belonging to said estate derived from his settlement of the partnership assets thereof, he is hereby discharged as such special administrator.

Witness my hand and the seal of said court this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

§ 243. Sale of interest of estate in partnership property.

Whenever the personal representative and the surviving partner are unable to agree upon a settlement, and no action is pending in equity for an accounting of the partnership matters between the personal representative and the surviving partner, the county court has authority to issue a license for the sale of the partnership interest of the estate, the statute providing that the county court which shall have issued letters testamentary or of administration upon the estate of a deceased partner may, upon due notice to all parties interested, authorize the executor or administrator of such deceased partner to sell at public auction his interest in the partnership property, and the surviving partner may be a purchaser at such sale, the same as any disinterested party. The administrator or executor making such sale shall report his proceedings thereon to the court, and, upon due notice to all persons interested, the court may confirm the sale, or, for good reason therefor appearing, may set the same aside, and order another sale. The court shall also direct the execution of such paper titles to the property sold as the circumstances may require.[37]

§ 244. Notice—Hearing.

On filing such application the court should set a date for hearing and direct that notice thereof be given. The method of service rests in the discretion of the

[37] Rev. Stats., c. 17, § 114, [1378].

court. Personal service on the parties interested should be had, if possible.[38]

The court has power on the hearing to approve the report, correct or modify it or reject it altogether, but there appears to be no way of enforcing the order or decree.

Form No. 111.

PETITION FOR LICENSE TO SELL PARTNERSHIP PROPERTY.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that on the ——— day of ———, 19—, letters testamentary were issued to him out of and under the seal of said court, and that he now is, and ever since has been, the executor of said estate.

That said estate is the owner of a half interest in the partnership property of the late firm of A. B. & F. G., and that said partnership property consists of a stock of dry goods in the city of ———, said county.

That your petitioner and said surviving partner, F. G., are unable to agree on the settlement of said partnership matters, and no suit in equity for an accounting between said F. G. and said estate is now pending in any court.

Your petitioner therefore prays that an order of said court may be entered granting him a license, as such executor, to sell at public auction the interest of said estate in said partnership property.

Dated this ——— day of ———, 19—.

(Signed) C. D.,
By C. E. A., His Attorney.

[Add verification, Form No. 5.]

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[38] Rev. Stats., c. 17, § 116, [1380].

Form No. 112.

ORDER TO SHOW CAUSE WHY LICENSE SHOULD NOT ISSUE TO EXECUTOR TO SELL INTEREST OF ESTATE IN A PARTNERSHIP.

[Title of Cause and Court.]

State of Nebraska,
——— County,—ss.

To All Persons Interested in the Estate of A. B., Deceased:

You are hereby notified that on the ——— day of ———, 19—, C. D., executor of said estate, filed his petition in said court praying for license to sell at public auction the interest of said estate in the late partnership of A. B. & F. G.

You are therefore ordered to show cause, if any there be, why the prayer of said petitioner should not be granted, at the county court room in the city of ———, said county, on the ——— day of ———, 19—. It is futher ordered that service of this order be had by [publication for three weeks in the ———, a newspaper printed and published in said county].

Dated this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

[Service of this order is had as the court may order.]

Form No. 113.

LICENSE TO EXECUTOR TO SELL INTEREST OF HIS DECEDENT IN A PARTNERSHIP.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the petition of C. D., executor of said estate, for leave to sell at public auction the interest of said estate in the late partnership of A. B. & F. G., and, it appearing to the court from the proof that notice of the hearing of said petition has been given all parties interested, as ordered by the court, and it further appearing to me that said C. D. and F. G. cannot agree upon a settlement, and that no suit in equity for an accounting of said partnership assets is pending, and that the best interests of the said estate demand that the interest of said estate in said partnership be sold, it is therefore ordered that said C. D. be, and he hereby is, authorized to sell at public auction to the highest bidder the interest of the said estate

in the following described partnership property [describe partnership property to be sold]; that said C. D. cause notice of said sale to be given [state how notice of sale is to be given].

It is further ordered that said C. D. make a return to this court as soon as said sale is made of his doings under this license.

(Seal) (Signed) J. K.,
County Judge.

Form No. 114.

REPORT OF EXECUTOR OR ADMINISTRATOR ON SALE OF PARTNERSHIP PROPERTY.

[Title of Cause and Court.]

I, C. D., executor of said estate, respectfully submit the following report of my doings under the license issued to me by said court for the sale of the interest of said estate in the late firm of A. B. & F. G.

Pursuant to said license I gave notice that said sale would be held on the ——— day of ———, 19—, at the store building of the late firm in the city of ———, in said county, and caused a notice, a copy of which is hereto attached, marked "Exhibit A," to be [state how notice given].

That on the ——— day of ———, 19—, that being the time and place designated in said notice, I sold at public auction, to the highest bidder for cash, the interest of the estate in the following described property [describe property as in license]; that said property was sold to F. G. for the sum of ——— dollars, he being the highest bidder therefor, and that being the highest sum bid; that in making said sale I used my best efforts to obtain the highest possible price for said property; and that, in my judgment, said sum of ——— dollars is the fair valuation of the interest of said estate in said property.

Dated this ——— day of ———, 19—.

(Signed) C. D.,
Executor of the Estate of A. B.

Form No. 115.

CONFIRMATION OF EXECUTOR'S SALE OF PARTNERSHIP INTEREST.

[Title of Cause and Court.]

This cause came on for hearing upon the motion of C. E. A., attorney for C. D., executor of said estate, to confirm the sale made by said C. D. of the interest of said estate in the late partnership of A. B. & F. G.; and it appearing to the court that said sale was conducted pursuant to the decree of this court heretofore entered, that said proceedings have been regular in all respects, and that the sum bid for said property is the fair value thereof, it is therefore ordered and adjudged by me that said C. D., executor of said estate, be and he hereby is directed to execute and deliver to said F. G., the purchaser thereof, for and on behalf of the estate, a bill of sale of said stock of goods and fixtures.

Dated this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

CHAPTER XXI.

MORTGAGING REAL ESTATE BY EXECUTORS AND ADMINISTRATORS.

§ 245. Authority of Executor or Administrator to Mortgage Real Estate.
246. Jurisdiction of County Court to Grant License to Mortgage.
247. Appointment of Special Administrator to Execute Mortgage.
248. Hearing on Petition and Application—License.
249. Mortgages and Notes.
250. Discharge of Special Administrator.

§ 245. Authority of executor or administrator to mortgage real estate.

An administrator has only that authority over the real estate of his decedent which is given him in express terms by the statute, and therefore cannot, unless empowered by the court, execute any mortgage on the same. An executor has no more power than an administrator over the real estate of his testator, unless it is conferred upon him by the will. As a general proposition, a naked power to sell and convey testator's real estate for the purpose of paying the debts and making a distribution of the residue to certain persons does not empower them to mortgage the property, and a sale without consideration to a third party, and the execution of a mortgage by him, the estate obtaining the proceeds, is in effect a mortgage, and not valid;[1] but if the disposition of his estate directed by the testator is of such a character as to authorize the inference that he intended to give the power to mortgage, or the intention cannot be carried out unless

1 Arlington State Bank v. Paulsen, 57 Neb. 717, 78 N. W. 303.

the power to mortgage exists, then a mortgage executed by him would be valid.[2]

§ 246. Jurisdiction of county court to grant license to mortgage.

The county judge may, if it appear that the best interests of the estate demand it, grant authority to executors or administrators to mortgage any real estate belonging to such estates, when mortgages existing on such real estate are due, or about to become due, and there is no money to pay or redeem them. The amount of such mortgages cannot be larger than those already on the real estate.[3]

The court acquires jurisdiction by the filing of a petition by the representative, or other person interested setting up the facts which show the necessity of executing the mortgage.[4]

In Oregon similar powers are granted the executor or administrator, and he may also borrow money secured by mortgage on any of the property of the estate, when the same can be secured for the same or a less rate of interest, for the purpose of funding the indebtedness of the estate.[5] The number of creditors whose demands are unpaid does not affect the right of the court to grant the order.[6] The procedure is identical with that in Nebraska, and the court obtains jurisdiction by the filing of a verified petition, or an affidavit.[7]

2 Faulk v. Dashiell, 62 Tex. 642; Kent v. Morrison, 153 Mass. 137, 26 N. E. 427; Ayres v. Palmer, 57 Cal. 309; Arlington State Bank v. Paulsen, 57 Neb. 717, 78 N. W. 303.

3 Rev. Stats., c. 17, § 227, [1491].

4 Boevink v. Christiaanse, 69 Neb. 256, 95 N. W. 252.

5 L. O. L., § 1278.

6 Lawrey v. Sterling, 41 Or. 518, 69 Pac. 460.

7 Lawrey v. Sterling, *supra.*

Form No. 115a—Oregon.

PETITION FOR ORDER TO MORTGAGE REAL ESTATE.

[Title of Cause and Court.]

To the Hon. J. K., County Judge of ——— County, Oregon:

Comes now C. D. and represents that he is the duly qualified and acting administrator of the estate of A. B., late of said ——— county, deceased. That said estate has paid all claims, costs, charges and expenses due from the same, with the exception of a certain demand of E. F. upon a promissory note, upon which there is now the sum of $———, with interest thereon at ——— per cent from the ——— day of ———, 19—. That a loan can be made upon the following described lands of said estate, ———, for the sum of $——— due in ——— years from date, with interest at ——— per cent per annum; that all the personal assets belonging to said estate and liable for the payment of debts, costs and expenses have been so applied, and that by the payment of said sum of $——— to said E. F., the administration of said estate may be closed and said real estate delivered to the heirs so mortgaged. That it will be for the best interest of said estate to obtain a loan on said real estate and with the proceeds thereof pay said demand of said E. F.

Your petitioner therefore prays that he be granted an order and license as such administrator to negotiate a loan on said real estate in the sum of $——— and to execute and deliver to the mortgagee a note or notes aggregating said sum of $——— and a mortgage on said lands as security for the same.

(Signed) C. D.,
Administrator.

[Add verification.]

Form No. 115b—Oregon.

ORDER GRANTING LICENSE TO MORTGAGE PROPERTY.

[Title of Cause and Court.]

On reading and filing the petition, duly verified, of C. D., administrator of said estate, praying for an order licensing him, said administrator, to execute a mortgage on the real estate of said estate for the purpose of funding the debts of said estate, and it appearing therefrom that [copy of allegations of petition in full].

It is therefore ordered that said C. D., as such administrator as aforesaid, be and hereby is authorized and empowered to execute and deliver a mortgage upon the above-described real estate in the sum

of $———, together with a note or notes aggregating said sum, and bearing interest at not to exceed ——— per cent per annum, to be secured by said mortgage.

Dated this ——— day of ———, 19—.

Form No. 116.

PETITION FOR LICENSE TO MORTGAGE REAL ESTATE.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that on the ——— day of ———, 19—, letters of administration upon the estate of said A. B. were issued to him out of and under the seal of said court.

That said estate is seised of real estate situated in the county of ——— and state of Nebraska, and described as follows [describe the real estate mortgaged], and which is encumbered by a mortgage for the sum of ——— dollars ($———), dated the ——— day of ———, 19—, and recorded in the office of the register of deeds of said county, in Book ——— of Mortgages, page ———; that said mortgage was given to secure a promissory note of even date therewith, payable ———, 19—, with interest thereon at the rate of seven per cent per annum, payable annually, and is a valid and subsisting lien on said premises, and there is now due thereon the sum of ——— dollars ($———), with interest at the rate of seven per cent per annum from the ——— day of ———, 19—.

That your petitioner has collected from the personal assets belonging to said estate the sum of ——— dollars, and has paid out therefrom for allowance for the support of the widow and minor heirs of said A. B., as ordered by said court, and for debts allowed against said estate by said court, and for costs and expenses of administration, the sum of ——— dollars ($———), and now has on hand the sum of ——— dollars ($———), which said sum is insufficient to redeem said premises from the lien of said mortgage; that there are no other personal assets of said estate which can be converted into money and used for the purpose of redeeming said real estate from said lien; that said real estate is of the value of ——— dollars ($———), and yields an income to said estate of the sum of ——— dollars ($———).

That your petitioner has an opportunity to borrow the sum of ——— dollars ($———), to be secured by a first mortgage on said above-described premises, for the period of ——— years, interest

thereon to be at six per cent per annum, payable annually, and that the interests of said estate will be subserved by the borrowing of said sum to satisfy a mortgage now a lien on said premises, and the execution of a new mortgage thereon for the sum of ——— dollars ($———), with interest thereon as aforesaid.

Your petitioner therefore prays that a license may be granted him empowering him to execute a mortgage upon said above-described premises for the sum of ——— dollars ($———), due ——— years from date, with interest thereon at the rate of six per cent per annum, payable annually, and also execute in behalf of said estate, a promissory note or notes for the sums last aforesaid, and to deliver said note or notes and mortgage.

Dated this ——— day of ———, 19—.

C. D., Administrator.
By F. W. B., His Attorney.

[Add verification, Form No. 5.]

§ 247. Appointment of special administrator to execute mortgage.

If no executor or administrator has been appointed, the county judge may, upon the filing of a proper petition, appoint a special administrator, whose duties are confined to the particular one of procuring the license, executing the mortgage and accompanying notes, and attending to the release of the mortgage then thereon.[8] No notice is required of the application for the appointment of the special administrator, and the petitioner may in the same instrument make application for the grant of a license to mortgage the real estate. The court, no doubt, has authority to require a bond of the special administrator for the faithful performance of his duties, but it is not necessary.

8 Rev. Stats., c. 17, § 228.

Form No. 117.

PETITION FOR APPOINTMENT OF SPECIAL ADMINISTRATOR, AND FOR LICENSE TO MORTGAGE REALTY.

[Title of Cause and Court.]

Your petitioner, C. B., respectfully represents unto the court that on the ——— day of ———, 19—, A. B., late a resident of said county, departed this life, leaving a widow, your petitioner, and D. B. and M. B., children and heirs at law of said A. B.; that said A. B. died intestate, and no administrator has ever been appointed of his said estate.

That said A. B., at the time of his death, was seised in fee simple of the following described real estate [describe real estate], it being all the real estate which he possessed; that said real estate is encumbered by a mortgage, which said mortgage is dated ———, 19—, and recorded in the office of the register of deeds of said county in Book ——— of Mortgages, page ———, and was given to secure a promissory note of even date therewith, payable on the ——— day of ———, 19—, with interest thereon at eight per cent per annum, payable annually, and there is now due thereon the sum of ——— dollars ($———), with interest thereon at the rate of eight per cent per annum from ———, 19—, to date; that said property is of the value of ——— dollars ($———), and is occupied by your petitioner and her minor children, D. B. and M. B., as and for a homestead; that the personal estate of said A. B. consisted only of his personal effects, wearing apparel, household furniture, and other articles of personalty, and the value of all of them will not exceed the sum of ——— dollars ($———), and there is no money or assets which can be converted into money belonging to said estate with which to redeem said above-described premises from the lien of said mortgage.

That your petitioner has an opportunity to borrow the sum of ——— dollars ($———), to be secured by a first mortgage on said above-described premises, for the period of ——— years, interest thereon to be at six per cent per annum, payable annually, and that the interests of your petitioner and said minor heirs will be subserved by borrowing said sum to satisfy the mortgage now a lien on said premises, and the execution of a new mortgage thereon for the sum of ——— dollars ($———), with interest as aforesaid.

Your petitioner therefore prays that letters of special administration upon said estate for the purpose of executing and delivering said mortgage only may issue to her out of and under the seal

of said court, and that an order of said court may be made authorizing and empowering her, as such special administrator [balance as in Form No. 116].

§ 248. Hearing on petition and application—License.

No notice is required of the pendency of the petition for license to mortgage real estate. A formal hearing must be had and the allegations of the petition proved by competent testimony. A verbal permit is void.[9] A license should be issued in due form and made a part of the records, and the executor or administrator should file a report of his proceedings under the license with the court.

Under the Oregon practice, a formal hearing is not necessary.

Form No. 118.

LICENSE TO EXECUTOR OR ADMINISTRATOR TO MORTGAGE REAL ESTATE OF HIS DECEDENT.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the petition of C. D., administrator of said estate, for license to execute and deliver a mortgage for the sum of ——— dollars ($———) upon the following described real estate [describe realty as in petition], and also a note or notes aggregating said sum to be secured by said mortgage; and it appearing to said court that said property is now encumbered by a mortgage for the sum of ——— dollars ($———), and that the said sum, with interest thereon at the rate of seven per cent per annum from ———, 19—, will be due and payable on the ——— day of ———, 19—, and that there is not sufficient personalty belonging to said estate to redeem said realty from the lien of said mortgage, and that the best interests of said estate will be subserved by the execution of a mortgage upon said realty to secure the sum of ——— dollars ($———):

It is therefore ordered and adjudged that the said C. D. be, and he hereby is, authorized and empowered to execute and deliver, for

9 Boevink v. Christianaase, 69 Neb. 256, 95 N. W. 652.

and in behalf of the said estate, a mortgage upon the real estate above described in the sum of ——— dollars ($———), and also a note or notes aggregating the sum of ——— dollars ($———), which are to be secured by said mortgage, said note or notes to bear interest at the rate of six per cent per annum, and to be payable ——— years from date thereof.

Given under my hand, and the seal of said court thereto affixed, this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

Form No. 119.

ORDER FOR APPOINTMENT OF SPECIAL ADMINISTRATOR TO EXECUTE NOTES AND MORTGAGE.

[Title of Cause and Court.]

This cause came on for hearing upon the application of C. B. for her appointment as special administrator of the estate of A. B., deceased, for the purpose of executing and delivering a mortgage upon the following described real estate, of which the said A. B. died seised [describe real estate]; and it appearing to the court that the said A. B. departed this life on the ——— day of ———, 19—, being, at the date of his death, a resident of said county, intestate, leaving C. B., his widow, and E. B. and F. B. his children and heirs at law, and that no administrator has ever been appointed of his said estate; and it further appearing to the court that the best interests of said estate will be subserved by the execution of said mortgage:

It is hereby ordered that special letters of administration for the purpose of the execution of said mortgage and notes only issue out of and under the seal of said court to said C. B. [upon her filing a bond in this court conditioned to faithfully perform said duty, in the penal sum of ——— dollars ($———)].

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

Form No. 120.

LETTERS OF SPECIAL ADMINISTRATION.

State of Nebraska,
——— County,—ss.

To C. B., Widow of A. B., Late of Said County:

Whereas, A. B., late of said county, departed this life intestate, being, at the time of his death a resident of said county and seised of

real estate therein, by reason whereof the granting of special letters of administration upon his estate devolves upon the county court of said county:

Now, therefore, you are hereby appointed special administratrix of said estate, with authority only to execute and deliver any mortgage and note or notes, which said mortgage may be given to secure, which may be authorized by this court, and also with power and authority to pay the money received on said mortgage in satisfaction of the mortgage now a lien on said real estate.

In testimony whereof, I have hereunto set my hand and affixed my official seal this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

§ 249. Mortgage and notes.

The executor or administrator should obtain the lowest possible rate of interest on the new mortgage and reduce its amount as much as possible by applying personalty on the old lien. The authority to execute it being one conferred only by statute and the order of the court,[10] the new mortgage should show that it was executed pursuant to the license granted by the county judge.[11] The holder of a void mortgage executed by a personal representative, the proceeds of which have been applied in payment of a valid mortgage, is entitled to be subrogated to the rights of such prior mortgage,[12] but not if the prior mortgage was invalid, or the proceeds applied to other purposes.[13]

The accompanying notes should be signed by him as such representative. They are a liability of the estate and not binding on him personally.[14] A purchaser of

10 Lawrey v. Sterling, 41 Or. 618, 69 Pac. 160.
11 Thomas v. Parker, 97 Cal. 456, 32 Pac. 562.
12 Boevink v. Christianaase, 69 Neb. 256, 95 N. W. 652.
13 Henry v. Henry, 73 Neb. 476, 103 N. W. 441, 100 N. W. 789.
14 Wisconsin Trust Co. v. Chapman, 121 Wis. 479, 99 N. W. 341.

such notes and mortgages takes them with full knowledge of the extent and limitations on the powers of the mortgagor and payer, and the rule of *caveat emptor* applies.[15]

Form No. 121.

MORTGAGE BY PERSONAL REPRESENTATIVE.

Know all men by these presents, that I, C. D., of the county of ——— and state of Nebraska, in my capacity as administrator of the estate of A. B., late of said county, pursuant to license granted me by the county court of ——— county, Nebraska, on the ——— day of ———, 19—, authorizing and empowering me, as such administrator, and for and in behalf of said estate, to execute and deliver a mortgage upon the following described real estate [describe real estate as in petition] for the sum of $———, and also a note or notes which are to be secured by said mortgage, aggregating said sum, said notes to bear interest at the rate of seven per cent per annum, for and in consideration of the sum of $——— to me in hand paid, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, and convey unto L. M., of ——— county, Nebraska, the following described real estate, situated in ——— county, Nebraska, and known and described as follows [describe real estate as in petition], together with all the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining.

Provided, always, and these presents are upon this express condition, that whereas, said C. D., in his capacity as administrator as aforesaid, and pursuant to the license granted him by the county court of ——— county, Nebraska, has executed and delivered to the said L. M. a promissory note of even date herewith, payable ——— after date, with interest at the rate of seven per cent per annum, payable annually: Now, therefore, if the said C. D., as administrator as aforesaid, or his successors in trust, shall well and truly pay or cause to be paid said sum of money in said note mentioned, with interest thereon according to the tenor and effect thereof, and shall well and truly keep and perform all the covenants and agreements on the part of said estate to be kept and performed, then these presents shall be null and void; but if the said sum of money, or any part thereof, or any interest thereon, is not paid when the same becomes due, or if

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15 Neary v. Neary, 70 Neb. 319, 97 N. W. 302.

the said mortgagor shall fail to keep and perform all the covenants and agreements on the part of said estate to be kept and performed, then the whole of said sum, together with the interest then accrued, shall immediately become due and payable.

Dated this ——— day of ———, 19—.

(Signed) C. D.,
Administrator of the Estate of A. B., Deceased.

Witnesses:
F. G.
M. N.

State of Nebraska,
——— County,—ss.

On this ——— day of ———, 19—, before me, a notary public in and for said county, personally came C. D., administrator of the estate of A. B., deceased, to me personally known to be the identical person whose name is affixed to the foregoing instrument as mortgagor, and acknowledged the execution of the same to be his voluntary act and deed, as such administrator, for the purposes therein mentioned.

Witness my hand and official seal this ——— day of ———, 19—.

(Seal) (Signed) D. J. S.,
Notary Public.

Form No. 122.

MORTGAGE NOTE OF EXECUTOR OR ADMINISTRATOR.

———, Neb., ———, 19—.

——— after date, for value received, I, C. D., administrator of the estate of A. B., deceased, pursuant to the order of the county court of ——— county, Nebraska, dated ———, 19—, promise to pay to the order of E. F. ——— dollars ($———) with interest thereon at ——— per centum per annum, payable annually.

Payable at ———.

(Signed) C. D.,
Administrator of the Estate of A. B., Deceased.

§ 250. Discharge of special administrator.

As far as the assets of the estate in his possession are concerned, such special administrator is merely a medium for the transfer of the amount due on the original mortgage to the mortgagee. No other assets

of the estate come into his possession, and there is therefore no fund from which the costs of the proceeding and his services to the estate can be paid. If the principal of the original mortgage has been reduced, the court would have the right to permit the new mortgage to be executed for a sum large enough to redeem the lands from the lien of such original mortgage, and pay the expenses of procuring the license, together with a reasonable sum for his services. He should file a report of his doings with the county court, and, upon their approval, he is entitled to his discharge.

When an executor or administrator executes the mortgage, the account of his receipts and disbursements and expenses are properly included in his annual or final account, though he should make and file his report, the same as a special administrator.

Form No. 123.

REPORT OF EXECUTOR, ADMINISTRATOR, OR GUARDIAN ON MORTGAGING REAL ESTATE.

[Title of Cause and Court.]

I, C. D., special administrator of said estate, respectfully report that, pursuant to the license granted me on the ——— day of ———, 19—, by said court for the mortgaging of the following described real estate [describe real estate as in mortgage], on the ——— day of ———, 19—, I executed and delivered to X. Y. a promissory note due ——— years from date, with interest thereon at the rate of six per cent per annum, and also on the same date I, for and on behalf of said estate, executed a mortgage upon the real estate above described to secure the payment of said note, and I received from said X. Y. the sum of ——— dollars ($———). [I paid to M. N. the sum of ——— dollars ($———), being the amount due on the mortgage held by him on said real estate. I have also paid the costs of this proceeding, being the sum of ——— dollars ($———), and now have in my possession the sum of ——— dollars ($———), which said sum

I respectfully pray that I may be allowed to retain for my services and expenses in said proceedings.] [I paid said sum to M. N., that being the amount due on the mortgage held by him on said real estate.] That attached hereto, marked "Ex. A." and "Ex. B," are the note executed by said A. B. in his lifetime to said M. N., and a release of said mortgage, which was given by said A. B. to secure the same.

(Signed) C. D.,
Administrator.

Form No. 124.

CONFIRMATION OF REPORT.

[Title of Cause and Court.]

C. D., special administrator of said estate, having filed a report of his doings as such special administrator in the matter of executing a mortgage to X. Y. in renewal of a mortgage which was, at the death of said A. B., a lien on certain of his real estate, it is hereby ordered that the same be and hereby is in all respects confirmed, and said C. D. be allowed the sum of ——— dollars for his services and expenses, and that he be discharged.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

CHAPTER XXII.

ENFORCEMENT OF DECEDENT'S CONTRACT FOR SALE OF REAL ESTATE.

§ 251. Executor or Administrator has No Inherent Authority to Execute Deed to Real Estate.
252. Enforcement of Decedent's Real Estate Contracts.
253. Petition for Enforcement of Contract to Convey Real Estate.
254. Notice of Hearing.
255. Hearing on the Petition.
256. Costs.
257. Specific Performance of Contracts to Convey Realty.
258. Contracts Covering Homesteads.

§ 251. Executor or administrator has no inherent authority to execute a deed to real estate.

An administrator of a vendor who had, in his lifetime, given a contract or bond for the sale of real estate has no power to execute a deed to the same to the vendee, though all the covenants and agreements on the part of the vendee may have been complied with by him; neither has an executor, unless a power of sale has been given him by the will.[1] An executor or administrator may deliver a deed which had been executed by a decedent and deposited in escrow, to be delivered upon the performance of a condition precedent, or the happening of a certain event, and an executor may also deliver a deed executed by his testator and directed by the will to be delivered after his death.[2]

1 Rearich v. Swinehart, 11 Pa. 233; Adams v. Harris, 47 Miss. 144.

2 Adams v. Harris, 47 Miss. 144.

§ 252. Enforcement of decedent's real estate contracts.

Any contract made by a decedent during his lifetime for either the purchase or sale of real estate survives his death, unless otherwise therein provided, and may be enforced either by or against his heirs, devisees or executors or administrators. There are two methods provided by law for enforcing such contracts. The first is by a special proceeding in the district court, and is limited to contracts in writing.[3] It may be brought by any person claiming to be entitled to the conveyance,[4] by the executor or administrator of such person for the benefit of the parties entitled thereto,[5] or by the executor or administrator himself.[6] The second is by an action for specific performance, which may be brought whether the contract is in writing or oral.[7] It may be brought by the person entitled to the conveyance against the heirs, devisees, executor or administrator,[8] by the heirs or devisees against the vendor,[9] or by the personal representative.[10]

In Oregon the executor or administrator may be authorized to execute and deliver a deed to a vendee only in cases where the decedent at the time of his death was a party to a bond for a deed or other en-

3 Rev. Stats., c. 17, §§ 166, 169, 171, [1430], [1433], [1435].

4 Rev. Stats., c. 17, § 167, [1431].

5 Rev. Stats., c. 17, § 178, [1442].

6 Rev. Stats., c. 17, § 179, [1443].

7 Chess' Appeal, 4 Pa. 52; Guilford v. Love, 49 Tex. 715; Cory v. Hyde, 49 Cal. 479.

8 Rev. Stats., c. 17, § 172, [1436].

9 Young v. Young, 45 N. J. Eq. 27; House v. Dexter, 9 Mich. 246.

10 Solt v. Anderson, 67 Neb. 103, 93 N. W. 205.

forceable contract requiring him to convey real estate.[11] Jurisdiction to authorize the execution of such deed is vested in the county judge of the county where the estate is being administered. A report or verified petition may be presented to him, showing that all the terms and conditions of the bond or contract have been met so as to entitle the other party thereto to a conveyance, and if satisfied therewith he shall make an order authorizing and directing the execution and delivery of the requisite deed to the proper parties.[12]

The proceeding is substantially the same as on the application of an executor or administrator under the Nebraska statute to complete such contract when the conditions have been performed by the vendee, except that the issue and service of a citation is not required.

The purpose of the special proceeding is to give the executor or administrator authority to complete an executory contract where the vendee has clearly complied with his agreements or is ready to do so, and the personal representative is satisfied that it is for the best interest of all concerned that the deed be executed and delivered. It is not a bar to a suit for specific performance. The estate has a third remedy. The executor or administrator may, in case of default, treat the contract executed by his decedent as a mortgage and foreclose the same,[13] or place the vendee *in statu quo* and avoid the contract. His election is binding on the estate and cannot be revoked except for fraud.[14]

11 L. O. L., § 1269.

12 L. O. L., § 1270.

13 Hendrix v. Barker, 49 Neb. 369, 68 N. W. 531; Gardels v. Kloke, 36 Neb. 593, 54 N. W. 834.

14 Gillilan v. Oakes, 1 Neb. Unof. 893, 95 N. W. 511; Solt v. Anderson, 67 Neb. 103, 93 N. W. 205.

§ 253. Petition for enforcement of contract to convey real estate.

The vendee in a contract in writing executed by the decedent, who claims that he is entitled to a conveyance pursuant thereto, may file a petition for that purpose, setting forth the facts upon which such claim is predicated.[15] If he be not living, any person who would be entitled to the estate under him as heir, devisee or otherwise, in case the conveyance had been made according to the terms of the contract, or the executor or administrator of such deceased person for the benefit of the person so entitled, may commence such proceedings.[16]

The executor or administrator of a deceased vendor who desires to complete such contract may file his petition therefor in the district court of the county in which the land or any part thereof is situated,[17] and may include different contracts with different persons and for different tracts of land in one petition.[18]

The statute does not state who shall be made parties when the petition is filed by a vendee or his personal representative, but when filed by a representative of a vendor, the heirs at law, devisees or other representatives of the deceased vendor when not made plaintiffs must be made defendants.[19] The rule appears to be the same as in cases of specific performance. All parties having an interest in the land as heirs or

15 Rev. Stats., c. 17, § 167, [1431].
16 Rev. Stats., c. 17, § 178, [1442].
17 Rev. Stats., c. 17, § 179, [1443].
18 Rev. Stats., c. 17, § 180, [1444].
19 Rev. Stats., c. 17, § 179, [1443].

devisees, or by virtue of the marriage relation, must be named as parties.[20]

The petition should set out the execution and delivery of the contract, the substantive parts thereof, with a description of the land, and allege performance by the vendee of all the covenants and agreements on his part to be kept and performed.[21]

Form No. 125.

PETITION BY VENDEE TO REQUIRE EXECUTOR OR ADMINISTRATOR TO EXECUTE DEED.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that on the ——— day of ———, 19—, one A. B., then a resident of said county, entered into a written contract with your petitioner, by the terms of which said A. B. agreed to sell, and your petitioner to purchase of said A. B., the following described real estate, situated in ——— county, Nebraska, to wit: [Describe real estate as in contract.] Your petitioner agreed to pay said A. B. for the said land the sum of ——— dollars, in payments as follows: ——— dollars on the ——— day of ———, 19—, and ——— dollars on the first day of each and every month thereafter, until said sum of ——— dollars is fully paid with interest on each and all of said payments from date of said contract until paid, at the rate of —— per cent per annum, payable annually.

That said A. B. therein agreed, upon the payment of said principal and interest as provided in said contract, to make to your petitioner, his heirs and assigns, a valid title in fee simple to said land, and for that purpose to execute and deliver to your petitioner, his heirs and assigns, a good and sufficient warranty deed for the same, subject, however, to the taxes of 19—, and subsequent taxes which your petitioner agreed to pay, and that said contract further provided that the covenants and conditions thereof should be binding upon the heirs and assigns of the parties thereto.

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20 In re Reed, 19 Neb. 397, 27 N. W. 391; Holmes v. Columbia National Bank, 4 Neb. Unof, 893, 97 N. W. 26.

21 Cory v. Hyde, 49 Cal. 470; Peters v. Phillips, 19 Tex. 70; Carter v. Jackson, 56 N. H. 364.

Second. That on said ——— day of ———, 19—, your petitioner paid to said A. B. the sum of ——— dollars, and subsequently, on the first day of each and every month thereafter, paid to said A. B. the sum of ——— dollars, with interest thereon at the rate of —— per cent per annum, payable annually, and there is nothing now due from your petitioner on said contract.

Third. That your petitioner has paid all the taxes and assessments levied against said property since said ——— day of ———, 19—, and performed all the covenants and agreements of said contract on his part to be kept and performed.

Fourth. That said A. B. departed this life on the ——— day of ———, 19— [leaving a last will and testament] [intestate], and that on the ——— day of ———, 19—, letters testamentary [of administration] upon the estate of the said A. B. were issued out of and under the seal of the county court of ——— county, Nebraska, to E. F., and said E. F. is now executor [administrator] of said estate.

Fifth. That said A. B. left him surviving a widow, C. B., and the following named heirs at law [and devisees]:———

Sixth. That said A. B. never executed and delivered to your petitioner any deed of conveyance to said real estate according to the terms of said contract, nor did said A. B. execute any deed to said property, and deposit the same in escrow, to be delivered to your petitioner upon the performance of the conditions and covenants of said contract.

Your petitioner therefore prays that the court may appoint a time and place for the hearing of said petition, and cause notice of the pendency thereof to be given to said parties above named, and that upon said hearing a decree be entered authorizing and directing said E. F., executor [administrator] of the estate of A. B., deceased, to execute for and in behalf of said estate a deed to said real estate, and thereby convey the same to your petitioner free and clear from all conveyances and encumbrances.

(Signed) C. D.

[Add verification, Form No. 5.]

Form No. 126.

PETITION BY EXECUTOR FOR AUTHORITY TO EXECUTE DEED TO LAND SOLD BY DECEDENT ON A CONTRACT.

In the District Court of ——— County, Nebraska.

C. D., Executor of the Estate of A. B., Deceased,

Plaintiff,

v.

E. F. and G. H.,

Defendants.

Comes now C. D., and alleges that on the ——— day of ———, 19—, A. B., then a resident of said county, entered into a written contract with the defendant, E. F., by the terms of which said A. B. agreed to sell, and said E. F. to buy, the following described real estate, situated in ——— county, Nebraska, to wit: [Describe real estate, and set out conditions and covenants in said contract as in Form No. 125.]

Second. That on the ——— day of ———, 19—, said E. F. paid to said A. B. the sum of ——— dollars, and has paid since said date the sum of ——— dollars, said sums so paid as aforesaid being the payments of principal and interest up to the ——— day of ———, 19—, and that the final payment of ——— dollars on said contract will become due on the ——— day of ———, 19—, and that plaintiff, as administrator as aforesaid, is desirous of completing said contract so made by said A. B. in his lifetime.

Third. That on the ——— day of ———, 19—, said A. B. departed this life intestate, and on the ——— day of ———, 19—, letters of administration out of and under the seal of the county court of said county were issued to said plaintiff as administrator of the estate of A. B., deceased, and said plaintiff is now administrator of said estate.

Fourth. That said A. B. never executed and delivered to defendant, E. F., a deed of said above-described real estate, nor did said A. B. execute any deed to said real estate, and deposit the same in escrow, to be delivered to said E. F. upon the performance of the conditions and covenants of said contract.

Fifth. That said A. B. left, him surviving, a widow and one heir at law, a son, the defendant G. H., who is a minor of the age of ——— years.

Plaintiff therefore prays that the court may appoint a time and place for the hearing of said petition, and cause notice of the pendency

thereof to be given all parties interested therein, and that, upon said hearing, a decree may be entered authorizing and directing said plaintiff, as administrator of the estate of A. B., deceased, to execute, for and on behalf of said estate, a deed to said real estate upon the payment by said E. F. of the balance so due on said contract, and thereby convey the same to the said E. F. free and clear from all conveyances and encumbrances, as provided by said contract.

Dated this ——— day of ———, 19—.

(Signed) C. D.,
Administrator of the Estate of A. B., Deceased.

§ 254. Notice of hearing.

When the petition is presented to the judge of the district court it is his duty to set a time and place for hearing the same, and order notice of the pendency thereof, and of the time and place of hearing, to be published at least six successive weeks before such hearing in such newspaper or newspapers in this state as he may deem necessary.[22]

The notice should be directed to the heirs or devisees by name.[23] Personal service is not required by statute, but ought to be had in addition to service by publication, when practicable.

22 Rev. Stats., c. 17, § 168, [1432]; In re Reed, 19 Neb. 397, 27 N. W. 391; Solt v. Anderson, 67 Neb. 103, 86 N. W. 1076.

23 Holmes v. Columbia Nat. Bank, 4 Neb. Unof. 893, 97 N. W. 26, where it was held that an heir, not served with process, except by a general notice by publication addressed to all persons interested in the estate of W. W. Holmes, deceased, was not barred of his interests by the decree.

Form No. 127.

NOTICE OF HEARING.

[Title of Cause and Court.]

To E. F., G. H. and C. B.:

You are hereby notified that, on the ——— day of ———, 19—, C. D. filed his petition in the district court of ——— county, Nebraska, the object and prayer of which are to obtain a decree authorizing and directing E. F., executor of said estate, to execute and deliver to him [as trustee for the heirs of G. H.,—or, as administrator of the estate of G. H., deceased] a deed containing full covenants of warranty, to the following described real estate [describe property], in pursuance of the terms of a certain written contract between said A. B. and C. D. [G. H.].

Said petition will be heard at chambers at the courthouse in the city of ———, in said county, on the ——— day of ———, 19—, at the hour of 9 A. M.

It is further ordered that notice of the pendency of this petition, and of the time and place fixed for the hearing thereon, be given by publication for six successive weeks in the ———, a newspaper published in this state.

Dated this ——— day of ———, 19—.

(Signed) W. M.,
District Judge.

§ 255. Hearing on the petition.

Upon the return day, at the place fixed for the hearing, upon filing the proof of publication, a hearing is had before the judge of the district court, and all persons interested in the estate may appear before him and defend against such action, and the court may examine on oath the petitioner, and all others who may be produced before him for that purpose.[24]

If, after a full hearing upon such petition and examination of the facts and circumstances of such claim, the judge is satisfied that the land should be deeded

[24] Rev. Stats., c. 17, § 168, [1432].

to the vendee in the contract, or his executor or administrator, he shall thereupon make a decree authorizing and directing the executor or administrator to make and execute a conveyance thereof to the person entitled thereto.[25] When the proceeding is brought by the executor or administrator of the vendor, and there are payments to be made to the estate under the contract, the court may cause the proceeds of such sale to be secured for the benefit of the estate, for which purpose a bond is required.[26]

If the judge shall doubt the right of the petitioner to have a specific performance of the contract, he shall dismiss the petition without prejudice to the rights of the petitioner who may at any time thereafter prosecute an action to enforce it.[27]

§ 256. Costs.

The statute contains no provision in regard to the costs. The executor or administrator, not having any authority to complete the contract until the permission of the court is first had and obtained, and the vendee not being able, without a decree, to obtain what is justly due him, it would be unjust, where no defense was interposed, to compel him to pay costs which circumstances compelled him to incur in order to obtain his deed. The costs should therefore be paid by the estate.

25 Rev. Stats., c. 17, § 169, [1433], § 178, [1442].

26 Rev. Stats., c. 17, § 181, [1445]; Solt v. Anderson, 62 Neb. 153.

27 Rev. Stats., c. 17, § 171, [1435].

Form No. 128.

DECREE DIRECTING EXECUTOR OR ADMINISTRATOR TO CONVEY REALTY.

[Title of cause and court, as in Form No. 125.]

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the petition of C. D. for a decree authorizing and empowering E. F., executor of the estate of A. B., deceased, to execute and deliver to him, said C. D., a warranty deed to the following described realty, pursuant to a contract in writing executed by said A. B. in his lifetime, and delivered to said C. D., and was submitted to the court.

Upon consideration whereof, the court finds that due notice of the pendency of said petition, and of the time and place of the hearing thereon, has been given to all parties interested as heretofore ordered by said court; that on the ——— day of ———, 19—, said A. B. and said C. D. entered into a contract in writing, by the terms of which said A. B. agreed to sell, and C. D. to purchase, the realty above described, and that, upon the performance of the conditions and covenants of said contract on the part of said C. D., to be kept and performed, said A. B. agreed to execute and deliver to said C. D. a deed to the above-described realty, containing full covenants of warranty; that the conditions and covenants of said contract which the said C. D. therein agreed to keep and perform have been by him, said C. D., fully kept and performed, and he is entitled to a conveyance thereof as prayed for.

It is therefore ordered and decreed that the said E. F., executor as aforesaid, be and he hereby is directed, for and on behalf of said estate of said A. B., to execute and deliver to said C. D. a warranty deed to said realty within ten days from this date. It is further ordered and decreed that, if said E. F., administrator, shall neglect or refuse to execute and deliver said deed as above described, then a duly certified copy of this decree may be filed in the office of the register of deeds of said county, and, when so filed and recorded, shall operate as a full and complete transfer of the legal title to said premises, in the same manner and to the same extent as though a deed had been executed and delivered to said C. D. by said E. F., executor, according to the directions of this decree. And it is further ordered that the said E. F., executor, pay the costs of this proceeding, taxed at $———.

(Signed) W. M.,
District Judge.

Form No. 129.

DECREE AUTHORIZING EXECUTOR TO COMPLETE CONVEYANCE OF REALTY, AND EXECUTE BOND.

[Title of cause and court, as in Form No. 125.]

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the petition of C. D., executor of the estate of A. B., deceased, for permission to complete a certain contract for the sale of the following described real estate [describe realty as in petition], executed and delivered by said A. B. in his lifetime to one E. F., and to execute a deed therefor, and was submitted to the court.

Upon consideration whereof, the court finds that due notice of the pendency of said petition, and of the time and place fixed for the hearing thereof, was given to all persons interested, by publishing the same in the ———, a newspaper printed and published in said state, as appears by the proof of publication thereof on file, as ordered by said court, that on the ——— day of ———, 19—, said A. B. executed and delivered to E. F. a certain contract in writing, by the terms of which the said A. B. agreed to sell, and said E. F. to buy, the realty above described, and that upon the performance of the conditions and covenants of said contract on the part of the said E. F., to be kept and performed, said A. B. agreed to execute and deliver to said E. F. a deed to the above-described realty, containing full covenants of warranty; that there is now unpaid on said contract the sum of ——— dollars, which said sum is due and payable, according to the terms of said contract on the ——— day of ———, 19—, with interest thereon at —— per cent, and that said E. F. has fully performed all the other covenants and conditions on his part to be kept and performed, and, upon the payment of the said sum of ——— dollars, as aforesaid, is entitled to a deed to said realty, as provided in said contract, and said C. D., executor, desires to complete said contract according to the terms thereof.

It is therefore ordered and decreed that said C. D., executor of the estate of A. B., deceased, be and he hereby is authorized, for and on behalf of said estate, to execute and deliver to said E. F. a deed to said realty, as provided in said contract, upon the payment to him by said E. F. of the sum of ——— dollars, with interest thereon at —— per cent per annum, on the ——— day of ———, 19—, and upon the approval by the county court of said county of a bond in the penal sum of ——— dollars, to be executed by said C. D., with good and sufficient surety, to the county judge of said county, conditioned that

said C. D., executor, will well and truly account for all the proceeds of said sale, and administer the same according to law and the will of the said A. B.

(Signed) W. M.,
District Judge.

Form No. 130.

BOND ON EXECUTING DEED TO REALTY.

[First part, as in usual form of bond.]

Whereas, a decree has been made by the Hon. W. M., judge of the district court of ——— county, Nebraska, authorizing C. D., executor of the estate of A. B., deceased, to execute and deliver to E. F. a deed with full covenants of warranty to the following described realty [describe real estate as in petition], upon the payment to him said executor of the sum of ——— dollars:

Now, therefore, the condition of this obligation is such that, if the said C. D. shall well and truly account for said sum of ——— dollars, the proceeds of said sale, and administer the same according to law and the will of said A. B., then these presents to be null and void; otherwise to be and remain in full force and effect.

(Signed) C. D.
L. M.

Bond and surety approved by me this ——— day of ———, 19—.

(Signed) W. M.,
Judge of District Court.

Form No. 131.

EXECUTOR'S OR ADMINISTRATOR'S DEED ON SALE OF REAL ESTATE PURSUANT TO CONTRACT.

Know all men by these presents, that I, C. D., executor of the estate of A. B., deceased, by virtue of the authority conferred upon me as such executor by a decree of the Hon. W. M., judge of the district court of ——— county, Nebraska, dated ———, 19—, and which said decree is in the words and figures following [copy decree], do hereby grant, bargain, sell, and convey unto E. F., of ——— county, ———, the following real estate situated in ——— county, Nebraska, and described as follows [describe realty as in petition], together with all the tenements, hereditaments, and appurtenances to the same belonging.

To have and to hold the above-described premises, with the appurtenances, unto the said E. F. and his heirs and assigns.

And I, C. D., as executor of the estate of said A. B., and for and in behalf of said estate, do hereby covenant with the said E. F., his heirs and assigns, that said estate is lawfully seised of said premises, that they are free from encumbrances, and that said estate has good right and lawful authority to sell the same, and I, C. D., do in my capacity as executor as aforesaid, and for and in behalf of said estate, hereby covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever.

Signed this ——— day of ———, 19—.

C. D.

In presence of:
G. H.
L. M.

§ 257. Specific performance of contracts to convey realty.

Whenever any person who is bound by contract to convey real estate dies before the conveyance is made, the vendee may prosecute an action for specific performance of the same against the heirs, devisees, executor or administrator of the decedent.[28] An administrator, it has been held, may also bring an action for the same purpose. He may compel a vendee to perform and obtain license to execute the conveyance.[29]

The rules governing parties to the action, discretion of the court in awarding performance, and proceedings generally in the action are the same as in ordinary cases for specific performance. The court may require the personal representative to join in the conveyance with such of the heirs or devisees as live in this state.[30] Every conveyance made in pursuance of such decree shall be effectual to pass the estate contracted as fully

28 Rev. Stats., c. 17, § 172, [1436].
29 Solt v. Anderson, 62 Neb. 153, 86 N. W. 1076.
30 Rev. Stats., c. 17, §§ 173, 174, [1437], [1438].

as if the contracting party himself was still living and then executed the same.[31] A copy of the decree, duly certified and recorded in the office of the register of deeds where the land is located, gives the person the right to the possession of the lands and to hold the same according to the same tenure as if they had been conveyed by deed, but does not prevent the court from enforcing such decree by proper process according to the usual course of proceedings.[32]

§ 258. Contracts covering homesteads.

A contract for the sale of the one hundred and sixty acres or the two lots which make up the family homestead cannot be enforced unless it is both signed and acknowledged by both husband and wife.[33] If the contract includes the homestead with other tracts of land it is also unenforceable. To specifically enforce such contract would be to substitute the opinion of the court for the agreement of the parties.[34]

31 Rev. Stats., c. 17, § 175, [1439].

32 Rev. Stats., c. 17, §§ 176, 177, [1440], [1441].

33 Solt v. Anderson, 67 Neb. 103, 93 N. W. 205; Id., 63 Neb. 734, 89 N. W. 206; Meisner v. Hill, 92 Neb. 435, 138 N. W. 583.

34 Anderson v. Schertz, 94 Neb. 390, 143 N. W. 238.

CHAPTER XXIII.

FOREIGN AND ANCILLARY ADMINISTRATION.

§ 259. Limitation on Powers of Executor or Administrator at Common Law.
260. Powers of Foreign Executor or Administrator Within this State.
261. Limitation on Powers of Foreign Representatives.
262. Rights of Nebraska Administrator in Other States.
263. Jurisdiction of the Court to Appoint Ancillary Administrator.
264. Purposes for Which Appointment Proper.
265. Procedure for Appointment.
266. Hearing—Order for Appointment.
267. General Rules Governing Ancillary Administration.
268. General Powers and Duties of Ancillary Administrators.
269. Allowance and Payment of Claim.
270. Accounting by Ancillary Administrators.
271. Disposition of Surplus After Paying Debts.

§ 259. Limitations on powers of executor or administrator at common law.

At common law the jurisdiction of an executor or administrator was strictly limited to the confines of the jurisdiction from which he received his appointment. He had no right to any part of the assets of his decedent beyond the limits of his state or country, and was not responsible for them. If he wished to reach property or collect debts belonging to the estate in another jurisdiction, he had to first take out letters of administration therein or procure the appointment of someone else as an ancillary administrator. His rights in this state are therefore entirely statutory.[1]

[1] Burton v. Williams, 63 Neb. 431, 88 N. W. 765; Godwin v. Jones, 3 Mass. 514; Vickery v. Beier, 16 Mich. 50; Gilman v. Gilman, 54 Me. 453; Moore v. Fields, 42 Pa. 472; Estate of Appel, 66 Cal. 432, 6 Pac. 7; Lines v. Lines, 142 Pa. 149, 21 Atl. 849.

§ 260. Powers of foreign executor or administrator within this state.

The Nebraska statute, while not entirely doing away with the necessity of ancillary administration, has given a foreign executor or administrator very extensive authority over the assets situated within this state. Such rights, however, as such foreign representative, cease when ancillary letters issue here. He has the right to commence and prosecute any suit or action in any court in this state in his capacity as executor or administrator, in like manner and with like restrictions as a nonresident may be permitted to sue, provided that, in case any executor or administrator shall have been appointed in this state, such person only shall be entitled to prosecute actions or suits within this state in his capacity as such executor or administrator.[2]

The phrase "suit or action" in the statute above cited is limited to actions at law or in equity and does not include special proceedings, like mortgaging real estate or sales of lands for payment of debts.[3]

The right to maintain suits also gives him the right to receive and receipt for debts and other property of the estate within this state,[4] assign mortgages,[5] become substituted as plaintiff in an action brought by his decedent and pending at the date of his death,[6] and

2 Rev. Stats., c. 17, § 162, [1426]; Jackson v. Phillips, 57 Neb. 189, 77 N. W. 683; Cox v. Yeasel, 63 Neb. 431, 68 N. W. 483.

3 McAnnulty v. McClay, 16 Neb. 420, 20 N. W. 266.

4 Martin v. Gage, 147 Mass. 204, 17 N. E. 310; Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790.

5 Reynolds v. McMullen, 55 Mich. 569, 22 N. W. 41.

6 Hendrix v. Rieman, 6 Neb. 522.

by filing certified copies of his appointment, etc., obtain a license from the district court for the payment of debts or legacies,[7] but he cannot, relying on his foreign appointment alone, procure a license to sell.[8]

As far as the collection of personal assets is concerned, he has, with the exception of summary proceedings for disclosure of assets, substantially the same powers as a local representative, and for such purpose alone no necessity exists for his appointment.[9]

§ 261. Limitations on powers of foreign representatives.

No action can be maintained against a foreign executor or administrator in this state,[10] and the same rule which forbids his being made a defendant in an original action would also prevent a suit being revived against him as a defendant.

A power of sale given a foreign executor by will is not *per se* authority to sell the land, if located in this state.[11] The will must be probated and letters issued in this state, but where the rights of third parties have not intervened, a subsequent probate of the will would cure the defect.[12]

7 Rev. Stats., c. 17, § 214, [1478].

8 McAnnulty v. McClay, 16 Neb. 420, 20 N. W. 266.

9 Mackey v. Coxe, 18 How. (U. S.) 104; Wilkins v. Ellett, 9 Wall. (U. S.) 740; Abbott v. Miller, 10 Mo. 141.

10 Burton v. Williams, 63 Neb. 431, 88 N. W. 765; Creighton v. Murphy, 8 Neb. 349, 1 N. W. 138; Vaughan v. Northrop, 15 Pet. (U. S.) 1.

11 League v. Williamson, 33 Tex. Civ. App. 647, 77 S. W. 435; Green v. Alden, 92 Me. 177, 42 Atl. 358.

12 Brown v. Smith, 101 Me. 545, 64 Atl. 915.

There are no statutes in Oregon giving any powers to a foreign executor or administrator; therefore the common law governs and the issue of ancillary letters is necessary to enable the estate to enforce its demands. The personal representative, however, is not barred from bringing actions. He may, by virtue of the domiciliary letters, commence a suit, but before trial he must have qualified by procuring letters testamentary or of administration in Oregon.[13] The taking out of letters dates back to the commencement of the suit.[14]

§ 262. Rights of Nebraska administrator in other states.

Independent of any statute, the home executor or administrator has the right to receive assets in another state and receipt for the same. If no ancillary administrator is appointed, it is his duty to take charge of and collect such foreign assets in so far as the laws of such foreign state permit,[15] and his liability therefor is just the same as for assets received in this state.[16] If he takes out ancillary letters or they are issued to another person, he is only liable in this state for the surplus transmitted to him after administration has been completed in such other state.[17]

13 Gray v. Franks, 86 Mich. 382, 49 N. W. 130; Leahy v. Haworth, 141 Fed. 850; Hodges v. Kimball, 91 Fed. 845.

14 Black v. Henry G. Allen Co., 42 Fed. 618; Doolittle v. Lewis, 7 Johns. Ch. (N. Y.) 45.

15 Denny v. Faulkner, 22 Kan. 89; Vroom v. Van Horn, 10 Paige Ch. (N. Y.) 49.

16 Section 414, *post*.

17 Clark v. Blackington, 110 Mass. 372; Jennison v. Hapgood, 10 Pick. (Mass.) 78.

§ 263. Jurisdiction of court to appoint ancillary administrator.

An ancillary administrator is an administrator with or without the will annexed appointed in a state other than that in which decedent last resided. The power of the county court to grant letters depends upon the existence of assets within the county at the date of decease. They may consist entirely of real estate,[18] or a claim for damages under the statute for causing the death of decedent.[19] If such assets were not in the state at the time of his death, but were brought here afterward, the court should decline to grant letters. The appointment of an administrator in the state of decedent's domicile vests such assets in him for the purposes of administration as of the date of his decedent's death, and our statutes give him ample power to recover them.[20] Letters may issue though no representative has yet been appointed in the home state.[21]

§ 264. Purposes for which appointment proper.

When a person dies testate, leaving an estate consisting of realty or personalty, or both, and by the terms of the will the executor is vested with special duties in regard to the same, which powers are to be exercised in this state, or seised of real estate, or when a nonresident dies intestate, seised of real estate in

18 Moore's Estate v. Moore, 33 Neb. 509, 50 N. W. 443.

19 Missouri Pac. R. R. Co. v. Lewis, 24 Neb. 248, 40 N. W. 401.

20 Martin v. Gage, 147 Mass. 204, 17 N. E. 310; Valentine v. Jackson, 9 Wend. (N. Y.) 302; Holcomb v. Phelps, 16 Conn. 127.

21 Morefield v. Harris, 126 N. C. 626, 36 S. E. 125.

this state, ancillary administration is the best method the law provides for completing the chain of title to the real estate and confirming the rights of an executor. Such administration is also proper when on account of the absence from the state of the executor or administrator it appears to be for the best interests of the estate that there be someone on the ground with ample authority to look after the interest of the estate.[22]

The usual purpose in securing the appointment of an ancillary administrator is to save money and time for the local creditors, by giving them an opportunity to present their claims and receive payment in this state. Where real estate is involved, it is the only sure method of completing the chain of title.

§ 265. Procedure for appointment.

The procedure for the appointment of an ancillary administrator is substantially the same as for the appointment of an administrator or for the issue of letters testamentary.

The petition is usually filed by the domiciliary administrator or someone in his behalf. It may be made by a creditor residing within this state, if not filed until after thirty days from the date of the death of the decedent. A nonresident creditor cannot compel the appointment of such representative, for the ancillary administrator would have no greater powers to convert the assets into money than the executor or domiciliary

22 Mansfield v. McFarland, 202 Pa. 173, 51 Atl. 763; Brown v. Smith, 101 Me. 545, 64 Atl. 515.

administrator, and the creditor would gain nothing thereby.[23]

A county to whom the decedent was indebted for unpaid personal taxes is not a proper petitioner.[24]

The petition may be filed before the home representative has received his letters.[25]

When filed within thirty days from decedent's death or when no domiciliary letters have been issued or petitioned for, the right of preference is generally recognized as in other cases.[26] The home representative is a proper administrator, especially where there is little work to be done. The matter rests largely in the discretion of the court,[27] and if there is much to be done, a resident of the county can give it better attention than a nonresident of the state.

The petition should contain substantially the same allegations as for general administration, and in addition should set up the grant of letters in the home state or country, if they have been issued. It may be resisted by the home representative, or heirs or legatees, either on the ground of lack of jurisdiction, or that it is not for the best interests of the estate, or objections may be made to the nominee of the petitioner.[28]

23 In re Williams' Estate, 130 Iowa, 553, 107 N. W. 608; Putnam v. Pitney, 45 Minn. 242, 47 N. W. 791.

24 Commissioners Dawes Co. v. Furay, 5 Neb. Unof. 507, 99 N. W. 271.

25 Burbank v. Payne, 17 La. Ann. 15; Clark v. Clement, 33 N. H. 563.

26 Dalrymple v. Gamble, 66 Md. 298, 8 Atl. 468, 7 Atl. 683.

27 Fletcher's Admr. v. Sanders, 7 Dana (Ky.), 345.

28 Smith v. Sherman, 4 Cush. (Mass.) 408; Martin v. Gage, 147 Mass. 204, 17 N. E. 310.

Form No. 132.

PETITION FOR APPOINTMENT OF ANCILLARY ADMINISTRATOR.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that on the ——— day of ———, 19—, A. B., late of county of ——— and commonwealth of ———, departed this life at the city of ———, in said county of ———, intestate; that said A. B. was, immediately preceding his death, a resident and inhabitant of said county of ———, and was possessed of real and personal property situated in the said county of ——— and state of Nebraska, of the value of ——— dollars; that on the ——— day of ———, 19—, your petitioner and G. H. were duly appointed administrators of said estate by the probate court of the said county of ——— and commonwealth of ———.

Your petitioner further shows that no last will and testament of said A. B. has been discovered, nor is your petitioner aware of the existence of any such instrument, and your petitioner believes that said A. B. died intestate; that said A. B. left, him surviving [give names and residence of widow and heirs, and ages of minors so far as known; if not known, so state].

Your petitioner therefore prays that letters of administration upon said estate situated within this state only may be granted to H. C. M., of the city of ———, in said county of ———, upon the goods, rights, and chattels of said deceased within this state.

Dated this ——— day of ———, 19—.

(Signed) C. D.

[Add verification, Form No. 5.]

§ 266. Hearing—Order for appointment.

The notice of hearing, service and hearing, are the same as in case of ordinary administrators, and a like bond should be required.

The order for appointment is a final one, and subject to appeal. The domiciliary representative is held to be an interested party and entitled to an appeal, as

well as a widow or other beneficiary.[29] He can be removed from office for the same causes and in the same manner as regular administrators or executors.[30]

§ 267. General rules governing ancillary administration.

The administration granted within this state extends to all the estate of the deceased in this state, and excludes the jurisdiction of the court or probate of every other county.[31]

While the personal representative appointed at the county of the late domicile of the decedent is usually spoken of as the principal administrator, and the ancillary one as his subordinate, yet the authority of the latter is complete and distinct over all the assets of the estate within the confines of this state. The *lex domicilii* governs the distribution, but the *lex loci rei sitae* the collection and administration of the personalty. The ancillary administrator is governed by the laws of this state and the orders and decrees of the court appointing him, in executing his bond, making his inventory and appraisement, reducing the assets of the estate to possession, taking possession of the realty and managing the same, paying creditors, accounting for and making final payments of the residue in his hands, and performing all other acts necessary to the due administration of the estate in this state. He can be removed by no other court than that which granted him his letters, and all questions arising in

29 Graves v. Tilton, 63 N. H. 192; Shaw, Appellant, 81 Me. 207, 16 Atl. 662.

30 See § 155, *supra*.

31 Rev. Stats., c. 17, § 74, [1338].

regard to his rights, powers and liabilities must be determined according to the laws of this state, and by the courts thereof.[32]

§ 268. General powers and duties of ancillary administrators.

The ancillary administrator should include in his inventory and charge himself with all the local assets of the estate, the right of the executor or home administrator to them terminating as soon as his letters are issued to him.[33] He should take charge for the estate of all litigation of such estate pending herein,[34] including actions which may have been revived by the home administrator, and may maintain any action or proceeding which could be maintained by any executor or administrator, the situation of the estate so far as such matters are concerned being the same as though his decedent was at the date of his death a resident of this state.[35]

His authority excludes the right of the home administrator over all the assets of the estate within this state. He has sole authority to collect the debts due. Notes secured by mortgages on local real estate are within this rule, and he has power to release them.[36] A voluntary payment by a debtor to the home repre-

32 Heydock's Appeal, 7 N. H. 496; Hooper v. Olmstead, 6 Pick. (Mass.) 481; Clark v. Clement, 33 N. H. 563; Blackwood v. Reg., 8 App. Cas. 82.

33 Story, Confl. Laws, 514a; Trecothick v. Austin, 4 Mason, 33; Fed. Cas. No. 14,164.

34 Rev. Stats., c. 17, § 157, [1421].

35 Durie v. Blauvelt, 49 N. J. L. 114, 6 Atl. 312; Sloan v. Sloan, 21 Fla. 589.

36 Reynolds v. McMullen, 55 Mich. 568, 22 N. W. 41.

sentative is no defense to an action on the same by him.[37]

There is no privity between him and the home personal representative whether the latter be an executor or administrator.[38] A judgment against one in his representative capacity will not affect the other so far as the assets which the other has received are concerned,[39] and a judgment in one jurisdiction cannot be made the basis of an action against him in another.[40]

The rule is different where the same person is appointed executor by the will in different states, or different executors are appointed in different states in the same will. In such cases a judgment against the executor in one state is *prima facie* evidence against him in the other, and a judgment against one of the several executors is *prima facie* judgment against them all.[41]

§ 269. Allowance and payment of claims.

The weight of authority is, that a foreign as well as a local creditor may present his demand and have same allowed and paid by the ancillary administrator,[42] and on account of the lack of privity between the ancillary representatives, its rejection in the home

37 Vaughan v. Barrett, 5 Vt. 333; Furguson v. Morris, 67 Ala. 389; Equitable Life Ins. Soc. v. Vogel, 76 Ala. 441.

38 Creighton v. Murphy, 8 Neb. 349, 1 N. W. 138.

39 Brathwaite v. Harvey, 14 Mont. 208, 36 Pac. 38; Merrill v. New England Life Ins. Co., 103 Mass. 245.

40 Creighton v. Murphy, 8 Neb. 349, 1 N. W. 138; Price v. Mace, 47 Wis. 23, 1 N. W. 336.

41 Creighton v. Murphy, 8 Neb. 349, 1 N. W. 138; Hill v. Tucker, 13 How. (U. S.) 458.

42 State v. Rock Co. Probate Court, 67 Minn. 51, 69 N. W. 609.

state would not prevent its being proved in the other state.[43] The policy of the law is to favor local creditors, and a claim filed or action brought under such circumstances looks suspicious. All foreign claims should be very carefully investigated.[44]

At the expiration of the proper time, the reduction of assets to possession being completed, the court should make an order for the payment of debts as in other cases. If the estate is solvent, and there are sufficient assets within the state which can be used for that purpose, the local debts should be paid in full from the local assets.[45] If there are not sufficient assets to pay the debts in full, they may be paid *pro rata,* and the creditor would be obliged to prove the balance due in the forum of the home personal representative. If the estate is insolvent, the law does not permit the creditors in one state to be paid in full, while those in another, simply because of their residence, receive only a small dividend on their demands. The ancillary administrator should distribute the funds of the estate in his possession among the creditors residing in this state *pro rata,* having regard to all the assets and the whole aggregate amount of debt here and abroad, and remit the surplus, if any, to the principal administrator.[46] This cannot be done until the amount which can be applied on debts in the home jurisdiction has been ascertained, and the claims filed in that forum allowed. The ancillary administrator

43 Strauss v. Phillips, 189 Ill. 9, 59 N. E. 560.

44 Morton v. Hatch, 54 Mo. 498; Fellows v. Lewis, 65 Ala. 343.

45 Normand's Admr. v. Grognard, 17 N. J. Eq. 425; Davis v. Estey, 8 Pick. (Mass.) 475.

46 Dawes v. Head, 3 Pick. (Mass.) 128; Davis v. Estey, 8 Pick. (Mass.) 475; Normand's Admr. v. Grognard, 17 N. J. Eq. 425.

should obtain from the court which appointed the home administrator certified copies of the records showing the above facts, and from them and the order allowing claims and account showing assets on hand in the probate court of this state the judge can make a decree for payment of debts.

The priorities of the different classes of creditors is the same as in ordinary cases of administration.[47]

Form No. 133.

DECREE FOR PAYMENT OF DEBTS—ANCILLARY ADMINISTRATION—ESTATE INSOLVENT.

[Follow Form No. 141 to *, then say:] It appearing from the records and files of this estate, in the probate court of the county of ——— and commonwealth of ———, that the assets of said estate in the said state of ——— are the sum of ——— dollars, and that the debts allowed against said estate in said probate court of said ——— county amount to the sum of ——— dollars; that the total assets of said estate in the states of Nebraska and ——— amount to the sum of ——— dollars, and the debts allowed against said estate in said states amount to the sum of ——— dollars, and that said total assets are insufficient to pay said debts in full, and that the expenses of administration in this state and in said state of ———, amounting to the sum of ——— dollars, have not been included in the foregoing findings of the amounts of the assets and liabilities of said estate, and are in the hands of the administrators of said estate in ——— and Nebraska:

It is therefore ordered and adjudged that said C. D., administrator, from said sum of ——— dollars so in his hands as aforesaid, pay said creditors whose claims have been allowed in this court the sum of ——— cents on the dollar of the amount of their respective claims as of date of their allowance, that being their pro rata share of said assets, having regard to all the assets and the whole aggregate amount of the debt of said estate, both in the state of Nebraska and the state of ———, and that he remit the balance then remaining in his hands to E. F., executor of said estate, in the county of ——— and commonwealth of ———.

(Signed) J. K.,
County Judge.

[47] Goodall v. Marshall, 11 N. H. 88.

If the assets in this state are insufficient to pay the local debts, or their *pro rata* share if the estate is insolvent, the creditors then have a right to payment of such balances from the assets in the home state, and must prove their claims for the same.[48]

§ 270. Accounting by ancillary administrator.

The accounting by the ancillary administrator is wholly independent of that of the domiciliary representative. If the same person represents the estate in both jurisdictions, he must keep entirely separate and distinct accounts, the same as though he had charge of two different estates. He cannot use assets from the ancillary jurisdiction in payment of costs, debts and expenses incurred in the home jurisdiction until the ancillary administration has been completed.[49]

When he represents the estate in both jurisdictions, he is not chargeable in the ancillary jurisdiction with assets of the estate which he collected in a third state, being accountable only for what he received in this state.[50] He is entitled to attorney fees, costs and expenses incurred in good faith the same as in other cases.[51]

He is accountable for all his acts as such administrator to the court which granted him his letters and none other. The home administrator may file objections to the account, but when allowed in the ancillary

48 Ramsay v. Ramsay, 196 Ill. 179, 63 N. E. 618.

49 Aspden v. Nixon, 4 How. (U. S.) 467; Jennison v. Hapgood, 10 Pick. (Mass.) 77.

50 Tunnicliff v. Fox, 68 Neb. 811, 94 N. W. 1032.

51 Benjamin v. Rush, 89 Neb. 334, 131 N. W. 602.

forum it is final and cannot be reviewed except in case of lack of jurisdiction.[52]

§ 271. Disposition of surplus after paying debts.

Ancillary administrators, and domiciliary administrators or executors in the home state, are so completely independent of each other that the assets of the estate received by one in his jurisdiction cannot be sued for, nor their transfer compelled by the other. Ancillary assets can only be disposed of pursuant to the decree of the court from which the letters issued.[53] A decree of the court for that purpose should be obtained as soon as possible.

In the case of testate estates it is the duty of the administrator with the will annexed to dispose of the same according to such will, as far as such will may operate upon it, and the residue as is provided by law in cases of estates in this state belonging to persons inhabitant of any other state or country. Specific and demonstrative legacies would therefore be paid by the local representative, and the balance transmitted to the domiciliary representative.[54]

In the case of intestate estates there is some difference of authority as to by whom the surplus is to be divided. It is elementary that it is distributed among the heirs according to the laws of decedent's domicile. The question is, Who is the proper party to make the

52 Baldwin's Appeal, 81 Pa. 441; Clark v. Blackington, 110 Mass. 369.

53 Taylor v. Barron, 35 N. H. 484; Hill v. Tucker, 13 How. (U. S.) 458; McGraw v. Irwin, 87 Pa. 139; McCord v. Thompson, 92 Ind. 565; Dawes v. Boylston, 9 Mass. 337.

54 Rev. Stats., c. 17, § 46, [1310].

distribution? Some courts hold that the court which granted the letters has power to determine who such parties are and their shares and order payment to them,[55] while others, on account of the rule that the personal property of an intestate, wherever the same may be situated, is regarded as having no other location than that of his domicile, hold that such residue should be transmitted to the domiciliary representative;[56] others that it is a matter within the discretion of the court.[57]

In both testate and intestate estates, if it appears that there are unpaid debts in the home jurisdiction, the residue should be transmitted to the executor or administrator.[58] The practice in this state is not uniform.

The petition for distribution may be made when the final account is filed, or one made thereafter. Notice to all persons interested must be given as in other administration cases.

Form No. 134.

PETITION FOR ORDER FOR PAYMENT OF RESIDUE OF ESTATE.

[Title of Cause and Court.]

Your petitioner, C. D., administrator of said estate, respectfully represents unto the court that all proceedings required by law have been had for the proper filing, examination, adjustment and allowance of claims against said estate; that all claims allowed have been paid

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55 In re Hughes, 95 N. Y. 55; Lawrence v. Kittredge, 21 Conn. 577.

56 Mackey v. Cox, 18 How. (U. S.) 100; Ordroneaux v. Helie, 3 Sand. Ch. (N. Y.) 512; Putnam v. Pitney, 45 Minn. 242, 47 N. W. 490; Hutton v. Hutton, 40 N. J. Eq. 461, 2 Atl. 280; Wilkins v. Ellett, 9 Wall. (U. S.) 740; Low v. Bartlett, 8 Allen (Mass.), 259.

57 Fretwell v. McLemore, 52 Ala. 124.

58 Fretwell v. McLemore, 52 Ala. 124.

in full; that on the ——— day of ———, 19—, your petitioner submitted his final account of his administration, which said account was on the ——— day of ———, 19—, after due notice given as required by law, approved; that there remains in the possession of said petitioner the sum of $——— to be distributed among the heirs of said A. B. according to the laws of the state of ———; that E. F., of the city of ———, in the county of ———, state of ——— is the administrator of said estate in said state of ———; that none of the persons claiming to be distributees of said estate are residents of the state of Nebraska and all of them reside in said state of ———.

Your petitioner therefore prays that a time and place be fixed for hearing on said petition, that notice thereof be given to all persons interested as by law provided, and that on said hearing a decree of said court be made and entered assigning said residue to said E. F. as administrator of the estate of said A. B.

Dated this ——— day of ———, 19—.

(Signed) C. D.

[Add verification.]

Form No. 135.

DECREE OF DISTRIBUTION OF ANCILLARY ESTATE.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this matter came on for hearing upon the petition of C. D. [the answer of G. H.] and the evidence, and was submitted to the court. Upon consideration whereof the court finds that all the debts, claims, and demands against said estate have been fully paid and satisfied, and there remains a residue in the hands of the administrator of the sum of ——— dollars; that said A. B. was, during his lifetime, a resident of the state of ———, and that E. F., of the city of ———, in said state, is the administrator of said estate in said state of ———.

It is therefore ordered that said residue of ——— dollars, after the paying the costs of these proceedings, be paid to the said E. F., as such administrator of the estate of A. B., deceased, in the state of ———, and that on filing his receipt therefor he be discharged.

(Signed) J. K.,
County Judge.

CHAPTER XXIV.

ALLOWING CLAIMS AGAINST THE ESTATE.

§ 272. Creditor's Interest in the Estate of a Decedent.
273. Power of County Judge to Allow Claims.
273a. Presentation of Claims to Representative.
273b. Duty of Representative.
273c. Special Proceedings Against Estate.
273d. Suit Against Representative.
274. Time and Place for Hearing Claims.
275. Notice to Creditors.
276. Claims Which Need not be Filed.
277. Claims Which Need not be Filed—Concluded.
278. Property Held by a Trustee.
279. Statute of Limitations.
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285. Funeral Expenses—Concluded.
286. Claims Against an Estate—Accrued Demands.
287. Claims Becoming Due After Death.
288. Express Contracts to Pay for Services Rendered.
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291. Conversations and Transactions With Decedent.
292. Competency of Adverse Party.
293. Adverse Party.
294. Waiver of Objections.
295. Declarations and Admissions to Third Party in Presence of Claimant.
296. Claims for Breach of Covenants.
297. Claims Due Nonresidents.
298. Joint Claims.
299. Executor's or Administrator's Claims.
300. Contingent Claims.
301. Contingent Claims Becoming Absolute.
302. Contract to Bequeath or Devise Property.
303. Consideration of Contract.

304. Relief Granted.
305. Writings of Deceased Persons as Evidence.
306. Extending Time for Presentation of Claims.
307. Order Extending Time for Filing Claims.
308. Order Allowing Claims.

§ 272. Creditor's interest in the estate of decedent.

The creditors of a decedent have a lien, to the extent of their claims and demands, upon all assets of the estate, except such as pass absolutely to the surviving spouse and children, subject only to the homestead rights and the statutory allowances for support. The law takes such assets into its possession and control through the medium of its duly appointed and qualified agent, executor or administrator as the case may be, and holds them for the creditors until the rights of all persons to whom the estate is indebted and the value of the estate are ascertained. While it is necessary for them to establish the validity of their demands, it is not necessary for them to bring any action to subject the assets to the payment of their debts. Such assets are already in the hands of an officer of the law, whose duty to pay them over, or to satisfy all demands, either in whole or in part, as the estate is solvent or insolvent, can be enforced.[1]

Creditors of the same class stand upon an equal footing. The diligent creditor, unless he has previously acquired a lien on some part of the assets, fares the same as the dilatory one whose claim is filed the last day given in the notice. One demand has no preference over another except it be given by statute.[2] The

[1] McClintock's Appeal, 29 Pa. 361.

[2] In re Osburn's Estate, 36 Or. 8, 58 Pac. 521; Colton v. Field, 131 Ill. 398, 22 N. E. 545.

interest of creditors of the estate is exclusive and superior to the liens of creditors of heirs, devisees or legatees, upon real estate for their demands.[3]

§ 273. Power of county judge to allow claims.

Under the Nebraska practice all claims against an estate must be filed in the county court of the county out of and under whose seal letters testamentary or of administration issued, which court has original jurisdiction of the examination, adjustment and allowance of all lawful claims and demands of all persons against the deceased,[4] including those payable at a future date and those payable in specific articles,[5] and if the executor or administrator files a setoff against any claim, no matter how payable, to ascertain and allow the balance in favor of or against the estate.[6] His jurisdiction extends to unliquidated demands,[7] and equitable demands for money due where the right and extent of the recovery is easily ascertained.[8]

§ 273a. Presentation of claims to representative.

Under the Oregon practice, neither the county court nor the judge thereof has original jurisdiction to pass upon claims against the estate, excepting only those

3 Bruch v. Lantz, 2 Rawle (Pa.), 392; Morris v. Mowatt, 2 Paige (N. Y.), 586.

4 Rev. Stats., c. 17, § 118, [1382]; Craig v. Anderson, 3 Neb. Unof. 638, 92 N. W. 640.

5 Rev. Stats., c. 17, § 124, [1388].

6 Rev. Stats., c. 17, § 123, [1387].

7 Dubuch v. Wildermuth, 3 La. Ann. 407.

8 Palmer v. Green, 6 Conn. 19; Collins v. Tillouse's Admr., 26 Conn. 373; Shelton v. Hadlock, 62 Conn. 143, 25 Atl. 483; Dixon v. Buel, 21 Ill. 203; Spaulding v. Warner's Estate, 52 Vt. 29.

due the executor or administrator. All other demands are required to be presented to the personal representative with proper vouchers, excepting only those on which actions are pending against decedent at the time of his death, and which may be revived against his estate, or where equitable relief is sought.

They should be itemized and verified by the affidavit of the claimant, or someone in his behalf, having personal knowledge of the fact, to the effect that the claim is justly due, that no payments have been made thereon, except as stated, and that there is no just counterclaim to the same to the knowledge of the affiant.[9] The demand must be set out with sufficient particularity to show the existence of a liability against the estate, but the formalities demanded of a pleading in action are not necessary.[10]

They are deemed presented when proffered to the executor or administrator, and left in his possession a reasonable length of time for him to examine into their merits and determine their validity.[11] What is such time is a question for the court to determine from all the facts and circumstances connected with the matter.[12] He is given no power to summon witnesses or take testimony. If it appears or is alleged that there is any written evidence of such claim, the same may be demanded by him, or its nonproduction accounted for.[13]

He must either allow or reject all claims presented. His neglect to act within a reasonable time is equivalent to rejecting the demand.[14]

9 L. O. L., § 1240; In re Lucke's Estate, 64 Or. 320, 123 Pac. 47.

10 Goltra v. Penland, 42 Or. 18, 69 Pac. 925.

11 Willis v. Marks, 29 Or. 493, 45 Pac. 293.

12 Goltra v. Penland, *supra.*

13 L. O. L., § 1240.

14 Goltra v. Penland, *supra.*

§ 273b. Duty of representative.

A claim rejected or held by him an unreasonable length of time must be delivered to the claimant on demand, and replevin will lie for its recovery if such demand is refused.[15] If satisfied that the claim is just, he must indorse upon it the words, "Examined and approved," with the date thereof, and sign his name officially. If not so satisfied, he must indorse it "Examined and rejected," with the date and his signature.[16]

His duties in passing on claims are not judicial, but more in the nature of those of an auditor. His approval is not even *prima facie* evidence of its validity, if objected to on the final hearing.[17] An unverified claim cannot be legally presented,[18] and if it is rejected for indefiniteness or irregularity in setting out the demand, or for any technical reason, and he wishes to raise the question of its legal presentation, he should note on it the reasons for his rejection.[19]

Claims may be presented at any time between the dates of the qualification and discharge of the executor or administrator.[20]

He is required to keep a list of all claims legally exhibited against the estate, and every three months file with the county court a statement of all such claims as may have been presented, and whether the same have been allowed or rejected by him.[21]

15 Willis v. Marks, 29 Or. 498, 45 Pac. 293.

16 L. O. L., § 1241.

17 In re Chambers' Estate, 38 Or. 131, 62 Pac. 1013; Irvine v. Beck, 62 Or. 596, 125 Pac. 832.

18 Zachary v. Chambers, 1 Or. 321.

19 Aikin v. Coolidge, 12 Or. 244, 6 Pac. 712.

20 L. O. L., §§ 387, 1239; In re Murray's Estate, 56 Or. 138, 107 Pac. 19.

21 L. O. L., § 1241.

Form No. 135a—Oregon.

VERIFICATION OF CLAIM.

State of Oregon,
County of ———,—ss.

C. D., being first duly sworn, on oath says that the foregoing statement of his claim against the estate of A. B., late of said county, deceased, is just and correct, and that the amount of $——— is justly due thereon; that no payments have been made thereon, except as above set forth; that there is no just counterclaim to the same to the knowledge of affiant; that affiant is the owner of said claim and has personal knowledge of the facts herein set forth.

(Signed) C. D.

Subscribed and sworn to before me this ——— day of ———, 19—.

(Signed) G. H.,
Notary Public.

Form No. 135b—Oregon.

CLAIM ON A PROMISSORY NOTE.

Estate of A. B., C. D., Executor, in Account with E. F.

19—.

———. To balance on note.....$———
To interest at ——— % from ——— to ———.....$———
Total .....$———

State of Oregon,
County of ———,—ss.

E. F., being first duly sworn, on oath says that heretofore, to wit, ———, 19—, A. B. executed and delivered to affiant his promissory note in words and figures following [copy of note and indorsements]; that no payments have been made hereon except such as have been indorsed upon said note; that the foregoing statement of the amount due affiant from the estate of A. B., late of said county, deceased, is just and correct; that there is no just counterclaim to the knowledge of this affiant, that affiant is the owner of said demand, and has personal knowledge of the facts herein set forth.

(Signed) E. F.

Subscribed and sworn to before me this ——— day of ———, 19—.

(Signed) G. H.,
Notary Public.

§ 273c. Special proceedings against estate.

If the executor or administrator reject the claim, two remedies are afforded the claimant: he may either bring suit against such representative,[22] or he may present his claim to the county court for allowance, giving the executor or administrator ten days' notice of the application. The court thus acquires jurisdiction to hear and determine in a summary manner all such rejected claims. The decision of the court thereon has the force and effect of a judgment, from which an appeal can be taken as in ordinary cases.[23] The proceeding may be brought by his assignee.[24]

Formal pleadings are unnecessary. The claim proved must be identical with that presented to the administrator. If he presents a claim on a *quantum meruit,* evidence of an express contract is inadmissible; he cannot amend by substituting a different cause of action.[25] The proceedings are of an equitable rather than a legal character,[26] with the object of furnishing a speedy and efficient remedy untrammeled by technical pleadings. The burden of proof is on the claimant, and he must show that the claim has been legally presented to the executor or administrator and rejected by him, and that it is a just demand against the estate and unpaid. These latter facts must be established by other evidence than that of the claimant.[27] The claimant is not an incompetent witness, but his testimony must be corroborated by that of other witnesses, or other evidence which must be sufficient to establish the indebtedness of the estate to him.[28]

22 Pruitt v. Muldrick, 39 Or. 355, 65 Pac. 20.

23 L. O. L., § 1241.

24 In re Morgan's Estate, 46 Or. 242, 78 Pac. 1029.

25 Wilkes v. Cornelius, 21 Or. 352, 28 Pac. 135.

26 In re Morgan's Estate, 46 Or. 235, 77 Pac. 608, 78 Pac. 1029.

27 Goltra v. Penland, 45 Or. 261, 77 Pac. 129; L. O. L., § 1241; Irvine v. Beck, 62 Or. 596, 125 Pac. 834.

28 Bull v. Payne, 47 Or. 581, 84 Pac. 697; Quinn v. Gross, 24 Or. 150, 33 Pac. 525; Harding v. Grim, 25 Or. 596, 36 Pac. 634.

Form No. 135c—Oregon.

NOTICE OF FILING CLAIM.

[Title of Cause and Court.]

To C. D., Administrator of the Estate of A. B., Deceased:

You are hereby notified that on the ——— day of ———, 19— at the hour of 10 A. M. of said day, or as soon thereafter as counsel can be heard, I will make application to said court for the allowance of a certain claim held by me against said estate in the sum of $———, which claim was by me presented to you as such administrator for allowance on the ——— day of ———, 19—, and by you indorsed as "examined and rejected" on the ——— day of ———, 19—.

Dated this ——— day of ———, 19—.

(Signed) E. F.

§ 273d. Suit against the representative.

Any person having a demand against an estate which has been presented to the executor or administrator and rejected, or if no action has been taken by him thereon has been held by him a reasonable time, fixed by the court at not more than six months,[29] may at any time before the final settlement and discharge of the executor or administrator, but not less than six months from the date of letters, bring an action against him thereon.[30] The action must be brought within the period of the general statute of limitations, but the time elapsing between the delivery of the demand to the representative and its rejection, or a reasonable time after its delivery when he neglected to take any action on it, cannot be included. During such periods the statute as suspended.[31]

The complaint must show that the letters were granted six months before the suit was brought.[32]

29 Goltra v. Penland, 45 Or. 263, 77 Pac. 129.

30 L. O. L., §§ 386, 387; Blaskower v. Steel, 23 Or. 198, 31 Pac. 252; Pruitt v. Muldrick, 39 Or. 355, 65 Pac. 20; Goltra v. Penland, 45 Or. 259, 77 Pac. 129; In re Morgan's Estate, 46 Or. 235, 78 Pac. 1029.

31 In re Morgan's Estate, 46 Or. 235, 77 Pac. 608, 78 Pac. 1029.

32 Wells v. Applegate, 10 Or. 526; Aiken v. Coolidge, 12 Or. 284, 6 Pac. 712.

If the executor or administrator doubt the validity of any claim presented to him, he may agree in writing with the claimant that an order of reference be made by the court or judge thereof concerning the same. The referee has authority to hear and determine the matter and report to the court, in the same manner and with like effect, as if the order was made in an action or suit upon the claim.[33]

Form No. 135d—Oregon.

AGREEMENT FOR REFERENCE OF CLAIM.

Whereas, E. F., has presented to C. D., administrator of the estate of A. B., a claim against said estate in the sum of $———, and said administrator has doubt of the validity of said claim;

It is hereby stipulated and agreed by and between said E. F. and said C. D., administrator as aforesaid, that an order be made and entered by the county court of ——— county, Oregon, appointing a referee to hear and determine said claim, and to make and file his report and findings thereon in the same manner as if said order of reference was made by said court in an action or suit on said claim.

Dated this ——— day of ———, 19—.

(Signed) E. F.,
C. D.,
Administrator of the Estate of A. B., Deceased.

§ 274. Times and place for hearing claims.

It is the duty of the county judge, within sixty days from the grant of letters testamentary or of administration, to make an order fixing the time for filing claims and dates for hearings thereon. The time allowed should not be less than six nor more than eighteen months, as the circumstances may require.[34] A like order should be made when a special adminis-

33 L. O. L., §§ 1244, 1245.

34 Rev. Stats., c. 17, §§ 118, 120, [1382], [1384]; Dredla v. Bache, 60 Neb. 655, 83 N. W. 916.

trator is appointed on an appeal from the order for letters.[35]

The usual practice is to make it a part of the "general order,"[36] and to fix two dates for hearings, one about thirty days from its date and the other a few days after the last day for filing claims. It must direct how notice shall be given.

§ 275. Notice to creditors.

Notice to creditors of the time fixed for filing claims and dates set for hearing must be given by posting the same in four public places in the county, or by publication in a legal newspaper in said county for four weeks, or in any manner which the court may direct.[37] If by publication, the surviving spouse or a majority of the heirs, devisees or legatees of lawful age may designate the paper.[38] The almost universal practice is to give notice by publication. Service of the notice cannot be had until after the order for its issue is made and entered.[39]

The notice is not solely for the benefit of creditors, but also for the purpose of notifying all persons interested in the estate, and giving them an opportunity to object to claims which they think not a proper charge against it.[40]

The statute directing such notice is mandatory and not directory. The notice must comply with the

35 Cadman v. Richards, 13 Neb. 383, 14 N. W. 159.
36 Section 182, *supra*, Form No. 78.
37 Rev. Stats., c. 17, § 118, [1382].
38 Rev. Stats., c. 17, § 119, [1383].
39 Ribble v. Furmin, 71 Neb. 108, 98 N. W. 420.
40 Dredla v. Bache, 60 Neb. 655, 83 N. W. 916.

order, and be served by posting or publication, or otherwise in such manner as the court therein directs. If it fails to comply with any of these requirements, it is invalid, and not a bar to the *bona fide* claims of creditors.[41]

Form No. 136.

NOTICE TO CREDITORS.

[Title of Cause and Court.]

Notice to all persons interested in said estate is hereby given that C. D., administrator of said estate, will meet the creditors of said estate at the county courtroom in the city of ———, said county, on the ——— day of ———, 19—, and on the ——— day of ———, 19—, at the hour of 9 A. M., for the purpose of the hearing, adjustment and allowance of claims against said estate. All persons having claims or demands against said estate must file the same in said court on or before ———, 19—, or said claims will be forever barred.

Dated ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

It is the duty of an executor or administrator, immediately after his appointment, to publish a notice thereof, in some newspaper published in the county, if there be one, or otherwise, in such paper as may be designated by the court or a judge thereof, as often as once a week for four successive weeks, and oftener if the court shall so direct. Such notice shall require all persons having claims against the estate to present them to him with proper vouchers, within six months from the date of such notice, at a place in the county to be therein specified.[42] A copy of the notice with proof of publication of the same must be filed with the clerk of the court before the expiration of the six months.[43] A failure to file the proof will not affect the

41 Ribble v. Furmin, 71 Neb. 108, 98 N. W. 420; Hawkins v. Ridenhour, 13 Mo. 125; Lee v. Patrick, 31 N. C. 135.

42 L. O. L., § 1238.

43 L. O. L., § 1239; In re Murray's Estate, 55 Or. 138, 107 Pac. 19.

decree of discharge, provided the same was actually published.[44] A failure to publish the notice is cause for removal.[45]

Form No. 136a—Oregon.

NOTICE TO CREDITORS.

Notice is hereby given that letters of administration [testamentary], upon the estate of A. B., late of ——— county, Oregon, deceased, have been issued to me out of and under the seal of the county court of said county. All persons having claims against said estate are required to present them, with the proper vouchers, to me at my office No. ——— street, in the city of ———, in said county within six months from the date of this notice.

C. D.,
Administrator of the Estate of A. B., Deceased.

§ 276. Claims which need not be filed.

There are certain classes of claims against the estate of a decedent which are not required to be formally filed and approved by the county court before being paid. They consist of those on which an action is pending at the time of decedent's death, or on which a judgment has been entered or a decree obtained, and those secured by liens on specific property, either real or personal.

A claim or demand on which an action is pending against a decedent and which survives, and may be revived with the executor or administrator as defendant, need not be filed nor presented to the representative. The judgment obtained thereon, or any other judgment against him, is deemed final and conclusive, and binds the assets of the estate in the same manner as though formally filed or presented and allowed.[46]

[44] In re Conant's Estate, 43 Or. 535, 73 Pac. 1018.

[45] In re Barnes' Estate, 36 Or. 282, 59 Pac. 464.

[46] Harlin v. Stevenson, 30 Iowa, 317; O'Donnell v. Herman, 42 Iowa, 60.

All such judgments should be certified to the county court.[47]

Under the Oregon practice, the holder of a judgment obtained against decedent in his lifetime may present a certified copy of the judgment to the executor or administrator as in other cases for his rejection or allowance, or may proceed to enforce it in the same manner by execution and levy as though the party were living.[48] The lien is not discharged by the death of the party. The execution may issue without formal presentation of the claim at any time after six months from the granting of letters of administration.[49]

Any lien on the realty or personalty of a decedent, obtained previous to his death by attachment, judgment or execution, may be enforced by the creditor in the same manner as though his death had not occurred.[50] If the writ has been levied and the property is insufficient to satisfy the claim in full, it may be filed as a contingent claim.[51]

The general rule is that the holder of any demand secured by a specific lien on either real or personal property has the same remedy for the collection of his demands against the successors in title that he had against the party himself. He may foreclose, file it and recover from the general assets of the estate,

47 Section 283, *post.*

48 L. O. L., §§ 220, 1243.

49 Knott v. Shaw, 5 Or. 484; Barrett v. Furnish, 21 Or. 19, 26 Pac. 281; Bower v. Holladay, 28 Or. 491, 22 Pac. 553; Watson v. Moore, 40 Or. 206, 66 Pac. 814.

50 Rev. Stats., c. 17, § 154, [1418]; White v. Ladd, 34 Or. 422, 56 Pac. 515.

51 Ansley v. Baker, 14 Tex. 600; City of Carondelet v. Desnoyers' Admr., 27 Mo. 36.

or file it as a contingent claim. The right of a mortgagee or his assigns to commence a suit for foreclosure and prosecute to a decree and sale of the real estate, after the death of the mortgagor, is recognized by all courts.[52] The holder of a mortgage note not filed against the estate cannot resort to the general assets, should his security prove insufficient;[53] nor is he obliged to first exhaust such security before taking any steps to reach the general assets. He may file it as a contingent claim.[54]

The holder of a lien under a verbal contract, or of a statutory lien when a continuance of possession is necessary to maintain it, must make a demand on the representative before bringing any suit to enforce it.[55] A judgment rendered against an executor in an action revived against the estate does not become a lien on the real estate the same as a judgment rendered against the decedent in his lifetime. Its standing is the same as any other proved demand against the estate.[56]

The filing of a note and mortgage as a claim against the estate does not release the lien of the mortgage.[57] Whether a party is entitled to have his debt against the general estate of a deceased mortgagor allowed in

52 Null v. Jones, 5 Neb. 500; Jones v. Null, 9 Neb. 57, 1 N. W. 867; National Life Ins. Co. v. Fitzgerald, 61 Neb. 692, 85 N. W. 948; Verdier v. Bigne, 16 Or. 210, 19 Pac. 64; Teel v. Winston, 22 Or. 491, 29 Pac. 142; Putnam v. Russell, 17 Vt. 54.

53 Null v. Jones, 5 Neb. 500; Teel v. Winston, 22 Or. 491, 29 Pac. 142.

54 Day v. Graham, 97 Mo. 398, 11 S. W. 55.

55 Blaine v. Truax, 58 Or. 582, 115 Pac. 567.

56 Carter v. Penn, 79 Ga. 747, 4 S. E. 896; Vance v. Smith, 124 Cal. 219, 56 Pac. 1031.

57 National Life Ins. Co. v. Fitzgerald, 61 Neb. 692, 85 N. W. 948; Verdier v. Bigne, 16 Or. 210, 19 Pac. 64.

the county court while his foreclosure action is pending is doubtful.

Chattel mortgage security follows the same rule.[58]

§ 277. Claims which need not be filed—Concluded.

A claim secured by a vendor's lien on real estate may be treated either as an interest in land or as a mortgage,[59] foreclosed in the same manner at any time after default, and would therefore follow the same rule as a mortgage in regard to filing and allowance.[60]

An action of ejectment is one to be determined by the district court, and is not a claim against the estate within the authority of the county judge to consider, there being nothing demanded of the estate except the land which is alleged to be wrongfully withheld.[61]

A bond for title is also a claim for land only, and need not be filed. The remedy of the holder of the bond is by suit in equity for specific performance, or by the statutory proceeding to enforce a conveyance.[62]

A claim or demand of a municipality for past due taxes on realty or personalty need not be filed. The taxes themselves are a lien on the premises, and the city or county may enforce their rights by the usual proceedings of a tax sale.[63]

58 Purdin v. Archer, 4 S. D. 54, 54 N. W. 1043.

59 Hendrix v. Barker, 49 Neb. 369, 68 N. W. 531; Oakes v. Gillilan, 1 Neb. Unof. 893, 95 N. W. 511.

60 Jackson v. Phillips, 57 Neb. 189, 77 N. W. 683; Allen v. Smith, 29 Neb. 74.

61 Kerns v. Dean, 77 Cal. 555, 19 Pac. 317.

62 Gregory v. Hughes, 20 Tex. 345. See § 253, *supra*.

63 Gager v. Prout, 48 Ohio St. 89, 26 N. E. 1013; People v. Olvera, 43 Cal. 492.

The liability of the estate of a decedent to the creditor of a corporation for corporate debts, where by statute there is a personal liability of the stockholders, is not a proper claim to be presented to the county judge or commissioners for allowance. The right to collect from a corporation stockholder, it has been held, must be enforced by a proceeding to which all the stockholders and others interested are made parties, so that the rights and liabilities of all may be adjusted. The object of the statute is to create a common fund, from which all the creditors of the corporation may be paid, either in whole or part.[64] The amount of the judgment or decree, if any, should be certified to the county court, as should also the costs in an ejectment case.

§ 278. Property held by a trustee.

For the recovery of property which was held by decedent as a trustee, two remedies exist. The parties may establish their claim by bill in equity to impound the fund, when it can be traced, and have it declared a trust fund, or enforce it as an ordinary claim against the estate by filing it in the county court.[65] In either case, if the trustee was appointed by the court, any claim which he might have against the fund must be determined by the court appointing him.[66] If the property consists of shares of corporate stock or other similar personalty, it may be allowed the same as claims payable in specific articles.

64 In re Martin's Estate, 56 Minn. 420, 57 N. W. 1065; Allen v. Walsh, 25 Minn. 543.

65 Robinson v. Tower, 95 Neb. 198, 145 N. W. 348; Hill v. State, 23 Ark. 604; Gunter v. James, 9 Cal. 643.

66 Robinson v. Tower, 95 Neb. 198, 145 N. W. 348.

In Oregon, only the remedy afforded by an action in equity to impress a lien on the trust fund exists.[67]

§ 279. Statute of limitations.

No demand barred by the statute of limitations can be allowed by the court either in favor of or against an estate.[68] It was formerly the rule that an executor or administrator could waive the statute and thus permit a creditor to enforce a demand which he could not have enforced against the creditor at the time of his death.[69] The order allowing a barred claim is not subject to collateral attack.[70]

There is considerable authority to the effect that the death of a debtor interrupts the running of the statute.[71]

The larger number of decisions are that in the absence of a statute the death of the debtor does not toll the statute.[72]

67 Dunham v. Siglin, 39 Or. 295, 64 Pac. 661.

68 Rev. Stats., c. 17, § 123, [1387]; L. O. L., § 279; Brusha v. Hawke, 87 Neb. 254, 126 N. W. 1079; Vette v. Heinrichs, 93 Neb. 551, 141 N. W. 152.

69 2 Kent, Com., § 416.

70 Section 308, *post.*

71 McClintock's Appeal, 29 Pa. 360; Carriger's Admr. v. Whitington's Admr., 26 Mo. 311; Nelson v. Herkel, 30 Kan. 456, 2 Pac. 110; Bauserman v. Charlott, 46 Kan. 480, 26 Pac. 1051, 143 U. S. 647, 13 Sup. Ct. Rep. 466. These cases are based on the theory that during the period between the death of the debtor and the appointment of his executor or administrator there is no person against whom the creditor can proceed; that a creditor can compel administration, and that, unless he neglects to do so within a reasonable time, the time between the death of the debtor and the appointment of his executor or administrator should be deducted. In many states it is a statutory rule.

72 Baker v. Brown, 18 Ill. 91; Dekay v. Darrah, 14 N. J. L. 288; Nicks v. Martindale, Harp. (S. C.) 135, 18 Am. Dec. 647; Quivy v. Hall, 19 Cal. 97.

The question has never been passed on by our supreme court. The rule adopted in Kansas and approved on appeal in the United States supreme court is the most equitable one.

The filing of a claim interrupts the running of the statute in the same manner as commencing a suit against the decedent in his lifetime. It is in effect the beginning of a suit against his estate.[73]

The statute of limitations does not run against unpaid personal taxes due from decedent. They are not "debts," in the usually accepted sense of the term, but a charge or burden imposed upon property for the benefit of the public.[74]

There are many varieties of claims against an estate which do not become due until after the death of the intestate,—such as demands for support and maintenance,—and all such must be filed within the time limited.[75]

§ 280. The statute of nonclaim.

"Every person having a claim or demand against the estate of a deceased person, whether due or to grow due, whether absolute or contingent, who shall not, after the giving of notice as above provided, exhibit his said claim or demand to the judge or commissioners within the time limited for that purpose, shall

[73] Schaberg v. McDonald, 60 Neb. 493, 83 N. W. 837; Fritz v. Fritz, 93 Iowa, 27, 61 N. W. 169.

[74] Price v. Lancaster County, 18 Neb. 199, 24 N. W. 605; Greenwood v. Town of La Salle, 107 Ill. 225, 26 N. E. 1089; Iowa Land Co. v. Douglas County, 8 S. D. 491, 67 N. W. 52.

[75] In re Kessler's Estate, 87 Wis. 660, 59 N. W. 129; Patterson v. Patterson, 13 Johns. (N. Y.) 379; Quackenbush v. Ehle, 5 Barb. (N. Y.) 469.

be forever barred from recovering on such claim or demand, or setting off the same in any action whatever. This section does not limit or affect the time within which a person may enforce any lien against property, real or personal, of such deceased person, nor does it affect actions pending against the deceased at the time of his death.''[76]

There is no statute of this kind in Oregon.

The statute of nonclaim, as it is called, operates the same as the statute of limitations. It is a bar to the allowance of all claims properly chargeable against the estate which are not filed within the time fixed by the court in its first order for filing claims or subsequent order extending the same.[77] The personal representative is without authority to waive it,[78] and if he neglects to plead it and an order is entered allowing the claim, it is not binding on the estate or the sureties on his administration bond.[79]

It applies to all classes of creditors of the estate, though some of them may be nonresidents, infants or incompetent persons.[80] A formal direction to an executor contained in the will to pay debts applies to such debts only as have been filed as the statute requires,

76 Rev. Stats., c. 17, § 126, [1390].

77 Burling v. Alvord, 77 Neb. 861, 110 N. W. 683; Stichter v. Cox, 52 Neb. 532, 72 N. W. 848.

78 Fitzgerald's Estate v. First Nat. Bank, 64 Neb. 260, 89 N. W. 813; Heath v. Wells, 5 Pick. (Mass.) 140; Thayer v. Hollis, 3 Met. (Mass.) 369; Amoskeag Mfg. Co. v. Barnes, 48 N. H. 25.

79 Dawes v. Shed, 15 Mass. 6; Robinson v. Hodge, 117 Mass. 222.

80 Erwin v. Turner, 6 Ark. 14; Rockport v. Walden, 54 N. H. 167; Van Hauen v. Tierney (Mich.), 146 N. W. 658; Gardner v. Estate of Callaghan, 61 Wis. 91, 20 N. W. 685; Cone v. Dunham, 59 Conn. 145, 20 Atl. 311.

and no general provision for payment of debts relieves the creditor from the duty of filing his claim.[81]

A defendant in an action brought by an executor or administrator cannot set up a defense by way of setoff or counterclaim a demand he may have against the estate, unless the same has been filed in court within the time prescribed by the order of such court and allowed,[82] but may plead it as a payment, provided the deceased in his lifetime agreed that it should be credited on account.[83]

§ 281. The two year limitation.

The statute provides that if any person having a claim or demand shall fail for two years from and after the death of such decedent to apply for and take out letters of administration on the estate of such deceased person, or cause such letters to be taken out as provided by law, then such claim shall be forever barred.[84] The limitation applies only to intestate estates. It is not a bar to the filing of claims by creditors when letters have been granted on the application of the heirs of next of kin more than two years after the death of the decedent.[85]

§ 282. Proving claims.

The filing of a claim being equivalent to the commencement of an action against the estate, all claims

81 Collamore v. Wilder, 19 Kan. 67.

82 Parker v. Wells, 68 Neb. 647, 94 N. W. 717; Carpenter v. Murphy, 57 Wis. 541, 15 N. W. 798; Ewing v. Griswold, 43 Vt. 400; Soule v. Benton, 44 Vt. 309.

83 Parker v. Wells, 68 Neb. 647, 94 N. W. 717.

84 Rev. Stats., c. 17, § 126, [1390].

85 National Bank v. Bradshaw, 91 Neb. 714, 136 N. W. 1015.

must be filed by the party owning them and having a right to enforce them.[86] They must be in writing, itemized and supported by an affidavit stating the amount due thereon over and above all setoffs and counterclaims. When based upon notes or bonds, such instruments themselves are properly filed, together with a sworn statement of the amounts due thereon; when on a contract or obligation, such contract or obligation should be set out, and the demand be substantially like a petition in an action on the same in the county or district court. Where the demand is on a covenant, as for a breach of warranty of title in a deed of conveyance, it will greatly lessen the duties of the judge if the case is adjudicated with the same formality as regards pleadings as in an action brought in the district court for that purpose.[87]

Claims may be filed at any date after the entry of the order and the close of the last business day fixed by the court. They may be heard and allowed at any times fixed by the court or by agreement of parties, though long after the last date for filing them.[88]

The executor, administrator, a creditor or a beneficiary of the estate may contest any claim on file in the county court. The filing of a claim is notice to all parties interested in the estate of the pendency of a suit against it.[89]

86 Civ. Code, § 23.

87 Hartman v. Lee, 30 Ind. 281.

88 Patrick v. Patrick, 72 Neb. 454, 100 N. W. 939; Schaberg's Estate v. McDonald, 60 Neb. 492, 83 N. W. 737; Hueber v. Sesseman, 38 Neb. 78, 56 N. W. 697.

89 Dredla v. Baache, 60 Neb. 655, 83 N. W. 916.

The personal representative should be present on the dates set for hearing, if any claims have been filed. No demand can be allowed in his absence.[90] He should examine into all claims filed, and if he has good reason to believe that any claim against the estate is unjust, excessive or not a proper demand, should interpose a defense employing necessary legal assistance.[91]

Form No. 137.

AFFIDAVIT VERIFYING CLAIM.

State of Nebraska,
——— County,—ss.

C. D., being first duly sworn, on oath says that the annexed is a true statement of his account against the estate of A. B., deceased; that the amount of $——— is now due claimant, and the same is just and correct, and remains due and unpaid, and that he knows of no legal setoff or counterclaim whatsoever against the same, or any part thereof.

(Signed) C. D.

§ 283. Proving claims—Concluded.

The executor or administrator should file all counterclaims and setoffs against demands of creditors, and may interpose any defense which would be available to his decedent in an action brought on the same demand during his lifetime.[92]

Formal pleadings on claims are not required by statute but frequently are by court rule. It will always save time and facilitate business if answers and replies are filed as in other cases. They will be given a liberal construction in the interests of justice.[93]

90 Herman v. Beck, 68 Neb. 567, 94 N. W. 512.
91 Egerton's Exrs. v. Egerton, 17 N. J. Eq. 419.
92 Lucas v. Cassaday, 1 Greene (Iowa), 208.
93 Fitch v. Martin, 82 Neb. 124, 119 N. W. 250; Fitzgerald's Estate v. First Nat. Bank, 64 Neb. 260, 89 N. W. 813; Fitzgerald's Estate v.

An assignee of a claim filed but not allowed may proceed thereon in the name of the original claimant or be substituted.[94] A claimant who has a suit pending against a decedent during his lifetime for the recovery of any demand may dismiss the same without prejudice, and establish it before the judge, but if the statute of limitations would have been a bar against the claim were it not for the pending of the suit thereon, the estate may successfully plead the statute of limitations. The claim must stand upon the same footing as though no proceedings were commenced or pending to recover it.[95]

A judgment rendered against the deceased in a court in another state or foreign country must be proved the same as in an action brought on a foreign judgment in any court in this state, and the failure of such foreign court to acquire jurisdiction over the party is a good defense. Such foreign judgments, as well as domestic judgments, should always be exhibited.[96] However, where the same party is the personal representative of the estate in the foreign state, a judgment against him as such representative in a court of that state is final and conclusive against the estate of his decedent here, and should be certified to the judge or commissioners.[97]

Union Savings Bank, 65 Neb. 97, 90 N. W. 994; Devries v. Devries, 5 Neb. Unof. 179, 97 N. W. 590.

[94] Harman v. Harman, 62 Neb. 452, 87 N. W. 177; Fitzgerald's Estate v. Union Savings Bank, 65 Neb. 97, 90 N. W. 994.

[95] Jones v. Keep's Estate, 23 Wis. 45; Bank of Maywood v. McAllister's Estate, 56 Neb. 188, 76 N. W. 552.

[96] Smith v. Grady, 68 Wis. 215, 31 N. W. 477; Jarvis v. Barrett, 14 Wis. 591; McEwan v. Zimmer, 38 Mich. 765.

[97] Creighton v. Murphy, 8 Neb. 349.

A claim is considered as allowed on the date the judge announces his decision thereon, and not as of the date when it is journalized and spread at large on the records.[98] A county judge cannot adjourn the hearing upon any claim without the knowledge of the personal representative, nor in any manner change or modify his decision without such notice; and where a judge, without notice, set aside his allowance of a claim, and allowed a much larger sum, the allowance will be set aside by a bill in equity, it appearing that the time for appeal has expired, and that the estate has a good and sufficient defense.[99]

The rule in regard to allowing claims is that if no objections are made, the affidavit verifying the account is sufficient proof. If a claim is contested, it must be established by the same weight of evidence as would be necessary to establish it in an action brought against the decedent while living. Parties should present their whole case fully and fairly in the county court.[100]

§ 284. Funeral expenses.

The surviving husband or wife, or in case the decedent left no surviving spouse, the next of kin, have charge of the body of the deceased, with the right to designate where it shall be buried, the kind of burial

98 McGrew v. State Bank of Humboldt, 60 Neb. 716, 84 N. W. 99; Bickel v. Dutcher, 35 Neb. 761, 53 N. W. 663.

99 Dundas v. Chrisman, 25 Neb. 495, 41 N. W. 449.

100 Fitzgerald's Estate v. Union Sav. Bank, 65 Neb. 97, 90 N. W. 994.

service and all other funeral arrangements, unless otherwise directed by will.[101]

Under the Oregon statute, the executor named in the will, or if there be none, or he do not attend to it, then the husband, widow or next of kin, in the order named, are authorized to incur funeral charges on account of the estate, in the burial of the deceased before administration. The burial must be in a manner suitable to the conditions and circumstances of life of the decedent. If the estate is insufficient to satisfy the claims against it, including legacies and devises, such charges are limited to those necessary to give the deceased a plain and simple burial.[102]

The expenses of funeral, burial, etc., stand upon a different footing than other demands against the estate, as they are not contracted by the decedent, nor, as it frequently happens, by any person who has power to bind the estate. The estate, however, is liable upon an implied promise to a third person who, as an act of duty or necessity, has provided for the burial expenses of a deceased person in a manner suitable to his social rank and standing, and such expenses are reasonable.[103] They are therefore more in the nature of expenses of administration, and there is some diversity of opinion whether they should be paid by the executor or administrator without first being formally allowed by the county judge. The courts generally

101 McEntee v. Bonacum, 66 Neb. 551, 92 N. W. 633; Thompson v. Pierce, 95 Neb. 692, 146 N. W. 948; Larson v. Chase, 47 Minn. 307, 50 N. W. 238; Neighbors v. Neighbors (Ky.), 65 S. W. 607; O'Donnell v. Slack, 123 Cal. 285, 55 Pac. 906; Hackett v. Hackett, 18 R. I. 155, 28 Atl. 42.

102 L. O. L., § 1299.

103 Sullivan v. Horner, 41 N. J. Eq. 299, 7 Atl. 411; Lenderink v. Sawyer, 92 Neb. 587, 138 N. W. 744.

hold that the personal representative may pay them directly without their being first filed.[104]

The practice varies in this state. Some courts, by rule, require them to take the same course as other claims, while others, also by rule, permit the executor or administrator to pay them directly and credit himself with them in his final account. When the estate is solvent, there seems to be no reason why they cannot as well be paid by the personal representative direct, the question of their validity being determined on the hearing of the final account. If there is any question about the ability of the estate to pay expenses of administration and funeral charges, they should be filed; otherwise the personal representative will have some difficulty in paying the administration expenses in full.

§ 285. Funeral expenses—Concluded.

Funeral expenses must be reasonable in amount, and such as are warranted by the financial condition of the estate and the social standing of decedent during his lifetime. A costly and elaborate funeral for a man who lived plainly and left only a small estate is out of place, and though such a one is held, the cost of a plain, simple funeral is all the estate can be held liable to pay.[105]

Though the same rule applies in the case of insolvent estates, the courts are loath to refuse to sanction payment of funeral expenses which are for such services

104 Lenderink v. Sawyer, 92 Neb. 587, 138 N. W. 744; Patterson v. Patterson, 59 N. Y. 574; McNally v. Weld, 30 Minn. 209, 14 N. W. 895; Dampier v. St. Paul Trust Co., 46 Minn. 526, 49 N. W. 286; Fitzhugh's Exr. v. Fitzhugh, 11 Gratt. (Va.) 300.

105 Foley v. Brocksmit, 119 Iowa, 457, 93 N. W. 344.

as are usually rendered the remains of those whose rank and standing in life are the same as those of the deceased.[106] They include charges for the burial, undertaker's bill,[107] mourning goods for widow and family,[108] price of a burial lot,[109] and if the deceased died away from home, the cost of the transportation of his remains to the family burial lot.[110] The cost of a suitable monument or tombstone is also a proper expense.[111] The expenses of a "wake," it has been held, are a proper funeral expense where it appeared that a custom prevailed among those of the social position and nationality as the deceased of holding such a ceremony previous to the funeral proper.[112]

At common law a wife's funeral expenses and expenses of last illness were not a charge against her separate estate unless they could not be collected from her husband,[113] and such is still the rule in many jurisdictions,[114] though other cases hold her estate primarily liable.[115]

106 Bradley's Estate, 11 Phila. (Pa.) 87; Sullivan v. Horner, 41 N. J. Eq. 299, 7 Atl. 411; Flintham's Appeal, 1 Serg. & R. (Pa.) 16.

107 Hewett v. Bronson, 5 Daly (N. Y.), 1.

108 Wood's Estate, 1 Ashm. (Pa.) 314.

109 Metz Appeal, 11 Serg. & R. (Pa.) 201; Jennison v. Hapgood, 10 Pick. (Mass.) 77.

110 Sullivan v. Horner, 41 N. J. Eq. 299, 7 Atl. 411.

111 Owens v. Bloomer, 14 Hun (N. Y.), 296; Ferrin v. Merrick, 41 N. Y. 315.

112 McCue v. Garvey, 14 Hun (N. Y.), 562.

113 Galloway v. McPherson's Estate, 67 Mich. 546, 35 N. W. 114; Petition of Johnson, 15 R. I. 438, 8 Atl. 248.

114 Gould v. Moulahan, 53 N. J. Eq. 341, 33 Atl. 483; Brand v. Brand, 109 Ky. 721, 60 S. W. 704; Waesch's Estate, 106 Pa. 204, 30 Atl. 1124.

115 Schneider v. Estate of Brier, 129 Wis. 446, 109 N. W. 99; Morrissey v. Mulhern, 168 Mass. 412, 47 N. E. 407; McClellan v. Filson, 44 Ohio St. 184, 5 N. E. 861.

§ 286. Claims against an estate—Accrued demands.

Demands which accrued during the lifetime of the decedent and which can be enforced through the county court, except where suits are pending thereon, consist of demands based on a contract, either express or implied,[116] for conversion,[117] for breach of covenant,[118] for mesne profits, for an injury to real or personal estate, and for any deceit or fraud,[119] for an accounting on a contract creating a trust relation between decedent and claimant, which contract was completed during decedent's lifetime, and could have been enforced by an action at law[120] for specific articles,[121] for taxes,[122] for liability as surety,[123] and in some cases for trust funds.[124]

§ 287. Claims becoming due after death.

Another class of claims which should be filed are those which became due after decedent's death.[125] These consist of demands arising from contracts made by the decedent during his lifetime with claimant or his assignor, payment of which was to be made after the death of the decedent, or where there was a general

116 3 Bl. Com., § 302.

117 Middleton v. Robinson, 1 Bay (S. C.), 58.

118 Hovey v. Newton, 11 Pick. (Mass.) 421.

119 Civ. Code, § 463.

120 Sullivan v. Ross' Estate, 113 Mich. 311, 76 N. W. 309, overruling 98 Mich. 570.

121 Rev. Stats., c. 17, § 124, [1388].

122 Findley v. Taylor, 97 Iowa, 420, 66 N. W. 774.

123 Wood v. Fisk, 63 N. Y. 245.

124 Gaffney's Estate, 146 Pa. 49, 23 Atl. 163. See § 278, *supra.*

125 Rev. Stats., c. 17, § 124, [1388].

promise to pay.[126] The contract may be either verbal or written.[127]

They also include certain demands not necessarily based on either an express or implied contract between decedent and claimant or his assignor, but on acts, surroundings, conditions and circumstances which the court will construe as imposing a liability against the estate for such services or expenses. They consist of expenses of last illness, and the costs and expenses of an unsuccessful proponent of a will who has acted in good faith and in performance of the duties which the law imposes on him.[128] An unsuccessful contestant of a will, it has been held, has no claim against the estate.[129]

§ 288. Express contracts to pay for services rendered.

Where services are rendered decedent by claimant under an express contract, either verbal or written, which were to be paid for by a devise or legacy, or otherwise, and the decedent dies intestate or fails to provide for claimant in his will, the claimant may recover, in the county court, the amount agreed on; or if no amount has been agreed on, he may recover what such services are reasonably worth.[130] If he is given

126 Ridler v. Ridler, 93 Iowa, 347, 61 N. W. 994.

127 Cary v. White, 52 N. Y. 138; Hobart v. Hobart, 62 N. Y. 80; Appeal of Starkey, 61 Conn. 199, 23 Atl. 1081.

128 Clark v. Turner, 50 Neb. 290, 69 N. W. 843; In re Bowman's Will, 133 Wis. 494, 113 N. W. 956.

129 Wallace v. Sheldon, 56 Neb. 55, 76 N. W. 180; overruling Seebrock v. Fedawa, 33 Neb. 413, 50 N. W. 270; and Mathis v. Pitman, 32 Neb. 191, 49 N. W. 182. See § 104, *supra*.

130 Wallace v. Long, 105 Ind. 522, 5 N. E. 666; Taggart v. Tevanny, 1 Ind. App. 339, 27 N. E. 511; Ellis v. Carey, 74 Wis. 176, 42 N. W.

a legacy and it is insufficient, he is entitled to the difference between what he received and what he earned.[131]

Where the services are of such a nature that their pecuniary value cannot be determined, the claimant may file a bill in equity for a specific performance of the agreement.[132] An agreement to leave claimant a devise or legacy, though void for any reason, is admissible for the purpose of showing that the services were not intended by either party to be gratuitous.[133]

§ 289. Implied contracts to pay for services rendered.

The relation or lack of relationship of the parties, and the circumstances, surroundings and conditions under which the services were rendered may be such as to imply a contract between the parties for their payment. Services performed without any expectation of their being paid for, and without evidence of any request for their payment, for a party closely related, are not a valid claim.[134] Where claimant and decedent are members of the same household, the law will not ordinarily imply a contract between them for support or services rendered.[135]

252; Freeman v. Foss, 145 Mass. 361, 14 N. E. 141; In re Kessler's Estate, 87 Wis. 660, 59 N. W. 129; Schwab v. Pierro, 43 Minn. 520, 46 N. W. 71.

131 Porter v. Dunn, 131 N. Y. 314, 30 N. E. 122; Reynolds v. Robinson, 64 N. Y. 589.

132 Kofka v. Rosicky, 41 Neb. 328, 59 N. W. 788.

133 Martin v. Martin, 108 Wis. 284, 84 N. W. 439. For enforcement of agreement to leave property by will, see § 304, *post*.

134 Normile v. Osborn, 207 Pa. 367, 56 Atl. 937; Hunson's Estate, 133 Cal. 38, 65 Pac. 14.

135 Robinson v. McAffee's Estate, 59 Mich. 375, 26 N. W. 643; Hall v. Finch, 29 Wis. 278; Dye v. Kerr, 15 Barb. (N. Y.) 444; Hinkle v.

If it appears that there was no intention that the services should be gratuitous, and the facts and circumstances attending the performance of the work are sufficient to rebut the presumption arising from relationship, and authorize the inference that both parties acted upon the understanding that the services were to be paid for, a promise to pay for the same will be implied.[136] The rule that a person who, after becoming of age, remains under the parental roof, and occupies the same family relations as while a minor, will be presumed to have rendered services to his parents gratuitously, does not apply where the family relations have been sundered for some time, and the parties again live together, it appearing from the business relations, surroundings and circumstances that there was an expectation of receiving pay for the services, and an intention on the part of the deceased that the claimant should be rewarded for his labor.[137]

§ 290. Implied contract to pay for services rendered—Concluded.

Less proof is required to establish an implied contract for services where the parties were but distantly

Sage, 65 Ohio St. 256, 65 N. E. 999; Williams v. Hutchinson, 3 N. Y. 312.

136 Hooker v. Van Slambrook, 127 Mich. 61, 86 N. W. 402; Wallace v. Schaud, 81 Md. 594, 32 Atl. 324.

137 Marietta v. Marietta, 90 Iowa, 201 57 N. W. 798; Morton v. Rainey, 82 Ill. 215; Ensey v. Hines, 30 Kan. 704, 2 Pac. 261; Hill v. Hill, 121 Ind. 255, 23 N. E. 87; Chapman v. Barnes, 29 Ill. App. 184; In re Ryder's Estate, 59 Hun (N. Y.), 618; Simmons v. Partridge, 154 Mass. 500, 28 N. E. 901. It is a difficult matter to draw the line between cases where liability will be implied and where none exists. So much depends, as appears from the above-cited cases, on the age,

related, and had never occupied even a *quasi* parental relation,[138] or were not related. Where the parties were not related, it has been held that the rendition and acceptance of the services and evidence of their value were sufficient to charge the estate with their payment,[139] and where they are related, evidence sufficient to rebut the presumption arising from such relationship, though falling short of proving an express contract, is sufficient.[140]

A claimant is entitled to recover for such services what they are reasonably worth.[141] The amount of such recovery is determined by evidence of the condition of the decedent, "just as to his condition, as to how he had to be taken care of, the care and attention which such condition required and which he received, and the circumstances and conditions under which the parties came together again under the family roof," and their general condition and standing in life.[142]

§ 291. Conversations and transactions with decedent.

Our Civil Code provides that no person having a direct legal interest in the result of any civil action or proceeding, where the adverse party is the representative of a deceased person, shall be permitted to testify

health, circumstances and conditions of the parties, that each has to be decided largely on its own particular facts.

138 In re Kessler's Estate, 87 Wis. 660, 59 N. W. 129; Quigly v. Arnold, 22 Ill. App. 269.

139 Wallace v. Schaud, 81 Md. 594, 32 Atl. 324; Todd v. Martin (Cal.), 37 Pac. 872.

140 In re Kessler's Estate, 87 Wis. 660, 59 N. W. 129.

141 Hawkins v. Doe, 60 Or. 437, 117 Pac. 749.

142 Marietta v. Marietta, 90 Iowa, 201, 57 N. W. 708; Peck v. McKean, 45 Iowa, 18; Wilson v. Wilson, 52 Iowa, 44, 2 N. W. 615.

to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the party having such direct legal interest may be examined in regard to the facts testified to by such deceased person, but shall not be permitted to testify further in regard to such transaction or conversation.[143] The word "representative" includes an executor or administrator,[144] consequently the evidence of third parties is necessary to prove an express verbal contract or an implied contract.

A transaction may be defined as an affair which forms the subject of negotiations between parties.[145] It is an exceedingly broad term as used in the code, embracing every variety of matters which are the subject of negotiations, contracts or actions between parties,[146] including the contents of a letter, the letter itself having been destroyed,[147] the delivery of a contract between the parties,[148] identification of letters written by deceased,[149] identification of checks payable

143 Civ. Code, § 335.

144 Gillette v. Morrison, 9 Neb. 395, 2 N. W. 853.

145 Kroh v. Heins, 48 Neb. 691, 67 N. W. 771.

146 Russell v. Close's Estate, 79 Neb. 318, 112 N. W. 559, 83 Neb. 232, 119 N. W. 515; Wilson v. Wilson, 83 Neb. 562, 120 N. W. 147.

147 Kroh v. Heins, 48 Neb. 691, 67 N. W. 771; Smith v. Perry, 52 Neb. 738, 73 N. W. 282; Sorenson v. Sorenson, 56 Neb. 729, 77 N. W. 68.

148 Russell v. Close's Estate, 79 Neb. 318, 112 N. W. 559; Wilson v. Wilson. 83 Neb. 562, 120 N. W. 147.

149 Harte v. Reichenberg, 3 Neb. Unof. 820, 92 N. W. 987.

to deceased,[150] payment or delivery of money,[151] the delivery of property, the title to which is in dispute,[152] private diaries containing entries relating to business affairs of the deceased,[153] and the making of indorsements on notes.[154]

§ 292. Competency of adverse party.

The interested party is not disqualified as a witness, but merely from testifying in regard to matters prohibited by the code.[155] He may testify that a certain instrument was in existence, where he saw it and its condition when he saw it.[156]

A claimant for services rendered or work and labor performed is not entirely barred by the statute from testifying concerning the same. He may testify to what he has done, providing it does not involve a personal transaction with the deceased, and then, if he can connect these services with the deceased by other and competent testimony, his testimony, if otherwise relevant and competent, may be considered by the court or jury.[157] The questions cannot be asked in such form that an answer, while ostensibly excluding the

150 Holloway v. Filson, 89 Neb. 403, 131 N. W. 606.

151 In re Necker's Estate, 80 Neb. 123, 113 N. W. 1045.

152 Nunnally v. Becker, 52 Ark. 550, 13 S. W. 79.

153 Fitch v. Martin, 83 Neb. 124, 119 N. W. 25.

154 Cornelius v. Miles (Ky.), 53 S. W. 517.

155 Sharmer v. McIntosh, 43 Neb. 509, 61 N. W. 727; Riddell v. Riddell, 70 Neb. 472, 97 N. W. 609.

156 Hartnett v. Holdredge, 5 Neb. Unof. 114, 97 N. W. 443, 73 Neb. 570, 103 N. W. 277.

157 Fitch v. Martin, 74 Neb. 538, 104 N. W. 1072, 83 Neb. 124, 119 N. W. 25.

deceased therefrom, carries with it the inference that the services were performed for the deceased.[158]

The owner of a claim on a book account is not a competent witness to prove the entries upon his own books, as they are considered as evidence of transactions.[159]

The assignor of a claim who disposed of it in good faith previous to the death of the decedent is not disqualified from testifying fully,[160] but if the transfer was made subsequently to his death, he is bound by the same rule as the claimant.[161]

Under the Oregon practice, the questions discussed in sections 291, 292, 293 and 294 are not raised in actions on claims. The facts which establish the liability of the estate to the claimant must be proved by other evidence than that of the claimant. He is a competent witness as to all matters connected with the claim, but the court, a referee or a jury cannot allow it unless there is sufficient competent evidence outside of his testimony to establish it.[162]

§ 293. Adverse party.

The husband or wife of claimant may testify as to such transactions or conversations unless he or she be a part owner of the claim.[163]

The term "direct legal interest in the result of any civil action or proceeding" refers only to the claim or

158 Fitch v. Martin, 74 Neb. 538, 104 N. W. 1072, 83 Neb. 124, 119 N. W. 25.

159 Martin v. Scott, 12 Neb. 42, 10 N. W. 532.

160 Tecumseh Nat. Bank v. McGee, 61 Neb. 709, 85 N. W. 949.

161 Magenau v. Bell, 13 Neb. 247, 13 N. W. 277; Riddell v. Riddell, 70 Neb. 472, 97 N. W. 609.

162 Goltra v. Penland, 45 Or. 261, 77 Pac. 129; L. O. L., § 1241.

163 Gillett v. Morrison, 9 Neb. 395, 2 N. W. 853; Parker v. Wells, 68 Neb. 647, 94 N. W. 717; Hisket v. Bozarth, 75 Neb. 70, 105 N. W 990; Adams v. Dennis, 76 Neb. 682, 107 N. W. 865.

demand sought to be enforced in the action pending, so that a joint heir or legatee is competent to testify to transactions or conversations if he has no interest in the particular demand.[164]

A representative who is only a nominal defendant, as in an action by a wife to set aside the joint deed of herself and husband, is not an adverse party.[165]

The term "representative" includes other parties than an executor or administrator, a surviving partner,[166] creditors of an insolvent estate, in an action to set aside an alleged fraudulent transfer,[167] an assignee of creditors in an action between such assignee and a deceased assignor,[168] and any party who succeeds to the right of the decedent by purchase, descent or operation of law.[169]

A party may testify to conversations and transactions with the deceased agent of his adverse party the same as if such agent were living.[170]

§ 294. Waiver of objections.

Section 335 of the Revised Civil Code does not operate like the statute of nonclaim, and the representative

164 Hageman v. Powell's Estate, 76 Neb. 514, 107 N. W. 749.

165 Buckingham v. Roar, 45 Neb. 244, 63 N. W. 398.

166 Mead v. Weaver, 42 Neb. 149, 60 N. W. 375; Pierce v. Atwood, 64 Neb. 92, 89 N. W. 669; North v. Angelo, 75 Neb. 381, 110 N. W. 570. In the latter case a plaintiff was permitted to testify to transactions with a decedent in an action against a copartnership which succeeded to the business of a partnership in which decedent was a member. The court approved the rule in the Mead case.

167 Adler Sons Co. v. Hellman, 55 Neb. 266, 75 N. W. 877.

168 Housel v. Cremer, 13 Neb. 298, 14 N. W. 398.

169 Brown v. Forbes, 1 Neb. Unof. 888, 96 N. W. 52.

170 Walker v. Hale, 92 Neb. 829, 139 N. W. 658.

may waive it by failing to make the proper objection,[171] or by introducing such testimony himself.[172] When he introduces any evidence of a transaction by a claimant with the decedent or of a conversation, the claimant is then competent to testify fully in regard to every element of that phase of the contract gone into by the other side, but no further.[173] If evidence of a part of the testimony given on another trial,[174] or a part of a conversation,[175] or a letter concerning the transaction is given,[176] the claimant may in rebuttal give his account of the conversation or transaction or conversation.[177]

Evidence as to one conversation will not permit testimony of another and independent conversation, though it followed almost immediately,[178] nor payment of a note secured by mortgage, of an agreement made when the mortgage was executed.[179]

Where testimony of the claimant was taken by deposition and proper objections were interposed to the same as incompetent under the code, the personal representative did not waive his objections to the testimony by cross-examination, where his objections

171 Bartlett v. Bartlett, 15 Neb. 593, 19 N. W. 691.

172 Parrish v. McNeil, 36 Neb. 727, 55 N. W. 222.

173 Dickinson v. Columbus State Bank, 70 Neb. 260, 98 N. W. 813; Taylor v. Ainsworth, 49 Neb. 496, 68 N. W. 1045; American State Bank v. Harrington, 34 Neb. 597, 52 N. W. 376.

174 Russell v. Close's Estate, 83 Neb. 232, 119 N. W. 515.

175 In re Neckel's Estate, 80 Neb. 123, 113 N. W. 1015.

176 Cline v. Dexter, 72 Neb. 619, 101 N. W. 246.

177 Bangs v. Gray, 60 Neb. 457, 83 N. W. 680, in which, as well as in Russell v. Close's Estate, plaintiff substantially established his cause of action on rebuttal.

178 In re Neckles' Estate, 80 Neb. 123, 113 N. W. 1045.

179 Dickenson v. Columbus State Bank, 70 Neb. 260, 98 N. W. 813.

were sustained by the court, and he is not entitled to the benefit of his cross-examination.[180]

§ 295. Declarations and admissions to third party in presence of claimant.

A claimant may testify as to conversations in which he took no part between decedent and a third party, concerning a transaction between claimant and decedent.[181] His evidence in such case is on the same footing, as far as admissibility is concerned, as admissions, declarations or conversations made to third parties who have no interest in the claim or demand.[182] Declarations or admissions are always competent to prove the terms of a contract and that it has been complied with by the claimant,[183] and thus to prove claimant's demand.[184]

By the Oregon code the declaration, act or omission of a deceased person against his interest is admissible as evidence to that extent against his successor in interest,[185] and when a party in an action, suit or proceeding against an executor or administrator appears as a witness in his own behalf, or offers statements made by the deceased against the interest of the deceased, statements of the deceased in his own favor may also be proven.[186]

180 Bentley v. Bentley's Estate, 72 Neb. 803, 101 N. W. 976.

181 Kroh v. Heins, 48 Neb. 691, 67 N. W. 771; Powers v. Powers, 79 Neb. 680, 113 N. W. 189; Wright v. Reed, 118 Iowa, 333, 92 N. W. 61.

182 Heyne v. Dorflier, 57 Hun (N. Y.), 591; Carey v. White, 52 N. Y. 138; Hobart v. Hobart, 62 N. Y. 80.

183 Simmonds v. Partridge, 154 Mass. 500, 28 N. E. 901.

184 Knight v. Knight, 6 Ind. App. 269, 33 N. E. 456; Kettery v. Thumma, 9 Ind. App. 498, 36 N. E. 919.

185 L. O. L., § 710.

186 L. O. L., § 732.

§ 296. Claims for breach of covenants.

Damages for breach of covenant in a deed or other conveyance made by a decedent, or of a personal covenant, if accruing during his lifetime, are a proper demand against his estate.[187] If occurring after the death of the covenantor, the demand is against the heir or devisee and not the estate,[188] except the covenant be a personal one, in which case the claim lies against the estate.[189]

§ 297. Claims due nonresidents.

The county court has power to adjust claims of nonresidents. The policy of the law is to favor as far as possible the local creditors and to require foreign creditors, when the administration in this state is ancillary, to file their demands with the representative in their own state. At the same time a nonresident creditor is entitled to the same rights in the estate as a resident. The allowance of the claim in another jurisdiction and where the estate is under the charge of a different administrator is not binding on the personal representative in this state. There is no privity between them.[190] The local administrator succeeds to none of the powers, rights and duties of the foreign representative, and a decision against the representa-

187 Estabrook v. Hapgood, 10 Mass. 313; Sheldon v. Warner, 58 Mich. 444, 26 N. W. 667.

188 Scott v. Scott, 70 Pa. 244; Booth v. Starr, 5 Day (Conn.), 275.

189 Brownfield v. Holland, 63 Wash. 86, 114 Pac. 890; Elliott v. Garvin, 166 Fed. 278.

190 See section 268, *supra*.

tive in the one state is not binding in the other. The demand must be formally allowed.[191]

A nonresident creditor the amount of whose claim is within the jurisdiction of the federal court may maintain an action thereon in such court.[192] It must be begun within the time fixed by the county court for the filing of claims against the estate,[193] and the judgment obtained, when filed in the county court, becomes an obligation of the estate enforceable in the same manner as any other demand.[194]

§ 298. Joint claims.

When any two or more persons shall be indebted upon any joint contract or upon a judgment founded upon a joint contract, and either of them shall die, his estate shall be liable therefor, and it may be allowed as if the contract had been joint and several, or as if the judgment had been against him alone; and the other parties to such contract may be compelled to contribute or pay the same, if they would have been liable to do so upon payment thereof by the deceased.[195] This statute changes the common-law rule, which released

191 Creswell v. Slack, 68 Iowa, 110, 26 N. W. 42; Stacy v. Thrasher, 6 How. (U. S.) 57; Talmadge v. Chappel, 16 Mass. 71; Turner v. Risor, 54 Ark. 33, 15 S. W. 13; McGarvey v. Darnall, 134 Ill. 367, 25 N. E. 1005.

192 Union Nat. Bank v. Vaiden, 18 How. (U. S.) 503; Lawrence v. Nelson, 143 U. S. 215, 12 Sup. Ct. Rep. 440.

193 Security Trust Co. v. Black River Nat. Bank, 187 U. S. 211, 23 Sup. Ct. Rep. 52; Schurmier v. Connecticut Mut. Life Ins. Co., 171 Fed. 1.

194 Connecticut Mut. Life Ins. Co. v. Schurmier (Minn.), 147 N. W. 246.

195 Rev. Stats., c. 17, § 160, [1424].

the estate of a deceased obligor on a joint contract from liability,[196] and makes the liability of the estate the same on both joint and joint and several contracts as if he were living.

§ 299. Executor's or administrator's claims.

An executor or administrator having a claim or demand against the estate, either absolute or contingent, has no greater privilege in regard thereto than any other party. If the estate is solvent, he, of course, receives his pay in full; if insolvent, he must share with the other creditors his proportion of the loss. There is no reason why he should not be called upon to establish his demand in the same manner he would be obliged to had he no other interest in the estate, and, when the estate is insolvent, there cannot well be an order of payment made until his claim is proved. In some states the court of probate jurisdiction is given by statute the authority to appoint a special administrator to represent the estate on such hearings, and the common law recognized the authority of the probate courts to make such appointment, the officer being called an "administrator *pendente lite.*" If the executor's or administrator's claim is contested, it might be for the interest of the estate for the court to appoint some person to represent the estate on the hearing, but it would seem that, if the position taken by the personal representative was so antagonistic to the estate, he ought to be removed, and someone else appointed.

It has been held, the estate being solvent, the personal representative may retain in his possession suffi-

[196] Pecker v. Julius, 2 Browne (Pa.), 31.

cient assets of the estate to satisfy his demand, and the claim need not be presented the same as that of the others,[197] the validity or invalidity of the claim being determined by the court on the hearing of the final account.[198] Claims for expenses incurred by the executor or administrator in the course of the administration are passed upon in his final account.

Under the Oregon practice, the county court or judge has authority to allow the claim of an executor or administrator. Such allowance does not conclude a creditor or person interested in the estate in any action, suit or proceeding between such executor or administrator, and such creditor, heir or other person.[199] If he reject the claim, either in whole or in part, or in case the same is not presented for allowance as provided by law, the executor or administrator may retain the amount thereof until the final settlement of his accounts, when if the same is controverted, or objected to by any person interested in the estate, the right of the representative to have the same allowed shall be tried and determined by the court. It must be presented to the court before the statute of limitations has run against it.[200]

§ 300. Contingent claims.

A contingent claim against an estate is one where the liability depends upon some future event, which may or may not happen, and therefore makes it now wholly uncertain whether there ever will be a liability.[201] It is a demand or debt which is not then abso-

197 Sanderson's Admrs. v. Sanderson, 17 Fla. 820.
198 In re May, 45 Ch. Div. 499.
199 L. O. L., § 1246.
200 L. O. L., § 1247.
201 Sargent's Estate v. Kimball's Estate, 37 Vt. 321.

lute or certain, but depends upon the occurrence or nonoccurrence of some event after the death of the testator or intestate.[202] The contingency is the happening of the event and not the time of its happening.[203]

The principal contingent claims are those growing out of liability as indorser, guarantor or surety upon commercial paper,[204] as surety on bonds, as payer of mortgage notes, and the statutory liability of a stockholder in a banking or other corporation.[205]

If any person shall be liable as security for the deceased, or have any other contingent claim against his estate which cannot be proved as a debt, the same may be presented, with the proper proof, to the county court, which if satisfied that such claim is a legal demand against the estate, may order the executor or administrator to retain in his hands sufficient to pay such contingent claim, when the same shall become absolute, or, if the estate shall be insolvent, sufficient to pay a proportion equal to the dividends of other creditors.[206] When a claim is so filed and approved by the court within the time fixed for filing absolute claims, the holder places himself on terms of proximate equality with the holders of such other claims.[207]

Under the Oregon practice, a contingent claim may be presented and allowed the same as any other demand. If approved, its present value is paid into court and held subject to the happening of the con-

202 Stichter v. Cox, 52 Neb. 532, 72 N. W. 848.
203 Verdier v. Roach, 96 Cal. 467, 31 Pac. 554.
204 Cockeril v. Hobson, 16 Ala. 391.
205 Hazlett v. Blakeley's Estate, 70 Neb. 613, 97 N. W. 808.
206 Rev. Stats., c. 17, § 141, [1405].
207 Hazlett v. Blakeley, 70 Neb. 613, 97 N. W. 808.

tingency.[208] If the estate is insolvent, it would necessarily prorate with other claims.

§ 301. Contingent claims becoming absolute.

A contingent claim becomes absolute as soon as the event which fixes the liability of the estate occurs.[209] The claimant may, at any time within two years from the time limited to other creditors to present their claims, present his demand, which the court had previously approved as a contingent obligation, for allowance as a proper claim, and if the contingency is established by due proof, it may be allowed and ordered paid in whole or in part as the assets of the estate will permit.[210]

The supreme court has said that it was a question of doubt whether a contingent claim not filed as such within the time limited other creditors to present their demands can be subsequently filed and allowed, though it did not accrue or become absolute until after the time limited.[211]

A statute was enacted in 1867 which permits a claimant having a demand which shall accrue or become absolute at any time after the time limited by creditors to present their claims to prove the same in the county court within one year after it accrues or becomes absolute.[212] In 1901 the statute of nonclaim was amended to include contingent claims. Previous to that amend-

208 L. O. L., § 1301.

209 Hazlett v. Blakeley, 70 Neb. 613, 97 N. W. 808.

210 Rev. Stats., c. 17, §§ 142, 143, [1406], [1407]; Brinkworth v. Hazlett, 64 Neb. 502, 90 N. W. 537.

211 Burling v. Alvord, 77 Neb. 861, 110 N. W. 683.

212 Rev. Stats., c. 17, § 144, [1408].

ment a contingent claim filed some time after the expiration of the time fixed in the notice to creditors was held a proper charge.[213] The doubtful question is, Was section 144 repealed by implication by the amendment? It was clearly the intention of the legislature to shut out all contingent demands, and it would therefore seem that said section 144 was repealed by implication.

Form No. 138.

ORDER OF COUNTY JUDGE ALLOWING CONTINGENT CLAIM.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, being the day fixed by the court for the hearing of the contingent claim of G. H. against said estate, said G. H. appeared and presented evidence in support thereof, and C. D., administrator of said estate, in opposition thereto; and it appearing to the court that said claim was a contingent one, and that the same became absolute and the amount thereof determined on the ——— day of ———, 19—, and that said claim is just and a just demand against said estate; and it further appearing that said administrator has not in his possession sufficient assets with which to pay said claim:

It is therefore ordered that said claim be allowed at the sum of ——— dollars ($———), and that said C. D., administrator, pay such proportion of said claim from the assets of said estate now in his possession as he may have the funds to pay, and, if any real or personal estate of the said A. B. shall afterward come into his possession, he shall pay such claim, or such part thereof as he may have assets to pay, within thirty days after said assets have been received by him.

(Signed) J. K.,
County Judge.

§ 302. Contract to bequeath or devise property.

A contract by which a party agrees for a consideration to make a certain disposition of either real or personal property is valid, and constitutes an obligation

213 Hazlett v. Blakeley, 70 Neb. 613, 97 N. W. 808.

of his estate.[214] Such consideration is usually services performed or to be performed by claimant for decedent.[215] The execution of reciprocal wills by both husband and wife,[216] or the satisfaction of a claim or demand,[217] are also sufficient considerations.

The contract may be oral,[218] in which case the evidence to establish it must be clear and satisfactory.[219]

The rule of law governing enforcement of contracts to devise or bequeath, and actions for breach of the same, differs somewhat from that on other contracts. The party not in default does not in each case have a choice of remedies. If the consideration is a definite amount of labor performed or services rendered by the claimant and the value of the same can be ascertained,

214 Hawkins v. Doe, 60 Or. 437, 119 Pac. 754; Kelley v. Devin, 65 Or. 215, 132 Pac. 535; Van Dyne v. Freeland, 12 N. J. Eq. 142; Rivers v. Rivers' Exrs., 3 Desaus. (S. C.) 190; Wright v. Tinsley, 30 Mo. 389; Green v. Broyles, 3 Humph. (Tenn.) 167; Wright v. Wright, 31 Mich. 380; Updike v. Tenbroeck, 32 N. J. L. 105; Smith v. Smith's Admrs., 28 N. J. L. 208.

215 Kofka v. Rosicky, 41 Neb. 328, 59 N. W. 788; Damkroeger v. James (Neb.), 146 N. W. 936; Best v. Gralapp, 69 Neb. 811, 96 N. W. 641; Teske v. Ditberner, 65 Neb. 167, 91 N. W. 181; Kelley v. Devin, 65 Or. 215, 132 Pac. 575.

216 Brown v. Webster, 90 Neb. 591, 134 N. W. 185.

217 Clawson v. Brewer, 67 N. J. Eq. 201, 58 Atl. 598.

218 Moline v. Carlson, 92 Neb. 419, 138 N. W. 721; Hespen v. Wendeln, 85 Neb. 172, 122 N. W. 852; Harrison v. Harrison, 80 Neb. 103, 113 N. W. 1042.

219 Kofka v. Rosicky, 41 Neb. 328; Teske v. Ditberner, 65 Neb. 167, 91 N. W. 181, 70 Neb. 544, 98 N. W. 57; Best v. Gralapp, 96 Neb. 801, 96 N. W. 641; Pemberton v. Pemberton's Heirs, 76 Neb. 669, 107 N. W. 996; Peterson v. Bauer, 76 Neb. 652, 107 N. W. 993; Moline v. Carlson, 92 Neb. 419, 138 N. W. 621; Labs v. Labs, 92 Neb. 378, 138 N. W. 561; Damkroeger v. James (Neb.), 146 N. W. 936; Rose v. Oliver, 32 Or. 447, 52 Pac. 176; Richardson v. Orth, 40 Or. 252, 66 Pac. 925, 69 Pac. 494.

and a payment will place the parties in the same position as before, specific enforcement cannot be had. The remedy of the claimant is to file his demand in court and recover either the specific amount or on a *quantum meruit*. His right to recover, but not the amount of his recovery, is based on the contract.[220]

§ 303. Consideration for contract.

If the consideration of the contract is services rendered, and they are of such a character that it is impossible to estimate their value by any pecuniary standard, it is not within the power of any court, after their performance, to restore the party to the same position he was in before the agreement was made by awarding him damages, and his remedy is by bill in equity for specific performance.[221] Under this rule full performance of an agreement, by a son of full age and living away from home, to return with his family and take care of his father and attend to his business,[222] by a son,[223] or stepson,[224] to remain at home and attend to his parents' affairs, by a party who had lived with a family since infancy to remain on the farm of decedent,[225] in consideration of receiving cer-

220 Hawkins v. Doe, 60 Or. 437, 117 Pac. 754; Freeman v. Foss, 145 Mass. 361, 14 N. E. 141; Ellis v. Carey, 74 Wis. 176, 42 N. W. 252.

221 Kofka v. Rosicky, 41 Neb. 328, 59 N. W. 788; Kelley v. Devin, 65 Or. 215, 132 Pac. 535; Rhodes v. Rhodes, 3 Sand. Ch. (N. Y.) 279.

222 Best v. Gralapp, 69 Neb. 811, 96 N. W. 641, 99 N. W. 837; Harrison v. Harrison, 80 Neb. 103, 113 N. W. 1042.

223 O'Connor v. Waters, 88 Neb. 224, 129 N. W. 261; Teske v. Ditberner, 65 Neb. 167, 91 N. W. 181, 70 Neb. 544, 98 N. W. 57; Kelley v. Devin, 65 Or. 215, 132 Pac. 535.

224 Hespen v. Wendelen, 85 Neb. 172, 122 N. W. 852.

225 Moline v. Carlson, 92 Neb. 419, 138 N. W. 721.

tain specific property or a share therein, give a right to enforce the same.

The same principle governs a like contract for services for any elderly person if performed under the same conditions.[226]

A contract made between deceased and the parent of an infant, by the terms of which the deceased agreed to adopt the minor and to make him an heir with others or give him a fixed share in the estate, is also within the rule when the person so agreed to be adopted enters the family of deceased and performs the usual duties of a child.[227] In none of the cases last cited was the claimant formally adopted.

§ 304. Relief granted.

When recovery cannot be had on a *quantum meruit* or actual consideration paid, specific performance is claimant's only remedy. An action for damages for breach of contract to convey cannot be sustained.[228]

Part performance of such contract of such character that the court cannot restore the promisee to the situation he was in when the agreement was made, or compensate him in damages, takes it out of the statute of frauds.[229] Evidence that the promisor expressly

226 Brinton v. Van Cott, 8 Utah, 480, 33 Pac. 218; McKinnon v. McKinnon, 56 Fed. 409; Jaffee v. Jacobson, 4 U. S. App. 4, 1 C. C. A. 24, 48 Fed. 21.

227 Peterson v. Bauer, 83 Neb. 405, 119 N. W. 764, 76 Neb. 661, 111 N. W. 361; Pemberton v. Pemberton's Heirs, 76 Neb. 669, 107 N. W. 993; Kofka v. Rosicky, 41 Neb. 328, 59 N. W. 788.

228 Hertzog v. Hertzog, 34 Pa. 318; Erben v. Lorillard, 19 N. Y. 299.

229 Best v. Gralapp, 69 Neb. 811, 96 N. W. 641; Kelley v. Devin, 65 Or. 215, 132 Pac. 535.

agreed to make a will is not necessary. An agreement to "give" claimant a certain piece of land or a certain share in the estate is sufficient.[230]

It was formerly held that where the contract included property in which the surviving spouse had a homestead right, it was enforceable, and the value of such right could be given the surviving spouse by the decree.[231] Under the present holding of the supreme court,[232] it would only be enforceable, if at all, as to the estate of remainder, unless such survivor consented thereto.[233]

Executors, administrators, heirs, devisees or legatees of the promisor take the property impressed with a trust in favor of the claimant.[234] They are the defendants, and the decree against them should be for a substantially specific performance.[235]

§ 305. Writings of deceased persons as evidence.

The book entries and other writings of a person deceased, made at or near the time of the transaction, and when the deceased was in a position to know the facts therein stated, are presumptive evidence of such facts when the entry was made against the interest of the person so making it, or when made in a professional capacity, or in the ordinary course of professional con-

230 Kofka v. Rosicky, 41 Neb. 328, 59 N. W. 788; Moline v. Carlson, 92 Neb. 419, 138 N. W. 721.

231 Teske v. Ditberner, 83 Neb. 701, 120 N. W. 147.

232 Meisner v. Hill, 92 Neb. 435, 138 N. W. 583.

233 Moline v. Carlson, 92 Neb. 419, 138 N. W. 721.

234 Bruce v. Moon, 57 S. C. 60, 35 S. E. 415; Howe v. Watson, 179 Mass. 30, 60 N. E. 415; Smith v. Pierce, 65 Vt. 200, 25 Atl. 1092.

235 Wright v. Tinsley, 30 Mo. 389.

duct, or when in the performance of a duty especially enjoined by law.[236] The above is declaratory of the common-law rule. It must be shown that such writings are original, contemporaneous, and in the line of the writer's duty,[237] or when he was in a position to know the facts therein stated, that they were in his handwriting,[238] and that they were found among his possessions.

The presumption is that the books of account of a deceased person, or the records which he made in any official capacity, were regularly kept by him, and are true statements of the transactions therein set forth. If testimony is subsequently introduced which raises any question as to the validity or authenticity of the writings, it is for the judge to determine, or, in the case of an appeal to the district court, for the jury under proper instructions from the court.[239]

§ 306. Extending time for presentation of claims.

The court may extend the time allowed to creditors to present their claims, as the circumstances of the case may require; but not so that the whole time shall exceed two years.[240] The application must be filed within six months from the expiration of the time first

236 Civ. Code, § 354; L. O. L., § 798; Susewind v. Lever, 37 Or. 367, 61 Pac. 644.

237 Wharton, Evidence, § 238; 1 Greenleaf, Evidence, § 115.

238 Welsh v. Barrett, 15 Mass. 380; Inhabitants of Augusta v. Inhabitants of Windsor, 19 Me. 317; Van Swearingen v. Harris, 1 Watts & S. (Pa.) 356.

239 Odell v. Culbert, 9 Watts & S. (Pa.) 66; Van Swearingen v. Harris, 1 Watts & S. (Pa.) 356.

240 Rev. Stats., c. 17, § 121, [1385].

fixed.[241] It should be by petition, under oath, setting up the demand, the reasons why it was not filed previously, and show that the applicant has not been guilty of laches and has exercised due diligence.[242]

Notice of the filing of the application and the date set for its hearing should be given the executor or administrator as the court may direct.

The court has no power to file the claim until after a hearing has been had and leave granted. The applicant must show that his neglect was due to such reasons as lack of notice of the death of deceased and unavoidable mistake or accident, or fraud. The rule is that the showing must be such as would warrant a court in setting aside a judgment and granting a new trial in ordinary cases,[243] and the order will not be disturbed if it appeared that the court acted with discretion.[244] The equities of the case, must be very strong, however, to justify a court in granting the application where a long time was given in the first notice, and the personal representative has rendered his account.[245]

241 Rev. Stats., c. 17, § 122, [1386]; Fitzgerald v. First Nat. Bank, 64 Neb. 260, 89 N. W. 813. A strong dissenting opinion was filed in this case, a minority of the court holding that section 121 gave the county court the power to allow a claim to be filed and to act on it, on proper application at any time within two years.

242 Gilchrist v. Rea, 9 Paige (N. Y.), 66; State v. Ramsey Co. Probate Court, 42 Minn. 54, 43 N. W. 692.

243 Nebraska Wesleyan University v. Bowen, 73 Neb. 598, 103 N. W. 275.

244 Ribble v. Furmin, 71 Neb. 108, 98 N. W. 420.

245 Hazlett v. Burge, 22 Iowa, 531; Amsbaugh v. Exchange Bank, 33 Kan. 100, 5 Pac. 384.

Form No. 139.

APPLICATION FOR ORDER EXTENDING TIME FOR HEARING CLAIMS.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that he is a resident of Chicago, Illinois, and has resided therein for more than three years last past; that said estate is indebted to said petitioner in the sum of $——— on a certain promissory note executed and delivered by said A. B. to said petitioner on the ——— day of ———, 19—, and which said note became due and payable on the ——— day of ———, 19—, at the ——— bank, in the city of Chicago aforesaid; that petitioner had no knowledge whatever of the death of said A. B. or of the appointment of an administrator of his said estate or of the notice to creditors to present their claims against said estate until ———, 19—, when he was informed that said A. B. had been dead for more than six months and that the time fixed for filing claims against said estate had expired; that said A. B. left no estate within the state of Illinois, and that unless your petitioner be permitted to establish the amount of his said claim in this court, he will be unable to recover said sum of money so due from said estate.

Your petitioner therefore prays that an order be made and entered by said court extending the time for presentation of claims against said estate for ——— days.

Dated this ——— day of ———, 19—.

(Signed) C. D.

[Add verification.]

§ 307. Order extending time for filing claims.

If the reasons why the claim was not previously presented appear to the court satisfactory, an order is made extending the time, not to exceed three months, and notice thereof is given in such manner as the court may direct.[246]

It has been held under a statute like our own that the extension operates for the benefit of the applicant alone, and that any other belated creditor must make

246 Rev. Stats., c. 17, § 122, [1386].

his application also. The court has no power to allow a claim after the time first fixed has expired unless an order for the hearing of such claim has been entered.[247]

The order is a final one, and an appeal on it will lie to the county court.[248]

Form No. 140.

ORDER GRANTING TIME TO FILE A CLAIM.

[Title of Cause and Court].

Now on this ——— day of ———, 19—, this matter came on for hearing on the petition of C. D. to extend the time for filing claims against said estate, the answer of E. F., administrator of said estate, and the evidence was submitted to the court.

On consideration whereof the court finds that the said petitioner has not been guilty of laches and that the prayer of said petition should be granted.

It is therefore ordered that said C. D. be given leave to file said claim within ten days and the same be set for hearing on the ——— day of ———, 19—, at the hour of 9 A. M.

(Signed) J. K.,
County Judge.

§ 308. Order allowing claims.

The order of the county court allowing a claim of a creditor as a proper demand against the estate is valid and binding, and has the force and effect of a judgment against the estate until appealed from, or reversed or vacated in some of the modes prescribed by statute.[249]

247 McGee v. McDonald's Estate, 66 Mich. 628, 33 N. W. 737.

248 Ribble v. Furmin, 71 Neb. 198, 98 N. W. 420.

249 McGrew v. State Bank of Humboldt, 60 Neb. 716, 84 N. W. 99; McCormick v. McCormick, 53 Neb. 255, 73 N. W. 693; Patton v.

It is not necessary that any formal judgment be entered for the payment of each separate demand. The order should show the amount demanded by each claimant, the amount allowed, the amount disallowed, setoff allowed, the balance in favor of the claimant or the estate, and also whether notice of appeal was given or appeal taken either by the claimant or the estate. It should be signed by the judge and recorded, and though such record may be lacking in some recitals, such as appearance of parties, and even if unsigned, if properly entered and showing the date and amount allowed, it is sufficient.[250] It should include claims for debts only. (Claims of an executor or administrator for expenses and disbursements belong in his final account.[251])

Where it appears that all the statutory steps have been taken to give the court jurisdiction, it cannot be impeached in a collateral proceeding except for fraud.[252]

During the term at which it was entered the court has power, on application of an interested party, and notice to the executor or administrator, to vacate the order,[253] or may modify the same for good and suffi-

Bostwick, 39 Mich. 218; Stone v. Wood, 16 Ill. 177; Yeatman v. Yeatman, 35 Neb. 422, 53 N. W. 385.

250 McCormick v. McCormick, 53 Neb. 255, 73 N. W. 693; Yeatman v. Yeatman, 35 Neb. 422, 53 N. W. 385; Scott v. Rohman, 43 Neb. 618, 62 N. W. 46.

251 Erickson v. Nyblom, 78 Neb. 642, 111 N. W. 356.

252 State v. Ramsey Co. Probate Court, 25 Minn. 25; Shoemaker v. Brown, 10 Kan. 385; Baker v. Rust, 37 Tex. 242.

253 Brusha v. Hawke, 87 Neb. 254, 126 N. W. 1079.

cient reasons on notice to such personal representative.[254]

After the term and after the time for appeal has expired he may have a claim allowed in his absence and to which he has a good defense set aside by bill in equity,[255] or may have the order vacated or modified by general proceedings under the Civil Code to set aside judgments.[256]

An executor, administrator, heir, legatee or devisee may appeal to the district court.[257]

Form No. 141.

ORDER OF COUNTY JUDGE ALLOWING CLAIMS.

[Title of Cause and Court.]

Now on this ——— day of ———, 19—, came C. D., administrator of said estate, in person and by E. F., his attorney; and due proof having been made before me of the following claims, showing them to be just and lawful demands against the estate of A. B., deceased, I therefore adjust, allow or disallow, respectfully, the personal claims heretofore filed against the estate, in favor of or against the several persons hereinafter named, as set forth in the several columns opposite their respective names. The first column contains the names of the creditors of the said estate, and the character of their claim; the second shows the amount claimed; the third shows the amount allowed; the fourth shows the amount disallowed; the fifth shows the amount of setoff filed on behalf of the estate against such claim; the sixth shows the amount of setoff disallowed; the seventh shows the balance in favor of the creditors; the eighth shows the balance

254 Dundas v. Christian, 25 Neb. 495, 41 N. W. 449.

255 Dundas v. Christian, 25 Neb. 495, 41 N. W. 449.

256 Civ. Code, §§ 648, 656; McGrew v. State Bank of Humboldt, 60 Neb. 716, 84 N. W. 99.

257 Rev. Stats., c. 17, §§ 252, 271, [1516], [1535].

in favor of the estate; the ninth shows how notice was given the claimants.

Names of Creditors and Character of Claims	Amount Claimed	Amount Allowed	Amount Disallowed	Amount of Setoff Claimed	Amount of Setoff Allowed	Balance in Favor of Creditors	Balance in Favor of Estate	Notice, How Given
.....	.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....

And it satisfactorily appearing to the court from the proof on file that due notice as required by law has been given of the time and place designated for the hearing of claims against said estate, and it further appearing that said A. B., administrator as aforesid, has sufficient funds in his hands belonging to said estate to pay all the debts allowed against said estate in full:*

It is therefore ordered and decreed that said A. B., administrator as aforesaid, pay all the debts in full above allowed against said estate, together with interest thereon at the rate of seven per cent per annum, to the persons respectively entitled to the same.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

Form No. 142.

ORDER BARRING CLAIMS.

[Title of Cause and Court.]

Whereas, it appears from the records and files in the above-entitled matter that notice to creditors to present their claims and demands against said estate has been given pursuant to the order of the court heretofore issued by publication thereof for four successive weeks in the ———, a newspaper printed and published in said county, and by posting the same in three conspicuous places in said county, and that the time fixed by the court for the presentation, adjustment and

allowance of claims against said estate has expired, it is therefore ordered that all claims against said estate, not now on file in said court, excepting only such as are not required by law to be presented for allowance, be and the same are hereby forever barred.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

The effect of a judgment or decree against an executor or administrator on account of a claim against an estate of a decedent is only to establish the claim, as if it had been allowed by him, unless in an action brought on a claim filed more than six months after his appointment it is alleged in the complaint and found to be true that the representative has assets in his hands applicable to the satisfaction of the claim, in which case a personal judgment or decree may be entered.[258] If he suffers judgment against himself and a subsequent depreciation in value of the assets makes them insufficient, equity will relieve him, but not if the deficiency existed at the time and though on account of a lack of knowledge of the estate or a miscalculation he believed them sufficient.[259]

258 L. O. L., §§ 387, 1243.

259 Brenner v. Alexander, 16 Or. 351, 19 Pac. 9.

CHAPTER XXV.

SALES OF REAL ESTATE FOR PAYMENT OF DEBTS.

§ 309. Creditor's Lien on Realty.
310. Duty of Executor or Administrator to Procure License.
311. Nature of Proceedings.
312. When and Where Petition Filed.
313. Necessary Parties to Proceeding.
314. Necessary Allegations of Petition.
315. Description of Lands.
316. Order to Show Cause.
317. Service of Order to Show Cause.
318. Payment of Debts to Prevent Sale.
319. Hearing on the Application.
320. Hearing—Insufficiency of Personal Property.
321. Hearing—Debts and Expenses of Administration.
322. Hearing—Lands Subject to Sale.
323. Order of Sale or License.
324. Additional Bond.
325. Notice of Sale.
326. Sale Subject to Liens.
327. Oath of Executor or Administrator.
328. Sale.
329. Adjournment of Sale.
330. Executor or Administrator not to be a Purchaser.
331. Confirmation of Sale.
332. Confirmation of Sale—Concluded.
333. Sale of Contract Interest in Land.
334. Death of Executor or Administrator Pending Proceedings.
335. Sales by Foreign Executors or Administrators.
336. Taxation of Costs.
337. Executor's or Administrator's Deed.
338. Title of Purchaser.
339. Sale of Property in Which a Homestead is Included.

§ 309. Creditor's lien on realty.

Personal property is the primary fund from which the debts of an estate, and all the costs and expenses of administration, should be paid. When the person-

alty is insufficient, then the real estate becomes liable. In the interests of the creditors, and of the executor or administrator who has necessarily incurred costs and expenses in connection with the administration, all lands of which any decedent died seised, except the homestead exemption, may be sold by the executor or administrator, under the license of the district court, for the purpose of raising a fund with which to pay the debts of the estate, allowances for the support of the family and other costs and expenses of administration, including the inheritance tax.[1]

The death of a debtor gives his creditor a *quasi* lien on the former's real estate, which is established by the grant of letters testamentary or of administration, and the allowance of the claim, and enforced by a sale under order of the court, and no act of the heir or devisee can deprive him of such lien. A purchaser from such heir or devisee pending the administration of the estate takes a title subject to such rights of creditors therein, even though the executor or administrator consented to the sale.[2]

§ 310. Duty of executor or administrator to procure license.

A creditor is not obliged to take any action himself in order to have the right which he established in the

1 Rakes v. Brown, 34 Neb. 304, 51 N. W. 848; Rev. Stats., c. 17, §§ 1, 180, [1265], [1446]; L. O. L., § 1252; Howe v. Kern, 63 Or. 506, 125 Pac. 838; Houck v. Myers, 23 Or. 10, 17 Pac. 461; Smith v. Whiting, 55 Or. 398, 106 Pac. 793.

2 Watkins v. Holman, 16 Pet. (U. S.) 25; Farran v. Robinson, 17 Ohio St. 12; McCoy v. Morrow, 18 Ill. 519; Moncrief v. Moncrief, 73 Ind. 487; Westbrook v. Munger, 64 Miss. 575, 1 South. 750; Stiver v. Stiver, 8 Ohio St. 221.

decedent's real estate by proving his claim in county court enforced by a sale of the lands. If the personalty of a testator is insufficient to pay his debts, and the costs and expenses of the administration of his estate, including the inheritance tax, and the executor has a power of sale given him by the will, it is his duty to proceed to sell enough lands to meet such payments, and account for the proceeds in his annual or final accounting. If the will gives him no power of sale, he is on the same footing in regard to sales of real estate as an administrator, and it is the duty of either, when the personal estate in his hands is insufficient to pay such debts, costs and expenses, to procure a license from the court and sell lands.[3] The duty is imperative, and if he refuse or neglect to make the application, a creditor may have a writ of *mandamus* to compel him to act.[4]

§ 311. Nature of proceeding.

The proceeding for the sale of a decedent's real estate for the payment of his debts is a special and statutory one. It is a proceeding *in rem*, where the principal questions involved are the amount of the debts outstanding against the estate, the amount of personal property available for their payment and the necessity for selling the land to raise a fund for such payment. It is not adversary in its character, in the sense in which the term is used in actions, as only so much of the estate descends to the heirs or passes to

3 Rev. Stats., c. 17, § 182, [1446]; L. O. L., § 1252.

4 Clement v. Cozart, 109 N. C. 173, 13 S. E. 862.

the devisees as remains after the debts and expenses are paid.[5]

Jurisdiction of the proceeding is given the judge of the district court of the county in which letters testamentary or of administration were granted,[6] except when brought by a foreign personal representative. In such case it is brought in the county where the land is situated.[7]

Under the Oregon practice, the county court of the county having jurisdiction of the administration has jurisdiction of sales of real estate.[8] The proceeding is there held to be one hostile or adverse as to the heirs.[9]

§ 312. When and where petition filed.

The proceedings for such sale of real estate, when instituted by a resident executor or administrator, are commenced by presenting a petition to the district court of the county in which he was appointed, setting forth the amount of personal property that has come into his hands, and how much, if any, remains undisposed of, the debts outstanding against the estate, as

5 McClay v. Foxworthy, 18 Neb. 295, 25 N. W. 86; Bixby v. Jewell, 72 Neb. 755, 101 N. W. 1026; Miller v. Hanna, 89 Neb. 224, 131 N. W. 226.

6 Rev. Stats., c. 17, § 183, [1442].

7 Section 335, *post*. Under former statutes the old probate court had jurisdiction of such matters. On account of the fact that many probate judges were not "learned in the law," irregularities occurred so frequently making the sales void for lack of jurisdiction, that purchasers were unwilling to pay a reasonable price, so that the sole power to grant such licenses and coufirm the sales was given the district judge.

8 L. O. L., § 936.

9 Fisk v. Kellogg, 3 Or. 508; Smith v. Whiting, 55 Or. 393, 106 Pac. 790.

far as the same can be ascertained, a description of all the real estate of which the testator or intestate died seised, and the condition and value of the respective portions or lots.[10]

It may be presented at a session of the district court, or at chambers anywhere within the judicial district, no matter in what county the lands are located.[11] It need not be filed until later, but when presented at chambers must be filed as soon as practicable in the office of the clerk of the county in which the executor or administrator received his letters, and such filing is jurisdictional.[12]

There is no time fixed within which the proceeding must be brought, except the general one that it must be commenced within a reasonable time after the personal representative becomes acquainted with the circumstances and conditions of the estate. An executor or administrator may know very soon after his appointment whether such sale will be necessary, and it may be several years before he can definitely say that he is unable to collect enough assets to pay off all demands.[13] Where the cause of the delay was satisfactorily explained to the court, a license was granted seven years after the death of the decedent,[14] and one thirteen years after.[15] A delay of fourteen years was

10 Rev. Stats., c. 17, § 183, [1447].

11 Rev. Stats., c. 17, § 187, [1451]; Stack v. Royce, 34 Neb. 383, 52 N. W. 675.

12 Veeder v. McKinley-Lanning L. & T. Co., 61 Neb. 892, 86 N. W. 982; Stack v. Royce, 34 Neb. 383, 52 N. W. 675.

13 Hall v. Woodman, 49 N. H. 295; Smith v. Dutton, 16 Me. 308; Gunby v. Brown, 86 Mo. 253.

14 Bursen v. Goodspeed, 60 Ill. 277.

15 McCrary v. Tasker, 41 Iowa, 255.

held sufficient cause for dismissing the petition, no explanation of the delay being made.[16] A longer delay in filing the petition is permissible when the lands still remain in the possession of the personal representative, or the heir or devisee, than when it has passed from their possession into the hands of a purchaser;[17] and if it should appear that the delay was caused by the laches of the personal representative, the petition should be dismissed.[18]

It must be filed within the time limited for the payment of debts.[19]

§ 313. Necessary parties to the proceeding.

If there are two or more executors or administrators, they must all join in the petition, the words "executor or administrator" as used in the statute referring to all those who have qualified and are acting as such.[20]

The proceeding, though *in rem*, is not *ex parte*. By statute all persons interested in the estate are made parties to the same, and service of process must be had upon them.[21] The names and relationship of the heirs, the names of the devisees and who, if any, are minors, should be given. If the decedent was intestate or the land sought to be sold a lapsed or void devise, not passing into the residuary estate, they with

16 Jackson d. Jenkins v. Robinson, 4 Wend. (N. Y.) 436.

17 Ferguson v. Scott, 49 Miss. 500.

18 Wolf v. Ogden, 66 Ill. 224; In re Godfrey's Estate, 4 Mich. 308; Crosby's Estate, 55 Cal. 574; Hatch v. Kelly, 63 N. H. 29.

19 See Rev. Stats., c. 17, § 128, [1392].

20 Hannum v. Day, 105 Mass. 33.

21 Rev. Stats., c. 17, § 184, [1448]; L. O. L., § 1255; Fiske v. Kellogg, 3 Or. 503; Howe v. Kern, 63 Or. 501, 125 Pac. 837, 128 Pac. 819.

the surviving spouse[22] are the only interested parties.[23] In Oregon the widow is not a necessary or even a proper party.[24] In the case of the sale of devised land the devisees are the only persons interested,[25] and where the decedent was intestate and left no heirs or widow, the state is the only such party.[26] Purchasers pending administration are frequently made parties, but they are not in position to interpose any defense.[27]

On account of the proceeding being *in rem*, failure to name all the interested parties in the petition would not render the sale void or subject to collateral attack, but would be taken advantage of by the parties on the hearing.[28]

When service of the order to show cause is waived, or when the applicant prays for personal service instead of the usual publication, the petition must give the names and relation to the estate of all the interested parties, and who, if any, are minors.[29]

§ 314. Necessary allegations of petition.

The essential fact, which must be set up in the petition and established to the satisfaction of the district

22 McLaughlin v. McCumber, 36 Pa. 14; Simonton v. Brown, 72 N. C. 46.

23 Lessee of Adams v. Jeffries, 12 Ohio St. 253; Fiske v. Kellogg, 3 Or. 503; Gibson v. Roll, 30 Ill. 172; Patterson v. Hamilton, 26 Hun (N. Y.), 665; Winston v. McClendon, 45 Miss. 254.

24 In re Smith's Estate, 43 Or. 595, 73 Pac. 336, 75 Pac. 113.

25 William's Devisees v. Williams' Admr., 49 Ala. 439.

26 Trafford v. Young, 3 Tenn. Ch. 496.

27 Gibson v. Prits, 69 N. C. 155.

28 Lyons v. Hamer, 94 Ala. 197; Neville v. Kinney, 125 Ala. 149, 28 South. 542; Morris v. Hogle, 37 Ill. 150. See McClay v. Foxworthy, 18 Neb. 295, 25 N. W. 86.

29 Howe v. Kern, 63 Or. 496, 128 Pac. 819; Smith v. Whiting, 55 Or. 393, 106 Pac. 790.

court at the final hearing, is that the personal assets of the estate are clearly insufficient to pay the debts, allowances for the support of the family, and the charges of administration and inheritance tax.[30] The necessity for resorting to the real estate for the payment of such debts and expenses must appear affirmatively upon the face of the petition.[31]

The amount of the personalty received by the executor or administrator should be set out in full,—not necessarily by items, but the total should be given. A reference to the inventory or appraisement for the purpose of showing the amount collected is insufficient,[32] and, if either the whole or a part of the personal estate has been applied to the payment of the debts, the petition should so state, giving amounts paid, and amount remaining in the possession of the executor or administrator applicable to such payment,[33] but it need not aver that all the payments made by the executor or administrator were valid.[34] It is not necessary that the petition give a particular enumeration of the debts, designating the amount owing each creditor. A state-

30 Houck v. Meyer, 23 Or. 10, 17 Pac. 461; Howe v. Kern, 63 Or. 487, 125 Pac. 838, 63 Or. 500, 128 Pac. 818; Shields v. McDowell, 82 N. C. 137; Lynch v. Baxter, 4 Tex. 431; Foley v. McDonald, 46 Miss. 238; Roe v. Swezey, 10 Barb. (N. Y.) 247; Guy v. Gericks, 85 Ill. 428; Stuart v. Allen, 16 Cal. 473.

31 Renner v. Ross, 111 Ind. 269, 12 N. E. 508; Meadows v. Meadows, 73 Ala. 356; Sharp v. Sharp, 76 Ala. 312.

32 Pryor v. Downey, 50 Cal. 388.

33 Blount v. Pritchard, 88 N. C. 445.

34 Conger v. Cook, 56 Iowa, 117, 8 N. W. 782.

ment of their aggregate amount, and also of the amount unpaid, is all that is necessary.[35]

The petition should be verified, but such verification may be upon information and belief.[36]

Under the Oregon practice, in addition to the allegations required in such petition in Nebraska, it must set out the probable value of the different portions of the real estate, the amount and nature of the liens thereon, if any, the residences, so far as known, of the heirs or devisees, and if it is desired to sell the whole or any part of the real estate before the sale of the personal property, the petition shall set out the reasons therefor.[37] The place of residence of each heir must be given, if known, and not his address.[38]

§ 315. Description of lands.

The statute requires the petition to contain a description of all the real estate of which the testator or intestate died seised. This requirement is necessary to give the judge jurisdiction of the matter, and an omission to make these averments will render the sale liable to be set aside.[39] The question as to what constitutes such a description as will enable the court to acquire jurisdiction to grant the license has been variously determined by different supreme courts. The rule which is generally applied in the best considered

35 Collins v. Farnsworth, 8 Blackf. (Ind.) 575; Moffitt v. Moffitt, 69 Ill. 641.

36 Howland v. Carroll, 81 Ill. 224.

37 L. O. L., § 1253; Howe v. Kern, 63 Or. 496, 128 Pac. 819.

38 Smith v. Whiting, 55 Or. 398, 106 Pac. 790.

39 Townsend v. Gordon, 19 Cal. 188; Boland's Estate, 55 Cal. 310.

cases is that the county, township and range, and the subdivision of the section, should be given, or the description, if by metes and bounds or lot and block, be such that a person reading it would know the location of the land.[40] Where the petition failed to give the county, but the land was otherwise accurately described in the proceedings, the sale was held not affected by the faulty description in the petition.[41] The petition should always be such as to enable the court, aided by its judicial knowledge of public surveys, to know just where the lands of decedent are situated.[42]

It is not necessary to set out the nature and character of decedent's title.[43]

The petition should set out the condition and value of each separate tract. "Unimproved" is a sufficient description of the condition of a vacant lot in a town or city, or of wild, uncultivated land.[44] A statement of its condition without giving the value as near as it can be done is defective as against direct attack on appeal from the order of sale.[45]

40 Doe d. Hamilton v. Hardy, 52 Ala. 291; Wright's Heirs v. Ware, 50 Ala. 549; Smitha v. Flournoy's Admr., 47 Ala. 345; Blackwell v. Townshend, 91 Ky. 609, 16 S. W. 587.

41 Bryan v. Bauder, 23 Kan. 95; Howbert v. Heyle, 57 Kan. 58, 27 Pac. 116.

42 Money v. Turnipseed, 50 Ala. 499.

43 Tyndale v. Stanwood, 182 Mass. 534, 66 N. E. 23.

44 Richardson v. Butler, 82 Cal. 174, 23 Pac. 9.

45 In re Cook, 137 Cal. 184, 69 Pac. 998. It is held by some courts that when the petition is filed by an executor, it should show affirmatively that the will did not confer on him any power to sell real estate for any purpose, and that if such allegation was omitted, confirmation should be refused. There is no such requirement in this state.

Form No. 143.

PETITION OF EXECUTOR OR ADMINISTRATOR FOR LICENSE TO SELL REAL ESTATE.

In the District Court of ——— County, Nebraska.

In the Matter of the Application of C. D., Administrator, for License to Sell Real Estate.

Your petitioner, C. D., respectfully represents unto the court that on the ——— day of ———, 19—, letters of administration upon the estate of said A. B., deceased, were issued to him out of and under the seal of the county court of said county; that the debts allowed against said estate amount to the sum of ——— dollars ($———), and the costs of administering said estate will amount to about the sum of ——— dollars ($———); that the allowance made by said county court to E. F. for the support of herself and the minor children of said A. B. will amount to the sum of ——— dollars ($———), and that the total indebtedness of said estate will amount to about the sum of ——— dollars ($———); that the personal estate that has come into the hands of your petitioner amounts to the sum of ——— dollars ($———), and that all the personal assets of said estate have been reduced by him to possession; that he has paid from said personal assets upon the debts of said estate the sum of ——— dollars ($———), and upon allowances for support of widow, E. F., and expenses of administration, the sum of ——— ($———), and there still remains in his hands, undisposed of, personal assets of said estate of the value of ——— dollars ($———); that the following described real estate is all that belongs to said estate, to wit [describe each tract or lot of land, giving nature, extent, and value of improvements upon each separate tract or lot, and give value of the lands]; that, for the purpose of paying such debts, charges, and expenses, it is necessary to sell so much of said real estate as will bring the sum of ——— dollars ($———).

The names and residences of the heirs at law and next of kin of said decedent, and of all persons interested in said estate, are as follows: [Give names and residences, and age, if minors, of each of them.]

Your petitioner therefore prays that a license may be granted to him to sell so much of said real estate as may be necessary to pay said debts and expenses, and the expenses of this proceeding, and for such other relief as may be just and equitable.

(Signed) C. D.,
By H. C. M., His Attorney.

Form No. 143a—Oregon.

PETITION FOR LICENSE TO SELL REAL ESTATE.

[Title of Cause and Court.]

C. D., executor of the estate of A. B., deceased, respectfully represents unto said court that he has sold all the personal property belonging to said estate which is applicable for the payment of debts for the sum of $———, and that said amount has been applied by him in the payment of the debts of said estate and the costs and charges of administration, and that the following charges, expenses and claims against said estate are still unsatisfied, ———, and that no other debts have been presented to your petitioner for allowance, and that there are no other demands against said estate so far as your petitioner has been able to ascertain.

That said A. B. died seised of the following described real estate, ———, that said first described tract of land consists of an improved farm of ——— acres, all of which is capable of cultivation with a dwelling-house, barns and outbuildings thereon, all in a good state of repair, and is of the probable value of $———; that said last described tract of land consists of ——— acres unimproved and unfenced, with some scattering timber thereon of small value, and that the probable value of said tract is the sum of $———.

That the names, ages and residences of the devisees of said A. B. are as follows: L. B., age ——— years, residence ———; M. B., age ——— years, residence, ———; that it is necessary to sell the whole or a part of said above-described real estate for the purpose of paying the remainder of the debts of said estate and the charges and expenses of administration.

Your petitioner therefore prays that a citation issue to the devisees of said deceased to appear at the ——— term of said court to show cause, if any there be, why an order of sale should not be made authorizing and empowering your said petitioner to sell said lands or so much thereof as may be necessary for the payment of said residue of debts, charges and expenses of administration.

Dated this ——— day of ———, 19—.

C. D.,
Executor of the Estate of A. B., Deceased.
By W. M. L., His Attorney.

[Add verification.]

§ 316. Order to show cause.

"If it appears from the petition that there is not sufficient personal estate in the hands of the executor or administrator to pay the debts outstanding against the deceased and the expenses of administration, and that it is necessary to sell the whole or some portion of such real estate for the payment of such debts, the judge of the district court shall thereupon make an order directing all persons interested in the estate to appear before him at a time and place to be therein specified, not less than six weeks nor more than ten weeks from the time of making such order, to show cause why a license should not be granted to the executor or administrator applying therefor to sell so much of the real estate of the deceased as shall be necessary to pay such debts." [46]

The order may be made by the judge at any time, either in open court or at chambers,[47] anywhere within the district.

Under the Oregon practice, a citation issues to the devisees and heirs therein mentioned, and to all others unknown, if any such there be, to appear at a term of court not less than ten days after service of the citation to show cause, if any there be, why an order of sale should not issue.[48] When service is by publication, the return day must be after such publication is completed.[49]

[46] Rev. Stats., c. 17, § 184, [1448].

[47] Rev. Stats., c. 17, § 187, [1451]; Stack v. Royce, 34 Neb. 383, 52 N. W. 675.

[48] Howe v. Kern, 63 Or. 398, 125 Pac. 838, 63 Or. 500, 128 Pac. 818; L. O. L., § 1254.

[49] Smith v. Whiting, 55 Or. 393, 106 Pac. 791.

The personal representative and other parties interested in the estate cannot waive the issue of an order to show cause. It is absolutely necessary to confer jurisdiction upon the court, and a sale made without conveys no title, and is void,[50] and its validity may therefore be attacked in a collateral proceeding.

The order must substantially comply with the statute. It should be addressed to all persons interested in the estate but need not necessarily give the names of all the heirs, devisees, legatees or persons interested in the lands.[51]

Its contents should be sufficient to apprise any party reading it of the object and prayer of the petition and the time and place where it will be heard.[52] If it fails to give either the time and place for hearing, the heirs are not bound by it, and the court does not acquire jurisdiction thereby to grant a license.[53]

It has been held that the order should also contain a description of the land sought to be sold, and that if it is incorrectly described, the court is without jurisdiction, and a sale under a license so issued is void.[54] Our statute does not state just what the order shall contain, and it would seem that the general statement

50 Teverbaugh v. Hawkins, 82 Mo. 180; French v. Hoyt, 6 N. H. 370; Gerrard v. Johnson, 12 Ind. 637; Hawkins v. Hawkins' Admr., 28 Ind. 71; Gibbs v. Shaw, 17 Wis. 204.

51 Stack v. Royce, 34 Neb. 833, 52 N. W. 675; Hobson v. Ewan, 62 Ill. 146; Bostwick v. Skinner, 80 Ill. 158.

52 Gibson v. Roll, 27 Ill. 88; Jackson d. Grignon v. Astor, 1 Pinn. (Wis.) 137.

53 Finch v. Sink, 46 Ill. 169; Gibson v. Roll, 27 Ill. 88; Johnson v. Clark, 18 Kan. 157.

54 Lyon v. Vanatta, 35 Iowa, 528.

of the object and prayer ought to be enough to apprise interested parties of what land it is desired to sell.[55]

Form No. 144.

ORDER TO SHOW CAUSE WHY LICENSE SHOULD NOT BE GRANTED TO SELL REALTY.

In the District Court of ——— County, Nebraska.

In the Matter of the Application of C. D., Administrator, for License to Sell Real Estate.

Now, on this ——— day of ———, 19—, C. D., administrator of the estate of A. B., deceased, having presented his petition under oath praying for license to sell the following described real estate of the said A. B. [describe real estate the same as in the petition], or a sufficient amount thereof to bring the sum of ——— dollars ($———), for the payment of debts allowed against said estate, and allowances and costs of administration, for the reason that there is not a sufficient amount of personal property in the possession of said C. D., administrator, belonging to said estate, to pay said debts, allowances, and costs.

It is therefore ordered that all persons interested in said estate appear before me at chambers in the city of ———, in said county, on the ——— day of ———, 19—, at the hour of 10 o'clock A. M., to show cause, if any there be, why a license should not be granted to said C. D., administrator, to sell so much of the above-described real estate of said decedent as shall be necessary to pay said debts and expenses.

It is further ordered that a copy of this order be served upon all persons interested in said estate by causing the same to be published for four successive weeks in the ———, a newspaper printed and published in said county of ———.

(Signed) C. H.,
Judge of the District Court.

§ 317. Service of order to show cause.

If all persons interested in said estate signify in writing their assent to the sale, the service of notice

[55] In re Roach, 139 Cal. 17, 72 Pac. 393.

may be dispensed with.[56] Assenting to the sale does not do away with the order to show cause, but with service of it.[57] Service, therefore, can only be dispensed with when all the heirs or devisees are of full age and competent.[58] There is authority to the effect that a guardian may sign a consent to sale in behalf of his ward.[59]

If such assent is not filed, service of the order to show cause is had by personal service on all persons interested, at least ten days before the date set for hearing, or by publication for four successive weeks in such newspaper as the court shall order.[60] The method of service is optional with the district judge, and it must be strictly complied with. He may order service by publication, though all interested parties are residents of the county in which the application is filed.[61] When service is had by publication, the order must be published for four successive weeks in the newspaper designated and none other. Substituting another paper, or publication for a shorter time, is good cause for refusing to confirm the sale.[62]

Proof of publication must be made in the usual way by the affidavit of the printer, foreman or principal clerk, or other person knowing the same, and such affidavit is deemed conclusive on collateral attack.[63]

56 Rev. Stats., c. 17, § 185, [1449].

57 Section 316, *supra*.

58 Winston v. McLendon, 43 Miss. 254; Greenman v. Harvey, 53 Ill. 486; Ingersol v. Mangam, 84 N. Y. 622.

59 Helms v. Love, 41 Ind. 210; Smock v. Reichwine, 117 Ind. 194, 19 N. E. 776.

60 Rev. Stats., c. 17, § 185, [1449].

61 Fleming v. Bale, 23 Kan. 88; Fudge v. Fudge, 23 Kan. 416.

62 Townsend v. Tallant, 33 Cal. 45; Valle v. Fleming, 19 Mo. 454.

63 Finch v. Sink, 48 Ill. 169.

Any of them may also prevent the sale by giving a bond to the judge of the district court with such sureties as he may direct and approve, with condition to pay all the debts and expenses of administration so far as the goods, chattels, rights, credits and effects of the deceased shall be insufficient therefor, within such time as the judge may direct. The bond is for the security and may be prosecuted for the benefit of the creditors, as well as the executor or administrator.[64]

Application for permission to give the bond should be by motion to the district judge at chambers, and may be made at any time before license is issued.[65]

Form No. 145.

ORDER OF JUDGE OF DISTRICT COURT FIXING AMOUNT OF BOND ON APPLICATION TO PREVENT SALE.

In the District Court of ——— County, Nebraska.

In the Matter of the Application of C. D., Administrator, for License to Sell Real Estate.

Now, on this ——— day of ———, 19—, on motion of H. C. M., attorney for E. F., heir of said A. B., for leave to file a bond to stay the sale of the real estate described in the petition of said administrator, it is ordered that said proposed sale be not made, provided said E. F. shall give a bond in the sum of ———, with good and sufficient sureties to be approved by me, conditioned to pay all the debts and expenses of administration of said estate, so far as the goods, chattels, rights, credits, and effects of the deceased shall be insufficient therefor, within ——— months from this date.

(Signed) W. M.,
District Judge.

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64 Rev. Stats., c. 17, §§ 191, 192, [1455], [1456]. It is doubtful if such bond entirely releases the *quasi* lien of creditors. If the doctrine laid down in Thompson v. Pope, 77 Neb. 338, 109 N. W. 498, applies, the executor or administrator would still have recourse on the land if unable to collect from the bondsmen.

65 See Davis v. Kendall, 161 Ind. 412, 68 N. E. 894.

Form No. 146.

BOND TO PREVENT SALE OF REAL ESTATE.

Know all men by these presents, that we, E. F., of the county of ——— and state of Nebraska, as principal, and G. H. and L. M., of said county, as sureties, are held and firmly bound unto the judge of the district court of said ——— county, Nebraska, in the penal sum of ——— dollars, for which payment well and truly to be made we do hereby jointly and severally bind ourselves, our heirs, executors, administrators, and assigns.

Dated this ——— day of ———, 19—.

Whereas, C. D., administrator of the estate of A. B., deceased, has presented to the Honorable W. M., judge of the district court of said county, his petition to sell the real estate of said A. B., deceased, for the purpose of paying the debts of the deceased and the expenses of administration:

Now, therefore, the condition of this obligation is such that, if the above-bounden E. F. shall pay all the debts of said deceased and the expenses of administration, so far as the goods and chattels, rights and credits, of the deceased shall be insufficient therefor, within ——— months from this date, then this obligation shall be null and void; otherwise to remain in full force and effect.

(Signed) E. F.
G. H.
L. M.

The foregoing bond approved by me both as to form and sufficiency of surety this ——— day of ———, 19—.

(Signed) W. M.,
Judge District Court, ——— County, Nebraska.

In Oregon personal service of the citation must be had on heirs or devisees, known and residents of the state, in the same manner as a summons. Service on nonresidents and unknown parties is had by publication in a newspaper selected by the executor or administrator for not less than four weeks, or such further time as the court or judge may prescribe. When service is had by publication, the citation must contain a brief description of the property sought to be sold.[66]

[66] L. O. L., § 1255.

Service of the order in the manner above provided is jurisdictional.[67]

§ 318. Payment of debts to prevent sale.

The heirs or devisees may at any time before the sale is completed relieve the lands of the lien by paying the debts,[68] and a *bona fide* purchaser from an heir or devisee would have the same right.[69] The party desiring to thus release the land must make an absolute tender of the amount due; he is not entitled to an assignment of the claim or claims unpaid.[70]

§ 319. Hearing on the application.

At the time and place fixed for the hearing, or at the time to which the same may have been adjourned, upon proof of the service of the order to show cause, or the waiver thereof, the court may hear the testimony of all parties interested in the application, either in favor of or in opposition to the same.[71] The executor or administrator may be produced and examined on oath, and process to compel their attendance and testimony may be issued with like effect as in other cases.[72]

There are no fixed rules for pleadings, and the granting of continuances is within the discretion of the court. Answers or objections may be filed by the

67 Smith v. Whiting, 55 Or. 393, 106 Pac. 791; Browne v. Coleman, 62 Or. 461, 125 Pac. 278.

68 Davis v. Kendall, 161 Ind. 412, 68 N. E. 894; Sagers v. Mead, 171 Pa. 349, 33 Atl. 355.

69 Fletcher v. Livingston, 123 Mass. 388, 26 N. E. 1001.

70 Weil v. Clark's Estate, 9 Or. 387.

71 Rev. Stats., c. 17, § 186, [1450].

72 Rev. Stats., c. 17, § 188, [1452].

heirs or devisees and also by persons claiming as grantees under them.[73]

The appointment of the administrator cannot be attacked unless the record clearly shows that he was without jurisdiction to act as such officer.[74] If the proceedings for his appointment are regular on their face and the irregularities alleged are not jurisdictional defects, they are not a defense.[75] Defects or irregularities in the petition for sale, order and service may be raised by objection.

The petition must set out all the allegations required by the statutes. If it omits material facts such as the amount of personal property on hand or a description of the property, the objections should be sustained.[76] The court has the right to permit amendments of the petition by making it more definite, but cannot permit it to be amended to supply omissions which are jurisdictional.[77]

The duty of the court in a proceeding for the sale of land for payment of debts is to conserve the estate, and the question to be determined is, are the personal assets of the estate in the hands of the executor or administrator, together with those which it is his duty to reduce to possession, sufficient to pay the debts of the estate and the costs and expenses of administration.[78]

73 In re Campbell's Will, 170 N. Y. 84, 62 N. E. 1070; Newell v. Johns, 128 Ala. 584, 29 South. 609.

74 McAnnulty v. McClay, 16 Neb. 418, 20 N. W. 266.

75 Waldow v. Beemer, 45 Neb. 628, 63 N. W. 918.

76 Wright v. Edwards, 10 Or. 298.

77 Brown v. Powell, 45 Ala. 149.

78 Sasse v. Sasse, 93 Neb. 341, 141 N. W. 1026; In re Parker's Estate, 72 Neb. 601, 101 N. W. 233; Waldow v. Beemer, 45 Neb. 628, 63 N. W. 918.

§ 320. Hearing—Insufficiency of personal property.

If there are collectible assets belonging to the estate sufficient to pay all the debts, the court is without authority to grant the license.[79] The term "collectible assets" includes only such as are subject to the possession and control of the administrator or executor within this state.[80]

In Oregon, when the license is applied for before the personal estate is exhausted, it must be made to appear to the court that it is for the best interest of the estate or of the devisees, legatees or heirs thereof that it should be sold before the personal property.[81]

It should appear that all reasonable efforts have been made to relieve the real estate, though old debts due the estate and claims in litigation, the outcome of which is doubtful, need not be considered.[82] Personal assets which have passed into the hands of heirs or legatees, specific bequests excepted,[83] should be recovered and applied on the debts and costs and charges,[84] and if a will creates a fund for the purpose of taking care of the debts, it must be exhausted.[85]

When the application is made by an administrator *de bonis non,* it is a good defense that there is still a balance due him from his predecessor, and unless he can show that the same cannot be collected from such predecessor or bondsmen, or that even if it were col-

79 Sasse v. Sasse, 93 Neb. 641, 141 N. W. 1026.

80 Section 260, *supra.*

81 L. O. L., § 1252.

82 Schroeder's Estate, Myr. Prob. (Cal.) 7; Bridge v. Swain, 3 Redf. Sur. (N. Y.) 487.

83 In re Noon's Estate, 49 Or. 293, 88 Pac. 673, 90 Pac. 673.

84 Hollman v. Bennet, 44 Miss. 322.

85 Sasse v. Sasse, 93 Neb. 641, 141 N. W. 1026.

lected there would still be a deficiency, it should be denied.[86] If the deficiency is caused by the acts of the executor or administrator equivalent to a *devastavit,* the courts are divided on the question whether the lands should be made available for the debts. The New York rule is that it does not relieve the estate from liability,[87] while other courts hold it a good defense.[88] It is not necessary that the exact amount of the deficiency be determined. The application may be made in the early part of the administration. The right to the sale depends on an insufficiency and does not require the striking of a balance.[89] The burden of proof is on the applicant to establish the allegations of his petition.[90]

§ 321. Hearing—Debts and expenses of administration.

When the petition is filed after the allowance of claims by the county court, the district judge is bound by the order allowing them, and no defense to them can be set up.[91] It has been held, however, that where one claim was the basis of the application and such a state of facts existed as would justify a court of equity in setting aside a judgment, all the proper parties being before the court, the license was properly refused.[92]

86 Scherer v. Ingerman, 110 Ind. 429, 11 N. E. 8.

87 In re Bingham, 127 N. Y. 206, 27 N. E. 1056.

88 Foley v. McDonald, 46 Miss. 238.

89 Abila v. Burnett, 38 Cal. 658; Succession of Tabor, 33 La. Ann. 343; Shoemate v. Lockridge, 53 Ill. 503.

90 Garrett v. Bruner, 59 Ala. 513; Lawrence's Appeal from Probate, 49 Conn. 411.

91 Section 308, *supra;* Smith v. Smith's Admr., 27 N. J. Eq. 445.

92 Hillebrant v. Burton's Heirs, 17 Tex. 140.

The application may be made before claims are allowed.[93] In that case there would be two lines of defense open to a party alleging that the indebtedness was less than set out in the petition. He can either file a plea in the nature of a plea in abatement, setting up that alleged demands are being contested and that it is impossible to determine at present whether or not there is a deficiency of assets, or he may deny that such indebtedness exists. Of course the court or judge has no authority to hear and determine claims against the estate in the proceeding, but there would appear to be no good reason why he could not determine at least whether they were *prima facie* debts contracted by the deceased in his lifetime and not barred by the statute of limitations. As a matter of fact, more licenses for the sale of real estate are granted before all claims are allowed than after.

Costs and expenses of administration are both matters that eventually must be decided by the county court, and can only be estimated at the hearing.

§ 322. Hearing—Lands subject to sale.

Any land or interest therein the title to which was vested in decedent at the time of his death, except the homestead exemption,[94] may be sold for the benefit of his creditors, though such lands may have been sold by the heirs or devisees, or their title have passed to others by descent or devise.[95] A reversion or re-

93 Cahill v. Bassett, 66 Mich. 407, 33 N. W. 772.

94 Bixby v. Jewell, 72 Neb. 755, 101 N. W. 1026; Brandon v. Jansen, 74 Neb. 569, 104 N. W. 1054; Holmes v. Mason, 80 Neb. 448, 114 N. W. 606.

95 Rev. Stats., c. 17, § 194, [1458]; Drinkwater v. Drinkwater, 4 Mass. 354; Willard v. Nason, 5 Mass. 240.

mainder,[96] an interest as vendee in an executory contract for the sale of lands,[97] or any equitable interest or estate of inheritance is subject to sale under license, excepting only a leasehold interest, which is personalty and can be sold as such.[98]

Land may be sold though the title is in litigation. An application under such circumstances is inadvisable, and the conditions may be such as to require the court to refuse to grant the license.[99]

Sales for payment of debts when the widow was entitled to dower were always subject to such estate unless she had previously been endowed with other lands.[100] As she now takes an estate in fee by virtue of the marital relation, her rights are no greater than those of the heirs.[101]

There is authority to the effect that where the proceedings for the sale are before a court of general jurisdiction, and all the parties are before the court, the title to the lands may be determined in the action or proceeding, and that a decree refusing the license and quieting title in the heirs was conclusive and not subject to collateral attack except in a direct proceeding for that purpose.[102]

96 Valle v. Bryan, 19 Mo. 423; Lundsford v. Jarrett, 2 Lea (Tenn.), 579.

97 Hovarka v. Havlik, 68 Neb. 14, 93 N. W. 990; Rev. Stats., c. 17, § 208, [1472]; Cutler v. Mecker, 71 Neb. 732, 99 N. W. 514; L. O. L., § 1266.

98 Mulloy v. Kyle, 26 Neb. 313, 41 N. W. 1117.

99 Martin v. Bond's Estate, 64 Neb. 868, 90 N. W. 910.

100 Motley v. Motley, 53 Neb. 375, 73 N. W. 738.

101 Rev. Stats., c. 17, § 1, [1265].

102 Parker v. Wright, 62 Ind. 398; Gavin v. Graydon, 41 Ind. 559.

Granting or refusing a license is largely a matter of discretion, and when no jurisdictional questions are involved, the judgment of the court will not be disturbed unless an abuse of discretion injuriously affecting the parties interested clearly appears.[103]

§ 323. Order of sale or license.

If the district judge shall be satisfied after a full hearing on the petition and an examination of the proofs and allegations of the parties interested that a sale of the whole or some portion of the realty is necessary for the payment of the debts and expenses of administration, or if such sale shall be assented to by all persons interested, he shall thereupon make an order of sale authorizing the executor or administrator to sell the whole or so much of the real estate of the deceased as is necessary for the payment of the valid claims against the estate and the charges of administration, which must specify the lands to be sold and direct the order in which the sale shall be made.[104]

Lands of a testator which for any reason pass to his heirs must be sold in preference to that which is devised, and in no case should land which has been sold by an heir or devisee be ordered sold until that in their possession or in the possession of the personal representative is disposed of.[105]

Under the Oregon practice, where the debts for which a sale is sought are secured by mortgage, the mortgaged property must first be sold.[106]

103 In re Parker's Estate, 72 Neb. 601, 101 N. W. 233.

104 Rev. Stats., c. 17, §§ 193, 194, [1457], [1458]; L. O. L., § 1256; Smith v. Whiting, 55 Or. 399, 107 Pac. 790.

105 Rev. Stats., c. 17, § 194, [1458].

106 Howe v. Kern, 63 Or. 594, 125 Pac. 834.

Lands specifically devised or devised not chargeable with debts should not be sold until other available property is disposed of. There is no preference between specific devises, each being equally liable after the other property is exhausted.[107]

If a part of the lands, sufficient to pay the debts, cannot be divided without injury or loss to the estate, the court may order the entire tract or lot sold.[108] The order should specify the terms of sale, whether for cash or on credit. If on time, the terms must, in Nebraska, be not less than one-fourth cash and the balance, due in not exceeding three years, secured by mortgage on the premises.[109]

The description of the lands in the order of sale should be sufficiently definite to fix the location and quantity of each tract.[110] The license may authorize him to sell enough lands from certain described tracts to bring the necessary amount.[111] If the license authorizes the sale of only a part of the lands, it will be presumed that the court found that the sale of more was not necessary, and if they do not sell for enough to pay the debts and costs and charges of sale, a new proceeding must be instituted for the sale of other lands. The court cannot issue a supplementary license on the old petition.[112] Before the sale is made where the proceedings are before the judge sitting in cham-

107 Howe v. Kern, 63 Or. 594, 125 Pac. 834, 128 Pac. 818.

108 Rev. Stats., c. 17, § 193, [1457]; L. O. L., § 1256.

109 Rev. Stats., c. 17, § 200, [1464]; L. O. L., §§ 1256, 1257.

110 Bloom v. Burdick, 1 Hill (N. Y.), 130; Graham v. Hawkins, 38 Tex. 628.

111 Richardson v. Butler, 82 Cal. 174, 23 Pac. 9.

112 Ackley v. Digert, 33 Barb. (N. Y.) 176; Cunningham v. Anderson, 107 Mo. 371, 15 S. W. 972.

bers, the petition and the license must be filed in the office of the clerk of the district court of the county from which letters were issued to the personal representative. The authority to sell under license issued at chambers is established by the grant of the license, and the filing of a copy of the same together with the petition with the clerk of the court. It is immaterial whether the lands are situated in the county where administration was granted or not.[113] The order of the county court issuing or refusing to issue a license is a final one and subject to review by the supreme court.[114]

§ 324. Additional bond.

The district judge has power to require a further bond of the executor or administrator in all orders for sales of real estate, if he deems it necessary, and where more land than is necessary to pay the debts is ordered sold, a bond must be given to the district judge by the representative conditioned to account for all the proceeds that remain after the payment of the debts and charges, and to dispose of the same according to law.[115] It may be approved by the judge or clerk of the district court.[116]

Under the Oregon practice, an additional bond is required unless the penalty of the administration bond is at least double the amount of the personal property in the possession of the representative, or that may

113 Stack v. Royce, 34 Neb. 833, 52 N. Y. 675; Veeder v. McKinley-Lanning L. & T. Co., 61 Neb. 892, 86 N. W. 982.

114 Possenecker v. Entermann, 64 Neb. 409, 89 N. W. 1033; In re Smith's Estate, 43 Or. 595, 73 Pac. 336, 75 Pac. 133.

115 Rev. Stats., c. 17, §§ 189, 193, [1453], [1457].

116 Melcher v. Schluter, 5 Neb. Unof. 445, 98 N. W. 1082.

come into his possession, plus double the amount of the probable rents and profits of the real estate, and also plus double the amount of the probable receipts from the sale of the land. It must be conditioned to account for and dispose of the proceeds of the sale according to law, approved by the county judge and filed with the clerk of the court before the sale.[117]

The proceeds of any real estate sold for the payment of debts and charges are deemed assets in the hands of the executor or administrator, the same as if they were a part of the personalty, and himself and sureties upon his bond are chargeable and accountable therefor.[118] Courts and judges should in all cases require adequate security for the funds derived from the sale of a decedent's lands, in order that such funds may be properly accounted for, and no license for the sale of any real estate should be granted except upon condition that abundant security be given. Where a sale was had and no bond given, the court, on appeal from the order of confirmation, required the administrator to file a bond in double the amount of the proceeds of the sale, within twenty days, the sale to be set aside in case it was not filed.[119]

Form No. 147.

LICENSE TO SELL REAL ESTATE.

In the District Court of ——— County, Nebraska.

In the Matter of the Application of C. D., Administrator of the Estate of A. B., Deceased, for License to Sell Real Estate.

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the application of C. D., administrator of the estate of A. B., deceased, praying for license to sell the following described

117 L. O. L., § 1256; Smith v. Whiting, 55 Or. 399, 107 Pac. 790.

118 Rev. Stats., c. 17, § 191, [1455].

119 McClay v. Foxworthy, 18 Neb. 295, 25 N. W. 86.

real estate [describe lands as in petition and order to show cause]; and it appearing to me from the proof on file that due notice of the time and place of hearing said petition has been given to all persons interested in said estate, as required by law, and it further appearing to me, after full hearing on the petition, and from a consideration of the proofs and allegations of the parties, that the debts allowed [owing by said estate; or, against said estate] amount to the sum of ——— dollars ($———), and that the costs and expenses of administration will amount to the sum of about ——— dollars ($———), and that the personal assets of said estate will not exceed the sum of ——— dollars ($———), and it is therefore necessary to sell [give description of the land, or of that portion thereof which the court finds it necessary to sell] to pay said debts and expenses:

It is therefore ordered and adjudged by me, in consideration of the premises, that the said C. D. be and he hereby is licensed to sell, in the manner required by law, the following described property [describe property to be sold], subject to all liens and encumbrances existing at the death of the said A. B., said lands to be sold in the following order [state order], and upon the following terms, one-third cash, and the balance on three years' time, with interest at six per cent per annum, to be secured by note and mortgage on the premises sold; that prior to said sale, said C. D., administrator, give a bond, as required by law, in the sum of ——— dollars ($———), and immediately after said sale shall make a due return of his proceedings in the premises by virtue of this license.

Given under my hand this ——— day of ———, 19—.

(Signed) W. M.,
Judge of District Court.

Form No. 148.

BOND OF EXECUTOR ON SALE OF REALTY.

Know all men by these presents, that we, A. B., as principal, and C. D. and E. F., as sureties, all of ——— county, Nebraska, are held and firmly bound unto the judge of the district court of ——— county, Nebraska, in the penal sum of ——— dollars, for which payment well and truly to be made we do hereby jointly and severally bind ourselves, our heirs, executors, administrators, and assigns.

Dated this ——— day of ———, 19—.

Whereas, a license has been granted by the judge of the district court of ——— county, Nebraska, to A. B., executor of the estate of L. M., deceased, to sell the following described realty [describe

realty], and the proceeds of said sale will more than pay the debts and charges against said estate:

Now, therefore, the condition of this obligation is such that, if the above-bounden A. B. shall well and truly account for all the proceeds of said sale that shall remain after the payment of said debts and charges, and dispose of the same according to law, then these presents shall be null and void; otherwise to be in full force and effect.

(Signed) A. B.
C. D.
E. F.

Form No. 149.

GENERAL BOND ON SALE OF REALTY.

[First part as in Form No. 148.]

Whereas, a license has been granted by the judge of the district court of ——— county, Nebraska, to A. B., executor of the estate of L. M., deceased, to sell the following described realty [describe realty]:

Now, therefore, the condition of this obligation is such that, if the said A. B. shall well and truly account for all the proceeds of said sale, and administer the same according to law and the will of the said testator, then these presents shall be null and void; otherwise to be in full force and effect.

(Signed) A. B.
C. D.
E. F.

§ 325. Notice of sale.

It is the duty of the district judge granting the license after the bond, if one is required, has been approved, to deliver to the executor or administrator a certified copy of the license, and such personal representative is thereupon authorized to sell the real estate as therein directed within one year after the date of the order, but not after that period.[120] A sale purporting to be under such license after that date is void.[121]

120 Rev. Stats., c. 17, § 195, [1459].

121 Campau v. Gillett, 1 Mich. 416, 53 Am. Dec. 73.

Notice of the time and place of sale must be given by posting the same in three of the most public places of the county in which the land is situated, and by publication in some newspaper printed in the county for three consecutive weeks next before the sale, or, if there be no newspaper printed in the county, then in such other newspaper as the judge may direct. The notice must describe the lands and tenements to be sold with common certainty.[122]

The sale must be held within one week from the date of the last publication,[123] at public auction within the county where the lands are situated, between the hours of 9 o'clock in the morning and the setting of the sun on the same day, and must be held open for one hour, which hour shall be stated in the notice.[124]

The executor or administrator has power, when the terms of sale are not stated in the license, to fix them himself under the same restrictions as the district judge, the matter subsequently coming before the court for approval on confirmation,[125] which terms should be fully set out in the notice.

When the lands are encumbered, it is not necessary that the notice state that they will be sold subject to such encumbrances, for they can be sold no other way.[126]

122 Rev. Stats., c. 17, § 197, [1461].

123 Hartley v. Croze, 38 Minn. 325, 37 N. W. 450.

124 Rev. Stats., c. 17, § 198, [1460].

125 Rev. Stats., c. 17, § 200, [1462].

126 Section 327, *post*. It is a good plan for the applicant to state in his notice that a complete abstract of title to said land is in the hands of the attorney for the executor or administrator and may be examined by a purchaser at any time, and that the title sold will be as appears on the abstract.

Under the Oregon practice, such sales may be either public or private. The court or judge has power, if it appears to be for the best interests of the estate, either on the first hearing or on a subsequent application to order a private sale. In the case of public sales notice is given in the same manner as in sales on execution, but the court may order the sale to be made on the premises.[127] A notice particularly describing the property must be posted four weeks before the sale in three public places in the county and published once a week for the same period in a newspaper of the county, if there be one, or if there be none, then in a newspaper published nearest to the place of sale, or in a newspaper published by the state printer.[128] It must be published for the full twenty-eight days.[129]

When the executor or administrator is authorized to sell at private sale, a notice shall be both posted and published for the same length of time as in the case of sales at auction, which notice must describe the property and terms of sale, and that from and after a certain day named therein he will proceed to sell the real estate described at private sale.[130]

The particular place in the city or village where the sale is to take place should be given,—merely designating the city or village is not sufficient.[131] The notices must be both posted and published for the three successive weeks. Neither of itself is sufficient.[132] Proof of posting and publishing the notices is made in the usual manner by affidavits filed in the district court, and are evidence of the time, place and manner of giv-

127 L. O. L., § 1257.

128 L. O. L., § 1257.

129 O'Hara v. Parker, 27 Or. 174, 39 Pac. 1004.

130 L. O. L., § 1257.

131 Hartley v. Croze, 38 Minn. 325, 37 N. W. 450.

132 Kempe v. Pintard, 32 Miss. 324.

ing the notice.[133] The proof of posting the notice must show where they were posted. The question whether they were the three most conspicuous places in the county is determined by the court in passing on the sufficiency of notice, and if he finds that the notice is sufficient and properly given, such finding is conclusive that the places were the most conspicuous ones.[134]

Form No. 150.

NOTICE OF EXECUTOR'S OR ADMINISTRATOR'S SALE.

In the District Court of ——— County, Nebraska.

In the Matter of the Application of C. D., Administrator of the Estate of A. B., Deceased, for Leave to Sell Real Estate.

Notice is hereby given that, in pursuance of an order of the Honorable W. M., judge of the district court of ——— county, Nebraska, made on the ——— day of ———, 19—, for the sale of the real estate hereinafter described, there will be sold at public vendue to the highest bidder for cash [if on credit, state terms], at the front door of the courthouse in the city of ———, in said county, on the ——— day of ———, 19—, at the hour of 10 o'clock A. M., the following described real estate: [Describe said real estate.] Said sale will remain open one hour.

Dated this ——— day of ———, 19—.

(Signed) C. D.,
Administrator of the Estate of A. B., Deceased.

Form No. 151.

AFFIDAVIT OF POSTING NOTICES.

State of Nebraska,
——— County,—ss.

C. D., being first duly sworn, on oath says that on the ——— day of ———, 19—, he posted notices, of which the foregoing is a true

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133 Rev. Stats., c. 17, § 204, [1468].

134 Dexter v. Cranston, 41 Mich. 448, 12 N. W. 674; Schaale v. Wasey, 72 Mich. 414, 38 N. W. 317; Hugo v. Miller, 50 Minn. 105, 52 N. W. 381.

copy, in the following described public places: [State places where notices were posted, said places being three of the most public places in the said county of ———.]

(Signed) C. D.

Subscribed in my presence and sworn to before me this ——— day of ———, 19—.

(Signed) C. F. D.,
Notary Public.

§ 326. Sales subject to liens.

All such sales of lands are subject to all liens and charges existing thereon at the date of the death of decedent; and in case the estate shall be in any way liable for the amount so secured thereon, the purchaser is required to execute a bond to the personal representative to indemnify the estate against the same.[135] The usual practice is for the purchaser to pay off the liens and deliver the releases to the personal representative. Any agreement between the representative and the purchaser to bind the estate for the payment of the liens is void, and the purchaser can be compelled to pay the amount of his bid and take the property subject to the liens.[136]

§ 327. Oath of executor or administrator.

Every executor or administrator who may be authorized by the court to sell the realty of his decedent shall, before making the sale, take and subscribe an oath before the judge of the district court, or some other officer authorized to administer oaths, to use his best endeavors to dispose of the same to the advantage

135 Rev. Stats., c. 17, § 213, [1477]; In re Vasek's Estate (Neb.), 150 N. W. 1004.

136 Maul v. Hellman, 39 Neb. 222, 58 N. W. 112.

of those interested therein, which oath must be filed with the judge of the district court before the confirmation of the sale.[137] The oath is sufficient if it substantially complies with the wording of the statute,[138] and the sale will not be set aside on confirmation where the oath appears among the other papers in the case, but is not marked as filed.[139]

An oath is not required by the Oregon statutes.

Form No. 152.

OATH OF EXECUTOR OR ADMINISTRATOR ON SALE OF REAL ESTATE.

State of Nebraska,
——— County,—ss.

I, C. D., do solemnly swear that, in the sale of the following described real estate, to wit [describe property to be sold], which I am now about to offer for sale under a license issued to me as executor of the estate of A. B., deceased, by the Honorable W. M., judge of the district court of ——— county, Nebraska, I will exert my best endeavors to sell the same in such manner as will be most for the advantage of all persons interested in said estate.

(Signed) C. D.

Subscribed in my presence and sworn to before me this ——— day of ———, 19—.

(Seal) (Signed) C. F. D.,
Notary Public.

§ 328. Sale.

The sale must be made at the time and place specified in the order,[140] and under the direction of the representative himself. He has no power to delegate

137 Comp. Stats., c. 17, § 203, [1467].

138 Montour v. Purdy, 11 Minn. 384, 88 Am. Dec. 88; Frazier v. Steenrod, 7 Iowa, 339.

139 West Duluth Land Co. v. Kurtz, 45 Minn. 380, 47 N. W. 1134.

140 Rev. Stats., c. 17, § 198, [1462].

his power to an agent, nor is he obliged to act as auctioneer or personally attend to every detail. The law requires him to supervise the sale, and he should be present though the sale be cried by his auctioneer or attorney.[141] If the license gave the terms of the sale, he must strictly comply with them, and in all cases must offer the lands on the terms the notice calls for.[142]

If the land consists of two or more parcels, they should be offered separately.[143] Offering them as one tract would be ground for refusing confirmation,[144] but such sale is not subject to collateral attack.[145] He may sell a part only of the land described in the license,[146] but no more than is described therein.[147]

A sale of more or other land than the license covers, unless sold separately, is not only void as to the excess,[148] but as to the entire tract.[149]

The executor or administrator should use every effort to sell the land for the highest price and on the best terms obtainable.[150] Unlike other sales, he is not

141 Levara v. McNeny, 5 Neb. Unof. 318, 98 N. W. 679; Gridley's Heirs v. Phillips, 5 Kan. 349.

142 Reynolds v. Wilson, 15 Ill. 394; Smelser v. Blanchard, 15 La. Ann. 254.

143 Kinney v. Knoebel, 51 Ill. 112; Jackson v. Newton, 18 Johns. (N. Y.) 355; Bell v. Taylor, 114 Kan. 277.

144 Bunner v. Rand, 19 Wis. 253; Smith v. Scholtz, 68 N. Y. 41; Bouldin v. Ewart, 63 Mo. 430; Foley v. Kane, 53 Iowa, 64, 4 N. W. 821; Nelson v. Bronenberg, 81 Ind. 193.

145 Brown v. Hannah, 132 Mich. 33, 115 N. W. 980.

146 Ewing's Lessee v. Higbee, 7 Ohio St., pt. 1, p. 198.

147 Wakefield v. Campbell, 20 Me. 393.

148 Adams v. Morrison, 4 N. H. 166; Lockwood v. Sturdevant, 6 Conn. 373.

149 Litchfield v. Cudworth, 15 Pick. (Mass.) 23.

150 Pearson v. Moreland, 7 Smedes & M. (Miss.) 609.

obliged to strike off the property to the highest bidder, if he considers the bid below its reasonable market value. He can refuse to consummate the sale in order to prevent a sacrifice of the land, and advertise again,[151] or in his report to the court he may ask to have the sale set aside and the property readvertised and sold again.[152] He has no authority to accept, in payment for the property, anything else than cash, and the note or bond and mortgage given for the deferred payment. Should he accept the personal security of the purchaser, it is a breach of his duty, and he would be liable upon his official bond should a loss ensue thereby, even though he acted prudently and in good faith.[153] Nor can he accept claims or accounts against the estate. He is held liable for the full sum the realty belonging to the estate sold for.[154] In making the sale he acts solely under the order of the court, and can make no other terms with the purchasers than those prescribed in the license and the provisions of the statute.[155] Payment should be made by the actual transfer of the cash required by the bid of the purchaser to the executor or administrator on the date of the sale, or soon thereafter.[156] He has no authority to bind the estate by warranty, though he may so bind himself, if he chooses.[157]

151 Rogers v. Dickery, 117 Ga. 819, 45 S. E. 71.

152 Rohlff v. Estate of Snyder, 73 Neb. 524, 103 N. W. 49.

153 Foster v. Thomas, 21 Conn. 285.

154 Richards v. Adamson's Estate, 43 Iowa, 248.

155 Hamilton v. Pleasants, 31 Tex. 638, 98 Am. Dec. 551; Edmonson v. Garnett, 33 Tex. 259.

156 Durnford v. Degruys, 8 Mart. (La.) 220; State v. Lawson, 14 Ark. 114.

157 Worthy v. Johnson, 8 Ga. 238; Lynch v. Baxter, 4 Tex. 431.

§ 329. Adjournment of sale.

If, at the time appointed for the sale, the executor or administrator shall deem it for the best interests of all persons concerned therein that the sale shall be postponed, he may adjourn the same from time to time, not exceeding in all three months.[158] Power to adjourn a personal representative's sale exists independent of the statute.[159] He should be present at the time and place set for the sale and notify any party present of the adjournment. He cannot delegate to his attorney the power to adjourn a sale at his discretion.[160]

The adjournment may be to a different place than that given in the notice,[161] and be good on collateral attack.[162] Notice must be given by public declaration at the time and place appointed, and, if it be for more than one day, further notice should be given by posting or publishing the same, as the circumstances may permit.[163]

§ 330. Executor or administrator not to be a purchaser.

"The executor or administrator making the sale and the guardian of any minor heir of the deceased shall not, directly or indirectly, purchase or be interested in the purchase of any part of the real estate so sold, and

158 Rev. Stats., c. 17, § 205, [1469].

159 Jewett v. Guyer, 38 Vt. 209; Tinkom v. Purdy, 5 Johns. (N. Y.) 345; Goddard v. Sawyer, 9 Allen (Mass.), 78; Kelley v. Green, 63 Pa. 299.

160 Wolf v. Van Metre, 27 Iowa, 348.

161 Jewett v. Guyer, 38 Vt. 209.

162 Thompson v. Burdge, 60 Kan. 549, 57 Pac. 710.

163 Rev. Stats., c. 17, § 206, [1470].

all sales contrary to the provisions of this section are void, but the guardian may purchase the land for his ward."[164]

The above-cited statute does not make such sales absolutely void in the sense that they convey no title or interest whatever to the purchaser, but voidable; the parties interested having the right to have them set aside by motion or suit, as the condition of the proceedings allow, at any time after being apprised of the facts.[165]

If the personal representative sells to another person, and before confirmation buys the land himself, he is considered as a purchaser at his own sale.[166] The law also forbids him to sell to one who has a vested interest in his estate, so that neither husband nor wife can be a purchaser at the other's sale,[167] or a partnership the land sold by a partner as an executor.[168] Sales of this class come under substantially the same rule as where the personal representative is the purchaser, and can be set aside in the same way.[169]

The widow or an heir or legatee may purchase the land when the sale is made by another party as representative of the estate.[170]

164 Rev. Stats., c. 17, § 199, [1463]; L. O. L., § 1277.

165 Veeder v. McKinley-Lanning L. & T. Co., 61 Neb. 892, 86 N. W. 982; Cole v. Boyd, 68 Neb. 146, 93 N. W. 1003.

166 Woodard v. Jaggers, 48 Ark. 250, 2 S. W. 851; Bland v. Fleeman, 58 Ark. 84, 23 S. W. 4.

167 Scott's Estate v. Gorton's Exrs., 14 La. Ann. 111.

168 Harrod v. Norris' Heirs, 11 Mart. (La.) 297.

169 Musselman v. Eshelman, 10 Pa. 304; Worthy v. Johnson, 8 Ga. 236; Coat v. Coat, 63 Ill. 73; Potter v. Smith, 36 Ind. 231; Smith v. Drake, 23 N. J. Eq. 302.

170 Reinhart v. Seaman, 208 Ill. 448, 69 N. E. 847; Aubuchon v. Aubuchon, 133 Mo. 260, 34 S. W. 569.

§ 331. Confirmation of sale.

The executor or administrator should, as soon as practicable after the sale, file a report of his proceedings in the district court and bring the sale up for confirmation. The sale may be confirmed by the judge at chambers during vacation without the ten days' notice.[171] If the purchaser has not paid the amount of his bid, personal service should be had on him of the order to show cause why the sale should not be confirmed. The personal representative and other persons may be examined on oath concerning the sale, value of the land, etc., and if the district judge shall be of the opinion that the proceedings were unfair, or that the sum bid is disproportionate to the value, and that a sum exceeding the bid at least ten per cent can be obtained, exclusive of the expenses of a second sale, he is required to vacate such sale and direct that another be had in the same manner as though no previous sale had been had.[172]

If it appears to the judge that it was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property, he should make an order confirming the same and directing that conveyances be executed and delivered.[173]

171 Brusha v. Phipps, 86 Neb. 822, 126 N. W. 856.

172 Rev. Stats., c. 17, § 201, [1465]; L. O. L., § 1260; Miller v. Hanna, 89 Neb. 224, 131 N. W. 226; Rohlf v. Estate of Snyder, 73 Neb. 524, 103 N. W. 49.

173 Rev. Stats., c. 17, § 202, [1466]; Saxon v. Cain, 19 Neb. 488, 26 N. W. 385. It was held in this case that when the administrator makes an application to sell a tract of land, is granted a license to sell an undivided seven-eighths interest, sells the same, makes his report and asks for confirmation, the purchaser of such interest cannot have the order or license reviewed on error.

Form No. 153.

RETURN OF EXECUTOR OR ADMINISTRATOR ON SALE OF REAL ESTATE.

In the District Court of ——— County, Nebraska.

In the Matter of the Application of C. D., Executor of the Estate of A. B., Deceased, for Leave to Sell Real Estate.

To the Judge of the District Court of Said County:

I, C. D., administrator of said estate, herewith make return of my proceedings in the sale of the following described real estate [describe property the same as in the license], in pursuance of the license granted me on the ——— day of ———, 19—.

That in pursuance of said license I executed a bond, which was duly approved, and took the oath required by law, before L. M., a notary public of said county, and filed the same with this court, and thereupon I gave public notice of the time and place of said sale by publication of the same for three successive weeks in the ———, a newspaper printed and published in said county; that attached hereto, marked "Ex. A," and made a part of this return, is the affidavit of B. N., foreman of the said ———, of the publication of said notice; and by posting said notice in three of the most public places in said county of ———; that attached hereto, marked "Ex. B," and made a part of this return, is the affidavit of E. F. of posting said notices; that in pursuance of the terms of said notice, and at the time and place mentioned therein [if an adjournment was had, state to what time and place, and how notice thereof was given] I offered said real estate for sale at public auction to the highest bidder for cash, and kept said sale open for one hour, and sold said real estate to E. F. for the sum of ——— dollars ($———), he being the highest bidder therefor; that said sale was in all respects fairly conducted, and I exerted my best endeavors to sell said real estate in such manner as would be for the advantage of all persons interested in said estate; and in my opinion no greater sum than the amount specified can be obtained for the same. All of which is respectfully submitted.

Dated this ——— day of ———, 19—.

(Signed) C. D.,
Administrator of the Estate of A. B., Deceased.

Under the Oregon practice, confirmation of all sales of lands for payment of debts is required. Within ten days after the sale, the executor or administrator shall

make a return of his proceedings to the county court. At any time within fifteen days thereafter any person cited to appear on the application may file his objection to confirmation.[174]

§ 332. Confirmation—Concluded.

An heir or devisee, or his grantee, may appear before the court and show cause why the sale should not be confirmed. It has been held that a purchaser cannot be heard on the return to the order, and is precluded from objecting to his own act in bidding in the property.[175] Upon such hearing the court passes on the regularity of the entire proceedings, but as the jurisdiction of the court to grant the license and the necessity for the sale have already been determined in the hearing on the application, they will be presumed to have been regular.[176] The court therefore passes on the acts of the executor or administrator in making the sale, which include the bond, oath, publication and posting of notices, adjournments and notices of the same, the sufficiency of the price and the right of the bidder to become a purchaser.[177]

Confirmation of a sale is necessary to give it validity.[178] The title does not pass from the estate until the order is made and entered and the deed executed

174 L. O. L., § 1258; In re Seidel's Estate, 64 Or. 320, 130 Pac. 55.

175 Levy v. Riley, 4 Or. 398.

176 Saxon v. Cain, 19 Neb. 488, 26 N. W. 385.

177 Dawson v. Helmes, 30 Minn. 107, 14 N. W. 462; Culver v. Hardenbrugh, 37 Minn. 225, 33 N. W. 792; Allen v. Shephard, 87 Ill. 314; Koehler v. Ball, 2 Kan. 173.

178 In re Seidel's Estate, 64 Or. 325, 130 Pac. 55.

and delivered in pursuance thereof.[179] A deed executed before confirmation will not pass the title.[180]

Confirmation cures irregularities in making the sale, as where the administrator sold the land on credit, when the court required it to be for cash,[181] or where the license is granted to two administrators, and, one refusing to take part in the proceeding, the other qualifies and makes the sale according to law,[182] or a failure to sell the tracts separately, according to the order,[183] or a slight departure from the order of the court as to the terms;[184] provided it appears to the satisfaction of the court that the sale has been fairly conducted, the proceedings regular, no question of jurisdiction involved, and the best possible price obtained. If the land to be sold consists of several tracts, the court may approve and confirm the sale of one or more of them, the sales having been made separately, and vacate the sale of the others; and the fact that one or more sales have been held invalid does not in any manner affect the validity of a deed to the tract or tracts the sale of which was upheld and confirmed.[185]

If mortgaged land is sold for its full value and the administrator pays off the mortgage from the proceeds

179 Valle v. Fleming, 19 Mo. 454; Brown's Appeal, 68 Pa. 53; Greenough v. Small, 137 Pa. 132, 20 Atl. 553.

180 Rea v. McEachron, 13 Wend. (N. Y.) 465.

181 McCully v. Chapman, 58 Ala. 325.

182 Osman v. Traphagen, 23 Mich. 80; Wilkerson v. Allen, 67 Mo. 502.

183 Meadows v. Meadows, 81 Ala. 451, 1 South. 29.

184 Jackson v. Magruder, 51 Mo. 55; Brubaker v. Jones, 23 Kan. 411; Jacobs' Appeal, 23 Pa. 477.

185 Bacon v. Morrison, 57 Mo. 68.

of the sale, confirmation cures his failure to sell subject to the mortgage.[185a]

Except where jurisdictional questions are involved, confirmation is largely a matter within the discretion of the district judge, and his order will be rarely disturbed.[186]

The title in the purchaser dates back to the date the land is struck off to him at the sale; and any lease or contract affecting the land made by the executor, administrator, heir or devisee, or alienee of either, is void as to him.[187]

A purchaser cannot be compelled to pay the entire price for the property until the sale is confirmed and deed ordered. If he then refuses to pay, the executor or administrator may obtain an order from the district court to compel him to comply with his bid, which order is, in effect, a judgment for specific performance, and enforced the same way.[188]

Form No. 154.

CONFIRMATION OF SALE.

In the District Court of ——— County, Nebraska.

In the Matter of the Application of C. D., Executor of the Estate of A. B., Deceased, for Leave to Sell Real Estate.

An order to show cause why the sale of the following described real estate [describe real estate as in license] should not be confirmed, having been made on the ——— day of ———, 19—, and given to all persons interested therein, and it appearing to me that notice was given of the time and place of said sale according to law, that the sale of said real estate was had according to said notice, was legally made

185a In re Vasek's Estate (Neb.), 150 N. W. 1004.

186 In re Estate of Parker, 72 Neb. 601, 101 N. W. 283.

187 Inman's Admr. v. Gibbs, 47 Ala. 305.

188 Maul v. Hellman, 39 Neb. 222, 58 N. W. 112.

and fairly conducted, and that the sum bid is not disproportionate to the value of the property sold,* it is therefore ordered and adjudged by me that the said sale be and the same hereby is confirmed, and that C. D., administrator of the estate of said A. B., deceased, is hereby directed, as such executor, to execute a deed of conveyance to E. F., the purchaser of the above-described premises.

Dated this ——— day of ———, 19—.

(Signed) W. M.,
Judge of District Court, ——— County.

§ 333. Sale of contract interest in land.

When the equity of the decedent in land held by a contract of purchase or bond for a deed is sold, the sale is made subject to all the payments, if any, to become due, and the sale should not be confirmed until the purchaser execute a bond to the executor or administrator for the benefit and indemnity of the person entitled to the interest of the deceased in the land so contracted for, in double the whole amount of payments thereafter to become due on such contracts, with sureties as the judge of the district court shall approve. If there are no further payments to be made, a bond is unnecessary.[189] The conditions of the bond are that the purchaser will make all payments for such land as shall become due after the sale, and fully indemnify the executor or administrator and the person so entitled against all demands and expenses, by reason of any covenants and agreements contained in said contract.[190] Upon the confirmation of such sale, the executor or administrator executes to the purchaser an assignment of the contract, which assignment vests in the purchaser, his heirs and assigns, all the right, title

189 Rev. Stats., c. 17, § 208, [1472]; L. O. L., § 1267.
190 Rev. Stats., c. 17, § 209, [1473]; L. O. L., § 1267.

and interest of the estate in and to the land sold at the time of the sale, and such purchaser has the same rights and remedies against the vendor which the deceased would have were he living.[191]

Form No. 155.

BOND OF PURCHASER OF VENDEE'S INTEREST IN LAND CONTRACT.

Know all men by these presents, that we, E. F., as principal, and G. H., and L. M., as sureties, all of ——— county, Nebraska, are held and firmly bound unto C. D., executor of the estate of A. B., deceased, in the penal sum of ——— dollars [double the amount unpaid on contract or mortgage], for which payment well and truly to be made we do hereby jointly and severally bind ourselves, our heirs, executors, administrators, and assigns.

Dated this ——— day of ———, 19—,

Whereas, on the ——— day of ———, 19—, E. F. purchased at public auction of C. D., as executor of the estate of A. B., deceased, the interest of said estate in a contract for the purchase of the following described realty [describe property as in license], and there is still unpaid on said contract the sum of ——— dollars ($———), payable as follows [state when payments become due]:

Now, therefore, the condition of this obligation is such that, if the said E. F. shall well and truly pay or cause to be paid to R. S., the vendor in said contract, his heirs, executors, administrators, or assigns, all the payments set forth in said contract yet to become due, and fully indemnify said C. D., executor, and all other persons entitled to any interest in said land so contracted as heirs or devisees of said A. B., against all demands, costs, charges, and expenses, by reason of the covenants and agreements in said contract contained, then these presents shall be null and void; otherwise to be and remain in full force and effect.

(Signed) E. F.
G. H.
L. M.

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191 Rev. Stats., c. 17, § 210, [1474]; L. O. L., § 1268.

The foregoing bond and surety approved by me this ——— day of ———, 19—.

(Signed) W. M.,
Judge of the District Court, ——— County.

Form No. 156.

CONFIRMATION OF SALE OF CONTRACT EQUITY IN REAL ESTATE.

[Follow Form No. 154 to *, then say:] And the bond of the purchaser of said premises, E. F., conditioned that said E. F. will make all payments for such land as shall become due after the date of such sale, and will fully indemnify said C. D., executor, and C. B., the heir, of said A. B., against all demands, costs, charges, and expenses by reason of any covenant or agreement contained in the said contract for the purchase of said premises entered into between L. M. and said A. B., having been approved by me both as to form and sufficiency of sureties, it is therefore ordered and adjudged by me that said sale be and the same hereby is confirmed, and C. D., executor of the estate of A. B., deceased, is hereby directed, as such executor, to execute a deed of conveyance to said E. F., the purchaser of the above-described premises.

Dated this ——— day of ———, 19—.

(Signed) W. M.,
Judge of District Court, ——— County.

§ 334. Death of executor or administrator pending proceedings.

When an executor or administrator dies pending the proceedings for the sale, the administrator *de bonis non* may go on with the proceedings, the administration being continued by the same official, but a different person. If the license has not issued, he should be substituted and license granted to him.[192] The same principle applies where his death occurs after license. He should make the sale and report to the court the same as his predecessor would have done,

192 Trumble v. Williams, 18 Neb. 144, 24 N. W. 716.

and the court can empower him to execute and deliver the proper conveyances.[193]

§ 335. Sales by foreign executors or administrators.

When any executor or administrator shall be appointed in any state or territory, or in any foreign country, on the estate of any person dying out of this state, and no executor shall be appointed within this state, the foreign executor or administrator may file a copy of his appointment, duly authenticated, in the district court of the county in which there may be any real estate of the deceased, and upon filing such copy be licensed to sell the real estate for the same purposes and in the same manner as if he were appointed in this state.[194] If the decedent was a resident of this state at the time of his death, and letters testamentary or of administration issued upon his estate in another state or foreign country, such letters would not confer upon his executor or administrator any authority to act in this state in any manner, and a license to sell his real estate in this state could only be granted to an executor or administrator appointed by the county court of that county which was the place of his domicile at the time of his death.[195] If the foreign executor or administrator file a duly authenticated copy of his bond with the district judge granting him the license of sale, and it shall appear therefrom that he is bound by sufficient sureties in the state or country in which

193 Gress Lumber Co. v. Leitner, 91 Ga. 810, 18 S. E. 63; Baker v. Bradsby, 23 Ill. 632; Brown v. Redwyne, 16 Ga. 67.

194 Rev. Stats., c. 17, § 214, [1477].

195 McAnulty v. McClay, 16 Neb. 420, 20 N. W. 266.

he received his appointment to account for the proceeds of the sale for the payment of debts or legacies and charges of administration, no other bond need be required, but, if the foreign bond be not filed, the judge shall require him to give a bond with the same conditions as that of the local administrator, except that the proceeds are to be disposed of according to the law of the state or country where he was appointed.[196] If the license empowers him to dispose of more realty than is sufficient to pay the debts, legacies and charges of administration, he must give a bond conditioned to account for such excess, and dispose of the same according to law.[197]

§ 336. Taxation of costs.

The sale of a decedent's real estate for the payment of his debts is for the benefit of his estate, and the costs of the application, sale and deed should be paid therefrom unless it appear to the district judge on the hearing that the application is unreasonable, and the objections thereto are sustained, in which event the court may, in its discretion, award costs to the party prevailing, and enforce payment thereof.[198]

§ 337. Executor's or administrator's deed.

The deed of an executor or administrator should refer to the authority under which he acted, and contain apt words to convey the estate of the decedent, as distinguished from his own private estate.[199] It

196 Rev. Stats., c. 17, § 215, [1479].

197 Rev. Stats., c. 17, § 216, [1480].

198 Rev. Stats., c. 17, § 220, [1484].

199 Griswold v. Bigelow, 6 Conn. 258; Brown v. Redwyne, 16 Ga. 67; Bobb v. Barnum, 59 Mo. 394; Kingsbury v. Wild, 3 N. H. 30.

should also state that the estate conveyed belonged to the decedent. If the deed recites a compliance with all the formalities required by the statute, it constitutes *prima facie* evidence of the regularity of the proceedings.[200] As an executor's or administrator's deed executed without the order of the court is void, his sole power being derived from a compliance with the statute, enough of the proceedings by which the order was obtained should appear on the face thereof to show his authority therefor, and the fact and circumstances under which it was executed.[201] Mere misrecitals in the deed as to the order of sale or previous proceedings will not invalidate the conveyance of the title, if enough appears from the whole record and proceedings to show the true facts and circumstances under which the deed was made.[202]

The Oregon statute requires the executor's or administrator's deed to set out the date of the order directing the sale, and the book, number thereof, and the page containing the same, and the date of the order confirming the sale, giving the book and page where it is recorded.[203]

200 Chase v. Whiting, 30 Wis. 544; Doe d. Clements v. Henderson, 4 Ga. 148.

201 Goforth's Lessee v. Longworth, 4 Ohio, 129, 19 Am. Dec. 588; Atkins v. Kinnan, 20 Wend. (N. Y.) 241, 32 Am. Dec. 540; Doe d. Clements v. Henderson, 4 Ga. 148, 48 Am. Dec. 216; Tutt v. Boyer, 51 Mo. 425; Watson v. Watson, 10 Conn. 77.

202 Garner v. Tucker, 61 Mo. 427; Thomas v. Le Baron, 8 Met. (Mass.) 355; Lessee of Glover's Heirs v. Ruffin, 6 Ohio, 255.

203 L. O. L., § 1261.

Form No. 156a—Oregon.

EXECUTOR'S OR ADMINISTRATOR'S DEED.

Know all men by these presents, that in pursuance of an order of the Honorable J. K., county judge of ——— county, Oregon, made on the ——— day of ———, 19—, and recorded in Book Number ———, of the probate records of said county, I was licensed by said judge to sell at public auction, in the manner provided by law, the real estate in said order described; that thereupon I gave notice of the time and place of sale as required by law, and at the time and place therein specified sold the real estate hereinafter described at public auction to C. D., of the county of ———, and state of ———, he being the highest bidder therefor; that said sale was on the ——— day of ———, 19—, duly reported to said county judge, and on the ——— day of ———, 19—, an order confirming said sale and directing the execution and delivery of a deed to said purchaser, was made by said judge and entered in Book Number ———, page ———, of the probate records of said county.

[Balance as in Form No. 157.]

Form No. 157.

EXECUTOR'S OR ADMINISTRATOR'S DEED.

Know all men by these presents, that, in pursuance of an order of the Honorable W. M., judge of the district court of ——— county, Nebraska, made on the ——— day of ———, 19—, I was licensed by said judge to sell at public auction, in the manner provided by the law, the real estate hereinafter described; that thereupon I gave notice of the time and place of said sale, as required by law, and at the time and place therein specified, after said sale had been held open one hour, sold said real estate at public auction to E. F., of the county of ———, state of ———, he being the highest bidder therefor; that said sale was thereupon reported to said judge of the district court, and by him in all things confirmed, and I was ordered to make a deed of conveyance of said premises to said purchaser.

Now, therefore, I, C. D., administrator of the estate of A. B., deceased, in consideration of the premises and the sum of ——— dollars ($———) so bid and paid by said E. F., and by virtue of the powers vested in me by said order and proceedings, do by these presents grant, sell, and convey unto the said E. F., and to his heirs and assigns, the real estate described as follows [describe property], with all the hereditaments and appurtenances thereunto belonging or in any wise apper-

taining, to have and to hold the same to him, the said E. F., and to his heirs and assigns, forever.

In witness whereof I have hereunto set my hand this ——— day of ———, 19—.

(Signed) C. D.,
Administrator of the Estate of A. B., Deceased.

Witness:
(Signed) L. M.

State of Nebraska,
——— County,—ss.

On this ——— day of ———, 19—, before me, the undersigned, a notary public, duly commissioned and qualified, in and for said county, personally appeared C. D., administrator of the estate of A. B., deceased, personally known to me to be the identical person whose name is subscribed to the foregoing instrument as grantor, and acknowledged the execution thereof to be his voluntary act and deed as said administrator for the purposes therein expressed.

Witness my hand and official seal the day and year above written.
(Seal) (Signed) C. F. D.
Notary Public.

Form No. 158.

ASSIGNMENT OF LAND CONTRACT BY EXECUTOR OR ADMINISTRATOR.

Know all men by these presents, that, in pursuance of an order of the Honorable W. M., judge of the district court of ——— county, Nebraska, made on the ——— day of ———, 19—, I was licensed by said judge to sell at public auction, in the manner provided by law, the interest of the estate of A. B. as vendee in a contract for the purchase of the real estate hereinafter described; that thereupon I gave notice of the time and place of sale, as required by law, and at the time and place therein specified, after said sale had been held open one hour, sold said interest of said estate as vendee to E. F., he being the highest bidder therefor; that said sale was thereupon reported to said judge of the district court, and the said E. F. filed his bond with said judge as required by law, and the same was approved, and said sale in all things confirmed, and I was ordered to make an assignment of the interest of said estate as vendee in said contract to said purchaser.

Now, therefore, I, C. D., administrator of the estate of A. B., deceased, in consideration of the premises and the sum of ——— dol-

lars ($———) so bid and paid by said E. F., and by virtue of the powers vested in me by said order and proceedings, do by these presents sell, assign, and transfer unto the said E. F., his heirs and assigns, all the right, title, and interest of said estate in and to a certain contract for the purchase of the following described real estate [describe property], which said contract is hereto attached.

In witness whereof I have hereunto set my hand this ——— day of ———, 19—.

(Signed) C. D.,
Administrator of the Estate of A. B., Deceased.

Witness:
L. M.
[Acknowledgment, as in Form No. 157.]

§ 338. Title of purchaser.

The purchaser takes the interest which the deceased had in the land at his death, with all the rights, hereditaments and appurtenances belonging thereto, including growing crops which would pass with the land.[204] The rule of *caveat emptor* applies to the sale, and the prospective purchaser should always investigate the title and inform himself of any existing equities as well as liens,[205] and he cannot have the sale set aside on the ground that the deceased had no title to the property when the records would have disclosed such information to him.[206]

There is considerable authority to the effect that the rule goes no further than to cover defects disclosed by the records, and in the case of a *bona fide* purchaser

204 Backenstoss v. Sahler's Admrs., 33 Pa. 251; McIlvaine v. Harris, 20 Mo. 457, 64 Am. Dec. 196.

205 Motley v. Motley, 53 Neb. 375, 73 N. W. 738; Bingham v. Maxcey, 15 Ill. 295.

206 Beene's Admr. v. Collenberger, 38 Ala. 647; Bennett v. Owen, 13 Ark. 177.

will not reach secret equities attaching to the title.[207] In such case the purchaser could rescind the sale or interpose the defense of no consideration to the action or proceeding to recover the purchase price.[208]

If the land is in the actual possession of other parties, the executor or administrator is under no obligation to put the purchaser in possession, and the latter must himself pay the cost of acquiring what he has bought.[209]

§ 339. Sale of land in which a homestead is included.

The lots or land occupied by decedent as a home during his lifetime are subject to the demands of his creditors, to the extent of the difference between the homestead exemption of two thousand dollars and the value of decedent's interest therein at the time of his death.[210]

There is no proceeding by statute for the sale of lands by the personal representative in order to obtain this difference and apply it on the debts, nor is there any action at law which would reach it. It has been held that the personal representative may apply to the district court for a decree to sell the land in which the widow has a homestead exemption, that the court, by virtue of its general inherent equity powers, has

207 Wilson v. Holt, 18 Ala. 528, 3 South. 321; Banks v. Ammon, 27 Pa. 172; Rorer, Judicial Sales, § 462.

208 Roehl v. Pleasant, 31 Tex. 45, 98 Am. Dec. 515.

209 Rudolph v. Underwood, 88 Ga. 664, 16 S. E. 55.

210 Meisner v. Hill, 92 Neb. 435, 138 N. W. 583; Perry Livestock Co. v. Biggs, 4 Neb. Unof. 440, 94 N. W. 712. The homestead exemption cannot be sold for debts, but according to the decision in the Meisner-Hill case, the liability of the excess above the two thousand dollars is clearly admitted.

jurisdiction to order a sale and the payment of the two thousand dollars of the proceeds to the widow, or as the court may direct for her benefit, the balance to be applied as in other cases.[211]

211 Wardell v. Wardell, 71 Neb. 774, 89 N. W. 674. The holding in the Meisner-Hill case overrules but one point in the Wardell case, i. e., the definition of a homestead. The court concedes that the decision in the Wardell case was what the law and facts called for, but say that the definition of a homestead by Commissioner Ames was too broad, including estates having no debts, when he should have limited it, as was done in the case, to estates where there were debts.

CHAPTER XXVI.

COLLATERAL ATTACK ON PERSONAL REPRESENTATIVE'S SALES.

§ 340. When Action may be Brought.
341. Void and Irregular Sales.
342. Attacking the License.
343. Attacking the License—The Petition.
344. Attacking the License—Order to Show Cause.
345. Jurisdictional Irregularities.
346. Failure to Give Bond.
347. Failure to Take Oath.
348. Notice of Time and Place of Sale.
349. Compliance With the Order of Sale.
350. Purchase by Disqualified Party.
351. Fraud.
352. Rights of Purchaser at Void Sale.

§ 340. When action may be brought.

An heir or devisee, or person claiming under him, can maintain an action to set aside a void sale of his lands by an executor or administrator within ten years from the date of the confirmation of the same.[1] If he is under legal disability when his cause of action accrued, he may bring it within ten years after such disability is removed.[2]

In Oregon the suit must be brought within five years from the removal of disability.[3]

1 Holmes v. Mason, 80 Neb. 448, 114 N. W. 606; Brandon v. Jensen, 74 Neb. 569, 104 N. W. 1054; Hobson v. Huxtable, 79 Neb. 334, 112 N. W. 658; Mitchell v. Campbell, 19 Or. 213, 24 Pac. 456; Fuller v. Hager, 47 Or. 242, 83 Pac. 782.

2 Civ. Code, §§ 16, 17; Albers v. Kozeluh, 68 Neb. 522, 94 N. W. 521, 97 N. W. 646.

3 L. O. L., § 17.

The limitation of time for setting aside irregular sales is five years from the date of confirmation, or if the party be under disability, within five years from the removal of such disability, residence outside of the state being equivalent to disability.[4]

Under the Oregon practice, the statute[5] fixes the limitation at five years, without any saving clause. It would seem, however, that the general provision of law[6] would govern.

In neither case will the action lie if the heir or devisee has received and retained, with knowledge of the facts, any part of the proceeds of the sale,[7] such acts operating as an estoppel even though the sale was void. Nor will equity permit a party to recover the land or a share in it and retain the proceeds of its sale. If he brings suit within the proper time after obtaining knowledge of the facts, the purchaser is entitled to reimbursement, but must account for the use of the premises.[8]

As the action accrues on date of confirmation, it may be brought by a remainderman during the continuance of the previous estate.[9]

4 Rev. Stats., c. 17, §§ 221, 222, [1485], [1486].

5 L. O. L., § 7160.

6 L. O. L., § 17.

7 Mote v. Kleen, 83 Neb. 585, 119 N. W. 1125; Staats v. Wilson, 76 Neb. 204, 107 N. W. 230, 109 N. W. 379; Browne v. Coleman, 62 Or. 461, 125 Pac. 279.

8 Cole v. Boyd, 68 Neb. 146, 93 N. W. 1003; Browne v. Coleman, 62 Or. 461, 125 Pac. 279. In the Cole case the profits received exceeded the taxes and the purchase price and the court held that the plaintiff was under no obligation to offer to reimburse such purchaser.

9 Lyons v. Carr, 77 Neb. 833, 110 N. W. 785; First Nat. Bank of Perry v. Pilger, 78 Neb. 168, 110 N. W. 704. In the case first cited a homestead worth less than two thousand dollars was sold and the pur-

§ 341. Void and irregular sales.

Executor's and administrator's sales which are subject to collateral attack are those which are void in their inception and those which are voidable. The purchaser at a void sale takes no title. Such sale followed by possession operates to disseise the heir or devisee, and if continued for the statutory period ripens into a title by adverse possession.[10] A voidable sale conveys a title which may be terminated at the suit of the lawful owner of the fee.[11]

Void sales of this class consist of sales of homesteads worth under two thousand dollars,[12] sales to parties who are incompetent purchasers under the statutes,[13] and sales in which the court entirely failed to acquire jurisdiction of the proceeding.[14] Voidable sales are those in which the defects and irregularities in the proceedings were not such as to entirely deprive the court of power to act, as where the court did comply

chaser took possession. An action to quiet title was brought by the widow and heirs more than ten years after the youngest child became of age. It was held that the sale was void at its inception, that the holder of the fee could have maintained an action during the continuance of the life estate, but that the action had become barred as to all the parties by the statute.

10 Mitchell v. Campbell, 19 Or. 198, 24 Pac. 455.

11 Veeder v. McKinley-Lanning L. & T. Co., 61 Neb. 892, 86 N. W. 982.

12 Tindall v. Peterson, 71 Neb. 160, 99 N. W. 659; Bixby v. Jewell, 72 Neb. 755, 101 N. W. 1026; Holmes v. Mason, 80 Neb. 448, 114 N. W. 606; Hobson v. Huxtable, 79 Neb. 334, 112 N. W. 658.

13 Rev. Stats., c. 17, § 199, [1463]; Cole v. Boyd, 68 Neb. 146, 93 N. W. 1003.

14 Mitchell v. Campbell, 19 Or. 198, 24 Pac. 455; Smith v. Whiting, 55 Or. 393, 106 Pac. 790.

with the statute but the parties failed to take the steps necessary to show that it had done so.[15]

In the case of any action relating to real estate sold by an executor or administrator in which an heir or person claiming under him shall contest the validity of the sale, it shall not be avoided on account of any irregularity in the proceedings, provided it shall appear:

First. That the executor or administrator was licensed to make the sale by the district court having competent jurisdiction;

Second. That he gave a bond which was approved by the judge of the district court, in case a bond was required upon granting a license;

Third. That he took the oath prescribed by the statute;

Fourth. That he gave notice of the time and place of sale as by law prescribed;

Fifth. That the premises were sold accordingly and the sale confirmed by the court, and that they are held by one who purchased them in good faith.[16]

Plaintiff's recovery is limited to the share or interest in the land which passed to him as an heir or devisee.[17]

Under the Oregon practice, when land has been sold by an executor or administrator under license from the court of probate jurisdiction for the payment of debts, and the sale was made in good faith, the money devoted to that purpose, and the sale confirmed or

15 Veeder v. McKinley-Lanning L. & T. Co., 61 Neb. 892, 86 N. W. 982.

16 Rev. Stats., c. 17, § 223, [1487].

17 Holmes v. Mason, 80 Neb. 448, 114 N. W. 606; Hobson v. Huxtable, 79 Neb. 334, 112 N. W. 658; Lyons v. Carr, 77 Neb. 883, 110 N. W. 705.

acquiesced in by the court, and the period of five years has elapsed since the sale and confirmation, such sales are by law considered as confirmed and approved, notwithstanding any informalities or irregularities in the proceedings prior to the sale, and are sufficient to sustain a deed to the purchaser conveying all the interest decedent had in such real estate, and in case no deed has been given, it entitles such purchaser to such deed, and if through mistake or omission in said deed, or defect in its execution, it shall be inoperative, it is made sufficient to convey the title to the property described therein, and may be made the basis of an action to quiet title in the purchaser.[18]

The above cited provisions of the statutes do not apply to deeds which are absolutely void, because the county court or judge was entirely without jurisdiction to make them. They apply exclusively to irregular sales curing defects and informalities and not an entire want of power to act.[19]

§ 342. Attacking the license.

The issue of a license to sell real estate to a party as executor or administrator who never actually was, or had any authority to act as, such executor or administrator does not give the party receiving it any rights as against the heirs or devisees. The sale is clearly subject to collateral attack.[20]

A valid license can only issue to a person duly appointed executor or administrator,—one to whom let-

18 L. O. L., §§ 1256, 1258.

19 Mitchell v. Campbell, 19 Or. 198, 24 Pac. 455; McCullough v. Este, 29 Or. 349, 25 Pac. 724; Fuller v. Hager, 47 Or. 242, 83 Pac. 782; Browne v. Coleman, 62 Or. 461, 125 Pac. 279.

20 Prior v. Downey, 50 Cal. 388; Coon v. Cook, 6 Ind. 268; Burrell v. Chicago M. & St. P. Ry. Co., 43 Minn. 363, 45 N. W. 849; Griggs' Appeal, 101 Pa. 412.

ters have lawfully issued from a court having jurisdiction. The weight of authority is that if the court of probate did not acquire jurisdiction to grant the letters, the district court has no authority to hear and determine his petition for the sale of his decedent's realty, and that a sale under such circumstances is subject to collateral attack.[21]

The general rule regulating collateral attack on the appointment of an executor, administrator or guardian is that, where the jurisdiction depends upon some collateral fact, which can be decided without deciding the case on the merits, then the jurisdiction can be questioned collaterally and disproved, even though the jurisdictional facts be averred of record, and were actually found from evidence, by the court rendering the judgment or decree, to exist.[22]

Where the question involved is one which goes to the very gist of the suit, so that it cannot be decided without going into the merits of the original action or proceeding itself, then the order is collaterally conclusive, because the question cannot be tried without retrying the case on its merits, which is not permissible in a collateral proceeding.[23]

21 Washington v. McCaughan, 34 Miss. 304; Haug v. Primeau, 98 Mich. 91, 57 N. W. 25; Templeton v. Falls Land & Cattle Co., 77 Tex. 55, 13 S. W. 964; James v. Meyer, 41 La. Ann. 1100, 7 South. 618; Hyde v. Redding, 74 Cal. 493, 16 Pac. 380.

22 Holyoke v. Haskins, 5 Pick. (Mass.) 20; Jochumsen v. Suffolk Sav. Bank, 3 Allen (Mass.), 87; Wanzer v. Howland, 10 Wis. 8; Sears v. Terry, 26 Conn. 273; Salladay v. Bainhill, 29 Iowa, 555; Burns v. Van Loan, 29 La. Ann. 560.

23 Staples v. Fairchild, 3 N. Y. 41; Angell v. Robbins, 4 R. I. 493; Brown v. Foster, 6 R. I. 564.

In the appointment of a personal representative, either executor, administrator or guardian, the court which issued the letters is presumed to have acted upon sufficient evidence, and therefore, where it has acted upon a petition which sets up the necessary jurisdictional facts, and it appears that notice has been given to all parties in interest in the manner prescribed by law, and letters issued, the proceedings cannot be collaterally avoided by evidence that the necessary facts were not established.[24] The appointment of the wrong person—one not entitled to letters—cannot be questioned collaterally.[25]

Irregularities in the appointment of an administrator *de bonis non* are not grounds of collateral attack upon sales made by him. The weight of authority is that, when the court has once acquired jurisdiction over the estate, the removal or discharge of one administrator, and the appointment of another, upon grounds not recognized by law, or in a manner not authorized by the statutes, are simply errors touching the administration of the estate, and do not in any way affect his sales of realty by order of the court.[26]

[24] Andrews v. Avory, 14 Gratt. (Va.) 236; Sutton v. Sutton's Estate, 13 Vt. 71; Abbott v. Coburn, 28 Vt. 663; Seward v. Didier, 16 Neb. 58, 20 N. W. 12; Moore v. Philbrick, 32 Me. 102.

[25] Pick v. Strong, 26 Minn. 303, 3 N. W. 697; Ramp v. McDaniel, 12 Or. 108, 6 Pac. 456; Brubaker v. Jones, 23 Kan. 411.

[26] Boody v. Emerson, 17 N. H. 577; Culver v. Hardenbergh, 37 Minn. 225, 33 N. W. 792; Duffin v. Abbott, 48 Ill. 17. *Contra*, Dooley v. Bell, 87 Ga. 74, 13 S. E. 284; Kamerer v. Morlock, 125 Mich. 320, 84 N. W. 319.

§ 343. Attacking the license—The petition.

The records in the proceeding must show that a good petition was filed by the executor or administrator in the court which had jurisdiction of such proceeding.[27] Recitals in the order of confirmation that such petition was duly filed when neither the records of the proceeding nor the files show that such was the case make the sale subject to collateral attack.[28]

If the record shows a petition containing sufficient allegations to give jurisdiction filed in the proper court and that it has been acted upon as sufficient by such court, in the absence of fraud or collusion,[29] defects and irregularities in the petition itself cannot be inquired into collaterally,[30] but defects in the petition in giving the names and residences of the parties interested in the estate, and a consequent defective and insufficient service upon them, made the sale void.[31]

A failure to verify the petition does not affect the jurisdiction of the court, and is therefore an insufficient ground of attack.[32]

§ 344. Attacking the license—Order to show cause or citation.

While there is some authority to the effect that an executor's or administrator's sale cannot be attacked

27 Schroder v. Wilcox, 39 Neb. 136, 57 N. W. 1031; Veeder v. McKinley-Lanning & L. T. Co., 61 Neb. 892, 86 N. W. 982.

28 Ball v. Collins (Tex.), 5 S. W. 622.

29 Seymour v. Ricketts, 21 Neb. 240, 31 N. W. 781.

30 Smith v. Barr, 83 Minn. 354, 86 N. W. 342; Phillips v. Phillips, 23 S. D. 231, 83 N. W. 94.

31 Smith v. Whiting, 55 Or. 393, 106 Pac. 790.

32 Trumble v. Williams, 18 Neb. 144, 24 N. W. 716; Johnson v. Jones, 2 Neb. 126.

collaterally for the want of an order to show cause or a citation, when the record shows a regular confirmation,[33] the weight of authority is all the other way. Its sufficiency, where the court found that "proper notice" was given to all persons interested according to law, will not be impeached on collateral attack, such grounds alone being insufficient to set aside the sale,[34] unless it also appears from the records that the provisions of the statutes and the order of the court for the service of the process have not been complied with.[35] Jurisdiction of the court will not be presumed, and it should appear from the records of the proceedings for the sale that the court obtained the power to grant the order of sale by a legal service of process.[36]

In the case of service by publication, and the records fail to show that the order was published as directed by the court, extrinsic evidence that the publication was actually made will cure the defect.[37]

The sale will be held invalid at the suit of an heir when he, while a minor, or his guardian for him,

33 Spurgin v. Bowers, 82 Iowa, 187, 47 N. W. 1029; Ryan v. Fergusson, 3 Wash. 356, 28 Pac. 910; Appeal of Kelsey, 47 Ark. 413, 2 S. W. 102.

34 Moore v. Neil, 39 Ill. 256; Moffitt v. Moffitt, 69 Ill. 641; Stow v. Kimball, 28 Ill. 93.

35 Fiske v. Kellogg, 3 Or. 503; Smith v. Whiting, 55 Or. 393; Chicago K. & N. Ry. Co. v. Cook, 43 Kan. 83, 22 Pac. 988; Dickinson v. Dickinson, 124 Ill. 483, 16 N. E. 861.

36 Knapp v. Wallace, 50 Or. 354, 92 Pac. 1054; Northcutt v. Lemery, 8 Or. 316; Smith v. Whiting, 55 Or. 393, 106 Pac. 790, holding that where the order of sale recites that due service was had, but that the only service on resident heirs was by publication, the sale was subject to collateral attack.

37 Schroeder v. Wilcox, 39 Neb. 136, 57 N. W. 1031.

waived service of the order;[38] also where an attorney entered an appearance for him and there was no service or attempted service of process on him.[39]

§ 345. Jurisdictional irregularities.

A sale made by a personal representative under authority of a license issued by a district judge at chambers is voidable and the heir or devisee can recover the lands, unless the petition, the order to show cause, the proof of service of same, and the license are on file in the office of the clerk of the district court of the county from which his license issued.[40] The power to make the sale must be proved by the record which the law directs shall be kept,[41] so that although the power granted a district judge at chambers to grant a license carried with it the implied power to determine the necessity of the sale, and the sufficiency of the pleadings, and when jurisdiction is once obtained the order or judgment rendered is valid until set aside in direct proceedings,[42] if the record of the proceedings for sale have not been perpetuated as required by the statute by filing all such papers with the clerk of the district court, there is no lawful evidence of such sale and an heir can have it set aside.[43]

The statute requires the license to give a description of the lands to be sold, but on collateral attack a full,

38 Winston v. McClendon, 43 Miss. 254; Dickison v. Dickison, 124 Ill. 483, 16 N. E. 861; Ingersol v. Mangam, 84 N. Y. 622.

39 Bonnell v. Holt, 89 Ill. 71.

40 Veeder v. McKinley-Lanning L. & T. Co., 61 Neb. 892, 86 N. W. 982.

41 Stack v. Royce, 34 Neb. 833, 52 N. W. 675.

42 Trumble v. Williams, 18 Neb. 144, 24 N. W. 716.

43 Veeder v. McKinley-Lanning L. & T. Co., 61 Neb. 892, 86 N. W. 982.

complete and definite description is not necessary. A description sufficient to enable a person to identify the land, it is held, complies with the law.[44]

Failure to appoint a guardian *ad litem* of a minor at the hearing on the petition for license is not a ground for setting aside the sale.[45] The grant of a license on the date for hearing fixed by the district judge, which date was four days short of the six weeks required by law, is an irregularity only, and will not avoid the sale, nor is evidence that no claims were ever allowed a cause for setting it aside.[46]

§ 346. Failure to give bond.

The issue of an order of sale to an executor, administrator or guardian confers upon him an additional duty and responsibility beyond that contemplated in his appointment and his original bond,—that of using his best endeavors to dispose of the property to advantage, and of making a disposition of the proceeds according to law and the directions of the court; and the heir or former ward can always recover when he shows that no bond was given and approved.[47] Extrinsic evidence is admissible to show that the bond was in fact given and approved.[48]

§ 347. Failure to take the oath.

The heir or former ward will be entitled to recover the property when he shows that the oath was not

[44] Robertson v. Johnson, 37 Tex. 52; Doe d. Clements v. Henderson, 4 Ga. 148; Money v. Turnipseed, 50 Ala. 499.

[45] McClay v. Foxworthy, 18 Neb. 295, 25 N. W. 86; I. O. L., § 1255.

[46] Haight v. Hayes, 3 Neb. Unof. 587, 92 N. W. 297.

[47] Stewart v. Bailey, 28 Mich. 251; Babcock v. Cobb, 11 Minn. 347 (Gil. 247); Melcher v. Schluter, 5 Neb. Unof. 445, 98 N. W. 1082.

[48] Myers v. McGavock, 39 Neb. 843, 58 N. W. 522.

taken before the sale was made;[49] taking it after the sale would not make the sale valid.[50] If the oath fail to comply with the wording of the statute, but be of substantially the same effect, the plaintiff will not be entitled to recover;[51] nor can he recover where the oath is not marked "Filed," but appears to have been regularly taken, and is in the files of the case.[52]

Parol evidence is competent to show that an oath which appears to have been taken after the sale was actually taken in proper time.[53]

§ 348. Notice of time and place of sale.

The giving of notice of the time and place of sale is one of the five things necessary under the statute to make a sale good on collateral attack. Where notice is essential, as it is in this state, it has been held that its failure to state the place in the city or town where the sale would be held, merely naming the town alone,[54] or failure to give the hour when it would be held,[55] or where it was not both posted in three of the most public places in the county and published for the required time before the sale in the newspaper which the court directed, it was voidable and subject to collateral attack.[56]

49 Campbell v. Knights, 26 Me. 224; Parker v. Nichols, 7 Pick. (Mass.) 111; Howe v. Blomenkamp, 88 Neb. 389, 129 N. W. 539.

50 Ryder v. Flanders, 30 Mich. 336; Thornton v. Mulquinne, 12 Iowa, 549; Blackman v. Baumann, 22 Wis. 611.

51 Montour v. Purdy, 11 Minn. 384; Frazier v. Steenrod, 7 Iowa, 339.

52 West Duluth Land Co. v. Kurtz, 45 Minn. 380, 47 N. W. 1134.

53 Norman v. Olney, 64 Mich. 533, 31 N. W. 555.

54 Hartley v. Croze, 38 Minn. 325, 37 N. W. 449.

55 Trustees of Schools v. Snell, 19 Ill. 156.

56 Kempe v. Pintard, 32 Miss. 324.

§ 349. Compliance with order of sale.

An executor's or administrator's sale which is not made by or under the direction of such representative is void. No one else can be appointed to make it.[57]

A slight variation in the time of the day the sale is held from that stated in the notice is an irregularity only,[58] and is cured by confirmation.[59]

A sale at another place than that given in the notice, or at a different place from that to which it had been adjourned, are voidable, and the lands may be recovered.[60]

The sale must be at public auction. A private sale vests no title in the purchaser as against the heirs or those claiming under them.[61]

A failure to sell in parcels when so ordered by the license is an irregularity which is cured by confirmation, and on that ground alone no recovery can be had.[62]

Courts apply a very liberal rule when a doubt exists as to whether a sale has been confirmed. If the proceedings were regular, the records and files showing

57 Jarvis v. Rusick, 12 Mo. 63; Crouch v. Eveleth, 12 Mass. 503; Chambers v. Jones, 72 Ill. 275.

58 Meyers v. Carter, 37 N. C. 146.

59 Tippett v. Mize, 30 Tex. 365.

60 Hall v. Ray, 40 Vt. 576; Murphy v. Hill, 77 Ind. 139; Paulsen v. Hall, 39 Kan. 365.

61 Hutchinson v. Cassidy, 46 Mo. 431; Caines v. De La Croix, 6 Wall. (U. S.) 719; Neal v. Patten, 40 Ga. 363; Van Horn v. Ford, 16 Iowa, 578. In the latter case the heir was permitted to recover the land from an innocent purchaser eighteen years after the sale was made and confirmed.

62 McCampbell v. Durst, 73 Tex. 410, 11 S. W. 380; Osman v. Traphagen, 23 Mich. 80.

that the purchaser was entitled to the order, deed given, the land paid for, possession given, no question of fraud raised, almost anything in the shape of an order or memorandum is sufficient confirmation,[63] and a notation on the judge's docket, "Sale confirmed, deed ordered," has been held ample evidence of confirmation.[64]

§ 350. Purchase by disqualified party.

Another good cause for recovering the land sold is its purchase by the personal representative through a third party and later deeded to him. A transfer to him of the property soon after the sale is presumptively fraudulent.[65] If it is made a considerable time afterward, fraud will not be presumed, but must be established by other evidence than that appearing on the face of the records.[66]

Instead of an action to quiet title to the land in the heir or devisee, he may elect to hold the purchaser as a trustee, holding the legal title for the benefit of those interested.[67] He is a trustee *ex maleficio,* and the trust so far void in equity that it can be set aside by

63 Moody v. Butler, 63 Tex. 210; In re Harvey, 16 Ill. 127.

64 Camden v. Plain, 91 Mo. 117, 4 S. W. 86. It has been held that where all proceedings are regular, no confirmation is necessary. Learned v. Mathews, 40 Miss. 210.

65 Whipff v. Heder, 6 Tex. Civ. App. 685, 26 S. W. 118; Bergin v. Haight, 99 Cal. 52, 33 Pac. 760; Fisher v. Bush, 133 Ind. 315, 32 N. E. 924.

66 Stephen v. Beall, 22 Wall. (U. S.) 329; Michoud v. Girod, 4 How. (U. S.) 503.

67 Elting v. Biggsville Nat. Bank, 173 Ill. 368, 50 N. E. 1095; Stuckey v. Lockhard, 87 Ark. 232, 112 S. W. 747.

the *cestui que trust* on account of the purchase being by or for the person selling.[68]

§ 351. Fraud.

Any fraudulent scheme or combination between the executor or administrator and an heir, guardian or purchaser which causes a loss to the estate is good cause for collateral attack. A sale so made is voidable, but cannot be set aside where the same facts were brought before the court on objections to confirmation.[69] A sale at an inadequate price is always evidence of fraud,[70] and if accompanied by other evidence, is sufficient to set aside the sale. In many cases but little other evidence is necessary; as where land was sold to a party who was a close friend and confidential adviser of the executor,[71] or the administrator was the only creditor and the land sold for just enough to pay his claim.[72]

Willful misrepresentation of the quality or productiveness of the land, or facts showing that there was a combination with the administrator to keep parties from bidding and that consequently a smaller price was received than the property was worth, are sufficient to avoid the sale.[73]

68 Davoue v. Fanning, 2 Johns. Ch. (N. Y.) 252; Glass v. Greathouse, 20 Ohio, 503; Brackenridge v. Holland, 2 Blackf. (Ind.) 377; Bergin v. Haight, 99 Cal. 52, 33 Pac. 760.

69 Gordon v. Gordon, 55 N. H. 399.

70 Webster v. Calden, 52 Me. 203; Kimball v. Lincoln, 98 Ill. 578; Williams v. Johnson, 112 N. C. 424, 17 S. E. 496.

71 Barnawell v. Threadgill, 56 N. C. 50.

72 Humes v. Cox, 1 Pinn. (Wis.) 551.

73 McQueen v. McDaniel, 18 Ky. Law Rep. 954, 35 S. W. 880; Manning v. Mulrey, 192 Mass. 547, 78 N. E. 551; Jones v. French, 92 Ind. 138.

A sale will be set aside where it appears from the appointment of the administrator down to the date of the deed a scheme was carried out to get possession of valuable property at a small price.[74]

§ 352. Rights of purchaser at void or voidable sale.

A purchaser at an executor's or administrator's sale which is later set aside has been uniformly held to be entitled to receive back the money which he has paid in and which has been paid out in satisfaction of the debts of the estate,[75] in satisfaction of encumbrances on the estate,[76] and for taxes.[77] He is substantially subrogated to the rights of parties who have charges against the land. Any other rule would be to appropriate one man's property to the use of another.[78]

He is also entitled to payment for any increase in the value of the land on account of improvements he has put on it.[79]

He must account for the rents and profits received.[80]

74 Bergin v. Haight, 99 Cal. 52, 33 Pac. 760, in which a party fraudulently procured the appointment of his agent as administrator, had fraudulent claims allowed against the estate, and the land sold for a meager price by his agent, and sale confirmed and deed ordered to him. He then sold to a third party, but the fraud was so flagrant all through the administration that a purchaser from the heirs was permitted to have the deed set aside.

75 Cole v. Boyd, 68 Neb. 146, 93 N. W. 2003; Blodgett v. Hitt, 29 Wis. 169; Baker v. Martin, 156 Ind. 53, 59 N. E. 174.

76 Holz v. Burling, 84 Neb. 211, 120 N. W. 954, in which the heir repudiated the sale on account of the land being a homestead.

77 Ball v. Clothier, 34 Wash. 299, 75 Pac. 1099.

78 Valle v. Fleming, 19 Mo. 454; Hudgin v. Hudgin's Exr., 27 Gratt. (Va.) 304; Winslow v. Crowel, 32 Wis. 639.

79 Miller v. Rich, 204 Ill. 444, 88 N. E. 488; Mulford v. Minch, 11 N. J. Eq. 16; Hatcher v. Briggs, 6 Or. 31.

80 Cole v. Boyd, 68 Neb. 146, 93 N. W. 1000.

CHAPTER XXVII.

PAYMENT OF DEBTS AND EXPENSES.

§ 353. Time Within Which Debts are Payable.
354. Time Granted an Administrator *De Bonis Non* to Pay Debts.
355. Assets Liable for the Payment of Debts.
356. Order of Application of Personalty to Payment of Debts.
357. Direction in Will for Payment of Debts.
358. Debts Charged on the Real Estate.
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360. Adjustment of Liens on Realty.
361. Liability of Heirs, Legatees and Devisees for Payment of Debts.
362. Actions Against Heirs, Devisees and Legatees.
363. Actions Against Executors and Administrators.
364. Executor or Administrator not Subject to Garnishment.
365. Classification of Claims for Payment of Debts.
366. Interest on Claims.
367. Order for Payment of Claims.
368. Payment, How Made.
369. Liability of Executor or Administrator to Creditors.

§ 353. Time within which debts are payable.

The debts of an estate should be paid as soon after their allowance as the assets will permit. No claim should be paid before it is allowed, and any agreement between the claimant and an heir, legatee or devisee for the payment of an ordinary unsecured claim which has not been regularly filed and approved by the county judge is not binding on the estate.[1]

The time first fixed for their payment is not to exceed eighteen months.[2] Extensions may be granted as the circumstances may require, and not exceeding six months at a time, not extending the entire time beyond

1 Johnson v. Pulver, 1 Neb. Unof. 290, 95 N. W. 697.
2 Rev. Stats., c. 17, § 127, [1391].

three years, on application of the executor or administrator.[3] If the time first fixed was less than a year and a half, extensions up to that time may be granted by the court without notice to parties interested. Whenever application is made for an extension beyond one year and six months from the date of letters, notice is required to be given all parties interested of the pendency of the application, and of the time and place set for hearing the same by publication for three successive weeks in some newspaper to be designated by the court, and no order extending the time shall be granted unless such notice shall have been previously given.[4]

Form No. 159.

APPLICATION FOR EXTENSION OF TIME FOR PAYMENT OF DEBTS.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that he is the duly appointed executor of said estate; that heretofore, to wit, ——— an order of said court was made and entered fixing the date for the payment of the debts and legacies of the said deceased at one year and six months from said date, which time will elapse on the ——— day of ———, 19—, and that debts and demands have been allowed against said estate in the sum of ——— dollars; that said estate is solvent, and able to pay all debts in full; that he will be unable to collect the assets of said estate, owing to his being obliged to bring suits against G. H. and E. F. for the recovery from them of demands due said estate, and which said suits are now pending in the ——— court of ——— county, Nebraska, and on account of his inability to sell a sufficient amount of said estate for a sum equivalent to said debts and legacies within the time fixed by this court for the payment of said debts and legacies; that he has a reasonable expectation of collecting all the assets of said estate, or sufficient thereof to satisfy all of said debts, legacies, and expenses within six months.

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3 Rev. Stats., c. 17, § 128, [1392].

4 Rev. Stats., c. 17, § 129, [1393].

Wherefore, your petitioner prays that the court may appoint a time and place for hearing and deciding upon said application, and cause notice of the pendency thereof to be given to all persons interested, in the manner prescribed by law, and that, upon said hearing, the time for paying said debts and legacies and settling said estate be extended for the period of six months from the ——— day of ———, 19—.

Dated this ——— day of ———, 19—.

(Signed) C. D.,
Executor Estate of A. B.

[Add verification, Form No. 5.]

Form No. 160.

NOTICE OF APPLICATION TO EXTEND TIME FOR PAYING DEBTS.

[Title of Cause and Court.]

To All Persons Interested in the Estate of A. B., Deceased:

Notice is hereby given that C. D., executor of said estate, on the ——— day of ———, 19—, filed his application in said court, praying that the time heretofore, by order of said court, allowed for the payment of debts and legacies and settling of said estate, be extended for the period of ——— months to the ——— day of ———, 19—.

It is further ordered that notice of the pendency of this petition, and of the time and place for the hearing of the same, be given to all persons interested in said estate by publication once each week for four successive weeks in the ———, a newspaper published in said county.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

Form No. 161.

ORDER EXTENDING TIME FOR PAYMENT OF DEBTS AND LEGACIES.

[Title of Cause and Court.]

This matter came on for hearing upon the application of C. D., executor of said estate, praying that the time fixed by the court for the payment of the debts and legacies of said estate be extended for the period of six months, and to the ——— day of ———, 19—, and was submitted to the court.

The court finds that due notice of the pendency of said petition has been given by publication in the manner prescribed by law, and that

the circumstances of the case require that the executor be granted further time for the payment of said debts and legacies.

It is therefore ordered that the time fixed by the court for the payment of said debts, legacies, and expenses be extended for the period of ———, and to the ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

Under the Oregon practice, the county court, at the first term after the filing of the first semi-annual account, ascertains and determines if the estate be sufficient to pay the claims presented and allowed during that period, together with the funeral charges and expenses of administration, and if he so finds, an order is entered for that purpose, but if the estate is insufficient, he shall ascertain what per centum of claims it is sufficient to satisfy, and order and direct accordingly. Similar orders are entered at the close of each six months' period thereafter.[5] Claims not due are ordered paid at their present value.[6]

Claims filed within the six months' period fixed by the statute take precedence over those presented later, and payment of the later claims is postponed until those presented within the first six months are satisfied.[7] The order of the court for their payment, excepting only those demands allowed by the county court in special proceedings on claims, or which have been reduced to judgment against the representative, afford him no protection as against objections to their allowance on the final hearing on his account.[8] He may pay claims without first obtaining an order of the court, but incurs an additional liability should he pay them out of order or the court refuse for any reason to approve his acts.[9]

5 L. O. L., § 1284.
6 L. O. L., § 1301.
7 In re Murray's Estate, 56 Or. 138, 107 Pac. 19.
8 In re Chambers' Estate, 38 Or. 134, 62 Pac. 1013.
9 Tostel v. Morat, 19 Or. 183, 23 Pac. 900.

§ 354. Time granted an administrator de bonis non to pay debts.

When an administrator *de bonis non* is appointed, it is the duty of the court to make an order allowing a time for disposing of the estate unadministered, and paying the debts and legacies, which time shall not, in the first instance, exceed one year for the time such new administrator shall be appointed, and it may be extended upon like notice and in like manner as in the case of an original executor or administrator.[10] The statute, however, is not construed as taking away the liability of an executor or administrator to make an immediate payment when demanded upon a decree for the distribution of the assets among creditors, legatees or heirs at law. The new administrator has the same length of time as is allowed his predecessor for closing up the estate, the three years commencing to run from the time of his appointment.[11]

§ 355. Assets liable for the payment of debts.

All property which a person owned at the time of his death, excepting only that which he cannot devise or bequeath, and that necessary for the payment of the expenses of administering his estate, together with that which has been recovered by the personal representative from the persons to whom he fraudulently transferred it,[12] is liable for the payment of his debts.[13]

10 Rev. Stats., c. 17, § 130, [1394].

11 Saxon v. Gain, 19 Neb. 488, 26 N. W. 385.

12 Section 212, *supra*.

13 Norton v. Norton, 5 Cush. (Mass.) 524; Lunn v. Yeaton, 3 Cranch C. C. 182, Fed. Cas. No. 8642.

A testator cannot by will exempt any part of his property from such liability to the prejudice of his creditors,[14] nor direct that any preference other than that made by law be given one creditor or class of creditors over another.[15]

Personal property is the primary fund for the payment of the debts of an intestate. In the case of a testate estate, if the will contains no direction for their payment, or clause setting out any part of the estate for that purpose, they will be paid from the personalty. In order to make them a charge upon the realty, it must clearly appear from the will that it was the intention of the testator that his debts be paid from his real estate.[16]

If the will makes provisions for the debts, or designates the particular portion of the estate to be appropriated therefor, then they are to be paid accordingly out of the estate so appropriated, as far as the same shall be sufficient.[17] If such provisions are not sufficient, such part of the estate, real or personal, as shall not have been disposed of by the will, if any, shall be applied, according to the provisions of the law, for that purpose.[18] The estate, real or personal, given by will to any devisee or legatee shall be held liable for the payment of the debts and expenses of adminis-

14 Magruder v. Carroll, 4 Md. 335; Henderson's Succession, 113 La. 101, 36 South. 904.

15 Deering v. Kerfoot, 89 Va. 491, 16 S. E. 671.

16 Leigh v. Savidge's Exrs., 14 N. J. Eq. 124; Bragaw v. Bolles, 51 N. J. Eq. 84, 25 Atl. 949; Adams v. Brackett, 5 Met. (Mass.) 280; Arnold v. Dean, 61 Tex. 249; Cadmus v. Combes, 37 N. J. Eq. 264.

17 Rev. Stats., c. 17, § 52, [1316].

18 Rev. Stats., c. 17, § 53, [1317].

tration in proportion to the amount of the several legacies and devises, except the specific devises and legacies, and the persons to whom they shall be made, shall be exempt if it appear to the court necessary in order to carry out the intention of the testator, and there be other sufficient estate.[19]

§ 356. Order of application of personalty to payment of debts.

The order in which personal property may be taken for debts depends very largely on the terms of the will. Where there is no property designated for the debts and no direction for their payment, the rule is the same as in case of devises, and general legacies should be first exhausted before specific legacies are taken,[20] and the residuary personalty will be applied before general legacies.[21]

The effect of the words so frequently found in wills, "after the payment of all my just debts," is to postpone the vesting of all legacies and devises until they are paid, thus making the debt, unless the will contain other directions, a charge upon the entire estate, the same as if debts were not mentioned.[22]

§ 357. Directions in will for payment of debts.

A clause in a will directing the payment of the debts from certain property makes such property a primary

19 Rev. Stats., c. 17, § 54, [1318].

20 In re De Bernal Estate (Cal.), 131 Pac. 375; In re Martin's Estate, 25 R. I. 1, 54 Atl. 589.

21 Stevens v. Underhill, 67 N. H. 68, 36 Atl. 370; Brown v. Brown, 41 N. Y. 507; L. O. L., § 1251; Howe v. Kern, 62 Or. 496, 125 Pac. 837.

22 Shallcross v. Finden, 3 Ves. 738.

fund, and to that extent releases the rest of the estate from liability.[23]

A direction to the executor to pay all the debts makes them a primary charge on that part of the estate which comes into his possession pending administration, to wit, the personalty and the income from the realty,[24] and if he is a devisee or legatee, they would be a charge on his devise or legacy.[25]

The word "debts," as used in wills, will generally be held to include any claim which can be allowed against the estate,[26] and also debts secured by mortgage.[27]

§ 358. Debts charged on real estate.

The common-law rule is that in order to charge the debts on the real estate and exonerate the personalty there must be an express direction to that effect in the will.[28] It is not necessary that this be done in so many words. It is sufficient if that intent be gathered from the instrument as a whole, or its conditions are such that they cannot be complied with were the debts to be paid from the personalty,[29] and in order to entirely shift the primary liability from the personal to the

23 Smith v. Wyckoff, 11 Paige (N. Y.), 49; Newport v. Newport, 5 Wash. 113, 31 Pac. 428.

24 Cook v. Dawson, 29 Beav. 126.

25 Reynolds v. Reynolds' Exrs., 16 N. Y. 257; Shallcross v. Finden, 3 Ves. 738; Williams v. Chitty, 3 Ves. 345.

26 Rogers v. Rogers, 3 Wend. (N. Y.) 503, 20 Am. Dec. 716.

27 Turner v. Laird, 68 Conn. 198, 35 Atl. 1124; French v. Vradenburgh, 105 Pa. 10.

28 Tait v. Northwick, 4 Ves. 823.

29 Wright's Appeal, 12 Pa. 256; Tracy v. Tracy, 15 Barb. (N. Y.) 503; Seaver v. Lewis, 14 Mass. 83; Bugbee v. Sargeant, 27 Me. 38.

real estate, it must appear that such was the clear intention of the testator.[30]

If the personal estate is all specifically bequeathed, and the real estate ordered sold for the payment of debts, the personalty will be released.[31]

The tendency of the more recent decisions is to get away from the common-law rule and to hold that a general intention, instead of a specific, express or implied direction, is sufficient to charge the debts on the real estate.[32]

If the will directs that the real estate be sold, and the proceeds, together with the personal estate, charged with the payment of the debts, the two species of property would be liable in proportion to their respective values.[33] If realty and personalty are both charged with payment of the debts, the personalty still remains the primary fund.[34]

§ 359. Assets not liable for debts.

Damages recovered under the statute for causing the death of the decedent by the wrongful act, neglect or default of another are not liable for his debts, but are for the exclusive benefit of his next of kin.[35]

30 Crone's Appeal, 107 Pa. 571; Calder v. Curry, 17 R. I. 610, 25 Atl. 103.

31 Hoes v. Van Hoesen, 1 Barb. Ch. (N. Y.) 400.

32 Kiswetter v. Kress, 24 Ky. Law Rep. 1239, 70 S. W. 1065; Jackson v. Bevins, 74 Conn. 96, 49 Atl. 890; McKinley v. Coe, 66 N. J. Eq. 70, 57 Atl. 1030.

33 Turner v. Turner, 57 Miss. 775.

34 2 Redfield on Wills, 210.

35 Rev. Stats., c. 17, §§ 164, 165, [1428], [1429]. It has been held that the personal representative who recovers such damages is entitled to retain therefrom his legal commission, including anything above the

In Oregon such assets are equally liable for debts with other property.[36]

Advancements, though required to be deducted from the share accruing to the heir, are not considered, in the strict sense of the term, as assets of the estate,—that is, as far as the payment of the debts is concerned, an executor or administrator cannot recover them from the heir, even though the estate be insolvent.[37]

§ 360. Adjustment of liens upon realty.

It is an old established rule of law that an administrator has the right to satisfy a mortgage debt from the personal assets of the estate, thus relieving the realty from the encumbrance;[38] and it has been held that the heir may compel the application of the personalty to the discharge of a mortgage, except he dispose of his entire interest in the estate or in the realty.[39] There is little to be gained from such a course. The heir might just as well receive his share in cash, and apply it to the satisfaction of the mortgage, as to compel the personal representative to pay it.

In Oregon the redemption of property from the lien of mortgages is largely within the direction of the county court. If the deceased left any property, either real or personal, under mortgage, and did not devise or provide for the redemption of the same by will, the

regular percentage which the court may adjudge to be due him for special services and a reasonable fee for his attorney. Baker v. Raleigh & G. R. Co., 91 N. C. 308.

36 Section 263, *supra*.

37 2 Bl. Com. 513; Wilson v. Soper, 13 B. Mon. (Ky.) 411; L. O. L., § 7354.

38 Sutherland v. Harrison, 86 Ill. 363.

39 Haven v. Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353.

county court or judge, on the application of an heir, creditor or other person interested in the estate, may order the executor or administrator to redeem such property out of the proceeds of the other personal property, if it appears that such redemption would be for the interest of the estate, and not prejudicial to creditors.[40] If redemption is not ordered, the court shall enter an order for the sale of the property in the same manner as sales of other lands for the payment of debts. The conveyance covers the equity of the estate only in the property.[41]

After the return to the order of sale and ten days before making an order for the application of the proceeds, the mortgagee or other person to whom the debt secured by such mortgage is payable shall be cited to appear and show the amount of his debt; and may file objections to the report of the expenses of the proceeding and sale. The proceeds are applied in payment of the expenses of the sale, but not including general administration expenses or compensation of the representative; secondly, to the satisfaction of the debt, and the residue is applied in due course of administration.[42] If the mortgage is not due, the party entitled to it shall receive its present value.[43]

The right of the party holding the mortgage or other lien to a foreclosure or to enforcement of a judgment or decree is not affected by the statute.[44]

In regard to testate estates, the rule is necessarily different, the will often containing provisions setting apart certain property for the payment of debts, or a clearly expressed intention that the devisee should take subject to the encumbrance. If it clearly appears

40 L. O. L., § 1271; Howe v. Kern, 62 Or. 496, 125 Pac. 833.

41 L. O. L., § 1272; Howe v. Kern, *supra*.

42 L. O. L., § 1273; Shephard v. Saltzman, 34 Or. 43, 54 Pac. 882.

43 L. O. L., § 1274.

44 Verdier v. Bigne, 16 Or. 210, 19 Pac. 64; L. O. L., § 1274.

from the terms of the will that it was the intention of the testator that the devisee should take subject to the encumbrance, the personal estate cannot be used for that purpose; otherwise, the same rule applies as in the case of intestate estates;[45] and the same would be true of the payment of vendors' liens upon the realty.[46]

Taxes upon the realty accruing previous to the death of the decedent should be paid from the personalty. Those accruing after his death are a charge upon the land, and the heir or devisee takes subject to them,[47] and the statute does not require them to be paid by the personal representative,[48] except when he takes possession of the same.[49]

Though at common law the devisee of encumbered real estate or legatee of encumbered personalty was entitled to have the same paid,[50] they were not payable from specific bequests or from the proceeds of other devised lands.[51] If the mortgage was on the land at the time it came into testator's possession, the devisee took the property subject to the lien.[52]

45 Keene v. Munn, 16 N. J. Eq. 398; Lennig's Estate, 52 Pa. 135.

46 Henderson v. Whitinger, 56 Ind. 131.

47 Henderson v. Whitinger, 56 Ind. 131; Lamport v. Beeman, 34 Barb. (N. Y.) 239.

48 Rev. Stats., c. 17, § 102, [1366].

49 Patrick v. Patrick, 72 Neb. 454, 100 N. W. 939.

50 Richardson v. Hall, 124 Mass. 228; Plimpton v. Fuller, 11 Allen (Mass.), 139; Thompson v. Thompson, 4 Ohio St. 333; Hoff's Appeal, 24 Pa. 203; Johnson v. Goss, 128 Mass. 433.

51 Frazier v. Littleton, 100 Va. 9, 40 S. E. 108; 2 Jarman on Wills, 626, 634.

52 Thompson v. Thompson, 4 Ohio St. 333; Andrews v. Bishop, 5 Allen (Mass.), 403.

§ 361. Liability of heirs, legatees and devisees for the payment of debts.

Whenever, pending the settlement of the estate, any of the personal assets thereof shall have been transferred by the personal representative to the heirs or legatees, and it shall subsequently appear that the personalty still remaining in the hands of the executor or administrator is insufficient to pay the debts in full, it is the duty of such legatee or heir to return to the personal representative the assets transferred to him, or enough thereof to pay the debts. Such liability frequently arises in the case of contingent claims. When a contingent claim shall be presented within one year from the time it shall accrue, and be established, and the executor or administrator shall not have sufficient to pay the whole of said claim, the creditor shall have the right to recover the whole or a part of his claim as the executor or administrator has not assets to pay, against the heirs, devisees or legatees who shall have received sufficient real or personal property from the estate.[53] When the heirs, devisees or legatees shall have received real or personal estate, and shall be liable for any debts by reason of the executor or administrator not having in his possession enough property to pay the same, it having been transferred to such heirs, devisees or legatees, they shall be liable in proportion to the estate they may have respectively received; and the creditor may have any other action or suit at law or in equity, and shall have the right to recover his claim against a part or all of such devisees, heirs or

[53] Rev. Stats., c. 17, §§ 144, 145, [1467], [1468].

legatees to the amount of the estate they may have respectively received.[54]

This action is not an original one, but a special proceeding for the enforcement and collection of a claim previously allowed, and it has been held to have been properly brought in the district court. If it is realty that is sought to be recovered, the proper action is by petition to subject the lands to the lien of the debt, and it will be sustained, even though the heirs or devisees have sold their interest to third parties.[55]

It is also a special proceeding under the Oregon practice. The sureties may be made parties to the same. Notice of the application must be given ten days before the term at which it is made. The decree directs the payment of the amount within a definite time, and if not paid, it may be enforced by execution against the sureties the same as a decree of the district court.[56]

On account of personalty being the primary fund, legacies should be first recovered,[57] and devises cannot be resorted to except where the legacies are insufficient.[58] The value of the gift is fixed as of the date of the death of the decedent.[59]

A party who receives possession of a bequest or devise which is charged with debts before the debts are paid does not become liable for the entire amount of the debts, but only for an amount equal to the value of the property which he has received as a beneficiary.[60]

54 Rev. Stats., c. 17, § 148, [1412]; L. O. L., §§ 1308, 1309.

55 Horst v. McCormick Harvester Co., 30 Neb. 558, 46 N. W. 717.

56 L. O. L., § 1309.

57 Hunt v. Grant, 87 Minn. 189, 91 N. W. 485.

58 Hessig v. Hessig, 131 Ky. 514, 115 S. W. 748.

59 Rogers v. Rogers, 3 Wend. (N. Y.) 503.

60 Otheimer v. Single, 73 N. J. Eq. 539, 68 Atl. 231; Frost v. Wingate, 73 N. H. 535, 63 Atl. 19.

A devise so charged, or other assets which were received by the beneficiary before the debts were paid, may be followed into the hands of third parties, purchasers from the beneficiaries, and subjected to their share of the unpaid debts,[61] and at common law any creditor could follow assets which had been obtained by third parties by collusion with the personal representative.[62]

§ 362. Action against heirs, devisees or legatees.

The action against the heirs, devisees or legatees must be brought within one year from the date upon which the claim is allowed and established. The statute commences to run from the date when the claim was allowed in the county court. If an appeal is taken, it interrupts its running, and it commences to run again when the judgment, affirmed in the district or supreme court, is certified back to the county court, —the date on which the records of the county court would show that the claim was finally allowed and established.[63]

All parties who have received assets of the estate should be made defendants. The original petition may be filed against a part of them, and the others brought in by proper process, and the court will allow such amendments as may be necessary to make them defendants on terms.[64]

61 Thomas v. Williams, 80 Kan. 632, 102 Pac. 772; Ristine v. Kurtz, 97 Iowa, 339, 66 N. W. 185; Elwood v. Deifendorf, 5 Barb. (N. Y.) 398.

62 Worthy v. Johnson, 8 Ga. 236; Shannon's Heirs v. Dillon, 8 B. Mon. (Ky.) 389.

63 Horst v. McCormick Harvester Co., 30 Neb. 558, 46 N. W. 717.

64 Rev. Stats., c. 17, §§ 148, 150, [1412], [1414].

If more than one person shall be liable, and the creditors shall bring a suit against all or a part of the persons so liable, and the persons liable shall dispute the debts of the amount claimed, the court may order an issue to be formed and the amount ascertained by the verdict of a jury, and the court shall ascertain and determine how much each is liable to pay and award execution therefor.[65]

An heir or devisee or legatee who has paid more than his share may enforce contribution from the others, including the estate of one who died leaving his share unpaid,[66] and legatees or devisees who take property exclusively charged with debts may enforce contribution between themselves only.[67]

Form No. 162.

PETITION TO RECOVER MONEY FROM HEIRS WHICH WAS PAID THEM BY ADMINISTRATOR.

[Title of Cause and Court.]

The plaintiff complains of the defendant and for cause of action alleges that on the ——— day of ———, 19—, he filed a certain demand in the county court of said county against the estate of A. B., deceased, as a contingent claim for the sum of one thousand dollars; that on the ——— day of ———, 19—, an order of said court was made and entered finding that said claim was a proper contingent demand against said estate; that later said claim became absolute, and on the ——— day of ———, 19—, was duly allowed and established by said county court in favor of said plaintiff and against the estate of said A. B., deceased, in the sum of one thousand dollars, and that an order of said county court was thereupon made and entered directing L. M., administrator of said estate, to pay the same; that no part of said amount so due plaintiff as aforesaid has been paid, and there is due plaintiff thereon the sum of one thousand dollars, with interest from ———, 19—.

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65 Rev. Stats., c. 17, § 151, [1415].

66 Rev. Stats., c. 17, §§ 152, 153, [1416], [1417].

67 Rev. Stats., c. 17, § 149, [1413].

Second. That, as appears by the annual report of L. M., administrator of the said estate of said A. B., deceased, he has collected, of the assets of said estate, the sum of five thousand dollars; has paid as allowances for the support of the widow and minor children of said A. B. the sum of, to wit, two thousand dollars; that he has paid debts allowed against said estate by the commissioners thereon, amounting to the sum of one thousand dollars.

Third. That said L. M., administrator, on, to wit, the ——— day of ———, 19—, paid to defendant E. F. the sum of one thousand dollars, and to defendant G. H. the sum of five hundred dollars, and that, since the filing of his annual report, said L. M. has paid other claims and demands against said estate, which plaintiff verily believes amount to the sum of five hundred dollars, and that he now has in his possession no assets of said estate which can be applied upon the payment of the debt so allowed by said commissioners against the estate of said A. B.

Fourth. That, as appears by the inventory filed by said L. M., administrator, and by said annual report of said L. M., all the assets of said estate of said A. B. have been by said L. M. reduced to possession and paid out and expended by him as in paragraphs two and three alleged, and that there are no assets of said estate in the possession of any other heirs or distributees of said estate except the said sums of one thousand dollars and five hundred dollars, so as aforesaid in the possession of said defendants E. F. and G. H., and that the said sums so as aforesaid paid by said L. M., administrator, to said defendants E. F. and G. H., are of the proceeds of certain notes and mortgages belonging to said estate, and collected by said L. M., administrator.

Your petitioner therefore prays judgment against the defendant E. F. for the sum of six hundred sixty-six and 66/100 dollars, with interest thereon from the ——— day of ———, 19—, and for judgment against the defendant G. H. for the sum of three hundred thirty-three and 33/100 dollars, with interest from ———, 19—, and costs of suit.

(Signed) C. D.,
By A. B. H., His Attorney.

[Add verification, Form No. 5.]

§ 363. Actions against executors or administrators.

The law recognizes the right of a creditor to bring an action against an executor or administrator to reach

the assets in his hands for a contingent debt after the same has become absolute and duly allowed within one year after it shall become due. If the executor or administrator has not retained sufficient assets, he may set up as a defense that he has fully administered the estate which has come into his possession or knowledge.[68] And if it shall appear on the trial that he had fully administered the estate at the time the claim was presented, and has no assets of the estate which can be lawfully appropriated for that purpose, he shall be discharged, and shall have judgment for his costs; but if it shall be found that he had assets sufficient to pay a part of such claim, judgment shall be rendered against him for such sum only as shall be equal to the amount of the assets in his hands.[69]

If the giving of the notice of the examination and allowance of claims against the estate before the judge or commissioners shall in any case be omitted for the period of one year after the granting of letters testamentary or of administration, any person having a contingent or other lawful claim against a deceased person may at once commence an action thereon, and prosecute the same against the executor, administrator, heir, devisee or legatee, as the case may be, who shall have received real or personal property from the estate. Such creditor is required to commence the action against such heir, legatee, devisee, executor or administrator within five years after the issuing of letters testamentary or of administration.[70]

68 Rev. Stats., c. 17, §§ 145, 146, [1409], [1410].
69 Rev. Stats., c. 17, § 147, [1411].
70 Rev. Stats., c. 17, § 154, [1418].

No other action at law, except for the possession of real or personal property can be brought against an executor or administrator.

Form No. 163.

PETITION AGAINST EXECUTOR OR ADMINISTRATOR TO RECOVER CONTINGENT CLAIM.

In the District Court of ——— County, Nebraska.

C. D.,

Plaintiff,

vs.

E. F.,

Defendant.

The plaintiff complains of the defendant, and alleges that on the ——— day of ———, 19—, said E. F. was duly appointed administrator of the estate of A. B., deceased, by letters of administration issued out of and under the seal of the county court of said county, and now is acting as such administrator.

Second. That on the ——— day of ———, 19—, said plaintiff presented to the Honorable J. K., county judge of said county, his certain contingent claim against said estate in the sum of ——— dollars; that on the ——— day of ———, 19—, said county court, by an order duly made and entered, allowed said claim of this plaintiff against said estate in the sum of ——— dollars ($———) as a contingent claim against the estate of said A. B., and that the said Honorable J. K., county judge, also made an order on the said ——— day of ———, 19—, directing said defendant, E. F., to retain in his hands, as such administrator, the sum of ——— dollars of the assets of said estate for the purpose of paying said contingent claim of plaintiff so allowed as a contingent claim by said county judge, should said claim become an actual and fixed demand against said estate.

Third. That said defendant has in his possession, as plaintiff verily believes, the sum of ——— dollars ($———), which said amount is sufficient to pay said demand of said plaintiff, and that on the ——— day of ———, 19—, plaintiff demanded of defendant, said administrator, the sum of ——— dollars, being the amount allowed plaintiff by the county judge as aforesaid, and that payment thereof was refused.

Fourth. That no part of the claim or demand of plaintiff against the estate of said A. B. has been paid.

Your petitioner therefore prays for judgment against the said E. F. for the sum of ——— dollars, provided it shall appear on the trial of this action that said E. F., administrator, has retained in his hands sufficient assets of said estate to pay the same; and if it shall appear that said E. F., administrator, has in his hands only sufficient assets of said estate to pay a part of said claim of plaintiff, then that judgment be rendered against him for a sum equal to the amount of the assets in his hands, and for the costs of this action.

(Signed) C. D.,
By A. B. H., His Attorney.

[Add verification, Form No. 5.]

§ 364. Executor or administrator not subject to garnishment.

A writ of garnishment cannot issue to an executor or administrator pending administration of the estate. He would be unable to disclose the amount due an heir or legatee, and if he could do so, his admissions would not bind the estate.[71]

After the decree of distribution or order for payment of legacies is entered, the interest of the heir or legatee is subject to garnishment.[72]

A creditor of an heir or legatee who has reduced his demand to judgment, and exhausted all legal remedies in an attempt to collect the same, may maintain an action in the nature of a creditor's bill, to subject the interest of his debtor in the estate to the payment of his judgment,[73] and an injunction may issue restrain-

71 White v. Ledyard, 48 Mich. 264, 12 N. W. 216; Boyer v. Hawkins, 86 Iowa, 50, 52 N. W. 659; Thurston v. Wilmer, 94 Md. 455, 51 Atl. 96.

72 Palmer v. Noyes, 45 N. H. 174; Brown v. Wiley, 107 Ga. 85, 32 S. E. 905; Hudson v. Wilber, 114 Mich. 116, 72 N. W. 162.

73 Anderson v. Bradford, 5 J. J. Marsh. (Ky.) 69; Peay v. Morrison's Exrs., 10 Gratt. (Va.) 149; Farrar v. Haselden, 9 Rich. Eq. (S. C.) 331.

ing the personal representative from paying out any part of such share pending the suit.[74]

§ 365. Classification of claims for payment.

When an estate is solvent, no question arises over preferred claims, but if the assets are insufficient to pay them in full, they are paid in the following order after first deducting the expenses of administration:

First. The necessary funeral expenses;

Second. The expenses of the last sickness;

Third. Debts having a preference by the laws of the United States;

Fourth. Debts due other creditors.[75]

The first two classes are charges imposed on the estate by the law of the land, payable by the executor without being formally allowed by the county court.[76] What is the last illness is principally a question of fact. It may have lasted for months or perhaps years. It does not include all the charges for medical attendance, nurses, etc., during the existence of the disease which proved fatal, unless the illness resulting therefrom was continuous, requiring such services constantly, but the expenses incurred during the final illness resulting from such disease,[77] and all claims growing out of such illness rank together.[78]

Debts having a preference by the laws of the United States are those due the federal government, which

74 Earle v. Grove, 92 Mich. 285, 52 N. W. 615.

75 Rev. Stats., c. 17, §§ 131, 132, [1395], [1396].

76 Section 284, *supra*. For what are proper funeral expenses, see § 284, *supra*.

77 Huse v. Brown, 8 Me. 167; Percival v. McVey, Dud. (S. C.) 337.

78 Bennett v. Ives, 30 Conn. 229.

yields to no other creditor, and whose claims take precedence over all other demands.[79] It includes taxes of all kinds due the federal government, liability for money or other property for which the deceased was personally responsible while living, and liability as a surety upon a bond.[80]

It has been held that a surety on a bond to the United States who has been compelled to pay the same is subrogated to the rights of the government, and entitled to precedence over other creditors.[81]

The fourth class includes all other demands, either actual or contingent, which are a legal charge against the estate, and which have been allowed as such by the court or commissioners. It is immaterial whether the debt was one contracted in this state, or in some other state, where it might have a priority over other claims which rank with it here. It comes in the last class, and is paid according to the laws of Nebraska.[82] Personal taxes due the county or municipality come under this head. They have no priority over other demands, and rank the same as ordinary debts against the estate.[83]

In Oregon, claims allowed within the first six months after the date of notice of the issue of letters, and those presented, allowed or established within each succeed-

79 1 Stats. at Large, 515; United States v. Eggleston, 4 Saw. 199, Fed. Cas. No. 15,207.

80 United States v. Duncan, 4 McLean, 607, Fed. Cas. No. 15,003; United States v. Eggleston, 4 Saw. 199, Fed. Cas. No. 15,207.

81 Reed v. Emory, 1 Serg. & R. (Pa.) 339; Akin v. Dunlap, 16 Johns. (N. Y.) 77.

82 Union Bank of Georgetown v. Smith, 4 Cranch C. C. 21, Fed. Cas. No. 14,362.

83 Hedman v. Anderson, 8 Neb. 185; Millett v. Early, 16 Neb. 266.

ing period of six months, are paid in the following order: 1. Funeral charges; 2. Taxes of whatever nature due the United States; 3. Expenses of last sickness; 4. Taxes of whatever nature due the state, or any county or other public corporation therein; 5. Debts preferred by the laws of the United States; 6. Debts which at the date of the death of the deceased were a lien on his property or any right or interest therein, such preference extends only to the proceeds of the property on which the lien exists, and as such takes preference over any other class except taxes; 7. Debts due employees of the decedent and earned within ninety days immediately preceding his death; 8. All other claims against the estate.[84]

Classification of claims is based entirely on their subject matter. A judgment against an executor or administrator in his representative capacity stands the same as the demand on which it was based, and gives its holder no preference over those holding like claims.[85]

§ 366. Interest on claims.

There is no statute in this state fixing the rate of interest on claims that have been allowed against an estate. The usual practice is to allow interest at seven per cent from the date of their allowance, which is the rule in other states where claims are allowed by a court or commissioners.[86] Claims which by their terms bear interest until paid, like promissory notes, would continue to bear interest after allowance at the same rate.[87]

84 L. O. L., §§ 1295, 1296.

85 In re Fox, 92 N. Y. 93; Harrington v. Tolbert, 110 Ga. 428, 35 S. E. 687.

86 Mowry v. Peck, 2 R. I. 260; Glenn's Estate, 74 Ga. 567, 16 Pac. 396.

87 Reber's Estate, 142 Pa. 208, 22 Atl. 380.

If the estate is insolvent, it would be more equitable to disallow all interest for the benefit of creditors of a lower class.[88]

§ 367. Order for payment of claims.

The allowance of a claim against an estate is a direction for its payment, and when the estate is solvent they should be paid either in full or by installments, as the circumstances of the estate permit, enough being retained by the executor or administrator to satisfy contingent claims should they become absolute.[89]

If the assets are insufficient to pay all the debts, creditors of a lower class cannot be paid until those of the classes above it have been provided for, and if there is not enough to pay such class, each receives a dividend in proportion to the amount of his demand.[90] In such case the court in its order allowing the claim should state to which class it belongs, and an appeal lies to the district court from the classification as well as the allowance.[91]

The order classifying claims may be amended or changed by the county court in the same manner as other final orders.[92] It has been held that in case of a conflict between creditors over priorities, the executor or administrator may have all parties brought into court and the question determined.[93]

88 See Bowers v. Hammond, 139 Mass. 360, 31 N. E. 729; Camp v. Grant, 21 Conn. 41.

89 Rev. Stats., c. 17, §§ 134, 137, 143, [1398], [1401], [1407].

90 Rev. Stats., c. 17, § 133, [1397].

91 Relson v. Russell's Admrs., 15 Mo. 356.

92 Jillett v. Union Nat. Bank, 56 Mo. 304.

93 Jeter v. Barnard, 42 Ga. 43.

If the executor or administrator pays to a creditor of one class money which ought to be paid to a creditor of a superior class, he must account to the creditors of the superior class for the property thus distributed, at least to the amount of the outstanding claims of that class.[94] Payment to a creditor of a larger dividend than he is entitled to gives the other creditors of the same class no claim on the executor or administrator for a proportionate amount. The overpayment is all that can be apportioned.[95]

Form No. 164.

DECREE FOR PAYMENT OF DEBTS.

[Follow Form No. 141 to *, then, if assets are insufficient to pay debts in full, say:] And it further appearing that C. D., administrator as aforesaid, has in his hands, belonging to said estate, the sum of ——— dollars, which sum is insufficient to pay the debts in full: It is therefore ordered and adjudged that said administrator first reserve from said assets a sufficient sum with which to pay the costs of administration, together with the allowance for support of the widow and minor children of said A. B., still remaining unpaid, and that he then pay the claims designated as "funeral expenses," next the claims designated as "expenses of last illness," next those which have a preference by virtue of the laws of the United States, and that he distribute the balance of said assets among the other creditors in proportion to the amounts of their several demands, retaining, however, in his possession, a sufficient amount to pay the same *pro rata* share of the contingent claim of ——— dollars allowed one X. Y., should claim become absolute. No interest to be allowed creditors upon any of their claims.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

In Oregon the order of the county court for the payment of claims imposes a personal liability to each creditor included therein.[96]

94 Miller v. Janey's Exr., 15 Mo. 265; Schoenich v. Reed, 8 Mo. App. 356; Pinneo v. Goodspeed, 120 Ill. 524, 12 N. E. 196.

95 Pinneo v. Goodspeed, *supra*.

96 L. O. L., § 1302.

Form No. 165.

DECREE FOR FURTHER DISTRIBUTION TO CREDITORS.

[Title of Cause and Court.]

It appearing to the court from the report of C. D., administrator of said estate, on file herein, that he has in his possession assets of said estate to the amount of ——— dollars applicable to the further payment of debts previously allowed against said estate, it is therefore ordered and decreed that the said administrator distribute said sum to said creditors in proportion to the amount of their demands allowed said estate [pay said creditors the balance due each and all of them from said estate], together with interest thereon from the date of said allowance.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

If an appeal shall have been taken from the decision of the court or commission, and shall remain undetermined, the court may suspend the decree for the payment of the debts, or may order a distribution among the creditors whose claims have been allowed, leaving in the hands of the executor or administrator sufficient assets to pay the claim which may have been disputed or appealed,[97] and the same would, of course, be true of a claim taken to the district court upon error. When the disputed claim shall have been finally settled, the court shall order the same to be paid out of the assets retained, to the same extent and in the same proportion as the other creditors.[98]

§ 368. Payment, how made.

The executor or administrator should pay the creditors in cash and take their receipts to be filed as vouchers in the county court. The county judge has

[97] Rev. Stats., c. 17, § 135, [1399].
[98] Rev. Stats., c. 17, § 136, [1400].

no power to receive and disburse it.[99] Such order would protect the personal representative, but the judge who made it ought to be impeached on general principles.

The administrator may, with the consent of the creditor, assign to him promissory notes belonging to the estate,[100] or the creditor may buy property of the estate and apply his claim on the purchase price.[101]

§ 369. Liability of executor or administrator to creditors.

Whenever a decree has been made for the distribution of the assets among the creditors, the executor or administrator of the estate, after the time of payment shall arrive, shall be personally liable to the creditors for their debts, or the dividend thereon, as for his own debts, or he shall be liable on his bond which may be put in suit by any creditor whose demand is unpaid.[102]

Two remedies are thus provided; the first by the issue of an execution, as on a judgment, out of the county court, or out of the district court if the matter has been taken there on appeal and affirmed. If the county court execution has been returned unsatisfied, a transcript may be filed in the district court and execution issued thereon. The second is by action on the bond.[103] When the time fixed by the court for the payment of debts has expired, whether the estate be solvent or not, the court may, on the application of the

99 Wheeler v. Barker, 51 Neb. 846, 71 N. W. 750.
100 Marshall County v. Hanna, 57 Iowa, 372, 10 N. W. 745.
101 Neely v. Blair, 157 Pa. 417, 27 Atl. 777.
102 Rev. Stats., c. 17, § 138, [1402].
103 Lydick v. Chaney, 64 Neb. 288, 89 N. W. 801.

executor or administrator, by an order for that purpose, cause notice to be given to the creditors of the time appointed or limited for the payment of such debts, which notice shall be given by publishing the same at least three weeks successively in some paper to be designated by the court, or in such manner as the court shall direct.[104] If, after this notice shall have been given, any creditor shall neglect to demand from the executor or administrator his debt, or the dividend thereof, within two years from the time so limited for the payment of debts, or if the notice shall have been given after such time, within two years from the date of the last publication, the claim of such creditor shall be forever barred.[105]

Form No. 166.

ORDER TO CREDITORS TO DEMAND THEIR CLAIMS.

[Title of Cause and Court.]

Application having been made to this court by C. D., administrator of said estate, for an order requiring all creditors of said estate to demand the amounts allowed them by the commission appointed to adjust and allow claims against said estate, and it appearing that the time fixed for the payment of the debts of said estate has expired, notice is hereby given all creditors of said estate that the time fixed by the court for the payment of the debts allowed against said estate expired on the ——— day of ———, 19—, and that all creditors whose claims against said estate have been allowed are required to appear and demand the same on or before ———, 19—, and that in default thereof their claims will be forever barred.

It is further ordered that service of this order be had by publication of a copy of the same for three successive weeks in the ———, a legal newspaper of said county.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

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104 Rev. Stats., c. 1, § 139, [1403].

105 Rev. Stats., c. 17, § 140, [1404].

CHAPTER XXVIII.

PAYMENT OF LEGACIES.

§ 370. Personalty the Primary Fund for Payment of Legacies.
371. Charges on Real Estate for Payment of Legacies.
372. Sales of Real Estate for Payment of Legacies.
373. Payment of Legacies to Debtors and Creditors.
374. Vesting of Legacies.
375. Lapsed Legacies.
376. Lapsed and Void Legacies.
377. Abatement of Legacies.
378. Ademption of Legacies.

§ 370. Personalty the primary fund for legacies.

The personal estate is the primary fund for the payment of legacies unless the will directs otherwise,[1] and if it does not appear from the will that the real estate is to be charged with their payment, they will abate, either in whole or in part, if the personalty is insufficient.[2]

The acceptance of a devise or bequest conditioned upon the payment by the devisee or legatee of a legacy to a third party makes such legacy a charge on such legacy or devise, and the devisee or legatee personally responsible therefor,[3] thus partially relieving the personalty. Personalty may be made the secondary fund, but a specific direction to that effect is practically necessary to do it.[4]

1 Lupton v. Lupton, 2 Johns. Ch. (N. Y.) 613; Gallagher's Appeal, 43 Pa. 123; Gridley v. Andrews, 8 Conn. 1; Simonsen v. Hutchinson, 231 Ill. 508, 83 N. E. 183.

2 Hoyt v. Hoyt, 85 N. Y. 142; Crawford v. McCarthy, 159 N. Y. 514, 54 N. E. 277; Hibler v. Hibler, 104 Mich. 274, 62 N. W. 361.

3 Burch v. Burch, 52 Ind. 136; Dodge v. Manning, 1 N. Y. 298; Fuller v. McEwen, 17 Ohio St. 288.

4 Gordon v. James, 86 Miss. 719, 39 South. 18.

§ 371. Charges on real estate for payment of legacies.

What will or will not be construed by a court as charging legacies on real estate, depending as it does on the intention of the testator to be determined from the entire will, is a difficult matter to decide. There are a number of rules that have been generally recognized by the courts on the question.

A legacy payable from the estate, or directly chargeable on the estate, charges both real and personal property, the former being primarily liable.[5] A direction contained in a will which cannot be complied with unless the legacy is paid from the real estate will make it a charge thereon.[6]

Where legacies are given generally and the residue of the estate is bequeathed and devised in a mass, the legacies are a charge on the residuary realty, if the personalty is insufficient,[7] and the same is true if the will disposes of the residuary estate "after payment of legacies" or "after the above directions have been complied with,"[8] or devises land "after" the payment of a legacy or "with the understanding" that it shall be paid.[9]

5 Hartson v. Elden, 50 N. J. Eq. 522, 26 Atl. 561; Carter v. Gray, 58 N. J. Eq. 411, 43 Atl. 711; Cameron v. Boyd, 4 Dana (Ky.), 549.

6 Fauber v. Keim, 85 Neb. 217, 122 N. W. 849.

7 Wilson (Herdlitchka) v. Foss, 2 Neb. Unof. 428, 89 N. W. 300; Gallagher's Appeal, 48 Pa. 123; Wilcox v. Wilcox, 13 Allen (Mass.), 252; Robinson v. McIvor, 63 N. C. 649; Moore v. Beckwith, 14 Ohio St. 135; Corwine v. Corwine, 24 N. J. Eq. 579.

8 Smith v. Jackson, 115 Mich. 192, 73 N. W. 228; Simonsen v. Hutchinson, 231 Ill. 508, 83 N. E. 183; Root's Will, 81 Wis. 263, 51 N. W. 435.

9 Broadbridge v. Sackett, 138 Mich. 293, 101 N. W. 525; Spangler v. Newman, 239 Ill. 616, 88 N. E. 202; Lupton v. Lupton, 2 Johns. Ch. (N. Y.) 613.

If a testator gives legacies of such amounts as to greatly exceed the value of his personal estate, or when he had no personal estate whatever, the law assumes that he gave them with an intent to have them paid from his real estate.[10] If at the time he executed the will he had sufficient personal property to satisfy the legacies, but afterward converted it into real estate, so that at the time of his death they would abate unless paid from the real estate, they will be so charged.[11]

A direction to an executor to pay legacies is a charge only on the personal estate and income from the real estate, unless he is also a devisee, when they would become a charge on his devise, if the personalty was insufficient.[12]

Specific devises follow a different rule, and legacies will not be charged on them unless such was the clear intention of the testator and there is no residuary or general devise.[13]

§ 372. Sales of real estate for payment of legacies.

When a legacy is given that is effectual to pass or charge real estate, and the personal property is insufficient, the executor or administrator with the will annexed may be licensed to sell the same in the same manner and on the same terms and conditions as for

10 Thayer v. Finnegan, 134 Mass. 62; McCorn v. McCorn, 100 N. Y. 511, 3 N. E. 480; Fecht v. Henze, 162 Mich. 52, 127 N. W. 26; Clotilde v. Lutz, 157 Mo. 439, 57 S. W. 1018.

11 Scott v. Stebbins, 91 N. Y. 605; Turner v. Gibb, 48 N. J. Eq. 526, 22 Atl. 580.

12 Thayer v. Finnegan, 134 Mass. 62; Stroh v. O'Hearn (Mich.), 142 N. W. 865.

13 Davenport v. Sargeant, 63 N. H. 538, 4 Atl. 569; Newsom v. Thornton, 82 Ala. 402, 8 South. 261.

the payment of debts.[14] If the will contains a power of sale, it may be sold by the personal representative without leave of the court.[15] The order of sale should direct that lands generally devised be sold first, then that given specifically.[16]

When a legacy is charged on a specific or general devise, the legatee may proceed against the devisee by a bill in equity to foreclose his lien,[17] or by action at law.[18] Where a devise is given on condition of, or subject to, the payment of a legacy, the legatee is the party to enforce such claim. The duty of an executor to bring the statutory proceeding for a sale is limited to legacies which are charged generally on the real estate.

The lien of legacies on lands continues until they are paid and follows the lands into the hands of *bona fide* purchasers.[19]

§ 373. Payment of legacies to debtors and creditors.

A legacy to a debtor does not discharge the debt unless the will clearly shows that it was intended to be in addition to the amount due the testator. When the estate is solvent, the legacy is considered as paying it in part, if less than the amount due the estate, or in

14 Rev. Stats., c. 17, § 207, [1471].

15 In re Manning's Estate, 85 Neb. 60, 122 N. W. 711.

16 See § 323, *supra*.

17 Smith v. Jackman, 115 Mich. 192, 73 N. W. 228; Sherman v. Sherman, 4 Allen (Mass.), 392.

18 Swazey v. Little, 7 Pick. (Mass.) 296.

19 Wilson (Herdlitchka) v. Foss, 2 Neb. Unof. 428, 89 N. W. 300; Wood's Appeal, 133 Pa. 260, 19 Atl. 550; Harris v. Fly, 7 Paige (N. Y.), 421; Aston v. Galloway, 38 N. C. 126.

full if it equals or exceeds it, and the excess above the debt is payable to the legatee.[20]

When a legacy to a creditor equals or exceeds the debt due from the testator, the common-law rule was, that in the absence of an expressed intention, the legacy was given in satisfaction of the debt.[21] On account of the hardship of the rule, courts scrutinize all the provisions of the will carefully, and take into consideration the nature and character of the debt, and the situation of the parties, and if there is any evidence from which a contrary intention will be presumed, the creditor will be entitled to receive his legacy and collect his claim against the estate.[22] A direction to pay the debts gives him both his legacy and claim.[23]

§ 374. Vesting of legacies.

Legacies may be divided, with reference to the time when they come into the possession of the beneficiary, into four classes: First, those which take effect both in interest and possession at the death of testator; second, those taking effect at a specified time after testator's death; third, those taking effect in interest at testator's death but in possession at a future time; and fourth, those where the right to possession and enjoyment is limited to a contingency which may or may

20 Charlick's Estate, 11 Abb. N. C. (N. Y.) 56; Baldwin v. Sheldon, 48 Mich. 580, 12 N. W. 872; Kinney v. Newbold, 115 Iowa, 145, 88 N. W. 328.

21 Strong v. Williams, 12 Mass. 391.

22 Crouch v. Davis' Exr., 23 Gratt. (Va.) 62; Phillips v. McCombs, 53 N. Y. 494; Morris v. Simpson, 3 Houst. (Del.) 568.

23 Boughton v. Flint, 74 N. Y. 476.

not happen.[24] Courts favor vested rather than contingent interests, and a doubt is solved in favor of the legacy vesting.[25]

Legacies of the first class are payable at any time after the will is probated, and bear interest from the date their payment is ordered by the county court.[26] It has been held that a legacy given for the support of the legatee bears interest from the date of letters testamentary.[27]

They should be paid as soon as the condition of the estate will permit.[28]

Until the time a contingent legacy vests in possession it remains with the executor, or trustee, and unless the will directs otherwise, the income goes to him. Dividends on corporate stock are payable to the holder at the time.[29]

Stock dividends follow a different rule. As between trustee and *cestui que trust,* or life tenant and remainderman, the court will inquire when the same accrued or was earned; if before the *cestui que trust* or remainderman became entitled to possession, they go into the *corpus* of the estate, no matter when declared or made payable.[30]

24 McCartney v. Osborn, 188 Ill. 417, 9 N. E. 210.
25 Chess' Appeal, 87 Pa. 362.
26 Wheeler v. Ruthven, 74 N. Y. 428.
27 Thorn v. Garner, 113 N. Y. 198; Cooke v. Meeker, 36 N. Y. 15.
28 L. O. L., § 1303.
29 Godwin v. Hardy, 57 Me. 143.
30 Cook, Stock and Stockholders, 554.

§ 375. Lapsed legacies.

Under the common law, the death of a devisee or legatee before the testator worked a lapse of the legacy or bequest, and the same became a part of the residuary estate, or remained undisposed of, according to the terms of the will and the intention of the testator.[31]

Our statute has modified this rule in a great measure by providing that when a devise or legacy shall be made to any child or other relation of the testator, and the devisee or legatee shall die before the testator, having issue who shall survive the testator, such issue shall take the estate so given by the will, in the same manner as the devisee or legatee would have taken if he had survived the testator, unless a different disposition shall be made or intended by the terms of the will.[32] The meaning of the term "relation," as used in this statute, is not very clear. The supreme court has never decided whether it was used in its general sense, as including relatives by affinity and consanguinity, or as limited to relatives by consanguinity. Judging from the rule laid down in Van Riper v. Van Riper,[33] a fair construction would limit it to relatives by consanguinity.

Under the common law, if an estate is devised to two or more persons as joint tenants, or to two or more persons, no words of limitation or explanation being used, the death of one or more during the lifetime of the testator would not cause any portion of the legacy

31 Birdsall v. Hewlett, 1 Paige (N. Y.), 32; Prescott v. Prescott, 7 Met. (Mass.) 145; Ballard v. Ballard, 18 Pick. (Mass.) 41.

32 Rev. Stats., c. 17, § 50, [1314]; L. O. L., § 7327.

33 2 N. J. Eq. 1.

or devise to lapse, but it would vest in the survivor or survivors.[34]

This rule is not generally followed. The parties take as tenants in common and not as joint tenants, so that on the death of one of them during the life of the testator his share lapses,[34a] unless the deceased beneficiary was a descendant or relation of the testator or the will otherwise provided.

A legacy by a debtor to a creditor will not lapse on the death of the devisee before the testator, the presumption being that it was meant as a satisfaction of the debt, or a portion thereof, but, if a contrary intention can be ascertained from any circumstance or expression, it will be treated as lapsed.[35]

Legacies will also lapse when given to an association or corporation which has ceased to exist,[36] or is not at the time capable of taking. Legacies which fail because for any reason incapable of being paid on account of conditions, or other cause, are usually considered as void in their inception.

§ 376. Lapsed and void legacies.

Unless a contrary intention be expressed in clear and absolute terms, a lapsed legacy will pass into the residuary estate, should there be one created by a clause general in its terms, and the next of kin and

[34] 2 Jarman, Wills, 251, 253.

[34a] Kaser v. Kaser, 68 Or. 153, 137 Pac. 187; Maxwell v. Higgins, 38 Neb. 671, 57 N. W. 388; Smith v. Haynes, 202 Mass. 531, 89 N. E. 159; Haug v. Schumaker, 166 N. Y. 506, 60 N. E. 245.

[35] Russell v. Minton, 42 N. J. Eq. 123, 7 Atl. 342; Van Riper v. Van Riper, 2 N. J. Eq. 1.

[36] Gladding v. St. Mathews' Church, 25 R. I. 628, 57 Atl. 860.

heirs at law will take no interest therein.[37] If there be no such clause, it would necessarily go to the heirs at law, and be distributed according to the laws of distribution and descent;[38] and if there is a residuary bequest to two or more persons, and a share of one lapses or fails for any reason, such share also becomes a part of the intestate estate.[39]

In regard to devises which the courts have held to be absolutely void, there is some conflict of authority, some courts holding that they should go to the residuary devisee or legatee, if there be any.[40] The weight of authority, however, is that the devise, although void from the beginning, was never actually intended by the testator to form a part of his residuary estate, and that the estate therefore goes to the heirs at law, not on the ground of any supposed intention of the testator to confer any benefit upon them, but because they are entitled to all that part of his estate not legally disposed of by his will,[41] and accumulations directed to be made by the residuary clause also pass to the heir at law.[42] If a devise or bequest is charged with

37 West v. West, 89 Ind. 529; Holbrook v. McCleary, 79 Ind. 167; In re Benson, 96 N. Y. 499.

38 Lovering v. Lovering, 129 Mass. 97.

39 Burnet's Exrs. v. Burnet, 30 N. J. Eq. 595; Garthwaite's Exrs. v. Lewis, 25 N. J. Eq. 351; Huber's Appeal, 80 Pa. 348; Haldeman v. Haldeman, 40 Pa. 29.

40 Hayden v. Inhabitants of Stoughton, 5 Pick. (Mass.) 528; Brigham v. Shattuck, 10 Pick. (Mass.) 306.

41 Greene v. Dennis, 6 Conn. 292; Van Kleeck v. Reformed Dutch Church, 6 Paige (N. Y.), 600; James v. James, 4 Paige (N. Y.), 115; Stonestreet v. Doyle, 75 Va. 356; Wilson v. Odell, 58 Mich. 533, 25 N. W. 506.

42 Wilson v. Odell, 58 Mich. 533, 25 N. W. 506; Seibert's Appeal, 110 Pa. 329, 1 Atl. 346.

another bequest, and the second bequest fails for any reason, the first devise or bequest profits by the lapse.[43]

§ 377. Abatement of legacies.

Abatement may be defined as the reduction of a legacy, either general or specific, on account of the estate of the testator not being sufficient for the payment of the debts and legacies, or because of the failure of any fund from which they are to be paid.[44] A specific legacy abates entirely with the failure of the specific fund or particular article of personalty bequeathed, and the legatee will not be entitled to share in any other portion of the estate by virtue of his legacy.[45] It will not abate for the payment of debts unless there is a lack of sufficient other assets of the estate to pay them. It has been held that, if the fund from which a demonstrative legacy is to be paid fails from any cause, the legatee is nevertheless entitled to share in the estate the same as a general legatee.[46]

A legacy for a valuable consideration or in lieu of a distributive share follows the same rule in regard to abatement as a specific legacy, taking preference over general and demonstrative legacies. It must be paid in full unless the assets are insufficient to pay it and the debts and expenses of administration.[47] A bequest of one-third of testator's property is a specific legacy,

43 1 Jarman, Wills, 346.

44 Rapalje & Lawrence, Law Dict.

45 Roper, Legacies, 191.

46 Armstrong's Appeal, 63 Pa. 312; Bradford v. Brinley, 145 Mass. 81, 13 N. E. 1.

47 Blower v. Morret, 2 Ves. Sr. 420; Brown v. Brown, 79 Va. 648; Ellis v. Aldrich, 70 N. H. 219, 47 Atl. 95; Moore v. Alden, 80 Me. 301, 14 Atl. 199; Security Co. v. Bryant, 52 Conn. 311.

and therefore cannot be taken for the debts unless there is no other property.[48]

When the assets are insufficient to pay the general legacies, both demonstrative and general legacies will abate in proportion to the deficiency, unless by the terms of the will the testator has one or more legatees above the others,[49] and the burden of proof is upon him who asserts that the legacy should be treated as a specific one.[50] If there is a failure of assets sufficient to pay the debts, then specific legacies may be taken for that purpose.

§ 378. Ademption of legacies.

Ademption may be defined as the revoking or withholding of a legacy by reason of some act occurring during the life of the testator, by means of which he has parted title with the subject of the legacy, or its identity or description or value has become so changed that it cannot be identified, or the intention or purpose for which it was given has been fulfilled during the lifetime of the testator;[51] as, where a parent has given a legacy to a child, and subsequently gives to the child the property, or a portion thereof, which was included in the legacy, the purpose or intent of

48 Currier v. Currier, 70 N. H. 149, 47 Atl. 94.

49 Emery v. Batchelder, 78 Me. 233; Duncan v. Inhabitants of Township of Franklin, 43 N. J. Eq. 143; Moore v. Alden, 80 Me. 301, 14 Atl. 199; Security Co. v. Bryant, 52 Conn. 311; Ellis v. Aldrich (N. H.), 47 Atl. 95.

50 Shepherd v. Guernsey, 9 Paige (N. Y.), 357.

51 Richards v. Humphreys, 15 Pick. (Mass.) 133; Wyckoff v. Perrine, 37 N. J. Eq. 118; Hill v. Toms, 87 N. C. 493; Webb v. Jones, 36 N. J. Eq. 163, 168; Decker v. Decker, 121 Ill. 341; Taylor v. Tolen, 38 N. J. Eq. 91.

the parent not being stated, the law presumes the legacy to have been intended as the share or portion of the estate to come to such child at his death, and the legacy would be wholly or partially adeemed, as the case might be.[52] Money paid to a son for the purpose of defraying the expenses of his education, unless the will expressly provides that all payments made to legatees before testator's death shall be treated as advancements, does not come within the rule,[53] nor does the rule apply to realty.[54]

52 Clendening v. Clymer, 17 Ind. 155.
53 White v. Moore, 23 S. C. 456.
54 Langdon v. Astor's Exrs., 16 N. Y. 34; 1 Roper, Legacies, 365.

CHAPTER XXIX.

GIFTS CAUSA MORTIS AND ADVANCEMENTS.

§ 379. Gifts *Causa Mortis*—Defined.
380. What Property Subject to Gift *Causa Mortis*.
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§ 379. Gifts causa mortis defined—How made.

A gift *causa mortis* may be defined as a delivery made by a person in sickness, and apprehending immediate death, to the possession of another, of personal goods to be kept as his own, at the donor's decease, and subject to the implied condition that, if the donee die first, or the donor recover, the gift shall be void.[1] Such gifts are not looked upon with favor by the courts, and all requisites to their validity must be clearly established.[2] It must be made in apprehension of the death of the donor, either from infirmity, old age, severe illness or from impending danger.[3] Any gift made under such circumstances is presumed to be

1 2 Bl. Com. 514; Smith v. Ferguson, 90 Ind. 229; Hillman v. Young, 64 Or. 79, 127 Pac. 795.

2 Gano v. Fisk, 43 Ohio St. 462, 3 N. E. 532.

3 Robinson v. Ring, 72 Me. 140; Irish v. Nutting, 47 Barb. (N. Y.) 370; Gourley v. Linsenbigler, 51 Pa. 345; Rhodes v. Childs, 64 Pa. 18; First Nat. Bank of New Haven v. Balcon, 35 Conn. 351; Nicholas v. Adams, 2 Whart. (Pa.) 17; Grymes v. Hone, 49 N. Y. 17.

a gift *causa mortis,* and not *inter vivos.*[4] The property must be delivered by the donor to the donee, and, unless there is such actual change of possession as amounts to an entire change of possession of the property, no title passes.[5] Such delivery may be to a third person, in trust for the donee, although the gift does not come to the knowledge of the donee, and is not accepted by him until after the death of the donor.

The person to whom the delivery is made is regarded as the trustee for the donee, and his acts in holding the property for the donee are deemed to be in the donee's interest, the acceptance of the donee being presumed.[6] The donor must relinquish possession of the property, and actual possession be taken by the donee, or by someone as trustee for him, and such possession retained by the party to whom the gift is delivered, until the death of the donor.[7] Therefore, a written request by a person in apprehension of immediate death, to pay or deliver certain property therein described to a third party, will not constitute a gift *causa mortis,* for it would be in effect a will executed without the formalities required by the statute.[8]

4 Emery v. Clough, 63 N. H. 552, 4 Atl. 796.

5 Darland v. Taylor, 52 Iowa, 503, 3 N. W. 510; Fearing v. Jones, 149 Mass. 12, 20 N. E. 199; Drew v. Hagerty, 81 Me. 231, 17 Atl. 63; Coleman v. Parker, 114 Mass. 30; Yancy v. Field, 85 Va. 756, 8 S. E. 721; Wilcox v. Matteson, 53 Wis. 23, 9 N. W. 814; Gano v. Fisk, 43 Ohio St. 462, 3 N. E. 532.

6 Hillman v. Young, 64 Or. 79, 127 Pac. 793; Clough v. Clough, 117 Mass. 83; Devol v. Dye, 123 Ind. 321, 24 N. E. 246; Hogan v. Sullivan, 114 Iowa, 456, 87 N. W. 448; Beals v. Crowley, 59 Cal. 665; Woodburn v. Woodburn, 123 Ill. 608, 14 N. E. 58, 16 N. E. 209.

7 Smith v. Ferguson, 90 Ind. 229; Daniel v. Smith, 75 Cal. 548; Clough v. Clough, 117 Mass. 83.

8 Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. Rep. 415.

It is not necessary that the beneficiaries be named when the property is delivered to a trustee, if they are afterward designated by the donee.[9] The gift must be accepted by the donor, but, being of a beneficial interest, it will be presumed in cases where made to a trustee.[10] Where property is turned over to the donee by the donor shortly before his death, and the donee does not, at the time he received it, signify his acceptance, but, after the death of the donor, accepts it, the gift will fail.[11]

§ 380. What property subject to gift causa mortis.

Gifts *causa mortis,* from the very nature of the case, are limited to specific articles of personalty, specifically delivered.[12] Any kind of personal property can be given except shares of stock in corporations, the delivery of which was not accompanied by a formal assignment executed by the donor to the donee.[13] A promissory note executed by the donor to the donee, and without consideration, is more in the direction of an order or direction to pay than a payment, and cannot be recovered on as a gift *causa mortis.*[14]

9 Hogan v. Sullivan, 114 Iowa, 456, 87 N. W. 448; Caylor v. Caylor's Estate, 22 Ind. App. 666, 52 N. E. 465; Sorrells v. Collins, 110 Ga. 518, 36 S. E. 74.

10 Hogan v. Sullivan, 114 Iowa, 456, 87 N. W. 448; Clough v. Clough, 117 Mass. 83.

11 McGrath v. Reynolds, 116 Mass. 566.

12 Marshall v. Berry, 13 Allen (Mass.), 43; Headley v. Kirby, 18 Pa. 326; Meach v. Meach, 24 Vt. 591.

13 Egerton's Exrs. v. Egerton, 17 N. J. Eq. 419.

14 Parish v. Stone, 14 Pick. (Mass.) 198; Starr v. Starr, 9 Ohio St. 74; Second Nat. Bank v. Williams, 13 Mich. 282; Smith v. Smith's Admr., 30 N. J. Eq. 564.

A donor's own check payable to the donee cannot be treated as a gift, there being no actual delivery of the money, but instead an order on the bank to pay it, unless given for a valuable consideration,[15] or unless the donee has parted with it for a valuable consideration or cashed it.[16] Checks, and commercial paper generally, held by the owner as payee or indorsee may be indorsed by him and delivered as a valid gift.[17]

Bonds, shares of stock in corporations, insurance policies and savings bank deposits may be assigned and delivered as such gifts, and when the entire personal property consists of specific items, he can thus practically dispose of his entire estate.[18]

§ 381. Effect of gift.

A gift *causa mortis* is not an absolute disposition of one's property, but substantially a substitute for a bequest of the subject of the gift, and is revocable at the pleasure of the donor during his life and by the death of the donee before the donor.[19] If the donor recover from the particular illness or peril which was the moving cause of the gift being made, such recovery defeats it, and he may, at his option, regain possession of the property.[20] He also has the right, at any time before his death, to revoke the same, by ordering a

15 Whitehouse v. Whitehouse, 90 Me. 468, 38 Atl. 374; Burke v. Bishop, 27 La. Ann. 465, 27 Am. Rep. 567; Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. Rep. 415.

16 Tate v. Hilbert, 2 Ves. Jr. 111; Beak v. Beak, L. R. 13 Eq. 489.

17 Foster v. Murphy, 76 Neb. 576, 107 N. W. 843.

18 Meach v. Meach, 24 Vt. 591.

19 Hillman v. Young, 64 Or. 79, 127 Pac. 793.

20 Grymes v. Hone, 49 N. Y. 17.

return of the property, and though the donee neglects or refuses to comply with the demand, the revocation is complete and the donee loses what rights in the property he may have possessed.[21]

If the estate proves to be insolvent, the gift will not be sustained. Only such property can be the subject of a valid gift as is not needed for the payment of the debts. Any other rule would give a person so disposed an easy way to defeat the claims of his creditors.[22]

§ 382. How validity of gift determined.

The question whether such articles of personalty were disposed of by gift *causa mortis* usually arises when the executor or administrator attempts to take possession. The statutory proceedings for disclosure of assets[23] will give him some information but cannot determine the validity of the gift. Replevin or action for conversion is the effective remedy. The burden of proof is held to be with the donee to prove that the donor actually delivered the property to him in contemplation of death.[24] The donee is precluded from testifying to his conversations or transactions with the donor to the same extent as in the matter of claims against the estate.[25] The presumption that a gift made by a party who knows that he is near death is

21 Jones v. Selby, Finch Prec. Ch. 300; Merchant v. Merchant, 2 Brad. Sur. (N. Y.) 432.

22 Michener v. Dale, 23 Pa. 59; Borneman v. Sidlinger, 15 Me. 429.

23 Section 197, *supra.*

24 Buecker v. Carr, 60 N. J. Eq. 300, 47 Atl. 34; People's Savings Bank v. Look, 95 Mich. 7, 54 N. W. 629.

25 Section 292 et seq., *supra.*

not intended as one *inter vivos* is not conclusive.[26] Declarations of the donor made after the date of the alleged gift and the relationship and conditions of the parties are competent evidence to establish it.[27]

§ 383. Advancement—Defined.

An advancement may be defined as a gift of any property, either real or personal, by a parent to a child, or by an ancestor to lineal descendants, in anticipation of such child or lineal descendant's share in such parent's or ancestor's estate. As far as the division and distribution of the estate is concerned, it is regarded as a part thereof, and is considered by such child or other descendant as the whole or a part of his share in the estate.[28]

If of real estate, it may be of an estate or freehold or a lesser estate. The deeds to the same must be executed and delivered and all provisions therefor completed during the lifetime of the ancestor, but the right to the enjoyment of the premises need not vest until after his death.[29]

All gifts or grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by

[26] Carty v. Connolly, 91 Cal. 15, 27 Pac. 599; Henschel v. Maurer, 69 Wis. 576, 34 N. W. 926.

[27] Keniston v. Sceva, 54 N. H. 24; Connor v. Root, 11 Colo. 183, 17 Pac. 773.

[28] Rev. Stats., c. 17, § 12, [1276]; L. O. L., § 7354; Yundt's Appeal, 13 Pa. 575.

[29] Graves v. Spedden, 46 Md. 527; Nettleton v. Nettleton, 17 Conn. 542.

the decedent as an advancement, or acknowledged in writing as such by the child or other descendant.[30]

The doctrine of advancement applies to a gift as such to a child or descendant who died previous to the death of the donee leaving issue,[31] to illegitimate children, except in case of the death of the parent of the child before the donee,[32] and to gifts by both parents.[33]

It does not apply to property given by a husband or wife to each other or to collateral heirs, but only to children and lineal descendants.[34] By agreement between the parties, a gift by a donor to the husband of his daughter may be made an advancement and treated as a gift to the daughter.[35]

§ 384. Changing character of payment.

An advancement may be revoked or rescinded by the donor and changed into an absolute gift in the

30 Rev. Stats., c. 17, § 15, [1279]; L. O. L., § 7357; Lodge v. Fitch, 72 Neb. 652, 101 N. W. 338; Boden v. Mier, 71 Neb. 191, 98 N. W. 701.

31 Hessler v. Cady, 79 Neb. 691, 113 N. W. 147.

32 Page v. Page, 8 Neb. 202, where the child had been legitimatized by the marriage of his parents and the birth of lawful issue to them, so that his interest in the grandparent's estate was the same as theirs.

33 Murphy v. Nathans, 46 Pa. 508; Daves v. Hapgood, 54 N. C. 253.

34 Greiner's Appeal, 103 Pa. 89; In re Morgan, 104 N. Y. 74, 9 N. E. 861.

35 Hartwell v. Rice, 1 Gray (Mass.), 587; Booth v. Foster, 111 Ala. 312, 20 South. 356; Stayner v. Bower, 42 Ohio St. 314, in which it was held that the husband would be held the trustee of the wife, but that the wife was entitled to receive her full distributive share from her father's estate, and the estate subrogated to the rights and remedies against the husband. On account of the statutes giving a married woman full control over her separate property, it would be necessary for her to expressly assent to the gift being made as an advancement.

same manner as it became an advancement,[36] and a gift or debt may be changed into an advancement in the same way,[37] provided the debt has not become outlawed.[38]

§ 385. Evidence necessary to prove advancements.

Oral evidence is inadmissible to prove that payments by a donor were intended by him to be treated as advancements, and the doctrine of advancement by presumption does not prevail in this state.[39] Payments of money or other valuable property to a child, or conveyances of real estate, unless otherwise expressed in the consideration, or explained by competent evidence, are presumed to be gifts and not advancements.[40]

To constitute a payment or conveyance or delivery of property an advancement, there must have been an intent on the part of the donor to so consider it, though it is not necessary that such intent be known to the donee or concurred in by him,[41] and such intent must be shown by written evidence, either the grant itself, charges entered by the donor, or the receipt of the donee,[42] and such writing or charges by the donor must have been made during the lifetime of the donee. The character of the payment or conveyance cannot be

36 Sherwood v. Smith, 23 Conn. 516.

37 Roland v. Schrack, 29 Pa. 125; Kirby's Appeal, 109 Pa. St. 41.

38 Levering v. Rittenhouse, 4 Whart. (Pa.) 130.

39 Boden v. Mier, 71 Neb. 191, 98 N. W. 701; Riddell v. Riddell, 70 Neb. 472, 97 N. W. 609; Lodge v. Fitch, 72 Neb. 652, 101 N. W. 338.

40 Johnson v. Ghost, 11 Neb. 414, 8 N. W. 391.

41 Johnson v. Evans, 8 Gill (Md.), 155; Johnson v. Hoyle, 3 Head (Tenn.), 56.

42 Riddell v. Riddell, 70 Neb. 472, 97 N. W. 609; Boden v. Mier, 71 Neb. 191, 98 N. W. 701; Lodge v. Fitch, 72 Neb. 652, 101 N. W. 338.

changed after the death of the party to whom it is given or granted.[43]

The receipt of the donee or the entries in the books of account of the donor or the terms of the conveyance are sufficient to charge the donee with the advancement.[44]

§ 386. Testate estates.

The doctrine of advancements does not apply to testate estates unless the will so directs.[45] Advancements previously made are converted by the will into gifts.[46] Should there be a surplus after the payment of all legacies, debts and charges, and there is no residuary clause, it will be distributed without regard to any payments made by the ancestor to the heirs during his lifetime.[47]

§ 387. Value of advancement.

If the value of the advancement be expressed in the conveyance, or in the charge made therefor by the intestate, or in the acknowledgment of the party receiving it, it shall be considered as of that value in the division and distribution of the estate; otherwise it shall be estimated according to its value when given as near as the same can be ascertained.[48] Where pos-

43 Hessler v. Cady, 79 Neb. 691, 113 N. W. 147.

44 French v. Strumberg, 52 Tex. 92; Brown v. Brown, 16 Vt. 197; Fellows v. Little, 46 N. H. 27.

45 Hall v. Hall, 132 Iowa, 664, 110 N. W. 148; Turpin v. Turpin, 88 Mo. 337; Buehler's Appeal, 100 Pa. 385.

46 McCormick v. Hanks, 105 Iowa, 639, 75 N. W. 494; Boron v. Kent, 190 N. Y. 422, 83 N. E. 472.

47 Turner's Appeal, 52 Mich. 298, 18 N. W. 123.

48 Rev. Stats., c. 17, § 16, [1280]; L. O. L., § 7358.

session was postponed until the death of the decedent or a future date, it is treated as "given" when the party takes possession.[49] It has been held that the donee of a life insurance policy should be charged with the net amount received from the company.[50]

The donee is not chargeable with interest on such valuation previous to the death of the intestate,[51] but for the purpose of equalizing the shares it is usually allowed after the death of the ancestor.[52] The fact that the advancement became worthless or depreciated in value during its possession by the donee does not relieve him from liability to account for the same at its value when he received it. He would profit from the increase and must bear the loss from depreciation.[53]

§ 388. Advancements and distribution.

If the amount of such advancement to an heir shall exceed his share, he is not required to refund any part of it, and if less, he is entitled to enough more to give him his full share. If the advancement was made in real estate, its value shall be considered a part of the real estate to be divided, and if in personal estate,

49 Pigg v. Carroll, 89 Ill. 205; Moore v. Burrow, 89 Tenn. 107, 17 S. E. 1035.

50 Cazassa v. Cazassa, 92 Tenn. 373, 22 S. W. 560; Culberhouse v. Culberhouse, 68 Ark. 405, 59 S. W. 38.

51 Black v. Whitall, 9 N. J. Eq. 572; Ray v. Loper, 65 Mo. 470; Hosmer v. Sturges, 31 Ohio St. 657; Pigg v. Carroll, 89 Ill. 206; Jackson v. Jackson, 28 Miss. 674.

52 Sprague v. Moore, 130 Mich. 92, 89 N. W. 712; Moore v. Burrow, 89 Tenn. 101, 17 S. W. 1035.

53 Fennell v. Henry, 70 Ala. 484; Kelley v. McCallum, 83 N. C. 563; Nelson v. Wyan, 21 Mo. 347.

as a part of the personalty; and if in either case it shall exceed the share of real and personal estate, respectively, that would have come to the heir so advanced, he shall not refund any part of it, but shall receive so much less out of the other part of the estate as will make his whole share equal to those of the other heirs who are of the same degree with him.[54]

The advancement to a child or lineal descendant of an intestate who predeceased him leaving issue is adjusted in the same manner, his taking the share he would have taken if living.[55]

In the case of intestate estates, all questions concerning advancements are determined by the county court on the hearing for final distribution.[56] In a testate estate, where certain payments were directed by the will to be treated as advancements, the district court has power to adjust the same between devisees in a suit for partition.[57]

54 Rev. Stats., c. 17, §§ 13, 14, [1277], [1278]; L. O. L., § 7356.
55 Rev. Stats., c. 17, § 17, [1281]; L. O. L., § 7359.
56 McClave v. McClave, 60 Neb. 464, 83 N. W. 668.
57 Schick v. Whitcomb, 68 Neb. 784, 94 N. W. 1023.

CHAPTER XXIX-A.

DOWER AND CURTESY.

§ 388a. Definitions.
388b. Dower in Mortgaged Property.
388c. Dower of Aliens and Nonresidents.
388d. Property Subject to Dower.
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388f. Dower and Curtesy—How Barred.
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388h. Assignment of Dower.
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388k. Dower in Lands that have Enhanced in Value.
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388m. Dower in Lands not Capable of Division.
388n. Damages for Withholding Dower.
388o. Incidents of Dower.
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§ 388a. Definitions.

Dower is of ancient common-law origin,[1] and may be defined as a provision made by law for the benefit of the widow out of the real estate of which her husband was seised.[2] Dower in Oregon differs considerably from what it was at common law, being the use during the remainder of her life of the one-half of the estate whereof the husband was seised of an estate of inheritance at any time during their marriage, unless she is lawfully barred thereof.[3]

Curtesy, which at common law was a life estate in the wife's real estate when there were children born alive to the parties, is made by statute an estate iden-

1 Coke Litt. 124b.
2 Schiffen v. Pruden, 64 N. Y. 47; Dow v. Dow, 36 Me. 211.
3 L. O. L., § 7286.

tical in amount with dower, assigned, admeasured and barred the same way; and as far as practicable all laws applicable to dower are applicable in like manner and with like effect to curtesy.[4] There are no separate statutory provisions regulating assignment of curtesy or defining the various incidents connected therewith, and with the few exceptions hereafter noted the law governing dower applies equally to curtesy.

On the death of either husband or wife the interest of the one in the estate of the other, which up to that time was a mere lien or charge on the real estate, ceases to be such charge or lien, and becomes at once an estate carved out of the lands of the intestate, and exempted from the payment of his ordinary unsecured debts.[5] The estate does not immediately vest in possession, excepting the right of the widow to occupy the dwelling-house of the decedent for one year.[6] The executor or administrator is entitled to the control of the property and the right to the rents and profits pending administration for the purpose of paying the debts and charges of administration.[7] The right does not attach to any particular part or portion of the lands, but is a general right to the use of the one-half of the lands or one-half of the rents and profits.[8]

A widow is not entitled to dower in both lands of which her husband died seised and lands for which they were deeded in exchange, but may elect to take such estate in either. She will be deemed to have taken dower in the lands received in exchange unless

4 L. O. L., § 7315.

5 David Adler & Sons Clothing Co. v. Hellman, 55 Neb. 266, 75 N. W. 887; Motley v. Motley, 53 Neb. 275, 73 N. W. 738; Wylie v. Charlton, 43 Neb. 646, 62 N. W. 220.

6 L. O. L., § 7308.

7 Leonard v. Grant, 8 Or. 276; Neal v. Davis, 53 Or. 424, 99 Pac. 69, 100 Pac. 212.

8 Neal v. Davis, *supra;* Jackson v. O'Rorke, 71 Neb. 418, 98 N. W. 1068.

she commences proceedings to recover dower in the other lands within one year.[9]

§ 388b. Dower in mortgaged property.

A widow is entitled to dower in lands encumbered by a mortgage executed by her husband previous to her marriage, or by a purchase money mortgage executed after her marriage and in which she did not join, as against all persons except the mortgagee and those claiming under him. Should such mortgages be foreclosed and a surplus remain after their payment, she is entitled to the interest or income of the one-half of such surplus for her life.[10]

If the heir or other person claiming under the husband shall pay and satisfy the mortgage, the amount so paid shall be deducted from the value of the land, and the widow shall have set out for her, for her dower in the mortgage lands, the value of one-half of the residue after such deduction.[11]

If the mortgage was given after marriage and she did not unite with her husband in executing it, she is entitled at his decease to her dower to the same extent as though the mortgage never existed.[12] When she joins in the mortgage she releases her right only as to the mortgagee and his assigns, the same as her husband releases his.[13] Dower may be assigned in mortgaged land, subject to defeasance by breach of the conditions of the mortgage, and when it is so assigned she holds her interest therein until default and foreclosure.[14] At common law it was held to be the duty

9 L. O. L., § 7287; Motley v. Motley, 53 Neb. 375, 73 N. W. 738.

10 L. O. L., § 7290.

11 L. O. L., § 7291.

12 Gerry v. Stimson, 60 Me. 186.

13 Bell v. City of New York, 10 Paige (N. Y.), 40; Young v. Tarbell, 37 Me. 509.

14 Danforth v. Smith, 23 Vt. 247; Culver v. Harper, 27 Ohio St. 464; Tucker v. Field, 51 Miss. 191.

of the administrator to relieve the lands from mortgage liens as far as possible, for the purpose of increasing the widow's dower.[15] As in Oregon the power to redeem real estate is subject to the order of the county court or judge, and the widow is given a distributive share in the personal estate, there is nothing to be gained from such redemption except in special cases.

If a mortgage executed by the husband and wife is foreclosed during coverture, she is entitled to a dower interest in the surplus moneys arising from a judicial sale under the decree against her, which may remain after satisfying the mortgage debt and the proper costs incident to the foreclosure, costs incurred in resisting her right and in litigating the claims of other parties in regard to the property not to be considered. The rule is the same where the husband died after the sale, and the surplus remained in his hands.[16] The wife is always a necessary party to the foreclosure suit.[17]

§ 388c. Dower of aliens and nonresidents.

Aliens are entitled to dower the same as citizens. The dower of a nonresident is limited to those lands in this state of which her husband died seised, and she may recover it in the same manner as a resident.[18]

[15] Mantz v. Buchanan, 1 Md. Ch. Dec. 202; Holmes v. Holmes, 3 Paige (N. Y.), 363; Morgan v. Sackett, 57 Ind. 580.

[16] Mills v. Van Voorhies, 20 N. Y. 412; Unger v. Leiter, 32 Ohio St. 210; Reiff v. Horst, 55 Md. 42; Hawley v. Bradford, 9 Paige (N. Y.), 200; State Bank v. Hinton, 21 Ohio St. 509. The supreme court of New York has recognized the right of a wife to have her inchoate right of dower in the surplus arising from a sale under a decree of foreclosure during the lifetime of her husband set out to vest in possession at her death. Denton v. Nanny, 8 Barb. (N. Y.) 618; Matthews v. Duryee, 45 Barb. (N. Y.) 69.

[17] Ketchum v. Shaw, 28 Ohio St. 503; Ross v. Boardman, 22 Hun (N. Y.), 527; Mills v. Van Voorhies, 20 N. Y. 412; Denton v. Nanny, 8 Barb. (N. Y.) 618.

[18] L. O. L., § 7306.

Her rights are defeated by a conveyance by the husband during coverture.[19]

§ 388d. Property subject to dower.

Dower attaches to all the realty of the husband in this state, and to all tenements and hereditaments thereunto belonging or in any wise appertaining,[20] including mines already opened and those portions not yet worked,[21] to estates in common,[22] to lands purchased by a partnership, of which her husband was a member, with partnership funds, except the partnership be insolvent,[23] to lands held by the husband under the donation act, if the required four years' residence has been completed, whether final proof has been made and certificate or patent issued or not,[24] to lands entered under a land warrant and conveyed by the husband before patent issued, the wife not joining in the deed,[25] to lands conveyed to her by her husband during his lifetime in which she was held to be a trustee *ex maleficio* for the heirs because of fraud in procuring the conveyance,[26] to lands allotted to an Indian by federal statute in trust for an Indian allottee for a term of years, for the sole use and benefit of such allottee, "or in case of his decease to his heirs, accord-

19 Thornburn v. Doscher, 32 Fed. 811; Atkins v. Atkins, 18 Neb. 474, 25 N. W. 724; Ligare v. Semple, 32 Mich. 438.

20 Coke Litt. 32a.

21 Billings v. Taylor, 10 Pick. (Mass.) 460; Findlay v. Smith, 6 Munf. (Va.) 134; Crouch v. Puryear, 1 Rand. (Va.) 258.

22 Rank v. Hanna, 6 Ind. 20; Lee v. Lindell, 22 Mo. 292; Den d. Woodhull v. Longstreet, 18 N. J. L. 405.

23 Green v. Green, 1 Ohio St. 535; Dyer v. Clark, 5 Met. (Mass.) 562; Willet v. Brown, 65 Mo. 138; Divine v. Mitchum, 4 B. Mon. (Ky.) 488; Campbell v. Campbell, 30 N. J. Eq. 415.

24 McKay v. Freeman, 6 Or. 449; Love v. Love, 8 Or. 23; Farris v. Hayes, 9 Or. 81.

25 Purcell v. Lang, 108 Iowa, 158, 79 N. W. 1005.

26 Parrish v. Parrish, 33 Or. 486, 54 Pac. 352.

ing to the laws of the state of Oregon,"[27] to lands recovered from a fraudulent grantee of the husband,[28] to lands which her husband acquired after the execution of the will and which were not devised therein,[29] to such lapsed and void legacies as do not pass into the residuary estate, in which case she is entitled to both dower and the provisions of the will,[30] and, if a resident of Oregon, to lands aliened by her husband during coverture when she did not join in the conveyance.[31]

A judicial sale of the husband's lands during his lifetime on an execution against him alone does not bar her right of dower in the lands sold.[32] The purchaser takes subject to the inchoate right of the wife to dower;[33] nor does a sale by an administrator under a license of the court for the payment of the ordinary unsecured debts of the estate,[34] unless she expressly consents and agrees thereto and joins in the conveyance.[35] Her personal knowledge of the sale, even though she was present and heard the land offered, the bids made and the property struck off to the highest bidder without making any objection, is no

27 Beam v. United States, 162 Fed. 260; Parr v. United States, 153 Fed. 462.

28 Campbell v. Clark, 2 Doug. (Mich.) 141.

29 Hall v. Hall, 2 McCord Eq. (S. C.) 269; City of Philadelphia v. Davis, 1 Whart. (Pa.) 490.

30 Johnson v. Johnson, 32 Minn. 313, 21 N. W. 725; Power v. Cassidy, 79 N. Y. 602; Hand v. Marcy, 28 N. J. Eq. 59.

31 L. O. L., § 7286.

32 Hanely v. Kubli, 46 Or. 632, 74 Pac. 224.

33 Motley v. Motley, 53 Neb. 375, 73 N. W. 738; Vinson v. Gentry, 14 Ky. Law Rep. 804, 21 S. W. 578; Grady v. McCorkle, 57 Mo. 172; Porter v. Lazear, 109 U. S. 84, 3 Sup. Ct. Rep. 58; Laton v. Corser, 51 Minn. 406, 53 N. W. 717.

34 House v. Fowle, 22 Or. 303, 29 Pac. 890; Whiteaker v. Belt, 25 Or. 490, 36 Pac. 534; Kent v. Taggart, 68 Ind. 163.

35 Compton v. Pruitt, 88 Ind. 171; Motley v. Motley, 53 Neb. 375, 73 N. W. 738.

bar to her dower.[36] Her right takes precedence over that of a mechanic's lien.[37]

Dower does not attach to an equitable estate.[38] Curtesy, however, attaches to both legal and equitable estates,[39] and to property held by a trustee for the wife, the rents and profits being payable to her,[40] and to property held by a lessee, the right to have the estate set out, however, not accruing until after the termination of the lease.[41] It has been held not to attach to an estate of less than a freehold.[42]

Neither dower nor curtesy attach to lands conveyed by both husband and wife with intent to defraud creditors, when such lands are recovered by the executor or administrator on the application of the creditors, the deed being good as between the parties to it,[43] nor does dower attach to lands deeded to an administrator which were conveyed by the husband before marriage as security for a debt, a bond for reconveyance being taken and the lands redeemed by the administrator.[44]

§ 388e. Requisites of dower and curtesy.

The requisites of dower and curtesy in Oregon are substantially the same. They are marriage, seisin,

36 House v. Fowle, 22 Or. 303, 29 Pac. 890; Whiteaker v. Belt, 25 Or. 490, 36 Pac. 534.

37 Bishop v. Boyle, 9 Ind. 169; Shaeffer v. Weed, 3 Gilm. (Ill.) 511; Gove v. Cather, 23 Ill. 634.

38 Whiteaker v. Vanschoaick, 5 Or. 113; Farnum v. Loomis, 2 Or. 30.

39 Gilmore v. Burch, 7 Or. 374; Beam v. United States, 162 Fed. 260.

40 Lowry's Lessee v. Steele, 4 Ohio St. 170; Jackson d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74; Sweeney v. Montgomery, 85 Ky. 55, 2 S. W. 562.

41 Forbes v. Sweesy, 8 Neb. 520.

42 Hall v. Crabb, 56 Neb. 392, 76 N. W. 865.

43 Curtis v. Price, 12 Ves. 103; Richardson v. Welch, 47 Mich. 309, 11 N. W. 172.

44 Hall v. Hall, 70 N. H. 47, 47 Atl. 79; Pugh v. Bell, 2 B. Mon. (Ky.) 125.

and death of the owner of the estate of inheritance.[45] The marriage must have been a valid one, or, if voidable, have never been avoided.[46] A marriage by consent *per verba de praesenti* is sufficient to entitle the party to the estate,[47] and so is a common-law marriage, it appearing that the parties lived and cohabited together as husband and wife, were commonly reputed to be married and held themselves out to the public as such.[48]

The decedent must have been seised of an estate of inheritance in the property for his own use and benefit.[49] If the decedent held the land as an executor or trustee of an express or resulting trust, the estates do not attach.[50]

§ 388f. Dower and curtesy—How barred.

A married woman may bar her right of dower in any estate conveyed by her husband, or by his guardian if he be a minor, by joining in the deed of conveyance thereto, or by executing a separate deed with or without mentioning barring of dower. Such separate deed can only be executed to the grantee of the husband or the heirs or assigns of such grantee.[51] Her deed must be both signed and acknowledged.[52] The curtesy of the husband may be barred by his joining in or executing a deed in like manner.[53]

45 Stevens v. Smith, 4 J. J. Marsh. (Ky.) 64.

46 1 Greenleaf, Cruise, 154.

47 Pearson v. Howey, 11 N. J. L. 18.

48 Fenton v. Reid, 4 Johns. (N. Y.) 52; Donnelley v. Donnelley's Heirs, 8 B. Mon. (Ky.) 113.

49 Atwood v. Atwood, 23 Pick. (Mass.) 283; Poor v. Horton, 15 Barb. (N. Y.) 485; Prits v. Richey, 29 Pa. 71; 2 Bl. Com. 129.

50 Tillman v. Spann, 68 Ala. 102; Gage v. Ward, 25 Me. 101; Johnson v. Plume, 77 Ind. 166; Glenn v. Clark, 53 Md. 580; Fontaine v. Boatsmen Savings Inst., 57 Mo. 552.

51 L. O. L., § 7298.

52 Maynard v. Davis, 127 Mich. 571, 86 N. W. 1051.

53 Besser v. Joyce, 9 Or. 310.

Dower may also be barred by a jointure settled on the wife before her marriage with her assent, provided the same consists of a freehold estate in lands, for the life of the wife at least, to take effect in possession or profits immediately on the death of her husband.[54] Such jointure must recite that it is given expressly in lieu of dower,[55] and must be assented to, if she be of the full age of twenty-one, by her joining with her father or guardian in the conveyance.[56] Dower is also barred by an antenuptial agreement, which must be assented to by the intended wife in the same manner as a jointure.[57] Such contract must strictly comply with the statutes. The pecuniary provision must be made in the agreement itself; its amount must be fixed and certain, leaving nothing to be done by either party for its determination. Therefore an antenuptial agreement by which the husband was to provide for the wife by will, which agreement was complied with by the husband, does not bar the widow from electing to take under the statute.[58] The jointure or pecuniary provision is not void as to creditors when the value of the property is about equal to the dower interest.[59]

Dower is not barred by a conveyance previous to the marriage, which does not take effect, according to its terms, until the death of the grantor, he still remaining in possession of the property and of its rents and profits. Such instrument being testamentary in its character, the husband is seised of the property as though it had never been executed.[60]

54 L. O. L., § 7299.

55 Pepper v. Thomas, 85 Ky. 539, 4 S. W. 297.

56 L. O. L., § 7300.

57 L. O. L., § 7301.

58 Fellers v. Fellers, 54 Neb. 694, 74 N. W. 1077.

59 Singree v. Welch, 32 Ohio St. 320.

60 Pinkham v. Pinkham, 55 Neb. 729, 77 N. W. 411; Hazleton v. Reed, 46 Kan. 73, 26 Pac. 450; Conrad v. Douglas, 59 Minn. 498, 62 N. W. 673; Donald v. Nesbit, 89 Ga. 290, 15 S. E. 367.

During the existence of the marriage relation no valid agreement can be made between the husband and wife for the release of dower or curtesy,[61] or agreement between them for a division of their lands by the terms of which certain property is to be "exclusively" the property of the husband and other property "exclusively" the property of the wife.[62] This rule does not bar either, if possessed of a separate estate, from selling and conveying the same to the other. The law makes a distinction between an absolute sale of real estate by husband to the wife, or *vice versa,* by which the grantor parts with the entire interest and a release or relinquishment of the statutory interest which the surviving spouse takes in the lands of the decedent. The conveyance of the lands is valid to the same extent as between persons who are not husband and wife, and includes either dower or curtesy.[63]

Form No. 166a.

JOINTURE BARRING DOWER.

This indenture, made this ——— day of ———, 19—, by and between A. B., of ——— county, Oregon, an unmarried man, and C. D., of ——— county, Oregon, an unmarried woman of full age, witnesseth: That whereas, said parties intend to be joined in the bonds of matrimony, and are desirous of executing a conveyance by which said C. D. becomes barred of any right of dower which she may, after said contemplated marriage, acquire in the lands of the said A. B., now, therefore, in consideration of said intended marriage, said A. B. hereby grants, bargains, and conveys unto the said C. D. the following described real estate [describe real estate], together with all the tenements and hereditaments thereunto belonging or in any wise appertaining, to have and to hold the same unto the said C. D. for and during her natural life, possession of said premises by said C. D. to be given at the marriage of said A. B., and said C. D.; and the said A. B., for himself, his heirs, executors, and

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61 House v. Fowle, 20 Or. 165, 25 Pac. 376; McCrary v. Biggers, 46 Or. 465, 81 Pac. 356.

62 Potter v. Potter, 43 Or. 149, 72 Pac. 702.

63 Jenkins v. Hall, 26 Or. 79, 37 Pac. 62; L. O. L., § 7306.

assigns, hereby covenants and agrees to and with the said C. D. that he is lawfully seised of the above-described premises in fee simple, that they are free from all liens and encumbrances, and that he has full right and authority to convey the same; and he further covenants and agrees to warrant said premises against the demands of all persons whatsoever.

And the said C. D., for and in consideration of said marriage and the execution and delivery of this instrument by the said A. B., hereby expressly assents and agrees to receive said premises in lieu of dower in all lands of which the said A. B. may be seised of all estate of inheritance at any time during their marriage.

In witness whereof, the parties hereto have hereunto set their hands the day and year first above written.

(Signed) A. B.
C. D.

Witness:
G. H.
L. M.

State of Oregon,
——— County,—ss.

On this ——— day of ———, 19—, before me, a notary public duly commissioned at and within the county aforesaid, personally came A. B. and C. D., to me known to be the persons described in and who executed the foregoing instrument, and acknowledged the same to be their free act and deed, and executed for the purposes therein mentioned.

Witness my hand and official seal.

(Seal) (Signed) J. C. C.,
Notary Public.

§ 388g. Election between jointure and dower, or devise and dower or curtesy.

If the jointure or pecuniary provision be made before marriage and without the consent of the intended wife, or if it be made after marriage, she shall make her election after the death of the husband whether she will take such jointure or pecuniary provision or be endowed with the lands of her husband, but she shall not be entitled to both.[64] At common law the

[64] L. O. L., § 7302; Runyan v. Winstock, 55 Or. 203, 105 Pac. 895.

widow was entitled to both dower and a devise, or pecuniary provisions in the will of her husband, unless such will expressly declared to the contrary.[65] Under the Oregon statutes she is not entitled to both, but must make her election which she will take, unless the will plainly shows an intention to give her both.[66] A devise or bequest, in order to be in lieu of dower, must be made direct to the widow or for her use and benefit, freed from any trust for other purposes,[67] nor will a charge on the estate for the board, lodging, clothing and all desirable comforts for a wife in her declining years be considered as a bequest in lieu of dower.[68]

§ 388h. Assignment of dower.

Upon the death of the husband the right of the widow to dower becomes a vested one, but until formally set apart to her, she has no right to an undivided one-half or the use of any particular tract or portion,[69] excepting only the right to the occupancy of the dwelling-house.[70] She may continue to occupy the lands with the children, or other heirs of the deceased, or may receive one-half of the rents, issues and profits therefrom so long as the heirs or others interested do not object, without having her dower assigned.[71] She may also, by agreement with the heirs and personal representatives, receive a gross sum from the estate equal to the present value of her life interest or estate, interest being computed at the legal rate,[72] or an agree-

65 4 Kent, Com., 58; In re Gotzian, 34 Minn. 159, 24 N. W. 920; Atkinson v. Staig, 13 R. I. 725.

66 L. O. L., § 7303.

67 Rittgers v. Rittgers, 52 Iowa, 218, 9 N. W. 188.

68 Bentley v. Bentley, 112 Iowa, 625, 84 N. W. 676. As to method of election, see § 431, *post*.

69 Neal v. Davis, 53 Or. 424, 100 Pac. 212.

70 L. O. L., § 7308; Aikin v. Aikin, 12 Or. 203, 6 Pac. 682.

71 L. O. L., § 7297.

72 Hale v. James, 6 Johns. Ch. (N. Y.) 258; Williams' Case, 3 Bland (Md.), 186.

ment may be made with the heirs for the payment, properly secured, of the one-half of the income during her lifetime.[73] When the value of the income for one year has been agreed upon, the present value can be figured from mortality and interest tables. Find from the mortality table her life expectancy, then from the interest tables the present value of an annuity of one dollar per year during such expectancy; multiply this amount by the value of the income for one year, and the result is the present value of her dower.

§ 388i. Assignment of dower by county court.

An action for recovery of dower or curtesy must be brought within ten years from the date of the death of the deceased.[74] When the right to the estate is not disputed by the heirs, or devisees or any persons claiming under them, it may be assigned, in whatever counties the lands may lie, by the county court of the county in which the estate is settled, on the application of the surviving spouse or other person interested in the estate.[75] This statute is a limitation on the powers of the county court over the settlement of the estates of deceased persons given it by the constitution, and in order to oust such court of jurisdiction, objections must be filed setting out facts which, if established, would defeat the right of the petitioner to recover.[76]

Notice of the hearing on the petition is required to be given to the heirs, devisees or other persons in such manner as the court may direct.[77]

If objections are filed, the court has no jurisdiction to proceed further, and the proceedings should be dismissed without prejudice. If there are none, the court

73 Lenfers v. Henke, 73 Ill. 405.

74 Laws 1913, p. 211.

75 L. O. L., § 7293.

76 Guthman v. Guthman, 18 Neb. 104, 24 N. W. 435; Clemons v. Helihan, 52 Neb. 287, 72 N. W. 270.

77 L. O. L., § 7293.

may enter an order awarding dower and for the purpose of assigning the same direct that a warrant issue to three discreet and disinterested persons, authorizing and requiring them to set out the dower by metes and bounds, when it can be done without injury to the whole estate.[78]

The commissioners shall be sworn by a judge of any court of record, or a justice of the peace, faithfully to discharge their duties, and shall as soon as may be set off the dower according to the command of such warrant, and make return of their doings, with an account of their charges and expenses in writing to the county court; and the same being accepted and recorded and an attested copy thereof filed in the office of the county clerk where the lands are situated, the dower shall remain fixed and certain, unless such confirmation be set aside and reversed. Costs on appeal and one-half of the costs of such proceeding shall be paid by the widow, and the other half by the adverse party.[79]

Form No. 166b.

PETITION FOR ASSIGNMENT OF DOWER BY WIDOW—COUNTY COURT.

[Title of Cause and Court.]

Your petitioner, C. B., respectfully represents unto the court that on the ——— day of ———, 19—, at the city of ———, in the state of Oregon, she was married to said A. B.; that on or about the ——— day of ———, 19—, at the city of ———, in said state, said A. B., then being a resident of said ——— county, departed this life intestate [if decedent left a will, say, "leaving a last will and testament, which was duly admitted to probate in the county court of said ——— county on the ——— day of ———, 19—; that your petitioner hereby renounces the provisions made for her in said will, and elects to be endowed of the estate of which said A. B. died seised"]; that said A. B. was seised of an estate of inheritance in the following described real estate [describe real estate]; that your petitioner is the widow of said A. B.,

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78 L. O. L., § 7294.

79 L. O. L., § 7295.

and that her right of dower in said real estate has not been barred by any act or omission on her part, either before or after the death of her said husband, and that she is therefore entitled to her dower interest therein; that said dower right in said real estate has not been disputed by any of the heirs [devisees] of said A. B., nor by any other persons claiming through or under them; that the following persons are interested in said real estate [give names and places of residence, as far as known, of heirs or devisees or other persons interested].

Your petitioner therefore prays that dower in said real estate may be assigned to her, and for such other relief as may be just and equitable.

(Signed) C. B.

Dated at ———, Oregon, this ——— day of ———, 19—.

[Add verification, Form No. 5.]

Form No. 166c.

NOTICE OF PENDENCY OF PETITION FOR DOWER—COUNTY COURT.

State of Oregon,
——— County,—ss.

To the Heirs at Law, Devisees, and All Persons Interested in the Estate of A. B., Deceased:

You are hereby notified that on the ——— day of ———, 19—, C. B. filed her petition in the county court of said county, duly verified, praying for the assignment to her of dower in the following described premises: [Describe premises as in petition.] You are notified to appear at the county court room in the city of ———, said county, on the ——— day of ———, 19—, and show cause, if any there be, why the prayer of the said petitioner should not be granted. It is further ordered that a copy of this petition be served on all parties interested in said lands by publication thereof once each week for three successive weeks in the ———, a newspaper printed and published in said county.

In witness whereof, I have hereunto set my hand and affixed the seal of said court this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

Form No. 166d.

ANSWER SETTING UP DEFENSE TO DOWER.

[Title of Cause and Court.]

Comes now E. F., and for answer to the petition of said C. B., praying for the assignment to her of dower in the following described lands

[describe lands as in petition], alleges that said C. B. is not the widow of said A. B., deceased; that on the ——— day of ———, 19—, in the county court of ——— county, ———, in a certain case in which said A. B. was plaintiff and C. B. defendant, said A. B. was granted a decree of divorce from said C. B., and that said decree has never been reversed or modified, and is now in full force and effect, and was granted for the cause of adultery committed by said C. B.; [that said E. F. purchased said lands above described on the ——— day of ———, 19—, at a judicial sale on a judgment rendered in the circuit court of ——— county, Oregon, in an action wherein G. H. was plaintiff and A. B. was defendant, and that, since the purchase of said property, the same has been greatly enhanced in value on account of the erection by said E. F. of a brick block of the value of $10,000]; [that on the ——— day of ———, 19—, said C. B., C. D., administrator of said estate, G. H., L. M., and your petitioner, sole heirs of said A. B., entered into a contract and agreement with said C. B. by the terms of which said G. H., L. M., and E. F. purchased of said C. B., for the sum of $2,000, her dower and other interest in said estate].

Said E. F. therefore prays that this proceeding may be dismissed.

Dated this ——— day of ———, 19—.

(Signed) E. F.

[Add verification, Form No. 5.]

§ 388j. Assignment of dower by circuit court.

The general equity jurisdiction of the circuit court gives it the power to assign dower in all cases, irrespective of the statute vesting such power to a limited extent in the county court,[80] and whenever the right is disputed its jurisdiction is exclusive.[81] The action may be brought by the widow or an interested party, making all parties claiming title, including grantees of the heirs or devisees, defendants, or against the grantees of the heirs alone. The petition need not set up that the right to dower is denied by the defendants.[82] The practice regarding appointment of commissioners, report and confirmation and filing same in

80 Baer v. Ballingall, 37 Or. 422, 61 Pac. 825.

81 Baer v. Ballingall, *supra*.

82 McKay v. Freeman, 6 Or. 449.

the office of the county clerk where the lands lie is usually the same as in the county court.

Dower may also be assigned in an action for partition, provided the widow expressly assents. The interest is not sufficient to authorize her to bring such action and compel a sale of the interests of the heirs.[83]

§ 388k. Dower in lands that have enhanced in value.

The widow is entitled to dower in lands that were aliened by the husband without her having joined in the conveyance, and which have enhanced in value since their alienation according to their value at the time of the transfer.[84] The term "enhanced in value" as used in the above section means an increase in value caused by the erection of buildings or the making of improvements, and does not cover an advance in values owing to extrinsic causes, or common to all tracts similarly located.[85] The date of the alienation of the property is determined by the date of the deed, or if sold under judicial proceedings, by the date of the judgment, if in a court of law, or of confirmation, if in equity.[86]

In determining the value of the dower the value of the property is fixed as of the date of the assignment and the value of improvements placed thereon since the date of the transfer deducted. The widow is entitled to the present value of the use of the one-half of the resulting amount.[87] Repairs which merely keep the property in about the same condition as it was in when the transfer was made are not included.[88]

83 Hurste v. Hotaling, 20 Neb. 178, 29 N. W. 299; Coles v. Coles, 15 Johns. (N. Y.) 319; Woods v. Clute, 1 Sand. Ch. (N. Y.) 201.

84 L. O. L., § 7292.

85 Thorburn v. Doscher, 32 Fed. 812.

86 Butler v. Fitzgerald, 43 Neb. 192, 61 N. W. 640; Scheffer v. Weed, 8 Gilm. (Ill.) 511; Hale v. James, 6 Johns. Ch. (N. Y.) 258.

87 Butler v. Fitzgerald, 43 Neb. 192, 61 N. W. 640; Allen v. McCoy, 1 Ohio St. 418; Summers v. Babb, 13 Ill. 483.

88 Walsh v. Wilson, 131 Mass. 535.

§ 3881. Dower in lands that have depreciated in value.

Where property depreciates in value after alienation, from natural causes, negligence or the voluntary act of the alienee, a proportion of the loss falls on the widow if she asks to have dower assigned therein.[89]

If the lands were not aliened during the life of the husband and the depreciation is caused by the loss or destruction of the improvements by fire, and the insurance money has been received by the personal representative, heirs or devisees, she is entitled to the benefit of a share of such amount, the value of the property being treated as of the date of the husband's death.[90]

§ 388m. Dower in property not capable of division.

It is not necessary that the commissioners set apart any separate tract of land which is to be the property of the widow during her lifetime. Whenever the estate consists of a mill or other tenements which cannot be divided without damage to the whole, and in all cases where it is impracticable to divide the estate by metes and bounds, dower may be assigned of half of the rents, issues and profits to be had and received by the widow as a tenant in common.[91]

Form No. 166e.

PETITION FOR ASSIGNMENT OF DOWER—CIRCUIT COURT.

[Title of Cause and Court.]

The plaintiff complains of the defendants, and for cause of action alleges, that on the ——— day of ———, 19—, at the city of ———, in said county, plaintiff was married to A. B., and that afterward, and on or about the ——— day of ———, 19—, said A. B. departed this

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89 Hale v. James, 6 Johns. Ch. (N. Y.) 258; Thompson v. Morrow, 5 Serg. & R. (Pa.) 289; Powell v. Bronson & Brimfield Mfg. Co., 2 Mason, 347.

90 Campbell v. Murphy, 55 N. C. 357.

91 L. O. L., § 7296.

life at his residence, in said county of ——— [intestate]; leaving a last will and testament, which was duly admitted to probate in the county court of said county on the ——— day of ———, 19—; that on the ——— day of ———, 19—, plaintiff filed in said county court her waiver of the provisions made for her in the will of the said A. B., and elected to take her dower interest in said estate.

(2) That E. F. and G. H. are the children and only heirs at law of the said A. B.

(3) That said A. B., during the time of said marriage, was seised in fee simple of the following described real estate, to wit [describe premises], situated in ——— county, Oregon, and that defendant I. J. now claims said premises by virtue of a deed executed and delivered by the said A. B. to the said I. J. on the ——— day of ———, 19—, and which said deed was not signed or acknowledged by this plaintiff.

(4) That plaintiff, by reason of said marriage, upon the death of the said A. B., became entitled to dower in the lands above described, which dower has never been assigned to her, nor has she received any equivalent therefor, or released the same.

Plaintiff therefore prays that she may recover dower in the premises above described, and for such other relief as equity may require.

(Signed) C. B.,
By G. G. M., Her Attorney.

[Add verification, Form No. 8.]

Form No. 166f.

PETITION BY HEIR FOR ASSIGNMENT OF DOWER.

In the Circuit Court of ——— County, Oregon.

L. B.,
Plaintiff,
vs.
C. B., S. D., E. F., and G. H.,
Defendants.

The plaintiff complains of the defendants, and for cause of action alleges, that on the ——— day of ———, 19—, A. B. and C. B., the father and mother of plaintiff, were married at the city of ———, in ——— county, state of ———, and that afterward, on the ——— day of ———, 19—, at his residence in the county of ——— and state of Oregon, said A. B. died intestate, leaving his widow and S. D., D. F., and G. H., his children, his only heirs at law.

(2) Said A. B. died seised in fee simple of the following described real estate, situated in ——— county, Oregon. [Describe real estate.]

(3) Said C. B., by virtue of said marriage, upon the death of the said A. B., became entitled to dower in the above-described lands, which dower has never been assigned to her, nor has she received an equivalent therefor, or released the same.

(4) That plaintiff has purchased the interest of the other heirs in said above-described premises subject to the dower of said C. B., and is compelled to encumber the same and have said dower assigned.

The plaintiff therefore prays that the said C. B. may be assigned her dower in the premises above described, and for such other relief as justice may require.

(Signed) L. B.,
By G. G. M., His Attorney.

[Add verification, Form No. 5.]

Form No. 166g.

DECREE FOR DOWER—COUNTY COURT.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the petition of C. B. and the answers of E. F. and G. H., and the evidence, and was submitted to the court, on consideration whereof the court finds that A. B., in his lifetime, was seised of all estate of inheritance of the following described real estate, to wit [describe property], and that the plaintiff is the widow of the said A. B., and is entitled to dower in said premises, and to have the same assigned.

It is therefore considered by the court that the said petitioner be endowed of the one-third part of the above-described premises as her dower therein as the widow of the said A. B., and that C. V., B. N., and M. H., of said county, be and hereby are appointed by the court to assign said dower to said plaintiff according to law, and report said assignment of dower to this court without delay.

(Signed) J. K.,
County Judge.

Form No. 166h.

WARRANT TO COMMISSIONERS.

State of Oregon,
——— County,—ss.

To C. F., B. N., and M. H., of Said County:

Whereas, C. B. filed her petition in the county court of ——— county, Oregon, praying for the assignment to her of dower in the following described premises [describe property], and, after due notice by personal service of an order to show cause upon all the parties named therein, a hearing was had thereon, and the court having found from the evidence that the petitioner is the widow of the said A. B., that he died seised of an estate of inheritance in the land above described, and that the petitioner is entitled to dower in the same, you are hereby appointed commissioners to admeasure the dower of the said petitioner in said above-described estate by setting off the same by metes and bounds, if it can be done without injury to the whole estate. If the premises cannot be divided without damage to the whole estate, you will assign the rents, issues, and profits of said estate to be had and received by the widow as tenant in common with the owners of the said estate.

You will give due notice to all parties interested in said estate, to wit [give names of parties interested], of the time and place for the admeasurement of said dower, and will admeasure the same, and make due return of your proceedings with all convenient speed.

Form No. 166i.

OATH OF COMMISSIONERS TO SET OFF DOWER.

We and each of us do solemnly swear that we will faithfully discharge the duties devolving upon us as commissioners, appointed by the county court of ——— county, Nebraska, to set off the dower of C. B. in the lands of which her late husband, A. B., died seised of all estate of inheritance.

(Signed) C. F.
B. N.
M. H.

Subscribed in my presence and sworn to before me this ——— day of ———, 19—.

(Signed) J. H. W.,
Justice of the Peace.

Form No. 166j.

REPORT OF COMMISSIONERS ON ASSIGNMENT OF DOWER.

[Title of Cause and Court.]

We, the undersigned, duly appointed by an order of said court to assign dower to C. B., widow of said A. B., respectfully report that, having first taken the oath required by law, and which is hereto attached, marked "Ex. A," we gave personal notice to all the persons named in the petition filed in this proceeding that, on the ——— day of ———, 19—, we would meet to assign said dower.

That on said day we met at the premises described in said order, to wit [describe as in the decree],* and caused a survey to be made of the same in the presence of the parties interested, and in their presence we admeasured and laid off to said widow one-third of the said premises, as follows [describe portion assigned to widow], and designated the same by monuments. [If land cannot be divided, follow to *, then insert: That said estate consists of a business block [state what it consists of], and cannot be divided by metes and bounds. We therefore assigned to the said C. B. one-third of the rents, issues and profits of said estate, to be had and received by her as tenant in common with the owners of said estate.]

Dated this ——— day of ———, 19—.

(Signed) E. F.
G. H.
I. J.

Form No. 166k.

ORDER CONFIRMING ASSIGNMENT OF DOWER.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the report of the commissioners appointed by the court to make an assignment of dower from said estate to C. B., widow of said A. B. Upon consideration whereof, the court finds that said assignment and proceedings have in all respects been made in conformity to law, and the same are hereby approved and confirmed.

It is therefore ordered that the said C. B. have use and possession of the lands so assigned her during her life, said lands being described as follows: [Describe property as in decree.]

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

§ 388n. Damages for withholding dower.

Whenever a widow recovers her dower in lands of which her husband died seised, she is entitled to damages for withholding the same, which are fixed by the statute at one-half of the annual value of the mesne profits of the lands in which she shall recover dower, not including the use of permanent improvements made after the death of the husband by his heirs, or by any other person claiming title to such lands, to be estimated in a suit against the heirs of her husband from the time of his death, and in suits against other persons from the time of demanding her dower of such persons.[92]

When a widow shall recover her dower in any lands aliened by the heir of her husband, she shall be entitled to recover of such heir, in a civil action, her damages for withholding such dower from the time of the death of the husband to the time of the alienation by the heir, not exceeding six years in the whole; and the amount which she shall be entitled to recover from such heir shall be deducted from the amount she would otherwise be entitled to recover from such grantee, and any amount recovered as damages from the grantee shall be deducted from the sum she would otherwise be entitled to recover from such heir.[93]

§ 388o. Incidents of dower.

When a widow accepts an assignment of dower in her husband's lands, it is a bar to any further claim for dower against the grantee of the husband, his grantee, or the grantee of the heir, unless she shall have been lawfully evicted from the lands so assigned.[94]

The estate so assigned to the widow becomes her separate property. It may be sold or assigned by her and subjected to her debts and sold on execution.[95]

92 L. O. L., §§ 7309, 7310, 7311.

93 L. O. L., § 7312.

94 L. O. L., § 7313.

95 Baer v. Ballingall, 37 Or. 424, 61 Pac. 802.

The widow must keep the houses and fences in good repair, and is liable to the person having next immediate inheritance therein for waste.[96] She may cut wood and timber for ordinary farm purposes or so as to fit the land for cultivation or pasture, provided the same is not cut for sale but for use in connection with the premises.[97] Where mining property is assigned her, she may take out ore in a vein or lead already opened, and for such purpose may sink a shaft to strike a lead disclosed in the mine,[98] but has no right to open up new mines.[99]

As between herself and the remainderman, she is liable for the taxes.[100]

§ 388p. Dower recovered by default or collusion.

"When a widow, not having right to dower, shall, during the infancy of the heirs of her husband, or any of them, or of any person entitled to the lands, recover dower by the default or collusion of the guardian of such infant heir or other person, such heir or other person, so entitled, shall not be prejudiced thereby; but when he comes of full age, he shall have an action against such widow to recover the lands so wrongfully awarded for dower." [101]

96 L. O. L., § 7307.

97 Disher v. Disher, 45 Neb. 100, 65 N. W. 369; Webster v. Webster, 33 N. H. 18; McCracken v. McCracken, 6 T. B. Mon. (Ky.) 352.

98 Ward v. Carp River Iron Co., 47 Mich. 65, 10 N. W. 109; Gains v. Green Pond Iron Min. Co., 33 N. J. Eq. 603; McCord v. Oakland Quicksilver Min. Co., 64 Cal. 134, 27 Pac. 863.

99 Cecil v. Clark, 49 W. Va. 359, 39 S. E. 202; Ohio Oil Co. v. Daughetee, 240 Ill. 361, 88 N. E. 818.

100 Spiech v. Tierney, 56 Neb. 514, 76 N. W. 1090; King v. Boetcher (Neb.), 147 N. W. 836.

101 L. O. L., § 7314.

CHAPTER XXX.

ASSIGNMENT OF HOMESTEAD.

§ 389. Descent of Homestead.
390. How Homestead of Surviving Spouse Barred.
391. Rights of Survivor in Homestead.
392. Assignment of Homestead by County Court.
393. Selection and Setting Out Homestead from Larger Tract.
394. Assignment of Homestead by District Court.
395. The Remainder in the Homestead Property.

§ 389. Descent of homestead.

Upon the death of the holder of the legal title to a homestead, two estates are created: a life estate in the surviving spouse, which cannot be defeated by will, and an estate of remainder in the heirs or devisees.[1]

The homestead is defined by the supreme court as the house and land where the family dwells.[2] It is the actual home of the family, including the land and buildings which constitute the same, and the possession and enjoyment of all which may be successfully defended by either husband or wife during the marriage state against the independent acts of either, and against the void acts of either or both. It is this homestead to which the survivor succeeds and in which he or she takes a life estate.[3]

Its area is limited to one hundred and sixty acres, if situated outside the limits of an incorporated city

1 Naiman v. Bohlmeyer (Neb.), 150 N. W. 829; Brichacek v. Brichacek, 75 Neb. 417, 106 N. W. 473; Rev. Stats., c. 29, § 1, [3076].

2 Gallagher v. Smiley 28 Neb. 189, 44 N. W. 187; Palmer v. Sawyer, 74 Neb. 108, 103 N. W. 1088.

3 Anderson v. Schertz, 94 Neb. 390, 143 N. W. 287; Meisner v. Hill, 92 Neb. 435, 138 N. W. 583.

or village, and to two surveyed and platted lots if within such limits.[4]

The lots or tracts must be contiguous, but in case of farm lands, need not be in the same government subdivision.[5] The term "lot" includes any part of a platted subdivision of a city or village.[6] Its value is limited, as against the rights of general creditors, to the sum of two thousand dollars, just the same as it was during the lifetime of the former owner, but as against the interests of heirs or devisees there is no limitation.[7]

Such value is determined by the claimant's interest in the land and not by the actual worth of the premises. Therefore, if, after deducting the amount of the mortgages and liens against the property, the value is two thousand dollars or under, the entire property passes to the survivor, subject to such liens.[8]

The homestead right is in addition to the statutory share of the survivor, or the provisions made for him or her by will. It is an absolute right passing to the survivor, though the children may all be of age and away from home,[9] or there are none surviving,[10] or the

4 Rev. Stats., c. 29, § 1, [3076]; Meisner v. Hill, 92 Neb. 435, 138 N. W. 583; In re Jurgen's Estate, 87 Neb. 571, 127 N. W. 855; Anderson v. Schertz, 94 Neb. 390, 143 N. W. 238.

5 Tindall v. Peterson, 71 Neb. 160, 98 N. W. 688, 99 N. W. 659.

6 Norfolk State Bank v. Schwend, 51 Neb. 146, 70 N. W. 970.

7 Meisner v. Hill, 92 Neb. 435, 138 N. W. 583. This case expressly overrules Tyson v. Tyson, 61 Neb. 438, 98 N. W. 1076, and Wardell v. Wardell, 71 Neb. 774, 99 N. W. 674, in so far as they hold that the two thousand dollar limitation applies to all cases.

8 Hoy v. Anderson, 39 Neb. 386, 58 N. W. 125; Corey v. Plummer, 48 Neb. 381, 67 N. W. 445.

9 Gallagher v. Smiley, 28 Neb. 189, 44 N. W. 187.

10 Roberts v. Greer, 22 Nev. 318, 40 Pac. 6.

survivor is not the head of a family,[11] and does not depend on occupancy.[11a]

It is not essential that the decedent held a title in fee. The right attaches to any estate of inheritance.[12]

A homestead has been defined by the Oregon supreme court as the home place, the place where the family resides.[13] It is not an estate or a fixed interest in or charge on the lands, but a right of exemption from levy and sale on execution or attachment in certain real estate which is the actual abode of, and is owned by, a party or some member of his family. It is in the nature of a contingent interest, which becomes fixed and determinable only by the act of the owner, or owner and husband or wife of a married party.[14]

Such homestead shall not exceed fifteen hundred dollars in value, nor one hundred and sixty acres in extent, if not located in a city or town laid off into blocks and lots; if located in any city or town, then it shall not exceed one block; but in no instance shall it be reduced to less than twenty acres or one lot, regardless of value.[15]

§ 390. How homestead right barred.

The homestead right may be lost by abandonment. To constitute abandonment it must appear that the surviving spouse left the home of the decedent long before his or her death, without cause, and with intent to renounce the marital relations, and established a

11 First Nat. Bank v. Reece, 65 Neb. 292, 89 N. W. 804.

11a Naiman v. Bohlmeyer (Neb.), 150 N. W. 829.

12 State v. Townsend, 17 Neb. 530, 23 N. W. 509; Burling v. Alvord's Estate, 77 Neb. 861, 110 N. W. 683.

13 Mansfield v. Hill, 56 Or. 405, 108 Pac. 1007.

14 L. O. L., §§ 221, 223.

15 L. O. L., § 222.

home elsewhere, which he or she claimed as a residence.[16]

Whether an antenuptial contract, executed as the statute directs, by which the surviving spouse renounces the right to inherit a part or all the lands of the decedent, bars the homestead right is an open question.[17] The weight of authority is that such contract not specifically mentioning the homestead is not a bar.[18]

The only sure way the homestead right can be barred is by a conveyance executed and acknowledged by both husband and wife as the statute provides.[19] Any contract, lease or agreement to devise to a third party which is not so executed is void.[20]

§ 391. Rights of survivor in homestead.

The underlying principle of the homestead law is the furnishing the surviving spouse a place where he or she and the family are safe as to everybody, if the place is not worth more than two thousand dollars, and if it does exceed two thousand dollars in value, then save as to everybody except creditors. Upon the death of the fee-holding spouse, a new title in the property occupied as a home is created in the survivor,

16 Dickman v. Burkhauser, 16 Neb. 686, 21 N. W. 396; Lamb v. Wogan, 27 Neb. 236, 42 N. W. 1041.

17 Reiger v. Schaible, 81 Neb. 33, 115 N. W. 560.

18 Zachman v. Zachman, 201 Ill. 380, 66 N. E. 256; Mahaffy v. Mahaffy, 63 Iowa, 505, 18 N. E. 685; Mann v. Mann's Estate, 53 Vt. 38. The cases above cited are based on the proposition that the words "inherit real estate" refer to the vesting of the fee.

19 Rev. Stats., c. 29, § 4, [3079].

20 Meek v. Lange, 65 Neb. 783, 91 N. W. 695; Kolke v. Wolf, 78 Neb. 594, 111 N. W. 134; Teske v. Ditberner, 70 Neb. 544, 98 N. W. 57.

which vests, *eo instanti*, in such survivor for life, individually and unconditionally, free from the right of the children of either spouse to a division of the income therefrom.[21]

The homestead right is not lost by abandonment,[22] unless such abandonment had become a bar to the right of the survivor to claim a homestead previous to the death of the fee-holding spouse,[23] nor is it in any way dependent upon the actual occupancy of the premises as a home by such survivor or family.[24] The surviving spouse is under no obligations to share the income of the premises with the minor children of the fee-holding spouse.[25]

Where the title to the homestead was in the surviving spouse, and such survivor on the death of the decedent ceased to be the head of a family, the homestead rights which became vested in such survivor during the lifetime of such deceased spouse do not cease at his or her death.[26]

21 Shearon v. Goff, 95 Neb. 417, 145 N. W. 855; Durland v. Seiler, 27 Neb. 33, 42 N. W. 741; Nebraska Loan & Trust Co. v. Smassall, 38 Neb. 516, 57 N. W. 167; In re Estate of Robertson, 86 Neb. 490, 125 N. W. 1093.

22 Richardson County v. Smith, 25 Neb. 767, 41 N. W. 744; Durland v. Seiler, 27 Neb. 33, 44 N. W. 744; Bauman v. Franse, 37 Neb. 897, 56 N. W. 305; L. O. L., § 223.

23 Section 390, *supra*.

24 Richardson County v. Smith, 25 Neb. 767, 41 N. W. 744; Shearon v. Goff, 95 Neb. 417, 145 N. W. 855; Naiman v. Bohlmeyer (Neb.), 150 N. W. 829.

25 In re Estate of Robertson, 86 Neb. 490, 125 N. W. 1093; Fletcher v. Fletcher, 83 Neb. 156, 119 N. W. 232.

26 First Nat. Bank of Greenwood v. Reece, 64 Neb. 292, 89 N. W. 804; Palmer v. Sawyer, 74 Neb. 108, 103 N. W. 1088.

The homestead is subject to liens and encumbrances existing thereon at the death of the decedent.[27] It cannot be sold under license from the district court for the payment of the debts of the estate or costs and expenses of administration, though such debts are secured by liens on the property.[28] The remedy for the enforcement of such claims is by foreclosure, and pending the same the court has no power to appoint a receiver to collect the rents and profits.[29]

Neither executor nor administrator have any interest whatever in the homestead property in which the surviving spouse takes a life estate.[30]

No formal action making a selection is necessary. If the survivor continues to occupy the town lots or one hundred sixty acre tract which comprised the homestead during the life of the decedent, such occupancy, in the absence of clear and satisfactory evidence to the contrary, is a sufficient selection of the property from the lands of the decedent.[31]

In Oregon the widow and minor children are entitled to remain in possession of the homestead until admin-

27 Wardell v. Wardell, 71 Neb. 774, 99 N. W. 674; Cooley v. Jansen, 54 Neb. 33, 74 N. W. 351; Prugh v. Portsmouth Sav. Bank, 48 Neb. 414, 67 N. W. 445; Hoy v. Anderson, 39 Neb. 386, 58 N. W. 125.

28 Bixby v. Jewell, 72 Neb. 755, 101 N. W. 1026; Luons v. Carr, 77 Neb. 833, 110 N. W. 705; Holmes v. Mason, 80 Neb. 448, 114 N. W. 606; Hadsal v. Hadsal, 82 Neb. 587, 118 N. W. 331; Judson v. Creighton, 88 Neb. 37, 128 N. W. 620; Naiman v. Bohlmeyer (Neb.), 150 N. W. 829.

29 Joslin v. Williams, 3 Neb. Unof. 192, 90 N. W. 1124.

30 In re Estate of Robertson, 86 Neb. 490, 125 N. W. 1093; Tindall v. Peterson, 71 Neb. 160, 98 N. W. 688, 99 N. W. 659; Brandon v. Jensen, 74 Neb. 569, 104 N. W. 1054; Hadsall v. Hadsall, 82 Neb. 587, 118 N. W. 331.

31 Shearon v. Goff, 95 Neb. 417, 145 N. W. 855.

istration has been granted and the inventory filed,[32] and the widow is also entitled to remain in the dwelling-house of her husband for one year without being chargeable with rent therefor.[33] Her rights in the dwelling-house are merely to continue in possession during the year. If she leaves the property she cannot regain possession by either ejectment or forcible detention.[34] The exemption passes to the party or parties who succeed to the fee, but there is no way by which the exempt property can be set off in favor of the surviving spouse or family.[35] The fee passes to the heirs subject to the exemption.[36]

§ 392. Assignment of homestead by county court.

The county court has inherent jurisdiction, though of a limited character, to assign the homestead to the surviving spouse.[37] The rule is the same as for assigning dower under the former dower law. If the right is contested and an issue of fact raised, which if established by proof would defeat such right, and the issue is of such a nature that the county court has no power to determine it, that court is without jurisdiction.[38] The answer should set up the defense affirmatively. A general denial or plea to the jurisdiction is not sufficient.[39]

32 L. O. L., § 1233.

33 L. O. L., § 7308; Aikin v. Aikin, 12 Or. 293, 6 Pac. 682.

34 Aikin v. Aikin, *supra*.

35 Mansfield v. Hill, 56 Or. 405, 107 Pac. 471.

36 L. O. L., § 226.

37 Guthman v. Guthman, 18 Neb. 98, 24 N. W. 435; Seery v. Curry, 26 Neb. 353, 42 N. W. 97.

38 Tyson v. Tyson, 71 Neb. 438, 98 N. W. 1076; Guthman v. Guthman, 18 Neb. 98, 24 N. W. 435.

39 Tyson v. Tyson, 71 Neb. 438, 98 N. W. 1076; Clemons v. Helebhan, 52 Neb. 287, 72 N. W. 270.

Application for assignment of homestead should be by petition of the claimant, under oath, or if the claimant is incompetent, by his general guardian or guardian *ad litem*. The judge may then set the petition for hearing and give notice to all parties interested as he sees fit. The statute contains no directions in regard to notice or service, and its issue and service are within the discretion of the court.

If the property clearly appears to be a homestead and the interest of the survivor not worth over two thousand dollars, or if worth more than two thousand dollars, that there are no general creditors having any claim against it, the court should make an order assigning it to the survivor for life, provided, of course, no question affecting the jurisdiction is raised.

Form No. 167.

PETITION FOR ASSIGNMENT OF HOMESTEAD.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that she is the widow of said A. B., deceased; that said A. B. was at the date of his death the owner in fee of the following described real estate situated in said county [describe real estate]; that there are no creditors of said estate or charges against said estate save and except costs and expenses of administration, and there is sufficient personal property to pay the same; or that said real estate is worth not more than two thousand dollars after first deducting existing liens against the same; that said above-described premises constituted the homestead of said A. B. and were occupied as such by said A. B. and your petitioner at the time of his death, and that your petitioner is entitled to a homestead in said premises for the use and benefit of herself and the minor children of her, said petitioner, and said A. B.

Your petitioner therefore prays that an order of said court be made and entered setting out said premises to her as a homestead, for the use and benefit of herself during her lifetime and of the minor children of said decedent during their minority.

(Signed) C. D.

[Add verification, Form No. 5.]

Form No. 168.

ORDER ASSIGNING HOMESTEAD.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this matter came on for hearing on the petition, under oath, of C. D. for the assignment to her of the following described property [describe premises as in petition], as and for a homestead, and the evidence, and was submitted to the court.

Upon consideration whereof, the court finds that said C. D. is the widow of said A. B., that said premises were at the date of the death of said A. B. occupied by said A. B. and said petitioner as a homestead, and that the net value of the same, after first deducting existing liens thereon, does not exceed the sum of two thousand dollars; or that there are no creditors of said estate or charges against said estate save and except costs and expenses of administration, and there is sufficient personal property to pay the same, and that said petitioner is entitled to have said premises set out to her as a homestead.

It is therefore ordered that said premises be assigned to said C. D. as a homestead for the use and benefit of herself and minor children during her lifetime.

(Signed) J. K.,
County Judge.

§ 393. Selection and setting out homestead from larger tract.

When an execution issued on a judgment rendered against decedent in his lifetime is levied on land in which a homestead exemption is included, the head of the family may have such exemption set out to her in the same manner as the judgment debtor could if he were living.[40]

Where there are general creditors of the estate and the value of the homestead tract exceeds two thousand dollars, there is no method provided by the statutes for

[40] Rev. Stats., c. 29, § 5, [3080]. See First Nat. Bank of Tekamah v. McClanahan, 83 Neb. 706, 120 N. W. 185.

setting out the specific tract on which the dwelling and appurtenances are located, though the value of the interest of the estate therein may be under the two thousand dollars. The former dower law directed the appointment of appraisers by the county court to set out dower. From analogy between homestead and dower there would seem to be no sufficient reason why the homestead right could not be set out the same way in cases where the right is not questioned, and the object is simply to segregate from the larger tract that particular part of the same which cannot be reached for debts. If such part cannot be set out without injury to the whole tract, then the county court is without jurisdiction.

The value of the homestead property should be fixed as of the date of the death of decedent.[41]

Form No. 169.

ORDER FOR ASSIGNMENT OF HOMESTEAD AND APPOINTING APPRAISERS.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this matter came on for hearing on the petition of C. B., widow of said A. B., under oath, for the assignment to her of a homestead in the homestead property of which said A. B. died seised, and the evidence and was submitted to the court.

Upon consideration whereof the court finds that notice of the time and place fixed for hearing on said petition has been given pursuant to the order of said court heretofore made and entered; that said A. B. died seised of the following described real estate, which was at the date of his death occupied by himself and family as a homestead, ———; that the value of said real estate exceeds the sum of $2,000; that said petitioner is entitled to a homestead exemption in said real estate to the extent of $2,000, and that on account of the insufficiency of the personal estate of said decedent to pay the debts and costs of administration of said estate a sale of real estate will probably have to be made

41 In re Jurgen's Estate, 87 Neb. 571, 127 N. W. 885.

by the administrator of said estate, including that interest in said above-described real estate which is liable for the debts of said estate.

It is therefore ordered and adjudged by me that E. F., G. H. and L. M., disinterested residents of said county, be and hereby are appointed appraisers, and are hereby directed to set apart from said real estate a part thereof on which the buildings and appurtenances are located, not exceeding in value $2,000, as a homestead for said C. B., provided the same can be done without injury to said real estate as a whole, and to report their proceedings hereon to this court within ——— days from this date.

(Signed) J. K.,
County Judge.

Form No. 170.

REPORT OF APPRAISERS.

[Title of Cause and Court.]

We, E. F., G. H., and L. M., appraisers duly appointed by said court to set out the homestead exemption of C. B., widow of said A. B., in the homestead of which said A. B. died seised, respectfully report that we have examined said homestead and premises and find that a tract of land on which the buildings and appurtenances are located, of the value of $2,000, can be set apart without injury to the entire tract, which said tract that can be so set apart is described as follows: ———.

Dated this ——— day of ———, 19—.

(Signed) E. F.,
G. H.,
L. M.,
Appraisers.

Form No. 171.

ORDER CONFIRMING REPORT AND ASSIGNING HOMESTEAD EXEMPTION.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, E. F., G. H., and L. M., appraisers heretofore appointed to set out the homestead exemption of C. B. in the homestead of which said A. B. died seised, having filed their report, and the same having been examined by said court, it is hereby ordered that the same be approved and that the following described tract of land be set out to said C. B. as and for a homestead exemption: ———.

(Signed) J. K.,
County Judge.

In Oregon the homestead exemption can only be set out in cases where a creditor has had an attachment or execution levied on the property. The proceedings which may be instituted by the owner of the fee or the husband, wife, agent or attorney of such owner, are the same as when the levy is made during the lifetime of the debtor,[42] and are commenced by a notice to the officer making the levy that the owner claims a homestead exemption in the premises, describing the same by metes and bounds, lot or block, or legal subdivision of the United States. The officer thereupon notifies the creditor of such claim. If the property exceeds the minimum of twenty acres or one lot and the owner deem it of greater value than fifteen hundred dollars, he may direct the sheriff to select three disinterested householders of the county, who shall examine and appraise such homestead under oath, commencing with the twenty acres or lot upon which such dwelling is located, appraising such lot or twenty acres separately; and if the same exceed fifteen hundred dollars, then the sheriff shall proceed to sell all in excess of fifteen hundred dollars, by lots or smallest legal subdivisions, offering them in the order directed by the judgment debtor, if he chooses to direct; otherwise he shall sell the same as aforesaid, so as to leave the homestead as compact as possible.[43] In lieu of such proceedings the creditor may pay the judgment debtor fifteen hundred dollars, and then sell the homestead as he might heretofore have done, adding the fifteen hundred dollars to his lien. The fifteen hundred dollars in the hands of the debtor shall be exempt from execution.[44]

42 Mansfield v. Hill, 56 Or. 405, 107 Pac. 471.

43 L. O. L., § 224.

44 L. O. L., § 225.

§ 394. Assignment by district court.

The statute contains no directions for assigning the homestead when, on account of the indebtedness of the estate, the interest of the survivor is limited to the use of two thousand dollars in value, and a tract of land on which the buildings and appurtenances are situated cannot be set apart to such survivor. In such case a homestead right is a first lien on the property,[45] subject, of course, to prior existing liens.[46]

The district court of the county in which the homestead property is situated has original jurisdiction to set out the homestead exemption in cases of this character, as well as in cases where an answer is filed bringing the title to the real estate into question.[47] The claimant may maintain an action, substantially a bill in equity, to have such interest set out to him. The Wardell case is based on the proposition that inasmuch as the entire estate of realty, excepting only the homestead right, is subject to debts, the administrator may sell the land under the statute directing sales for payment of debts, and in that action or proceeding the right of the survivor in the homestead may be ascertained, its value determined and paid to him. This case was overruled by Meisner v. Hill only to the extent that the court followed a wrong rule of construction of the statutes which define a homestead; that instead of allowing Mrs. Wardell the use of two thousand dollars during her lifetime, she should have been given the use

45 Perry Livestock Co. v. Biggs, 4 Neb. Unof. 440, 94 N. W. 712; Meisner v. Hill, 92 Neb. 435, 138 N. W. 583.

46 Section 391, *supra*.

47 Wardell v. Wardell, 71 Neb. 774, 99 N. W. 674.

of what was left of the proceeds of the sale of the home property after paying the debts.

§ 395. The remainder in the homestead property.

On the death of the surviving spouse, the remainder in the homestead property, unless otherwise disposed of by will, passes to the heirs of the fee-holding spouse.[48] Heirs and devisees take such remainder discharged from liability for debts of the former owner of the fee to the same extent that it was in his lifetime.[49]

[48] Schuyler v. Hanna, 31 Neb. 307, 47 N. W. 932; Fort v. Crook, 3 Neb. Unof. 12, 90 N. W. 634.

[49] Rev. Stats., c. 29, § 16, [3091]; Holmes v. Mason, 80 Neb. 448, 114 N. W. 605; Hall v. Hooper, 47 Neb. 111, 66 N. W. 33; Lyons v. Carr, 77 Neb. 833, 110 N. W. 705.

CHAPTER XXXI.

INHERITANCE TAX.

§ 396. Nature of the Tax.
397. Tax on Inheritance, Devises and Requests.
398. Property Transferred in Contemplation of Death.
399. Property Liable to Taxation.
400. Jurisdiction of County Court Over Inheritance Tax.
401. Duties of Appraisers.
402. Duties of Appraisers—Concluded.
403. Assessment of the Tax.
404. Appeals.
405. When Inheritance Tax Due.
406. Payment of Inheritance Tax by Executor, Administrator or Trustee.
407. Refunding Excess or Erroneous Payment.
408. Action for Recovery of Tax.
409. Inheritance Tax Records.
409a. Life Expectancy Tables.

§ 396. Nature of the tax.

The right of a person to take property by descent, devise or bequest depends upon statutory and not common law, and therefore the state has power to impose a restriction in the way of a tax on inheritances, bequests and devises, and also to fix the *situs* of the property for purposes of taxation.[1] It is not a tax on property, but on the right of succession to property, and is not within the constitutional provisions requiring uniformity of taxation because not included therein.[2]

1 In re Sanford's Estate, 90 Neb. 410, 133 N. W. 870; State v. Vinsonhaler, 74 Neb. 675, 105 N. W. 472; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 42 L. Ed. 1037; United States v. Perkins, 163 U. S. 625, 41 L. Ed. 287.

2 State v. Allston, 94 Tenn. 674, 30 S. W. 750; Union Trust Co. v. Durfee, 125 Mich. 487, 84 N. W. 1101; In re Swift, 137 N. Y. 77, 32 N. E. 1096; State v. Hamlin, 86 Me. 445, 20 Atl. 76; Ferry v. Campbell,

§ 397. Tax on inheritances, devises and bequests.

The lineal descendants, father, mother, husband, wife, brother, sister, widow of a deceased son, or husband of a deceased daughter of any person who died seised or possessed of any property, real, personal and mixed, which shall pass by will or the intestate laws of this state, while a resident of this state, or if he was not a resident of this state at the time of his death had property within this state, are liable for the payment of an inheritance tax upon the clear market value of the property so actually received by each such person of one per cent on the excess above ten thousand dollars. Any child or children adopted as such in conformity to the laws of the state, or any person to whom the deceased for not less than ten years stood in the acknowledged relation of parent, is liable to the same tax.[3]

The statutory share of a surviving spouse does not pass under the intestate laws, though right of possession does not accrue until the death of the decedent, but by virtue of the marital relation. It is not subject to the payment of an inheritance tax.[4] Should decedent be testate and he or she elect to take under the will, the value of such statutory interest would still

110 Iowa, 290, 81 N. W. 604; In re Short's Estate, 16 Pa. 63. Inheritance tax laws have been in force in England for almost a hundred years, and within the last twenty-five years have been placed on the statute books of nearly all of the United States. Their constitutionality has been strongly attacked in both state and federal courts, the power of legislatures to enact them has been almost uniformly sustained, and they are a very important part of our revenue system.

3 Rev. Stats., c. 69, § 334, [6622].

4 Strahan v. Wayne County, 93 Neb. 828, 142 N. W. 678.

be exempt.[5] The surviving spouse takes the homestead interest also by virtue of the marital relation, and the same rule would make the present value of his or her interest therein exempt.[6]

Collateral heirs are liable for the payment of a tax of two per cent on the excess over two thousand dollars of the clear market value of the property actually received by each one of them, whether by descent, bequest or devise.

Other persons or corporations receiving property in the same way are liable to a tax as follows: On each and every hundred dollars of the clear market value of all property, and at the same rate for any less amount, up to five thousand dollars, two dollars; on all estates of over five thousand dollars and not exceeding ten thousand dollars, three dollars; on all estates of over ten thousand dollars and not exceeding twenty thousand dollars, four dollars; on all estates of over twenty thousand dollars and not exceeding fifty thousand dollars, five dollars; and on all estates of over fifty thousand dollars, six dollars. Estates of under five hundred dollars are not subject to a tax.[7]

A devise or bequest of any property or income therefrom or interest therein for life or years to one of the parties liable for the lowest inheritance tax rate, with remainder to a collateral heir or stranger in blood, or a corporation, is subject to the tax separate and apart from the remainder.[8]

5 In re Sanford's Estate, 91 Neb. 752, 137 N. W. 864.
6 In re Estate of Kennedy, 157 Cal. 517, 108 Pac. 280.
7 Rev. Stats., c. 69, § 334, [6622].
8 Rev. Stats., c. 69, § 335, [6623].

If the remainder passes to one of the same class as the life estate or term for years, the lesser estate is not separately taxable. The intent of the law seems to be not to exempt either from taxation, but to collect the tax the same as though it were an absolute bequest or devise, leaving its adjustment to the recipients.[9] The Nebraska statute was adopted from Illinois.

The inheritance tax law of Oregon includes grandparents among those liable for the one per cent tax, fixes the exempt amount at five thousand dollars, and entirely exempts estates of under ten thousand dollars in value. When property passes to collateral heirs, the exemption is two thousand dollars, and estates of under five thousand dollars are exempt. In all other cases the tax is three per cent on all amounts received up to ten thousand dollars, four per cent on all amounts over ten thousand and not exceeding twenty thousand dollars, and five per cent on amounts received over twenty thousand and not exceeding fifty thousand, and six per cent on amounts over fifty thousand dollars. Gifts of under five hundred dollars in value and all gifts to benevolent, charitable or educational institutions incorporated in Oregon and actually engaged therein in carrying out the work for which they were incorporated, or to any person or persons to be held in trust for any such institution in lieu thereof, are entirely exempt.[10]

The Oregon inheritance tax law is drafted on the same lines as that of Nebraska. It is construed there as including the widow's dower, though that question has never been decided by the supreme court.

[9] In re Kingman's Estate, 220 Ill. 563, 77 N. E. 135.

[10] L. O. L., §§ 1192, 1191.

§ 398. Property transferred in contemplation of death.

Property transferred by deed, grant, sale or gift, made in contemplation of the death of the grantor or bargainor, or intended to take effect in possession or enjoyment, after such death, to any person or persons or any body politic or corporate, in trust or otherwise, or by reason thereof any person or body corporate shall become beneficially entitled, in possession or expectation to any property or income therefrom, is also subject to a tax in the same amounts.[11]

The law imposes no restrictions on the right of a person to give away his property during his lifetime, provided the gift was actually made, not colorable only, and not in contemplation of death and with intent to defeat collection of the tax.[12] Whether or not it was so made is largely a question of fact, determined from a consideration of the terms of the instrument, the age and state of health of the deceased, and all the circumstances and conditions surrounding it.[13] Gifts *causa mortis* are clearly taxable,[14] as is a deed of practically all one's property shortly before death, with full knowledge that death was imminent and without consideration.[15]

The term "in contemplation of death" means the apprehension which arises from some existing condi-

11 Rev. Stats., c. 69, § 334, [6622]; L. O. L., § 1191.

12 People v. Kelley, 218 Ill. 509, 75 N. E. 1038.

13 In re Spalding, 163 N. Y. 607, 57 N. E. 1134; State v. Pabst, 139 Wis. 561, 121 N. W. 351; In re Benton, 234 Ill. 366, 84 N. E. 1026.

14 Matter of Cornell, 170 N. Y. 423, 63 N. E. 445.

15 Rosenthal v. People, 211 Ill. 306, 71 N. E. 1121; Merrifield v. People, 212 Ill. 400, 72 N. E. 446.

tion of body or impending peril, and not the general expectation which every mortal possesses.[16]

The payment of the tax can only be defeated by such a *bona fide* conveyance as parts absolutely with the title, control, management, possession and enjoyment during the grantor's lifetime,[17] and not made in contemplation of death.[18]

The burden of proof is on the county to prove that gifts made by decedent in his lifetime were made for the purpose of defeating payment of the tax.[19]

The Oregon statute protects the interest of the state to a greater extent than that of Nebraska, as it imposes a liability for the payment of the tax in certain cases on parties who had in their possession assets of an estate. No safe deposit company, trust company, bank, corporation, person, or persons holding securities or assets of a decedent or of a corporation in which decedent at the time of his death owned any stock, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or upon their order or request, unless notice of the time and place of such intended transfer be given the state treasurer in writing at least five days prior to such transfer. The treasurer or his representative has the right to examine the securities, and if he deems it advisable that the securities be not immediately delivered, he shall notify the party holding the same in writing not to deliver them for ten days, unless the

16 In re Baker's Estate, 178 N. Y. 575, 70 N. E. 1094; In re Spalding, 163 N. Y. 607, 57 N. E. 1124.

17 Lacy v. State Treasurer (Iowa), 121 N. W. 179; Seibert's Appeal, 110 Pa. 329, 1 Atl. 346; People v. Moir, 207 Ill. 180, 69 N. E. 905; In re Todd, 237 Pa. 466, 85 Atl. 845.

18 Matter of Baker, 178 N. Y. 575, 70 N. E. 1094; People v. Burkhalter, 247 Ill. 600, 93 N. E. 379.

19 In re Dessert, 154 Wis. 320, 142 N. W. 647.

notice be sooner revoked. Failure to serve notice or to defer delivery when it is ordered renders the party holding the securities liable for the tax in case one is levied.[20]

§ 399. Property liable for taxation.

All real estate passing by will, the statutes of inheritance, or by deed executed in contemplation of death, if within the values fixed by law, is subject to the payment of the tax, whether the owner was a resident of the state or otherwise. The interest of a mortgagee in real estate, or his interest as vendor in a contract for the sale of land, is not such an interest as will render such items of property subject to the tax in this state where they were continuously in the possession of a nonresident outside of the state. They are not taxable as interests in lands but as personalty.[21]

The clear intent of the statute is to make the right of succession to all personal property, the title to which must be traced through the executor or administrator in this state, and also such personal property as had an actual *situs* in this state at the date of the death of the decedent, though he be a nonresident, liable for a tax.[22]

Under the Oregon statute only such personal property as is subject to the jurisdiction of the county court for distributive purposes can be taxed in that state, except where decedent was domiciled in Oregon.[23]

Tangible property of a deceased nonresident, such as livestock, merchandise, grain, or even a bank de-

20 L. O. L., § 1201.
21 Dodge County v. Burns, 89 Neb. 534, 131 N. W. 922.
22 Rev. Stats., c. 69, § 334, [6622].
23 L. O. L., § 1228.

posit, are subject to a tax here,[24] as are also notes, bonds, mortgages and similar securities in the hands of a deposit company, or of an agent for purposes of collection and reinvestment, if actually in this state at decedent's death.[25]

Shares of stock in a Nebraska corporation have a *situs* under the law in this state, can only be transferred by virtue of the laws thereof, and it has been held are taxable here.[26] Corporate bonds are taxable where the decedent last lived, and hence those owned by a foreign estate would not be taxable here unless actually within the state.[27]

Payment of the tax in one state is no defense to a proceeding under the laws of another state for the collection of a tax on such property as is or was at decedent's death actually in the state where such proceeding is pending.[28]

The *situs* of devised property under the law is fixed as of the date of the death of the decedent. No agreement between the devisees for the conveyance of a part of the land to a claimant in satisfaction of his demand in any manner affects its liability for the tax,[29] nor can a personal representative avoid payment of the tax by any transfer of the assets, or applying them

24 Blackstone v. Miller, 183 U. S. 202, 47 L. Ed. 444.

25 In re Stanton's Estate, 142 Mich. 491, 105 N. W. 1122.

26 Kountz v. Douglas County, 84 Neb. 596, 121 N. W. 593; Gardner v. Carter, 74 N. H. 507, 69 Atl. 939.

27 In re Clinch, 180 N. Y. 300, 73 N. E. 85; Frothingham v. Shaw, 175 Mass. 59, 55 N. E. 623.

28 Douglas County v. Kountz, 84 Neb. 506, 121 N. W. 593; McCurdy v. McCurdy, 197 Mass. 248, 83 N. E. 881.

29 Sanford v. Saunders County, 90 Neb. 410, 133 N. W. 870.

in the payment of the shares of parties entitled to an exemption instead of those which are not.[30]

In Oregon the tax is assessed on the market value of a foreign estate remaining after the payment of such debts and expenses as are chargeable to it under the laws of that state. If the executor, administrator or trustee in such foreign state files with the clerk of the court having ancillary jurisdiction, and with the state treasurer, duly certified statements, exhibiting the true market value of the entire estate of the decedent owner, and the indebtedness for which said estate has been adjudged liable, fully attested by the judge of the court having original jurisdiction, the beneficiaries shall be entitled to have deducted such proportion of the said indebtedness of the decedent from the value of the property as the value of the property within this state bears to the value of the entire estate.[31]

Whenever a decedent appoints one or more trustees or executors, and in lieu of their allowance or commission makes a bequest or devise of property to them, which would otherwise be liable for the tax, or appoints them residuary legatees, and said bequests, devises or residuary legacies exceed what would be a reasonable compensation for their services, such excess shall be liable for the tax, and the court having jurisdiction of his accounts, upon its own motion or on application of the state treasurer, shall fix such compensation.[32]

§ 400. Jurisdiction of the county court over inheritance taxes.

The county court of the county in which the estate is being administered or of which deceased was a resi-

30 In re Ramsdill, 190 N. Y. 492, 83 N. E. 584.
31 L. O. L., § 1229.
32 L. O. L., § 1204.

dent, or if a nonresident of the county, in which the estate is located, has jurisdiction to hear and determine all questions relating to inheritance taxes, and the court first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other.[33]

It is the duty of the county treasurer to see that no property liable for the payment of an inheritance tax goes clear. The judge and county clerk are required once every three months to make a statement in writing to him of the party from which or the party from whom they have reason to believe such tax is due and unpaid.[34]

Whenever any real estate of which the decedent may be seised shall pass to any body corporate, or to any person or persons, or in trust for them or some of them, it shall be the duty of the executor, administrator or trustee of such decedent to give information thereof in writing to the treasurer of the county wherein the real estate is situated within six months after they undertake the execution of their expected duties, or if the facts shall not be known within that period, within one month after the same shall have come to their knowledge.[35]

If the county treasurer has reason to believe that an estate is liable for such tax, he should notify the county attorney, who is required to proceed, to enforce the same and represent the county in all proceedings for its assessment and collection. The first step is the appointment of an appraiser to determine the value of the property, which appointment may be made by

[33] Rev. Stats., c. 69, § 346, [6634]; L. O. L., § 1205.
[34] Rev. Stats., c. 69, § 349, [6637].
[35] Rev. Stats., c. 69, § 340, [6628].

the judge on his own motion, or on application of an interested party or the county attorney.

It is the duty of the county judge within ten days after the filing of the will, or the application for letters testamentary or of administration, if in his opinion the estate is subject to the payment of the inheritance tax, to cause the county clerk to send to the state treasurer a certificate of the filing of such will or application for the grant of letters, and to proceed as soon as practicable thereafter to determine the value of the property and the amount of the tax due thereon.[36] The statute requiring an inventory should be strictly enforced in such cases, and in case there is a trustee of the estate, he should file his inventory within thirty days from his acceptance of his trust, but on application of a party in interest, may be granted further time not exceeding three months.[37]

The executor, administrator or trustee of an estate which appears to be liable for the tax must at least ten days prior to the making of the assessment notify the state treasurer, in writing, of the time and place fixed for making the same, and file proof of service with the clerk of the court.[38] The court has power to assess the tax on the basis of the first inventory and appraisement, or he may require the same to be reappraised.[39]

§ 401. Duties of appraisers.

The order appointing an appraiser should name the parties interested or claiming an interest in the estate, all of whom are entitled to notice of the time and place fixed for the appraisement, and it may also direct the

[36] L. O. L., § 1206.
[37] L. O. L., §§ 1207, 1208.
[38] L. O. L., § 1209.
[39] L. O. L., § 1210.

appraiser to find the present value of life estates, annuities, and other matters involved in the assessment of the tax.

The appraiser is required to give notice by mail to such persons as the court may direct of the time and place fixed for making the appraisement. He may be authorized to issue subpoenas and to compel the attendance of witnesses. The testimony must be taken under oath, and reduced to writing and filed with his report in the county court. The appraiser determines from such evidence the value of the property, makes findings on such other questions submitted to him, and files the same with statement of fees with the court.

All costs are paid by the county treasurer out of any funds he may have in his hands on the certificate of the county judge.[40]

Form No. 172.

APPOINTMENT OF INHERITANCE TAX APPRAISER.

[Title of Cause and Court.]

To C. D.:

You are hereby appointed appraiser under the inheritance tax law of the estate of A. B., deceased, late of said county, and are directed to appraise it at its fair market value the following described real estate and personal property of said A. B., together with such other property of said A. B. as you may find he died seised or possessed of, said value to be fixed as of the date of the death of said A. B., to wit, ———, 19—.

You are also directed to fix and determine the value of all annuities and life estates created under the terms of the will of said A. B. and the present value of the homestead interest of C. B., widow of said A. B.

You are directed to fix a time and place for making said appraisement, and forthwith notify E. F., whose postoffice address is ———, etc., they being persons having or claiming to have an interest in said prop-

40 Rev. Stats., c. 69, § 344, [6632].

erty, of the time and place fixed by you for making said appraisement. At the time and place so fixed by you, you are directed to take the testimony, under oath, of such witnesses as may be necessary, and compel their attendance. From such evidence and from your inspection of said premises, you will make a report of the fair market value of the said property of said estate in writing, and return the same, together with your findings on the other matters submitted to you with said depositions, to this court.

Witness the seal of said court this ——— day of ———, 19—.
(Seal) (Signed) J. K.,
County Judge.

The county court has power on his own motion, if no inventory has been filed, or if the one on record appears to be insufficient or inadequate, or on application of the state treasurer or an interested party, to appoint one or more persons as appraisers to appraise the true value of the property embraced in any inheritance, devise, bequest or legacy, subject to the payment of any tax imposed by this act.[41] Other matters, such as the values of life estates and annuities, may also be submitted to him or them.

The order should also fix the time and place when the appraisement will be made. Notice thereof is required to be given by the county clerk to the state treasurer, and to all persons known to have a claim or interest in the inheritance, devise, bequest, legacy or gift to be appraised, and to such other persons as the court may direct. Such notice shall be given by mail. The fees of the appraisers are fixed at three dollars per day and actual and necessary traveling expenses, payable by warrant on the state treasurer, issued on the certificate of the county judge, and payable from the inheritance tax fund. In all other respects the powers and duties of the appraisers are the same as in Nebraska.[42]

41 L. O. L., § 1211.
42 L. O. L., § 1213.

§ 402. Duties of appraisers—Concluded.

The notice should fix the time far enough in advance of the hearing to give both parties sufficient opportunity to prepare their evidence. Its service, in the manner directed by the court, is jurisdictional.[43]

Neither real estate nor personal property should be appraised on the basis of assessment for other taxes, but their value should be ascertained and determined by the evidence of competent witnesses.[44] The statute contemplates that the appraiser may, if he thinks necessary, personally examine real estate and take testimony at different places as will be most accessible and convenient for the witnesses, thus avoiding excessive mileage. The statute does not give the county judge power to appoint an appraiser for each county in which land is situated when the application is filed.

In a few counties such practice prevails, the appraisers in the outside counties simply appraising the lands in their counties. This may save money for the road fund but the statute does not warrant it. An appraiser may appraise the personalty and the real estate in his county, file a report thereon and resign and permit another to be appointed in the other county.

Corporate stock which has a regular market value or which is listed on a stock exchange should be appraised at what it was selling for at the date of the death of the decedent.[45] In appraising unlisted stocks or shares in close corporations, the value of the plant

[43] In re Backhouse, 185 N. Y. 544, 77 N. E. 1181.

[44] In re Westurn, 152 N. Y. 43, 46 N. E. 315; In re McGhee, 105 Iowa, 9, 74 N. W. 695.

[45] Walker v. People, 192 Ill. 106, 61 N. E. 489.

and other property, its earning capacity and general condition is about the best evidence of their value.[46] It is doubtful whether the appraiser has power to compel such corporation to produce its books and papers for the purpose of fixing the value of its stock.[47]

The value of a life estate is usually considered the present value of an annuity of the income of the property as ascertained from mortality and annuity tables.[48] The present value of the remainder is determined by deducting the present value of the annuity from the whole value of the property.[49]

The Oregon statute requires all such inheritances, devises, bequests or gifts to be appraised at their full and true value immediately upon the death of the decedent, or as soon thereafter as may be practicable; provided that when the same shall be of such a nature that its full and true value cannot be ascertained at such time, it shall be appraised in like manner when such value first becomes ascertainable. The value of every future, contingent or limited estate, income, interest or annuity dependent upon any life or lives in being shall be determined by the rules or standards of mortality, and of value commonly used by actuaries' combined experience tables, except that the rate of interest on computing the present value of all future or contingent interests or estates shall be four per cent per annum interest.[50]

[46] In re Jones, 172 N. Y. 675, 65 N. E. 570; In re Palmer, 183 N. Y. 238, 76 N. E. 16.

[47] State v. Carpenter, 129 Wis. 189, 108 N. W. 641.

[48] Howe v. Howe, 179 Mass. 546, 61 N. E. 225.

[49] State v. Pabst, 139 Wis. 561, 121 N. W. 351; People v. Nelms, 241 Ill. 571, 89 N. E. 683.

[50] L. O. L., § 1212.

Form No. 173.

REPORT OF APPRAISERS.

[Title of Cause and Court.]

I herewith submit my report of the appraisement of said estate as follows:

Pursuant to the order of appointment which is herewith returned, on the ——— day of ———, 19—, I fixed ——— 19—, and my office in the city of ———, as the time and place for making said appraisement, and gave notice of the same to C. D., E. F., and G. H., by letter addressed to said C. D., E. F., and G. H., at ———, copies of which said letters are herewith returned marked "Ex. A," "Ex. B," and "Ex. C." I, on the same day, issued subpoena for G. H. and C. F. and delivered same to the sheriff of ——— county for service. Said subpoena was on the ——— day of ———, 19—, returned indorsed as follows: [Return of officer.]

On the said ——— day of ———, 19—, I proceeded to take testimony concerning the value of said estate within the state of Nebraska. G. H., administrator, appeared in person and by A. B., his attorney. It was stipulated and agreed that the testimony of all witnesses taken in this county be taken in shorthand by M. B., a stenographer, reduced to writing by him, and need not be signed by said witnesses. Testimony of G. H. and C. F. taken. Said depositions are herewith returned marked "Ex. C" and "Ex. D." [If hearing adjourned, state time and place and issue and return of subpoenas, if any.] [If real estate was viewed by appraiser, so state, giving date.]

From said depositions and an inspection of said property, I find the reasonable market value of said estate on the date of the death of said decedent, to wit, ———, 19—, to be the sum of ——— dollars ($———), as is hereinafter more particularly set forth.

II.

Real estate in ——— county:

[Give specific description of each lot or tract in county of which decedent died seised and valuation of each, and foot the column.]

III.

Personal estate in ——— county:

[Give valuation of each item of personal property subject to general taxation in the county, or was within the county.]

IV.

I find the fair market value of the estate of said A. B. located in said county, to be the sum of ——— dollars ($———).

[Make similar separate findings for property in each county.]

V.

That the following described premises, ———, were at the date of the death of said A. B. occupied by him and his wife, C. B., as a homestead, and that the clear market value of the homestead interest of said C. B. in said last above-described premises is the sum of $———, and that the value of the statutory share of said C. B. in said entire estate is the sum of ———.

Dated this ——— day of ———, 19—.

Respectfully submitted,

———,

Appraiser.

Statement of Costs.	
Stenographer's fees	$———
Subpoenas	$———
Mileage ——— miles	$———
Postage	$———
Sheriff's fees	$———
Witness fees:	
.. ..miles	$———
....miles	$———
Total costs	$———

Time Necessarily Employed in Making Appraisement.	
Notices	1 day
Taking testimony	"
Viewing land	"
Hearing argument, findings and report	"

[If the appraiser was instructed to find the value of the shares of the heirs and the amount due each county, insert after V:]

VI.

I find from the record and files in said estate that the debts of said estate and the costs and expenses of administration amount to the sum of $———, and that the total value of said estate to be distributed to the widow and heirs at law is the sum of $———.

VII.

The following named persons are heirs of said A. B. and their relationship to him, the clear market value of their shares or interests in said

estate, the sums exempt from payment of an inheritance tax, and the amount of the tax due from each are as follows:

Names.	Relation.	Value of Share.	Exemption.	Tax.
———	———	$———	$———	$———
———	———	$———	$———	$———
		———	———	———
		Total, $———	$———	$———

VIII.

That the shares of said tax due the various counties in which the assets of said estate are situated are as follows:

	Share.	Percentage.	Tax.
——— county.	$———	———%	$———
——— county.	$———	———%	$———
	———	———	———
Total,	$———	100%	$———

Form No. 174.

REPORT OF APPRAISERS—REMAINDERS, CHARGES AND LIFE ESTATES.

The will was substantially as follows: Devise in fee including homestead and bequest of specific property to wife; bequest to son subject to debts, expenses, etc.; devise to son for life with remainder to a corporation; devise to another party subject to two legacies. The bequest to the son was more than sufficient to pay the charges against it.

[Form No. 173 to VII.]

VII.

That by the terms of said will there was devised to C. B., the widow of said decedent, the following described real estate: [describe lands] of the clear market value of $———, and also bequeathed to her personal property, to wit: [describe personalty] of the clear market value of $———. That the clear market value of the interest of the said C. B. in said estate is the sum of $———, which is exempt from the payment of an inheritance tax.

VIII.

That by the terms of said will there was bequeathed to F. B., a son of said decedent, personal property, to wit: [describe personalty] of the

clear market value of $———, and also devised to him an estate for life in the following described lands: [describe lands]. That said F. B. is —— years of age and the clear market value of said life estate is the sum of $———, and that the clear market value of the interest of said F. B. in said estate is the sum of $———, of which said amount the sum of $10,000 is exempt from the payment of an inheritance tax.

IX.

That the remainder in said real estate in finding VII, above described, was devised to ———, a corporation, and the clear market value of said remainder is the sum of $———, no part of which is exempt from the payment of an inheritance tax.

X.

That by the terms of said will there was devised to E. F., a nephew of said decedent, the following described real estate: [describe lands] of the value of $———, subject, however, to the payment of a legacy in the sum of $5,000 to one G. H., also a nephew of said decedent, and also with the payment of a legacy of $2,000 to L. M.; that the interest of said E. F. in said estate is of the value of $———, of which said amount the sum of $2,000 is exempt from the payment of an inheritance tax; that $2,000 of the legacy to said G. H. is exempt from the payment of an inheritance tax, and no part of the legacy to L. M. is exempt from the payment of such tax.

XI.

The following named persons are devisees and legatees of said A. B., and the clear market value of the respective interests of each, the rate of taxation, and the amount of tax due from each to the respective counties in this state in which such property is situated are as follows:

Names.	Values.	Rate.	Exemption.	Tax.	County.	Total Tax.
F. B.	$———	1%	$———	$———	———	
F. B.	$———	1%	$———	$———	———	$———
	———	——	———	———		———
	$———		$10,000	$———		$———
E. F.	$———	2%	$———	$———	———	
E. F.	$———	2%	$———	$———	———	
	———	——	———	———		———
	$———		$ 2,000	$———		$———
G. H.	$———	2%	$ 2,000	$———	———	$———
L. M.	$———	2%	None	$———	———	$———
	———	——	———	———		———
	$———	2%	None	$———	———	$———

[Balance as in previous form.]

Any appraiser who takes any fee or reward from an executor, administrator, trustee, legatee or next of kin, or other interested person, is deemed guilty of a misdemeanor, and subject to fine and imprisonment.[51]

Such personal representative must within ten days after an appraisement or reappraisement, and before payment to the legatees or any party entitled to a beneficial interest therein, make and render to the state treasurer a copy of the inventory and appraisement, duly certified as such by the clerk of the court, and also make and file with the state treasurer a duplicate list or statement of the amount of such legacy or distributive share, together with the amount of tax which has accrued or which will accrue. Such list must contain the name of each and every person entitled to any beneficiary interest in the estate, together with the clear market value of such interest as found and determined by the court, and must be under oath.[52]

Within thirty days after the assessment and determination of the tax, the state treasurer may file objections thereto in writing and apply for a reassessment. Ten days' notice must be given all parties interested, and on the hearing evidence may be introduced in support or opposition thereto. The court may either sustain the appraisement or set it aside and determine the value of the property. The evidence must be taken and filed the same as that taken by the appraiser. An appeal to the circuit court may be made by the state treasurer or any party interested in the estate, which is heard in the same manner as appeals in suits in equity.[53]

51 Rev. Stats., c. 69, § 345, [6633]; L. O. L., § 1232.

52 L. O. L., § 1209.

53 L. O. L., § 1216.

§ 403. Assessment of the tax.

Upon the filing of the report of the appraiser, the court forthwith determines and fixes the cash values of all estates, annuities and life estates or terms of years growing out of said estates and the tax for which the same is liable, and gives immediate notice through the mails to all parties interested therein.[54] The values as found by the appraiser are the basis for the assessment, and he cannot change and modify them.[55] Findings or other questions submitted may be modified. Unless he had previously referred the matter to the appraiser, he should ascertain from the records the debts against the estate, and the costs and expenses of administration as near as the same can be done,[56] and deduct the total from the gross value of the estate, or from the devises and legacies chargeable therewith. The shares of the heirs, devisees or legatees in this balance is determined, and the amounts remaining after deducting the exemptions are the bases of the assessment.[57]

It has been held that a devisee cannot defeat the tax by a showing that the gift to him was in satisfaction or payment of a debt due him from the estate.[58]

It is impossible for either court or appraiser to determine the exact amount due until the final account of the executor or administrator is allowed, except where no administration is had in this state. The appraiser is seldom appointed until the year allowed for

54 Rev. Stats., c. 69, § 344, [6632]; L. O. L., § 1214.
55 Weston v. Goodrich, 86 Hun (N. Y.), 194.
56 In re Gihon, 169 N. Y. 443, 62 N. E. 561.
57 Callahan v. Woodridge, 171 Mass. 595, 51 N. E. 176.
58 In re Gould's Estate, 156 N. Y. 423, 51 N. E. 287.

the payment of the tax without interest has nearly expired, and if there is an overpayment, it may be recovered. If there is a shortage, the road fund is the loser.

Form No. 175.

ORDER ASSESSING INHERITANCE TAX.

[Title of Cause and Court.]

Whereas, C. D., appraiser, has filed his report of the clear market value of all the estate, real and personal, of which said A. B. died seised, situated within the state of Nebraska, and which is liable for the payment of an inheritance tax in said state, and it appearing therefrom that the clear market value of the estate of said A. B. at the date of his death, situated within the state of Nebraska, and which may be liable for the payment of an inheritance tax, is $———, as follows:

Personal estate in ——— county of the value of $———
Personal estate in ——— county of the value of $———
———
$———

Real estate in ——— county.

Description.	Value.
———	$———

Real estate in ——— county.

Description.	Value.
———	$———

That the following described property was the homestead of A. B. at the date of his death, ———, and that the present value of the homestead interest of C. B., the widow of said A. B., therein is the sum of $———, and that the right of succession to the same is not liable for the payment of an inheritance tax.

I find from said report and the records and files in the matter of said estate that the value of the statutory interest of said C. B., widow, in said estate is the sum of $———, and that the right of succession to the same is not liable for the payment of an inheritance tax.

*I find that J. B. is a son of said A. B., and under the statute takes by inheritance the one-half of the estate of said A. B. remaining after deducting the homestead interest and statutory share of said C. B., and that the clear market value of the estate so inherited by him, the said C. B., is the sum of $———, that he is entitled to an exemption of

$10,000, and that the clear market value of the property so inherited by said J. B., the succession to which is liable for the payment of an inheritance tax, is $———, and that the tax due thereon is the sum of $———. [Similar findings for other heirs.]

I find that ———% of said tax is due the said county of ———, and that ———% of said tax is due said county of ———%, and that the entire tax due from the heirs of said A. B. on their rights of succession to his said estate is the sum of $———.

I hereby assess a tax on said right of succession of said A. B. in the sum of $———, of which said sum $——— is payable to said ——— county and $——— to ——— county. [Similar findings on taxes due from other heirs.]

It is also ordered that C. D., appraiser, be allowed the sum of $——— for his services, and that the following parties be allowed the sums set after their respective names for their fees in connection with said appraisement:

C. M., stenographer.....$———
E. F., witness.....$———
W. D., constable.....$———

and that said costs be paid by the county treasurer of ——— county.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

Form No. 176.

ORDER ASSESSING INHERITANCE TAX, REMAINDERS, CHARGES AND LIFE ESTATES.

[Follow Form No. 175 to *.]

I find that by the terms of the will of said A. B. there was devised to said C. B. the following described real estate, ———, of the clear market value of $———, and bequeathed to her personal property of the clear market value of $———, and that the value of the property so devised and bequeathed to her is the sum of $——— and is less than the present value of her homestead interest and of her statutory share, should she elect to take under the statute, and that the right to succeed to said property under said devise and bequest is not liable for the payment of an inheritance tax.

I find that by the terms of said will there was bequeathed to F. B., a son of decedent, personal property of the clear market value of $———, all situated in said county of ———, and that there was devised to him a life estate, the description of which and clear market values are

as follows: [Descriptions and values by counties as in Form No. 175, adding another column giving values of his life interest.] That the clear market value of the interest of said F. B. in said estate is the sum of $———; that he is entitled to an exemption of $10,000, and that the clear market value of the property so devised and bequeathed unto said F. B., the right to the succession to which is liable for the payment of an inheritance tax, is $———, and the tax due thereon is the sum of $———, of which said amount the sum of $——— is due and payable to the county treasurer of ——— county and $——— to the county treasurer of ——— county, Nebraska.

I find that the remainder in said real estate devised to said F. B. was devised to ———, a corporation; that the clear market value of said estate of remainder is the sum of $———, no part of which is entitled to exemption, and that the tax due on the right of succession to the same is $———, of which said amount the sum of $——— is due ——— county and $——— due ——— county, Nebraska. [Similar findings for other devisees or legatees.]

I hereby assess a tax on the said right of succession of said F. B. to property situated in ——— county in the sum of $——— and to property in ——— county in the sum of $———. [Similar findings as to other taxes.]

It is hereby ordered that C. D., executor of said estate, be and he hereby is directed to retain in his possession from the said legacy to said F. B. the sum of $———, the same being the inheritance tax thereon; that F. B. pay to said executor the balance of said tax, the same being the sum of $———; that said E. F. deduct from the legacy to said G. H. which was charged on the lands devised to him the tax due from G. H. on his right to succession to his said legacy in the sum of $———, and pay the same to said C. D., and that said ———, a corporation, pay to said C. D. the tax assessed on its said right of succession.

[Costs as in previous form.]

When a tax is assessed against the right of succession to property in two or more counties, the exemption should be proportionately deducted from the values in each. One county ought not to be deprived of money for its road fund at the expense of another.

Each county ought to pay its share of the costs of appraisement, which in some cases can be done by

apportioning it to the amount of tax received by each. If the appraiser in the home county resigns after appraising the home assets and other appraisers are successively appointed in different counties, each county should pay the fees and costs of its own appraiser. If he takes testimony in different counties, witness and officers' fees should be charged to the county in which the testimony was taken, and his mileage and a part of his fee is also a proper charge. It is a matter largely in the discretion of the court.

§ 404. Appeals.

The statute provides that any person dissatisfied with the appraisement or assessment may appeal to the county court of the proper county within sixty days after making and filing such appraisement or assessment, conditioned upon giving security to the court to pay all the costs, together with all taxes that may be fixed by the court.[59]

The usual practice in this state is for the losing party to file his objections to the appraisement in the county court, and take his appeal from the appraisement or assessment direct to the district court.[60]

59 Rev. Stats., c. 69, § 344, [6632].

60 See Dodge County v. Burns, 89 Neb. 534, 131 N. W. 922; In re Sanford, 90 Neb. 410, 133 N. W. 870; Strahan v. Wayne County, 93 Neb. 828, 142 N. W. 878. In construing a statute similar to our own, the New York court of appeals holds that in making the assessment the judge acts as a ministerial or taxing officer, and that any question on the liability of the succession to the property for the payment of an inheritance tax must be brought before him sitting as a court on appeal. In re Wolf, 137 N. Y. 205, 33 N. E. 156; Weston v. Goodrich, 86 Hun (N. Y.), 154; In re Costello, 189 N. Y. 288, 82 N. E. 139. In Douglas County v. Kountz, 84 Neb. 506, 121 N. W. 593, an appeal was taken

The appeal may be taken by any party interested, which includes, besides heirs, devisees or legatees, the county,[61] and an executor,[62] but not an administrator.[63]

The burden of proof in the district court is upon the appellant to show jurisdictional defects or irregularities in the proceedings, the liability or nonliability of the succession to certain property to the tax, or that the findings of values are not supported by the evidence.[64]

Form No. 177.

BOND ON APPEAL FROM ASSESSMENT OF INHERITANCE TAX.

[Title of Cause and Court.]

Whereas, on the ——— day of ———, 19—, an order of said court was made and entered assessing an inheritance tax in the sum of ——— dollars on the right of C. D. to take the following described real estate as a devisee of said A. B., and the said C. D. is dissatisfied with said assessment and desires to appeal therefrom to the district court of said county:

Now, therefore, we, C. D., as principal, and E. F. and G. H., as sureties, do hereby undertake unto the county court of said county to pay all costs of said appeal, together with all taxes that may be fixed by said district court thereon.

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to the district court from an order of the county court overruling a demurrer to an answer to an application for the appointment of an appraiser. The supreme court questioned the right of the party to appeal, but assumed jurisdiction for the purpose only of determining whether the succession to the property was subject to the tax.

61 Commonwealth's Appeal, 128 Pa. 603, 13 Atl. 386. See Dodge County v. Burns, 89 Neb. 534, 131 N. W. 922; In re Culver's Estate, 153 Iowa, 461, 133 N. W. 722.

62 Humphreys v. State, 70 Ohio St. 67, 70 N. E. 957.

63 Commonwealth v. Coleman, 52 Pa. 468.

64 State v. Kiler, 121 Iowa, 423, 96 N. W. 952; People v. Kelley, 218 Ill. 509, 75 N. E. 1038; In re McPherson, 104 N. Y. 306, 10 N. E. 685; Ferry v. Campbell, 110 Iowa, 290, 81 N. W. 604.

This obligation shall be binding on the heirs, executors, administrators and assigns of the parties hereto.

Dated this ——— day of ———, 19—.

(Signed) C. D.
E. F.
G. H.

The above security approved by me both as to form and sufficiency.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

On an appeal by the county no bond is necessary.

Under the Oregon practice, an appeal also lies to the circuit court from all final orders, judgments or decrees in the matter of assessing the tax, which are heard and tried in the same manner as appeals in suits in equity.[65]

§ 405. When inheritance tax due.

Taxes on the right of succession to property are due and payable at the death of the decedent, and interest at the rate of seven per cent per annum shall be charged and collected therefrom for such time as they are not paid; provided that if the tax is paid within one year from the accruing thereof, interest shall not be charged, and if the executor, administrator or trustee does not pay the tax within one year, he shall be required to give a bond for the payment of the same with interest.[66] The county court has no power to remit the interest on the tax, and if it is not paid within the year, interest from the date of decedent's death to date of payment should be collected.[67]

65 L. O. L., § 1224.

66 Rev. Stats., c. 69, § 336, [6624].

67 Saunders County v. Sanford, 90 Neb. 410, 133 N. W. 870.

In Oregon the inheritance tax is due and payable eight months from the date of the death of the decedent, excepting only those on conditional or contingent devises and legacies, which are due and payable when the party beneficially entitled thereto shall come into the possession thereof.[68]

Any person or body corporate succeeding to a remainder, the right of succession to which is chargeable with the tax, may elect not to pay the same until they come into the possession and enjoyment of it. In such case such persons or body corporate shall give a bond to the state of Nebraska in a penal sum of three times the amount of the tax, conditioned for the payment of the tax at such time or period as they or their representatives may come into the actual enjoyment of the property, which bond shall be filed with the clerk of the county to which the tax is payable. They are also required to file a verified return of the property and the above bond within one year from the death of the decedent, and may renew the same for five years.[69]

Form No. 178.

BOND OF REMAINDERMAN TO SECURE PAYMENT OF INHERITANCE TAX.

Know all men by these presents, that we, C. D., as principal, and E. F., G. H., and L. M., as sureties, all of ——— county, Nebraska, are held and firmly bound unto the state of Nebraska in the penal sum of ——— thousand dollars, for which payment well and truly to be made we do hereby jointly and severally bind ourselves, our heirs, executors, administrators, and assigns, by these presents.

Whereas, by the terms of the last will and testament of A. B., late of said county, deceased, which said will was, on the ——— day of ———, 19—, admitted to probate in the county court of said county, and

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68 L. O. L., § 1193.

69 Rev. Stats., c. 69, § 335, [6625]; L. O. L., § 1203.

letters testamentary granted thereon to X. Y., a devise was made to C. D. of the following described real estate, subject to the life estate of R. S. therein [describe real estate], and the fair market value of said devise has been determined to be ——— thousand dollars, and the inheritance tax due the state of Nebraska from said C. D. thereon is the sum of ——— dollars, and said C. D. is desirous of deferring payment of the same until he enters into the possession thereof:

Now, therefore, the condition of this obligation is such that, if the said C. D. shall well and truly pay or cause to be paid to the treasurer of said county the sum of ——— dollars, being the amount of said inheritance tax, together with interest thereon at the rate of seven per cent per annum from the ——— day of ———, 19— [date of death of decedent], to the date of payment, and shall, at the request of the county judge of said county, renew this obligation within five years from its date, then this obligation to be null and void; otherwise to be and remain in full force and effect.

Dated this ——— day of ———, 19—.

(Signed) C. D.
E. F.
G. H.
L. M.

I hereby approve of the foregoing bond, both as to form and sufficiency of sureties.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

§ 406. Payment of inheritance tax by executor, administrator or trustee.

It is the duty of the executor, administrator or trustee having any charge or trust in legacies or property for distribution to deduct the tax therefrom before making any payments. If the legacy or property be not money, he shall collect the tax thereon upon the appraised value thereof from the legatee or person entitled to such property, and he shall not deliver or be compelled to deliver any specific legacy or property subject to tax to any person until he shall have col-

lected the tax thereon. Whenever any such legacy shall be charged upon or payable out of the real estate, the heir or devisee, before paying the same, shall deduct such tax therefrom, and pay the same to the executor, administrator or trustee, and the same shall remain a charge upon such real estate until paid, and the payment thereof shall be enforced by the executor, administrator, or trustee in the same manner that the payment of said legacies might be enforced. If, however, such legacy shall be given in money to any person for a limited period, he shall retain the tax upon the whole amount, but, if it be not in money, he shall make application to the court having jurisdiction of his accounts to make apportionment, if the case requires it, of the sum to be paid into his hands by the legatees, and for such further orders relative thereto as the case may require.[70] The personal representative of a decedent has full power and authority to sell the assets of the estate in the same manner as for the payment of debts for the purpose of paying this tax.[71]

All inheritance taxes assessed in Oregon are payable to the state treasurer, and if paid within eight months from the death of the decedent, are subject to a discount of five per cent. If not paid within eight months from the time they accrue, they bear interest at eight per cent from the time they become due, unless by reason of claims upon the estate, necessary litigation or other unavoidable delay, they cannot be determined and paid within the time provided, in which case they bear six per cent interest from the date they accrue until the cause of the delay is removed, and eight per cent thereafter, and in all cases where a bond is given to secure their payment, interest at six per

70 Rev. Stats., c. 69, § 337, [6625]; L. O. L., § 1199.

71 Rev. Stats., c. 69, § 338, [6626]; L. O. L., § 1198.

cent must be paid.[72] The procedure for the payment of the tax to the state treasurer is identical with that for the payment of the same tax in Nebraska to the county treasurer, and the tax remains a lien for the same period of time.[73]

Inheritance taxes on real estate are payable to the treasurer of the county within which the lands are situated and those on personal property to the treasurer of the county in which the property was subject to general taxation, or in which the late owner, if a resident of this state, resided. Shares of stock in Nebraska corporations owned by nonresidents may be taxed in the county where the corporation has its principal business office.[74]

Every sum of money retained by any executor or administrator, or trustee, or paid into his hands for any tax on any property, shall be paid by him within thirty days thereafter to the treasurer of the proper county, who is required to give, and every such representative shall take, a receipt for the same.[75]

Whenever any foreign executor shall assign or transfer any stocks or loans in this state standing in the name of the decedent or in trust for the decedent which shall be liable to such tax, he is required to pay the same to the county treasurer, otherwise the tax shall be paid by the corporation, provided it has knowledge before the transfer of the stocks or loans that they are subject to an inheritance tax.[76]

Receipts for inheritance taxes should state on what real property, if any, they are paid, the name of the

72 L. O. L., § 1197.
73 L. O. L., §§ 1194–1196, 1198, 1199.
74 Douglas County v. Kountz, 84 Neb. 506, 121 N. W. 593.
75 Rev. Stats., c. 69, § 359, [6627].
76 Rev. Stats., c. 69, § 342, [6630]; L. O. L., § 1201.

party paying the same, and whether or not in full payment. A certified copy of the same may be obtained on payment of a fee of fifty cents, and the receipt or copy recorded in the office of the county clerk where the lands are situated.[77]

In Oregon such receipts can be obtained from the state treasurer on payment of a fee of twenty-five cents and recorded with like effect in the office having control of the deed records of the county.[77a]

The tax remains a lien on the property for five years.[78]

§ 407. Refunding excess or erroneous payments.

When any debts shall be proved against the estate of the deceased after the distribution of legacies from which the inheritance tax has been deducted in compliance with the statute, and the legatee is required to refund any portion of the legacy, a proportion of the tax shall be paid to him by the executor or administrator, or by the county treasurer, if it has been paid to him.[79]

If any tax has been paid to the county treasurer erroneously, it may be refunded by him on satisfactory proof of error in the amount of the same if application is made within two years from the time of its payment.[80]

Under the Oregon practice, the time within which such action must be brought is fixed at three years.[81]

77 Rev. Stats., c. 69, § 352, [6640].

77a L. O. L., §§ 1220, 1221.

78 Rev. Stats., c. 69, § 353, [6641]; L. O. L., § 1196.

79 Rev. Stats., c. 69, § 341, [6629].

80 Rev. Stats., c. 69, § 353, [6631].

81 L. O. L., § 1200. The above sections of the statutes clearly refer to cases where excessive taxes have been paid by reason of errors of

§ 408. Action for recovery of tax.

If it shall appear to the county court that any inheritance tax has not been paid according to law, the county court shall issue a summons commanding the person or corporation liable to pay such tax or interested in such property to appear before the court on a certain day, not more than three months after date of such summons, to show cause why such tax should not be paid. The proceedings, practice and pleadings, and the hearing and determination and judgment in said court, shall be the same as now provided or those which may be hereafter provided in probate cases in county courts in this state, and the fees and costs in such cases shall be the same as in probate cases in county courts.[82]

Under the Oregon practice, proceedings for the enforcement of the tax are commenced on the application of the prosecuting attorney of the county at the request, in writing, of the state treasurer. A citation to the persons liable for the tax is issued commanding them to appear and show cause before the court on a day specified not more than thirty days from its date, unless the court for good cause grants a longer time, why the tax has not been paid. The citation is served as ordered by the court. If it shall appear that the tax is due and payable and cannot be enforced under the provisions of the inheritance tax, the prosecuting attorney is given power to sue for the same in the name of the state. The costs of the proceeding, if the county judge certifies that there was probable cause for instituting it, are payable by a warrant on

fact, and not errors of law in determining whether or not the property is actually liable for the tax. The remedy in such cases is clearly by appeal.

82 Rev. Stats., c. 69, § 347, [6635].

the inheritance tax fund in the same manner as the costs of appraisement.[83]

Whenever the estate charged or sought to be charged is of such a nature or is so disposed that the liability is doubtful, or the value thereof cannot be ascertained with reasonable certainty, the state treasurer may, with the written approval of the attorney general, setting forth the reasons therefor, compromise with the beneficiaries and compound the tax, subject to the approval of the county court.[84]

§ 409. Inheritance tax records.

The records of inheritance taxes are kept separate from the other records of the estate in books furnished by the secretary of state, in which should be entered the returns made by the appraiser, the cash value of annuities, life estates and terms for years, and other property fixed by him and the tax assessed thereon, and the amounts of any receipts for payments thereof filed with him.[85] The inheritance tax constitutes a special road fund, which is under the charge of the county board.

Form No. 179.

PETITION OF COUNTY ATTORNEY FOR PAYMENT OF DELINQUENT INHERITANCE TAX.

In the County Court of ——— County, Nebraska.

In the Matter of the Estate of A. B., Deceased.

Your petitioner, R. J. S., county attorney of said county of ———, and acting in his capacity as such county attorney, respectfully represents unto the court that A. B., late a resident of said county, departed this life at the village of ———, in said county, leaving a last will and testament, which said instrument was, on the ——— day of ———, 19—, duly admitted to probate by said court, and that letters of administra-

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83 L. O. L., § 1217.

84 L. O. L., § 1222.

85 Rev. Stats., c. 69, § 349, [6687].

tion thereupon issued to C. D., the executor therein named, and said C. D. is now the duly qualified executor of said estate; that on the ——— day of ———, 19—, L. M., of said county, was appointed by said court to appraise the property of said estate liable for the payment of the inheritance; that said L. M. thereupon gave notice of the time and place fixed by him for appraising said property, and on the ——— day of ———, 19—, appraised said property at the sum of ——— dollars, and filed the report of his proceedings, together with the depositions taken by him in said appraisement matter, in said court; and that on the ——— day of ———, 19—, this court made an order assessing said tax in the words and figures following: [Copy order in full.]

Your petitioner therefore prays that a summons to show cause issue to C. D., executor of the estate of said A. B., and to E. F. and the X Y. Z. Co., commanding them to show cause, if any they have, why a decree of said court should not issue directing said executor to pay the said tax, and for such other and further relief as justice may require.

Dated this ——— day of ———, 19—.

(Signed) R. J. S.,
County Attorney.

Under the Oregon practice, the county court is required to enter in a book furnished by the secretary of state a record of all estates on which letters testamentary or of administration are granted, giving names of the heirs, devisees, legatees and beneficiaries, their residences and relationship to the decedent, the amount of their legacies, the estimated values of their devises, the amount of the inventory, the returns of the inheritance tax appraisers, the value of all inheritances, devises, bequests, legacies and gifts inherited from such decedent, or given by such decedent in his will or otherwise, as fixed by the court; and the tax assessed thereon and the amounts of any receipts for payment thereof filed in said court. Expectancy tables, and tables giving values of annuities and life estates, and the present worth of remainders and reversions.[86]

The tax to the amount of $5,000 constitutes an inheritance tax fund. Amounts in excess of that sum are

[86] L. O. L., § 1218.

transferred to and become a part of the general fund of the state.[87]

§ 409a. Life expectancy tables.

Life expectancy tables are necessary in determining the present value of homestead interests and life estates. Such tables which have been prepared by recognized authorities, and are contained in a law book of general acceptance as a standard, or other reliable publication, are competent evidence of a person's expectancy of life.[87a] As they are prepared from general mortality statistics, proof that the party whose expectancy it is desired to determine is in sound health is not necessary.[87b] They are not conclusive, and evidence of the habits and present physical condition of the party is admissible to show that his expectancy is above or below the average.[88]

The American and Carlisle tables are the ones most frequently referred to.[89] The Actuaries table, prepared from mortuary statistics of a large number of life insurance companies by an association of actuaries, is also a standard. There is but little difference between them, except that for extreme old ages the expectancies according to the Carlisle table are too high.

87 L. O. L., § 1195.

87a Chicago R. I. & P. R. Co. v. Hambel, 2 Neb. Unof. 607, 89 N. W. 643; Sellars v. Foster, 27 Neb. 118, 42 N. W. 907.

87b Cusick v. Boyne, 1 Cal. App. 643, 82 Pac. 985.

88 South Omaha v. Sutliffe, 72 Neb. 746, 101 N. W. 997.

89 Chicago R. I. & P. R. Co. v. Hambel, 2 Neb. Unof. 607, 89 N. W. 643.

CHAPTER XXXII.

ACCOUNTING.

§ 410. Duty of Executor or Administrator to Render an Account.
411. When Accounting Required.
412. Proceedings for an Accounting.
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414. Debtor Side of Account—General Charges.
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418. Costs and Expenses of Administration.
419. Costs and Expenses of Administration—Concluded.
420. Fees of Executor or Administrator.
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422. Notice of Hearing on Administration Account.
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425. Order Allowing Final Account.
426. Coexecutors and Coadministrators.
427. Equitable Action to Recover Assets.
428. Accounting by Former Executor or Administrator With Administrator *De Bonis Non.*

§ 410. Duty of executor or administrator to render an account.

Every administrator, or an executor who has given a general bond as such, is required to give an account of the whole of the goods, chattels, rights and credits of the deceased which may come into his possession, including proceeds of the sale of real estate for the payment of debts and legacies, and of all the interest, profit and income that shall in any way come into his hands from the estate of the deceased.[1]

1 Rev. Stats., c. 17, § 237, [1501]; L. O. L., §§ 1282, 1285.

An executor who has given a bond as residuary legatee is not compelled to file an account of the property that has come into his charge; a statement accompanied by vouchers, or showing that all the debts allowed against said estate, and the legacies and the costs and expenses of administration have been paid, is all that is required.[2]

The Oregon statutes do not provide for a residuary legatee bond, and consequently a full accounting is required of all estates.

§ 411. When accounting required.

Every executor or administrator is required to render an account within one year from the date of his letters, unless further time is allowed by the court, or at any time pending administration, when cited so to do, on application of an interested party. Where for any reason a full settlement cannot be had within the time fixed by the court, a settlement shall be made as far as possible, and the administration continued until a full settlement can be had.[3]

Under the Oregon practice, he is required within the first ten days of April and October of each year, until the administration is completed, to file a verified account with the clerk of the county court, with proper vouchers showing the amount of claims presented, amount allowed and disallowed, and payments made. In case the notice of his appointment shall be within sixty days next preceding the first day of April or October, the filing of the account shall be omitted until the succeeding April or October.[4]

2 McElroy v. Hathaway, 44 Mich. 339, 6 N. W. 367; Copp v. Hersey, 31 N. H. 317.

3 Rev. Stats., c. 17, § 245, [1509].

4 L. O. L., § 1262; In re Mark's Estate, 66 Or. 344, 133 Pac. 777.

He may be cited to file his account at any time after the expiration of six months from his appointment when it is made to appear by the application, under oath, of any party interested in the estate that there are assets in the hands of such representative, the whole or any portion of which ought to be immediately paid to such applicant. Such citation may also issue when he has neglected to file his accounts within the time fixed by the statute.[5]

An interested party includes a creditor,[6] an heir, distributee or legatee,[7] and in some cases a remainderman.[8] A surety upon his bond cannot compel an accounting.[9]

After the time for completing the administration has expired the court may of its own motion cite him to account.[10]

The statutes contemplate that an estate be administered within three years from the date of letters, except in cases of a testate estate where a trust exists which cannot be closed up within that period. If at the expiration of three years the debts and legacies are all paid, the court may of his own motion cite the personal representative to account. Where a trust has been created by the will, the estate can be closed up except in so far as the trust prevents.[11]

5 Rev. Stats., c. 17, § 248, [1512]. See L. O. L., § 1283; In re Mark's Estate, 66 Or. 344, 133 Pac. 777.

6 Wever v. Marvin, 14 Barb. (N. Y.) 376; Beeber's Appeal (Pa.), 8 Atl. 191.

7 Rogers v. Marston, 80 Me. 404, 15 Atl. 22.

8 Godwin v. Wartford, 107 N. C. 168, 11 S. E. 1051.

9 Durnell v. Providence Mun. Ct., 9 R. I. 189.

10 Whitman's Appeal, 28 Pa. 376; In re Campbell, 12 Wis. 369.

11 Rev. Stats., c. 17, § 128, [1392].

There is no statute of limitations fixing the time within which application for an accounting by the personal representative may be granted.[12] As long as there are assets of the estate unadministered, it is the duty of the court to cite him to appear. Lapse of time raises a presumption, which is not conclusive, that the administration has been fully completed.[13] After one year, provided he has not been granted an extension of time, or some trust exists, he has no valid reason for not filing either a full or partial account. No excuse will be accepted short of an absolute discharge,[14] or that no assets have ever come into his hands, which is in effect a final account.[15]

§ 412. Proceedings for an accounting.

When the personal representative has never filed an account or procured an extension of time, and the time fixed for completing the administration has expired, a motion or petition setting up such fact is all that is required. An application for an interlocutory account should set out sufficient facts to show that some disposition should be made of the assets in the hands of the executor or administrator.[16] If for a final accounting, it should show that the estate is fully administered. If the executor or administrator has

12 Fuller v. Cushman, 170 Mass. 286, 39 N. E. 361; Allen v. Bartlett, 52 Kan. 387, 34 Pac. 1042.

13 Fuller v. Cushman, 170 Mass. 286, 39 N. E. 361; Roberts v. Johns, 16 S. C. 171.

14 Montgomery v. Cloud, 27 S. C. 188, 3 S. E. 196; Portis v. Cummings, 14 Tex. 139; In re Sanderson's Estate, 74 Cal. 199, 15 Pac. 753.

15 In re Soutter, 105 N. Y. 514, 12 N. E. 34.

16 Treadwell v. Sorrell, 23 Miss. 563.

uncollected notes or securities in his possession, a final settlement cannot be had unless the parties entitled thereto have agreed upon a distribution of such assets.[17]

A petition filed a long time after letters issue should set out with particularity the assets remaining on hand and the duties of the representative not complied with.[18] In all cases it should allege the interest the applicant has in the estate and should be verified.[19]

A citation should issue and personal service had on the representative. Should he fail to comply with the order of the court, he may be proceeded against for contempt, and is also liable on his bond for all damages that may accrue.[20] The order is not subject to appeal.[21]

Form No. 180.

GENERAL PETITION FOR AN ACCOUNTING BY AN EXECUTOR OR ADMINISTRATOR.

[Title of Cause and Court.]

Your petitioner, E. F., respectfully represents unto the court that he is an heir at law of said A. B. (legatee of said estate]; [that on the ——— day of ———, 19—, he filed a claim against said estate in said court, which claim was, on the ——— day of ———, 19—, allowed by the judge thereof in the sum of ——— dollars, and no appeal has been taken from the order allowing the same]; that on the ——— day of ———, 19—, letters of administration issued out of and under the seal of said court to C. D.; that on the ——— day of ———, 19—, the said court made an order fixing the time of payment of debts and disposing of said estate at one year from said date last aforesaid, and

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17 In re Morrison's Estate, 48 Or. 612, 87 Pac. 1043.

18 Tait v. Gardner, 119 Ga. 133, 46 S. E. 73.

19 In re Robinson, 6 Mich. 137; Rev. Stats., c. 17, § 248. [1512].

20 Rev. Stats., c. 17, § 248, [1512]; L. O. L., § 1283; Rutenic v. Hamakar, 40 Or. 451, 67 Pac. 192.

21 In re Palthorp, 160 Pa. 316, 28 Atl. 689.

that no further time has been granted by the court for that purpose; that said administrator has disposed of said estate, but has neglected and still neglects to pay the debts due from said estate, and settle the same, and render an account of his administration.

Your petitioner therefore prays that said C. D., administrator as aforesaid, may be required to pay the debts against said estate, and settle the same, and render an account of his administration, as far as the same may be had, and that, in the case of his failure to do so, his account be determined in his absence, and for such other and further relief as may be deemed just and equitable.

(Signed) E. F.

[Add verification, Form No. 5.]

Form No. 181.

PETITION BY LEGATEE FOR AN ACCOUNTING.

[Title of Cause and Court.]

Your petitioner, E. F., respectfully represents unto the court that he is interested in said estate as a legatee thereof; that on the ——— day of ———, 19—, letters testamentary issued out of and under the seal of said court to C. D., as executor of said estate; that said C. D., executor as aforesaid, has collected from the personalty of said estate the sum of ——— dollars ($———), and now holds the same in his possession; that the debts due from said estate have been paid; that, according to the terms of said will, a legacy of ——— dollars ($———) was directed to be paid to your petitioner within six months from the date of the issue of letters testamentary, and made a first charge upon the assets of said estate; that there is now in the hands of said executor funds sufficient to pay said legacy, and all expenses of administration; that said C. D., executor as aforesaid, has neglected and refused, and still neglects and refuses, to pay said legacy as directed by said will, and that the amount of said legacy should be immediately decreed to be paid to your petitioner.

Your petitioner therefore prays that said C. D., executor as aforesaid, be required to render an account of his administration, and decreed to pay said legacy to your petitioner, and for such other and further relief as may be just and equitable.

Dated this ——— day of ———, 19—.

(Signed) E. F.

[Add verification, Form No. 5.]

Form No. 182.

CITATION TO EXECUTOR OR ADMINISTRATOR TO ACCOUNT.

State of Nebraska,
——— County,—ss.

To C. D., Executor of the Estate of A. B., Deceased:

You are hereby notified that, on the ——— day of ———, 19—, E. F. filed his petition in the county court of said county praying for an accounting of your administration of said estate.

You are required to render an account of your doings as administrator of said estate on or before the ——— day of ———, 19—.

Dated this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

§ 413. Annual or interlocutory accounts.

Accounts rendered pending administration, and before the final account, are in the nature of a statement of the transactions of the executor or administrator up to that date, and differ materially from the final account. They are often made *ex parte,* and without notice to those interested in the estate, and the hearing thereon very frequently takes place in the absence of such persons. The approval of them by the court is a judicial determination that they are only *prima facie* correct.[22] The accounts so allowed without practically any hearing thereon are not considered binding and conclusive. At any time before the final account of administration is allowed they may be opened up and their correctness questioned; and this is true, though no exception or appeal has been taken from their allowance.[23] Such account, however, is presumed

22 Musick v. Beebe, 17 Kan. 47.

23 Bachelor v. Schmela, 49 Neb. 37, 68 N. W. 378; Boales v. Ferguson, 55 Neb. 565, 76 N. W. 18; In re Heath's Estate, 58 Iowa, 36, 11 N. W. 723; Griggs v. Shaw, 42 N. J. Eq. 631, 9 Atl. 578.

to be correct until attacked on the hearing of a second interlocutory or a final account on account of mistakes, errors, or fraud.[24]

In cases where the account is contested, it has been held conclusive on all of those contesting it who were not under disability, and on all those under disability who were properly represented by guardians.[25] The order not being final is not appealable.[26]

Form No. 183.

ANNUAL OR INTERLOCUTORY ACCOUNT OF EXECUTOR OR ADMINISTRATOR.

[Title of Cause and Court.]

The undersigned, C. D., administrator of the estate of A. B., deceased, herewith submits the account of his administration of said estate, including all transactions of said estate up to ———, 19—.

C. D., Administrator, in Account with Estate of A. B., Deceased.

DR.			CR.		
19.....	.....	$.....	19.....	.....	$.....
	.....	.....		.....	.....
	[Give items of all cash received.]			[Give all disbursements by items.]	
		$.....		By bal. on hand.	$.....

There remains in my possession and undisposed of the following assets of said estate, the appraised value of which is set opposite each item:

Items		Values
	.....	$.....
	.....	.....
	Total appraised value of assets in my possession undisposed of.....	$.....

24 Patterson v. Bell, 25 Iowa, 150.

25 Kittson v. St. Paul Trust Co., 78 Minn. 325, 81 N. W. 7; Duke's Admr. v. Duke's Distributees, 26 Ala. 673; Turney v. Williams, 7 Yerg. (Tenn.) 211; Succession of Triche, 39 La. Ann. 289, 2 South. 52.

26 Continental Trust Co. v. Peterson, 76 Neb. 411, 110 N. W. 316.

That the total value of all the assets of the estate in my possession is ——— dollars ($———).

State of Nebraska,
——— County,—ss.

C. D., administrator of the estate of A. B., deceased, being first duly sworn, on oath says that the foregoing is a correct account of his doings as administrator of said estate of the amount received and paid out by him up to this date, and of the amount of unadministered assets in his possession.

(Signed) C. D.

Subscribed in my presence and sworn to before me this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

§ 414. Debtor side of the account—General charges.

An administration account is a statement, under oath, showing by items what assets the representative has received and what has been done with them, accompanied by proper vouchers for all disbursements. The inventory and appraisement is the basis for all accounts. It is not conclusive or binding on either party. Property omitted, though not included in a supplemental inventory may be shown as well as other errors. He is presumed by law to be liable for the property at its appraised value.[27]

The executor or administrator should account for all the estate inventoried, for property sold under license of the court at the prices received, and for those sold without such order at their appraised value, or if he received more at the prices received, unless he acted in good faith and the loss was not occasioned by his fault.[28] If the property is sold for its reasonable

27 Conser's Estate, 40 Or. 139, 66 Pac. 607.
28 Rev. Stats., c. 17, §§ 241, 239, [1505], [1503]; L. O. L., § 1289.

value, and he has substantially received the appraised value of the estate, he should not be charged with slight differences in appraised values.[29] He must account for all the increase of the estate, but is not responsible for loss or decrease or destruction occurring without his fault.[30] If he is an ancillary administrator, he is only chargeable with assets collected and received in this state.[31] He is chargeable with all profits, from whatever source derived, growing out of his management of the estate, and is allowed no other pay than that given him by statute.[32] If he has taken possession of the real estate, or any part of it, he is chargeable with the rents and income from the time when the condition of the estate was such as to make such possession necessary.[33] He is chargeable with his own debt to the estate, though insolvent, if at any time during the administration he had property sufficient to pay it.[34] In case of his insolvency, an action in equity would appear to be necessary to fix the amount.

Under the Oregon statute by which his indebtedness is to be considered as money belonging to the estate, it ceased to be either property of the estate to be accounted for at not less than its appraised value or a debt due the estate, and therefore not a liability of

29 In re Osburn's Estate, 36 Or. 11, 58 Pac. 521; In re Conser's Estate, 40 Or. 139, 66 Pac. 607.

30 Rev. Stats., c. 17, § 249, [1513]; L. O. L., § 1289.

31 Tunnicliff v. Fox, 69 Neb. 811, 94 N. W. 1032.

32 Walworth v. Bartholomew, 76 Vt. 1, 56 Atl. 101; Norris' Appeal, 71 Pa. 106; Dilworth's Appeal, 108 Pa. 92; Ex parte Glenn, 20 S. C. 64; In re Gilbert's Estate, 39 Hun (N. Y.), 61.

33 Section 199, *supra.*

34 Section 217, *supra.*

his in case it was uncollectible, and he is chargeable with the same.[35]

He is also chargeable with the rental value of such part of the real estate as he himself may occupy,[36] and with the proceeds of the sales of lands recovered from a fraudulent grantee of the decedent.[37]

He is not chargeable with debts due the deceased which are uncollectible,[38] nor with the value of the household furniture, exempt property and effects which pass to the widow and children.[39]

§ 415. The debtor side of the account—Interest.

An executor or administrator should account for all interest received on funds in his hands at a rate not less than what he actually received.[40] Where he has administered the estate successfully without serious delay or incurring large costs, courts are loath to charge him with interest, unless he has actually received it, his duty being to administer and not invest,[41] but if he has converted interest-bearing securities into cash when the money was not needed, and deposited it in a bank not drawing interest,[42] or permitted large sums of money to remain idle when he could at least have obtained bank rates of interest on them, he should

35 In re Mason's Estate, 42 Or. 178, 70 Pac. 507; L. O. L., § 1182.
36 Rev. Stats., c. 17, § 243, [1507].
37 Section 215, *supra*.
38 Rev. Stats., c. 17, § 242, [1506]; L. O. L., § 1289.
39 Section 417, *post*.
40 Barney v. Saunders, 16 How. (U. S.) 543.
41 Wyman v. Hubbard, 13 Mass. 232.
42 Verner's Estate, 6 Watts (Pa.), 250.

be charged with the rate of interest which he would have received had they been so invested.[43]

He is always chargeable with interest when he mingles the funds of the estate with his own, or uses them for his own benefit,[44] or has without authority from a will continued the business of the decedent, though at a loss.[45] In both the above cases, if he has made profits in excess of usual interest rates, he may be compelled to account for the profits received and also forfeit his commission.[46]

Interest should also be charged to him where he has mingled the funds with those of strangers, and where they have been deposited in banks to the credit of such parties, though he personally received no benefit therefrom,[47] and where he has neglected for an unreasonable length of time to file his account when cited so to do, such delay not being caused by laches or any direct act of those interested in the estate.[48]

Another cause for charging interest is delay caused by negligence and bad faith of the representative, which resulted in a benefit to no one except his attor-

43 Mathes v. Bennett, 21 N. H. 199; Walker's Appeal, 116 Pa. 419, 9 Atl. 654; Hough v. Harvey, 71 Ill. 72; In re Brewster's Estate, 113 Mich. 561, 71 N. W. 1085.

44 In re Bush's Estate, 89 Neb. 334, 131 N. W. 602; Westover v. Carman's Estate, 49 Neb. 397, 68 N. W. 501; Perrin v. Lepper, 72 Mich. 454, 40 N. W. 859; McClosky v. Gleason, 56 Vt. 264.

45 Section 232, *supra*.

46 Norris' Appeal, 71 Pa. 106.

47 Westover v. Carman's Estate, 49 Neb. 397, 68 N. W. 501.

48 Lommen v. Tobiason, 52 Iowa, 655; Walker's Appeal, 116 Pa. 519, 9 Atl. 654; Eubank v. Clark, 78 Ala. 73; Johnson v. Holfield, 82 Ala. 123, 2 South. 753.

neys, and evidence that the litigation causing the delay was on the advice of his attorneys is no defense.[49]

In all cases of negligence or misconduct on the part of the representative, he should be charged with interest at the statutory rate from the date the estate would have been settled had it been administered by a diligent representative, guided by proper legal advice.[50] If such misconduct amounts to a willful violation of law, and there appears to have been a fixed plan of the representative and his legal advisers to loot the estate, he should be charged the highest rate the statute provides, and the interest compounded annually or semi-annually.[51]

He is not chargeable with interest on funds held awaiting the result of suits pending against the estate, unless they have been used by him for his own purposes or he has received interest on them,[52] nor on that held pending an appeal from the allowance of his account when the appellate court sustained the order.[53]

49 Bullion v. Ribble, 87 Neb. 700, 128 N. W. 32.

50 Bullion v. Ribble, 87 Neb. 700, 128 N. W. 32.

51 In re Sanderson's Estate, 74 Cal. 199, 15 Pac. 753; Elliott v. Sparrell, 114 Mass. 404; Schieflin v. Stewart, 1 Johns. Ch. (N. Y.) 620; Scott v. Crews, 72 Mo. 261; Perrin v. Lepper, 72 Mich. 454, 40 N. W. 850. In the latter case an executor, who was a surviving partner, for twenty years resisted various suits to compel him to settle his affairs, and converted substantially the entire assets of the estate. The decision of the lower court was for the defense. The supreme court reversed the case and charged the representatives of the estate of the executor with seven per cent compound interest for twenty years, principal and interest, amounting, including real estate, to five hundred thousand dollars.

52 Booker v. Armstrong, 93 Mo. 49, 4 S. W. 727; Dortch v. Dortch, 71 N. C. 224.

53 Wendell v. French, 19 N. H. 205; Stearns v. Brown, 1 Pick. (Mass.) 530.

§ 416. Debtor side of the account—Lands purchased.

An executor or administrator who has violated his trust by purchasing lands with the personal assets may be charged with the amount so expended, with interest. If he has taken the title in himself, he holds it in trust for the distributees, and they have an equitable lien for the amount due them.[54] A more equitable rule would be to make the delinquent representative a trustee for the full value of the property if it exceeded in value the amount of the interests of the creditors and distributees therein.

§ 417. Credit side of account—General charges.

The credit side of the account should be a complete and itemized statement of all payments made by the executor or administrator connected with its administration, so that a balance can be struck showing the exact amount to be distributed to the heirs of an intestate estate or to a residuary legatee. They may be divided into three classes: Debts, expenses of administration and fees for services of the representative. Legacies paid from personal assets, or from the proceeds of the sales of real estate, are also proper credits. He is entitled to credit for all general claims allowed against the estate which he has paid, and under no circumstances should he receive credit for payment of an unsecured general demand which was not presented and allowed by the county court.[55]

He is also entitled to credit for money paid to redeem any of the assets from a lien or charge thereon, and

54 Blake v. Chambers, 4 Neb. 90.

55 Johnson v. Pulver, 1 Neb. Unof. 290, 95 N. W. 697.

if he has advanced the money himself, there being no assets available when they became due, it is proper to allow him interest on such amount so advanced.[56]

Money paid to the widow or guardian of minors or to distributees generally is not, strictly speaking, a proper credit, excepting only the statutory allowance for support.[57] It is more in the nature of an advancement, and may be deducted by the court in making the decree of distribution.[58] The better practice is not to include them as credits in the account itself, but carry them as so much cash on hand, deducting them from the amounts found due by the court.

The value of the property allowed by statute in all estates to the widow and heirs is not a proper credit unless the representative has already charged himself with it.

§ 418. Costs and expenses of administration.

The executor or administrator is allowed all the necessary expenses pertaining to the care, management and settlement of the estate,[59] and all costs of the county court and its officers growing out of the administration, including the premium on his official bond when the same is paid by a surety company.[60]

56 Jennison v. Hapgood, 10 Pick. (Mass.) 77; Booker v. Armstrong, 93 Mo. 49, 4 S. W. 727; Liddell v. Liddell, 11 N. J. L. 44; Evertson v. Tappen, 5 Johns. Ch. (N. Y.) 498.

57 Trueman v. Tilden, 6 N. H. 201; In re Fitzgerald's Estate, 57 Wis. 508, 15 N. W. 794.

58 Hyland v. Baxter, 98 N. Y. 610; Bradley v. Bradley's Admr., 83 Va. 75, 1 S. E. 477.

59 Rev. Stats., c. 17, § 246, [1510]; L. O. L., § 1290.

60 Rev. Stats., c. 17, § 236, [1500]; L. O. L., § 4678.

He is entitled to necessary traveling expenses incurred in connection with the business of the estate, including those of a trip to another state,[61] but not for such expenses incurred before the death of decedent, there being no express promise to pay the same,[62] and to expenses incidental to the caring for and marketing livestock, and to the sale of personalty, including advertising, getting property in shape for sale, and pay of an auctioneer,[63] and to the amount paid clerks, agents and bookkeepers when the extent and character of the estate make such employment necessary.[64]

Bills for services of clerks, collectors, etc., of small estates are not looked on by the courts with much favor. The executor or administrator is required, within reasonable limits, to perform himself or at his own expense the manual labor connected with the administration. The law allows him a commission, which may be increased by the court if the work done justifies it. He has no right to hire others to do his work at the expense of the estate.[65]

An executor is entitled to proper costs and expenses, and ordinarily to attorney fees, in securing the probate of a will.[66] Both executors and administrators are allowed reasonable attorney fees in any necessary

61 Ladd v. Stephens, 147 Mo. 319, 48 S. W. 915; In re McCullough's Estate, 31 Or. 86, 49 Pac. 886.

62 In re McCullough's Estate, 31 Or. 86, 49 Pac. 886.

63 In re Moore's Estate, 72 Cal. 335, 13 Pac. 880; Dey v. Codman, 39 N. J. Eq. 258; Griswold v. Chandler, 5 N. H. 492.

64 Sowles v. Hall, 73 Vt. 55, 50 Atl. 550; Matter of Jacobs, 99 Mo. 427, 12 S. W. 457; Dey v. Codman, 39 N. J. Eq. 258.

65 Noble v. Jackson, 132 Ala. 230, 31 South. 450; In re Harbeck, 145 N. Y. 848, 41 N. E. 89.

66 See § 104, *supra.*

litigation or matter requiring legal advice or counsel pertaining to the administration of the estate.[67] Unless he is himself an attorney, or competent to draft legal papers, the employment of an attorney is necessary.[68] He should be allowed his attorney fees and expenses in any litigation connected with the collection of the assets and the settlement of the estate, it appearing that they have been incurred in good faith, and for the benefit of those interested,[69] even though not successful.[70]

An attorney may be employed on a liberal contingent fee.[71] The general practice is to allow a lump sum for all services performed,[72] though an itemized statement showing charges for each particular matter may enable the court to pass more understandingly on the bill.[73] Allowances for attorney fees may be made as the administration of the estate progresses instead of being left until the final hearing.[74] If made *ex parte,* they are not binding on those interested in the estate.[74a]

67 Section 230, *supra;* L. O. L., § 1290.

68 Section 15, *supra.*

69 Bullion v. Ribble, 87 Neb. 700, 128 N. W. 32; In re Rapp's Estate, 77 Neb. 674, 110 N. W. 661; Marx v. McMoran, 136 Mich. 406, 99 N. W. 396; Taylor v. Wright, 93 Ind. 121; Tuttle v. Robinson, 33 N. H. 104; Steel v. Holladay, 20 Or. 467, 25 Pac. 69; In re Osburn's Estate, 36 Or. 13, 58 Pac. 521; In re Simon's Will, 55 Conn. 239, 11 Atl. 36; In re Marrey's Estate, 65 Cal. 287, 3 Pac. 896.

70 Forward v. Forward, 6 Allen (Mass.), 494.

71 In re McCullough's Estate, 31 Or. 86, 49 Pac. 886.

72 In re Osburn's Estate, 36 Or. 13, 58 Pac. 521.

73 Steel v. Holloday, 20 Or. 467, 25 Pac. 69.

74 Knight v. Hamaker, 40 Or. 424, 61 Pac. 107.

74a In re Munger's Estate (Iowa), 150 N. W. 447.

§ 419. Costs and expenses of administration—Concluded.

The executor or administrator is not entitled to either costs, expenses or attorney fees when the litigation in which they were incurred was caused by his own carelessness, negligence or incompetence,[75] or in cases not honestly and intelligently prosecuted, but which clearly appear to have been conducted in the interest of the administrator,[76] or in resisting claims to which there was no meritorious defense.[77] No expenses of this kind should be allowed an administrator where the entire administration showed a studied plan on the part of the attorneys to contest every step taken by the heirs looking to a settlement of the estate, resisting meritorious claims, and in every way prolonging the administration by appeals and dilatory proceedings.[78]

An executor or administrator who is also an attorney is entitled to pay for legal services in all cases where, had he been a layman, necessity required or common prudence would have dictated that he secure legal counsel to assist him in the settlement of the estate.[79] If it appears necessary for the best interests

75 Blake v. Pegram, 109 Mass. 541; Price's Estate, 81 Pa. 263; Cameron v. Cameron, 15 Wis. 1.

76 McDowell v. First Nat. Bank of Sutton, 73 Neb. 307, 102 N. W. 615; Fletcher v. Fletcher, 83 Neb. 126, 119 N. W. 232.

77 Bullion v. Ribble, 87 Neb. 700, 128 N. W. 32.

78 Bullion v. Ribble, *supra*. In this case the county judge allowed, *ex parte*, attorney's claims for resisting demands which the supreme court said were subject to no meritorious defense, and were approved by the heirs, almost equal to the amount of the claims, besides having previously allowed them excessive sums on like orders.

79 In re Wilson's Estate, 83 Neb. 252, 119 N. W. 522; In re Rapp's Estate, 77 Neb. 674, 110 N. W. 661.

of the estate, he can employ additional counsel. In all cases where he is an attorney, the court should carefully examine his account and give the estate the benefit of the doubt, when there is a question whether the duties were strictly legal or such as should be performed by a personal representative himself.[80]

Attorney fees are not a primary liability of the estate. The executor or administrator employs the lawyer, and is personally liable for his pay.[81] He credits the fees in his final account, and on the hearing they should be allowed, if reasonable in amount and beneficial to the estate.[82]

In determining their value the following elements should be considered: The amount of property involved, and consequent responsibility, the questions of law raised, their intricacy, difficulty or novelty, the time, labor and responsibility, and the result of the services.[83]

If they are reasonable and proper and have not been paid, the court has authority to allow the amount and direct that it be paid to the attorney.[84]

Costs on proceedings for the sale of real estate for the payment of debts and legacies, or to obtain leave to complete contracts for the purchase or sale of lands during the lifetime of the decedent, are proper credits.[85]

80 In re Wilson's Estate, 83 Neb. 252, 119 N. W. 522.

81 Waite v. Willis, 42 Or. 290, 70 Pac. 1034; Besancon v. Wegner, 16 N. D. 240, 112 N. W. 965.

82 In re McCullough's Estate, 31 Or. 86, 49 Pac. 884; In re Rapp's Estate, 77 Neb. 674, 110 N. W. 661; Marx v. McMoran, 136 Mich. 406, 99 N. W. 396; In re Munger's Estate (Iowa), 150 N. W. 447.

83 Kentucky Bank v. Combs, 7 Pa. 543; Harland v. Lilienthal, 53 N. Y. 438; Betts v. Betts, 4 Abb. N. C. (N. Y.) 317.

84 Thacher v. Dunham, 5 Gray (Mass.), 26.

85 Section 256, *supra*.

§ 420. Fees of executor or administrator.

At common law an executor or administrator received no pay for his time or services. That doctrine never prevailed in this country, and the pay of both is fixed by law. A testator may by his will make provisions for the pay of his executor, and the same will be deemed full pay for his services unless he shall by a written instrument filed in the county court renounce all claims to compensation under the will.[86] The renouncement should be filed before he accepts the office.[87] When no compensation is given the executor by the will, or he renounce the same, he or an administrator will be allowed commissions upon the amount of the personal estate collected and accounted for by him, and for the proceeds of real estate sold under an order of the court for the payment of debts, as follows: For the first thousand dollars, at the rate of five per cent; for all above that sum, and not exceeding five thousand dollars, at the rate of two and one-half per cent; and for all above five thousand dollars, at the rate of one per cent; and in all cases such further allowances may be made as the county judge shall deem just and reasonable, and for any extraordinary services not required of an executor or administrator in the ordinary course of his duty.[88]

He is not entitled to a commission on property which never came into his possession, or property not administered on.[89]

86 Rev. Stats., c. 17, § 246.
87 In re Runyon, 125 Cal. 195, 57 Pac. 783.
88 Rev. Stats., c. 17, § 247, [1511].
89 Steel v. Holladay, 20 Or. 464, 25 Pac. 69.

Under the Oregon statute he is entitled to the following commission upon the whole estate accounted for by him: For the first one thousand dollars or any less sum, seven per cent; for all above that sum and not exceeding two thousand dollars, five per cent; for all above two thousand dollars and not exceeding four thousand dollars, four per cent, and for all above four thousand dollars, at the rate of two per cent. He is also allowed further compensation for extraordinary and unusual services not ordinarily required of an executor or administrator in the discharge of his trust.[90]

If his compensation is fixed by the will and the estate proves insufficient to pay the debts of the deceased, the court shall reduce the compensation, so far as may be necessary to satisfy such claims, to an amount equal to what the executor would have been entitled if no such provision had been made.[91]

It is pretty generally conceded that an executor is not entitled to a commission for delivering legacies of specific articles. Whether he is entitled to a commission on the value of notes, stocks or bonds turned over to heirs or legatees is a question on which there is a difference of opinion, based largely on local statutes. If the beneficiary takes notes in lieu of cash, it has been held that he was entitled to a commission,[92] and the same rule has been applied to corporate stock.[93] The usual practice in this state is to allow him a commission on the amount with which he has charged himself in his account, not including specific property which he reports as on hand.

90 L. O. L., § 1292.
91 L. O. L., § 1291.
92 Shephard v. Parker, 35 N. C. 103.
93 Ladd v. Stephens, 147 Mo. 319, 48 S. W. 915.

He may deduct these commissions as soon as the assets are converted into cash.[94] If there are two or more executors or administrators, the commissions belong to them jointly. If one does no more in administering the estate than the other, they must arrange between themselves for a division of the commission,—the county court has nothing to do with it.[95] He is not entitled to commission or pay as a surviving partner for settling up the business of the firm,[96]—a special administrator must be appointed for that purpose.[97] When the executor at the same time acts in the capacity of trustee, having been appointed to the two positions by the same will, he should receive his commission as executor, and, unless the services required of him as trustee were such as were not ordinarily required of an executor, he would be entitled to no additional pay as trustee.[98] If he has agreed to serve without receiving any compensation whatever for his services, such agreement is good, and the court may properly disallow his claim for such services.[99]

94 Drake v. Drake, 82 N. C. 443; Woodruff v. Lounsberry, 41 N. J. Eq. 699; Webb v. Peck, 131 Mich. 539, 92 N. W. 104. The Michigan statute is the same as ours, and in the latter case it was held that the commission was for collecting *and* accounting, and on his annual account he should not credit himself with a commission on uncollected assets. The court clearly intimated that he would not be entitled to a commission on assets in his possession not actually collected.

95 Bassett v. Miller, 8 Md. 548; Waddill v. Martin, 38 N. C. 562; Walker's Estate, 9 Serg. & R. (Pa.) 223.

96 Terrell v. Rowland, 9 Ky. Law Rep. 258, 4 S. W. 825; Dwyer v. Kalteyer, 68 Tex. 554, 5 S. W. 75.

97 Rev. Stats., c. 17, § 117, [1381].

98 Miller v. Congdon, 14 Gray (Mass.), 114.

99 Morton v. Johnston, 124 Mich. 561, 83 N. W. 369.

§ 421. Fees and special compensation.

Additional compensation may be allowed an executor or administrator whenever the court finds the services performed were not such as are required of an executor or administrator, and their allowance rests largely in the discretion of the county judge.[100]

Such services include hunting up witnesses for proponents in a case where the will was contested; consulting with and advising almost daily, for a long time, a surviving partner of the decedent who, according to the terms of the will, was settling up a large business;[101] services connected with the settlement of a large estate with assets in different places which required much traveling, the executor devoting his entire time to the business;[102] successfully compounding a large claim against the estate; for looking after work on a contract for the erection of a building partly completed by decedent, and other like services which are not within the scope of the usual duties of administration and have resulted profitably to the estate.[103] In order to secure their allowance, the representative must show what they are and their value to the estate.[104]

100 In re McCullough's Estate, 31 Or. 86, 49 Pac. 886; In re King's Estate, 113 Mich. 606, 71 N. W. 1030.

101 In re Brewster's Estate, 113 Mich. 561, 71 N. W. 1085.

102 Wisner v. Mabley's Estate, 74 Mich. 143, 41 N. W. 835.

103 In re Wilson's Estate, 83 Neb. 225, 119 N. W. 522; Mower's Appeal, 48 Mich. 441, 12 N. W. 646; In re Partridge's Estate, 31 Or. 279, 51 Pac. 82; In re Osburn's Estate, 36 Or. 14, 58 Pac. 521; In re Young's Estate, 97 Iowa, 218, 66 N. W. 163.

104 In re Wilson's Estate, 83 Neb. 252, 119 N. W. 522; Steel v. Holladay, 20 Or. 464, 25 Pac. 69; Fitzgerald v. Paisley, 110 Iowa, 98, 81 N. W. 181.

An executor or administrator forfeits his fees whenever a loss has occurred to the estate on account of his willful default, neglect or misconduct,[105] but if his failure is due to misapprehension of facts and not to bad faith, he is entitled to them.[106] He forfeits additional compensation to which he would be otherwise entitled by permitting the funds to lie idle for years when they could have been invested.[107]

§ 422. Notice of hearing on administration account.

Before the administration account of any executor or administrator shall be allowed, notice thereof shall be given to all persons interested of the time and place of examining and allowing the same, and such notice may be given personally to such persons as the county judge shall judge to be interested, or by public notice under the direction of the court, provided that, if notice to creditors to present their claims and demands against such estate has been duly given as provided by law, and such time has fully expired, and no claims have been filed against such estate, or in case claims have been filed against the estate, and the same have been fully paid and satisfied according to the order of the court, and such estate is fully solvent, then, in either case, the county court may, on written request of the heirs of such estate, settle with the executor or administrator, without either public or personal notice being given to such heirs of such settlement, and the same shall be as valid as though public or personal

105 St. Paul Trust Co. v. Kitson, 62 Minn. 408, 65 N. W. 74.

106 Miller's Appeal, 113 Pa. 459, 6 Atl. 715; McKnight's Exrs. v. Walsh, 24 N. J. Eq. 498.

107 In re Young's Estate, 97 Iowa, 218, 66 N. W. 163.

notice has been given. This provision does not include a debt secured by a mortgage or other lien, and in such case the creditor may rely on his security.[108]

The foregoing provisions in regard to notice or citation must be strictly construed, if the same is not waived in the manner above provided. A settlement without it would not be binding upon those interested who were without notice, and not present in court.[109]

The safer practice is to give notice by publication. It has not yet been determined who are the heirs of the decedent, and, if any omit to sign the request and waiver, serious complication might arise. The whole manner of notice rests, however, in the discretion of the court.

Form No. 184.

WAIVER OF NOTICE OF HEARING ON FINAL ACCOUNT.

[Title of Cause and Court.]

Whereas, it appears from the records and files in this proceeding that notice to creditors to present their demands against said estate has been duly given, and such time has fully expired, and all the claims which have been allowed against said estate have been fully paid and satisfied by C. D., administrator of said estate, under the order of the court, and no appeal has been taken to the district court from the disallowance of any claims or demands by said court, and said estate is fully solvent, we, G. H. and N. M., heirs of said A. B., respectfully request that C. D., administrator of said estate, be permitted to have his final account as such administrator determined and allowed by said court without the giving of the public or personal notice required by law.

Dated this ——— day of ———, 19—.

(Signed) G. H.
N. M.

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108 Rev. Stats., c. 17, § 250, [1514].

109 McMullen v. Brasleton, 81 Ala. 442, 1 South. 778; Grant v. Hughes, 94 N. C. 231.

If the executor or administrator fails to appear after due and legal service of the citation, or if he appears before the court and neglects or refuses to account, the court has power to settle and determine his account in his absence.[110]

Form No. 185.

FINAL ACCOUNT OF EXECUTOR OR ADMINISTRATOR.

[Title of Cause and Court.]

The undersigned, C. D., administrator of the estate of A. B., deceased, herewith submits the final account of his administration to said court as follows:

C. D., Administrator, in Account with the Estate of A. B., Deceased.

DR.			CR.		
19....	.....	$.....	19....	.....	$.....
	.....	.....		.....	.....
	[In this column should be entered all cash receipts.]			[In this column should be entered all disbursements, including expenses of administration and pay for services.]	
		$.....		Balance on hand	$.....

All claims allowed against the estate of the said A. B., together with funeral charges, expenses of the last sickness, and costs and expenses of administering said estate, have been paid in full. Of the personal assets of the estate of the said A. B. there still remains in my hands, undisposed of, the following described property [give items of personalty on hand], and also said balance, as appears by the foregoing account, of ——— dollars ($———). Dower has been awarded the widow of said A. B., C. B., in the following described property [describe lands set out to widow for dower]. Of the real estate of said A. B., deceased, there remains in my possession, undisposed of, the following described lands [describe all lands not sold], which are to be distributed to the heirs at law of said decedent.

The undersigned, C. D., administrator, prays that this account be allowed as his final account of his administration, and that upon payment

110 Rutenic v. Hamaker, 40 Or. 451, 67 Pac. 192.

and delivery of the assets in his possession to the parties entitled thereto, he be discharged.

(Signed) C. D.,
Administrator.

State of Nebraska,
——— County,—ss.

I, C. D., do solemnly swear that the foregoing account is just and true, and that, to the best of my knowledge and belief, I have therein accounted for all the assets and effects of said A. B. that have come into my possession or knowledge.

(Signed) C. D.

Subscribed in my presence and sworn to before me this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

Under the Oregon practice, when the final account of the administration is properly filed with vouchers for payments, it is the duty of the court or judge to appoint a day for the hearing of objections thereto and the settlement thereof, and shall direct the executor or administrator to give notice thereof in some newspaper published in the county, and designated by said executor or administrator, if there be one, or otherwise in such newspaper as may be designated by the court or judge, as often as once a week for four successive weeks, and oftener if the court or judge shall so direct.[111]

Form No. 186.

CITATION ON HEARING OF FINAL ACCOUNT.

[Title of Cause and Court.]

State of Nebraska,
——— County,—ss.

To All Persons Interested in the Estate of A. B., Deceased:

You are hereby notified that on the ——— day of ———, 19—, C. D., administrator of the estate of A. B., deceased, filed in said court his final account as said administrator, and that said final account will

111 L. O. L., § 1285.

be heard on the ——— day of ———, 19—, at the hour of 10 o'clock A. M., at the county courtroom in the city of ———, in said county; and you are hereby cited to appear at the time and place above designated, and show cause, if such exists, why said account should not be allowed.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

§ 423. Hearing on the account.

The hearing on the final account is substantially a review by the court of all the financial transactions between the estate and the executor or administrator. The account must be sworn to and vouchers for all disbursements filed in court at least seven days before the date set for hearing. A neglect to verify it and file the vouchers within the seven days does not take away the power of the court to hear the account, but places the burden of proof as to each and every item on the executor or administrator.[112]

If all the vouchers are filed as required and no objections are made, and service of notice of the hearing had as ordered by the court, unless such service was expressly waived, the representative's testimony is all the evidence required, provided that the disbursements appear to be lawful and all the estate accounted for.

An heir, legatee, creditor or any person interested in the estate may file objections to the account or any particular item or items, excepting, of course, a creditor whose claim has been satisfied.[113] A legatee entitled to possession of a legacy after he becomes of age, the legacy in the meantime to be enjoyed by his

112 Rev. Stats., c. 17, § 245, [1509].

113 In re Whiton's Estate, 86 Neb. 367, 125 N. W. 606; L. O. L., § 1286.

parents, it has been held, does not have a sufficient interest to object to the account.[114]

When proper vouchers are filed, the hearing becomes substantially a trial of the issues raised by the objections, and the evidence of an objector must be confined to the items which he attacks.[115] If it is sought to charge the representative with additional assets, the burden of proof is on the objector, but if his right to credits is attacked, the burden is on him.[116] The vouchers are not binding on the beneficiaries of the estate, and do not change the burden of proof if attacked. An objector may show that they were obtained from him by fraud or misrepresentation, and do not represent actual payments.[117]

Amended or supplemental objections may be filed at any time to conform to the proof.[118]

Under the Oregon practice, objections may be filed against a claim paid by the executor or administrator on the order of the court made after presentation and allowance, and the claim must then be proved in the same manner as in the special proceeding before the county court or in an action thereon in the county or circuit court. Its allowance by the representative is not even *prima facie* evidence of its validity.[119] It is

114 Tunnicliff v. Fox, 68 Neb. 811, 94 N. W. 1032.

115 In re Whiton's Estate, 86 Neb. 367, 125 N. W. 606; Warren v. Hendricks, 40 Or. 139, 66 Pac. 607; In re Roach's Estate, 50 Or. 190, 92 Pac. 118.

116 In re Mall's Estate, 80 Neb. 233, 114 N. W. 156; In re Roach's Estate, 50 Or. 190, 92 Pac. 118; In re Bayley, 67 N. J. Eq. 566, 59 Atl. 215.

117 Westover v. Carman's Estate, 49 Neb. 397, 68 N. W. 501.

118 In re Roche's Estate, 50 Or. 190, 92 Pac. 118.

119 In re Chambers' Estate, 38 Or. 131, 62 Pac. 1013; Irvine v. Beck, 62 Or. 596, 125 Pac. 834.

incumbent on a party filing objections, if his right to an interest in the estate is attacked, to prove such right.[120]

Form No. 187.

OBJECTIONS TO EXECUTOR'S OR ADMINISTRATOR'S FINAL ACCOUNT.

[Title of Cause and Court.]

Comes now E. F., by F. W. B., his attorney, and objects to the allowance of the final account of C. D. as administrator of said estate for the following reasons:

First. Said administrator retained in his possession on deposit in the First National Bank of Omaha, Nebraska, the sum of ten thousand dollars for the period of one year, and has not accounted for any interest thereon.

Second. Said administrator used a large amount of the assets of said estate in his own business, and mingled them with his own funds, and derived large profits therefrom, and has not accounted for any interest thereon.

Fourth. Said administrator neglected to sell certain assets of the estate, to wit, sixty head of hogs, and, by reason of said neglect, said estate has sustained a loss of ——— dollars.

Fifth. Said administrator performed no special or extraordinary services in the administration of said estate for which he is entitled to extra compensation above his statutory commission, and item ——— of his said account should not be allowed.

Sixth. Said administrator received from one G. H., of said county, the sum of ——— dollars on an account due said estate from said G. H., and has failed to account for the same.

Seventh. That item ——— of said administration account should be disallowed for the reason that the payment so charged to have been made to L. N. was not in truth and in fact paid to him, and his receipt therefor was obtained by said administrator by means of false and fraudulent representations made by him, said C. D., administrator, to said L. N. [State specific objections to each item claimed to be not a proper credit, and give items with which he should be charged.]

Dated this ——— day of ———, 19—.

(Signed) E. F.,
By G. G. M., His Attorney.

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120 Ollschlager's Estate, 50 Or. 580, 89 Pac. 1049.

§ 424. Hearing on account—Concluded.

In many estates the validity of all the disbursements of the executor or administrator is determined on the hearing on his final account. An objector has thus a right to practically review the entire administration. Liability for the costs of the court or its officers may be raised, and exorbitant funeral charges, more expensive than the social and financial standing of the decedent warrant, cut down to a proper figure,[121] validity of payments made to discharge liens determined, also all other charges and expenses growing out of the custody and management of the assets.

Payment into court of money due on claims under order of such court, though it may be erroneous and without any authority of law, if made in good faith, protects the administrator, but not the judge or his bondsmen.[122] The right of the county court to cut out attorney fees previously allowed on *ex parte* orders, because the litigation appeared to be solely for the benefit of the attorneys and not the estate, has been recognized.[123]

Credits claimed for payment of ordinary unsecured debts not filed and allowed by the county court should be stricken out by the court of his own motion.[124] Those for the feed and care of livestock must be proved as in management of the property, such as fire insurance premiums, taxes, ordinary repairs as are required under the statutes and an action at law.[125]

121 Foley v. Brocksmit, 119 Iowa, 457, 93 N. W. 334.
122 Wheeler v. Barker, 51 Neb. 846, 71 N. W. 750.
123 Bullion v. Ribble, 87 Neb. 700, 128 N. W. 32.
124 Johnson v. Pulver, 1 Neb. Unof. 290, 95 N. W. 697.
125 In re Irwin's Estate, 152 Iowa, 323, 131 N. W. 57.

If the attorney fees paid or which the representative asks to be allowed appear large in proportion to the value of the estate, there should be other evidence of their reasonableness, etc., than that of the interested parties, and the court should look into them carefully.[126] Attorneys for the beneficiaries should never be allowed any fees at the expense of the estate.[127]

Additional compensation should not be granted unless the executor or administrator proves that he performed extra services. Its allowance is largely in the discretion of the court, and the order will be rarely disturbed.[128]

The indebtedness of the representative to the estate can be fixed on the hearing,[129] and also the indebtedness of the estate to him. If his claim, or the principal part of it, was dishonest, and he knew it to be such and insisted on its allowance, causing expensive litigation, the estate is not liable for his costs and attorney fees.[130]

He is chargeable with property omitted and with any waste or loss to the estate due to his negligence or wrongful act.[131]

126 In re Wilson's Estate, 83 Neb. 252, 119 N. W. 522.

127 Cowie v. Strohmeyer, 150 Wis. 401, 136 N. W. 956.

128 In re Fischer's Estate, 158 Mich. 1, 122 N. W. 257.

129 In re Mall's Estate, 80 Neb. 233, 114 N. W. 56.

130 Mackin v. Hobbs, 126 Wis. 216, 105 N. W. 305.

131 Hoffman v. Armstrong, 90 Md. 123, 44 Atl. 1012. Our supreme court has held that an administrator who was an attorney and who secretly collected a commission of twenty-five per cent or one thousand two hundred and fifty dollars from a claimant, the full sum being paid by a part of the heirs without knowledge that the administrator was retaining such commissions, could not be compelled by the other heirs to account for it in his final accounting. The court say that his act

If he has occupied any of the real estate, and the parties are unable to agree on the rental value of the same, the court may refer the matter to one or more disinterested persons, whose award, if accepted by the court, is final.[132]

The hearing on the final account is one of the most important proceedings connected with the administration. A full opportunity should be given all interested to contest its allowance. If the administrator is guardian of minors, or if minors are not represented by a general guardian, a guardian *ad litem* may be appointed.[133]

The account of an executor must include all transactions affecting legacies. If he is also a legatee, the amount received, to the extent of his legacy, must be charged against the same, less his lawful commissions and disbursements.[134]

Form No. 188.

APPOINTMENT OF COMMISSIONERS TO DETERMINE RENTS DUE FROM THE PERSONAL REPRESENTATIVE.

State of ———,
——— County,—ss.

To E. F., of ——— County, Nebraska.

Whereas, a dispute has arisen between C. D., administrator of the estate of A. B., deceased, and the beneficiaries of said estate, in regard to the amount due from said C. D. to said estate for the use of following described premises belonging to said estate, which were occupied by him pending the administration of said estate [describe premises], and

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was "not commendable," but under the peculiar circumstances was not misconduct. In re Wilson's Estate, 86 Neb. 175, 125 N. W. 158. The decision was by a divided court.

132 Rev. Stats., c. 17, § 243, [1507].

133 Section 16, *supra*.

134 In re Knight's Estate, 91 Neb. 127, 135 N. W. 379.

said parties are unable to agree upon the sum to be charged against said C. D. for the use of said premises:

You are hereby appointed a commissioner to hear the evidence adduced by the parties, and determine therefrom, as well as from an inspection of said premises, at your discretion, the amount justly due said estate from said C. D., administrator, for the use of said premises above described.

Dated this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

§ 425. Order allowing final account.

The order allowing an executor's or administrator's final account is in the nature of a judgment or decree, and is therefore conclusive on all matters involved in it. It concludes the personal representative as to the balance found in his hands for distribution, and fixes the basis on which such distribution is to be made. It binds the estate and those interested therein.[135] Its allowance does not preclude further inquiry as to assets subsequently found to properly belong to the estate, and which do not appear in the account and were not passed upon, for it is binding only on matters therein contained,[136] and it does not affect the rights and liabilities of distributees between themselves in regard to assets advanced one or more of them by the personal representative pending administration.[137]

The county court has power, even after the term, to open the settlement of a former account to correct any error or mistake therein except as to items in dis-

135 Bachelor v. Schmela, 49 Neb. 37, 68 N. W. 378; Boales v. Ferguson, 55 Neb. 565, 76 N. W. 18; Shelby v. Creighton, 65 Neb. 485, 91 N. W. 369; McCreary v. Creighton, 76 Neb. 179, 107 N. W. 240.

136 Flanders v. Lane, 54 N. H. 390; McAfee v. Phillips, 25 Ohio St. 374.

137 Sparhawk v. Buel's Admr., 9 Vt. 41.

pute which have been previously heard and determined.[138]

The order may be revised or amended by proceedings under the code, the same as any other judgment of the county court,[139] and where at common law a court of equity has power to set aside an account for fraud or misrepresentation of the personal representative,[140] the exclusive original jurisdiction of the county court over administration and its inherent authority give it power to entertain a bill in equity for that purpose.[141]

Form No. 189.

ORDER ALLOWING FINAL ACCOUNT.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the final account of C. D., executor of said estate; and it appearing to the court from the proof on file that all persons interested in said estate have been duly notified as required by the court, and after a full examination of said account, the court finds that the same is correct in all respects, and ought to be allowed.

It is therefore ordered that the same hereby is allowed as the final account of said C. D., executor of the estate of A. B., deceased, and that, upon the payment of the amount for distribution now in his hands to the parties entitled thereto, and who are to be hereafter determined, he will be discharged from said trust.

(Signed) J. K.,
County Judge.

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138 Merrick v. Kennedy, 46 Neb. 264, 64 N. W. 989.

139 Civ. Code, § 648.

140 Stevenson's Admr. v. Phillips, 15 N. J. Eq. 236; Lewis v. Williams, 54 Mo. 200; West v. Reavis, 13 Ind. 294; Patterson v. Bell, 25 Iowa, 149; Pierce v. Irish, 31 Me. 254; Montgomery v. Cloud, 27 S. C. 188, 3 S. E. 196; Bradley v. Bradley's Admr., 83 Va. 75, 1 S. E. 477.

141 See Williams v. Miles, 63 Neb. 859, 89 N. W. 341, 68 Neb. 463, 94 N. W. 705.

In Oregon the order on the hearing on administration account is a final decree, and appealable as such to the circuit court.[142] It may be set aside by an action in equity in the circuit court.[143] The county court may also set it aside at the term at which it is entered or at a subsequent term for manifest mistakes or errors appearing therein.[144] The court may also permit the filing of a further or supplemental report which may be heard and determined after notice to all parties interested in the same manner as an original account.[145]

§ 426. Coexecutors and coadministrators.

Coexecutors and coadministrators who have given a joint bond are jointly liable and make joint accounts, but where several bonds have been given, as between themselves and also as to creditors, legatees and distributees, each is liable as a principal for his own acts and for what he receives and applies, unless he joins with the others in the direction or application of the funds.[146] He accounts separately, can only be compelled to account for what he received, and is not liable on the accounting for the wrongful act, causing a loss to the estate, of his corepresentative who assumed the entire management of the estate or of that matter in which the loss occurred, when he did not acquiesce in such act.[147] In such case the liability of the corepre-

142 In re Plunkett's Estate, 33 Or. 416, 54 Pac. 152.

143 Froebich v. Lane, 45 Or. 23, 76 Pac. 351; Johnson v. Savage, 50 Or. 284, 91 Pac. 1082.

144 Cross v. Baskett, 17 Or. 82, 21 Pac. 47.

145 Dray v. Bloch, 29 Or. 351, 45 Pac. 772.

146 Peter v. Beverly, 10 Pet. (U. S.) 532, 9 L. Ed. 522.

147 Cheever v. Ellis, 144 Mich. 477, 108 N. W. 390; Wilson's Appeal, 115 Pa. 95, 9 Atl. 473; In the Matter of Peck's Estate, 31 App. Div. 407, 52 N. Y. Supp. 1028.

sentative is that of a surety for his delinquent associate.[148]

Where the loss occurred through the joint negligence of the representatives,[149] or one had knowledge of the transaction and apparently acquiesced in it, or expressly assented to it,[150] or where the parties acted jointly, were together almost daily, and the acts of each could have been known to the other by the exercise of reasonable diligence,[151] the creditors or beneficiaries can look to each as principals. Knowledge of the misapplication must have been had at the time it occurred. Merely permitting the representative to possess the assets without going further and concurring in the application of them does not make a joint liability.[152] Negligence of a coexecutor in appointing and looking after an agent cannot be imputed to his associate who had nothing to do with it.[153]

The representative who is not at fault cannot be compelled to contribute at the suit of his corepresentative.[154]

§ 427. Equitable action to recover assets.

There is one class of cases where it is necessary for a creditor to go into the district court to enforce an ordinary unsecured claim against an estate, by an action for accounting. Where the estate appeared to be

148 Section 457, *post*.

149 In the Matter of Peck's Estate, 41 App. Div. 407, 52 N. Y. Supp. 1028.

150 In re Niles' Estate, 113 N. Y. 547, 21 N. E. 687.

151 In re Irvine's Estate, 203 Pa. 603, 53 Atl. 502.

152 Peter v. Beverly, 10 Pet. (U. S.) 532, 9 L. Ed. 522.

153 Cocks v. Haviland, 124 N. Y. 431, 26 N. E. 976.

154 Cheever v. Ellis, 144 Mich. 477, 108 N. W. 390.

insolvent because of a fraudulent conspiracy between the administrator and the county judge, a creditor may bring an action in behalf of all similarly situated against the parties to compel them to account for the assets of the estate. It is true that the creditors have a remedy at law, but in the interests of justice they are not compelled to rely on it.[155]

§ 428. Accounting by former personal representative with administrator de bonis non.

The court has power to require an executor whose term of office is ended to render an account and pay over all moneys in his hands and deliver all the personal property belonging to the estate to his successor.[156] It is a power which exists irrespective of the statute based on the exclusive jurisdiction of the court over administration accounts.[157] On such hearing the burden of proof is on the former representative to give a strict account of what has become of the property which came into his possession.[158] The citation may issue though the representative has been formally discharged, it appearing that he has never rendered an account and still has assets of the estate in his possession.[159]

If the former representative is dead, the citation may issue to his personal representatives and his

155 McGlave v. Fitzgerald, 67 Neb. 417, 93 N. W. 692.

156 Rev. Stats., c. 17, § 248, [1512].

157 Rutenic v. Hamakar, 40 Or. 253, 67 Pac. 196.

158 Gatch v. Simpson, 40 Or. 496, 66 Pac. 688; Rutenic v. Hamakar, 40 Or. 253, 67 Pac. 199.

159 Betcher v. Betcher (Minn.), 86 N. W. 1.

bondsmen, the bondsmen being in such case necessary parties.[160]

The order of the court fixing the amount due and directing its payment is binding on the parties thereto, unless set aside on appeal or for fraud in an action in equity.[161] At common law an administrator *de bonis non* only administered such property as had not been converted into money by his predecessor and the only remedy of those interested in the estate was by action against him and his bondsmen.[162]

160 Gatch v. Simpson, 40 Or. 496, 66 Pac. 688.
161 Crombie v. Engle, 19 N. J. L. 83.
162 Bradshaw v. Commonwealth, 3 J. J. Marsh. (Ky.) 332.

CHAPTER XXXIII.

DIVISION OF THE ESTATE.

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§ 429. Descent of real estate to surviving spouse.

Upon the death of any person leaving a husband or wife surviving, such survivor takes an estate in fee in all the real estate of which such person died seised of an estate of inheritance at any time during mar-

riage, or in which he or she possessed an estate either legal or equitable at the time of his or her death, which has not been lawfully conveyed by the husband or wife while a resident of this state, which has not been sold under execution or judicial sale, and which has not been lawfully devised subject to his or her debts and the right of homestead as follows:

First. One-fourth part if the survivor is not the parent of all the children of the deceased, and there be one or more children, or the issue of one or more deceased children living.

Second. One-third part if the survivor is the parent of all the children of the deceased, and there be two or more children, or one child and the issue of one or more deceased children surviving.

Third. One-half if the survivor is the parent of all the children of the deceased and there be only one child or the issue of a deceased child surviving.

Fourth. One-half if there be no children or the issue of any deceased child or children surviving.[1]

Fifth. The entire property if there be no relatives of the blood of the decedent surviving.[2]

The property which the survivor takes under the statute is in lieu of dower or curtesy, and during the life of the deceased the survivor had an inchoate right therein which became vested on the death of the owner of the fee. It is in a certain sense community property, and the husband and wife silent partners therein, with the right of the holder of the fee to manage such property, and in the manner provided by law sell or

1 Whitford v. Kinzl, 92 Neb. 378, 138 N. W. 597.

2 Rev. Stats., c. 17, § 1, [1265].

exchange for other property, which at once becomes subject to the same right. Neither party is an heir of the other, but takes by virtue of the marital relation.[3] It passes to the surviving spouse when the will of the deceased makes no provisions for the survivor.[4]

Under the Oregon statutes no estate in fee passes to the surviving husband or wife, excepting only when there are no children or lineal descendants surviving.[5] Instead, an enlarged estate of dower and a modified estate of curtesy, identical with the enlarged dower, is given.[6]

§ 430. Barring inheritances.

The right of a married man or woman to inherit a part or all of the real estate of which his or her spouse was seised of an estate of inheritance at any time during marriage may be barred by a conveyance executed by both husband and wife while residents of this state, or, if either be not a resident of this state, by a conveyance by either both, or the one seised of the fee at the time of such conveyance and also by judicial sale during the lifetime of the owner of the title.[7]

Such rights may also be barred by an antenuptial contract in writing, signed by both parties and acknowledged in the manner required by law for con-

3 Strahan v. Wayne County, 93 Neb. 828, 142 N. W. 678; Gaster v. Gaster's Estate, 92 Neb. 6, 137 N. W. 900; Johnson v. Richardson (Neb.), 154 N. W. 314; Kohny v. Dunbar, 21 Idaho, 258, 121 Pac. 544.

4 Gaster v. Gaster's Estate, 92 Neb. 6, 137 N. W. 900.

5 Section 434a, *post.*

6 Chapter XXIXa.

7 Rev. Stats., c. 17, § 5, [1269].

veyances of real estate, or executed in conformity with the laws of the estate where made.[8] Homestead rights will not be barred unless expressly included therein.[9]

The contract must be entered into before marriage. An agreement between husband and wife by which each forever relinquishes any and all rights under the statute in the lands of the other is void.[10] It must be definite and complete. If it appears to be executory, and some act remains to be performed after marriage, it is not enforceable.[11] Where property is conveyed by it, the marriage has been held a good and sufficient consideration, even as against creditors, it appearing that the wife was ignorant of the fraudulent intent of the husband.[12]

Each party may by such contract relinquish all his or her future rights in the property of the other, the marriage being regarded as a sufficient consideration to sustain it.[13]

A separation agreement between husband and wife while living apart from each other, by which certain property is conveyed to a trustee for the wife, said trustee having power to convey to parties designated at her death, and a like arrangement as to the husband's property, have been held valid during the lifetime of the parties, and would undoubtedly be good after the death of either party.[14]

8 Rev. Stats., c. 17, § 6, [1270].

9 Section 390, *supra*.

10 Potter v. Potter, 43 Or. 148, 72 Pac. 702.

11 Becker v. Linton, 80 Neb. 655, 114 N. W. 928.

12 Leininger Lumber Co. v. Dewey, 80 Neb. 859, 126 N. W. 87.

13 Forwood v. Forwood, 86 Ky. 114, 5 S. W. 361; Reiger v. Schaible, 81 Neb. 33, 115 N. W. 560; Nail v. Maurer, 25 Md. 532.

14 Fox v. Davis, 113 Mass. 255; Grime v. Borden, 166 Mass. 198.

The utmost good faith is required of both parties. Their relationship is one of mutual confidence, and far different from those dealing with each other at arms' length. It is the duty of each to be frank and unreserved and to fully disclose all the facts and circumstances which may in any way affect the agreement,[15] and the burden of proof is on the party contesting the same.[16]

Form No. 190.

ANTENUPTIAL CONTRACT.

This agreement made this ——— day of ———, 19—, by and between A. B. and C. D., both of the county of ——— and state of Nebraska, witnesseth, that

Whereas, said parties are about to be married, and said A. B. is the owner of both real and personal property, a part of which he wishes to hold free of any claim or right of said C. D. therein, and with full right to dispose of the same by will, and to bar the right of inheritance of his wife therein, and said C. D. is also the owner of certain property all of which she desires to hold, retain and dispose of in the same manner as that of said A. B.

It is hereby expressly covenanted and agreed by and between the parties hereto that said C. D., in consideration of said marriage, hereby waives, releases and relinquishes all rights, claims and demands, either at law or in equity, in and to the property of the said A. B. which he now owns or may hereafter become seised or possessed, save and except the homestead interest and the statutory allowance for her support pending the administration of the estate of said A. B.

And the said A. B., also in consideration of said marriage, hereby waives, releases and relinquishes all rights, claims and demands, either at law or equity, including homestead rights, in and to all the property now owned by said C. D. or of which she may hereafter become seised or possessed.

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15 Murdock v. Murdock, 219 Ill. 123, 76 N. E. 57; Fisher v. Kontz, 110 Iowa, 498, 80 N. W. 551; Graham v. Graham, 143 N. Y. 573, 38 N. E. 722.

16 Reiger v. Schaible, 81 Neb. 33, 115 N. W. 560.

In witness whereof the said parties have hereunto set their hands this ——— day of ———, 19—.

(Signed) A. B.
C. D.

State of Nebraska,
——— County,—ss.

On this ——— day of ———, 19—, before me, the undersigned, a notary public in and for said county, personally came A. B. and C. D., to me personally known to be the persons described in and who executed the foregoing instrument, and each respectively acknowledged the same to be his and her free act and deed, and each further acknowledged that he or she executed said instrument for the purposes therein mentioned.

Witness my hand and official seal the day and year last above written.

(Seal) (Signed) G. H.,
Notary Public.

§ 431. Election between will and distributive share.

The enlarged estate which the surviving spouse takes in the real estate of the decedent being in lieu of dower or curtesy, and the right of election between such estate and the provisions of the will being given him or her by law, the same general principles govern its exercise as the right to dower in states where it exists. Neither husband nor wife can by a separate act, and without the consent of the other, deprive the survivor of the right to elect whether he or she will take the provisions of the will, or that interest in the estate which he or she would take had decedent died intestate.[18] Such survivor will be deemed to have accepted the terms of the will, unless he or she files in the county court, within one year after the date of the letters testamentary, a refusal in writing to accept the estate so

[18] Johnson v. Richardson (Neb.), 151 N. W. 314; Rev. Stats., c. 17, § 7, [1272]; L. O. L., §§ 7302, 7315.

devised or other provisions of the will, which declaration must be executed and acknowledged the same as a deed.[19]

In Oregon the survivor will not be deemed to have elected to take dower or curtesy unless she or he begin proceedings for the assignment of the same within one year from the date of the death of the decedent.[20] The right of election applies only to lands in the state where the will is probated. In other states it is based on the laws of such states.[21]

Before making her election, the widow is entitled to a full opportunity for learning the amount, value, condition and situation of the estate, and all matters pertaining thereto. If made in ignorance of the amount and condition of the estate, or through fraud or misrepresentation, it is not binding on her, and may be recalled at any time before the final distribution of the estate.[22] When she has made an improvident election, without knowledge of the extent of the estate, through fraud or misrepresentation on the part of those interested in the estate, courts of equity have permitted her to withdraw her election or change it, even after the expiration of the statutory period.[23] In such cases she must account to the estate for all the money she has received, ex-

19 Rev. Stats., c. 17, § 8, [1272].

20 L. O. L., §§ 7304, 7315.

21 Rannells v. Rowe, 116 Fed. 425, 92 C. C. A. 177; Staig v. Atkinson, 144 Mass. 564, 12 N. E. 354.

22 Sill v. Sill, 31 Kan. 248, 1 Pac. 556; Evans' Appeal, 51 Conn. 435; Ludington v. Patton, 111 Wis. 208, 86 N. W. 571.

23 United States v. Duncan, 4 McLean, 99, Fed. Cas. No. 15,002; Smither's Exr., 9 Bush (Ky.), 230; Grider v. Eubanks, 12 Bush (Ky.), 510; Ludington v. Patton, 111 Wis. 208, 86 N. W. 571.

cept statutory provisions for her support pending settlement of the estate, restore the real estate, and account for the use thereof, and is entitled to receive from the estate her interest as of the date when she received the property under the will,[24] though some of the property may have passed into the hands of the heirs.[25]

Form No. 191.

ELECTION TO TAKE UNDER STATUTE.

[Title of Cause and Court.]

I, C. B., of the county and state aforesaid, widow of said A. B., deceased, do hereby elect, pursuant to the terms of section seven, chapter seventeen, of the Revised Statutes of Nebraska, to reject the provisions made for me by the will of said A. B., which has been duly admitted to probate in said court, and to take in lieu thereof such share of the real and personal estate of said A. B. as I would take by descent, had said A. B. departed this life intestate, and I hereby release and relinquish all my right, title and interest as legatee and devisee of said A. B. under the terms of said will.

Dated this ——— day of ———, 19—.

(Signed) C. B.

[Add acknowledgment, same form as for deeds.]

§ 432. Election on behalf of survivor.

The right of election is uniformly regarded by the courts as a personal one. It can only be exercised by the party himself, or by someone acting under the direction of the court for him. It is not transmissible by descent or assignment,[26] nor is the right to revoke the same.[27]

24 Ludington v. Patton, 111 Wis. 208, 86 N. W. 571.

25 Huguenin v. Baseley, 14 Ves. 273; Bridgeman v. Green, Wilmot, Ops. 58, 65.

26 Estate of Nordquist v. Sahiboom, 114 Minn. 329, 131 N. W. 329; Welch v. Anderson, 28 Mo. 293; Penhallow v. Kimball, 61 N. H. 596; Pinkerton v. Sargent, 102 Mass. 56.

27 Fergos v. Schaible, 91 Neb. 180, 135 N. W. 448.

If insane or otherwise incompetent, the survivor cannot make a valid renunciation, nor has his or her guardian such rights without express direction from the county court.[28]

It is the duty of the county judge, on the application of the guardian or guardian *ad litem*, to make the election, and he should protect the interests of the incompetent without regard to any advantage or disadvantage that may accrue to the legatees or devisees.[29]

The usual practice is for the guardian to file a petition setting out in full all the circumstances and conditions and ask for directions. However, an oral application, made by a guardian *ad litem* and acted on by the court, has been held to be sufficient.[30]

Form No. 192.

PETITION BY GUARDIAN OF INCOMPETENT WIDOW FOR AUTHORITY TO ELECT.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that on the ——— day of ———, 19—, he was appointed by said court guardian of C. B., an incompetent person; that one A. B., late of said county, the husband of said C. B., departed this life in said county on the ——— day of ———, 19—, leaving a last will and testament, which was, on the ——— day of ———, 19—, admitted to probate in said court; that said will contains the following bequests and devises to said C. B. [copy all provisions of said will which contain any bequest or devise to widow]; that said C. B. was, on the ——— day of

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28 Donald v. Portis, 42 Ala. 29; Heavenridge v. Nelson, 56 Ind. 90; Pinkerton v. Sargent, 102 Mass. 568; Young v. Boardman, 97 Mo. 181, 10 S. W. 48.

29 Bonacum v. Manning, 85 Neb. 90, 122 N. W. 711; Penhallow v. Kimball, 61 N. H. 596; Young v. Boardman, 97 Mo. 181, 10 S. W. 43; Andrews v. Bassett, 92 Mich. 449, 52 N. W. 743.

30 Gaster v. Gaster's Estate, 90 Neb. 529, 134 N. W. 235.

———, 19—, adjudged an insane person by the commissioners of insanity in and for said county, and is now, and for more than two years last past has been, insane and incompetent to transact any business; that said C. B. is possessed in her own right of no property whatsoever, and has no other means than her interest in the estate of said A. B., or the provisions made for her in said will; that said estate consists of real estate of the value of ——— dollars, unencumbered by mortgage, and personal property of the value of ——— dollars, and that the debts against said estate will not exceed the sum of ——— dollars.

Your petitioner therefore prays that instructions may be given him by said court whether to elect, on behalf of his said ward, to receive the above provisions of said will, or to have assigned to her her statutory interest in said estate, and the provisions made for her by statute.

Dated this ——— day of ———, 19—.

(Signed) C. D.

[Add verification, Form No. 5.]

Form No. 193.

ORDER DIRECTING GUARDIAN OF INCOMPETENT WIDOW TO ELECT STATUTORY SHARE.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the petition, duly verified, of C. D., for instructions whether to receive for and on behalf of his ward, C. B., the provisions made for her by the will of said A. B., or renounce the same and be endowed of his estate.

Upon consideration whereof, the court finds that the provision made for said C. B. by the will of said A. B. will yield a smaller income for said C. B. than her statutory interest in said estate. The said C. D., guardian, is therefore directed and instructed to elect to renounce the provisions of said will for and on behalf of his said ward.

(Signed) J. K.,
County Judge.

§ 433. Effect of rejection of devise or bequest.

The effect of an election to take under the statute is to terminate the interests given by the will to the

survivor, and to place him or her, in so far as the property in this state is concerned, in the same position as though deceased died intestate, giving him or her the share or interest of the surviving spouse an intestate person, neither more nor less.[31] Election to take under the statute does not revoke the will, but may make it a difficult matter to find out what was the testator's intention, and as to the other beneficiaries it will be complied with as far as possible.[32]

The amount necessary to make up the statutory share may generally be obtained by adding to the property given by the will contributions from the other parties in proportion to their bequests or devises, and made either in realty or personalty, as the case may be.[33] If a life estate is given the survivor and the remainder to designated parties, the rejection of the will gives the remaindermen the right to immediate enjoyment,[34] unless the will indicates otherwise.[35]

In many cases it is almost impossible to ascertain and carry out the testator's intentions when the survivor elects to take under the statute. The draftsman of a will can obviate an election in almost every case by explaining to the testator the rights the surviving spouse has in an estate.

31 Geiger v. Bitzer, 80 Ohio St. 85, 88 N. E. 134; Ashelford v. Chapman, 81 Kan. 312, 105 Pac. 534; In re Fogg, 105 Me. 480, 74 Atl. 1133.

32 Pitman v. Pitman, 81 Kan. 643, 107 Pac. 235; Fennell v. Fennell, 80 Kan. 730, 106 Pac. 1038.

33 Shreve v. Shreve, 176 Mass. 458, 57 N. E. 686; In re Klenke, 210 Pa. 575, 60 Atl. 167.

34 Hall v. Smith, 61 N. H. 144; Woodburn's Estate, 151 Pa. 586, 25 Atl. 145; Beideman v. Sparks, 64 N. J. Eq. 374, 55 Atl. 1132.

35 Jones v. Knappen, 63 Vt. 391, 22 Atl. 630.

§ 434. Descent of real estate to heirs.

The residue of the estate remaining after deducting the share of the surviving spouse as in section 429 described, and any real estate or any right thereto, or any interest therein in fee simple or for the life of another, not lawfully devised, of which a person not leaving a husband or wife surviving shall die seised, descends, subject to his debts, in the manner following:

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

If there be no issue living at the date of his or her death, to his or her lineal descendants, if of the same degree, equally, otherwise by right of representation.

Second. If there be no issue to the father and mother of the deceased or the survivor of them.

Third. If there be no issue or father or mother, to the brothers and sisters and the children of any deceased brother or sister by right of representation.

Fourth. If there be no issue, or father or mother, or brother or sister, to the next of kin in equal degree, excepting that where there are two or more collateral kindred in equal degree but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote.

Fifth. If any person die leaving several children, or one child and the issue of one or more children, and any such surviving child shall die under age and not having been married, all the estate that came to the deceased child by inheritance from such deceased parent shall descend, in equal shares, to the other chil-

dren of the same parent and to the issue of any such child who shall have died, by right of representation.

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

Seventh. If the deceased leave no kindred or husband or wife, his estate shall escheat to the state of Nebraska.[36]

Under the first subdivision of the above statute, grandchildren of a deceased intestate take the share which their parent would take if living. Under the third subdivision grandchildren of a deceased brother or sister are not included, and grandnephews and grandnieces do not inherit when there are brothers or sisters or children of deceased brothers and sisters surviving.[37] A grandfather inherits before an uncle.[38]

§ 434a. Descent of real estate to heirs—Concluded.

Under the Oregon statutes the real estate of which an interstate dies seised descends, subject to his debts, as follows:

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

[36] Rev. Stats., c. 17, § 2, [1268].

[37] Noteware v. Colton, 95 Neb. 541, 145 N. W. 993.

[38] Smallman v. Powell, 18 Or. 367, 23 Pac. 249.

and if there be no child living at the time of his or her death, such property shall descend to all his or her lineal descendants. If of the same degree, they take equally; otherwise by right of representation.

2. If the intestate shall leave no lineal descendants, such real property shall descend to his wife, or if a married woman, to her husband, and if the intestate shall leave no wife or husband, the property shall descend in equal proportions to his or her father and mother.

3. If the intestate leaves no lineal descendants, nor husband, wife nor a father, the property descends to his or her mother, and if the mother is not living, then to the brothers and sisters in equal shares, and the issue of any deceased brother and sister by right of representation.[39]

4. If the intestate shall leave no lineal descendants, nor husband, wife, father, mother, brother or sister, the property descends to his or her next of kin in equal degree, excepting that when there are two or more collateral kindred in equal degree but claiming through different ancestors, those claiming through the nearest ancestor shall be preferred to those claiming through a more remote ancestor.

5. When any child shall die under the age of twenty-one years and leave no husband nor wife nor children, any real estate which descended to such child shall descend to the heirs of the ancestor from whom such real property descended the same as if such child died before the death of such ancestor.

6. If the intestate shall leave no lineal descendants nor kindred, such real property shall escheat to the state of Oregon.[40]

Subdivision 5, which has been enacted in substance in many states, is, as in Nebraska, clearly a modification of the previous parts of the section. Before the

[39] Grant v. Paddock, 30 Or. 320, 47 Pac. 712.

[40] L. O. L., § 7348; Gen. Laws 1913, c. 39.

amendments of 1905 and 1913 it was held that on the death of a woman intestate and leaving property which passed to her husband and minor children, followed shortly after by the death of one of the children, the inheritance of such child passed to the father, to the exclusion of the brothers and sisters.[41] As the act now stands the property would pass to the children to the exclusion of the parent.[42]

§ 435. Descent of real estate to heirs—Concluded.

The term "next of kindred," as used in the statutes, is limited to relations by blood or consanguinity only, descendants from the same stock or ancestors;[43] hence the reason that the wife or husband do not inherit from each other as kin or descendants.[44] The degrees of kindred are computed according to the rules of the civil law.[45] In order to determine in what degree a person is related to the intestate, begin with the intestate and ascend from him to a common ancestor, and descend from that ancestor to the person, counting each generation as one degree, excluding the decedent and including the heir.

The law does not permit inheritance *per stirpes* except where it is expressly and affirmatively provided.[46] It applies only from necessity, or where there are lineal heirs of different degrees.[47]

41 Stitt v. Bush, 22 Or. 239, 29 Pac. 737.

42 See § 435, *post.*

43 Birney v. Wilson, 11 Ohio St. 426.

44 Prather v. Prather, 58 Ind. 141; Warren v. Englehart, 13 Neb. 283, 13 N. W. 401.

45 Rev. Stats., c. 17, § 28; L. O. L., § 7353.

46 Douglas v. Cameron, 47 Neb. 358, 66 N. W. 430; Clary v. Watkins, 64 Neb. 386, 87 N. W. 1042.

47 Knapp v. Windsor, 6 Cush. (Mass.) 156.

When an intestate leaves neither widow, father, mother, brother, nor sister, but nephews and nieces, and grand nephews and nieces, the nephews and nieces take, to the exclusion of grand nephews and nieces, and, being of equal degree, they take *per capita*,[48] and, in all cases where the next of kin are of the same degree, they take *per capita*.[49]

Under the common law, a distinction was made between estates which came to the intestate by inheritance and those which were the result of his own efforts. Our statutes contain no such provisions, except in the case of infants dying under age, unmarried, and kindred of the half blood. Property which such infant inherited from a parent passes to his brothers and sisters and the children of deceased brothers and sisters, to the exclusion of the surviving parent. The portions of the statute defining the parties who take the property which such minor inherited limit or modify the previous subdivisions.[50]

If such minor dies intestate leaving no brothers or sisters, or issue of any deceased brothers or sisters, his estate inherited from his father or mother would be distributed and descend in the same manner as that of any other intestate leaving the same heirs. The limitation extends to an estate derived from parents only, and not to that received by him by inheritance or right of representation from a grandparent or other

[48] Douglas v. Cameron, 47 Neb. 358, 66 N. W. 430.

[49] Nichols v. Shepard, 63 N. H. 391; Baker v. Bourne, 127 Ind. 466, 26 N. E. 1078; Van Cleve v. Van Fossen, 73 Mich. 342, 41 N. W. 258; Snow v. Snow, 111 Mass. 389.

[50] In re Van Orsdol's Estate, 94 Neb. 98, 142 N. W. 686.

ancestor.[51] Such estate is the absolute property of the infant while living, and may be used for the payment of his debts and his maintenance and education, if necessary.[52]

§ 436. Kindred of the half blood.

"Kindred of the half blood shall inherit equally with those of the whole blood, in the same degree, unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance."[52a] Therefore, where the estate has been obtained by descent or devise from a common ancestor or by purchase, brothers and sisters of the half blood inherit from each other.[53] The law does not completely bar out those of the half blood, for, if they have any of the blood of the ancestor, however small the fractional part, they inherit as the intestate's next of kin, equally with those of the whole blood.[54] The children of a deceased brother or sister of the whole blood will take by representation, to the exclusion of brothers and sisters of the half blood, where the estate came by gift or inheritance from a person not the ancestor of the half blood.[55]

51 Goodrich v. Adams, 138 Mass. 552; Sedgwick v. Minot, 6 Allen (Mass.), 171.

52 Wiesner v. Zaun, 39 Wis. 188.

52a Rev. Stats., c. 17, § 11, [1275].

53 Den d. Pierson v. De Hart, 3 N. J. L. 73; Cutter v. Waddingham, 22 Mo. 206.

54 Den d. Delaplaine v. Searing, 8 N. J. L. 340; King v. Neely, 14 La. Ann. 165; Scott v. Terry, 37 Miss. 65.

55 Rev. Stats., c. 17, § 11, [1275]; L. O. L., § 7353.

The foregoing rules in regard to the descent of realty among those of the half blood apply to the distribution of personalty.[56]

§ 437. Descent of estate of illegitimate.

The estate of an illegitimate dying intestate passes to his issue; if he leaves no lawful issue, to his mother, and in case of her decease, to her heirs at law.[57] The property which so passes to them is that remaining after deducting the share of the surviving spouse.[58] On an issue of the legitimacy of a deceased intestate, the courts adopt a liberal rule in admitting testimony, it coming within the exception of the common-law rule admitting hearsay evidence in cases involving pedigree. Declarations of the deceased, declarations and acts of his mother and those of the relatives of his alleged father who were acquainted with him, are admissible.[59]

Under the Oregon statute the estate of an illegitimate dying intestate descends to the surviving spouse or issue, as in other cases; if none such survive, to the mother.[60] If there be no spouse, issue or mother surviving, his property escheats to the state.[61]

§ 438. Right of illegitimate to inherit.

At common law an illegitimate child was *nullius filius,* and therefore incapable of inheriting from

56 Rev. Stats., c. 17, § 3, [1267].
57 Rev. Stats., c. 17, § 10, [1274].
58 Rev. Stats., c. 17, § 1, [1264].
59 State v. McDonald, 55 Or. 435, 104 Pac. 967.
60 L. O. L., § 7352.
61 State v. McDonald, 59 Or. 525, 117 Pac. 288.

ancestors or collaterals.[62] This disability has been partially removed by the statute. He is the heir of his mother, inheriting her estate either in whole or part, the same as if he were born in lawful wedlock, and also of his father, if the latter has by an instrument in writing, signed in the presence of a competent witness, acknowledged himself as such.[63]

The writing must be one in which the paternity of the child is directly, unequivocally and unquestionably acknowledged.[64] It is not necessary that it be executed for the purpose or intent of constituting the party an heir nor that the illegitimacy be mentioned;[65] nor is it necessary that the witness actually affixed his name to the writing, where the witness saw him write and sign it.[66] Evidence that the decedent was adjudged the father of an illegitimate child in a bastardy proceeding before a court of competent jurisdiction is not sufficient to prove such illegitimate an heir; there must be a signed and witnessed writing, the voluntary and unequivocal act of the parent.[67] It does not make the child legitimate.[68]

He cannot claim, as representing his father or mother, any part of the estate of his or her kindred, either lineal or collateral, unless before his death his parents shall have intermarried and had other chil-

62 2 Bl. Com. 249.

63 Rev. Stats., c. 17, § 9, [1273].

64 Lind v. Burke, 56 Neb. 785, 77 N. W. 444; Van Hove v. Van Hove, 94 Neb. 575, 143 N. W. 836.

65 Thomas v. Estate of Thomas, 64 Neb. 581, 90 N. W. 630; Succession of Fletcher, 11 La. Ann. 60.

66 Blythe v. Ayers, 96 Cal. 532, 31 Pac. 915.

67 Moore v. Flack, 77 Neb. 52, 108 N. W. 143.

68 Brisbin v. Huntington, 128 Iowa, 166, 103 N. W. 144.

dren, and his father after such marriage shall have acknowledged him in the manner provided by law, or adopted him into his family, in which case such child and all legitimate children shall be considered as brothers and sisters, and the rights of both parents and children in each other's estates are the same as though all the children are legitimate.[69]

Under the Oregon statute he is the heir of his mother, but cannot take through her by representation, provided that when the parents of such child have formally married, and lived and cohabited as husband and wife, he is not regarded as an illegitimate, though the marriage be void.[70] A marriage, in order to legitimatize previously born offspring, may be one in form only and void at its inception, but must be followed by living and cohabiting together as husband and wife.[71] There is no law providing that the written and witnessed acknowledgment by a father of his illegitimate child shall make him his heir.

A subsequent marriage of the parents is not of itself sufficient to make their child legitimate. There must also be the birth of other children, and either adoption into the family or a written acknowledgment by the father.[72] Adoption into the family in such cases does not necessarily mean formally adopted by proceedings in the county court, but admitted and received into the family, given the family name, and recognized as a child.[73]

69 Rev. Stats., c. 17, § 9, [1273].
70 L. O. L., §§ 7351, 7352.
71 McCalla v. Bain, 45 Fed. 838.
72 Trayer v. Setzer, 72 Neb. 845, 101 N. W. 989.
73 Morton v. Morton, 62 Neb. 420, 87 N. W. 182.

§ 439. Inheritance by adopted children.

The right of an adopted child to inherit from his adoptive parents is strictly statutory. Unless the articles of adoption otherwise provide, the child has conferred upon him by the decree of the county court all the rights, privileges and immunities of children born in lawful wedlock.[74] If there are conditions or limitations in the articles, he takes accordingly, unless otherwise provided for by will. Articles which direct that the child shall receive a specified sum when of age and also the rights of a child born in lawful wedlock give both the money and rights in the estate.[75]

The adopted child is generally held to be entitled to the same property rights as natural children only in the estate of his adoptive parents,[76] but does not inherit from the natural children of his parents,[77] nor succeed to the estate of his foster parent's ancestors.[78] If he dies before his foster parents leaving issue, such issue take from the foster parents by right of representation.[79]

The adoption of a child does not take away any rights which he previously acquired, and while inheriting from his foster parents, will also inherit from his own kindred and parents.[80]

74 Rev. Stats., c. 18, § 84, [1623]. See L. O. L., § 7089.

75 Martin v. Long, 53 Neb. 694, 74 N. W. 43.

76 Flannagan v. Howard, 200 Ill. 296, 65 N. E. 782; Martin v. Long, 53 Neb. 694, 74 N. W. 43.

77 Hockaday v. Lynn, 200 Mo. 456, 98 S. W. 585; Helms v. Elliott, 89 Tenn. 446, 14 S. W. 930.

78 Meader v. Archer, 65 N. H. 214, 23 Atl. 251; Sunderland's Estate, 60 Iowa, 732, 13 N. W. 655.

79 Pace v. Klink, 51 Ga. 220.

80 Wagner v. Varner, 50 Iowa, 532.

§ 440. Posthumous children.

Posthumous children are considered by law as living at the death of the father, and if he was intestate, take the same share of his estate, and can take by representation.[81]

If he left a will and made no provision for such child, the child will take the same share as if he had died intestate, unless it shall be apparent from the will that it was the intention of the testator that no provision shall be made.[82] The provisions must be actual and definite though it may be entirely inadequate.[83]

The burden of proof appears to be on the party alleging that the omission to provide for such child was intentional.[84]

Stillborn children are presumed by law never to have had life,[85] but if the child lived even a few minutes, it acquired a right to take by descent or will.[86]

The county court having jurisdiction of the administration has power to set out such share. Proceedings should be by petition, notice to interested parties and service thereof as may be ordered by the court. Personal service should be had on the executor or administrator and on the devisees, legatees and heirs as far as possible.

81 Rev. Stats., c. 17, § 18, [1382].

82 Rev. Stats., c. 17, § 47, [1311]; Chicago B. & Q. R. R. v. Wasserman, 22 Fed. 872.

83 Stebbins v. Stebbins, 94 Mich. 304, 54 N. W. 159; In re Donges' Estate, 104 Wis. 397, 79 N. W. 786.

84 Knapp v. Minot, 164 Mass. 38, 41 N. E. 63; Bowen v. Hoxie, 137 Mass. 527.

85 Marsellis v. Thalhimer, 2 Paige (N. Y.), 35.

86 Catholic Mut. Ben. Assn. v. Firnane, 50 Mich. 82, 14 N. W. 707.

If the decedent died testate, the question depends on the construction of the will, which power is vested in the county court, subject to the usual restrictions on the rights of adverse claimants.[87] His interest could also be determined in an action for partition.[88]

Form No. 194.

PETITION FOR ORDER SETTING OUT SHARE OF POSTHUMOUS CHILD.

[Title of Cause and Court.]

Comes now C. B., a minor of the age of ———, by L. M., his guardian, under letters issued out of and under the seal of said court, and shows unto the court that he is a posthumous child of said A. B. and was born on the ——— day of ———, 19—; that said A. B. died on the ——— day of ———, 19—, leaving a last will and testament, which was on the ——— day of ———, 19—, admitted to probate in said court and letters testamentary thereupon issued to C. D.

That said will contains no provision whatever for any child which might be born in lawful wedlock to said A. B. after the date of his death, and it is not apparent from said will that it was the intention of the testator that no provision shall be made for such child.

That C. D., executor as aforesaid, has filed his final account as such executor, which said account was on the ——— day of ———, 19—, approved by said court, and, as appears by said account and the records and files in said matter, said C. D., executor, now has in his hands, to be divided and distributed among the legatees, distributees, and heirs at law, personal property of the value of ——— dollars, and real estate of the value of ——— dollars, which said real estate is described as follows: [Describe real estate.]

Your petitioner therefore prays that a time may be fixed by the court for the hearing of his said petition, that notice of the pendency thereof be given to all persons interested in the estate, and that, upon said hearing a decree be entered assigning to your petitioner the same

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87 Youngson v. Bond, 69 Neb. 356, 95 N. W. 700; Andersen v. Andersen, 69 Neb. 565, 96 N. W. 276; Reischick v. Reiger, 68 Neb. 348, 94 N. W. 156.

88 See Brown v. Brown, 71 Neb. 200, 98 N. W. 718.

share in the estate of the said A. B., both real and personal, as though he, the said A. B., had died intestate.

Dated this ——— day of ———, 19—.

(Signed) C. B. (a Minor),
By L. M., His Guardian.

[Add verification, Form No. 5.]

Form No. 195.

NOTICE OF HEARING ON PETITION OF POSTHUMOUS CHILD.

[Title of Cause and Court.]

To All Persons Interested in Said Estate:

You are hereby notified that C. B., a minor, by L. M., his guardian, has filed his petition in said court praying for a decree assigning to him a share in said estate as a posthumous child of said A. B., and that said petition will be heard at the county court room in said county on the ——— day of ———, 19—, at the hour of 9 A. M.

Dated this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

Under the Oregon statute a testator who fails to name a child or the descendants of a deceased child in his will, though born after the date of the will or after his death, or make provision for such child or issue, is deemed intestate in so far as such child or issue of deceased children are concerned, and the parties to whom the estate is given are required to refund their proportional parts.[89] The omitted children take under the law of descent the same shares as if the ancestor died intestate.[90] The children or grandchildren must be clearly named and provided for.[91] A devise to a widow for life or to sell and convey the said property for the benefit of herself and her heirs, does not mention and provide for the children, the word "heirs" not being the equivalent of "children."[92]

89 L. O. L., § 7325; Worley v. Taylor, 21 Or. 589, 28 Pac. 903.

90 Northrop v. Marquam, 16 Or. 186, 18 Pac. 449; In re Monser's Estate, 60 Or. 229, 118 Pac. 1022.

91 Gerrish v. Gerrish, 8 Or. 351.

92 Neal v. Davis, 53 Or. 423, 99 Pac. 69, 100 Pac. 212.

Form No. 196.

ORDER SETTING OUT SHARE OF POSTHUMOUS CHILD.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the petition of C. B., a minor, by L. M., his guardian, for an order assigning to said C. B. his share in the estate of said A. B. as a posthumous child of him, said A. B., and the evidence and arguments of counsel, and was submitted to the court.

Upon consideration whereof, the court finds that service of the notice of hearing has been had on all parties interested, as appears from proof of service on file herein; that the last will and testament of said A. B. does not show an apparent intention that no provision be made for any posthumous child born to said A. B., and that the said petitioner, C. B., is entitled to have assigned to him the same share in the estate of said A. B. that he, said C. B., would receive had said A. B. died intestate; that the final account of C. D., executor of said estate, showing the sum of ——— dollars in his hands for division, has been allowed, and that said C. D., executor, has in his possession the following described real estate: [Describe real estate.]

It is therefore decreed that said C. B. is entitled to [state share of child] in said sum of ——— dollars, being the sum of ——— dollars, and that he be assigned the same interest as tenant in common with the devisees of said estate in the above-described real property.

(Signed) J. K.,
County Judge.

§ 441. Share of child not provided for by will.

If any testator omit to provide in his will for any of his children or the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child, or the issue of such child, shall have the same share in the estate as though the deceased had died intestate.[93] The burden of proof is upon the claimant to show that the omission was by mistake, and parol evidence is admissible.[94]

93 Rev. Stats., c. 17, § 48, [1312].

94 Brown v. Brown, 71 Neb. 200, 98 N. W. 718.

The share of a posthumous child or of a child unintentionally omitted from the will is taken from the residuary estate as far as possible, and proportionately from the share of each devisee and legatee.[95]

Form No. 197.

PETITION BY CHILD OMITTED IN THE WILL FOR ASSIGNMENT OF HIS SHARE IN AN ESTATE.

[Title of Cause and Court.]

Comes now your petitioner, C. B., and respectfully represents unto the court that he is a son of said A. B., and was born in lawful wedlock on the ——— day of ———, 19—; that said A. B. departed this life on the ——— day of ———, 19—, at the county aforesaid, leaving a last will and testament, which was on the ——— day of ———, 19—, admitted to probate in said court, and letters testamentary thereupon issued to C. D. as executor of said estate; that said will omits to provide for your petitioner [state facts showing said omission to have been accidental and unintentional]. [Balance as in Form No. 194.]

§ 442. Rights of nonresident aliens.

Resident aliens are given the same right to the descent, enjoyment and possession of property as are citizens.[96] A resident alien is an unnaturalized foreigner living in this state; if living in another state, he is a nonresident alien.[97]

At common law an alien could not take either by descent or devise. Restrictions in this state apply only to nonresident aliens, and their rights are the same as those of residents in property within the limits of an incorporated city or village, and that held

[95] Bowen v. Hoxie, 137 Mass. 527; Shelby v. Shelby, 1 B. Mon. (Ky.) 266.

[96] Const., art. I, sec. 25.

[97] Glynn v. Glynn, 62 Neb. 872, 87 N. W. 1052.

for the purpose of erecting and maintaining manufacturing establishments.[98]

In Oregon there is no discrimination against aliens.

Such alien does not lose all rights in real estate devised to him or of which his ancestor died seised of an estate of inheritance, which is located outside the limits of a city or incorporated village. He may become a *bona fide* resident of the state and thus become entitled to its possession and enjoyment. If he is the sole party in interest, he may maintain an *ex parte* proceeding in the district court of the county in which the land is situated to have the property sold. The land reverts and escheats to the state. It is sold and the proceeds divided among those who would have been entitled to the lands.[99]

Where the deceased alien acquired title previous to March 16, 1889, while his rights were identical with those of a citizen, his widow, heirs or devisees may hold the same for ten years. If not sold within that time, or if they have not become residents of this state, it is in the same condition as lands acquired by such nonresident alien under a judgment or order of sale in foreclosure proceedings, which lands must be sold within ten years from the date possession is acquired. Whenever lands so escheat and revert to the state, it is the duty of the county attorney of the county in which the lands are situated to commence proceedings against such alien for the purpose of having a forfeiture declared. Service of summons is had as in

[98] Rev. Stats., c. 68, § 87, [6273]; Glynn v. Glynn, 62 Neb. 872, 87 N. W. 1052; Dougherty v. Kubat, 67 Neb. 269, 93 N. W. 317.

[99] Rev. Stats., c. 68, § 88, [6274].

cases of mortgage foreclosure. An appraisement of the lands is made by the judge, treasurer and clerk of the county, and the balance after deducting costs of appraisement is paid from the state treasury to the persons who would have been entitled to the lands. The widow, heirs or devisees of nonresident aliens may also maintain suit for partition, and the proceeds of the sale will be divided as if there had been no escheat.[100]

§ 443. Distribution of personalty.

When any person shall die possessed of any personal estate, or of any right or interest therein, not lawfully disposed of by his last will, the same shall be applied and distributed as follows:

First. The surviving husband or wife, if any, and if there be no surviving husband or wife, then the child or children, if any, of the deceased shall be allowed all the wearing apparel and ornaments and household furniture of the deceased, and all the property and articles that was or were exempt to the deceased at the time of his or her death, from levy or sale upon execution or attachment, and other personal property to be selected by her, him or them not exceeding two hundred dollars in value, and this allowance shall be made to such surviving husband or wife or child or children, if any, as well when he, she or they shall receive provision made in the will of the deceased as when the deceased dies intestate.

Second. The allowance for the support of the surviving spouse and children.[101]

100 Rev. Stats., c. 68, §§ 88, 89, [6274], [6275].

101 See § 186 et seq.

Third. The allowance for the support of the children under fourteen years of age when neither parent survives.[102]

Fourth. If the value of the estate does not exceed five hundred dollars, the court may, by a decree for that purpose, assign for the use and support of the surviving husband or wife, or for the support of children under fourteen years of age, the whole of such estate after the payment of the funeral charges and the costs and expenses of administration.

Fifth. If the personal estate amounts to more than five hundred dollars, and more than the allowances mentioned in the preceding subdivision of the section, the same shall be applied to the payment of the debts of the deceased and the charges and expenses of settling his estate.

Sixth. The residue is distributed to the same persons and in the same proportions as the real estate.[103]

The household furniture, wearing apparel, articles or property exempt to the decedent from attachment or execution, and two hundred dollars in addition thereto, pass to the surviving spouse or children, whether decedent was testate or intestate and whether the surviving spouse accepts or rejects the terms of the will.[104] No part of such property is assets of the estate or liable for the debts.[105]

102 See § 187, *supra.*

103 Rev. Stats. c. 17, § 3, [1267].

104 In re Leavitt's Estate, 85 Neb. 721, 124 N. W. 114; O'Shea v. Bruning, 85 Neb. 156, 122 N. W. 881; Fletcher v. Fletcher, 83 Neb. 156, 119 N. W. 232.

105 Judson v. Creighton, 88 Neb. 37, 128 N. W. 651.

§ 443a. Distribution of personalty—Concluded.

If the decedent or surviving spouse was the owner of a homestead, the value of the property which would pass to the survivor or the children under subdivision first above cited is two hundred dollars, not including specific exemptions. If such survivor or decedent was not the owner of a homestead, then he or she or the children would be entitled to a five hundred dollar exemption in lieu of homestead, and the amount which they would take under this subdivision would be seven hundred dollars, not including specific exemptions, and in neither case is such property subject to the debts of the estate.[106]

If the personal estate, not including that mentioned in subdivision first, exceeds five hundred dollars, and is sufficient to pay the allowances for the support of the surviving spouse and children under fourteen, then the surplus after paying the allowances is applicable to debts, costs and expenses of administration, and to distribution to the heirs, but if such estate does not exceed five hundred dollars, it may be assigned to the survivor or children under fourteen for their support, subject to funeral charges and administration expenses.

The exempt property, not including specific exemptions, together with the personal property of the value of two hundred dollars, must be selected by the survivor, or a request or demand made by him or her for the same, and if such property was not set out to the survivor during his or her lifetime, the right to it

[106] Judson v. Creighton, 88 Neb. 37, 128 N. W. 651.

does not pass to the estate of such survivor, it being considered in the nature of an allowance for support.[107]

Under the Oregon statute, the personal property of a deceased intestate is applied and distributed as follows:

1. If the intestate leaves a widow, she shall be allowed all articles of his apparel and ornament, according to the degree and estate of the intestate, and such property and provision for the use and support of herself and minor children as have been granted her by the court,[108] and this allowance shall be made as well when she waives the provisions made for her in the will as when he dies intestate.

2. The remaining personal property is applicable to the payment of the debts and expenses of administration.

3. The residue, if any, is distributed among the persons entitled to the real property of the intestate except,

4. If the intestate leave a husband, or widow and issue, such husband or widow shall be entitled to one-half of such personalty; but if no issue survive, the husband or widow shall be entitled to the whole of the residue.

5. If there be no husband, widow or kindred, the whole of such residue shall escheat to the state of Oregon.[109]

Subdivision 1 gives the widow, for herself and the minor children, the property which was exempt from execution during the lifetime of the husband, and makes all the other personalty liable for the debts and charges of administration.

107 Section 186, *supra.*

108 Section 186, *supra.*

109 L. O. L., § 7349; Kaser v. Kaser (Or.), 137 Pac. 189.

§ 444. Exceptions to right to inherit.

A person convicted of murder, or of unlawfully conspiring to kill another, cannot inherit from his victim, but there are no other exceptions.[110]

In Oregon the right of a murderer to inherit from his victim is governed by the common law, and the weight of authority is that under a plain and unambiguous statute, it is immaterial how the death of the ancestor occurred; the court cannot change the order of descent.[111]

The interest which a party has in public lands under a federal statute is not an estate of inheritance. The rights of the decedent therein pass to the surviving spouse or heirs by appointment under the federal statutes.[112] Lands granted or allotted to an Indian by act of Congress, there being no federal statutes of descent, on his death intestate pass to the surviving spouse or heirs under the laws of the state where they are situated.[113]

§ 445. Escheats.

When a person dies intestate without heirs or spouse surviving, or when the heir or spouse is incapable of inheriting on account of having been convicted of crime, the entire estate escheats to the state.[114]

110 Rev. Stats., c. 17, § 19, [1283].

111 Shallenberger v. Ransom, 41 Neb. 631, 59 N. W. 935; Owens v. Owens, 100 N. C. 240, 6 S. E. 794.

112 Walker v. Ehresman, 79 Neb. 775, 113 N. W. 218; Haun v. Martin, 48 Or. 204, 86 Pac. 371; Braun v. Matheissen, 139 Iowa, 409, 116 N. W. 789.

113 Porter v. Parker, 68 Neb. 338, 94 N. W. 123; Beam v. United States, 162 Fed. 260; Non-She-Po v. Wa-Win-Ta, 37 Or. 213, 62 Pac. 15.

114 Rev. Stats., c. 17, § 19, [1283].

Property escheats in Oregon solely on failure of heirs or no spouse surviving.[115] The word "widow" does not appear in the above section, but as there must be a failure of the parties mentioned in section 7348, L. O. L., the widow is clearly an heir, and takes a fee as such and not by virtue of the marital relation, as in Nebraska.

The appointment of an administrator in such estates is proper, and is necessary in order to provide for the payment of the debts of the deceased.[116] The title to the property and the right to its possession, *eo instanti*, vest absolutely and wholly in the state. No inquest or proceedings as at common law are necessary. The land becomes an immediate part of the school fund and is disposed of as other school lands.[117]

Under Oregon practice, an action at law must be brought by the district attorney, under the direction of the governor, on behalf of the state, or whatever action is necessary for the protection of its rights.[118] The action is commenced by the filing of an information in the circuit court of the county in which such estate or any part thereof is situated, and the issue of a summons and service of the same by publication thereof in some newspaper for six weeks.[119] The filing of the information does not oust the administrator or county court of jurisdiction over the allowance and payment of claims, or proceedings for sales of real estate for payment of debts.[120] As far as the personalty is concerned, the circuit court has no jurisdiction over it

115 L. O. L., § 7363; 59 Or. 525, 117 Pac. 283.

116 State v. Reeder, 5 Neb. 205; State v. O'Day, 41 Or. 495, 69 Pac. 542; Oregon v. Simmons, 46 Or. 159, 79 Pac. 498; State v. McDonald, 55 Or. 419, 104 Pac. 967.

117 State v. Reeder, 5 Neb. 203.

118 L. O. L., §§ 7364, 7366.

119 L. O. L., § 7366.

120 L. O. L., §§ 7367, 7371; State v. O'Day, 41 Or. 495, 69 Pac. 542; State v. McDonald, 55 Or. 419, 104 Pac. 967.

until the county court has found that there is no lawful claimant to it. The court acquires a jurisdiction over the real estate, and may pass on the devolution of the title to it, its jurisdiction in that respect being independent of the county court.[121]

Land which escheats to the state is sold by the sheriff of the county in the same manner as sales of real estate on execution, the sale confirmed and the proceeds, after paying the costs, etc., paid into the state treasury.[122] Unpaid claims against the estate and the costs and expenses of administration are paid by the state treasurer on warrants issued on the certificate of the county judge from the proceeds of the sale of the assets of the particular estate.[123]

Any person not a party or privy to the escheat proceeding may at any time within ten years file a petition in the circuit court of the county to establish his claim to the property, and if he recovers, is entitled to the same, less the costs and charges in connection therewith and the costs of administration, but without interest.[124]

§ 446. Personalty distributed as realty.

The surplus, if any, remaining after payment of debts, etc., from the proceeds of the sale of real estate, is treated as real estate in the order of distribution, and divided in the same proportions and among the same persons who inherited the land.[125] The common-law rule is the same,[126] and the same is true of the

121 State v. McDonald, 55 Or. 419, 104 Pac. 967.

122 L. O. L., § 7370.

123 L. O. L., § 7375.

124 L. O. L., § 7374; Young v. State, 36 Or. 424, 59 Pac. 812 36 Or. 427, 60 Pac. 711.

125 Rev. Stats., c. 17, § 219, [1483].

126 Pence's Appeal, 11 Ohio St. 290; Garner v, Wood, 71 Md. 37, 17 Atl. 1031.

sale of the lands of an infant which pass to his brothers and sisters and the issue of the same by representation.[127]

§ 447. Decree of distribution.

Heirs and legatees under our statutes and procedure, as at common law, trace their title to the personal property which they receive from the estate of their decedents through the executor or administrator.[128] After the payment of the debts, funeral expenses, costs and expenses of administration, and the allowances for the support and maintenance of the widow and minor children, a decree may be made assigning the residue to the persons designated by law.[129]

Such decree is necessary in both testate and intestate estates, as neither an executor nor administrator will be protected in the payment of legacies or distributive shares until an order of the court has been made and entered, giving the name of the party, the amount of the legacy or distributive share, or a description of the legacy, if a specific one.[130]

A distribution may be made as far as practical after the debts, charges and expenses are paid, when the estate is not ready for final settlement on account of pending litigation,[131] or on account of a trust relation being created by the will and the office of executor made a continuing one.[132]

127 In re Price, 67 N. Y. 231, 47 Hun (N. Y.), 109.

128 Clark v. Bundy, 29 Or. 193, 44 Pac. 282. Section 193, *supra*.

129 Rev. Stats., c. 17, §§ 229, 230, [1493], [1494].

130 Fauber v. Keim, 88 Neb. 379, 129 N. W. 538; Boales v. Ferguson, 55 Neb. 565, 76 N. W. 18.

131 Merrick v. Kennedy, 46 Neb. 264, 64 N. W. 989.

132 Rev. Stats., c. 17, § 86, [1350].

The county court has original exclusive jurisdiction of the distribution of the personal assets of an estate.[133]

§ 448. Petition for decree.

Application for final decree of distribution may be made by an executor or administrator, or any person interested in the estate.[134] A separate petition may be filed for that purpose and notice given the same as on hearing on the final account. It may be filed with such account, and the notice of hearing should notify the parties that a hearing will be had on the application for distribution.

Form No. 198.

PETITION FOR DISTRIBUTION OF RESIDUE OF ESTATE.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that on the ——— day of ———, 19—, letters of administration upon said estate issued to him out of and under the seal of said court; that all the proceedings required by law have been had for the proper filing, examination, and allowance of claims against said estate, and the same have been allowed and fully paid; that the funeral charges, expenses of administration, allowances for the support of the widow and family of the deceased pending administration, allowances for the support of the children of said deceased under fourteen years of age, and the amount allowed to the widow have been paid in full.

That on the ——— day of ———, 19—, he filed his final account, which on the ——— day of ———, 19—, after due notice, was examined and allowed; that it appears from said account that there remains in the hands of said administrator, your petitioner, a residue of ——— dollars, and that the following named persons are entitled to share in such residue: [Give names, ages, and residences of heirs and legatees.]

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133 In re Creighton's Estate, 12 Neb. 280, 11 N. W. 313; Manning v. Bonacum, 83 Neb. 417, 119 N. W. 672.

134 Rev. Stats., c. 17, § 232, [1496]; Lydick v. Chancy, 64 Neb. 288, 89 N. W. 801.

Your petitioner therefore prays that a day may be fixed for the hearing of the petition, and due notice thereof given all persons interested in the estate, and that such residue may be assigned and distributed in the proportion required by law, and for such other relief as may be just and equitable.

(Signed) C. D.

[Add verification, Form No. 5.]

§ 449. Hearing on application for distribution.

In order to establish his right to a share in the distribution of the estate the heir must prove his relationship to the decedent.[135] He must prove his descent either from deceased or a common ancestor.[136]

If the legitimacy of himself or of an ancestor through whom he claims is raised, marriage must be proved,[137] but proof of facts from which a legal marriage may be inferred is sufficient.[138] He must also bring himself within the provisions of the law of distribution under which he claims a share in the estate, and prove the exhausting of all lines of descent which would have a right to claim before him.[139]

The hearing is a proceeding *in rem*. The right to open and close is left to the discretion of the court, inasmuch as each claimant must recover on his own

135 Jackson d. Lawrence v. Hilton, 16 Johns. (N. Y.) 96; Birney v. Hann, 3 A. K. Marsh. (Ky.) 322.

136 Speese v. Shore's Estate, 81 Neb. 593, 116 N. W. 439.

137 Sorenson v. Sorenson, 68 Neb. 483, 94 N. W. 540; Morrill v. Otis, 12 N. H. 466.

138 Pratt v. Pierce, 36 Me. 448; Kaise v. Lawson, 38 Tex. 160.

139 Sorenson v. Sorenson, 68 Neb. 583, 94 N. W. 540; Stinchfield v. Emerson, 52 Me. 465; Emerson v. White, 29 N. H. 482; Bates v. Shrader, 13 Johns. (N. Y.) 261.

merits, and no decree can be entered without showing the rights of the distributees.[140]

The administrator is not regarded as an adverse party, consequently the claimant may testify to transactions with the deceased.[141]

In determining the amounts due distributees, it is the duty of the court to consider advancements made by the ancestor to the distributee and deduct them from his share.[142]

The indebtedness of an heir to an estate must be deducted from his distributive share of the personalty.[143] It differs from an advancement, as a personal representative is not obliged to collect an advancement even though the estate be insolvent, but before he is entitled to have his distributive share in the estate, his debt to the estate must be settled.[144] If it has not been already determined, the court has power on the hearing to fix the amount of such indebtedness to the estate.[145] The amount of his indebtedness in excess of his share in the personal property is a lien on his share in the real estate, which

140 Sorenson v. Sorenson, 68 Neb. 483, 100 N. W. 930, overruling same case in 94 N. W. 540, on this point.

141 Sorenson v. Sorenson, 68 Neb. 483, 100 N. W. 930, 103 N. W. 455.

142 McClave v. McClave, 60 Neb. 464, 76 N. W. 18.

143 Marvin v. Bowlby, 142 Mich. 245, 105 N. W. 751.

144 Oxsheer v. Nave, 90 Tex. 568, 40 S. W. 7; In re Dickinson's Estate, 148 Pa. 142, 23 Atl. 1053; Ayers v. King, 168 Mo. 244, 67 S. W. 558.

145 Holden v. Spier, 65 Kan. 412, 70 Pac. 348; Head v. Spier, 66 Kan. 386, 71 Pac. 836; Martin v. Martin, 170 Ill. 18, 48 N. E. 694; Stenson v. Halverson (N. D.), 147 N. W. 800.

lien is superior to that of any execution or judgment rendered against the heir or devisee.[146]

§ 450. Requirements of the decree.

The decree of distribution must name the persons and the proportions or parts to which each shall be entitled, and such persons shall have the right to demand and recover from the executor or administrator, or any person having the same, their respective shares.[147] Unless it give both the names of the distributees and the amounts to which they are entitled, the administrator has no authority to make payments thereon.[148] It should describe the real estate, give the names of the parties to whom it descends, and the interests which each holds as tenant in common.

Where there are personal assets undisposed of, such as cattle or livestock, they should be assigned to the distributees in common, and decree stating the proportion to which they are entitled the same as the real estate.

It should direct the personal representative to pay to each distributee his share.

§ 450a. Special proceedings for determining heirship.

A special proceeding for determining who are the heirs and distributees is provided by the Oregon statutes, in cases where the county court is of the opinion that a reasonable doubt exists, on the showing submitted, as to who are the heirs or distributees in whole or in part of the estate, or where any person claiming

146 Boyer v. Robinson, 26 Wash. 117, 66 Pac. 119; Keever v. Hunter, 66 Ohio St. 616, 57 N. E. 454; Gosnell v. Flack, 76 Md. 423, 25 Atl. 411; Stenson v. Halverson (N. D.), 147 N. W. 800.

147 Rev. Stats., c. 17, § 231, [1495].

148 Boales v. Ferguson, 55 Neb. 565, 76 N. W. 18.

to be an heir or distributee shall request such action. Any claimant, or any number of persons claiming to be heirs or distributees of the whole or a part of the estate, may file a verified petition in the county court for such purpose at any time after six months from the grant of letters testamentary or of administration. Such petition must set forth sufficient facts to show *prima facie* that each plaintiff is entitled to be declared an heir or distributee of a share in the estate and the proportionate share to which he is entitled. All persons not joined as plaintiffs who appear from the facts set out in the petition to have or claim rights as heirs or distributees, or who have filed in the matter of the estate written claims to be heirs or distributees, stating therein their names, ages, residences, and places of birth and relationship to the deceased, and all other persons known to the plaintiffs, or any of them, to have or claim rights as heirs or distributees, and all persons unnamed and unknown having or claiming to have any such interest, shall be made defendants. The name, age, residence, and relationship to deceased of all defendants so far as the same is known by plaintiffs or can be ascertained by reasonable diligence shall also be set out. If a minor is defendant, his guardian, if he have one in this state, must be joined with him.

It is the duty of the court before setting the petition down for a hearing to examine the same, and he may order that it be made more definite or certain or that other parties be joined as defendants.[149]

§ 450b. Citation and service.

On filing the petition the court makes an order for a hearing, which must be on a day certain, not less than ninety days nor more than six months from the date of the order, and directs the issue of a citation

[149] Laws 1913, p. 646.

to the defendants to appear and show cause why the facts should not be found, and the rights of heirship and distribution to said estate be decreed as set forth and prayed for in the petition of the plaintiffs on file therein, and to all persons named or unnamed having or claiming an interest to appear and file answers setting out their rights in the estate. The allegations of the petition and the facts as to the relief prayed need not be set out except by reference.[150]

Personal service of the citation must be had on all resident defendants, together with a copy of the petition, at least twenty days before the date of hearing. Service on nonresidents and unknown and unnamed persons is had by publication in some newspaper of the county not less than once a week for six successive weeks, and a copy thereof, together with a copy of the petition, mailed to those whose place of residence is known.[151]

§ 450c. Hearing on petition.

The county court acquires jurisdiction by the service of the citation and copy of the petition as above described. If any defendant is a minor with no guardian in the state, a guardian *ad litem* must be appointed. Any person may appear on or before the time fixed for the hearing, file an answer, putting in issue any of the allegations of the petition and setting out the facts of his heirship or interest in the estate. A copy must be served on the plaintiff or his attorney, who may reply thereto. The case is heard by the court on the issues of law and fact made by the pleadings as a civil action. The court shall not decree any person to be an heir or distributee of an estate unless

150 Laws 1913, p. 648.

151 Laws 1913, p. 648.

satisfied from the proof submitted, in which connection the verified petition and any affidavits, depositions, oral testimony and transcripts of church or official records, or other evidence submitted, may be considered, that such person bears the relationship to the deceased which he claims to bear. If the court has reason to believe that the person died without heirs, the proceedings shall be stayed for sixty days and immediate notice given to the governor.[152]

§ 450d. Decree determining heirs.

Under these proceedings the court shall not refuse to find who are the heirs or distributees entitled to any estate being administered therein because of the supposed or possible existence of an unknown or missing heir or distributee who has failed to appear at the hearing, unless it shall affirmatively appear that such heir or distributee has been seen or heard from within a period extending back not more than seven years prior to the death of the person whose estate is under administration; nor shall it be presumed without affirmative proof thereof that any such missing or unknown heir or distributee left issue; but the court shall in such case presume and adjudge that such heir or distributee has died without issue prior to the death of the decedent, and shall ascertain the heirs and order distribution accordingly.[153]

The decree of the court determining who are the heirs or distributees and designating their share or interests fully protects the executor or administrator, and is final and conclusive. It may be taken to the circuit court by appeal in the same manner as other civil cases. Any defendant or claimant, known or un-

152 Laws 1913, p. 649.

153 Laws 1913, p. 649.

known, against whom service has been had by publication, and who shall not have had actual knowledge of the pendency of such proceedings prior to the entry of a decree therein, or his representatives, may, upon good cause shown, and upon such terms as may be proper, be allowed to answer and set up his rights, and defend after the decree and within three years from the entry thereof. If he proves his case, he is entitled to his share in the estate, and may have judgment and execution against each of the distributees for such part as he should refund. Notice of application to reopen the decree must be given by personal service upon the distributees within the state, otherwise by such citation as the court may direct.

All persons who appeared in the original proceedings, or who have been adjudged heirs or distributees, or accepted any distributive share, are deemed before the court, and such court has jurisdiction over them, for the purpose of proceedings to reopen the decree, for three years.[154]

Form No. 199.

DECREE OF DISTRIBUTION.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the petition of C. D., administrator, for distribution of the residue of said estate now in his possession, the answer of G. H., and the evidence, and was submitted to the court. On consideration whereof, the court finds that all debts, claims, and demands against said estate, the allowances for the support of the widow and minor children, and the amount allowed the widow have been paid in full, and that there remains a residue in the hands of the administrator in the sum of ——— dollars [together with forty head of milch cows, three hundred head of steers on the range, and ten head of horses]; that C. B. is the widow of said A. B., and C. D., E. F., and G. H. are sons of said A. B., and the only persons entitled to share in said residue, and that the sum of ——— dollars has been paid to

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[154] Laws 1913, p. 650.

C. D. as an advancement; that, including said sum of ——— dollars, there remains for distribution the sum of ——— dollars; that C. B. is entitled to one-sixteenth of said sum of ——— dollars, C. D. five-sixteenths, E. F. five-sixteenths, and G. H. five-sixteenths; that the livestock above described be assigned to said C. B., C. D., E. F., and G. H. in the same proportions, to be held by them in common.

It is therefore ordered and decreed that said residue be divided as follows: To C. B., the sum of ——— dollars; to said C. D., the sum of ——— dollars; to E. F., the sum of ——— dollars; and to G. H., the sum of ——— dollars.

It further appearing that said A. B. died seised of the following described real estate [describe real estate], and that said C. D., E. F., and G. H. are the only heirs of said A. B., it is therefore ordered that said lands be assigned to them in common.

(Signed) J. K.,
County Judge.

§ 451. Effect of decree of distribution.

A decree of distribution is based on what the executor or administrator had or which the court finds such representative ought to have had in his hands for the legatees or distributees. It is a judgment operating as a judgment *de bonis propriis* at common law. The liability may be enforced by execution and on return *nulla bona* by action against the bondsmen.[155] Legacies and distributive shares draw interest from their date.[156]

It is final and subject to appeal. The county court has original jurisdiction to set it aside not only for the causes and in the manner prescribed by the code,[157] but after the expiration of the time for such proceedings, for fraud, mistake or misrepresentation.[158]

155 Lydick v. Chaney, 64 Neb. 288, 89 N. W. 801.

156 Rev. Stats., c. 32, § 3, [1267]; Smullin v. Wharton, 83 Neb. 328, 119 N. W. 773, 121 N. W. 441.

157 Civ. Code, §§ 648, 656.

158 Williams v. Miles, 63 Neb. 851, 89 N. W. 459; Weeks v. Wortman, 77 Neb. 407, 109 N. W. 503.

Under the Oregon practice, the order directing a distribution and settling the final account is a decree and not a judgment,[159] and is conclusive not only on the executor or administrator but on the sureties on his bond.[160] The most effective remedy for attacking the order is by an action in equity in the circuit court to set it aside for fraud.[161] Errors and irregularities can be raised by writ of review.[162]

The law imposes on an executor or administrator the duty of making a full and voluntary disclosure to the heirs, distributees, legatees and devisees of the situation, condition and value of the estate, and they are entitled to rely on his representations respecting such condition, situation and value,[163] and if he has betrayed such trust and the facts are not learned until after the time for appeal from the decree has expired, the only remedy they have is to reopen the decree.[164]

After the entry of the decree, as the amount due the heir or legatee is therein determined, and the only duty of the personal representative remaining being to pay over the same to the party entitled thereto, the reasons which prevent the issue of a writ of garnishment to a personal representative do not apply, and the practice in the courts of this state has been to allow the writ.

159 In re Plunkett's Estate, 33 Or. 414, 54 Pac. 152.

160 Bellinger v. Thompson, 26 Or. 320, 37 Pac. 714; Thompson v. Dekum, 32 Or. 506, 52 Pac. 517, 755.

161 Froebich v. Lane, 45 Or. 13, 76 Pac. 351; Johnson v. Savage, 50 Or. 294, 91 Pac. 1082.

162 Section 489, *post*.

163 Creamer v. Ingalls, 89 Wis. 112, 61 N. W. 82.

164 See Estate of Leavens, 65 Wis. 440, 27 N. W. 324: Beem v. Kimberly, 72 Wis. 343, 39 N. W. 542; Frawley v. Cosgrove, 83 Wis. 444, 53 N. W. 689.

Under the Oregon statute, if the distributees fail to apply for their shares of the estate within three months after the date of the order of distribution, the court may, on a showing to that effect by the executor or administrator, make an order directing payment of the same to the county treasurer, who holds the money in a special fund, subject to the further order of the court for its payment to the party entitled to it. If no application is made for it for one year, it is paid to the state treasurer, and if not claimed within ten years, escheats to the state.[165]

Form No. 200.

PETITION TO REVOKE DECREE OF DISTRIBUTION.

[Title of Cause and Court.]

Your petitioner, E. F., respectfully represents unto the court that on the ——— day of ———, 19—, the last will and testament of said A. B. was admitted to probate in said court, and letters testamentary thereupon issued to C. D.; that on the ——— day of ———, 19—, said C. D., executor, filed an inventory of the property belonging to said estate, which said inventory enumerated the following described real estate [describe real estate] and personal property, which was appraised at the sum of ——— dollars; that the following described personal property belonging to said estate came into the possession of said executor, and was not enumerated in said inventory, and has never been accounted for by him, to wit [describe personalty alleged to have been omitted, and state value]; that your petitioner had no knowledge of the existence of said last-described personalty, nor of its possession by said C. D., executor, until on or about the ——— day of ———, 19—.

That on the ——— day of ———, 19—, said C. D., executor, filed in said court a petition alleging that he had fully administered said estate, and praying for an order of distribution; that your petitioner was by said will given a legacy of the sum of ——— dollars, and was the devisee of the following described real estate [describe real estate], which said real estate is of the reasonable value of ——— dollars; that your petitioner is a resident of the state of South Carolina, and has been a resident of said state for more than twenty years

165 L. O. L., § 1303.

last past, and that he had previous to the ——— day of ———, 19—, no knowledge of the amount, character, and value of the said estate of said A. B., except such information as he received from said C. D., executor; that said C. D. had full knowledge of said estate, and the value thereof, and did falsely and fraudulently, and with the intent of him, said C. D., to defraud your petitioner, represent and pretend to your petitioner that the fund from which said legacy to your petitioner was required to be paid had failed, and that said legacy, therefore, could not be paid.

That said C. D. further falsely and fraudulently represented to your petitioner that claims had been filed against said estate in the sum of ——— dollars, that said claims were legitimate demands against said estate, and would be allowed by the court, and that it would be necessary to sell the real estate devised to your petitioner for the purpose of paying said debts; whereas, in truth and in fact, the claims filed against said estate aggregated the sum of ——— dollars, and those allowed the sum of ——— dollars, and no appeal has been taken from any order of this court disallowing any claim.

That your petitioner relied upon said false and fraudulent representations, so made to him as aforesaid by said C. D., and verily believed that said C. D. had represented to him the true condition of said estate; that, so relying upon said false and fraudulent representations so made by said C. D., as aforesaid, your petitioner, for and in consideration of the sum of ——— dollars to him in hand paid by said C. D., executed and delivered to him, said C. D., a conveyance and assignment of all his, your petitioner's, interest in said estate, which said conveyance and assignment was attached to the said petition of said C. D. for order of distribution and filed in this court.

That notice of the hearing on said petition for order of distribution was given by publication in the ———, a newspaper printed and published in said county, and that your petitioner had no actual knowledge of the date fixed for said hearing until the ——— day of ———, 19—.

That on the ——— day of ———, 19—, an order of this court was entered, assigning to said C. D. all of said share, both real and personal, which was devised and bequeathed to your petitioner.

Your petitioner therefore prays that a summons issue to said C. D., commanding him to show cause why said order of distribution heretofore entered on the ——— day of ———, 19—, be revoked and canceled; that said C. D. be compelled to account for all the property that has come into his possession as such executor, and to file herein a full, particular, and itemized account of his administration of said

estate, and of all his doings in respect thereto, or in any manner concerning the same, and his management and conduct thereof from the beginning of his said administration.

Dated this ——— day of ———, 19—.

(Signed) E. F.,
By E. H. S., His Attorney.

[Add verification, Form No. 5.]

[This form is the petition in Creamer v. Ingalls, *supra.*]

§ 452. Discharge of executor or administrator.

The executor or administrator may pay the legacies and distributive shares to the parties entitled thereto, taking their receipts for same. He also has the right to pay them into court for the use of the parties in cases where he is unable to find the legatee or heir, and such payment releases him from further liability for such amounts.[166] When the representative has paid these shares and there appear to be no further duties to be performed, he is entitled to a discharge.[167] The discharge is not a release from all duties and liabilities; it only discharges and releases him from liabilities up to that time, and does not affect his relation as a trustee.[168]

Form No. 201.

DISCHARGE OF EXECUTOR OR ADMINISTRATOR.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, C. D., administrator of the estate of said A. B., having filed in this court the receipts of C. D., E. F., G. H., and C. B. for the amounts adjudged to be due them by

166 Rev. Stats., c. 16, § 14, [1241].

167 Cowherd v. Kitchen, 57 Neb. 426, 77 N. W. 1107; Barney v. Babcock's Estate, 115 Wis. 409, 91 N. W. 982.

168 Hazlett v. Blakeley's Estate, 70 Neb. 613, 97 N. W. 808; Union Pacific R. R. Co. v. Smith, 5 Neb. Unof. 631, 99 N. W. 813.

this court, from the residue of said estate, according to the order duly entered herein on the ——— day of ———, 19—, it is hereby ordered that said C. D., administrator, be and he hereby is discharged from any further duties of administration, and that the sureties upon his official bond be released from any further liability thereon.

(Signed) J. K.,
County Judge.

Under the Oregon practice, it is the duty of the executor or administrator with the will annexed to have a copy of the will duly certified, recorded in every county of the state in which such testator left any real estate, in the record of deeds of such counties.[169] In other counties than that in which the administration is had, copies of the petition for his appointment, the order for letters and the final order discharging him must also be recorded.[170]

In the case of an intestate estate, copies of the petition for administration and of the orders appointing the administrator, determining heirship and for his discharge must be recorded.[171]

169 L. O. L., § 1144.
170 L. O. L., § 1147.
171 L. O. L., § 1147.

CHAPTER XXXIV.

ENFORCEMENT OF PROBATE BONDS.

§ 453. Purpose for Which Bond is Given.
454. Failure of Bond to Comply With Statute.
455. Common-law Bond.
456. Cumulative Bond.
457. Liability of Sureties of Coexecutors and Coadministrators.
458. Who can Bring Suit on Probate Bond.
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461. What Constitutes a Breach of the Bond.
462. What Constitutes a Breach of the Bond—Concluded.
463. Losses not Covered by Bond.
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465. Suit by Administrator *De Bonis Non.*
466. Authority to Bring Suit on Bond.
467. Time Within Which Action may be Brought.
468. Liability of Sureties.
469. Liability in Regard to Real Estate.
470. Liability for Proceeds of Sales of Real Estate Under Order of Court.
471. Action on the Bond.
472. Action, When Barred.

§ 453. Purpose for which probate bond is given.

The object of the bond required of an executor or administrator before letters issue is to secure to all parties interested in the estate—creditors, heirs and legatees—the amounts, or specific articles, to which the court finds they are justly entitled, and to afford them a source from which they can enforce payment of what they should receive from the estate, should the personal representative be guilty of mismanagement, misappropriation of funds, negligence, or of failure to comply with the decrees of the county court.

§ 454. Failure of bond to comply with the statutes.

The statutes specifically define what the conditions of the bond shall be. They are construed as directory, and if the bond substantially complies therewith, it is valid.[1] If some essential conditions are omitted, the parts which should have been inserted cannot be read into it, and the sureties are liable only for a breach of the conditions it contained.[2]

The general rule is that informalities and omissions where there was an evident intention on the part of the representative and his sureties to comply with all the legal requirements will not make the bond void, though its conditions vary slightly from those required, except in so far as it increases the statutory liability,[3] as where it did not state the name of the obligee running to "the judge of the probate court,"[4] or where it ran to the surrogate of another county but the conditions made it apply to the county where filed,[5] or where it failed to give the name of the decedent, it appearing to be the intention of the parties to obligate themselves to all concerned in the will which their principal was called on to execute,[6] but one in which no person or officer is named as obligee,[7]

1 Holbrook v. Bentley, 82 Conn. 502; Lanier v. Irvine, 21 Minn. 447; Schill v. Reisdorf, 88 Ill. 411; Probate Court v. Strong, 27 Vt. 202; Graves v. McHugh, 58 Mo. 499.

2 Carroll v. Connett, 2 J. J. Marsh. (Ky.) 195.

3 State v. Price, 15 Mo. 375; Newton v. Cox, 76 Mo. 352.

4 Buel v. Dickey, 9 Neb. 285, 2 N. W. 884.

5 Gerould v. Wilson, 81 N. Y. 573.

6 Foley v. Hamilton, 89 Iowa, 686, 57 N. W. 439.

7 Tidball v. Young, 58 Neb. 261, 78 N. W. 507.

or no amount is given,[8] is neither a statutory nor common-law obligation, and is void.

§ 455. Common-law bond.

If the instrument intended for a probate bond utterly fail to comply with the statute, or be given by a person acting under an absolutely void grant of letters, it will still be valid as a common-law obligation,[9] and, after he has acted as such personal representative, his sureties would be liable on the bond for a violation on the part of their principal of the legal obligations which he assumed therein.[10]

Action upon such common-law bond must be brought by the county judge to whom it was given, and who approved it, as trustee for the benefit of all parties interested in the estate. His successor has no authority to bring the action.[11]

The Oregon statutes provide that a surety on the bond of an executor or administrator may be released from subsequent liability for the act of his principal by order of the court upon the filing by such principal of a new bond. Such surety may apply by petition to the county court which approved the bond, praying to be relieved from further liability for the acts or omissions of the executor or administrator occurring after the date of the order relieving him, and for an order to his principal to show cause why such surety should not be released as prayed and the principal required to account and to give a new bond. The court thereupon causes an order to be issued returnable at

8 Everts v. Stiger, 6 Or. 55.

9 State v. Creusbauer, 68 Mo. 254.

10 Shalter's Appeal, 43 Pa. 83; Cleaves v. Dockray, 67 Me. 118; Waterman v. Dockray, 79 Me. 149, 8 Atl. 685.

11 Frye v. Crockett, 77 Me. 157.

such time and place and to be served in such manner as said court shall direct, and may in the meantime restrain the principal from acting, except in such manner as the court shall direct for the preservation of the estate. If the executor or administrator gives a new bond and the same is duly approved by the court within the time limited in the order, the court must make an order releasing the surety filing the petition from further liability as prayed; and in default of such principal thus accounting and filing a new bond within the time limited in such order, said court shall at once make an order directing him to account within ten days, and if the estate shall be found and made good or properly secured, such surety shall be discharged from any and all further liability as such for the subsequent acts of his principal after the date of such surety being relieved or discharged, and further discharging said executor or administrator from his position.[12]

§ 456. Cumulative bond.

When an additional bond is given under the order of the county court, or voluntarily without such order, the liability of the sureties on the first bond are in no way affected. They still remain liable for the past, present and future misconduct of their principal, and the county court cannot change such liability.[13] The liability of the new bondsmen dates back to the grant of letters, the same as that of the sureties on the new bond.[14]

12 L. O. L., § 685.

13 Bellinger v. Thompson, 26 Or. 330, 37 Pac. 714; Commonwealth v. Rogers, 53 Pa. 470; Wood v. Williams, 61 Mo. 63; Richter v. Leiby's Estate, 101 Wis. 434, 77 N. W. 745.

14 Elizalde v. Murphy, 163 Cal. 681, 126 Pac. 978.

Under the Oregon statutes,[15] the giving of a new or substituted bond under the order of the court discharges the sureties on the former bond from subsequent liability.

The two sets of sureties are equally liable for a breach of the conditions of either obligation, no matter when it occurred. As far as creditors, legatees or distributees are concerned, there is no primary liability,[16] but as between themselves, a surety on either bond against whom a judgment has been rendered for a default of his principal can enforce contribution from the sureties on both bonds.[17]

§ 457. Liability of sureties of coexecutors and coadministrators.

The surety on the separate bond of a coexecutor or coadministrator is only liable for a violation of the obligations of the bond by his own principal,[18] but where, as is usually the case, the representatives have together administered the estate and together transacted its business, each having a knowledge of what the other was doing, or of sufficient facts to give him notice, a surety on the bond of one is liable for the principal on the other bond, because his principal participated in them and contributed to the loss.[19]

15 L. O. L., §§ 1161, 1162.

16 Scofield v. Churchill, 72 N. Y. 565; Brown v. State, 23 Kan. 235; Lingle v. Cook's Admrs., 32 Gratt. (Va.) 262.

17 Rudolf v. Malone, 104 Wis. 470, 80 N. W. 743; Thompson v. Dekum, 32 Or. 506, 52 Pac. 517.

18 McKim v. Aulbach, 130 Mass. 481.

19 Clark v. State, 6 Gill & J. (Md.) 288; Cameron v. Justice of Inferior Court, Richmond Co., 1 Ga. 36. See, also, In re Irvine's Estate, 203 Pa. 603, 53 Atl. 502; In re Niles' Estate, 113 N. Y. 547, 21 N. E. 687. See § 426, *supra*.

If he did not participate in the wrongful acts of his associate, or having knowledge of such acts did not acquiesce in them, he is liable as a surety for his associate, but his sureties are not liable.[20]

The sureties on a joint bond of coexecutors or coadministrators are liable for the acts or defaults of either or any of them. The principals are jointly liable as sureties for the acts and defaults of each other and are jointly liable to a surety who has been compelled to make any payment on account of the neglect or default of either.[21] The liability of the obligors, as between themselves, is as joint principals, and not as sureties, when the property sought to be recovered was received by them jointly, was jointly receipted for by them, or they jointly participated in a *devastavit*.[22]

§ 458. Who can bring suit on probate bond.

An action may be brought on the bond of an executor or administrator by any creditor when the amount due him has been ascertained and ordered paid, if the executor or administrator shall neglect to pay the same when demanded,[23] which would include the holder of a judgment lien on realty which has been sold by the administrator by order of court, subject, of course, to the lien, and the proceeds applied in payment of

20 Sutherland v. Brush, 7 Johns. Ch. (N. Y.) 17; Monell v. Monell, 5 Johns. Ch. (N. Y.) 283; Manahan v. Gibbons, 19 Johns. (N. Y.) 427.

21 Moore v. State, 49 Ind. 558; Ames v. Armstrong, 106 Mass. 15; Hannum v. Day, 105 Mass. 33; Dobyns v. McGovern, 15 Mo. 662; Boyd v. Boyd, 1 Watts (Pa.), 365.

22 Lenoir v. Winn, 4 Desaus. (S. C.) 65; Clark v. State, 6 Gill & J. (Md.) 288.

23 Rev. Stats., c. 17, § 252, [1515].

the general creditors of the estate,[24] by any person as next of kin to recover his share of the personal estate, after the entry of a decree of the court declaring the amount due to him, if the executor or administrator shall fail to pay the same on demand,[25] and by any creditor, legatee, distributee or other person interested in the estate who has sustained a loss on account of the failure of the executor or administrator to perform any order or decree made by a county court having jurisdiction, for rendering of any account, for the settlement of an account, for the payment of debts, legacies or distributive shares, for the delivery of specific legacies, or by reason of any maladministration of the personal representative.[26]

§ 459. Proceedings necessary in order to sustain an action on a probate bond.

It is a rule of law, so well settled by the older judicial decisions as to seldom, if ever, be raised in the courts at the present time, that, before an action upon a probate bond can be sustained, the liability of the estate to the would-be plaintiff must be fully determined, the personal representative must have refused to perform his legal duty, and leave of the court which approved the bond and issued the letters had and obtained.[27] The liability, therefore, cannot well be determined

[24] State v. Brown, 80 Ind. 425.

[25] Rev. Stats., c. 17, § 253, [1516].

[26] Rev. Stats., c. 17, §§ 254, 255, [1517], [1518].

[27] Adams v. Petrain, 11 Or. 304, 3 Pac. 163; Probate Court v. Kimball, 42 Vt. 320; State v. Stafford, 73 Mo. 658; Commonwealth v. Wenrick, 8 Watts (Pa.), 159; Commonwealth v. Fretz, 4 Pa. 347; Commonwealth v. Moltz, 10 Pa. 527.

until the debts are allowed, and the administration of the estate nearly, if not entirely, completed.

The duty of a personal representative of a decedent to pay the debts, legacies, allowances and costs of administration does not become absolute and operative until an order of the court has been made requiring him to pay them, and such payment must be demanded. "The liability of a surety is contingent, * * * and therefore, before suit can be brought against him, the party in interest, whether creditor, legatee, heir or distributee, must proceed against the executor or administrator," and determine the amount owing by him in his official capacity to such party.[28]

Except in the case of residuary legatees, the liability of the bondsmen only attaches when the debt, claim or demand, whether of creditor, heir or legatee, is a proper demand against the estate, and the principal has received sufficient assets of the estate to pay it either in whole or in part, and has wasted or converted them, or refuses to apply them in payment; and no action can be maintained against the sureties unless the amount of the debt, the liability of the estate therefor, the sufficiency of the assets, the fact of waste or conversion, and the consequent liability of the principal has been first established by the judgment or decree of a competent court in a proper proceeding duly prosecuted against such principal.[29]

Under the common law, the following steps were held necessary in order to reach the sureties on an adminis-

[28] Commonwealth v. Fretz, 4 Pa. 347.

[29] May v. Kelly, 61 Ala. 489; Henderson v. Levy, 52 Ga. 35; Thompson v. Bondurant, 15 Ala. 346, 50 Am. Dec. 136; Cameron v. Justices of Inferior Court, Richmond Co., 1 Ga. 36.

tration bond, and render them liable for the debts of the estate: First, a suit against the executor or administrator in his representative capacity, with a judgment *de bonis testatoris* or *de bonis intestatis,* and a return of *nulla bona* on an execution thereon; second, an action on the bond founded upon the judgment.[30] Formerly, after the first judgment was obtained, an action of debt on that judgment, suggesting a *devastavit* against the executor or administrator personally and a judgment *de propriis,* was necessary.[31]

§ 460. Fixing liability of bondsmen.

Statutes like those in this state requiring claims against decedent's estates to be allowed and ordered paid by the county court, and the shares of the distributees and legatees to be determined by order of court, are substituted for the common-law method of fixing the liability. An order for their payment must be made before suit can be brought on the bond,[32] and a noncompliance with the order of payment is sufficient to sustain the action on the bond without any judgment establishing the *devastavit.*[33] In such action, actual proof of a *devastavit,* except, of course,

30 Dean v. Portis, 11 Ala. 104; Hobbs v. Middleton, 1 J. J. Marsh. (Ky.) 189; People v. Dunlap, 13 Johns. (N. Y.) 437; Dobbins v. Halfacre, 52 Miss. 561.

31 Stewart v. Champaign County Treasurer, 4 Ohio, 98; Catlett v. Carter's Exrs., 2 Munf. (Va.) 24; Justices of Inferior Court, Irwin County, v. Sloan, 7 Ga. 31.

32 Lydick v. Chaney, 64 Neb. 288, 89 N. W. 801; First Nat. Bank of St. Paul v. How, 28 Minn. 150, 9 N. W. 626; State v. Stafford, 73 Mo. 658; Probate Court v. Kent, 49 Vt. 380; Hood v. Hood, 85 N. Y. 561.

33 Warren v. Powers, 5 Conn. 373; Weber v. Noth, 51 Iowa, 375, 1 N. W. 652; Brewster v. Balch, 9 Jones & S. (N. Y.) 63.

where the action is brought against the representative for a conversion, is not necessary, for the county court, in making the order requiring the payment to be made, in effect passes upon the question, and such order is final and conclusive unless an appeal be taken therefrom. It must appear that all steps required have been taken to enforce the order of the county court, but without avail.[34]

A decree or order of the county court ascertaining the shares of the legatee or distributee is a sufficient determination of the liability of the executor or administrator in an action brought upon the bond.[35] Until such decree or order has been made and entered, and there has been a failure to comply therewith, the nonpayment of a legacy or distributive share will not support an action on the bond.[36] It has been held not necessary for the court to ascertain the actual share of the distributee or creditor, if the records show a decree due from the personal representative to the creditors, heirs or legatees, and, if the same is not paid, an action has been maintained on the bond for the benefit of all those interested.[37]

§ 461. What constitutes a breach of the bond.

A conversion, waste or misappropriation of the assets of the estate is, of course, a violation of the conditions

34 Hamlin v. Kinney, 2 Or. 91; Adams v. Petrain, 11 Or. 304, 3 Pac. 163.

35 Judge of Probate v. Fillmore, 1 D. Chip. (Vt.) 420; Commonwealth v. Wenrick, 8 Watts (Pa.), 159; United States v. King, 1 McArth. (D. C.) 499.

36 Pickett v. Gilmer, 32 La. Ann. 991; Judge of Probate v. Adams, 49 N. H. 150; Dawson v. Dawson, 25 Ohio St. 443; Municipal Court v. Henry, 11 R. I. 563; Thornton v. Glover, 25 Miss. 132.

37 Ordinary v. Mortimer, 4 Rich. (S. C.) 371.

of the bond, and the one for which actions are most frequently brought. It may have taken place before the inventory was filed, and be of property received before the bond was executed, if such conversion or misappropriation occurs afterward.[38] The bondsmen are also liable for the failure of their principal to resist unjust and unfounded claims against the estate to the amount of such claims;[39] for his failure to reduce to possession known assets of the estate, or for delay and negligence in reducing them to possession, whereby a loss resulted;[40] for delay in rendering his accounts, whereby a loss was sustained by the estate for the use of money lying idle in his hands;[41] for delay or failure to file the inventory (but for this particular breach nominal damages only can be recovered unless some actual loss to the estate is established).[42]

The failure of an executor or administrator with the will annexed to administer the estate according to the terms of the will constitutes a breach of the bond for which an action will lie against the sureties, as where the will directed that certain property be invested in a certain manner, and the personal representative neglected to make the investment, whereby a loss resulted, or a residuary legatee used the assets of the estate for his own personal ends, and left the debts unpaid.[43]

38 State v. Scott, 12 Ind. 529; Bellinger v. Thompson, 26 Or. 338, 37 Pac. 714.

39 Smith v. Cuyler, 78 Ga. 654, 3 S. E. 406.

40 Bourne v. Stevenson, 58 Me. 499.

41 McKim v. Bartlett, 129 Mass. 226; Ordinary v. Barcalow, 36 N. J. L. 15; Commonwealth v. Bryan, 8 Serg. & R. (Pa.) 128.

42 People v. Hunter, 89 Ill. 392; State v. Smith, 52 Conn. 557.

43 Edmunds' Admr. v. Scott, 78 Va. 720; Probate Court v. Angell, 14 R. I. 495; Judge of Probate v. Claggett, 36 N. H. 381; United States v. Barker, 2 McArth. (D. C.) 444.

§ 462. What constitutes a breach of the bond—Concluded.

Nonpayment of a legacy is a breach of the bond when the amount due and the order of payment have been duly determined in the manner provided in the preceding sections,[44] and it is immaterial whether the legacy grows out of realty or personalty, if the executor is chargeable with it;[45] but where an administrator with the will annexed gave an ordinary administrator's bond, instead of the bond required by statute, the court held his bondsmen could not be compelled to pay a legacy, as the obligation they executed contained no reference whatever to any will.[46] A failure to comply with any order or decree of the county or district court in reference to his duties, whereby a loss occurs to the estate, will render his bondsmen liable.[47]

Where an administrator applies the proceeds of the sale of lands made by order of court, upon which there are judgment liens, for the payment of other indebtedness, the holders of such judgment liens may bring an action on the bond for the amount of their demands.[48] But where the administrator in good faith, and under the order of the court, pays other encumbrances out of the proceeds of the sales of such lands sold, no action will lie therefor on his bond.[49]

44 Appeal of American Board of Commrs., 27 Conn. 344; Ruby v. State, 55 Md. 484; Gandolfo v. Walker, 15 Ohio St. 251.

45 Moore v. Waller's Heirs, 1 A. K. Marsh. (Ky.) 488.

46 Fulcher v. Commonwealth, 3 J. J. Marsh. (Ky.) 592.

47 Hancock v. Hubbard, 19 Pick. (Mass.) 167; State v. James, 82 Mo. 509; O'Gorman v. Lindeke, 26 Minn. 93, 1 N. W. 841.

48 State v. Brown, 80 Ind. 425.

49 State v. Schileiffarth, 9 Mo. App. 431.

When the personal liability of the executor or administrator has been determined in the manner provided in the preceding section, the nonpayment of a debt which has been allowed as proper demand against the estate, when the personal representative has received sufficient assets which are appropriate for its payment, constitutes a breach of the bond.[50] This applies to any claim which has been allowed by the court, the order allowing which still remains in full force and effect, even though it subsequently appears that the claim was barred by the statute, and should have been rejected.[51]

§ 463. Losses not covered by bond.

The bondsmen are not liable for services rendered the executor or administrator by a third party in the course of administering the estate, because, although the payment is one properly payable from the assets of the estate, it is the personal representative who incurred the debt;[52] but where an administrator brought replevin for goods which he claimed belonged to the estate, and, failing in the action, the surety on the replevin bond was compelled to pay, the judgment was held to be a debt of the estate for which the sureties upon the administration bond were liable.[53] The nonpayment of a note belonging to the estate, and transferred to a creditor thereof in settlement of his claim, does not render the bondsmen liable for it.[54] Nor can

50 Mortenson v. Bergthold, 64 Neb. 208, 89 N. W. 742.
51 Weber v. Noth, 51 Iowa, 375, 1 N. W. 652.
52 Baker v. Moor, 63 Me. 443; Taylor v. Mygatt, 26 Conn. 184.
53 State v. Dailey, 7 Mo. App. 549.
54 Rawson v. Piper, 34 Me. 98.

they be held liable for the failure of their principal to procure a license for the sale of lands for the purpose of obtaining funds with which to pay plaintiff's claim.[55]

§ 464. Residuary legatee's bond.

The bond of a residuary legatee stands on a different footing than the usual executor's bond. For the reason that he is not required to file an account it has been held that a legatee need not obtain an order from the court for the payment of his legacy before bringing suit.[56] The claim of a creditor must be allowed before he can bring suit.

The bond being conditioned to pay all the debts and legacies of the testator, it will be conclusively presumed that the executor has in his possession sufficient assets to pay them, and many of the usual defenses in cases on administration bonds are thus cut off.[57]

§ 465. Suit by administrator de bonis non.

An administrator *de bonis non* has power to bring an action on the bond of the former executor or administrator for any damages sustained by reason of his neglect, or the neglect or refusal of his representatives, to turn over to such new administrator, pursuant to the order and decree of the county court, or according to law, any estate remaining unadministered.[58]

55 Hawkins v. Carpenter, 88 N. C. 403.

56 Smith v. Lambert, 30 Me. 137.

57 Buel v. Dickey, 9 Neb. 285, 2 N. W. 884; Colwell v. Alger, 5 Gray (Mass.), 67; Jones v. Richardson, 5 Met. (Mass.) 247.

58 Rev. Stats., c. 17, § 257, [1521].

Before such suit can be brought a hearing must be had in the county court, and the liability of the original representative or, in case of his death, of his personal representatives, to the estate determined,[59] and an order of the court made thereon directing him or his representatives to deliver to the administrator *de bonis non* the unadministered assets and to pay to him the balance, if any found due, on account of the neglect or wrongful act of the original representative.[60]

§ 466. Authority to bring suit on bond.

An action upon the executor's or administrator's bond must be brought in the name of the party authorized by the county judge to bring the same, or in the name of the guardian of such party, and in such action the plaintiff shall be entitled to recover such damage as he may have sustained, to the amount of the bond, and no more, and a judgment in favor of a party for one delinquency shall not preclude the same or another party for an accounting on the same bond for other delinquencies, but the aggregate of all the recoveries on such bond shall not exceed the amount for which the bond was given. Permission must be obtained from the county judge to prosecute the action, and upon granting the same, he is required to furnish the applicant, on payment of the legal fee, a certified copy of the bond, together with a certificate that permission has been granted to prosecute, and the name

[59] Brown v. Jacobs, 24 Neb. 712, 40 N. W. 137; Adams v. Petrain, 11 Or. 304, 3 Pac. 163.

[60] Rutenic v. Hamakar, 40 Or. 263, 67 Pac. 196; United States v. Cox, 18 How. (U. S.) 100; Beall v. New Mexico, 16 Wall. (U. S.) 535; Campbell v. State, 62 Md. 1; In re Connelley's Estate, 73 Cal. 423.

and residence of the applicant.[61] The application may be made by a creditor, legatee or distributee or other person interested in the estate.[62] It should be by petition under oath and the order may be entered by the court without notice.[63]

Form No. 202.

APPLICATION FOR PERMISSION TO BRING SUIT ON A PROBATE BOND.

[Title of Cause and Court.]

Your petitioner, E. F., respectfully represents unto the court that he is a resident of the village of ———, Nebraska; that on the ——— day of ———, 19—, letters of administration upon the estate of said A. B., deceased, were issued out of and under the seal of said court to one C. D.; that on the ——— day of ———, 19—, your petitioner filed a claim against said estate with said court; that on the ——— day of ———, 19—, said claim was allowed by said court in the sum of ——— dollars ($———); that on the ——— day of ———, 19—, a decree was duly entered by said court requiring said C. D., administrator as aforesaid, to pay to your petitioner the said sum of ——— dollars ($———), which said sum your petitioner then and there demanded of said C. D., administrator, and that said C. D., administrator, has neglected and refused to pay the same.

Your petitioner therefore prays that permission may be granted him to bring suit upon the bond of said C. D., administrator of the said estate of A. B., deceased.

Dated this ——— day of ———, 19—.

(Signed) E. F.

[Add verification, Form No. 5.]

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61 Rev. Stats., c. 17, § 256, [1520].

62 Section 458, *supra*.

63 Roberts v. Weadock, 98 Wis. 400, 74 N. W. 93; Richardson v. Hazleton, 101 Mass. 108; Bennett v. Overing, 16 Gray (Mass.), 267.

Form No. 203.

APPLICATION OF ADMINISTRATOR DE BONIS NON FOR LEAVE TO BRING SUIT ON BOND OF HIS PREDECESSOR.

[Title of Cause and Court.]

Your petitioner, E. F., respectfully represents unto the court that on the ——— day of ———, 19—, letters of administration *de bonis non* upon the estate of said A. B., deceased, were issued to him out of and under the seal of this court; that on the day last aforesaid said court made an order requiring G. I., the original administrator of said estate, to turn over to your petitioner all the assets of said estate then remaining in his hands unadministered, and your petitioner thereupon demanded of said C. D. said assets of said estate, and said C. D. has neglected and refused to deliver said assets to your petitioner.

Your petitioner therefore prays that leave may be granted him to bring suit upon the bond of said C. D., the original administrator of said estate.

Dated this ——— day of ———, 19—.

(Signed) E. F.

[Add verification, Form No. 5.]

Form No. 204.

ORDER GRANTING PERMISSION TO BRING SUIT ON BOND.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on for hearing on the petition, duly verified, of E. F., for permission to bring suit upon the administration bond of C. D., administrator of said estate, and was submitted to the court.

Upon consideration thereof, it is ordered and adjudged by me that said E. F., of the village of ———, ——— county, Nebraska, be and he hereby is granted permission to bring suit upon the bond of C. D. as administrator of the estate of A. B., deceased, and that a certified copy of said bond be delivered to said E. F.

(Signed) J. K.,
County Judge.

Form No. 205.

CERTIFICATE OF PERMISSION TO BRING SUIT ON BOND.

State of Nebraska,
——— County,—ss.

I, J. K., county judge of said county, do hereby certify that the within and foregoing is a true copy of the bond of C. D., administrator of the estate of A. B., deceased, now on file in the county court of said county; and I do further certify that on the ——— day of ———, 19—, permission was granted by said court to E. F., of the village of ———, said county, to prosecute said bond.

In witness whereof, I have hereunto set my hand and caused the seal of said court to be affixed this ——— day of ———, 19—.

[Seal] (Signed) J. K.,
County Judge.

The Oregon statute does not require that permission be first obtained from the county court before bringing suit on the bond, as is the case in many states. The object of such statutes is to prevent such suits being brought prematurely. When permission is not a statutory requirement and there are no special proceedings for enforcing probate bonds, an order granting leave is not necessary.[64]

§ 467. Time within which the action may be brought.

An action on the bond of an executor or administrator may be brought within any time within ten years after the cause of action accrued.[65] It accrues when the party has the right to apply to the county court for permission to bring the action. Obtaining leave to sue on the bond is no part of the cause of action thereon, and delay in obtaining such leave does not affect the running of the statute.[66] The suit may

64 Bartels v. Grove, 4 Wash. 632, 30 Pac. 675; State v. Wilson, 38 Md. 338.

65 Code Civ. Proc., § 12; Bently v. Baker, 61 Neb. 92, 64 N. W. 603.

66 Ganser v. Ganser, 83 Minn. 199, 86 N. W. 18.

therefore be brought at any time within ten years after the executor or administrator has failed to pay the creditors, legatees or distributees, or comply with the order of the court.[67]

In Oregon the limitation is six years.[68]

§ 468. Liability of sureties.

The liability of the sureties on an executor's or administrator's bond is limited to the terms of the instrument, and cannot be extended by operation of law or by implication.[69] They are only liable for a breach of the conditions of the instrument they actually sign. They are responsible for all the assets of the estate which have come into the official possession of the personal representative within this state,[70] and for the proceeds of assets in another state which have been transmitted to him, and with which he has been properly charged;[71] but the sureties of an ancillary administrator appointed in this state are not liable for the assets of the estate in another state. Their liability is limited to the assets within the jurisdiction in which their principal received his appointment.[72] The bond is retrospective, and therefore covers assets

67 Williams v. State, 68 Miss. 680, 10 South. 52; Kennedy v. Cromwell, 108 N. C. 1, 13 S. E. 135.

68 L. O. L., § 6.

69 Warfield v. Brand's Admr., 13 Bush (Ky.), 77; White v. Ditson, 140 Mass. 351, 4 N. E. 606.

70 Gregg v. Currier, 36 N. H. 200; Fletcher's Admr. v. Sanders, 7 Dana (Ky.), 345; Governor v. Williams, 25 N. C. 152; Verret v. Belanger, 6 La. Ann. 109; Goode v. Buford, 14 La. Ann. 102; Dowling v. Feeley, 72 Ga. 557.

71 Judge of Probate v. Heydock, 8 N. H. 491.

72 Fletcher's Admr. v. Sanders, 7 Dana (Ky.), 345.

which may have come into the representative's possession before its execution, such goods being properly included in the inventory.[73]

Should an executor be appointed trustee by the will, he should give a bond as trustee in addition to his bond as executor, the duties of the two offices being entirely distinct and separate.[74] Should he neglect to give a bond as trustee, he is chargeable on his executor's bond with the amount of the trustee property in his hands, the clause of the bond, "to administer according to the will of the testator," making his sureties liable for the assets should he convert or misappropriate them.[75] The liabilities of the sureties on the executor's bond, when he is also trustee, continue until he shall account as executor and qualify as trustee. There must be some open and notorious act done by him, whereby it is known that the line has been crossed which separates the capacity of executor from that of trustee.[76] Should an executor, after the setting aside of the will, continue in charge of the estate as administrator without giving any other bond than his executor's bond, the sureties on such bond will be liable for the faithful performance of his duties as administrator.[77] If he has distributed the assets in good faith, pursuant to the

73 Scofield v. Churchill, 72 N. Y. 565; Choate v. Arrington, 116 Mass. 552; State of Creusbauer, 68 Mo. 254; Brown v. State, 23 Kan. 235.

74 Groton v. Ruggles, 17 Me. 137; Wyman v. Hubbard, 13 Mass. 234.

75 Hall v. Cushing, 9 Pick. (Mass.) 397; Briggs v. Baptist Church (Me.), 8 Atl. 257; Newcomb v. Williams, 9 Met. (Mass.) 525.

76 Joy v. Elton, 9 N. D. 428, 83 N. W. 875; In re Higgins' Estate, 15 Mont. 474, 39 Pac. 506; Bellinger v. Thompson, 26 Or. 320, 37 Pac. 714; Newcomb v. Williams, 9 Met. (Mass.) 525; State v. Branch, 134 Mo. 592, 36 S. W. 226.

77 Bell v. People, 94 Ill. 230.

directions of the court, in the payment of debts and legacies, the subsequent annulment of the will will not render the sureties liable for the payments so made.[78]

Where letters of administration were granted upon the estate of a person supposed to be dead, but who was in fact living, and the administrator disposed of the estate to the creditors and heir apparent, it was held that his bondsmen were liable to the supposed decedent for his property which the administrator had disposed of.[79]

The liability of the bondsmen for the debt of an insolvent representative to the estate is measured by his liability. They cannot be called upon to pay a debt which would be wholly or partially uncollectible were he not such representative,[80] nor are they released from paying such portion as he had the means to pay during administration,[81] and if he has charged himself with the full amount of his debt, equity will relieve his sureties to the extent of his inability to pay.[82]

Under the Oregon practice, the liability of the bondsmen in such cases in an action by a creditor covers the full amount of the indebtedness, and fraud of the executor in concealing from them the knowledge of his insolvency is no defense.[83]

78 Jones' Exr. v. Jones, 14 B. Mon. (Ky.) 373.

79 Williams v. Kiernan, 25 Hun (N. Y.), 355.

80 Baucus v. Barr, 5 Hun (N. Y.), 582; McCarty v. Frazer, 62 Mo. 263.

81 Kader v. Yeargin (Tenn.), 3 S. W. 178; Judge of Probate v. Sulloway, 68 N. H. 511, 44 Atl. 720.

82 Harker v. Irick, 10 N. J. Eq. 369.

83 United Brethren v. Aikin, 45 Or. 247, 77 Pac. 248.

§ 469. Liability in regard to real estate.

As the personal representative is entitled to possession of real estate pending administration, when he takes charge of it, the bondsmen would become liable for the rents and profits received therefrom by him,[84] and for failure to rent the property and keep the buildings in repair.[85] They are not liable for rents collected by him after his removal from office.[86]

The bondsmen of executors and administrators *de bonis non* with the will annexed are liable for moneys arising from sales of real estate made pursuant to the terms of wills,[87] on the principle that whatever is required to be converted into personalty is considered as personalty and must be so accounted for.[88] In Rhode Island his bondsmen are not liable.[89]

The bondsmen have been held liable for a loss sustained by the estate caused by a needless delay in making a sale of real estate for payment of debts under order of the court.[90]

§ 470. Liability for proceeds of sales of real estate under order of court.

The special bond which the district court may require of an executor or administrator on sale of lands for payment of debts is subsidiary to the first, and

84 May v. Kelley, 61 Ala. 489; Strong v. Wilkson, 14 Mo. 116.

85 See § 219, *supra*.

86 Brooks v. Jackson, 125 Mass. 307.

87 Zeigler v. Sprenkle, 7 Watts & S. (Pa.) 178; Commonwealth v. Forney, 3 Watts & S. (Pa.) 356; Simpson v. Kelso, 8 Watts (Pa.), 252.

88 Craig v. Leslie, 3 Wheat. (U. S.) 563.

89 Probate Court v. Hazard, 13 R. I. 3.

90 Stratton v. McCandless, 27 Kan. 296.

limits the liability of its sureties to the proceeds of the sale.[91] As far as such proceeds are concerned, it is a cumulative bond.[92]

For failure to account for such proceeds the rule is that an action will lie on either or both bonds, and that it is not necessary to first exhaust the administration bond before bringing action on the second bond.[93]

§ 471. Action on the bond.

The petition on the bond of an executor or administrator must set up its execution and approval,[94] all the steps taken to fix the liability of the principal, his neglect or refusal to comply with the judgment or order of the court, and the granting of permission by the county judge to bring the action.[95] An objection that permission of the county court was not obtained may be taken advantage of by plea in abatement.[96]

The bondsmen are bound by the recitals in the bond.[97] They are estopped from denying the legality of the appointment of their principal and from setting up any defense which is in the nature of an objection

91 Worgang's Admr. v. Clipp, 21 Ind. 119.

92 White v. Schaberg, 131 Mich. 319, 91 N. W. 168.

93 White v. Schaberg, 131 Mich. 319, 91 N. W. 168; Durfee v. Joslyn, 92 Mich. 211, 52 N. W. 626. The Michigan and Nebraska statutes on this matter are the same.

94 Jeffree v. Walsh, 14 Nev. 143.

95 Stratton v. McCandless, 27 Kan. 296; Slagle v. Entrekin, 44 Ohio St. 637, 10 N. E. 675; Tucker v. People, 87 Ill. 76; Johannes v. Youngs, 45 Wis. 445.

96 Johannes v. Youngs, 45 Wis. 445.

97 Thompson v. Rush, 66 Neb. 758, 92 N. W. 1060; Fridge v. State, 3 Gill & J. (Md.) 114.

to their own acts.[98] Their liability is coextensive with that of their principal. As long as there remains any duty which he is legally liable to perform, so long the obligation of the bond remains.[99]

They are in privity with their principal, bound by any decree of the court which binds him and estopped from questioning the order directing payment to a creditor, heir or legatee of the amount due him,[100] unless the court was without jurisdiction in making the order.[101]

The liability does not end with the discharge of the executor or administrator. If the decree approving his final account is set aside for fraud or other cause, the liability of the bondsmen is revived and the bondsmen held as though no discharge had been entered.[102]

If the preliminary proceedings have been regular and in compliance with the law, about the only defense open to the bondsmen is fraud. They may show

98 Johnson v. Smith, 25 Hun (N. Y.), 171; Williamson v. Woodman, 72 Me. 163; Nash v. Sawyer, 114 Iowa, 742, 87 N. W. 707; State v. Mills, 82 Ind. 126.

99 Wattles v. Hyde, 9 Conn. 19; Alexander v. Bryan, 110 U. S. 414, 4 Sup. Ct. Rep. 107.

100 Stovall v. Banks, 10 Wall. (U. S.) 583; Irwin v. Backus, 25 Cal. 114; Casoni v. Jerome, 58 N. Y. 315; Deobold v. Oppermann, 111 N. Y. 531, 19 N. E. 94; Towle v. Towle, 46 N. H. 431; Weber v. Noth, 51 Iowa, 375, 1 N. W. 652; Garber v. Commonwealth, 7 Pa. 265; Hobbs v. Middleton, 1 J. J. Marsh. (Ky.) 177; Scofield v. Churchill, 72 N. Y. 565; Ralston v. Wood, 15 Ill. 159.

101 Robbins v. Burridge, 128 Mich. 25, 87 N. W. 93.

102 Tucker v. Stewart, 147 Iowa, 294, 126 N. W. 183. In the above case a final decree was set aside for fraud fourteen years after it was entered. The judgment of the lower court was for the bondsmen, and it was reversed by the supreme court. A bondsman cannot be sure that he is released from liability until the statute of limitations has run.

that their signatures were obtained by means of fraudulent acts, misrepresentations or devices on the part of their principal,[103] provided they have not, by their own negligence, become estopped from denying the execution or validity of the bond as against the creditors or other beneficiaries of the estate.[104] They may also show that the decree or order of the county court fixing their liability was obtained by fraud or collusion;[105] or that the liability which the bond was intended to secure was itself barred by the statute of limitations.[106] The recovery of the plaintiff is limited to the amount which the court found to be due him from the executor or administrator, and which the court ordered paid.[107]

Form No. 206.

PETITION BY CREDITOR AGAINST SURETIES ON EXECUTOR'S BOND.

In the District Court of ——— County, Nebraska.

L. M., Plaintiff, vs. C. D., E. F., and G. H., Defendants.

The plaintiff complains of the defendants, and for cause of action alleges, that on the ——— day of ———, 19—, said defendant C. D., as principal, and E. F. and G. H., as sureties, executed and delivered to the county judge of said county their certain bond in the words and figures following [insert copy of bond]; that on the ——— day of ———, 19—, said bond was approved by said county judge, and

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103 Campbell v. Johnson, 41 Ohio St. 538.

104 Engstad v. Syverson, 72 Minn. 188, 75 N. W. 125.

105 Williamson v. Howell, 4 Ala. 693; Weber v. Noth, 51 Iowa, 375, 1 N. W. 652; Irwin v. Backus, 25 Cal. 214; Heard v. Lodge, 20 Pick. (Mass.) 53; Stovall v. Banks, 10 Wall. (U. S.) 583.

106 Biddle v. Wendell, 37 Mich. 452.

107 Harrison v. Clark, 87 N. Y. 572; Casoni v. Jerome, 58 N. Y. 315; Seawell v. Buckley's Distributees, 54 Ala. 592; State v. Holt, 27 Mo. 340; Probate Court v. Matthews, 6 Vt. 269.

filed in said county court, and thereupon letters testamentary upon the estate of said A. B., deceased, issued out of and under the seal of said court to said C. D., appointing him executor of the estate of said A. B., deceased.

Second. That on the ——— day of ———, 19—, plaintiff filed a claim against said estate of said A. B. with the county judge of said county, and which said claim or demand was on the ——— day of ———, 19—, allowed by said county judge in the sum of ——— dollars ($———); that on the ——— day of ———, 19—, a decree of said court was entered ordering and directing said C. D., executor as aforesaid, to pay to plaintiff said sum of ——— dollars ($———), and that plaintiff thereupon and on the date last aforesaid demanded of said C. D., as executor as aforesaid, said sum of ——— dollars ($———), and the said C. D. refused to pay the same, and no part of said sum has been paid to this plaintiff.

Third. That on the ——— day of ———, 19—, plaintiff made application to the county court of said ——— county for leave to bring an action on the bond of said C. D., as executor, and that on the date last aforesaid a certified copy of such bond, with a certificate of permission to bring suit indorsed thereon in the words and figures following [copy certificate], was delivered to plaintiff.

Fourth. That there is therefore now due from the defendants to the plaintiff the sum of ——— dollars, with interest thereon from the ——— day of ———, 19— [date of allowance of claim or order of payment in case no interest was to be paid on claims from date of their allowance].

Plaintiff therefore prays judgment against the defendants for the sum of ——— dollars ($———), with interest thereon from the ——— day of ———, 19—, and costs of suit.

(Signed) L. M.,
By R. J. S., His Attorney.

[Add verification, Form No. 5.]

Form No. 207.

PETITION FOR CONVERSION.

In the District Court of ———County, Nebraska.

L. M., Plaintiff, vs. C. D., E. F., and G. H., Defendants.

The plaintiff complains of the defendants, and for cause of action alleges, that A. B., late of ——— county, Nebraska, departed this life in said county on the ——— day of ———, 19—, intestate; that

on the ——— day of ———, 19—, said C. D., as principal, and E. F. and G. H., as sureties, executed and delivered to the county judge of said county their certain bond in the words and figures following [insert copy of bond]; that on the ——— day of ———, 19—, said bond was approved by said county judge and filed in said county court, and thereupon letters of administration upon the estate of said A. B., deceased, issued out of and under the seal of said court to said C. D., appointing him administrator of the estate of said A. B., deceased.

Second. That said C. D. thereupon entered on his said administration, and collected a large amount of assets belonging to said estate.

Third. The following described goods and chattels: One promissory note executed by X. Y. to said A. B. for the sum of ——— dollars, dated ———, 19—, due ———, 19—; twenty-four head of three-year-old steers, branded "V" on right shoulder, said brand being registered in the office of the county clerk of ——— county, Nebraska, as the brand of said A. B. [describe as particularly as possible all the goods, chattels, credits, and effects of the estate which plaintiff claims came into the possession of the administrator, and which are not included in the inventory],—belonging to said estate, came into the possession of the said C. D., administrator, which said above-described assets the said C. D., administrator, neglected and refused to return in the inventory of property belonging to said estate, but has converted the same to his own use, and has wholly neglected and refused to account for the same, either in his accounts or settlement in said county court.

Fourth. That plaintiff is one of the legal heirs and distributees of said estate.

Fifth. That on the ——— day of ———, 19—, plaintiff made application to the county court of said county for leave to bring an action on the bond of said C. D., administrator, and that on the date last aforesaid a copy of said bond, with the certificate of permission indorsed thereon, was delivered by said county court to this plaintiff. The following is a copy of said certificate: [Copy certificate.]

Sixth. That plaintiff has sustained damages by reason of the wrongful conversion of said property in the sum of ——— dollars.

[Add prayer for relief as in Form No. 206.]

§ 472. Action—When barred.

Whenever an action is rightfully brought by any creditor, heir at law, next of kin or legatee pursuant to the provisions of the statutes regulating suits on

executors' and administrators' bonds, the same shall, so far as the causes of action therein are concerned, be a bar to any other cause of action which might have accrued under the statutes regulating suits on bonds, but no further; nor shall such bar arise from the failure of any creditor, heir at law, next of kin, legatee or devisee to bring an action after the same shall have accrued, and before the appointment of an administrator.[108]

[108] Rev. Stats., c. 17, § 261, [1525].

CHAPTER XXXV.

APPEALS AND PROCEEDINGS IN ERROR.

§ 473. Review of Judgments and Decrees.
474. Parties to Appeal or Proceedings in Error.
475. Appealable Orders.
476. Appeals by Personal Representatives.
477. Appeals by Other Parties.
478. Appeals by Other Parties from Decrees Adverse to the Estate.
479. Transcript.
480. Administration Pending Appeals.
481. Proceedings in Appellate Court.
482. Failure to Perfect Appeals.
483. Order or Decree of District Court.
484. Writs of Error.
485. Procedure.
486. Supersedeas Bond.
487. Summons in Error.
488. Hearing in District Court.
489. Judgment of District Court in Error Proceedings.

§ 473. Review of judgments and decrees.

Final orders, judgments and decrees of the county court in probate and guardianship proceedings may be appealed to the district court of the county in which the decision was rendered.[1] A writ of error also lies to the district court to bring to that court for review jurisdictional or prejudicial errors appearing on the face of the record.[2] The procedure on probate appeals is governed by statutes differing largely from the sections of the code governing appeals to a higher court. As in the case of appeals from justice court, the case or proceeding is tried anew on substantially the same pleadings as in the county court.

1 Rev. Stats., c. 17, § 262, [1526].

2 Civ. Code, § 617; Rogers v. Reddick, 10 Neb. 352, 6 N. W. 413.

In Oregon appeal lies from the county to the circuit court on all final decisions of the court of probate,[3] as does also the writ of review, which is substantially the same as the Nebraska writ of error, or *certiorari* at common law.[4] The general provisions of the code, chapter V or title VII, for appeals from a lower to a higher court, govern appeals to the circuit court, with the exception that appeals from judgments are tried anew before a jury, and those from orders and decrees are heard on the transcript and the evidence before the lower court.[5] There are a number of matters of practice which are confined to appeals from the county to the circuit court.

§ 474. Parties entitled to appeal or to proceedings in error.

Many of the decisions of the county court in probate and administration matters are strictly *in rem*, with no adverse party, so that the rule governing the right of a party to a civil action to appeal does not apply. Any person affected by the order, judgment or decree complained of is a proper appellant or plaintiff in error.

The test of the right is, does the order or decree complained of operate directly upon the vested or contingent rights of the party; does it, in any manner, increase or diminish the value of his right or interest in any part of the estate.[6] Under this rule the sur-

3 L. O. L., § 945.

4 Garnsey v. County Court, 33 Or. 205, 54 Pac. 1089; Farrow v. Nevin, 44 Or. 496, 75 Pac. 711.

5 L. O. L., § 945.

6 Cowherd v. Kitchen, 57 Neb. 426, 77 N. W. 1107; Edney v. Baum, 59 Neb. 147, 80 N. W. 502; Missouri Pac. Ry. Co. v. Jay, 53 Neb. 747, 74 N. W. 259; Deering v. Adams, 34 Me. 401; Bryant v. Thompson, 128 N. Y. 426, 28 N. E. 522; In re Estate of Wright, 49 Cal. 550.

viving husband or wife, an heir, legatee or devisee, an executor or administrator, may appeal from any judgment or order which is adverse to the estate,[7] and a creditor from the order allowing the demand of another creditor.[8]

An executor or administrator is a proper appellant in his representative capacity only from such final decisions as affect the estate as a whole, and not those which only reach the right or interest of a person or class. If property is given him in trust, he has such an interest in it as makes him a proper appellant from any order which the court may make concerning it.[9] He is not a proper appellant from a final order of distribution.[10] Legatees cannot appeal from an order which does not affect their interests,[11] nor can any party from a matter to which he expressly consented in open court.[12]

§ 475. Appealable orders.

Any judgment or order or decree of the county court which is a final decision on actual, vested or contingent interests is subject to appeal to the district court.[13]

7 Rev. Stats., c. 17, § 264, [1528], § 263, [1527].

8 Rev. Stats., c. 17, § 271, [1535].

9 In re Creighton's Estate, 91 Neb. 654; 136 N. W. 1001.

10 Merrick v. Kennedy, 46 Neb. 264, 64 N. W. 989.

11 Cowherd v. Kitchen, 57 Neb. 426, 77 N. W. 1107.

12 In re Whitom's Estate, 86 Neb. 367, 125 N. W. 606. As to who are entitled to appeal from a decree admitting or refusing to admit a will to probate, see § 84, *supra*.

13 In re Estate of Gilbert, 104 N. Y. 200; Ferguson's Admr. v. Carson's Admr., 86 Mo. 673; Peeper v. Peeper, 53 Wis. 507, 10 N. W. 604; Spitley v. Frost, 15 Fed. 299.

Interlocutory orders are not appealable, but may be questioned in the appeal from the final order to which they led.[14]

An order appointing a special administrator is not subject to review,[15] for to do so would defeat the purpose of the appointment, but an order removing a special administrator and appointing another in his place is appealable.[16]

An order determining that a certain payment was not a gift *causa mortis* and directing the party claiming as donee and who was a former administrator to turn over the same to his successor is final,[17] as is also the decree or order entered in the hearing on a petition to set aside an order barring claims against an estate,[18] or an order refusing to reopen the decree allowing the final account.[19]

There are many other orders or decrees of the county court which are subject to review by a higher court and have been mentioned in former chapters.

Orders extending the time for the payment of debts or presentation of claims, granting or refusing to grant a continuance of any hearing, are interlocutory in their character, matters of discretion, and are not considered subject to either appeal or error.

14 Webb v. Stillman, 26 Kan. 371; Lutz v. Christy, 67 Cal. 457, 8 Pac. 39; Hodges v. Thacher, 23 Vt. 455; Felton v. Sowles, 57 Vt. 382.

15 Cadman v. Richards, 13 Neb. 384.

16 In re Estate of Pope, 75 Neb. 550, 106 N. W. 659.

17 Foster v. Murphy, 76 Neb. 576, 107 N. W. 843.

18 Ribble v. Furmin, 69 Neb. 38, 94 N. W. 967.

19 Martin v. Long, 53 Neb. 694, 74 N. W. 43.

§ 476. Appeal by a personal representative.

All appeals must be taken within thirty days after the decision complained of is made.[20] An executor, administrator, guardian or guardian *ad litem* appeals by filing notice thereof within the required time in the county court and paying the fee for a transcript. No bond is required of them,[21] and no notice to the adverse party need be given.[22] The district court has jurisdiction to determine whether the appellant should give bonds and if it finds that the appeal was taken by the representative in his personal capacity, it should be dismissed.[23] No bond is required of an executor who has given a bond as residuary legatee.[24]

Form No. 208.

NOTICE OF APPEAL BY EXECUTOR OR ADMINISTRATOR.

[Title of Cause and Court.]

Notice is hereby given that C. D., administrator of the estate of said A. B., hereby appeals to the district court of said county from an order of said county court made and entered on the ——— day of ———, 19—, allowing a claim against said estate in the sum of $———, and requests that a transcript of the proceedings of the court in said matter be filed in said district court within the time provided by law.

Dated this ——— day of ———, 19—.

(Signed) C. D.,
Administrator of Estate of A. B.

Under the Oregon practice, a party desiring to appeal to the circuit court may give notice in open court, or before the judge thereof if at chambers, that he ap-

20 Rev. Stats., c. 17, § 263, [1529]; L. O. L., § 550, subd. 5.

21 Rev. Stats., c. 17, §§ 264, 266, [1528], [1529].

22 Bazzoo v. Wallace, 16 Neb. 293, 20 N. W. 314.

23 Rhea v. Brown, 4 Neb. Unof. 461, 94 N. W. 716.

24 Thompson v. Pope, 77 Neb. 338, 109 N. W. 498.

peals from the decision, order, judgment or decree to the circuit court of the county, at the time the same is entered. Such notice must be entered on the records of the court. If notice is not given at the time the order or decree is made, the appellant may, within thirty days from its entry, serve a notice on the adverse party or parties, or his or their attorney, at any place in the state. Such notice must contain the title of the cause, the names of the parties, and notify the adverse party or his attorney that an appeal is taken to the circuit court from the judgment, order or decree, or some part thereof.[25] It is not necessary to set out the decree in full or even its substance, but it must be sufficient to advise the adverse party of the particular act of the court from which the party appeals.[26]

Notice, either made orally on the date of the entry of the judgment or order,[27] or in writing, in due form and served on the adverse party or his attorney, is necessary to give the circuit court jurisdiction. It cannot be waived by stipulation.[28]

The county court or judge thereof, may in his discretion permit an appeal by an executor, administrator or guardian without the giving of an undertaking or merely giving an undertaking for the costs. All other appellants are required, within ten days from the giving of notice or service of notice of appeal, to cause to be served on the adverse party an undertaking with one or more sureties to pay all damages, costs and disbursements awarded against him on the appeal, and in order to operate as a stay it must further provide that he will satisfy any judgment or decree rendered

25 L. O. L., § 550, subd. 1.

26 Christian v. Evans, 5 Or. 254; Crawford v. Wist, 26 Or. 596, 39 Pac. 218.

27 Barde v. Wilson, 54 Or. 68, 102 Pac. 301; Crawford's Estate, 51 Or. 76, 90 Pac. 147, 93 Pac. 820.

28 Oliver v. Harvey, 5 Or. 360; Shirley v. Burch, 16 Or. 1, 18 Pac. 351.

against him and obey the decree of the appellate court.[29] Within such ten days the original undertaking with the proof of service indorsed thereon must be filed with the clerk of the court. The amount of the undertaking is fixed by the court.[30] The appellee has five days from date of service of the undertaking in which to object to the sufficiency of the sureties, and if objections are filed, they must justify in like manner as in bail on arrest.[31]

The appeal is deemed perfected from the expiration of the time for exception to sufficiency of the sureties or from the justification thereof, but where the party in good faith, after due notice of his appeal, omits through mistake to do any other act, including filing of an undertaking, necessary to perfect the appeal or stay proceedings, the lower court or judge thereof, or the appellate court, may permit an amendment or performance of such act on such terms as may be just.[32]

§ 477. Appeals by other parties.

Any other party against whom an adverse order or decree has been entered by the county court desiring to appeal from the same shall give bond in such sum as the court may direct, within thirty days, signed by two or more sureties to be approved by the court, conditioned that the appellant will prosecute such appeal to effect, without unnecessary delay, and pay all costs that may be adjudged against him.[33]

29 L. O. L., § 550, subd. 2, § 551.

30 L. O. L., § 550.

31 L. O. L., § 550, subd. 3.

32 L. O. L., § 550, subd. 5.

33 Rev. Stats., c. 17, § 264, [1528]; In re Powers' Estate, 79 Neb. 680, 113 N. W. 198; Jones v. Piggott, 68 Neb. 140, 93 N. W. 1000.

The bond should run to the county judge. It is not void if it runs to the state of Nebraska as obligee. If objections are made, the appellate court should require appellant to file a new bond.[34]

If the records do not show an order of the court fixing its amount, and it appears to have been approved by the county court and filed within the thirty days, it will be presumed to have fully conformed to the court's orders.[35] If it is defective for any reason, as being signed by but one surety,[36] or failing to contain all the statutory conditions, the court will not be deprived of jurisdiction. A new one may be filed which does comply with the law.[37] A bond which is defective because a part of the necessary conditions are omitted does not operate as a *supersedeas*, and the county court may proceed in the matter the same as if no bond were filed.[38]

Form No. 209.

BOND OF APPELLANT.

[Title of Cause and Court.]

Know all men by these presents, that we, E. F., as principal, and G. H. and L. M., as sureties, all of said ——— county, Nebraska, are held and firmly bound unto the county judge of said ——— county, Nebraska, in the penal sum of ——— dollars, for which payment well and truly to be made we do hereby jointly and severally bind

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34 In re Gannon's Estate, 64 Neb. 220, 89 N. W. 1023.

35 Jacobs v. Morrow, 21 Neb. 233, 31 N. W. 739.

36 Casey v. Pebbles, 13 Neb. 7, 12 N. W. 840.

37 O'Dea v. Washington County, 3 Neb. 122.

38 In re Jones' Estate, 83 Neb. 841, 120 N. W. 839.

ourselves, our heirs, executors, administrators, and assigns by these presents.

Dated this ——— day of ———, 19—.

Whereas, on the ——— day of ———, 19—, in the county court of ——— county, Nebraska, an order was entered by said court allowing the final account of C. D. as administrator of said estate, and said E. F., an heir of said A. B., desires to appeal from the order of said court allowing said account to the district court of ——— county, Nebraska:

Now, therefore, the condition of this obligation is such that, if the said E. F. shall prosecute said appeal to effect without unnecessary delay, and pay all debts, damages, and costs that may be adjudged against him, then these presents to be null and void; otherwise to be and remain in full force and effect.

(Signed) E. F.
G. H.
L. M.

I hereby approve of the foregoing bond, both as to form and sufficiency of sureties, this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

§ 478. Appeals by other parties from decrees adverse to the estate.

A creditor, heir, devisee, legatee or distributee may appeal from an order or decree of the county court which is adverse to the estate.[39] The right of such party to take the matter to a higher court does not depend on the failure of the executor or administrator to appeal.[40]

Such parties are required to make a written application to the county court to fix the amount of the appeal bond. Such bond, aside from the usual conditions

39 Rev. Stats., c. 17, § 271, [1535].

40 Ribble v. Furmin, 71 Neb. 108, 98 N. W. 420.

contained in appeal bonds of other parties, must be given to also secure the intervening damages and costs to the adverse party.[41] It must be filed within thirty days.[42]

Form No. 210.

BOND OF CREDITOR ON APPEAL FROM ALLOWANCE OF CLAIM OF ANOTHER CREDITOR.

[Title of Cause and Court.]

Know all men by these presents, that we, E. F., as principal, and G. H. and L. M., as sureties, all of ——— county, Nebraska, are held and firmly bound unto the county judge of ——— county, Nebraska, in the penal sum of ——— dollars, for which payment well and truly to be made we do hereby jointly and severally bind ourselves, our heirs, executors, administrators and assigns.

Dated this ——— day of ———, 19—.

Whereas, on the ——— day of ———, 19—, an order was entered in the county court of ——— county, Nebraska, allowing a certain demand of ——— dollars against said estate and in favor of X. Y., and said E. F., as a creditor of said estate, and for the reason that said estate is insolvent, is desirous of appealing from said order to the district court of said county:

Now, therefore, the condition of this obligation is such that, if the said E. F. shall save said estate harmless from all damages and costs, and said X. Y. from intervening damages and costs, and will prosecute this appeal to effect without unnecessary delay, and pay all debts, damages, and costs that may be adjudged against him, then

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41 Rev. Stats., c. 17, § 271, [1535]; Drexel v. Rochester Loan Co., 65 Neb. 231, 91 N. W. 254.

42 Bazzo v. Wallace, 16 Neb. 290, 20 N. W. 315; Malick v. McDermot's Estate, 25 Neb. 268, 41 N. W. 157; Davis v. Davis, 27 Neb. 859, 44 N. W. 40; Drexel v. Rochester Loan Co., 65 Neb. 231, 91 N. W. 254. The cases above cited all hold that that portion of section 1535 of the Revised Statutes giving an interested party ten days' time after the expiration of the time given an executor to appeal was repealed by section 263 et seq., being sections 1, 2 and 3 of the act of February 28, 1881, and that the thirty day limit for taking an appeal from any order or decree of the county court applied in all cases.

these presents to be null and void; otherwise to be and remain in full force and effect.

(Signed) E. F.
G. H.
L. M.

§ 479. Transcript.

It is the duty of the county judge, within ten days after the filing and approval of the bond, and on payment of his fees, or within ten days after receiving notice of appeal by a personal representative, to make a certified transcript of the record of the proceedings relative to the matter appealed from, and transmit the same to the clerk of the district court.[43] It should contain a copy of the pleadings filed and proceedings had in the particular matter appealed from, and the order or decree complained of. The duty of the court to transmit it is ministerial.[44]

The district court acquires jurisdiction of the appeal only where the transcript and bond are filed within forty days from the date of the order and within ten days from the date the bond was filed in the county court.[45]

If the transcript and bond are filed after the time, the adverse party, by appearing generally and pleading to the issue or applying for continuance, waives his right to move to dismiss.[46]

If the appeal is not docketed in time on account of the neglect of the county judge, and the appellant is

[43] Rev. Stats., c. 17, § 266, [1530].

[44] In re Estate of McShane, 84 Neb. 70, 120 N. W. 1018.

[45] In re Estate of Powers, 79 Neb. 680, 113 N. W. 198; Jones v. Piggott, 68 Neb. 140, 93 N. W. 1000; Rhea v. Brown, 4 Neb. Unof. 461, 94 N. W. 716.

[46] Stevens v. Nebraska & Iowa Ins. Co., 29 Neb. 187, 45 N. W. 284.

free from fault, he cannot be deprived of his rights.[47] In such case the appeal should be docketed and heard the same as if filed within the proper time.[48] In probate appeals it is the duty of the judge to transmit the records to the clerk of the district court; in civil cases, the attorney for the appellant.

Under the Oregon practice, it is the duty of the appellant to file a transcript of the record of the proceedings in the lower court with the circuit court within thirty days from the date of perfecting the appeal. Proof of service of the notice of appeal and the undertaking, when one is required of the appellant, and the original pleadings, etc., in the judgment or matter appealed from, should also be included.[49]

If the appeal is from a decree, the evidence taken in the lower court, duly certified, must also accompany the transcript.[50]

If the transcript is not filed within the time provided, the appeal shall be deemed abandoned and the effect thereof terminated, but either the trial or appellate court may upon such terms as may be deemed just enlarge the time for filing the same but cannot extend it beyond the term of the appellate court next following the appeal.[51] The filing of the notice of appeal with proof of service, where notice was not given in the entry of the judgment or decree, of the undertaking when the appeal was not taken by the personal representative, and of the evidence in case of a decree, are necessary to give the circuit court jurisdiction. The parties cannot by their appearance confer juris-

47 Continental B. & L. Assn. v. Mills, 44 Neb. 136, 62 N. W. 478; Omaha Coal & Coke Co. v. Fay, 37 Neb. 68, 55 N. W. 211; Stewart v. Raper, 85 Neb. 816, 125 N. W. 472.

48 Dobson v. Dobson, 7 Neb. 296.

49 Laws 1913, p. 617.

50 In re Plunkett's Estate, 33 Or. 417, 54 Pac. 152.

51 Laws 1913, p. 619.

diction upon the appellate court, and in the absence of such jurisdictional papers, the proceedings must be dismissed.[52]

§ 480. Administration pending appeals.

The filing of a bond, when the appeal is taken by other parties than an executor or administrator, and perfecting the appeal operate as a *supersedeas* of the order or decree from which the appeal was taken.[53] It does not suspend administration. The court retains jurisdiction over the estate and all matters connected therewith not legitimately a part of the matter in controversy.[54]

Perfecting an appeal from the order admitting or refusing to admit a will to probate, or granting or refusing letters testamentary or of administration, does not suspend the administration of the estate. If the circumstances and conditions demand, and application is made therefor, letters of special administration will issue, if they have not already been granted. The rights of creditors are independent of, and should not be affected by, any controversy between the heirs, legatees, or devisees as to the validity of the will, or as to who should administer the estate. The court may give notice to creditors, and proceed with the hearing of claims, and the special administrator has authority to represent the estate on such hearings, and interpose any proper defense or counterclaim.[55]

52 In re Plunkett's Estate, 33 Or. 417, 54 Pac. 152.

53 Rev. Stats., c. 17, § 265, [1529]; Kerr v. Lowenstein, 65 Neb. 43, 90 N. W. 931.

54 Green v. Clark, 24 Vt. 136; Hicks v. Hicks, 12 Barb. (N. Y.) 322.

55 Cadman v. Richards, 13 Neb. 384, 14 N. W. 159.

Perfecting an appeal from an order removing an executor or administrator does not have the effect of continuing him in office pending the same. His powers terminate with the date of his removal. A coexecutor or coadministrator, if there be one, otherwise an administrator *de bonis non,* take charge of the estate.[56]

When an appeal has been taken from the order allowing or rejecting claims, an accounting can be had and the administration completed, excepting only the claim in dispute.[57]

§ 481. Proceedings in appellate court.

Upon filing the transcript the appellate court obtains jurisdiction to hear, try and determine the matter the same as on appeal from the judgment of the county court in civil cases.[58] The sufficiency of the transcript can be raised only by motion, supported by affidavit, which must be filed before any action is taken by the appellee. By appearing and moving for any order or filing any pleading, the appellee is estopped from questioning its sufficiency.[59] It may be amended under the general rule regarding amendments of transcripts in appeals.[60]

The right of a party to appeal without giving the statutory bond or undertaking may be raised by

56 Knight v. Hamakar, 33 Or. 154, 54 Pac. 227, 659; Day v. Holland, 15 Or. 364, 15 Pac. 855; Dutcher v. Culver, 23 Minn. 415.

57 Section 412, *supra.*

58 Rev. Stats., c. 117, § 267, [1531].

59 In re Estate of Creighton, 88 Neb. 107, 129 N. W. 181. See L. O. L., § 555.

60 Fulton v. Ryan, 33 Neb. 456, 50 N. W. 430; Worley v. Shong, 35 Neb. 311, 53 N. W. 72; L. O. L., § 555.

motion, and if the court finds that the judgment or order appealed from affects the personal rather than the official rights of the representative, the appeal should be dismissed.[61] The personal representative by appeal waives irregularities, if any, antecedent to the date of the judgment or order appealed from, provided they are not jurisdictional.[62]

The general rule is that all judgments or proceedings appealed to the higher court must be tried on the same issues as in the county court, a liberal construction being given to the pleadings.[63] It may be tried on the same pleadings as below or new pleadings filed, the matter being largely in the discretion of the appellate court.[64] There is one exception to the rule. On an appeal from a decree of distribution, a party who did not appear in the county court may file a petition for intervention.[65]

Under the Oregon practice, an appeal from a judgment of the county court in a probate matter, such as the judgment allowing or rejecting a claim, under the special proceedings for trial of demands against an estate, is tried in the same manner as an appeal in a civil action.[66] Other final orders of the county court in probate matters are regarded as in the nature of decrees in equity, and are tried in the circuit court on

61 Rhea v. Brown, 4 Neb. Unof. 461, 94 N. W. 716.

62 Dredla v. Baache, 60 Neb. 655, 83 N. W. 916.

63 Graham v. Townsend, 62 Neb. 364, 87 N. W. 169; Estate of Fitzgerald v. First Nat. Bank, 65 Neb. 97, 90 N. W. 994; L. O. L., § 556.

64 Estate of Fitzgerald v. First Nat. Bank, 65 Neb. 97, 90 N. W. 994.

65 In re Creighton's Estate, 91 Neb. 654, 136 N. W. 1001.

66 Johnson v. Schofner, 23 Or. 115, 31 Pac. 254; Wilkes v. Cornelius, 21 Or. 341, 31 Pac. 245.

appeal anew on the pleadings, and evidence given in the lower court.[67]

In many cases of probate appeals the evidence is largely of a documentary character, but in case of the probate of wills, removal of personal representatives for misconduct and some final accounts, the questions of fact are determined by oral evidence. The decision of the county judge who heard such witnesses is entitled to great weight, and will usually be upheld, unless the appellate court is of the opinion that the weight of the testimony is the other way.[68]

The right to a jury trial depends upon the character of the issue. If equitable, or involving a matter of judicial discretion, like the competency of a person seeking the appointment as executor or administrator, the trial should be to the court as in an action in equity,[69] but if an appeal from the order on the hearing for the probate of a will, or a claim against an estate, or where a question of fact is put in issue, either party is entitled to a jury.[70] All cases being tried *de novo*, the burden of proof is the same as in the county court.

Under the Oregon practice, probate appeals are heard in the circuit court by the court without a jury.[71]

§ 482. Failure to perfect appeals.

If any claimant appealing from the disallowance of his claim shall fail to prosecute his action in the dis-

67 In re Plunkett's Estate, 33 Or. 416, 54 Pac. 152; Morrison's Estate, 48 Or. 614, 87 Pac. 1043; In re Roach's Estate, 50 Or. 189, 92 Pac. 118.

68 In re Dart's Will, 34 Or. 66, 54 Pac. 947.

69 In re Scott's Estate, 76 Neb. 28, 106 N. W. 1003.

70 Sheedy v. Sheedy, 36 Neb. 373, 54 N. W. 560.

71 Stevens v. Meyers, 62 Or. 407, 126 Pac. 39.

trict court, such court may dismiss the appeal, or a certificate may be filed in the county court, as the case may require, the same as in the case of appeals from a justice of the peace, and thereupon such claim shall be forever barred, and the county court shall proceed in the same manner as if no appeal had been taken;[72] and the same is true where a person objecting to the allowance of some other person's claim shall appeal from such allowance. In this case, upon motion of the adverse party, and upon his producing an attested copy of the record and papers showing such appeal, the district court shall cause the appeal to be docketed, affirm the allowance appealed from, and enter judgment for costs against the appellant.[73] It may be stated as a general rule that when the district court dismisses an appeal, for whatever cause, the effect of the dismissal is to revive the original order, judgment, or decree, and give it the same force as if no appeal had been taken.[74]

If it appears that the appeal was taken vexatiously or for delay, the court shall adjudge that the appellant pay the costs thereof, including an attorney's fee, to the adverse party, the court to fix the amount. and the bond is liable therefor in cases where it is required.[75]

72 Rev. Stats., c. 17, § 269, [1533].

73 Rev. Stats., c. 17, § 290, [1534].

74 Bell v. Walker, 54 Neb. 222, 74 N. W. 617; Cleveland v. Quilty, 128 Mass. 578.

75 Rev. Stats., c. 17, § 264, [1528]. This section covers vexatious appeals by an executor or administrator. See § 477, *supra*.

§ 483. Judgments and decrees of the district court on appeal.

All probate appeals being tried *de novo* in the district court, the judgment or decree entered is final.[76] It is not a modification of the decision of the lower court, but a judgment or decree of the appellate court.[77] If in favor of the estate, it is enforceable by district court process. In other cases, it must be certified to the county court and its provisions complied with under the process or order of that court. The district court cannot issue an execution against an executor or administrator in his representative capacity.[78]

It may be taken to the supreme court in the same manner as other final decisions of the district court,[79] except that a personal representative may appeal without giving bond.[80] Any other appellant must give the statutory undertaking.[81]

§ 484. Writ of error.

Where manifest error affecting the jurisdiction appears on the record, or where the court has exercised functions erroneously to the manifest prejudice of a party, the proceedings may be reviewed by error to the district court. The repeal of the statute regulating

[76] Ribble v. Furmin, 69 Neb. 38, 94 N. W. 967; Williams v. Miles, 73 Neb. 193, 102 N. W. 402.

[77] In re Roach's Estate, 50 Or. 189, 92 Pac. 118.

[78] Bennett v. Taylor, 4 Neb. Unof. 800, 96 N. W. 669.

[79] Williams v. Miles, 73 Neb. 193, 102 N. W. 402, 105 N. W. 181, 106 N. W. 769.

[80] Kerr v. Lowenstein, 65 Neb. 43, 90 N. W. 931.

[81] In re John's Will, 30 Or. 522, 47 Pac. 341.

the taking of cases to an appellate court by writ of error[82] applies to the removal of cases from the district to the supreme court.[83] It is a question whether such right actually exists under the code, but as was said in the case last cited, "the practice heretofore used may be adopted so far as may be necessary to prevent a failure of justice." Previous to the act of 1905, the right was expressly recognized in a number of probate cases.[84]

Under the Oregon practice, the writ of review, which is identical with the common-law writ of *certiorari*,[85] may issue to the county court in all probate cases where such court has exercised its functions erroneously, or has exceeded its jurisdiction, to the injury of some substantial right of a party.[86] It is the usual remedy for prejudicial errors appearing on the face of the record, not based on the rulings of the lower court, on the law and the evidence and the application of the law to the facts, or where the record shows that the court was without jurisdiction.[87]

§ 485. Procedure.

The district court of the county within which the administration is had acquires jurisdiction of error proceedings by the filing of a petition in error within six months from the entry of the order or decree com-

82 Laws 1905, c. 174, p. 657.

83 Engles v. Morgenstern, 85 Neb. 51, 122 N. W. 688.

84 Rogers v. Redick, 10 Neb. 322, 6 N. W. 413; Herman v. Beck, 68 Neb. 566, 94 N. W. 512; Dredla v. Baache, 60 Neb. 655, 83 N. W. 916,

85 L. O. L., § 602.

86 Garnsey v. County Court, 33 Or. 295, 54 Pac. 1089; Malone v. Cornelius, 34 Or. 194, 55 Pac. 536.

87 Garnsey v. County Court, 33 Or. 295, 54 Pac. 1089; Farrow v. Nevin, 44 Or. 496, 75 Pac. 711.

plained of, except where a party is an infant or of unsound mind, or imprisoned, in which case he is allowed one year, exclusive of the time of his disability,[88] which petition should set out the specific errors complained of by formal allegation.[89]

There are no code provisions for settling and signing a bill of exceptions in probate proceedings in the county court, but the right to the same has been impliedly recognized.[90]

Removal of a case to the district court by error is therefore an available remedy only when the jurisdictional defects appear on the face of the record, and the practice is substantially the same as on error to the district court from a justice of the peace.

Form No. 211.

PETITION IN ERROR.

In the District Court of ——— County, Nebraska.

E. F., Plaintiff in Error, vs. C. D., Administrator of the Estate of A. B., Deceased, Defendant in Error.

The plaintiff complains of the defendant for that on the ——— day of ———, 19—, in a proceeding before the county court of said county, in the matter of the estate of A. B., deceased, said court entered an order dismissing the petition of plaintiff for the revocation of the probate of the last will and testament of the said A. B. A transcript of the proceedings is hereto attached. The plaintiff alleges that there is error in said proceedings and order, in this:

(1) State specifically each and all the errors relied on.

(2) Said court erred in sustaining the motion of said C. D., administrator, to dismiss said petition, and in dismissing the same.

The plaintiff therefore prays that said order may be reversed, and a new hearing granted in said action, and for such other relief as may be just and equitable.

(Signed) E. F.

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88 Civ. Code, §§ 616, 644.

89 Dredla v. Baache, 60 Neb. 655, 83 N. W. 916.

90 Herman v. Beck, 68 Neb. 566, 94 N. W. 512.

A transcript of the proceedings containing the final order, judgment or decree sought to be reversed, vacated or modified must be filed with the petition.[91] The petition need not be verified.[92]

Under the Oregon practice, the writ is allowed by the circuit court, or a judge thereof, of the county wherein the decision or determination sought to be made was entered. The petition must describe with sufficient certainty the decision complained of and set out specifically the errors therein,[93] and must be signed by the plaintiff or his attorney, and verified by the certificate of an attorney of the court, to the effect that he has examined the process or proceeding, and the decision or determination therein, and that the same is erroneous as alleged in said petition.[94]

It should set up the facts showing the illegal action of the lower court and the consequent injury, and not conclusions therefrom.[95] The party applying for the writ is denominated the plaintiff and the other parties defendants.

Form No. 211a—Oregon.

PETITION FOR WRIT OF REVIEW.

[Title of Cause and Court.]

C. D., plaintiff herein, respectfully represents that on the ——— day of ———, 19—, letters testamentary upon the estate of A. B., deceased, were issued to him out of and under the seal of the county court of said county; that on the ——— day of ———, 19—, one E. F. presented to plaintiff a certain demand against said estate, the same being a promissory note for the sum of $———, which said alleged

91 Civ. Code, § 620.

92 Newlove v. Woodward, 9 Neb. 505, 4 N. W. 237.

93 L. O. L., § 604; Farrow v. Nevin, 44 Or. 498, 75 Pac. 711; Curran v. State, 53 Or. 154, 99 Pac. 421.

94 L. O. L., § 604.

95 Southern Oregon Co. v. Coos County, 30 Or. 250, 47 Pac. 852; Southern Oregon Co. v. Gage, 31 Or. 590, 47 Pac. 1101.

claim was on the said ——— day of ———, 19—, examined and rejected by said plaintiff as the same appeared on the face thereof to be barred by the statute of limitations, more than five years having elapsed since the same became due and since any payments have been made thereon; that said E. F. filed said claim in the county court of said county and gave notice to plaintiff in due form of his application for hearing thereon before said court, and said court on the ——— day of ———, 19—, entered an order allowing said claim in the sum of $———, and that said court acted without jurisdiction in allowing said claim.

Plaintiff therefore prays that a writ of review issue out of and under the seal of said district court to the said county court of said ——— county.

Dated this ——— day of ———, 19—.

(Signed) C. D.

State of Oregon,
County of ———, ss.

I, C. M. W., an attorney of the circuit court of said county, do hereby certify that I have examined the proceedings in said county court of said county in the matter of the special proceedings in regard to the claim of E. F. against the estate of A. B., deceased, and the judgment of said county court thereon, and that proceedings and judgment are erroneous as alleged in said petition.

Witness my hand this ——— day of ———, 19—.

C. M. W.,
Attorney.

§ 486. Supersedeas bond.

The district court acquires jurisdiction by the filing of the petition in error,[96] but proceedings in error do not operate as a stay unless the clerk of the district court shall take a written undertaking to the defendant in error, executed on the part of the plaintiff in error with one or more sufficient sureties, to the effect that the plaintiff will pay all costs that may accrue on such proceedings in error, together with the amount of any judgment that may be rendered against such

[96] Welton v. Beltezore, 17 Neb. 401, 23 N. W. 1.

plaintiff in error, either on the further trial of the case after the judgment has been reversed or set aside, or upon and after affirmation thereof in the district court.[97]

Under the Oregon practice, an undertaking, in the sum of not less than fifty nor more than one hundred dollars, to be fixed by the court, conditioned for the payment of all costs and disbursements that may be adjudged to the defendant on review, is required before the writ issues.[98] The undertaking does not operate as a stay unless the court so directs in the writ, and in such case it should be fixed by the court at an adequate amount.[99]

Form No. 212.

BOND OF PLAINTIFF IN ERROR.

Know all men by these presents, that we, E. F., as principal, and G. H. and L. M., as sureties, all of ——— county, Nebraska, are held and firmly bound unto C. D., executor of the estate of A. B., deceased, in the penal sum of ——— dollars, for which payment well and truly to be made we do hereby jointly and severally bind ourselves, our heirs, executors, administrators, and assigns.

Dated this ——— day of ———, 19—.

Whereas, on the ——— day of ———, 19—, E. F. filed in the office of the district court of ——— county, Nebraska, a petition in error to obtain a reversal of an order rendered by the county court of said ——— county, Nebraska, on the ——— day of ———, 19—, dismissing the petition of the said E. F. for the revocation of the order admitting to probate the will of the said A. B., theretofore made in said proceeding, and taxing the costs in the sum of ——— dollars against said E. F., plaintiff in error:

Now, therefore, the condition of this obligation is such that if the said E. F. shall save said estate harmless, and pay all costs that may be taxed against him in the further prosecution of these error pro-

97 Civ. Code, § 622.

98 L. O. L., § 606; Gaston v. Portland, 48 Or. 84, 84 Pac. 1040.

99 L. O. L., § 608; Feller v. Feller, 40 Or. 76, 66 Pac. 468.

ceedings, then these presents to be null and void; otherwise to be and remain in full force and effect.

(Signed) E. F.
G. H.
L. M.

The foregoing undertaking hereby approved, both as to form and sufficiency of sureties, this —— day of ———, 19—.

(Signed) J. M. C.,
Clerk District Court.

§ 487. Summons in error.

The plaintiff in error is required to file a *praecipe,* whereupon a summons issues under the seal of the district court to the sheriff of the county in which the defendant in error or his attorney of record may be. It must be made returnable on or before the first day of the next term of the district court if made in vacation, and twenty days before the commencement of the term; if issued in term time, or within twenty days before the commencement of the term, it shall be returnable on a day named in the summons.[100] It may be served on the defendant in error or his attorney of record.[101]

An attorney of record for a defendant in error may waive issue and service of the summons after the transcript and petition are filed.[102]

100 Civ. Code, §§ 618, 619.

101 Civ. Code, § 618; Link v. Reves, 63 Neb. 424, 88 N. W. 670.

102 Dakota County v. Bartlett, 67 Neb. 62, 93 N. W. 192.

Form No. 213.

PRAECIPE FOR SUMMONS IN ERROR.

In the District Court of ——— County, Nebraska.

E. F., Plaintiff in Error, vs. C. D., Administrator of the Estate of A. B., Deceased, Defendant in Error.

To J. M. C., Clerk of Said Court:

Issue summons in error in the above-entitled cause, directed to the sheriff of ——— county, Nebraska, and returnable on the ——— day of ———, 19—.

Dated this ——— day of ———, 19—.

(Signed) E. F.,
Plaintiff in Error,
By F. D., His Attorney.

Under the Oregon practice, on the presentation to the circuit court or a judge thereof of a petition which shows, *prima facie*, that the county court has acted without jurisdiction, or exercised its functions erroneously to the prejudice of substantial rights of the plaintiff,[103] and the filing of a proper bond, it is the duty of the court to order the issue of a writ of review directed to the clerk of the county court, requiring him to return said writ to the circuit court at a time therein fixed, which may be either at the next term or in vacation, with a certified copy of the record or proceedings annexed thereto, that the same may be reviewed by such circuit court. The court may in its discretion also order that further proceedings be stayed pending decision on the writ.[104] The only questions before the judge at this time are the sufficiency of the petition,[105] and the right of the plaintiff to a stay.[106]

The order allowing the writ, fixing the date of its return and staying proceedings may be indorsed upon

103 Holmes v. Cole, 51 Or. 486, 94 Pac. 964; Raper v. Dunn, 53 Or. 203, 99 Pac. 889.

104 L. O. L., §§ 607, 608.

105 Holmes v. Cole, 51 Or. 486, 94 Pac. 964.

106 Feller v. Feller, 40 Or. 76, 66 Pac. 468; L. O. L., § 608.

the petition. The writ is then issued by the clerk of the circuit court on the filing of the petition, order and undertaking.

Form No. 214.

SUMMONS IN ERROR.

State of Nebraska,
——— County,—ss.

To the Sheriff of Said County:

You are hereby commanded to notify C. D., executor of the estate of A. B., deceased, that E. F. has filed a petition in error in the district court of ——— county, Nebraska, to obtain a reversal of the order entered in the county court of said county on the ——— day of ———, 19—, in the proceedings entitled, "In the Matter of the Estate of A. B., Deceased," dismissing the petition of said E. F. for the revocation of the probate of the will of said A. B.

You will make due return of this summons on the ——— day of ———, 19—.

In witness whereof, I have hereunto set my hand and affixed the seal of said court this ——— day of ———, 19—.

[Seal] (Signed) J. M. C.,
Clerk of District Court.

Form No. 214a—Oregon.

WRIT OF REVIEW.

[Title of Cause and Court.]

To G. H., Clerk of the County Court of ———, County, Oregon.

Whereas, on this ——— day of ———, 19—, an order was duly made by the Honorable J. L. S., a judge of the circuit court of said ——— county, on the petition of C. D., plaintiff herein, for a writ of review to said circuit court of a certain decree of the county court of ——— county, Oregon, in a proceeding pending therein, entitled "In the Matter of the Estate of A. B., Deceased," wherein it was ordered and adjudged by said county court [state judgment or decree as in the petition], for the reason that said county court acted without jurisdiction in entering said decree, and exercised its functions as a court erroneously, directing that a writ of review issue out of and under the seal of said circuit court to the end that said decree [judgment] of said county court may be reviewed by this court:

You are hereby commanded to return this writ to the circuit court of ——— county, Oregon, on or before the ——— day of ———, 19—, with a certified copy of the records of the county court concerning said decree.

In testimony whereof, I, E. F., clerk of said circuit court, have hereunto subscribed my name and affixed the seal of said court this ——— day of ———, 19—.

[Seal] (Signed) E. F.,
Clerk Circuit Court.

Service of the writ is had by delivery of the original to the clerk of the county court by any officer or person authorized to serve a summons and by a service of a certified copy by delivery to the opposite party at least ten days before the return of the original writ,[107] but on a writ of review of an order in a contest over probating a will, there are no adverse parties, and no one is entitled to service as a matter of right.[108]

§ 488. Hearing in the district court.

A probate proceeding brought to the district court by writ of error is tried on the questions of law set out in the petition in error and appearing on the transcript. If the decision of the lower court is sustained, the court renders judgment against the plaintiff in error for costs, and certifies its decision in the premises to the county court in order that it may be carried into effect.[109]

If the lower court is reversed, the case is retained for trial in the district court, where it is tried on the same issues as in the lower court and in the same manner as though originally brought to the district court

107 L. O. L., § 609.

108 Malone v. Cornelius, 34 Or. 195, 55 Pac. 536; Hubbard v. Hubbard, 7 Or. 42.

109 Civ. Code, § 624.

on appeal,[110] and the judgment certified to the county court.[111]

Form No. 215.

JUDGMENT AFFIRMING ORDER OF COUNTY COURT.

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the petition in error and the transcript of the proceedings and the final order of the county court of ——— county, Nebraska, and was submitted to the court.

On consideration whereof, the court finds that no error appears in said proceeding or order. It is therefore considered by said court that said order be and the same is hereby affirmed, and that the defendant recover his costs herein expended, taxed at $———. It is further ordered that the clerk of this court certify this judgment to the said county court, that the judgment or order affirmed may be enforced, as if proceedings in error had not been taken.

Form No. 216.

JUDGMENT REVERSING ORDER OF COUNTY COURT.

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the petition in error and the transcript of the proceedings and the final order or decree of the county court of ——— county, Nebraska, and was submitted to the court.

On consideration whereof, the court finds that there is error in said proceedings and order or decree. It is therefore considered by the court that said order or decree be and the same hereby is reversed at the costs to the present time of the defendant in error, and that said cause be retained in this court for trial and final judgment, pleadings to be filed as in cases of appeals.

The hearing on a writ of review brings up solely questions of law arising on the record of the county court. The return is the only pleading on the part of the defendant thereby raising all objections and defenses. The writ presents questions of law only. Questions of fact, or matters outside the record, can-

110 Civ. Code, § 625.

111 Rev. Stats., c. 17, § 268, [1532].

not be considered.[112] The sufficiency of the petition may be raised by motion.[113] If the return is incomplete, the court may order a further return to be made.[114]

The writ is concurrent with the right of appeal,[115] and though proceedings for both may be commenced, prosecuting one to a hearing is an abandonment of the other remedy.[116]

Upon the review the circuit court has power to affirm, modify, reverse or annul the decision reviewed, to award restitution to the plaintiff, or by mandate direct the lower court to proceed in the matter reviewed according to its decision. Appeal from a judgment on a writ of review lies to the supreme court the same as in action brought in the circuit court.[117]

§ 489. Judgment of district court in error proceedings.

The district court is without jurisdiction to enforce by process issued under its seal its judgment affirming the decision of the lower court, except that it may issue execution against a plaintiff in error not an executor or administrator. The judgment or decree is of the lower court, and enforceable by it alone.[118]

The order reversing the lower court is a final one, and may be taken to the supreme court before the

112 Gaston v. Portland, 48 Or. 85, 84 Pac. 1040; Hall v. Dunn, 52 Or. 479, 97 Pac. 811.

113 Holmes v. Cole, 51 Or. 487, 94 Pac. 964.

114 L. O. L., § 610.

115 L. O. L., § 605.

116 Feller v. Feller, 40 Or. 77, 66 Pac. 468.

117 L. O. L., § 611.

118 Civ. Code, § 624; Rev. Stats., c. 17, § 628, [1532]; Bennett's Estate v. Taylor, 4 Neb. Unof. 900, 96 N. W. 669.

case itself is tried by the district court.[119] The judgment entered on trial of the case after reversal of the lower court is final, and may be appealed to the supreme court.[120]

119 Banks v. Uhl, 5 Neb. 240; Tootle, Hosea & Co. v. Jones, 19 Neb. 588, 27 N. W. 635.

120 Ribble v. Furmin, 69 Neb. 38, 94 N. W. 967.

CHAPTER XXXVI.

APPOINTMENT AND REMOVAL OF GUARDIANS.

§ 490. Guardians—Definition.
491. Powers, Rights and Duties of Natural Guardians.
492. Testamentary Guardians.
493. Appointment of Guardian of a Minor.
494. Guardians of Minors Who have No Estate.
495. To Whom Letters may Issue.
496. Procedure for Appointment of Guardian of a Minor.
497. Hearing.
498. Appointment of Guardian for Insane or Incompetent Person.
499. Temporary Guardian.
500. Hearing.
501. Guardian for Spendthrift.
502. Contracts of Spendthrift Pending Appointment of Guardian.
503. Nature of Order Appointing or Refusing to Appoint a Guardian.
504. Guardian's Bonds.
505. Joint Guardians.
506. Guardian of Nonresidents.
507. Removal of Guardians.
508. Notice to Guardian.
509. Appointment of Successor.

§ 490. Guardians—Definitions.

A guardian is a person to whom is legally intrusted the care, custody, education and management of the person or property, or both, of a minor, or of any person who by reason of insanity, mental incompetency or being a spendthrift is adjudged by a court of competent jurisdiction to be incapable of looking after his wants and managing his business affairs.[1] At common law guardianship of minors was the only kind recognized.[2]

1 2 Kent, Com., 224.
2 2 Kent, Com., 221.

Minors include all male children under twenty-one years of age and all female children under eighteen, except that when a female marries between the ages of sixteen and eighteen her minority ends.[3]

Under the Oregon statutes all persons under twenty-one years of age are minors, except that the marriage of a female terminates her minority.[4]

Guardians may be divided into three classes: Guardians by nature,—those to whom the laws of humanity give the custody and control of the child; guardians by nurture,—those to whom the custody and control of the person only of the child has been given by its parents or others; and statutory guardians, or guardians in socage. The latter class are either appointed by the county court or designated by will and the nomination approved by the court.[5]

§ 491. Powers, rights and duties of natural guardians.

At common law the father was the natural guardian of his children and intrusted with their custody, control and education. At his death such right passed to the mother.[6]

The father and mother are the natural guardians of their minor children, and are equally entitled to their

3 Rev. Stats., c. 18, § 88, [1627]; Kiplinger v. Joslyn, 93 Neb. 40, 139 N. W. 1019; Parker v. Starr, 21 Neb. 680, 33 N. W. 424; Ward v. Laverty, 19 Neb. 429, 27 N. W. 393.

4 L. O. L., §§ 7097, 7099.

5 Rev. Stats., c. 18, §§ 89, 93, 98, [1628], [1632], [1637]; L. O. L., §§ 1310, 1319, 1322.

6 Taylor v. Jeter, 33 Ga. 195; In re Scarrett, 76 Mo. 565; Freto v. Brown, 4 Mass. 675.

custody and to care for their education, being themselves competent to transact their own business and not otherwise unsuitable.[7] The mother is the natural guardian of her illegitimate minor child.[8]

In the case of a divorce the court awards the custody of the children to the parent best qualified to care for them, regard being had to the interests of the child.[9]

The powers of a natural guardian are confined to the care and custody of the person of the child, and to his wages, unless he has been emancipated.[10] It is the duty of natural guardians to support their children.[11] This duty rests primarily upon the father,[12] but in case of his death upon the mother.[13]

The rights of a natural guardian do not extend to any property which the minor may receive by descent, devise, gift, or which he may have in his own right.[14] He can sell no property belonging to his child,[15] nor can he bind the estate of his child by any contract or agreement, or make any lease of his realty or collect

7 Rev. Stats., c. 18, § 93, [1632]; L. O. L., § 7057; Tiffany v. Wright, 79 Neb. 19, 112 N. W. 311; Terry v. Johnson, 73 Neb. 653, 103 N. W. 319.

8 Nine v. Starr, 8 Or. 49; Town of Hudson v. Hills, 8 N. H. 417; Alfred v. Makay, 36 Ga. 440.

9 Rev. Stats., c. 18, § 38, [1577]; L. O. L., §§ 512, 513.

10 Clemens v. Brillhart, 17 Neb. 335, 22 N. W. 779; Hammond v. Corbett, 50 N. H. 501.

11 Courtright v. Courtright, 40 Mich. 633; Cooper v. McNamara, 92 Iowa, 243, 60 N. W. 522; Trow v. Thomas, 70 Vt. 580, 41 Atl. 652.

12 Porter v. Powell, 79 Iowa, 151, 44 N. W. 295; Alvey v. Hartwig (Md.), 67 Atl. 132.

13 Missouri Pac. R. R. Co. v. Palmer, 55 Neb. 559, 76 N. W. 169.

14 Myers v. McGavock, 39 Neb. 843, 58 N. W. 522.

15 Wells v. Steckleberg, 50 Neb. 670, 70 N. W. 242.

the rents and profits therefrom.[16] He may accept the delivery of a deed to his child.[17]

§ 492. Testamentary guardians.

A testamentary guardian is one appointed by the last will and testament of a surviving parent for any of their minor children, whether born at the time of the making of the will or afterward. If the parents have been divorced, the one to whom is granted the custody of the children can appoint a testamentary guardian during the lifetime of the surviving parent.[18] Like an executor, he derives his authority from the will, but his appointment must be approved by the court, and he must be a suitable person.[19] The appointment may be made by implication as well as by directly designating or nominating the party.[20] The right to such appointment cannot be assigned.[21] If more than one person is appointed, on the death of one the guardianship passes to the survivor.[22]

A testamentary guardian has the same powers and performs the same duties as a statutory one.[23] He is required to give a bond in like manner and with like conditions as is required of a guardian appointed by the court, but if the testator, in his will appointing

16 Jones v. Jones, 46 Iowa, 466; Fonda v. Van Horne, 15 Wend. (N. Y.) 631; Jackson v. Combs, 7 Cow. (N. Y.) 36.

17 Hall v. Cardell, 111 Iowa, 206, 82 N. W. 503.

18 Wilkinson v. Deming, 80 Ill. 342; L. O. L., § 1316.

19 In re La Plant, 83 Minn. 366, 86 N. W. 351.

20 Balch v. Smith, 12 Neb. 437; Capps v. Hickman, 97 Ill. 429; Desribes v. Wilmer, 69 Ala. 25.

21 Balch v. Smith, 12 Neb. 437.

22 Eywe v. Shaftsbury, 2 P. Wms. 102.

23 Rev. Stats., c. 18, § 98, [1637]; L. O. L., § 1316.

him, shall have ordered or requested that such bond shall not be given, none shall be required unless from a change in the situation or circumstances of the guardian, or from other sufficient cause, the court thinks it proper to demand it.[24]

§ 493. Appointment of guardian of a minor.

The county court in each county, when it shall appear necessary or convenient, may appoint guardians to minors and others, being residents and inhabitants of the same county, and also to such as shall reside without the state and have an estate within the same.[25]

Except in the case where the application is for the appointment of a guardian of a nonresident who has property in this state, it is necessary, in order to give the court jurisdiction, that the residence of the minor be within the county in which the application is made.[26]

The residence of the parents or of those standing *in loco parentis* is presumptively the residence of the minor, though he may be actually in another county or state when the application is made.[27]

24 Rev. Stats., c. 18, § 99, [1638]; L. O. L., § 1317.

25 Rev. Stats., c. 18, § 90, [1629]; L. O. L., § 1311; Monastes v. Catlin, 6 Or. 122.

26 Connell v. Moors, 70 Kan. 88, 78 Pac. 164; In re Connor, 93 Neb. 118, 139 N. W. 834.

27 In re Johnson, 87 Iowa, 130; Modern Woodmen v. Hester, 66 Kan. 129, 71 Pac. 279; Darden v. Wyatt, 15 Ga. 414. There is authority to the effect that a minor who has no parents or near relatives may have a guardian appointed in the county in which he is last found. Dampier v. McCall, 78 Ga. 607, 3 S. E. 563.

§ 494. Guardians of minors who have no estate.

Whenever a parent has been convicted in a county court of the offense of ill-treating or abusing his child, or when any child under the age of fourteen years, by reason of orphanage, or of the neglect, crime, drunkenness or other vice of the parents, is growing up without education or salutary control, or in circumstances exposing such child or children to lead a dissolute or vicious life, the court may order such child or children to be committed to the custody of any legally incorporated humane society or society for prevention of cruelty to children, and such society is authorized to receive such child or children into its custody and to provide care and education in some suitable family or institution of instruction.[28]

Under the above statute notice to the parents must be given, and pending the hearing the court may order the child temporarily removed from the charge of the parent.[29]

It is the duty of peace officers to cause to be removed from houses of ill-fame any minors who are harbored, maintained or kept therein, though children of the inmates.[30] The children so removed may be placed by the county court in the control of a humane society or other discreet and suitable person.[31]

§ 495. To whom letters may issue.

A minor over fourteen years of age has a right to nominate a guardian, who, if approved by the court,

28 Rev. Stats., c. 18, § 132, [1671].
29 Rev. Stats., c. 18, § 133, [1672].
30 Crim. Code, § 222.
31 Crim. Code, § 223.

may be appointed accordingly,[32] but if his nominee is not approved by the court, or if after being cited he neglects to nominate a suitable person, or if he is under fourteen years of age, or a nonresident of the state, the court may issue letters to any suitable and competent person.[33]

A minor over fourteen years of age had a clear right at common law to nominate a guardian,[34] and where he is under that age, the court may properly consult his wishes, but is not required to give them the weight they would be entitled to if he was older.[35]

The nominee should be appointed unless the court finds that he is not a suitable and competent person to perform the duties of the trust. The court is given no discretion in the matter except as to the suitableness or unsuitableness of the party nominated by the minor over fourteen years of age.[36]

The natural guardians, other things being equal, are usually considered as entitled to the appointment.[37] They may consent to the appointment of a third party.[38] But if they ask for the appointment, it should be granted them, unless it appears that the best interests of the child demand that they issue to someone else.[39] However, a parent's wishes are always

32 Rev. Stats., c. 18, § 90, [1629].

33 Rev. Stats., c. 18, § 91, [1630]; L. O. L., § 1312.

34 Sherman v. Ballou, 8 Cow. (N. Y.) 304; Palmer v. Oakley, 2 Doug. (Mich.) 433, 47 Am. Dec. 41.

35 Walton v. Twiggs, 91 Ga. 90, 16 S. E. 313.

36 Lunt v. Aubens, 39 Me. 392; Arthur's Appeal, 1 Grant (Pa.), 55.

37 Weldon v. Keen, 37 N. J. Eq. 251; People v. Wilcox, 22 Barb. (N. Y.) 178; Johnson v. Kelley, 44 Ga. 485; L. O. L., § 1310.

38 Wirsig v. Scott, 79 Neb. 322, 112 N. W. 655.

39 In re McChesney, 106 Wis. 315, 82 N. W. 149; In re Welch, 74 N. Y. 290.

properly considered by a court in determining to whom letters may issue.[40]

Though no one outside of parents have any preference, letters of guardianship of an orphan should issue to some near relative who is otherwise competent.[41]

In Oregon the nearest relative is given preference.[42]

A nonresident may be appointed, but such appointment, however may not be a wise one, as he is without the jurisdiction of the court, and difficulty may be met with in enforcing orders and decrees.[43]

At common law a corporation was not a competent guardian.[44] By statute a legally incorporated humane society, or society for the prevention of cruelty to children, is empowered to become guardian of minor children in accordance with the general provisions of law applicable to the guardianship of minors. The powers and duties of such society as guardian are exercised by its officers,[45] and a trust company authorized by its articles of incorporation may act as guardian of parties under letters issued from the county court of the county in which it has its principal office.[46]

In Oregon any authorized trust company may be appointed.[47]

40 Page v. Hodgdon, 63 N. H. 53; Succession of Le Blanc, 37 La Ann. 546; Cowles v. Cowles, 8 Ill. 435.

41 Goss v. Stone, 63 Mich. 319, 29 N. W. 735; Woodruff v. Snoover (N. J. Eq.), 45 Atl. 980.

42 L. O. L., § 1310.

43 Finney v. State, 9 Mo. 227; Berry v. Johnson, 53 Me. 401.

44 In re Rice, 42 Mich. 528, 4 N. W. 284.

45 Rev. Stats., c. 18, § 131, [1670].

46 Rev. Stats., c. 14, § 195, subd. 6, [743].

47 Laws 1913, p. 723.

The granting of letters of guardianship to an executor or administrator of an estate in which the ward has a beneficial interest, unless the former is designated as a testamentary guardian, is not to be commended, and in many states is prohibited by statute. In some cases it might be for the best interest of the ward, but in others conflicting interests make it desirable that the same person should not act in two capacities.

There is no duty devolving upon the county court of greater importance than the appointment of a suitable person as guardian of a minor. In case both his parents are dead, his welfare, and his success or failure in life largely depend on the character and ability of the person appointed to take charge of his person and business affairs. The act of the court in issuing letters will not be disturbed on the ground that some other person should be appointed, unless there is an obvious abuse of authority.[48]

§ 496. Procedure for appointment of guardian of minor.

The county court acquires jurisdiction over a guardianship matter by the filing of a petition; if the minor is over fourteen years of age, he may file it himself, designating the person whom he desires to have appointed, and reciting the necessary facts which make an appointment necessary.[49]

If he is under fourteen, it is usually made by some competent interested person, though the court acquires jurisdiction if signed in his name.[50] A third party

48 White v. Pomeroy, 7 Barb. (N. Y.) 640.
49 Rev. Stats., c. 18, §§ 89, 90, [1628], [1629].
50 Seward v. Didier, 16 Neb. 59, 20 N. W. 12.

may make the application if the minor is over fourteen, and if the minor resides more than ten miles from the place of holding court, he should sign a written nomination of guardian before a justice of the peace, which is certified to the county judge and has the same effect as if made in the presence of the court.[51]

The application for the guardianship of a nonresident minor may be made by any person interested in his estate, in expectancy or otherwise, and should set out the existence of an estate requiring the care of a guardian.[52]

Form No. 217.

NOMINATION OF GUARDIAN.

To the County Judge of ——— County, Nebraska:

I, C. D., a minor of the age of fifteen years, hereby nominate C. D., of the village of ———, of said county, for guardian of my estate, and request that letters of guardianship issue to him.

Dated this ——— day of ———, 19—.

(Signed) A. B.

State of Nebraska,
——— County,—ss.

I, E. F., a justice of the peace in and for ——— township, in said county, do hereby certify that the foregoing instrument was executed by the said A. B. in my presence, and acknowledged by her as her free act and deed.

Dated this ——— day of ———, 19—.

(Signed) E. F.,
Justice of the Peace.

Form No. 218.

PETITION FOR APPOINTMENT OF GUARDIAN OF AN ORPHAN UNDER FOURTEEN.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that A. B. is a resident of said county and an orphan, his father, C. B.,

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51 Rev. Stats., c. 18, § 92, [1631]; L. O. L., § 1312.

52 Rev. Stats., c. 18, § 122, [1661]; L. O. L., § 1336.

having died on the ——— day of ———, 19—, and his mother, E. B., on the ——— day of ———, 19—; that said A. B. is three years of age, and is possessed of personal estate of the value of ——— dollars, consisting of [describe character of personalty], and real estate of the value of ——— dollars, as follows [describe real estate]; that it is necessary that a suitable and competent person be appointed guardian of the person and estate of said A. B. during his minority; that G. H. is a suitable and competent person to act as guardian of said infant, and has consented to act as such guardian if appointed.

(Signed) C. D.

[Add verification.]

Form No. 219.

PETITION FOR APPOINTMENT OF OTHER PERSON THAN PARENT AS GUARDIAN WHILE PARENT IS LIVING.

[Title of Cause and Court.]

Your petitioner respectfully represents unto the court that A. B. is a resident of said county, and a minor under the age of fourteen, to wit, of the age of ten years; that said A. B. is possessed of the following described personalty [describe personalty], of the value of ——— dollars, and is seised in her own right of the following described real estate [describe real estate], of the value of ——— dollars; that the residence of D. B., the father of said minor, is unknown, and he has not resided with or supported his family for the period of five years last past; that C. B., the mother of said A. B., is a woman of bad reputation for chastity, and is now an inmate of a house of prostitution in said county, and is not a suitable person to have charge of the estate or the custody of the person of said minor, and the best interests of said minor demand that a suitable and competent person be appointed guardian of her person and estate, and that she be entirely removed from the custody and control of her mother, said C. B.

That G. H., of said county, is a suitable and competent person to act as such guardian, and has consented to act as such if appointed.

Your petitioner therefore prays that a day may be set for the hearing of said petition, and notice given to said C. B., and that upon the hearing thereof, said G. H. may be appointed guardian of said minor.

Dated this ——— day of ———, 19—.

(Signed) C. D.

[Add verification.]

Form No. 220.

PETITION BY MINOR OVER FOURTEEN YEARS OF AGE FOR APPOINTMENT OF GUARDIAN.

[Title of Cause and Court.]

Your petitioner, A. B., respectfully represents unto the court that he is a resident of the county and state aforesaid, and is sixteen years of age, and a son of F. B., late of said county, deceased; that your petitioner is possessed of personal estate of the value of ——— dollars, and is seised in his own right of real estate of the value of ——— dollars, described as follows: [Describe real estate.]

Your petitioner is desirous of the appointment of a guardian of his property during his minority, and hereby nominates his mother, C. B., of said county, for such guardian; that said C. B. is a suitable and competent person to act as such guardian, and has consented to act as such if appointed.

Your petitioner therefore prays for the appointment of said C. B. as guardian.

Dated this ——— day of ———, 19—.

(Signed) A. B.

[Add verification.]

§ 497. Hearing.

The appointment of a guardian is a proceeding *in rem*.[53] In case of a nonresident, notice is required to be given to all persons interested as the court may direct.[54] In other cases no notice is required by statute. If the appointment of some other party than a parent is sought, the law clearly contemplates that notice should be given the natural guardian and an opportunity be afforded him to defend the implied charge that he is unfitted to take charge of his child's property.[55]

53 In re Thomsen, 1 Neb. Unof. 751, 95 N. W. 805.

54 Rev. Stats., c. 18, § 122, [1661]; L. O. L., § 1336.

55 Witasig v. Scott, 79 Neb. 322, 112 N. W. 655; Tong v. Marvin, 26 Mich. 35; Senseman's Appeal, 21 Pa. 331.

In the case of both residents and nonresidents, a hearing should be had and evidence introduced showing the necessity for the grant of letters. It must be shown that the domicile of a minor, unless he be a nonresident, is within the county where the petition is filed. The presumption of law that the residence of the parent is the residence of the child is not conclusive, and may be overcome by proof of facts and circumstances showing a different condition.[56]

If it appears that the minor is over fourteen years of age and has not nominated a guardian, he should be given such opportunity, and should also be allowed to do so in case his nominee refuses to accept or is found unsuitable. Though not required by statute, the minor ought to be personally present in court, and this seems to be imperative where he is over fourteen and has not nominated a guardian.

Form No. 221.

ORDER FOR APPOINTMENT OF GUARDIAN OF A MINOR.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the petition of C. D. for the appointment of G. H. as guardian of the person and estate of A. B., a minor under fourteen years of age, whose parents are both dead; and it satisfactorily appearing to the court that G. H. is a resident of said county, and a proper person to have the care and custody of the person and estate of the said A. B., and that it is necessary that a guardian should be appointed for him: It is therefore ordered by the court that the said G. H. be and he hereby is appointed guardian of the said A. B. upon his giving bond in the sum of ——— dollars, with two sureties, in manner and form as provided by law, and subject to the approval of the court.

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56 McNish v. State, 74 Neb. 261, 104 N. W. 186; Wirsig v. Scott, 79 Neb. 322, 112 N. W. 655.

§ 498. Appointment of guardian of an insane or incompetent person.

When the relatives or friends of an insane person, or of any person who by reason of extreme old age or other cause is mentally incompetent to take charge of himself and his property, shall apply to the county court to have a guardian appointed for him, the court shall cause a notice to be given to the supposed insane or incompetent person of the time and place fixed for the hearing of the proceeding, not less than fourteen days from the time appointed.[57]

Ten days' notice is required in Oregon.

If a person has been declared insane by the commissioners of insanity and no one applies to have a guardian appointed for him for thirty days thereafter, it is the duty of the clerk of the district court to make application to the county court of his county to appoint a guardian for such insane person.[58]

A suitable person or a trust company which is duly authorized to act as such may be appointed guardian of an incompetent person.

Form No. 222.

PETITION FOR APPOINTMENT OF GUARDIAN OF AN INSANE OR INCOMPETENT PERSON.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that A. B. is a resident of said county, and of the age of ——— years; that petitioner is a daughter of said A. B.; that said A. B. is possessed of personal property consisting of [state nature of personalty], of the value of ——— dollars, and is seised of real estate described as follows, and of the value of ——— dollars; that by reason of

57 Rev. Stats., c. 18, § 101, [1640]; L. O. L., §§ 1319, 1320.

58 Rev. Stats., c. 18, § 102, [1641].

advanced age and mental and physical weakness, said A. B. is not competent to take charge of and manage said property; [that said A. B. was on the ——— day of ———, 19—, by the commissioners of insanity of said county, duly adjudged an insane person, and is now and ever since said date has been insane and mentally incompetent to manage and control his estate].

That G. H., of said county, is a suitable and competent person to act as guardian of said A. B., and has consented to act as such guardian if appointed.

Your petitioner therefore prays that a day may be set for the hearing of said petition, and notice thereof given the said A. B., and, upon the hearing thereof, said G. H. be appointed guardian of said incompetent person.

Dated this ——— day of ———, 19—.

[Add verification, Form No. 5.]

Form No. 223.

ORDER FIXING DATE OF HEARING.

[Title of Cause and Court.]

On reading and filing the petition, duly verified, of C. D., praying for the appointment of a guardian of A. B. for the reason that said A. B. is an incompetent person, it is ordered that said petition be heard at the county court room in the city of ———, in said county, on the ——— day of ———, 19—, and that notice of said hearing be personally served on the said A. B., as required by law.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

Form No. 224.

NOTICE OF HEARING PETITION FOR APPOINTMENT OF GUARDIAN.

State of Nebraska,
——— County,—ss.

To A. B.:

You are hereby notified that on the ——— day of ———, 19—, C. D. filed his petition in the county court of said county praying for the appointment of a guardian of your person and estate for the reason that you are an incompetent person. You are further notified

that said petition will be heard at the county court room in the city of ———, in said county, on the ——— day of ———, 19—.

Dated this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

§ 499. Temporary guardian.

When application is made for the appointment of a guardian of an incompetent person, and it appears to the court that special reasons exist making it necessary for someone to look after the estate immediately, the court may appoint a temporary guardian without service of notice. His duties are to collect and conserve the assets until the regular appointment is made.[59]

§ 500. Hearing.

The county court acquires jurisdiction of the proceedings for the appointment of a guardian of an incompetent or insane person by the filing of a proper petition and service of notice.[60] He cannot waive notice of hearing,[61] and even though he be personally present in court, unless it appears that notice has been served on him, the court is without jurisdiction to appoint a guardian.[62] If the party has been previously adjudged insane, irregularities in the proceedings in which he was so adjudged cannot be raised in the proceeding for the appointment of a guardian.[63]

59 Bumpus v. French, 179 Mass. 131, 60 N. E. 414.

60 North v. Joslin, 59 Mich. 624, 26 N. W. 810; Winslow v. Troy, 97 Me. 130, 53 Atl. 1008.

61 Prante v. Lompe, 77 Neb. 377, 109 N. W. 496.

62 Winslow v. Troy, 97 Me. 130, 53 Atl. 1008.

63 Sprigg v. Stump, 8 Fed. 207.

The party is entitled to a full hearing. The next of kin or relatives may appear and contest the application, or take such part as they believe to be for his interests and the conservation of his estate.[64] Where he does not personally appear, or is not represented by counsel, it is proper for the court to appoint a guardian *ad litem* to look after his interests.[65]

There are two classes of cases where a guardian of an adult may be appointed. One comprises the insane and the other those mentally incompetent from other causes.

Except in cases where unquestioned insanity exists, a court should act cautiously in taking the custody and control of a man's property out of his hands and placing it, together with the custody of his person, in the hands of another. It is not necessary that the party be either an imbecile or idiot, nor is the court justified in making the appointment where the only showing is that he has exhibited poor judgment. If it appears that he is in need of care and protection and is mentally incapable of acting with fair and provident management, and is thus liable to be robbed of his estate, his mental incapability calls for the same protection as insanity.[66]

[64] Prante v. Lompe, 77 Neb. 377, 109 N. W. 496; Tierney v. Tierney, 81 Neb. 894, 115 N. W. 764.

[65] See Boden v. Mier, 71 Neb. 191, 98 N. W. 701; Laws 1913, p. 595.

[66] In re Streiff, 119 Wis. 566, 97 N. W. 189; Schick v. Stuhr, 120 Iowa, 396, 94 N. W. 915; In re Estate of Leonard, 95 Mich. 295, 54 N. W. 1082.

Form No. 225.

ORDER FOR APPOINTMENT OF GUARDIAN OF AN INCOMPETENT PERSON.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the petition of C. D. for the appointment of G. H. as guardian of A. B., an incompetent person, and the evidence, and was submitted to the court; and it appearing to the court that personal service of the time and place of the hearing of said petition, within the time required by law, has been had upon the said A. B., and it further appearing that said A. B. is not possessed of sufficient mental capacity to have the care, custody, and control of his person and estate, and that the best interests of said A. B. require that a guardian be appointed for him: It is therefore [balance as in Form No. 221].

§ 501. Guardian for spendthrift.

When any person by excessive drinking, or by gambling, idleness or debauchery of any kind, shall so spend, waste or lessen his estate as to expose himself or family to danger of want or suffering, or the county to the charge or expense for the support of himself or family, any officer having charge of the poor of the county, or justice of the peace of the county in which the spendthrift resides, may present a complaint to the county court, setting forth the facts and circumstances of the case and praying to have a guardian appointed for him.[67] The object in making the appointment is for the benefit and protection of the party and his family, and the prospective liability of the county for his support is only secondary.[68]

[67] Rev. Stats., c. 18, §§ 104, 105, [1643], [1644]; L. O. L., § 1322.

[68] Cushing v. Hale, 8 Vt. 38. The statute is sometimes resorted to for the purpose of placing a restraint on the expenditures of a party who has come into the possession of a considerable sum and

Personal notice must be given the alleged spendthrift at least ten days before the date set for the hearing.[69] If on the hearing the court finds that the case comes within the statute, letters should issue, whether the alleged spendthrift personally appears or not.[70]

Form No. 226.

COMPLAINT FOR SPENDTHRIFT.

State of Nebraska,
——— County,—ss.

The complaint of C. D., a justice of the peace in and for said county, taken on oath before me, J. K., county judge of said county, who, being first duly sworn, on oath says that one A. B., a resident of said county, is possessed of personal estate of the estimated value of ——— dollars, and is seised of the following described real estate [describe real estate], which is of the value of ——— dollars; that during the six months last past the said A. B. has become addicted to the habit of gambling and drinking intoxicating liquors to excess, and is wasting and squandering his estate by gambling and betting, and devotes no time whatever to his business and the care and preservation of his estate, and is so spending and lessening his estate as to expose himself and his family, which family consists of his wife, C. B., and two minor children,—F. B., aged 5 years, and M. B., aged 9 years,—to danger of want or suffering, or the county to a charge or expense for the support of him, said A. B., and his said family; that the best interests of him, said A. B., and of said county of ———, demand that some suitable person be appointed guardian of him, said A. B.

That G. H. is a resident of said county, and a suitable and competent person to act as such guardian, and has consented to act as such if appointed.

(Signed) C. D.

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is wasting it by "fast living," though he have no one dependent on him for support.

69 Rev. Stats., c. 18, § 106, [1645]; L. O. L., § 1323.

70 Rev. Stats., c. 18, § 106, [1645]; L. O. L., § 1323; Young v. Young, 87 Me. 44, 32 Atl. 782.

Subscribed in my presence and sworn to before me this ——— day of ———, 19—.

(Seal) (Signed) C. F. D.,
Notary Public.

[For order for notice, and notice, see Forms Nos. 223 and 224.]

Form No. 227.

ORDER FOR APPOINTMENT OF GUARDIAN FOR SPENDTHRIFT.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on for hearing upon the complaint of A. B. H., a justice of the peace in and for the city of ———, in said county, alleging that one A. B., of said county, is a spendthrift, and the evidence, and was submitted to the court. Upon consideration whereof, the court finds that personal notice of the time and place set by the court for the hearing on said complaint was given to said A. B. as required by law; and it further appearing to the court that the said A. B. is so wasting his estate by gambling and debauchery as to expose himself and his family to danger of want and suffering, or the said county of ——— to a charge and expense for the support of himself and his family, and that the best interests of the said A. B. demand that a guardian be appointed for him: It is therefore [balance as in Form No. 221].

§ 502. Contracts of spendthrifts pending appointment of guardians.

"After the order for notice has been issued, the complainant may cause a copy of the complaint, with the order for such notice, to be filed in the office of the county clerk of the county, and a minute thereof be entered on the lien book of said office; and if a guardian shall be appointed on such application, all contracts, except for necessaries at reasonable prices, and all gifts, sales, or transfers of real or personal estate, made by such spendthrift, after the filing of a copy of such complaint and order, as aforesaid, and

before the termination of the guardianship, shall be utterly void."[71]

§ 503. Nature of order appointing or refusing to appoint a guardian.

It is a question of some doubt whether the order of the county court appointing or refusing to appoint a guardian for a minor is subject to appeal to the district court. In a number of states it has been held that appeal does not lie.[72] The only cases where appeals are allowed appear to be where it is permitted by statute.

In the case of an incompetent person or spendthrift the person for whom a guardian is appointed may take an appeal from the order, and an heir apparent or presumptive may have the matter reviewed by the district court by appeal or writ or error.[73]

§ 504. Guardian's bond.

Every guardian, whether having the custody of the estate of a minor, incompetent person or spendthrift, is required to give a bond with surety or sureties in such sum as the court shall order, with condition as follows:

71 Rev. Stats., c. 18, § 107, [1646]; L. O. L., § 1324.

72 Adams v. Specht, 40 Kan. 377, 19 Pac. 812; Ramsay v. Thompson, 71 Md. 315, 18 Atl. 592; Cramer v. Corbis, 31 Ill. 259.

73 Prante v. Lompe, 77 Neb. 377, 109 N. W. 496; Tierney v. Tierney, 81 Neb. 193, 115 N. W. 764. In the latter case, which was an appeal from an order refusing to appoint a guardian for an alleged incompetent, it was held that section 1526, Revised Statutes, applied to guardianship matters, and that consequently the heirs presumptive had a right to appeal as aggrieved parties. Under the same reasoning it would look as though an appeal would lie from the appointment of a guardian for a minor.

First. To make a true inventory of all the real and personal estate of the ward that shall come into his possession or knowledge, and to return the same into court as the law directs.

Second. To dispose of and to manage all such estate and effects according to law, and for the best interests of the ward, and to faithfully discharge his trust as such guardian.

Third. To render an account of the property of the ward in his hands, including the proceeds of the real estate that may be sold by him, and of the management and disposition of such property, within one year after his appointment, and at such other times as the court shall direct.

Fourth. At the expiration of his trust, to settle his accounts with the court, or with the ward or his legal representatives, and to pay over and deliver all the estate and effects remaining in his hands or due from him on such settlement to the person or persons who shall be lawfully entitled to receive them.[74]

In Oregon the bond runs to the state.

A testamentary guardian is not required to give a bond when the testator in the will shall have ordered or requested that such bond be not given, except, owing to a change in the circumstances or situation of the guardian, or for other sufficient cause, the court shall think proper to require it.[75] No bond is required of a natural guardian.[76] The courts are very liberal in the construction of a guardian's bond, so as to bring

74 Rev. Stats., c. 18, § 96, [1635]; L. O. L., § 1315.
75 Rev. Stats., c. 18, § 98, [1637]; L. O. L., § 1317.
76 Westbrook v. Comstock, Walk. (Mich.) 314.

it within the requirements of the statute. A failure to give the ward's name in full,[77] failure to insert a penalty,[78] and a failure to set out the facts that the guardian has been duly appointed,[79] have been held not to invalidate guardians' bonds. The substitution of an executor's or administrator's bond for that of a guardian's, inserting the name of the ward for the deceased, has been held in effect no bond at all.[80] A guardian must also, before entering upon the duties of his trust, take the official oath.[81]

Form No. 228.

GUARDIAN'S BOND.

Know all men by these presents, that we, A. B., of the county of ———, and state of Nebraska, as principal, and C. D. and E. F., of the same place, as sureties, are held and firmly bound unto the county judge of ——— county, Nebraska, in the penal sum of ——— dollars, for which payment well and truly to be made we do hereby bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, by these presents.

Dated this ——— day of ———, 19—.

Whereas, said A. B. has been appointed by said court guardian of N. M., a minor of the age of ——— years [an incompetent person; or, spendthrift], and has signified his acceptance of his said trust:

Now, therefore, the condition of this obligation is such that, if the above-bound A. B. shall make a true inventory of all the real and personal estate of the said C. D. which shall come into his possession or knowledge, and return the same to the county court of ——— county within thirty days from this date, and shall dispose of and manage all such estate and effects of said C. D. according to the law and the best interests of said ward, and faithfully discharge his trust

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77 Turner v. Alexander, 41 Ark. 254; State v. Richardson, 29 Mo. App. 595.

78 State v. Britton, 102 Ind. 214, 1 N. E. 617.

79 Pratt v. Wright, 13 Gratt. (Va.) 175.

80 Hayden v. Smith, 49 Conn. 83.

81 Rev. Stats., c. 18, § 114, [1653].

as such guardian, and render an account, on oath, of the property in his hands, including the proceeds of all real estate that may have been sold by him, and of the management and disposition of such property, within one year after his appointment, and at such other times as the court shall direct, and, at the expiration of his trust, settle his accounts with the court or with the ward or his legal representatives, and pay over and deliver all the estate and effects remaining in his hands or due from him on such settlement to the person or persons who shall be lawfully entitled thereto, then this obligation to be null and void; otherwise to be and remain in full force and effect.

(Signed) A. B.
C. D.
E. F.

I hereby approve the foregoing bond, both as to form and sufficiency of sureties.

(Signed) J. K.,
County Judge.

Form No. 229.

OATH OF GUARDIAN.

I, C. D., do solemnly swear that I will well and faithfully perform the duties required of me as guardian of the estate of A. B., a minor, according to law and the best of my ability. So help me God.

(Signed) C. D.

Form No. 230.

LETTERS OF GUARDIANSHIP.

State of Nebraska, ——— County.

In the Matter of the Guardianship of A. B.

To C. D.:

Whereas, application in due form has been made to me for your appointment as guardian of the person and estate of A. B., a minor, and an orphan of the age of ——— years [an incompetent person; or, a spendthrift], residing in said county, and relying upon your care and fidelity, I hereby constitute and appoint you guardian of the said minor during his minority [incompetent person during the continuance of his disability; or, spendthrift until discharged by the court], with full power to receive, demand, and collect, by process of law, all the real estate and chattels, rights, credits, and effects belonging to said A. B., and to make a true and perfect inventory of all the property of the said A. B. within this state, and return the same to this

court on or before the ——— day of ———, 19—. You will also care for and manage the property of the said A. B. according to law and the best interests of the said A. B. Within one year from this date, and yearly thereafter, and at any time that may be required by this court, you will render a true account of all the money and property of the said A. B. in your hands, and you will render an account of all the money and property received by you, and of your guardianship, whenever you are required so to do by any court having jurisdiction in the premises.

In testimony whereof, I have hereunto set my hand and caused the seal of the court to be affixed this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

§ 505. Joint guardians.

Two or more persons may be appointed joint guardians of the same ward, either by a last will or the order of the county court. The trust is conferred upon them both jointly and severally. They are jointly liable for their joint acts, and severally liable for their separate acts.[82] If one declines to act, all the duties of the trust devolve upon the other; and the same is true where one of them dies after the issue of letters.[83] The statute contains no provisions in regard to their bond, as to whether it should be a joint bond with sureties or separate bonds with sureties. A joint bond is usually given. Each guardian is responsible only for that portion of the property which he receives.[84] The sureties are liable for the joint and several acts of each, and the discharge of one will not release them for the acts of the other.[85]

82 Blake v. Pegram, 101 Mass. 392.
83 In re Reynolds, 11 Hun (N. Y.), 41.
84 Jones' Appeal, 2 Watts & S. (Pa.) 143.
85 Hocker v. Woods' Exrs., 33 Pa. 466; Pim v. Downing, 11 Serg. & R. (Pa.) 66.

§ 506. Guardian of nonresident.

A guardian may be appointed for a nonresident minor or other person liable to be placed under guardianship, according to the laws of this state, who is seised of realty in this state.[86] The procedure is the same as in other cases, except that notice is required to be given to all persons interested in such manner as the court may require. There is no provision in the statutes for the appointment of a guardian of a nonresident who has no property in this state except personalty.

The guardian appointed at the residence of the minor is a proper person to make the application, and should he desire it, may receive the appointment.[87] The court may, however, issue letters to such other person as may be deemed suitable.[88]

Guardianship of a nonresident first lawfully granted within this state extends to all the estate of the ward within the state, and excludes the jurisdiction of the county court of every other county.[89] The guardian is required to give a bond with the same provisions as apply to other guardians, except that the provisions relating to the inventory and disposal of the effects is confined to such property as may come into his hands in this state.[90] His powers and duties are limited to this state, but within such limit are the same as though his ward lived here, and should his ward remove to this state, he is entitled to his custody in the same

86 Rev. Stats., c. 18, § 122, [1661]; L. O. L., § 1336.
87 Hoyt v. Sprague, 103 U. S. 613.
88 Earl v. Dresser, 30 Ind. 11.
89 Rev. Stats., c. 18, § 125, [1664]; L. O. L., § 1339.
90 Rev. Stats., c. 18, § 124, [1663]; L. O. L., § 1338.

cases as guardians of residents.[91] His appointment is principally for the purpose of bringing actions in regard to real estate or looking after the same.

§ 507. Removal of guardians.

The county court has power to accept the resignation of a guardian and revoke his letters.[92] Such resignation will not be considered as a judgment that a full accounting has been made by him.[93]

A guardian may be removed from his trust if the court finds that he is insane, incapable of discharging his trust, or evidently unsuitable therefor.[94] Incapability which is a ground for removal may be defined as a gross ignorance of duty,[95] or physical or mental incapacity to attend to the business of the estate.[96]

The term "unsuitable" covers a good many delinquencies. It includes corrupt morals, such as are likely to have an injurious influence on the character of the ward, especially when the guardian has custody of his person;[97] becoming an habitual drunkard;[98] refusing to support his ward when the ward is unable to support himself and he has ample funds for that purpose;[99] committing waste[100] knowingly permitting

91 Rev. Stats., c. 18, § 123, [1662]; L. O. L., § 1339.
92 Rev. Stats., c. 18, § 116, [1655]; L. O. L., § 1331.
93 King v. Hughes, 52 Ga. 600.
94 Rev. Stats., c. 18, § 116, [1655]; L. O. L., § 1331.
95 Wood v. Black, 84 Ind. 279; Nicholson's Appeal, 20 Pa. 50.
96 Damarell v. Walker, 2 Redf. Sur. (N. Y.) 198.
97 Ruohs v. Backer's Next Friend, 6 Heisk. (Tenn.) 395; Badenhoof v. Johnson, 11 Nev. 87.
98 Kettletas v. Gardner, 1 Paige Ch. (N. Y.) 488.
99 In re Swift, 47 Cal. 629.
100 Dickerson v. Dickerson, 31 N. J. Eq. 652.

unlawful claims against the estate to be paid;[101] using the personal property for his own benefit and collecting entirely inadequate rents from the realty;[102] criminal neglect or ill-treatment of his ward;[103] failure to give a new bond when ordered by the court;[104] and becoming insolvent.[105] It is not necessary to show that he has been corrupt or guilty of malfeasance in office; it is sufficient if it appears that he has neglected to properly protect his ward's interests.[106]

A minor cannot, on arriving at the age of fourteen years, nominate a guardian to succeed the one already serving, unless the former appointee resigns or is removed for cause.[107] A failure to render an account, if the neglect does not work an injury to the estate, is not a sufficient ground for removal,[108] the rule of law being that, where the statute enumerates the causes for removal, the court can remove the guardian for no other causes.[109]

Form No. 231.

PETITION FOR REMOVAL OF GUARDIAN.

[Title of Cause and Court.]

Your petitioner, E. F., respectfully represents unto the court that on the ——— day of ———, 19—, letters of guardianship on the estate of A. B., a minor, were issued out of and under the seal of

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101 Crooker v. Smith, 47 Neb. 102, 66 N. W. 19; Wood v. Black, 84 Ind. 279.

102 Robertson v. Epperson, 78 Neb. 279, 110 N. W. 540.

103 Rev. Stats., c. 18, §§ 118, 120, [1657], [1659].

104 Rev. Stats., c. 16, § 82, [1209].

105 Baldridge v. State, 69 Ind. 166.

106 Crooker v. Smith, 47 Neb. 102, 66 N. W. 19.

107 Gray's Appeal, 96 Pa. 243; Dibble v. Dibble, 8 Ind. 307.

108 Gott v. Culp, 45 Mich. 265, 7 N. W. 767.

109 Kahn v. Israelson, 62 Tex. 221.

said court to one C. D., and that said C. D. is now the guardian of the said A. B.; that said C. D. has become and now is unsuitable to perform the duties of guardian of said A. B., for that said C. D. has paid from the estate of said A. B. the sum of ——— dollars in satisfaction of a debt for which said A. B. and his said estate was not liable; that said C. D., on account of his advanced age and irascible temperament, is not a suitable person to act as said guardian [set out in full specific charges against the guardian].

Your petitioner prays that a time and place be fixed for the hearing on said petition, that notice thereof be given the said G. H., and that, upon the hearing of said proceedings, an order be entered removing said C. D. from his trust, and for the appointment of some suitable and competent person to be guardian of the said A. B.

Dated this ——— day of ———, 19—.

(Signed) E. F.

[Add verification, Form No. 5.]

§ 508. Notice to guardian.

Notice of the hearing on the petition for removal must be given the guardian and all persons interested.[110] The county court cannot hear, try and determine the alleged insanity, incapability or unsuitableness of the guardian, without his having an opportunity to be heard in his defense. A failure to serve notice upon him deprives the court of jurisdiction, unless, of course, he enter a voluntary appearance.[111] The court has no authority to appoint a new guardian until the authority of the former one has been terminated.[112]

When a guardian is arrested and brought to trial on the charge of criminal neglect and abuse of his ward,

110 Rev. Stats., c. 18, § 116, [1655].

111 Crooker v. Smith, 47 Neb. 102, 66 N. W. 19; Brodribb v. Tibbits, 63 Cal. 80; Copp v. Copp, 20 N. H. 284; McCloskey v. Plantz, 76 Minn. 323, 79 N. W. 176; Lee v. Ice, 22 Ind. 384.

112 Copp v. Copp, 20 N. H. 284; Robinson v. Zollinger, 9 Watts (Pa.), 169.

the county judge before whom the case was tried may remove him, after hearing the evidence on the trial, without further notice.[113] In all other cases notice must be served.

Form No. 232.

NOTICE OF HEARING ON PETITION FOR REMOVAL OF GUARDIAN.

[Title of Cause and Court.]

To C. D., Guardian of said A. B., and All Persons Interested in the Estate of said A. B.:

You are hereby notified that E. F. has filed his petition in said court praying for your removal from your trust as guardian of said A. B., a minor, for the reason [state causes for removal as alleged in the petition].

You are further notified that a hearing on said petition will be had at the county court room in said county on the ——— day of ———, 19—, at the hour of 9 o'clock A. M.

Dated this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

Form No. 233.

ORDER REMOVING GUARDIAN FOR CRIMINAL NEGLECT AND ABUSE OF WARD.

[Title of Cause and Court.]

It appearing to this court that on the ——— day of ———, 19—, E. F., filed his complaint under oath against C. D., guardian of A. B., an incompetent person, for neglecting to clothe and feed said A. B., and for ill-treatment of said A. B.; that a warrant was thereupon issued for the arrest of said C. D., and the same was delivered to J. N., sheriff of said county, who made return thereof on the ——— day of ———, 19—, as follows [copy return], and that said C. D. entered plea of not guilty: The court thereupon proceeded with the trial of said complaint. E. F. and G. H. were sworn and testified as witnesses for the complainant, and C. D. in his own behalf. Upon consideration of the evidence, the court found C. D. guilty in manner and form as alleged in said complaint.

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113 Rev. Stats., c. 18, § 133, [1672].

Now, therefore, it appearing to the court from the proceedings aforesaid that the said C. D. is not a fit and suitable person to have the custody of said minor, and the condition of said minor will be ameliorated by his removal from said trust, it is therefore ordered by me that the said C. D. be and he hereby is removed from his trust as guardian of said A. B., and is hereby ordered to file his account as such guardian within ten days from this date.

And it further appearing that L. M. is a suitable and competent person to act as guardian of said minor, and said L. M. having signified his willingness to accept said trust should it be granted him, it is further ordered and decreed that said L. M. be appointed guardian of the said A. B., a minor, upon his filing his bond as required by law in the penal sum of ——— dollars.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

Form No. 234.

ORDER REMOVING GUARDIAN.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on for hearing on the petition of E. F., praying for the removal of C. D. as guardian of said A. B., a minor, for [state causes], the objections of C. D., and the evidence, and was submitted to the court; and it appearing to the court that due notice has been given said C. D., guardian, of the pendency of said petition, as appears by the return of J. M., sheriff of said county, on file herein; and it further appearing to said court that the said C. D. is [state findings which are causes for removal]:

It is therefore ordered and decreed that the said C. D. be and he hereby is removed from his trust as guardian. It is further ordered that said C. D., within ten days from the date of this decree file his final account as guardian. And it appearing to the court that L. M. is a suitable person to act as guardian of the estate of said A. B., and the said L. M. having signified his willingness to accept said guardianship, the same is conferred upon him. It is therefore ordered that letters of guardianship on the person and estate of A. B. issue to the said L. M. upon the filing of a bond in this court in the penal sum of ——— dollars.

(Signed) J. K.,
County Judge.

§ 509. Appointment of successor.

Whenever any guardian shall die, be removed from his trust, or the court accept his resignation, pending the disability of his ward, a successor may be appointed. The new guardian is given authority to bring an action upon the bond of the former guardian for any damages sustained by his neglect or refusal, or the neglect or refusal of his representatives, to turn over to the new guardian, according to the order or decree of the county court or according to law.[114] He must turn over money or good securities,[115] but a receipt of the same does not release him from liability for mismanagement,[116] and a collusive or fraudulent settlement between the two can be set aside.[117] He may follow the assets into the hands of third parties, to whom they were unlawfully transferred by his predecessor.[118]

§ 509a. Transfer of guardianship.

The county judge has power, whenever the interest of the ward and convenience of the ward require, to transfer the guardianship to any other county in the state. A petition for this purpose must be filed setting forth the reasons for such change of venue, and if satisfied the same are sufficient, the judge shall make the order of removal and therein shall direct that certified copies of the record of the guardianship and the original bond filed by the guardian be transmitted to the clerk of the county to which such transfer is

114 Rev. Stats., c. 18, § 117, [1656].

115 Skidmore v. Davies, 10 Paige (N. Y.), 316.

116 Lamar v. Micou, 112 U. S. 452.

117 Ellis v. Scott, 75 N. C. 108.

118 Fox v. Kerper, 51 Ind. 148.

made, there to be filed. The filing of the transcript and bond in the court of the other county gives the county court of that county complete jurisdiction over the matter, and all further proceedings therein must be begun in that county.[119]

[119] L. O. L., §§ 1343–1345.

CHAPTER XXXVII.

POWERS AND DUTIES OF GUARDIANS.

§ 510. Inventory and Appraisement.
511. Custody of Person of Ward.
512. Support of Minor Ward.
513. Support of Incompetent or Spendthrift.
514. Labor and Services of Ward.
515. Collection of Assets.
516. Action Against Ward.
517. Contracts of Guardians.
518. Payments of Debts of Ward.
519. Powers and Duties in Regard to Real Estate.
520. Investment and Management of Personal Estate.
521. Investment and Management of Personal Estate—Concluded.
522. Liability of Guardian for Negligence.
523. Liability for Ill-treatment of Ward.
524. Rights of Foreign Guardian in This State.
525. Additional or Cumulative Bond.

§ 510. Inventory and appraisement.

A guardian, like an executor or administrator, is required, within three months after his receipt of letters, to make and file under oath a true and perfect inventory of all the property of his ward in this state which shall have come into his possession or knowledge. It must be appraised in the same way as that of a decedent.[1]

As in the case of a decedent, it is not conclusive of the existence of assets or of their value, and either party may show that it contains errors of omission or commission.[2]

1 Rev. Stats., c. 18, § 114, [1653]; L. O. L., § 1329. See § 172, *supra.*

2 Green v. Johnson, 3 Gill & J. (Md.) 389; Martin v. Sheridan, 46 Mich. 93, 8 N. W. 722.

If a guardian is indebted to the ward when he assumes the duties of his trust, such indebtedness becomes assets in his hands, to be inventoried and accounted for as other property.[3]

§ 511. Custody of person of ward.

The guardian of an insane or incompetent person, or of a spendthrift,[4] or of a minor whose parents are both dead, always has the custody of his ward.[5] The general rule is that if one or both of the parents are living, the guardian has charge of the property of the minor and is not entitled to his custody.[6] If the parent is not a suitable person to take charge of his child, the right exists, both at common law and under the statutes, to place his control in the hands of a guardian or of some other suitable person.[7] A minor cannot be removed from the custody of a parent unless it affirmatively appears that the habits, character or occupation of the parent are such that he is not a suitable person to look after his offspring, or that the circumstances, surroundings and conditions under which he

[3] Neill v. Neill, 31 Miss. 36; Hoile v. Bailey, 58 Wis. 434, 17 N. W. 322; Martin v. Davis, 80 Wis. 376, 50 N. W. 172; Winship v. Bass, 12 Mass. 203. For forms for inventory and appraisement, see Nos. 75, 79 and 80, pages 265, 270.

[4] Rev. Stats., c. 18, §§ 103, 109, [1642], [1648]; L. O. L., §§ 1321, 1326.

[5] Rev. Stats., c. 18, § 94, [1633]; L. O. L., § 1314; Jenkins v. Clark, 71 Iowa, 522, 32 N. W. 504; Burges v. Frakes, 67 Iowa, 460, 25 N. W. 735.

[6] Ramsay v. Potter, 20 Wis. 507; Lord v. Hough, 37 Cal. 657.

[7] Rev. Stats., c. 18, § 132, [1671]; Badenhoof v. Johnson, 11 Nev. 87; Luphie v. Winans, 37 N. J. Eq. 345.

is being brought up cannot but exert an evil influence upon him.[8]

Before the custody of a child can be permanently taken from its parents, they have a right to be heard. If notice of the application is given them, there is no reason why the question of their being suitable persons cannot be decided on such hearing, but unless it has been so determined, the letters do not give the guardian the right of custody.[9]

The rule which should govern in determining the right of custody is the same as in *habeas corpus*. The welfare and best interests of the child is the principal matter to be considered, but the court will not remove the child from the control of the parent unless such parent is an unsuitable person to bring up a child and the future welfare of the child require him to be placed in different surroundings.[10]

A guardian who also has the custody of his ward fixes the residence of his ward. He may remove from the county in which he was appointed to another,[11] or to another state.[12]

8 Clarke v. Lyon, 82 Neb. 625, 118 N. W. 472; Terry v. Johnson, 73 Neb. 653, 103 N. W. 319; Norval v. Zinsmaster, 57 Neb. 158, 77 N. W. 373.

9 In re Thomsen, 1 Neb. Unof. 751, 95 N. W. 805; Clarke v. Lyon, 82 Neb. 625, 118 N. W. 472.

10 Schroeder v. State, 41 Neb. 745, 60 N. W. 89; Sturtevant v. State, 15 Neb. 459, 19 N. W. 617; Norval v. Zinsmaster, 57 Neb. 157, 77 N. W. 373; Terry v. Johnson, 73 Neb. 653, 103 N. W. 319; Clarke v. Lyon, 82 Neb. 625, 118 N. W. 472.

11 Holyoke v. Haskins, 5 Pick. (Mass.) 20; Anderson v. Estate of Anderson, 42 Vt. 350.

12 Pedan v. Robb, 8 Ohio St. 227; Townsend v. Kendall, 4 Minn. 412 (Gil. 315).

§ 512. Support of minor ward.

The guardian of a minor whose father is living is not obliged to devote the funds of the estate to the support of his ward, the general rule being that it is the duty of a parent to support his infant children whether they have estates of their own or not.[13] This rule is usually relaxed in the case of a mother, and if the child has property of his own, she may obtain leave of the court to apply such part of his estate as is desirable for that purpose.[14] Where no formal application was made, but the amount claimed appears reasonable and the circumstances were such as would justify the court in granting it, it may be adjusted on the hearing on the final account.[15]

Both under the statute[16] and at common law, if the means of the father are limited, and the minor is possessed of an estate the income from which will support and maintain him in a more expensive manner than his father can reasonably afford, regard being had to the situation of the father's family, and to all the circumstances of the case, either the whole or a part of the expenses of the education and maintenance of such minor may be defrayed from his separate estate, as may be directed by the court, and the charges may be allowed accordingly in the settlement of such guardian.[17]

13 2 Kent, Com., 191; In re Besondy, 32 Minn. 285, 20 N. W. 366.

14 Ellis v. Soper, 111 Iowa, 431, 82 N. W. 1041; In re Carter, 120 Iowa, 215, 94 N. W. 488.

15 Welch v. Burris, 29 Iowa, 186; Latham v. Meyers, 57 Iowa, 519, 10 N. W. 924.

16 Rev. Stats., c. 18, § 97, [1636].

17 Kinsey v. State, 71 Ind. 72; Welch v. Burris, 29 Iowa, 186.

If the father is dead or wholly unable to support the minor children, it is the duty of their guardian to see that they are suitably supported, maintained and educated at the expense of the income or body of the estate, as their circumstances and the condition of the estate will warrant.[18]

It is an old rule that a minor wholly dependent upon his own property for support should be maintained, educated and supported in the same manner as those of his social standing, considering the amount and condition of his estate.[19]

Before any part of the principal of a ward's estate is expended for his support and maintenance, a formal application for that purpose should be presented to the county court and an order made for that purpose.[20] Such permission is not absolutely necessary. If the circumstances warrant it, and the condition of the estate permits, payments from the principal will be allowed, and held a proper charge in the settlement of the final account, though no leave of the court has been had and obtained.[21] All payments for a ward's maintenance and education should be made by the guardian himself, or by and under his express direction. It is not a power he can delegate to anyone.

18 State v. Roche, 94 Ind. 372; Bond v. Lockwood, 33 Ill. 212; In re Mells, 64 Iowa, 391, 20 N. W. 486; Chubb v. Bradley, 58 Mich. 268, 25 N. W. 186.

19 Wallis v. Neale, 43 W. Va. 529, 27 S. E. 227; Jones v. Parker, 67 Tex. 76, 3 S. W. 222; Stumph v. Goepper, 76 Ind. 323.

20 Foteaux v. Le Page, 6 Iowa, 123; Prebble v. Longfellow, 48 Me. 279; Johnson v. Haynes, 68 N. C. 514.

21 Wilson's Guardianship, 40 Or. 358, 68 Pac. 393, 69 Pac. 439; In re Besondy, 32 Minn. 385, 20 N. W. 366; Gott v. Culp, 45 Mich. 265, 7 N. W. 767; Karney v. Vale, 56 Ind. 542.

An apparent exception exists where the guardian, having sufficient assets applicable therefor, fails to supply his ward with necessaries. In this case, the ward himself or a competent third party may purchase suitable necessaries, and the guardian will be held liable therefor.[22]

§ 513. Support of incompetent or spendthrift.

An incompetent or spendthrift under guardianship is entitled to reimbursement for expenses incurred in resisting the application for his guardian's appointment.[23] He is also entitled to such support from his estate as its condition will permit. In the case of a person confined in a public asylum for the insane in this state, all costs and charges are defrayed by the county.[24] Costs of clothing should be paid by the guardian.

In the case of an insane person not confined in a public asylum, or one otherwise incompetent, the guardians may make a contract on behalf of the estate for his ward's support.[25]

He should obtain an order of the court for that purpose. In fixing the amount the court should consider the interests of the unfortunate rather than those of his presumptive heirs, and award such a sum as will, as far as possible, support him in the manner he formerly lived.[26]

22 Gwalty v. Cannon, 31 Ind. 227; Hastings v. Bachelor, 27 Tex. 259.

23 Rev. Stats., c. 18, § 108, [1647]; L. O. L., § 1325.

24 Rev. Stats., c. 74, § 94, [7271a].

25 Masters v. Jones, 158 Ind. 647, 64 N. E. 213; Creagh v. Tunstall, 98 Ala. 249, 12 South. 713.

26 Matter of Saulsbery, 2 Johns. Ch. (N. Y.) 347; Hambleton's Appeal, 102 Pa. 50.

The duties of the guardian of a spendthrift in looking after the support of his ward are substantially like those of the guardian of an incompetent.[27]

§ 514. Labor and services of ward.

It is not the policy of the law to permit a minor who has no parents to remain idle and consume the principal of his estate for his support, where he has sufficient age and ability to earn money for himself.[28] If he lives in the family of his guardian and his services exceed the value of his board, he should receive the difference,[29] or if less, the guardian's claim for his board should be reduced by their value.[30] If he works for another party, the guardian may permit him to use the money for his own purposes.[31]

A guardian should never compel his ward to work at the expense of an education which his age, ability and natural inclinations demand and the condition of his estate permits. He stands *in loco parentis*, and the duties devolving upon him should receive the same diligent attention as though his ward were his own child.

27 Rev. Stats., c. 18, § 109, [1648]; Sturgis v. Sturgis, 51 Or. 19, 93 Pac. 696. Where the ward is possessed of a large estate, the court should provide liberally for his welfare. The guardian of a Michigan spendthrift was for years authorized by the probate court to pay his ward's board at a fashionable club, clothing, jewelry, feed and care for a team of horses and a carriage, and ten dollars per month spending money, in all not exceeding three thousand dollars per year.

28 Brown v. Yaryan, 74 Ind. 305.

29 Denison v. Cornwell, 17 Serg. & R. (Pa.) 374.

30 Boardman v. Ward, 40 Minn. 399, 42 N. W. 202.

31 Shurtleff v. Rile, 140 Mass. 213, 4 N. E. 407.

§ 515. Collection of assets.

The right to the possession of the estate of a ward passes to his statutory guardian on his receipt of letters.[32] He should use the same diligence in collecting them that the ordinary business man would in the management of his own affairs, and is liable for negligence in failing to collect.[33] He should commence and prosecute all suits which may be necessary for that purpose,[34] including actions for property fraudulently obtained from his ward before the issue of letters.[35] He should collect and reduce to possession property coming to his ward by descent or devise,[36] and may follow assets into the hands of third parties with notice.[37] If the ward is entitled to a pension or has a claim against the federal government, he should prosecute the application.[38]

The code permits him to bring an action without joining with him the person for whose benefit it is prosecuted.[39]

As a general rule, he should accept nothing but money in settlement of demands of the estate,[40] but if he has acted with prudence and accepts other property,

32 Rev. Stats., c. 18, § 111; L. O. L., § 1314; Cohoe v. State, 79 Neb. 811, 114 N. W. 286.

33 In re Shandoney, 83 Cal. 387; Covington v. Leak, 65 N. C. 594.

34 Shepherd v. Evans, 9 Ind. 260.

35 Bennett v. Bennett, 65 Neb. 432, 91 N. W. 489; Somes v. Skinner, 16 Mass. 348.

36 Willis' Appeal, 22 Pa. 325; Covington v. Leak, 65 N. C. 594; Walter v. Walla, 10 Neb. 123, 4 N. W. 938.

37 Fox v. Kerper, 51 Ind. 149.

38 Boaz's Admr. v. Milliken, 83 Ky. 634.

39 Civ. Code, § 26.

40 Brenham v. Davidson, 51 Cal. 352; State v. Greensdale, 106 Ind. 364, 6 N. E. 926.

and such settlement appears to have resulted in a benefit to the estate, it should be approved.[41]

At common law, a guardian had a right to compromise debts due his ward whenever he deemed it for the best interests of the estate.[42] Our statutes provide that he may compromise claims with the approbation of the county court.[43] It is not clear whether such right exists independent of the statute, but it would seem that the same rule ought to apply as in case of executors and administrators, and the compromise upheld if it appears to have been in the interest of the estate.[44]

He has the same right as an executor or administrator to institute special proceedings for the recovery of any money, goods, effects, written instruments or other property belonging to the estate of the ward alleged to have been concealed, embezzled or conveyed away by any party, and such proceedings may also be instituted by the ward, or any person interested in the estate, or person having a prospective interest as heir or otherwise, or by a creditor.[45]

Property of a ward in the hands of his guardian is in the custody of the law, and not subject to attachment or execution. Deriving his powers from the

41 Mason v. Buchanan, 62 Ala. 112.

42 Schee v. McQuilliken, 59 Ind. 269; Graham v. Hester, 15 La. Ann. 148.

43 Rev. Stats., c. 18, § 111, [1650]; L. O. L., § 1327. For forms for petition and order, see Nos. 91, 92, p. 306.

44 Hagy v. Avery, 69 Iowa, 434, 29 N. W. 409; Torrey v. Black, 58 N. Y. 185.

45 Rev. Stats., c. 18, § 121, [1660]. For forms and procedure, see § 197, page 291 et seq.

court, the guardian is subject to the control of the court in its management.[46]

§ 516. Actions against ward.

It is the duty of a guardian to appear and represent his ward in all suits and proceedings to which he has been made a party defendant, unless another person has been appointed for that purpose as guardian *ad litem*.[47]

The personal liability of the ward, as in an action for a tort, will not support a suit against the guardian. The ward alone is liable.[48] The guardian may be joined with the ward in an action brought against the ward for divorce. The court has no power to make an order for the payment of alimony or suit money which will bind the guardian. The enforcement of such decree can only be through the county court.[49]

The defense in cases against minors and incompetents is frequently conducted exclusively by a guardian *ad litem*, whose duties are confined to the protection of the interest of the ward in the particular matter,[50] and a judgment or decree rendered against a minor not represented by guardian or guardian *ad litem* is voidable, but one so rendered against an incompetent ward is merely erroneous.[51] In the latter case,

46 Sections 520, 521, *post;* Sturgis v. Sturgis, 51 Or. 19, 93 Pac. 696.

47 Laws 1913, p. 595.

48 Garrigus v. Ellis, 95 Ind. 598.

49 Sturgis v. Sturgis, 51 Or. 20, 93 Pac. 696.

50 In re Estate of Robertson, 86 Neb. 490, 125 N. W. 1093.

51 McCallister v. Lancaster County Bank, 15 Neb. 295, 18 N. W. 57; McCormick v. Paddock, 20 Neb. 486, 30 N. W. 602; Parker v. Starr, 21 Neb. 690, 33 N. W. 424.

where there was nothing to show that the defendant was under guardianship and that there was a good defense, the judgment can be avoided by a suit in equity.[52]

Persons under disability who are represented in actions against them by guardians are bound by the same rules of law and procedure in the matter in which they are so represented as are other persons.[53]

§ 517. Contracts of guardians.

Contracts made by guardians with third parties in reference to the property of their wards differ from like contracts made by executors or administrators. A guardian has power to bind the estate of his ward by contract for the performance of any services necessary for the preservation and management of the estate, provided the same is reasonable in its terms. A person performing services pursuant to such contract may proceed directly against the estate.[54]

Contracts for the education and maintenance of the ward or for necessaries are binding on the guardian personally and not on the estate. He is entitled to reimbursement out of the estate, if they are just and proper, for payments made on account of them.[55]

In Oregon all contracts of a guardian come under the latter rule.[56]

52 Spence v. Miner, 90 Neb. 108, 132 N. W. 942.

53 Allyn v. Cole, 3 Neb. Unof. 235, 91 N. W. 505.

54 McCoy v. Lane, 66 Neb. 847, 92 N. W. 1010; Bailey v. Garrison, 68 Neb. 679, 94 N. W. 990.

55 Reading v. Wilson, 38 N. J. Eq. 446; Sperry v. Fanning, 90 Ill. 1371; Shephard v. Hanson, 9 N. D. 249, 83 N. W. 20; McKinnon v. McKinnon, 81 N. C. 201.

56 Sturgis v. Sturgis, 51 Or. 19, 93 Pac. 926.

§ 518. Payment of the debts of the ward.

It is the duty of the guardian to pay all the debts of his ward existing at the date of his letters from the personal estate and the income from the real estate,[57] but if such assets prove insufficient, he may obtain a license from the court and sell real estate for that purpose.[58] There are no statutory proceedings for the allowance and adjustment of claims against a ward. It is the duty of the guardian to pay such demands as he believes to be just and lawful. He has power, with the consent or approval of the court, to enter into a stipulation compromising a claim against his ward, whether a suit be pending on the same or not, and such stipulation will be as binding on him as though he were of lawful age.[59]

An action may be brought against the guardian in his official capacity, or against the ward himself, if an adult, and the judgment in such cases is enforceable against the ward's property in the guardian's possession.[60]

He has no power to borrow money for the purpose of paying debts.[61]

§ 519. Powers and duties in regard to real estate.

The duties of a guardian require him to take charge of all the real estate of his ward, and his rights over

57 Rev. Stats., c. 18, § 110, [1649]; L. O. L., § 1327.

58 Chapter XXXVIII.

59 Savage v. McCorkle, 17 Or. 48, 21 Pac. 444.

60 Bently v. Torbert, 68 Iowa, 122, 25 N. W. 939; Inhabitants of Raymond v. Sawyer, 37 Me. 406; Brown v. Chase, 4 Mass. 436; Morris v. Garrisson, 27 Pa. 226.

61 Trutch v. Bunnell, 11 Or. 58, 4 Pac. 588.

the same are much more extensive than those of an executor or administrator over the estate of his decedent. The law demands that his management be such as to obtain as much income as possible,[62] and at the same time keep the buildings and improvements in as good condition as the character and amount of the estate and the circumstances of the ward permit.[63] Ordinary repairs, such as merely keeping the property in tenantable condition, may be made without first obtaining permission from the court. Improvements in the way of erecting new buildings or extensive alteration of old ones can only be made after first obtaining an order of the court therefor.[64] If he neglects to obtain such order, the estate of the ward cannot be held liable therefor.[65] The costs of repairs and improvements are defrayed from the income of the real estate or from the personal property, though the proceeds of the sale of other real estate may, under order of the court, be used for the erection of improvements.

He has power to execute a lease of his ward's lands, which in all cases ends with the termination of his trust. In case of his death, resignation or removal during the existence of the disability of the ward, it will remain valid for the term unless his successor expressly disaffirms it.[66] Where the term of the lease extends beyond the date of the removal of the dis-

62 Thackary's Appeal, 75 Pa. 132.

63 Smith v. Gummere, 39 N. J. Eq. 27; Williams v. Fox, 25 Wis. 646.

64 Robinson v. Hersey, 80 Me. 225; Murphy v. Walker, 131 Mass. 341; Frankenfeld's Appeal, 102 Pa. 589.

65 Gerber v. Bauerline, 17 Or. 115, 19 Pac. 849.

66 In re Stafford, 3 Misc. Rep. (N. Y.) 106.

ability, such event, *per se*, terminates such lease,[67] and the former ward may at once avoid the unexpired term.[68]

He may redeem his ward's lands from mortgage liens,[69] foreclose mortgages and bid in the property for his ward,[70] sign in the capacity of "owner" a petition for paving a street,[71] join in and assent to partition of the real estate of his ward, and it has also been held that he may bid in the property for his ward at partition sale.[72] It is a general rule, however, that he cannot invest his ward's property in real estate without leave of the court.[73]

It is also held that a guardian may maintain a suit for partition in behalf of his ward.[74]

§ 520. Investment and management of personal estate.

The estate of any person under guardianship should always, when practicable, be so invested as to bring in the largest possible income consistent with good

67 Field v. Schiefflin, 7 Johns. Ch. (N. Y.) 150; Alexander v. Buffington, 66 Iowa, 360, 23 N. W. 754; Richardson v. Richardson, 49 Mo. 29; Watkins v. Peck, 13 N. H. 360.

68 Jackson v. O'Rorke, 71 Neb. 418, 98 N. W. 1069.

69 Wright v. Comly, 14 Ill. App. 551; Marvin v. Schilling, 12 Mich. 356; Witt v. Mewhirter, 57 Iowa, 545, 10 N. W. 890.

70 Walter v. Walla, 10 Neb. 123, 4 N. W. 398.

71 Chan v. City of South Omaha, 85 Neb. 434, 123 N. W. 464.

72 Bowman's Appeal, 3 Watts (Pa.), 369.

73 2 Kent, Com., 228, 230; Woods v. Boots, 60 Mo. 546; Holbrook v. Brooks, 33 Conn. 347; In re Petition of Dorr, Walk. Ch. (Mich.) 145; Davis' Appeal, 60 Pa. 118.

74 Bowen v. Swander, 121 Ind. 164, 22 N. E. 725; Goudy v. Shank, 8 Ohio St. 415; Tate v. Bush, 62 Miss. 145; Thornton v. Thornton, 27 Mo. 302.

security. A guardian should always keep the funds of the estate separate and distinct from those of his own. He should never deposit the cash of the estate in a bank in his own name, but in his official capacity as guardian. All sums belonging to the estate should, as soon as possible after their receipt by him, be invested in good interest-bearing securities, he only retaining in his possession sufficient to pay current expenses.[75]

The county court, on application of the guardian, or of any person interested in the estate of any ward, after such notice to all persons interested therein as the court shall direct, may authorize or require a guardian to sell or transfer any stock in public funds, or in any bank or corporation, or any other personal estate or effects held by him as guardian, and to invest the proceeds of such sale, and also any other money in his hands, in real estate, or in any other manner that shall be most for the interest of all concerned therein, and the said court may make such further orders and give such directions as the case may require for managing, investing and disposing of the effects of the estate in the hands of the guardian.[76] The guardian has no authority to dispose of any of the ward's property without first submitting the matter to the proper county court, and obtaining its order therefor. No sale or transfer of the property of the ward can be had without the authorization of the court.[77]

75 Knowlton v. Bradley, 17 N. H. 458.

76 Rev. Stats., c. 18, § 115, [1654]; L. O. L., § 1330.

77 Hendrix v. Richards, 57 Neb. 794, 78 N. W. 378; Slusher v. Hammond, 94 Iowa, 512, 63 N. W. 185; McDuffie v. McIntyre, 11 S. C. 551, 32 Am. Rep. 500; Gentry v. Bearss, 82 Neb. 787, 118 N. W. 1077.

The statute above cited is mandatory, and is strictly construed. In order to relieve himself from personal liability, he must file a formal petition in the county court; notice must be given, a hearing had and order made and entered.[78]

The method of service rests in the discretion of the court. The ward may appear by next friend or guardian *ad litem.* Evidence must be taken showing the desirability of making loans and the character of the security offered. The court should see that no doubtful notes, bonds or mortgages are palmed off on to the estate, safety being of greater importance than a high rate of interest.[79]

Where investments are made without leave of the court, he will be held liable for the lawful interest thereon, irrespective of what he may have received as profits from them.[80]

It is not the intention of the law that he make any profit from his trust except the compensation which the court gives him, and if he occupies his ward's real estate, he should be charged with its reasonable rental value.[81]

78 In re O'Brien's Estate, 80 Neb. 125, 113 N. W. 1001; Gentry v. Bearss, 82 Neb. 787, 118 N. W. 1077.

79 In re O'Brien's Estate, 80 Neb. 125, 113 N. W. 1001; In re Grandstrand, 49 Minn. 438, 52 N. W. 41. In the O'Brien case the county judge practically acted as agent, guardian and county judge without any application whatever being on file. Later, in his judicial capacity, he formally approved his acts. The court held such formal approval was no defense to an action against the guardian. A judge guilty of such conduct would probably be impeached were charges preferred against him.

80 Wilson v. Wilson, 90 Neb. 353, 133 N. W. 447.

81 Royston v. Royston, 29 Ga. 82; Fox v. Willis, 25 Wis. 646; Wilson v. Wilson, 90 Neb. 353, 133 N. W. 447.

Form No. 235.

APPLICATION TO SELL PERSONALTY AND REINVEST THE SAME.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that on the ——— day of ———, 19—, letters of guardianship of said estate were issued to him by said court, and that he now is the guardian of said estate. [State condition of personal estate, how invested, income now derived therefrom, what portion it is desired to sell, what portion of the proceeds needed for current expenses or debts, and in what manner it is desired to invest the proceeds of the sale.]

Your petitioner therefore prays that a time and place may be fixed for the hearing of this application, and notice thereof given to all parties interested therein, in manner to be determined by the court, and that an order of said court may be entered giving petitioner such order and directions in regard to the reinvestment of said assets as the case may require.

Dated this ——— day of ———, 19—.

(Signed) C. D.,
Guardian.

§ 521. Investment and management of estates—Concluded.

Where investments are made by guardians in the manner provided by law, they are not personally liable if a loss occurs, unless of the stock or securities themselves.[82]

A county judge has power to instruct a guardian to make investments according to his discretion. This is not the best practice for any of the parties interested, for if a loss results, the guardian may become liable therefor, unless it appears that he acted with

82 Hoyt v. Sprague, 103 U. S. 613; Guardianship of Cardwell, 55 Cal. 137; Carlysle v. Carlysle, 10 Md. 440.

diligence and prudence and the loss resulted from the fraudulent acts of another.[83]

If a guardian permits the funds of the estate to lay idle for any considerable length of time when he could have invested them, or employs them in his own business, he should be charged with interest,[84] and if he uses them in speculations on his own account, the interest may be compounded annually.[85]

What constitutes a proper investment for the funds of a ward is a matter resting in the sound discretion of the court and guardian. Our statutes, unlike those of some states, contain no provisions for such investment. Real estate securities, or municipal or federal bonds, though the income therefrom may not be as large as from other securities, are usually preferred.[86] The safety of the investment should be considered, rather than the amount of the income. Loans upon personal security or upon indorsements of persons or corporations of doubtful standing should not, as a general thing, be made.[87] He should never take any chances by loaning his ward's money at usurious rates, but should take as much as he can get with safety, if it is a legal rate.[88] If he makes usurious loans, and loses the interest, he is liable to his ward therefor.[89] If a guardian uses his ward's funds in speculation, and

83 Wyckoff v. Hulse, 32 N. J. Eq. 697; Slaughter v. Favorite, 107 Ind. 291, 4 N. E. 880; Jacobia v. Terry, 92 Mich. 275, 52 N. W. 629.

84 Swindall v. Swindall, 43 N. C. 285.

85 Farwell v. Steen, 46 Vt. 678; Little v. Anderson, 71 N. C. 190.

86 Spear v. Spear, 9 Rich. Eq. (S. C.) 184.

87 Clark v. Garfield, 8 Allen (Mass.), 427; Gilbert v. Guptill, 34 Ill. 112; Smith v. Smith, 4 Johns. Ch. (N. Y.) 281.

88 Frost v. Winston, 32 Mo. 489.

89 Draper v. Joiner, 9 Humph. (Tenn.) 612.

makes large profits, he is not allowed to pocket the proceeds, but, instead of paying compound interest, he may be compelled to account to the ward for the profits of the investment.[90]

§ 522. Liability of guardian for negligence.

A guardian should exercise the same degree of care and prudence in the management of the affairs of his ward as an executor in administering the estate of his decedent.[91] He is liable for losses to the estate caused by his negligence and lack of ordinary care and attention.[92] Failure to collect accounts which were good, and which it was his duty to collect, permitting property to be sold for much less than its reasonable value, neglecting to pay taxes and special assessments on the ward's property, when he has sufficient funds in his possession with which to pay them,[93] have been held to constitute negligence for which he is liable.

§ 523. Liability for ill-treatment of ward.

Any guardian to whom is given the custody of an infant, and whose duty it is to see that such is properly fed and clothed, is liable in an action brought by the infant through his guardian *ad litem* for injuries or damages which the infant has sustained on account of

90 Bond v. Lockwood, 33 Ill. 312; French v. Currier, 47 N. H. 88; Seguin's Appeal, 103 Pa. 139.

91 In re Roach's Estate, 50 Or. 197, 92 Pac. 118.

92 In re Roach's Estate, 50 Or. 197, 92 Pac. 118.

93 Leonard's Appeal, 95 Pa. 196; Leonard v. Barnum, 34 Wis. 105; McLean v. Hosea, 14 Ala. 194; Shurtleff v. Rile, 140 Mass. 214, 4 N. E. 407; Woodruff v. Snedecor, 68 Ala. 427.

such neglect and lack of suitable care.[94] He is also liable in a criminal action to a fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding sixty days, if he neglect to feed and clothe his ward, or maltreat or abuse him or her in any manner. The complaint may be made and filed by anyone having such minor in charge, and, if the county judge shall deem the same sufficient, he shall issue a warrant for the arrest of the guardian.[95]

Form No. 236.

INFORMATION AGAINST GUARDIAN FOR NEGLECT OR ABUSE OF WARD.

State of Nebraska,
——— County,—ss.

The complaint of E. F., taken under oath before me, J. K., county judge of said county, who, being first duly sworn, says that C. D., guardian of A. B., an incompetent person, late of the county aforesaid, at and within the county aforesaid, on, to wit, the ——— day of ———, 19—, and at divers and sundry other times previous to said date, has neglected to well feed and clothe said A. B., incompetent person, he, the said E. F., having in his possession, as guardian of said A. B., and belonging to the estate of said A. B., sufficient funds with which to provide sufficient food and clothing for said A. B., contrary to the statute in such case made and provided, and against the peace and dignity of the state of Nebraska.

And said E. F. further complaint and information makes that said C. D., guardian as aforesaid, at and within the county aforesaid, on, to wit, the ——— day of ———, 19—, did willfully and maliciously strike, maltreat, and abuse said A. B., contrary to the statute in such case made and provided, and against the peace and dignity of the state of Nebraska.

(Signed) E. F.

Subscribed in my presence and sworn to before me this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

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94 Nelson v. Johansen, 18 Neb. 182, 24 N. W. 730.

95 Rev. Stats., c. 18, § 130, [1669].

§ 524. Rights of foreign guardian in this state.

It is a well-recognized rule that a guardian appointed in one state has only statutory authority in another jurisdiction.[96] He may sell real estate by complying with the statute.[97]

A court of general equity jurisdiction has power, in its discretion, to order personal property, his share in a settled estate, or his share in real estate sold on partition sale, turned over to him.[98] Their right to bring actions to reduce assets of the estate to possession the same as a local guardian is not clear, though it has been permitted in some district courts, in the language of one of the older judges who has been dead for many years, "as a matter of broad justice."

A guardian who collects his ward's property in another state is responsible for it, and if it can be traced into his hands, he is liable, for it is immaterial where it was collected.[99]

§ 525. Additional or cumulative bond.

Whenever at any time during the existence of the trust it shall be made to appear to the court that the bond of a guardian has become impaired on account of the death or insolvency of a surety or for any reason is insufficient, the court may require an additional

96 Leonard v. Putnam, 51 N. H. 247; In re Rice, 42 Mich. 528, 4 N. W. 284; Morrell v. Dickey, 1 Johns. Ch. (N. Y.) 153.

97 Section 536, *post.*

98 Grimmett v. Ritherington, 16 Ark. 377; Delafield v. White, 19 Abb. N. C. (N. Y.) 104; Earl v. Dresser, 30 Ind. 11; Cochran v. Fillians, 30 S. C. 237.

99 Estate of Secchi, Minors, Myr. Prob. (Cal.) 225.

or cumulative bond,[100] and for failure to give such bond when ordered by the court, he may be removed.[101] The procedure is the same as on applications for additional bonds of executors or administrators.[102]

The new bond is, under our statutes, a strictly cumulative or additional obligation,[103] relating back to the date of the letters and covering all liabilities occurring during the entire term of guardianship.[104] If the penalty of the two bonds is different, the liability of the sureties is in proportion to and to the extent of the penalties[105]

Under the Oregon practice, the county court may require a new bond to be given by any guardian, and may discharge the existing sureties from future responsibility in regard to the case upon like terms as are prescribed for executors and administrators.[106]

100 Rev. Stats., c. 16, § 81, [1208].

101 Rev. Stats., c. 16, § 82, [1209].

102 Section 164, *supra.*

103 Douglas v. Kessler, 57 Iowa, 63, 10 N. W. 313.

104 Clark v. Wilkinson, 59 Wis. 543, 18 N. W. 481; Stevens v. Tucker, 87 Ind. 109; Commonwealth v. Cox's Admr., 36 Pa. 442; Loring v. Bacon, 3 Cush. (Mass.), 465.

105 Bond v. Armstrong, 88 Ind. 65.

106 L. O. L., § 1333.

CHAPTER XXXVIII.

GUARDIANS' SALES AND MORTGAGES OF LANDS.

§ 526. Power of Guardian to Sell Real Estate.
527. Procedure for Sale.
528. What Interest in Lands may be Sold.
529. Petition.
530. Order to Show Cause—Service.
531. Hearing on the Application.
532. License.
533. Bond and Oath.
534. The Sale.
535. Confirmation of Guardian's Sales.
536. Sales by Foreign Guardians.
537. The Rule of *Caveat Emptor.*
538. Division of the Proceeds.
539. Action for Recovery of Lands Sold by Guardians.
540. Estoppel of Former Ward.
541. Action by Party Claiming Adversely to Ward.
542. Collateral Attack on the License.
543. Collateral Attack, Bond and Oath.
544. Collateral Attack—Notice of Sale and Sale.
545. Mortgage on Minor's Lands—Application.
546. Proceedings on the Application.
547. Sales of the Interest of Insane Spouse in Real Estate.
548. Hearing and Bond.
549. Sale and Confirmation.

§ 526. Power of guardian to sell real estate.

A guardian is without authority to sell real estate or execute a deed of conveyance unless he has procured a license for that purpose from the district court or a judge thereof. Any guardian may, by complying with the statute, obtain a license for the sale of real estate of his ward for the purpose of paying debts, the costs and expenses of managing his estate, to raise money for the support, education and maintenance of

the ward or of his family, or both, and for the purpose of making an investment which will bring in a better income.[1]

In Oregon such powers are vested in the county judge.[2]

The guardian of an insane husband or wife who has been for three years incapable of executing a deed, relinquishment or conveyance of his or her rights in the real estate of the other may also obtain leave of the court to sell such interest.[3]

§ 527. Procedure for sale.

Only a person appointed to take charge of the property of a ward by a duly authorized court, and who has qualified according to law, can make application to sell real estate.[4] The procedure is analogous to that in executor's and administrator's sales for payment of debts. There are, however, a number of differences, owing to the broader power given a guardian than is possessed by an executor or administrator, the changes being such as are made necessary by the different capacity in which the applicant acts.

Before a license can be granted for the sale of the real estate of other wards than minors, the guardian must obtain a certificate from the county commissioners or board of supervisors of the county of which the ward is an inhabitant of their approval of the

1 Rev. Stats., c. 18, §§ 136, 138, 139, [1675], [1677], [1678].

2 L. O. L., §§ 1346, 1347.

3 Rev. Stats., c. 18, § 171, [1710].

4 Myers v. McGavock, 39 Neb. 670, 58 N. W. 522; Wells v. Steckleberg, 50 Neb. 670, 70 N. W. 242; Shanks v. Seamond, 24 Iowa, 131.

proposed sale, and that they deem it necessary.[5] The usual practice is to make a written application and attach the certificate of approval to the petition.

Under the Oregon practice, a like certificate is required of the county court.[6] The term "county court" as used in the above section is clearly the court which is composed of a judge and commissioners in charge of governmental or administrative duties of the county. The legislature never intended that the approval by a court of a proposed order should be a preliminary step to an application to the same court for such order.

Guardian's sales in this state are proceedings *in rem*, and not adversary in their character.[7]

Form No. 237.

PETITION TO COUNTY COMMISSIONERS FOR APPROVAL OF PROPOSED SALE OF INCOMPETENT PERSON'S REAL ESTATE.

To the County Commissioners of ——— County, Nebraska:

C. D., guardian of A. B., an incompetent person, respectfully represents to your honorable body that said A. B. is an insane person over the age of twenty-one years, to wit, of the age of ——— years, and is now confined in the Nebraska asylum for the insane at ———; that said A. B. is possessed of no personal property except clothing, wearing apparel, and household furniture of the value of ——— dollars ($———), and that he is the owner of the following described real estate [describe real estate], and that said real estate is of the value of ——— dollars ($———); that said A. B. is indebted to various persons in the sum of ——— dollars ($———), and there is no property of said A. B. in the possession of your petitioner which can be applied to the payment of said debts, and your petitioner desires to obtain a license from the district court of ——— county for the sale of said property for the payment of said debts.

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5 Rev. Stats., c. 18, § 137, [1636].

6 L. O. L., § 1335.

7 Hunter v. Buchanan, 87 Neb. 277, 127 N. W. 166; Huberman v. Evans, 46 Neb. 784, 65 N. W. 1045; Myers v. McGavock, 39 Neb. 843, 58 N. W. 522.

Your petitioner therefore respectfully requests your honorable body to certify to the judge of the district court of said county your approval of said proposed sale.

Dated this ——— day of ———, 19—.

(Signed) C. D.,
Guardian of the Estate of A. B., an Incompetent Person.

Form No. 238.

CERTIFICATE OF APPROVAL BY COMMISSIONERS OF PROPOSED SALE.

Whereas, C. D., guardian of the estate of A. B., an incompetent person, has made application to the commissioners of ——— county for their approval of the proposed sale of the real estate of said A. B. for the purpose of paying his debts, we hereby certify that we have examined into the necessity of said proposed sale, and find it necessary for the best interests of said incompetent person, and we fully approve of the same.

Dated this ——— day of ———, 19—.

(Signed) G. H.,
Chairman.

Attest:
(Seal) (Signed) E. F.,
Clerk of Commissioners.

§ 528. What interest in lands may be sold.

Any legal or equitable interest in lands may be sold under license of the court, including a reversion,[8] a remainder,[9] an undivided share,[10] a contingent remainder,[11] or other equitable interest.[12] Under this class of sales there appears to be no reason why the homestead of a person under guardianship may not be sold,[13] and there is authority to the effect that prop-

8 Foster v. Young, 35 Iowa, 27.
9 Wallace v. Jones, 93 Ga. 419, 21 S. E. 89.
10 Gilmore v. Rodgers, 41 Pa. 120.
11 Dodge v. Stevens, 105 N. Y. 985, 12 N. E. 759.
12 Anderson v. Mather, 44 N. Y. 249.
13 Merrill v. Harris, 65 Ark. 355, 46 S. W. 398.

erty devised to a minor under condition that it shall not be sold until he becomes of age may also be ordered sold.[14]

A guardian's sale conveys only the interest of the ward in the estate sold, and does not affect the rights of lienholders or those holding vested or contingent estates therein.[15]

§ 529. Petition.

When the application is made for a sale solely for the payment of debts, the contents of the petition are practically the same as in sales by executors and administrators. When made for other purposes, it should also contain a description of all the real estate owned by the ward, give the condition of the land sought to be sold with encumbrances, if any, and the facts and circumstances showing that the best interests of the ward will be subserved by such sale.[16] It should set out facts and not conclusions. The rule is that its contents must be sufficient to apprise the judge to whom the application for an order to show cause is made of the desirability of the sale.[17]

It may allege as many grounds for applying for such sale as the statute permits, and if any one of them is sufficiently alleged, a sale made under a proper license will be good.[18]

14 Fitch v. Miller, 20 Cal. 352; Southern Marble Co. v. Stegall, 90 Ga. 236, 15 S. E. 806.

15 Cool's Heirs v. Higgins, 23 N. J. Eq. 308.

16 Huberman v. Evans, 46 Neb. 784, 65 N. W. 1045; L. O. L., § 1351; Sprigg v. Stump, 8 Fed. 217.

17 Womble v. Trice, 112 Ky. 533, 66 S. W. 370, 67 S. W. 9.

18 Goldsmith v. Walker, 14 Or. 125, 12 Pac. 57.

It must be signed and verified by the guardian, but where verified by the attorney, it has been held good on collateral attack.[19] There is no such thing known to the law as an oral verified petition.[20] It should be filed with the clerk of the county where the lands are situated or a judge thereof sitting at chambers anywhere within the judicial district.[21]

Form No. 239.

PETITION OF GUARDIAN FOR LEAVE TO SELL REAL ESTATE OF HIS WARD FOR HIS EDUCATION AND MAINTENANCE AND FOR REINVESTMENT.

In the District Court of ——— County, Nebraska.

In the Matter of the Application of C. D., Guardian of the Estate of A. B., a Minor, for Leave to Sell Real Estate.

Your petitioner, C. D., respectfully represents unto the court that on the ——— day of ———, 19—, letters of guardianship out of and under the seal of the county court of said county were issued to him upon the estate of A. B., a minor; that said A. B. is of the age of ——— years, and now resides in said county; that said minor is the owner of personal property consisting of clothing, books, and household furniture of the value of ——— dollars, and is the owner of no other personal property; that he is the owner of the following described real estate [describe real estate, and give condition of the property and income therefrom]; that said A. B. is now a student in Dartmouth College, New Hampshire, and the cost of his tuition, board, traveling and other expenses is about the sum of seven hundred dollars ($700) per year, and the income from said realty is insufficient to pay said expenses; that your petitioner has an opportunity to invest the sum of ——— dollars of the proceeds of said sale, should the same be made, in a note secured by first mortgage on real estate bearing interest at the rate of seven per cent per annum.

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19 Hamiel v. Donnelley, 75 Iowa, 93, 39 N. W. 210; Ellsworth v. Hall, 48 Mich. 407, 12 N. W. 512; Myers v. McGavock, 39 Neb. 843, 58 N. W. 522.

20 State v. Dodge County, 20 Neb. 595, 31 N. W. 117.

21 Stewart v. Daggy, 13 Neb. 290, 13 N. W. 399; Dietrichs v. Lincoln & N. W. R. Co., 14 Neb. 356, 15 N. W. 728.

Wherefore, your petitioner prays that a license may be granted him to sell said real estate, or so much thereof as may be deemed by the court advisable and for the benefit of the ward, and for such other and further relief as may be just and equitable.

(Signed) C. D.,
By A. B. H., His Attorney.

[Add verification.]

§ 530. Order to show cause—Service.

If it shall appear from the petition that it is necessary or would be beneficial to the ward that a sale be made of any part of his real estate, an order is made by the court directing the next of kin of the ward and all persons interested in the estate to appear before the court at a time and place therein specified, not less than four nor more than eight weeks from the time of making such order, to show cause why a license should not be granted for the sale of such estate.[22] The order should contain a description of the land sought to be sold and the purpose of the sale.[23]

Personal service may be had on the next of kin and interested parties at least fourteen days before the date of hearing, or by publication in some newspaper of the county for three successive weeks, as the court may direct;[24] Oregon, ten days.[25] Such service is jurisdictional.[26] Notice to the ward himself is not necessary. As far as he is concerned, it is not an adversary

22 Rev. Stats., c. 18, § 143, [1282]; L. O. L., § 1352.

23 Deford v. Mercer, 24 Iowa, 118.

24 Rev. Stats., c. 18, § 144, [1683].

25 L. O. L., § 1353.

26 Clark v. Nebraska Sav. Bank, 50 Neb. 669, 70 N. W. 237; Wells v. Stecklenberg, 50 Neb. 670, 70 N. W. 242.

proceeding, but in effect his application.[27] Before the sale is made, a copy of the order, if issued at chambers, must be filed with the clerk of the district court.[28]

Form No. 240.

ORDER TO SHOW CAUSE WHY LICENSE SHOULD NOT ISSUE TO GUARDIAN FOR SALE OF HIS WARD'S REAL ESTATE TO RAISE FUNDS FOR HIS MAINTENANCE.

In the District Court of ——— County, Nebraska.

In the Matter of the Application of C. D., Guardian of the Person and Estate of A. B., a Minor, for Leave to Sell Real Estate.

On reading and filing the petition, duly verified, of C. D., guardian of the person and estate of A. B., a minor, for license to sell the following described real estate [describe real estate as in petition], or a part thereof, for the purpose of raising funds for the education and maintenance of said minor, and it appearing from said petition that said real estate consists of [unimproved lots in the city of Omaha, ——— county, Nebraska, and no income is obtained therefrom]:

It is therefore ordered that the next of kin of said minor and all persons interested in said estate appear before me at chambers in the courthouse in the city of ———, ——— county, Nebraska, on the ——— day of ———, 19—, at 9 o'clock A. M., to show cause, if any there be, why license should not be granted to said C. D., guardian, to sell said real estate for the purposes above set forth.

And it is further ordered that a copy of this order be personally served on all persons interested in said estate at least fourteen days before the date set for the hearing; [published once each week for three successive weeks in the ———, a newspapr printed and published in said county of ———].

Dated at chambers in said ——— county this ——— day of ———, 19—.

(Signed) C. H.,
Judge of the District Court, ——— County, Nebraska.

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27 Hunter v. Buchanan, 87 Neb. 277, 127 N. W. 166; Myers v. McGavock, 39 Neb. 843, 58 N. W. 522; Scarf v. Aldrich, 97 Cal. 360, 32 Pac. 324; Mohr v. Porter, 51 Wis. 437, 8 N. W. 364.

28 Rev. Stats., c. 18, § 119, [1688].

§ 531. Hearing on application for sale.

The hearing must be had at the time and place designated in the notice.[29] The next of kin and all other persons interested in the estate as heirs apparent or presumptive may appear before the court and contest the application. The guardian and witnesses may be examined under oath and process may be issued by the judge as in other cases.[30]

It is the duty of the court to determine on the examination whether it is for the benefit of the ward that his real estate or a part thereof should be sold for his maintenance or education or for investment.[31] If he finds it necessary or desirable to sell a part of the land and that by such sale the whole tract would be greatly injured, he may direct a sale of the whole or a part, or such part as he may deem necessary.[32]

"On the district court judges the law has conferred the exclusive power to say whether the facts exist which justify a sale of a ward's property by his guardian; to say whether the sale is a necessity to which the ward must submit; to say whether, in the judgment of the court, the sale asked to be authorized is for the best interests of the minor. This is a great discretion and a sacred trust confined to the district judges by the law, and they are thus made the guardians of the orphans of the commonwealth. Their authority to authorize a guardian on his application to

29 Rev. Stats., c. 18, § 146, [1685]; Knickerbocker v. Knickerbocker, 58 Ill. 399.

30 Rev. Stats., c. 18, §§ 145–147, [1684], [1685], [1686].

31 Rev. Stats., c. 18, § 148, [1687].

32 Rev. Stats., c. 18, § 150, [1689].

sell his ward's real estate was not meant to be exercised as a matter of course, but only after inquiry and investigation into all the facts and circumstances; and not then unless the mind of the court is convinced that such sale is a necessity or is for the best interests of the ward."[33]

§ 532. License.

The license should describe the property to be sold.[34] It must specify whether the sale is to be made for the maintenance of the ward and his family, or for the education of the ward and his children, or in order that the proceeds may be put out and invested. If the property appears to be less in value than five hundred dollars, the district judge may direct the guardian to sell at private sale; otherwise it must be at public auction.[35] The statute does not require him to fix the terms of the sale, and that matter may be left to the discretion of the guardian.

In Oregon it may be at either public or private sale, as the judge may order.[36]

Form No. 241.

LICENSE TO GUARDIAN TO SELL REAL ESTATE OF WARD.

In the District Court of ——— County, Nebraska.

In the Matter of the Application of C. D., Guardian of the Person and Estate of A. B., a Minor, for Leave to Sell Real Estate.

Now, on this ——— day of ———, 19—, at the hour of 9 A. M., this cause came on for hearing on the petition of C. D., guardian of the person and estate of A. B., a minor, for leave to sell the follow-

33 Myers v. McGavock, 39 Neb. 843, 58 N. W. 522.

34 Huberman v. Evans, 46 Neb. 744, 64 N. W. 1045.

35 Rev. Stats., c. 18, § 148, [1687].

36 L. O. L., § 1357.

ing described real estate of his said ward [describe real estate as in petition], and the evidence, and was submitted to the court; and it appearing to me from the proof on file that proper notice of the time and place of hearing said petition has been given the next of kin and all persons interested in said estate [that said proposed sale has been duly approved by the county commissioners of said ——— county, Nebraska, of which county said A. B. is a resident, and a certificate of their approval filed with the court]; and it further appearing to me, after a full hearing on the petition and an examination of the proofs and allegations of the parties, that it would be for the benefit of said ward that said real estate be sold to defray the necessary expenses of the education and maintenance of the ward, and for the purpose of reinvesting the balance of the proceeds in interest-bearing securities or some productive stock, it is therefore ordered and adjudged by me, in consideration of the premises, that the said C. D., guardian, be and he hereby is licensed to sell, in the manner prescribed by law, the real estate above described, subject to all the liens and encumbrances existing upon said premises. That prior to said sale said guardian give a bond as required by law in the penal sum of ——— dollars.

Given under my hand at chambers in judicial district this ——— day of ———, 19—.

(Signed) W. M.,
Judge of the District Court, ——— County.

§ 533. Bond and oath.

Every guardian licensed to sell real estate is required to give a bond, with sufficient surety or sureties to be approved by the judge, conditioned to sell the same in the manner prescribed by law for the sales of real estate by executors and administrators, and to account for and dispose of the proceeds of the sale in the manner provided by law.[37]

The bond is jurisdictional. The district judge is vested with no authority in the matter, and must take

[37] Rev. Stats., c. 18, § 151, [1690]; L. O. L., § 1355.

and approve, if in proper form and sufficient surety, a bond running to himself as obligee. The clerk is without authority to approve it.[38] It is not necessary that it be formally approved if it appears to have been presented to the judge during a session of court and directed by him to be delivered to the clerk.[39] If the land is sold at private sale, it is conditioned to dispose of the proceeds of the sale as provided by law.

He is also required to take an oath substantially the same as that of an executor on sale of real estate.[40] This is also jurisdictional, and unless taken within the specified time, he is without authority to sell.[41]

Form No. 242.

GUARDIAN'S BOND ON SALE OF REAL ESTATE.

Know all men by these presents, that we, C. D., as principal and E. F. and G. H., as sureties, all of ——— county, Nebraska, are held and firmly bound unto C. H., judge of the district court of said county, in the penal sum of ——— dollars ($———), for which payment well and truly to be made we do hereby jointly and severally bind ourselves, our heirs, executors, administrators, and assigns, by these presents.

Dated this ——— day of ———, 19—.

Whereas, on the ——— day of ———, 19—, the Honorable C. H., judge of the district court of said county, sitting at chambers, issued his license to C. D., guardian of the person and estate of A. B., a minor, for the sale of the following described real estate, for the purpose of [state for what purpose sale is to be made], [describe real estate as in petition].

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38 Bachelor v. Korb, 58 Neb. 122, 78 N. W. 485.

39 Hunter v. Buchanan, 87 Neb. 277, 127 N. W. 166.

40 Rev. Stats., c. 18, § 152, [1691]; L. O. L., § 1356.

41 Bachelor v. Korb, 58 Neb. 122, 78 N. W. 485; Fuller v. Hager, 47 Or. 242, 83 Pac. 782; Blackman v. Bauman, 22 Wis. 611; Campbell v. Knights, 26 Me. 224.

Now, therefore, the condition of this obligation is such that, if the said C. D. shall sell said real estate as ordered in the license heretofore issued by said C. H., district judge, and in the manner prescribed by law for the sales of real estate by executors and administrators, and account for and dispose of the proceeds of said sale in the manner provided by law, then this obligation to be null and void; otherwise to be and remain in full force and effect.

(Signed) C. D.
E. F.
G. H.

The foregoing bond approved by me this ——— day of ———, 19—.
(Signed) C. H.,
Judge of the District Court, ——— County, Nebraska.

§ 534. The sale.

Except when the property is worth less than five hundred dollars, notice of the time and place of sale must be given by publication, and posting notices in the same manner as in the case of sales for the payment of debts, and evidence of such notice may be perpetuated in the same way.[42] Its contents should be the same. It should contain a description of the property to be sold sufficiently accurate to enable it to be identified.[43]

Like an executor's or administrator's sale, it need not be made by the guardian personally, but may be conducted by his attorney or auctioneer under his personal direction.[44] Where the terms have been fixed by the court, he can make no contract or agreement not in accordance therewith, nor confirm or ratify any

42 Rev. Stats., c. 18, § 153, [1692]; L. O. L., § 1357.

43 Kenniston v. Leighton, 43 N. H. 309.

44 Myers v. McGavock, 39 Neb. 843, 58 N. W. 522; Levara v. McNeeny, 5 Neb. Unof. 318, 98 N. W. 179.

deed or agreement made by his ward. Such act of the ward is void.[45] The sale must be made to the highest bidder, without regard to any prearranged contract or agreement with the purchaser, or any subsequently made which are not within the terms of the license.[46]

A guardian may lawfully make an agreement with an intending purchaser by which the latter is to bid a certain price at the sale. If no one bids more and the price is adequate, the sale is valid, and the purchaser cannot set up the defense that the agreement was contrary to public policy and that he is consequently released from liability.[47]

The guardian cannot be a purchaser, and where there is evidence of collusion between him and a purchaser from whom he subsequently acquired the land, it has been held that no title passed, and that the interests of the ward were not divested.[48] The license continues in force for one year, and the sale may be made at any date within that time after proper notice.[49]

45 Gaylord v. Stebbins, 4 Kan. 42; Worth v. Curtis, 15 Me. 228.

46 Doty v. Hubbard, 55 Vt. 278.

47 Hyatt v. Anderson, 69 Neb. 702, 96 N. W. 620.

48 McKay v. Williams, 67 Mich. 547, 35 N. W. 159; Winter v. Truax, 87 Mich. 324, 49 N. W. 604; Carpenter v. McBride, 3 Fla. 292.

49 Rev. Stats., c. 18, § 153, [1692].

Form No. 243.

RETURN OF GUARDIAN ON SALE OF HIS WARD'S REAL ESTATE.

In the District Court of ——— County, Nebraska.

In the Matter of the Application of C. D., Guardian of the Person and Estate of A. B., an Incompetent Person, for Leave to Sell Real Estate.

To the Judge of the District Court of ——— County, Nebraska:

I, C. D., guardian of the person and estate of A. B., an incompetent person, herewith make return of my proceedings on the sale of the following described real estate [describe property the same as in the petition and license], pursuant to license granted to me on the ——— day of ———, 19—.

That, in pursuance of said license, I, on the ——— day of ———, 19—, took and subscribed the oath required by law before C. F. D., a notary public of said county, and filed the same in this court; on the same day I filed a bond as required by said license, which was on said day duly approved by the Honorable C. H., judge of said court; that I obtained a certificate of approval of said proposed sale from the board of supervisors of said county, and the same is on file herein, and thereupon I gave public notice of the time and place of said sale by publication of the same in the ———, a newspaper printed and published in said county, for three successive weeks, as required by said license [that attached hereto, marked "Ex. A," and made a part hereof, is the affidavit of E. F., foreman of the said ———, of the publication of this notice], and by posting said notice in three of the most public places in said county of ——— [that attached hereto, marked "Ex. B," and made a part of this return, is the affidavit of G. H. of the posting of said notices]; that in pursuance of the terms of said notice, and at the time and place mentioned therein [if an adjournment was had, state to what time and place, and how notice thereof was given], I offered said real estate for sale at public auction to the highest bidder for cash, and kept said sale open for one hour, and sold said real estate to L. M. for the sum of ——— dollars ($———), he being the highest bidder therefor, and said being the highest sum bid; that said sale was in all respects fairly conducted, and I exerted my best endeavors to sell said real estate in such a manner as would be for the advantage of all persons

interested in said estate, and of said ward; and, in my opinion, no greater sum than the amount specified can be obtained for the same.

I further report that, of the amount so received by me, the sum of ——— dollars ($———) will be necessary for the support and maintenance of said ward and his family, and for the payment of the costs of this proceeding, and that the balance of about ——— dollars will remain in my hands for investment, pursuant to the order of the court.

Dated this ——— day of ———, 19—.

(Signed) C. D.,
Guardian of the Person and Estate of A. B., an Incompetent Person.

§ 535. Confirmation of guardian's sales.

There is no statute providing for the confirmation of guardian's sales except the general one that they shall be conducted in the same manner as those by executors and administrators for the purpose of paying debts of their decedents. Confirmation of such sales has always been the practice in this state, and such is the clear intent of the law.

In the leading case on guardian's sales,[50] the court practically held it necessary by its decision that certain findings of the district judge on strictly jurisdictional matters were presumed to be based on sufficient evidence and not subject to collateral attack.

The petition, order to show cause and proof of service of same, when granted at chambers, should be filed in the office of the clerk of the district court. The procedure for confirmation should be the same as in executor's and administrator's sales, except that when sales are for the purpose of reinvestment or a surplus remains in the hands of the administrator not needed for present necessities, the court may specifically

50 Myers v. McGavock, 39 Neb. 843, 58 N. W. 522.

direct how it be invested, or instruct the guardian to invest according to his best judgment.[51] The residue of the proceeds remaining in the hands of a guardian upon the final settlement of his accounts is considered and disposed of as real estate.[52]

Confirmation cures the same irregularities as in executor's and administrator's sales, and, as in them, never renders a sale valid where some act is omitted which the statute requires in order to convey a good title.[53]

Form No. 244.

CONFIRMATION OF GUARDIAN'S SALE.

In the District Court of ——— County, Nebraska.

In the Matter of the Application of C. D., Guardian of A. B., an Incompetent Person, for License to Sell Real Estate.

An order to show cause why the sale of the following described real estate, ———, should not be confirmed having been made on the ——— day of ———, 19—, and given to all persons interested therein, and it appearing to me that notice was given of the time and place of said sale according to law, that the sale of said real estate was had according to notice, was legally made and fairly conducted, and that the sum bid is not disproportionate to the value of the property sold, it is therefore ordered and adjudged by me that the said sale be and hereby is confirmed, and that said C. D., guardian of A. B., an incompetent person, is hereby directed as such guardian to execute a deed of conveyance to E. F., the purchaser of said premises.

And it further appearing that said C. D., guardian as aforesaid, has in his possession of the proceeds of said sale the sum of ——— dollars, and that the sum of ——— dollars thereof is not needed for the immediate necessities of said ward or his family, it is further ordered that said guardian invest said sum of ——— dollars in a note

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51 Rev. Stats., c. 18, § 140, [1679].

52 Rev. Stats., c. 18, § 141, [1680].

53 Blackman v. Bauman, 22 Wis. 611.

or notes secured by mortgage on real estate of at least double the value of the loan.

Dated this ——— day of ———, 19—.

(Signed) W. M.,
Judge of District Court.

A guardian's deed is substantially the same as that of an executor or administrator.[54]

§ 536. Sales by foreign guardians.

When any minor, insane person or spendthrift residing out of this state shall be put under guardianship in the state or country in which he resides and shall have no guardian appointed in this state, the foreign guardian may file an authenticated copy of his appointment in the district court of any county in which his ward may own real estate, and obtain a license for the purpose of paying debts and the expenses and charges of managing the estate.[55] The certified copy should be proved by the authentication of the clerk, under the seal of the court, together with a certificate of the judge, or a presiding magistrate, that the attestation is in due form of law.[56] If the attestation is irregular on its face but it appears that the court found that the party making the application was the duly qualified guardian, the finding will not be disturbed on collateral attack.[57]

The petition, notice or order to show cause, and service of same, hearing, license, notice of sale, oath and sale are the same as in sales by a domestic guard-

54 See § 337, Form No. 157.

55 Rev. Stats., c. 18, §§ 155, 156, [1694], [1695]; L. O. L., 1359.

56 Civ. Code, § 422.

57 Myers v. McGavock, 39 Neb. 843, 58 N. W. 522.

ian. If he is licensed to sell more than enough to pay the debts and expenses of managing the estate, he is required, before making the sale, to give a bond to the district judge with sufficient sureties to account for all the proceeds of such sale that shall remain after the payment of said debts and charges and to dispose of the same according to law.[58] If it shall appear that he is bound by sufficient sureties in the state or country where he was appointed to account for the proceeds of such sale, and an authenticated copy of such bond is filed in the district court, no further bond shall be required.[59]

The proceeds of such sale are considered real estate the same as in case of sales by domestic guardians.[60]

Under the Oregon statutes, the proceedings for a sale by a foreign guardian are the same as those of a home representative,[61] and if objections are filed, costs may be awarded by the court, in its discretion, to the prevailing party.[62]

Form No. 245.

BOND OF FOREIGN GUARDIAN ON SALE OF REAL ESTATE FOR PAYMENT OF DEBTS.

Know all men by these presents, that C. D., of the county of Cook and state of Illinois, as principal, and E. F. and G. H., of ——— county, Nebraska, as sureties, are held and firmly bound unto the Honorable W. M., judge of the district court of ——— county, Nebraska, in the penal sum of ——— dollars ($———), for which payment well and truly to be made we do hereby bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Dated at ———, ——— county, Nebraska, this ——— day of ———, 19—.

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58 Rev. Stats., c. 18, §§ 157, 158, [1696], [1697]; L. O. L., § 1362.

59 Rev. Stats., c. 18, § 159, [1698].

60 Rev. Stats. c. 18, § 160, [1699].

61 L. O. L., § 1360.

62 L. O. L., § 1363.

Whereas, C. D. has filed an authenticated copy of the letters of guardianship upon the estate of A. B., a minor, issued to him out of and under the seal of the probate court of Cook county, Illinois, has made application for license to sell the real estate of his said ward situated in said ——— county, Nebraska, and the proceeds of the sale of said lands will more than pay the debts of said ward, and said district judge has ordered a sale thereof upon the filing by the said C. D., guardian, of the bond required by law:

Now, therefore, the condition of this obligation is such that if the said C. D., guardian of the estate of A. B., a minor, shall account before said district judge for all the proceeds of said sale that shall remain after the payment of the debts and charges against his said ward, and dispose of the same according to law, then these presents to be null and void; otherwise to be and remain in full force and effect.

(Signed) C. D.
E. F.
G. H.

The foregoing bond and sureties approved by me this ——— day of ———, 19—.

(Signed) W. M.,
Judge of the District Court, ——— County.

§ 537. The rule of caveat emptor.

The purchaser at a guardian's sale, or a purchaser from a vendee of a guardian and subsequent purchasers, must take notice at their peril of the regularity of the proceedings and the consequent right of the guardian to convey the property. Courts have uniformly treated guardians' sales as strictly judicial, and calling for a strict application of the rule of *caveat emptor*.[63]

§ 538. Disposition of the proceeds.

If the sale is made for the maintenance of the ward and his family, or the education of the ward, the guard-

63 Bachelor v. Korb, 58 Neb. 122, 78 N. W. 485.

ian shall apply the proceeds for that purpose so far as necessary, and shall put out the residue, if any, on interest, or invest it in the best manner in his power, until the capital shall be wanted for the maintenance of the ward and his family, or for the education of the ward, if a minor, or the children of a ward who is a drunkard or an incompetent person, in which case the principal may be used for that purpose as far as may be necessary, in like manner as if it had been personal estate of the ward.[64] If sold for the purpose of reinvestment, the guardian shall make the investment according to his best judgment, or in pursuance of any order that shall be made by the district court.[65] The guardian is obliged to apply the proceeds of the sale for that purpose for which the sale was authorized,[66] and the purchaser has no interest in the application of the proceeds. His interest in the matter ceases as soon as he pays the money.[67] The court may include in the order for confirmation an order for the investment of the proceeds of the sale, or a part thereof, in such securities as he shall deem to be for the benefit of the ward. For the purposes of descent, the proceeds of the sale of the guardian's real estate are considered as still retaining their character as realty,[68] but they lose that character and become personalty as soon as transmitted to an infant.[69]

64 Rev. Stats., c. 18, § 138, [1667].

65 Rev. Stats., c. 18, § 139, [1669]; L. O. L., § 1349.

66 Strong v. Moe, 8 Allen (Mass.), 125; Harding v. Larned, 4 Allen (Mass.), 426.

67 Mulford v. Beveridge, 78 Ill. 455.

68 Rev. Stats., c. 18, § 141, [1680]; L. O. L., §§ 1356, 1362.

69 Dyer v. Cornell, 4 Pa. 359; Holmes' Appeal, 53 Pa. 339; Kent, Com., 230.

If the guardian has obtained authority to complete a real estate contract or option made by a decedent in his lifetime, the court may authorize him to execute a note or notes and mortgage on the purchase price.[70]

§ 539. Actions for recovery of lands sold by guardians.

No action for the recovery of real estate sold by a guardian can be brought by the ward or any person claiming under him, unless it shall be commenced within five years next after the termination of the guardianship, excepting only that persons out of the state, and minors and others under legal disability to sue at the time when the cause of action shall accrue, may commence their action at any time within five years next after the removal of their disability, or after their return to this state.[71] The validity of these sales is more frequently tested in actions of this kind than in the proceedings for the sale.

As a general rule, a guardian's sale cannot be attacked collaterally except for the existence of certain irregularities enumerated by the statute, and which are statutory grounds for holding the sale invalid, or some irregularity which goes to the jurisdiction of the judge or the court which granted the license.[72] In such actions, the sale shall not be avoided on account of any irregularity in the proceedings, provided it shall appear—First, that the guardian was licensed to make

70 Rev. Stats., c. 18, § 178, [1717]; L. O. L., § 1350.

71 Seward v. Didier, 16 Neb. 64, 20 N. W. 12.

72 Walker v. Goldsmith, 14 Or. 125, 12 Pac. 537; Huberman v. Evans, 46 Neb. 784, 65 N. W. 1045; Scarf v. Aldrich, 97 Cal. 360, 32 Pac. 324; Davidson v. Bates, 111 Ind. 391, 12 N. E. 687.

the sale by a district court of competent jurisdiction; second, that he gave a bond which was approved by the judge of the district court, in case any bond was required by the court upon granting the license; third, that he took the oath prescribed in this subdivision; fourth, that he gave notice of the time and place of sale, as prescribed by law; fifth, that the premises were sold, accordingly, at public auction, and are held by one who purchased in good faith.[73] If all these statutory requirements have been complied with, and the court has acquired jurisdiction of the premises, though the proceedings may have been grossly irregular, and the sale such a one as the court would set aside upon an appeal, it would be sustained in a collateral action.[74]

All other provisions of the law regulating sales are presumed by the courts to be regular.[75]

The act to cure defects in deeds,[76] by which a guardian's deed on the sale of his ward's real estate for a valuable consideration, which consideration has been paid to the guardian or his successor in good faith, and which sale has not been set aside by the county court but has been confirmed or acquiesced in by such court, makes the deed good although the guardian failed to take the statutory oath before fixing the time and place of sale as the statute demands.[77]

73 Rev. Stats., c. 18, § 164, [1703]; L. O. L., § 1335.

74 Larimer v. Wallace, 36 Neb. 444, 54 N. W. 835; McCullough v. Estes, 20 Or. 349, 25 Pac. 724.

75 Hobart v. Upton, 2 Saw. 302; Gager v. Henry, 5 Saw. 237; Walker v. Goldsmith, 14 Or. 125, 12 Pac. 537; McCullough v. Estes, 20 Or. 349, 25 Pac. 724.

76 Laws 1899, p. 63; L. O. L., § 7164.

77 Fuller v. Hager, 47 Or. 242, 83 Pac. 782. Section 7164 appears to have been enacted as a curative section, applying only to sales previous to its enactment, February 18, 1899, but the court in the

§ 540. Estoppel of former ward.

If after a minor ward becomes of age, or after the incompetency of an adult ward is removed, he makes a settlement with his former guardian and receives money from him with knowledge that a portion of the funds is derived from the sale of his lands, he will be held to have ratified or confirmed the sale, and is estopped from denying its validity.[78] If he received the money with knowledge that it was a part of such proceeds, his lack of knowledge of gross irregularities in the sale does not change the rule.[79]

If he received no part of the proceeds on such settlement,[80] though they may have been used for his support, maintenance and education, the doctrine of estoppel does not apply.[81]

§ 541. Action by party claiming adversely to the former ward.

The provisions of the statute defining the proceedings necessary for a valid sale of a ward's lands are for the benefit of the ward. No one claiming ad-

Fuller case treated it as one of general application. As taking the oath has been held not a jurisdictional defect, the subdivisions requiring a bond and notice would probably follow the same rule, that is, that except in case of fraud, failure to comply with them could only be raised on confirmation or motion to set aside the order. Under this section, also, the purchaser in good faith, if he has not already received a deed, is entitled to one.

78 Handy v. Noonan, 51 Miss. 166; Hatcher v. Briggs, 6 Or. 31; Brazee v. Schofield, 2 Wash. Ter. 209, 3 Pac. 265.

79 Borcher v. McGuire, 85 Neb. 646, 124 N. W. 111; Kulp v. Heimann, 90 Neb. 167, 133 N. W. 206.

80 Kazebeer v. Nunemaker, 82 Neb. 732, 118 N. W. 646.

81 Rowe v. Griffiths, 57 Neb. 488, 78 N. W. 20; Wilkinson v. Filby, 24 Wis. 441.

versely to him or under any title not traced to him can question the validity of the sale,[82] even though the ward was defrauded by the sale.[83]

§ 542. Collateral attack on the license.

The principles governing collateral attack on guardians' sales of real estate are substantially the same as in the case of attack on executors' and administrators' sales. A valid license can only be granted to a person who is the duly appointed guardian of the ward whose property is to be sold.[84]

Letters issued on the estate of an adult ward without notice,[85] or from a county in which the ward had no property and was not a resident, give him no rights.[86] A defect in the authentication of the letters of a foreign guardian is cured by the order of confirmation in which the court found that the guardian was duly qualified.[87]

His license must issue under the seal of a "district court of competent jurisdiction," by which is meant, in the case of a domestic guardian, that of the county in which he was appointed,[88] and in the case of a foreign representative, that of the county in which his

82 Michel v. Borders, 129 Ind. 529, 29 N. E. 29.

83 Marvin v. Schilling, 12 Mich. 46.

84 Wells v. Stecklenberg, 50 Neb. 670, 70 N. W. 242; Grier's Appeal, 101 Pa. 412; McKee v. Thomas, 9 Kan. 343; Paty. v. Smith, 50 Cal. 153.

85 Severns v. Gerke, 3 Saw. 353.

86 In re Hubbard, 82 N. Y. 90; Palmer v. Oakly, 2 Doug. (Mich.) 433; Shroyer v. Richmond, 16 Ohio St. 455.

87 Myers v. McGavock, 39 Neb. 843, 58 N. W. 522.

88 Huberman v. Evans, 46 Neb. 784, 65 N. W. 1045.

letters were filed,[89] such being the only courts having jurisdiction.[90]

The sale will be good, though the description in the license was defective or erroneous, if it provided sufficient means for identifying the property.[91]

A sale without any license whatever is void.[92]

§ 543. Collateral attack—Bond and oath.

A guardian's sale without a bond being given is void on collateral attack by the former ward.[93] If it contains no indorsement of approval by the court, evidence may be given to show that it actually was so

89 Rev. Stats., c. 18, § 155, [1694].

90 Spellman v. Dowse, 79 Ill. 66.

91 Huberman v. Evans, 46 Neb. 784, 65 N. W. 1045; Bray v. Adams, 114 Mo. 486, 21 S. W. 853; Muarr v. Parrish, 26 Ohio St. 636. In Huberman v. Evans, the petition prayed for the sale of lots 4, 5 and 6, block W, Lowe's addition to the city of Omaha, Nebraska, together with other property There was no block W in Lowe's addition. The wards owned lots 4, 5 and 6, in block U. A license was granted the guardian for the sale of the property as described in the petition. The notice of sale correctly described the lots as 4, 5 and 6, in block U. A sale was had and confirmed, and deed ordered, which was subsequently executed and delivered, and which contained a correct description of all the lots owned by the wards. The court held that the sale divested the wards of all their interest, placing their reasons therefor upon the principle that, in the proceedings to sell the real estate of a ward, the description need not be more specific and definite than is required of a conveyance of real estate and that a deed whose granting clause conveyed all the grantor's lands within a certain county or city is not void for indefiniteness.

92 Ludlow's Heirs v. Park, 4 Ohio St. 5; Newcomb's Lessee v. Smith, 5 Ohio St. 448; Bell's Appeal, 66 Pa. 492; Toppett v. Mize, 30 Tex. 361.

93 Bachelor v. Korb, 58 Neb. 122, 78 N. W. 485.

approved.[94] A failure to take the oath also invalidates the sale. If taken after the date is fixed, it is a nullity.[95] An oath taken by the attorney retained by the guardian to take charge of the proceedings is also void.[96]

§ 544. Collateral attack—Notice of sale and sale.

While notice of the sale must be given by both posting and publication as provided by law, and the statute directs how proof of giving the notice shall be made, the method is not exclusive, and other evidence is admissible on collateral attack to show that notice was actually given.[97]

A guardian is without authority to purchase his ward's real estate at his own sale, either directly or through a third party.[98] A purchaser of such lands which have been bid in by the guardian during their minority or until after the statute of limitations has expired is chargeable with notice of his want of title.[99]

The sale may be set aside for fraud or collusion between the guardian and the purchaser.[100]

94 Section 533, *supra*.

95 Card v. Deans, 84 Neb. 4, 120 N. W. 440; Bachelor v. Korb, 58 Neb. 122, 78 N. W. 485; Ryder v. Flanders, 30 Mich. 336.

96 Levara v. McNeeny, 5 Neb. Unof. 318, 98 N. W. 679.

97 Larimer v. Wallace, 36 Neb. 444, 54 N. W. 825.

98 Brown v. Fisher, 77 Minn. 1, 79 N. W. 494; Frazier v. Jeakins, 64 Kan. 615, 68 Pac. 24; Aaronstein v. Irvine, 49 La. Ann. 1478, 22 South. 405.

99 Kazebeer v. Nunemaker, 82 Neb. 732, 118 N. W. 646; Albers v. Kosleuh, 68 Neb. 523, 94 N. W. 521, 97 N. W. 646; Neary v. Neary, 70 Neb. 319, 97 N. W. 302.

100 Southern Marble Co. v. Stegall, 90 Ga. 236, 15 S. E. 806; Dornetizer v. German Sav. Soc., 23 Wash. 132, 32 Pac. 682.

§ 545. Mortgage of minor's lands—Application.

A guardian has no power to encumber his ward's lands by mortgage, except under a license granted him by a court which is given by statute jurisdiction over the same.[101] The district court of the county from which letters issued, or a judge thereof sitting at chambers anywhere within the judicial district, has power to grant such license to the guardian of a minor whenever it appears necessary to obtain funds for the support or education of the ward. The proceedings are commenced by the presentation of a petition, which should be substantially in the same form as a petition for license to sell the lands for the same purposes, with additional allegations setting out the particular grounds which would make a mortgage preferable to a sale. An order is thereupon entered fixing the date for a hearing, which cannot be less than eleven days from its date. A copy of the petition with notice must be served on the minor in the same manner as a summons at least ten days before the hearing.[102]

The Oregon county court has no jurisdiction to license any guardian to mortgage the estate of his ward for any purpose.[103] Although section 1328, L. O. L., provides that a guardian may mortgage the real estate of his ward for the purpose of obtaining funds for his support, maintenance, support of his family or the care of his estate, there is no section of the statutes giving the county court power to authorize the same, and it is a doubtful question whether under the code the circuit court has such power.

101 Trutch v. Bunnell, 11 Or. 58, 4 Pac. 588.
102 Rev. Stats., c. 18, §§ 165, 166, [1704], [1705].
103 Trutch v. Bunnell, 11 Or. 58, 4 Pac. 588.

Form No. 246.

PETITION BY GUARDIAN FOR AUTHORITY TO MORTGAGE REAL ESTATE.

In the District Court of ——— County, Nebraska.

In the Matter of the Application of C. D., Guardian of A. B., a Minor, for License to Mortgage Real Estate.

Comes now C. D., guardian of A. B., a minor, and respectfully represents unto the court that said A. B. is of the age of 18 years and a resident of ———, in said county; that said ward is the owner of the following described real estate, ———, consisting of a house and lot in the city of ———, which is of the value of ——— dollars, and is free and clear of all liens and encumbrances; that said A. B. is possessed of no personal property save and except personal belongings, and has no income save and except what he may earn by labor and the sum of ——— dollars per month rent from said real estate.

That said A. B. has completed the high school course in the public schools of said city of ———, and is desirous of attending the state university to fit himself for the profession of ———, and will be unable to earn a sufficient amount during his vacations to pay his necessary expenses while at said university, and that the total amount necessary to defray the expenses of said A. B. at said university until he becomes of lawful age, after first deducting the income from said real estate, is about the sum of ——— dollars.

That your petitioner will be able to borrow the sum of ——— dollars, to be secured by a mortgage on said premises due in five years, with interest at six per cent per annum payable annually.

Your petitioner therefore prays that an order of said court be made and entered authorizing and directing him, said C. D., guardian as aforesaid, to execute and deliver a mortgage on said premises in the sum of ——— dollars, with interest at six per cent per annum, payable annually, and accompanying note or notes, for the purpose of the support and education of said A. B.

(Signed) C. D.,
Guardian.

[Add verification.]

Form No. 247.

NOTICE TO WARD.

State of Nebraska,
County of ———,—ss.

To A. B.

You are hereby notified that C. D., guardian of you, the said A. B., will on the ——— day of ———, 19—, make application to the district court of said county, at the hour of 10 A. M. of said day, or as soon thereafter as counsel can be heard, for an order authorizing said C. D. to execute a mortgage on lands belonging to you, said A. B. A copy of said application is hereto attached.

Dated this ——— day of ———, 19—.

C. D.,
Guardian.

§ 546. Proceedings on the application.

On the day fixed for the hearing, the court may without further notice enter the order prayed for, or direct a postponement of the matter, and order further notice by publication, or otherwise, or direct a reference for the purpose of ascertaining the propriety of ordering the mortgage.[104] The order granting the petition must be made a matter of record. It should give the amount and terms of the mortgage and authorize the guardian to execute the same in his own name.[105]

Before executing the mortgage a bond in double the amount thereof, conditioned to account for the proceeds, must be given by the guardian.[106] When the application is resisted, costs may be awarded the prevailing party, and when satisfied that no reasonable grounds exist for the application, they may be taxed against the guardian individually.[107]

104 Rev. Stats., c. 18, § 167, [1706].
105 Rev. Stats., c. 18, § 170, [1709].
106 Rev. Stats., c. 18, § 168, [1707].
107 Rev. Stats., c. 18, § 169, [1708].

Form No. 248.

ORDER AUTHORIZING GUARDIAN TO EXECUTE MORTGAGE.

In the District Court of ——— County, Nebraska.

In the Matter of the Application of C. D., Guardian of A. B., a Minor, for License to Mortgage Real Estate.

Now, on this ——— day of ———, 19—, this matter came on to be heard on the application of C. D., guardian of said A. B., for a license to mortgage real estate of said A. B., for the purpose of obtaining funds for the support of said A. B.

It appearing to the court that notice of the time of presenting said application has been given to said A. B. in manner and form as provided by law, and the said A. B. being present, and it further appearing to the court, after hearing, that the best interests of said A. B. will be subserved by empowering said petitioner to execute a mortgage on the following premises, the property of said ward, ———, for the purpose of obtaining funds for the education of said ward:

It is therefore ordered that said petitioner, C. D., be and hereby is authorized and empowered to execute a mortgage in the sum of ——— dollars, with interest thereon at six per cent, payable annually, due five years from date, together with the note or notes which said mortgage is to be given to secure. Bond of guardian previous to executing said mortgage fixed at ——— dollars.

W. M.,
District Judge.

§ 547. Sales of the interest of an insane spouse in real estate.

When either husband or wife has been insane for three years and incapable of executing any conveyance of his or her interest in the real estate of the other, including the homestead property, the district court of the county of which such insane person is a resident has power to authorize the legally appointed guardian of such insane person to sell and convey such interest.[108]

108 Rev. Stats., c. 18, §§ 171, 177, [1710], [1716].

A verified petition must be filed by the guardian in the office of the clerk of the district court, together with the written consent of the spouse of such insane person to the granting of the prayer thereof, and his or her agreement to pay whatever costs of said proceeding may be taxed against him or her.[109]

Form No. 249.

PETITION FOR LICENSE TO SELL INTEREST OF INSANE SPOUSE IN REAL ESTATE.

In the District Court of ——— County, Nebraska.

In the Matter of the Application of C. D., Guardian of A. B., an Insane Person, for License to Sell the Interest of said A. B. in Real Estate.

Comes now C. D. and represents unto the court that one A. B., a resident of said county, was on the ——— day of ———, 19—, adjudged by the commissioners of insanity of said county insane and a fit subject for confinement in a hospital for the care and treatment of insane people, and that for more than three years last past said A. B. has been insane and incapable of executing a deed, relinquishment or conveyance of real estate.

II.

That on the ——— day of ———, 19—, letters of guardianship of the person and estate of said A. B. were issued to your said petitioner out of and under the seal of the county court of said county, and he is now the duly appointed guardian of her the said A. B.

III.

That C. B. of said county is the husband of said A. B. and is the owner of the following described real estate, ———, which is of the value of ——— dollars, and that he is desirous of selling the same, and has given his written consent to the prayer of this petition, and his written agreement to pay whatever costs of this proceeding may be taxed against him.

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[109] Rev. Stats., c. 18, §§ 172, 176, [1711], [1715].

IV.

That E. F. and G. H. of said county are the children of said A. B. and said C. B., and their sole prospective heirs, and that the present value of the interest of said A. B. in said land by virtue of her marital relation with said C. B. is the sum of ——— dollars.

Your petitioner therefore prays that a date be fixed for the hearing on this petition, that an order to show cause why the prayer thereof should not be granted issue, service had as by law required, and that upon said hearing an order of said court be made and entered empowering petitioner to sell said interest of said A. B. in said real estate.

(Signed) C. D.,
Guardian of A. B.

[Add verification, Form No. 5.]

§ 548. Hearing and bond.

Service of the order to show cause is had in the same manner as in the case of guardians' sales, and when it is completed, a guardian *ad litem* must be appointed who shall ascertain the propriety and good faith and necessity of the prayer of the petitioner, and may resist the petition by making any proper legal or equitable defense thereto.[110] If the proposed sale is approved and the guardian found a proper person to make it, a decree may be entered fixing the value of the interest of the insane spouse, and authorizing a sale at public auction or private sale, conditioned on the giving of a bond to be approved by the court to faithfully perform his duties in relation to the sale and to account for the proceeds.[111]

The interest of the insane spouse in the lands of the other is that which he or she acquires by virtue of the marital relation. It is substantially a substitute for

110 Rev. Stats., c. 18, § 172, [1711].
111 Rev. Stats., c. 18, § 173, [1712].

the inchoate right of dower or curtesy at common law, its value depending on the number of children of the marriage, the existence of children by a former marriage of the owner of the fee and his or her expectancy of life.

Form No. 250.

BOND OF GUARDIAN ON SALE OF INTEREST OF INSANE SPOUSE IN LANDS.

Know all men by these presents, that we, C. D., as principal, and the X. Y. Surety Company, of ———, as surety, are jointly and severally held and firmly bound unto the district court of ——— county, Nebraska, in the penal sum of ——— dollars, for which payment well and truly to be made we do hereby bind ourselves, our heirs, executors, administrators and successors, by these presents.

Dated this ——— day of ———, 19—.

Now, therefore, the condition of this obligation is such that whereas an order has been entered in the district court of —— county, Nebraska, authorizing and empowering said above-bound C. D., guardian of A. B., an insane person, to sell the interest of said A. B., wife of one C. B., in certain real estate of said C. B., if the said above-bound C. D. shall faithfully perform his duties in relation to said sale and conveyance and faithfully account for the proceeds of said sale, this obligation to be void; otherwise to be and remain in full force and effect.

(Corporate Seal)

(Signed) C. D.
X. Y. Co.
By L. M., Vice-Pres.
C. F., Local Secretary.

Form No. 251.

ORDER EMPOWERING GUARDIAN OF INSANE PERSON TO SELL INTEREST IN LANDS.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this matter came on for hearing on the petition of C. D., guardian of said A. B., for an order empowering him to sell and convey the interest of said A. B. in the following described real estate, ———, the answer of J. A., guardian *ad litem*, and the evidence, and was submitted to the court.

On consideration whereof the court finds that service of the order to show cause heretofore issued in said matter has been had as directed by said court, that said application of said petitioner, C. D., is made in good faith, that it is necessary and for the best interest of said A. B. that her interest in said real estate be sold and conveyed, that said interest is an inchoate interest, by virtue of the marital relation existing between said A. B. and said C. B., consisting of an undivided one-third thereof, and the present value of said interest is the sum of ——— dollars.

It is therefore ordered that said C. D., guardian, be and he hereby is authorized to sell at private sale the said interest of said A. B. in said real estate at a sum not less than ——— dollars, and that before making said sale he execute and deliver to the clerk of this court his bond in the sum of ——— dollars, to be approved by said court, conditioned as provided by law.

(Signed) W. M.,
District Judge.

§ 549. Sale and confirmation.

There is no time within which the power to sell must be exercised. It may be revoked by the court when the insane person becomes of sound mind, such revocation having no effect on prior conveyances.[112] If the sale is at public auction, notice must be given the same as in guardians' sales of real estate for investment. In all cases the sale must be reported to the court, and if it appears regular and no sufficient cause is shown for setting it aside, it will be confirmed and the guardian directed to execute a deed to the purchaser.[113] The court has power to tax the whole or any part of the costs, including a reasonable fee for the guardian *ad litem* to the insane spouse, and they must be paid before the delivery of the deed.[114]

112 Rev. Stats., c. 18, § 175, [1714].
113 Rev. Stats., c. 18, § 174, [1713].
114 Rev. Stats., c. 18, § 176, [1715].

CHAPTER XXXIX.

ACCOUNTS AND SETTLEMENTS OF GUARDIANS.

§ 550. Annual Account of Guardian.
551. Guardian's Account—Debit Side.
552. Guardian's Accounts—Credits.
553. Power to Compel Interlocutory Accounting.
554. Discharge of Guardian.
555. Settlement Out of Court.
556. Action to Set Aside Settlement.
557. Action by Ward for Property Fraudulently Transferred.
558. Final Accounting in County Clerk.
559. Hearing on Guardian's Account.
560. Order Allowing Final Account of Guardian.
561. Liability of Sureties on Guardian's Bond.
562. Release of Sureties.
563. Action on Guardian's Bond.
563a. Appeals in Guardianship Matters.

§ 550. Annual account of a guardian.

The bond of a guardian requires him to make and file with the county court an account of his doings within one year after the issue of letters, and at such other times as the court shall direct. In order that the court shall have full knowledge of the general condition of the estate, and of any unfairness or wrongdoing of the guardian in the management of the funds of the ward, it is the general practice, even though not demanded by the statute, to require an account to be rendered every year thereafter until the termination of the guardianship. The annual account should show all the transactions between the guardian and the ward, and all transactions of the guardian in connection with the estate, up to its date. It should show

the amount received from all sources, the amount paid the ward, and the balance in the guardian's possession. The inventory is the basis of the first annual account, but is not conclusive. Either party may show errors or omissions therein. These annual or periodical accounts are not considered by the courts as conclusive and binding upon the parties.[1] They are held to be *prima facie* correct; but, though made under oath and approved by the court, they may be reopened or readjusted in any subsequent annual account, or in the final account. Either party may go behind them and show that other charges should be included, or that the charges therein made are not just and proper.[2] A joint account of joint guardians stands upon the same footing as that of a sole guardian, and may be reopened after the death of one of the guardians, on the settlement of his, the survivor's, accounts.[3]

§ 551. Guardian's account—Debit side.

The general rule is that every guardian is chargable with all the income from the real estate of his ward, with the value of all the personal property that came into his hands during the existence of the trust, with interest on deposits, and with the proceeds of investments made by him of the ward's property. He

1 Kidd v. Guibar, 63 Mo. 342; In re Davis, 62 Mo. 453; Douglas' Appeal, 82 Pa. 169; Wall's Appeal, 104 Pa. 14.

2 Latham v. Myers, 57 Iowa, 519, 10 N. W. 924; West v. West's Admr., 75 Mo. 204; State v. Jones, 89 Mo. 470; Davis v. Combs, 38 N. J. Eq. 473; Starrett v. Jameson, 29 Me. 504.

3 Blake v. Pegram, 109 Mass. 541.

should be charged with at least savings bank interest on funds which have lain idle for a period of six months or more,[4] with a loss occurring by reason of loans without having first obtained directions from the court concerning the security,[5] losses occurring when no specific directions for investments are given him by the county court,[6] and due diligence in looking into the value of the security has not been shown, or loans have been made without security.[7] Where he makes loans or investments without formal application and permission from the court, good faith and a high degree of business ability will not protect him from liability.[8]

If he permits funds to draw savings bank interest for a long time when they could have been invested so as to bring in more income, he should be charged with what he ought to have received.[9]

He should not be held liable for loss of funds occurring by the failure of a bank in which they were de-

4 White v. Parker, 8 Barb. (N. Y.) 48; Worrell's Appeal, 23 Pa. 44.

5 In re O'Brien's Estate, 80 Neb. 125, 113 N. W. 1001; In re Wilson's Estate, 90 Neb. 363, 133 N. W. 447; In re Carver, 118 Cal. 73, 50 Pac. 22.

6 Witty v. Witty, 10 Ky. Law Rep. 513, 40 S. W. 457; Brewer v. Ernest, 81 Ala. 435, 2 South. 84; Wyckoff v. Hulse, 32 N. J. Eq. 697; Covington v. Leak, 65 N. C. 594.

7 Probate Judge v. Mathes, 60 N. H. 433; Lee v. Lee, 55 Ala. 590.

8 Nagle v. Robbins, 9 Wyo. 211, 62 Pac. 154, 796; In re Shandoney, 133 Cal. 387, 65 Pac. 877.

9 Johnson v. Newton, 11 Hare, 169; Moyle v. Moyle, 2 Russ. & M. 710.

posited unless the circumstances are such that he could have known that it was in a critical condition.[10]

§ 552. Guardian's account—Credits.

A guardian is entitled to credit for all the money paid out according to law for the support and education of the ward, the payment of his debts and the support of his family. In cases where he has not obtained an order of court fixing the amount he may pay for such support and like expenses, it may be determined on the hearing on the final account,[11] for interest on money advanced by him to the ward,[12] for necessary costs and attorney fees, and expenses incurred in collecting and managing the estate.[13] If the attorney fees have not actually been paid, and there is a valid contract between the attorney and guardian for their payment, the court may allow them on the hearing and direct that they be paid directly to the attorney.[14]

The fees to which a guardian is entitled for his services are fixed by the court and rest largely in its discretion. He is entitled to such an amount as the size and character of the estate, the nature of his duties,

10 In re Grammel's Estate, 120 Mich. 487, 79 N. W. 706; In re Hunt, 141 Mass. 515, 6 N. E. 554.

11 Ellis v. Soper, 111 Iowa, 631, 82 N. W. 1041.

12 Hayward v. Ellis, 13 Pick. (Mass.) 273.

13 In re Tolifaro, 113 Iowa, 747, 84 N. W. 836; In re Brady (Idaho), 79 Pac. 75; Pyatt v. Pyatt, 44 N. J. Eq. 391, 15 Atl. 421; Scheib v. Thompson, 23 Utah, 564, 65 Pac. 499.

14 Bailey v. Garrison, 68 Neb. 779, 94 N. W. 990.

relationship to the ward, the duration of the trust, and all the surroundings and circumstances of the ward and estate seem to require.[15] But if the expenses appear large and there was much litigation largely for his own benefit, or partly for his benefit and partly for his ward, the charges should be made accordingly.[16] If he violates any statute, or order or decree of the court, and a loss thereby occurs, he loses his right to pay for his services and also has to make good the loss.[17] The court may, however, if the circumstances seem to warrant it, allow him something for his services.

§ 553. Power to compel interlocutory accounting.

A person under guardianship has no power to compel his guardian to file his account as long as the trust exists. A relative or person interested in the estate of the ward may make such application, as next friend, to compel him to account where he delays doing so and the circumstances are such as make an accounting desirable.[18]

15 Gott v. Culp, 45 Mich. 265, 7 N. W. 767; In re Hogan, 134 Mich. 361, 96 N. W. 439; Woomer's Appeal, 144 Pa. 383, 22 Atl. 749.

16 In re Tolifaro, 113 Iowa, 747, 84 N. W. 936; Pierce v. Prescott, 128 Mass. 140; Moore v. Shields, 69 N. C. 50.

17 Starrett v. Jameson, 29 Me. 504; Foteaux v. Le Page, 6 Iowa, 123; Mattox v. Patterson, 60 Iowa, 434, 15 N. W. 262; Knowlton v. Bradley, 17 N. H. 458; Farwell v. Steen, 46 Vt. 678.

18 Trumpler v. Cotton, 109 Cal. 250, 41 Pac. 1033; Monell v. Monell, 5 Johns. Ch. (N. Y.) 283; Clements v. Ramsay (Ky.), 4 S. W. 311.

Form No. 252.

GUARDIAN'S ANNUAL ACCOUNT.

[Title of Cause and Court.]

The following is a true statement of the account of C. D., guardian of the person and estate of A. B., a minor, with said estate, from the date of the issue of letters of guardianship to ———, 19—:

[Date]	Appraisement of personalty of said estate as per files in the case	$
	Income from the real estate [items]	
	Income from personalty [items]	
	Sales of real estate per order of court [items and description of property sold]	
		$

Credits.

Debts paid [items]	$
Paid for support of ward as per order of court [items]	
Taxes and repairs [items]	
Fees of county judge [items]	
Sale of personalty by order of judge [items]	
Attorneys' fees and costs and expenses [items]	
Property on hand [items]	
Appraised value of same	
Balance due estate	$

State of Nebraska,
——— County,—ss.

C. D., being first duly sworn, on oath says that the foregoing is a true statement of the account of his transactions in regard to said estate for the year ending ———, 19—, that the debtor items of said account include all the property of every kind and description that has come into his possession as guardian of said estate, and that the

credit items are a proper allowance against said estate, and vouchers for same are hereto attached.

(Signed) C. D.

Subscribed in my presence and sworn to before me this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

Form No. 253.

ORDER ALLOWING ANNUAL ACCOUNT OF GUARDIAN.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, the first annual account of C. D., guardian of said estate, came before this court for approval, and, after a due examination thereof, the court finds that the same is just and correct. It is therefore ordered that the same be approved. It is further ordered that the said C. D., guardian, make and file in this court a further account of his doings within one year from this date.

(Signed) J. K.,
County Judge.

§ 554. Discharge of guardian.

The coming of age of a minor operates *per se* as a discharge of the guardian, ending his rights to the further management of the estate.[19] The duty of making a settlement with his ward and delivering the property remaining.[20] The same rules would follow the marriage of a female ward after she has attained the age of sixteen.[21]

In the case of the guardian of an incompetent person, the guardianship continues until he is discharged by an order of the court which appointed him,[22] or by

19 Goble v. Simeral, 67 Neb. 276, 93 N. W. 235.

20 Stinson v. Leary, 69 Wis. 269, 34 N. W. 63.

21 Montoya v. Miller, 7 N. M. 289, 34 Pac. 40; Decker v. Fessler, 146 Ind. 16, 44 N. E. 657.

22 Hovey v. Harmon, 49 Me. 269.

an adjudication of a court of competent jurisdiction that the ward is of sound mind.[23]

Application for that purpose may be made by the ward, and notice given to the heirs presumptive and next of kin and also to the guardian.[24] If the person is discharged on a writ of *habeas corpus* on the ground that he is of sound mind, his guardian can be discharged on motion supported by a certified copy of the writ. In the case of parties who were adjudged incompetent, not insane, it should be made to appear that they have regained their health and are capable of managing their affairs and understanding ordinary business transactions.[25]

The death of a ward effects a discharge of the guardian,[26] and the duty of accounting for the estate devolves upon his representatives.[27]

§ 555. Settlement out of court.

The liability of a guardian to his ward may be settled between the parties as soon as the guardian is discharged without the matter being formally brought before the court for approval. A settlement so made must be a full and complete accounting of all the transactions of the guardian with the estate, accompanied by payment or delivery of whatever is due to the ward, and be evidenced by a written receipt.[28] It is binding

23 In re Scheuer, 31 Mont. 606, 79 Pac. 244.

24 Storms v. Allegan Circuit Judge, 99 Mich. 144, 57 N. W. 1074.

25 Cochran v. Anderson, 104 Ind. 282, 3 N. E. 934.

26 Barrett v. Provincher, 39 Neb. 773, 58 N. W. 292.

27 Peck v. Braman, 2 Blackf. (Ind.) 141.

28 Johnson v. Johnson, 2 Hill Eq. (S. C.) 277, 29 Am. Dec. 72; Cooper v. Cooper, 9 N. J. Eq. 655.

on both parties only when the guardian acts in good faith,[29] fully discloses to his ward all the circumstances and facts connected with his management of the estate, and all his rights therein,[30] and the transaction is entirely free from fraud, duress or undue influence.[31]

§ 556. Action to set aside settlement.

A settlement made by a guardian and ward out of court may be set aside for fraud, duress, undue influence or concealment of material facts, by action in equity in the district court.[32] It is substantially an action for equitable relief on the ground of fraud, and though the burden of proof is of course upon the plaintiff, less evidence of actual fraud is required than in other cases for equitable relief on similar grounds.[33]

The influence growing out of the fiduciary relation between a guardian and his ward is not presumed by law to terminate with removal of disability, especially in the case of minors, and hence all sales, contracts and agreements made by the former guardian and ward are looked upon by the courts with some suspicion, and if for an inadequate consideration, or slightly tinctured with misrepresentations or suppression of

29 Hooper v. Hooper, 26 Mich. 435; Powell v. Powell, 52 Mich. 432.

30 Witt v. Day, 112 Iowa, 110, 83 N. W. 797; Hawkins' Appeal, 32 Pa. 263; Lewis v. Browning, 111 Pa. 493; Douglass v. Ferris, 138 N. Y. 192, 33 N. E. 1041.

31 Motley v. Motley, 43 Ala. 455; Hardin's Admr. v. Taylor, 78 Ky. 593.

32 Butterick v. Richardson, 39 Or. 246, 64 Pac. 390; Van Rees v. Witzenberg, 112 Iowa, 30, 83 N. W. 787; and cases cited under § 555.

33 Stark v. Gamble, 43 N. H. 465; Voltz v. Voltz, 74 Ala. 555; Van Rees v. Witzenberg, 112 Iowa, 30, 83 N. W. 787.

truth, will be set aside.[34] Where different conclusions may be drawn from the facts connected with the settlement, that will be adopted which is in favor of the former ward.[35] A conveyance of real estate made by a party to his former guardian soon after he became of age, if accompanied by very slight evidence of misrepresentation, concealment of material facts or actual fraud, makes out a *prima facie* case, and it devolves on the former guardian to prove that the sale was just and equitable,[36] and he must show that he made a full disclosure of all the circumstances and conditions of the estate and that the ward knew that such settlement was to operate as a release of the guardian.[37]

A gift from a ward to his guardian is voidable only, the burden of proof being on the guardian to show that it was made freely and voluntarily, and with a full understanding of his rights.[38] It is not necessary before bringing suit that he tender back the money he received on the settlement, but he may in his pleadings or at the trial offer to return what was paid him.[39] In case of the death of the guardian after settlement, the action may be brought against his executor or administrator and the bondsmen of such executor or administrator joined as parties.[40]

34 Eberts v. Eberts, 55 Pa. 110; Garvin's Admr. v. Williams, 50 Mo. 206; Tucke v. Bucholz, 43 Iowa, 415.

35 Van Rees v. Witzenberg, 112 Iowa, 30, 83 N. W. 787; Kirby v. Taylor, 6 Johns. Ch. (N. Y.) 242; Spalding v. Brent, 3 Md. Ch. 411; Wainright v. Smith, 106 Ind. 239, 6 N. E. 333.

36 Berkmeyer v. Kellerman, 32 Ohio St. 240; Bond v. Lockwood, 33 Ill. 212.

37 Gregory v. Orr, 61 Miss. 307.

38 Wade v. Pulsifer, 54 Vt. 45.

39 Line v. Lawder, 122 Ind. 548, 23 N. E. 758.

40 Witt v. Day, 112 Iowa, 110, 83 N. W. 797.

The decree, if in favor of the ward, sets aside the settlement, and restores the guardian's bond as a security for its being complied with. The costs of the action, however, are not a liability for which the bondsmen can be held.[41]

§ 557. Action by ward for property fraudulently transferred.

No fraudulent transfer or dealing of the guardian with his ward's property will be allowed to stand. The ward may bring an action on the bond for the value of the property, or he may follow the same and recover it, even though it has passed into the hands of a third party.[42] He cannot pursue both remedies. If he has repudiated a fraudulent or unauthorized act of his guardian, and brought an action on the bond, he cannot set up any legal or equitable claim to the property into which the assets of his estate have passed.[43] If unable to realize the amount due from the bondsmen, he may file a bill in equity for the recovery of such property as he can trace.[44] A guardian who has purchased realty with his ward's funds holds the same as trustee of the ward, and, if he has sold or transferred the land to a third party with notice, the ward will be permitted to establish a resulting trust in the land.[45] If the guardian took the title as trustee

41 Douglass v. Ferris, 138 N. Y. 192, 33 N. E. 1041.

42 Vason v. Bell, 53 Ga. 416.

43 Rowley v. Towsley, 53 Mich. 329, 19 N. W. 80; Beam v. Froneberger, 75 N. C. 540.

44 Branch v. Du Bose, 55 Ga. 21; Hill v. McIntire, 39 N. H. 410.

45 Robinson v. Pebworth, 71 Ala. 240; Hamnett's Appeal, 72 Pa. 337; Royer's Appeal, 11 Pa. 36; Rowland v. Thompson, 73 N. C.

of the ward, then deeded to a third party, or if the third party had any knowledge, either from the deeds or otherwise, where the purchase money came from, a resulting trust would be established.[46] Any transaction of the guardian which, while perhaps not fraudulent, is not authorized by the court or law, may be ratified or disapproved by the ward.[47] He cannot ratify in part and disapprove in part. The transaction is an entirety.[48] Transactions of this nature are contracts for the purchase of real estate, irregular sales of land, a loan of the ward's funds to a firm of which the guardian is a member, or any unauthorized investment by the guardian. In the case of a loan to a firm of which the guardian is a member, the ward may elect to consider the amount as a loan, or hold the guardian for the amount due upon his bond.[49]

A formal ratification of any irregular dealings of the guardian with his ward's estate is not necessary. If, after becoming of age, he receives and retains the benefit of such transactions with a full knowledge of their irregularity and his consequent rights, he will be presumed by the law to have ratified them.[50]

419; Robinson v. Robinson, 22 Iowa, 427; White v. Parker, 8 Barb. (N. Y.) 48.

46 Morrison v. Kinstra, 55 Miss. 71; Taylor v. Brown, 55 Mich. 482, 21 N. W. 901.

47 Tomlinson v. Simpson, 33 Minn. 443, 23 N. W. 864; Eckford v. De Kay, 8 Paige (N. Y.), 89.

48 Singleton v. Love, 1 Head (Tenn.), 357.

49 Douglas v. Bennett, 51 Miss. 680; Summers v. Howard, 33 Ark. 490; Morgan v. Johnson, 68 Ill. 190; Shorter v. Frazer, 64 Ala. 74; Loyd v. Malone, 23 Ill. 43; Bush v. Bush, 33 Kan. 556.

50 Seward v. Didier, 16 Neb. 58, 20 N. W. 12; Caffey v. McMichael, 64 N. C. 507; Cassedy v. Casey, 58 Iowa, 326, 12 N. W. 286; Teipel v. Vanderweier, 36 Minn. 443, 37 N. W. 934.

Where the settlement was made in the county judge's office and the account gone over by the ward, guardian and county judge, though there was no judicial record of its approval, and a receipt filed, the ward is estopped from attempting to recover property the proceeds of which were included in such account.[51]

§ 558. Final accounting in county court.

The county court has original jurisdiction of the accounting between a guardian and his former ward,[52] unless the trust has terminated by a settlement between the parties out of court.[53] When a settlement is not made outside of court, the guardian should file his account as soon as possible after the disability of the ward ceases and a hearing had after notice to the ward, which should be personally served. The ward may waive service and enter his appearance. A hearing without service or entry of appearance is of no more binding effect than a hearing on an annual account.[54]

If he neglects to render the account, the ward may file his petition in the county court for that purpose.[55] There is authority to the effect that the right to file such petition is not barred by the statute of limitations.[56] A lapse of time after the ward becomes of age,

51 Borcher v. McGuire, 85 Neb. 646, 124 N. W. 111; Kulp v. Heiman, 90 Neb. 167, 133 N. W. 205.

52 Bisbee v. Gleason, 21 Neb. 534, 32 N. W. 578; Wilson v. Wilson, 90 Neb. 353, 133 N. W. 447.

53 Butterick v. Richardson, 39 Or. 246, 66 Pac. 390.

54 Jacobs v. Fouse, 23 Minn. 51; Mead v. Bakewell, 8 Mo. App. 549; Murphy v. Murphy, 2 Mo. App. 549; Roberts v. Schultz, 45 Tex. 184.

55 Bisbee v. Gleason, 21 Neb. 536, 32 N. W. 578; Ball v. Le Clair, 17 Neb. 39, 22 N. W. 118.

56 Gilbert v. Guptil, 34 Ill. 112.

equal to the statute, raises a presumption that there is nothing due the ward.[57] Except in the case of fraud, it should be filed within four years.[58]

On the filing of the petition a citation should be issued and personally served on the guardian. Under a statute similar to that of this state, it is held that service by publication on a guardian who had become a nonresident gave the court jurisdiction.[59] After the death of a guardian his personal representatives may be summoned in the same manner.[60]

Form No. 254.

PETITION TO REQUIRE GUARDIAN TO ACCOUNT.

[Title of Cause and Court.]

Your petitioner, A. B., respectfully represents unto the court that on the ——— day of ———, 19—, letters of guardianship upon his said estate were issued out of and under the seal of said court to C. D.; that your petitioner became of lawful age on the ——— day of ———, 19—, and on the ——— day of ———, 19—, he demanded a settlement of the said matters of his said estate with said C. D., and that said C. D. has failed and refused and neglected to settle his business as guardian of said estate with your petitioner; that said C. D. has in his possession a large amount of money, notes, bonds, rights, and effects belonging to your petitioner, and is indebted to your petitioner in an amount unknown to your petitioner, but which is not less than the sum of ——— dollars.

Your petitioner therefore prays that a citation issue out of and under the seal of said court to the said C. D., commanding him to appear before said court on a day to be therein specified, and then and there make full report of his doings as such guardian, and pay

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57 Maulfair's Appeal, 110 Pa. 402, 2 Atl. 530; Kimball v. Ives, 17 Vt. 430.

58 See Jones v. Strickland, 61 Ga. 366; Bane's Appeal, 27 Pa. 492.

59 Heisen v. Smith, 138 Cal. 216, 71 Pac. 180.

60 Waterman v. Wright, 56 Vt. 164.

over to your petitioner the money which may be due him on said accounting, according to law and the terms of his said bond.

Dated this ——— day of ———, 19—.

(Signed) A. B.

[Add verification.]

Form No. 255.

CITATION TO GUARDIAN TO FILE HIS FINAL ACCOUNT.

State of Nebraska,
——— County,—ss.

To C. D., Guardian of A. B., a Minor:

You are hereby cited to appear before the county court of ——— county, Nebraska, at the county court room in said county, on the ——— day of ———, 19—, and then and there make and file a report of doings and transactions as such guardian, and, upon the hearing on said account, settle the affairs of such guardianship, and pay to the said A. B. the money which may be found due him on such accounting, as required by law and the terms of your bond. Should you fail or neglect to comply with the terms of this citation, the amount due from you to the said A. B. on your said account will be determined in your absence.

Dated this ——— day of ———, 19—.

(Seal) (Signed) J. K.,
County Judge.

§ 559. Hearing on guardian's account.

If the guardian fails to appear and file his account, the court may proceed in his absence to take testimony concerning the property, examine into his transactions with the funds and determine the amount due the ward; and a decree rendered without any appearance on his behalf is binding on all parties interested.[61]

The account may be a continuation of the last annual account, or a complete statement of all his transactions with the property, the latter being the better practice, if there is a probability of objections being

61 Bisbee v. Gleason, 21 Neb. 536, 32 N. W. 578.

filed.[62] In any case the ward may object to any items which he believes are not a legitimate claim against him or introduce evidence of property omitted.[63]

It should include all transactions up to the date when the disability ends. If there are several wards, separate accounts should be filed for each.[64]

Though not required by statute, vouchers for all expenditures should be filed.[65] The burden of proof is on the guardian to show that payments claimed for the benefit of the ward were for that purpose, and that credits claimed for debts were *prima facie* demands against the ward.[66] Where no objections are filed, the testimony of the guardian that the account as it stands is correct is sufficient.

§ 560. Order allowing final account of guardian.

A guardian's final account, when approved by the county court, is conclusive as to all matters lawfully embraced therein.[67] It cannot be attacked collaterally.[68] An appeal may be taken to the district court in the same manner as in probate cases. If the guardian appeal, he must give a bond.[69] If the guardian

62 Ellis v. Soper, 111 Iowa, 631, 82 N. W. 1041.

63 Section 510, *supra.*

64 Pursley v. Hayes, 22 Iowa, 11; Hescht v. Calvert, 32 W. V. 215, 9 S. E. 87.

65 Gregg v. Gregg, 18 N. H. 190; Newman v. Read, 50 Ala. 297.

66 Stewart v. McMurray, 82 Ala. 269, 3 South. 47.

67 State v. Leslie, 83 Mo. 60; McCleary v. Menke, 109 Ill. 294; Foust v. Chamblee's Admr., 51 Ala. 74; Candy v. Hannamore, 76 Ind. 125.

68 Bisbee v. Gleason, 21 Neb. 534, 32 N. W. 578; Lynch v. Rotan, 39 Ill. 14.

69 Goble v. Simeral, 67 Neb. 276, 93 N. W. 235.

filed his account of his own motion, he ought to receive credit for his reasonable costs and expenses, including attorney fees in defending a settlement which the court approved.[70] If he had to be formally cited to account, he should at least pay the costs of the citation.[71] The allowance of fees of his attorney in connection with the accounting is largely in the discretion of the court.[72]

The decree lacks one element of a judgment; an execution cannot issue thereon, and payment may be made by either turning over the assets and securities or in cash.[73]

The inherent jurisdiction of the county court over guardianship matters gives it power to set aside the decree if it was obtained by fraud or misrepresentation in the same manner as other final decrees of such court.[74]

Form No. 256.

PETITION BY GUARDIAN FOR HIS RELEASE FROM LIABILITY.

[Title of Cause and Court.]

Your petitioner, C. D., respectfully represents unto the court that on the ——— day of ———, 19—, letters of guardianship of the said A. B., then a minor, issued to him out of and under the seal of said court; that he thereupon entered upon the discharge of his duties, and has completed his trust as such guardian; that on the ——— day of ———, 19—, the said A. B. became of lawful age; that on the ——— day of ———, 19—, he made a full settlement

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70 Nagle v. Robbins, 9 Wyo. 11, 62 Pac. 154, 796; Neilson v. Cook, 40 Ala. 498.

71 Pyatt v. Pyatt, 44 N. J. Eq. 391, 15 Atl. 421.

72 Moore v. Shields, 69 N. C. 50; Kingsbury v. Powers, 131 Ill. 182, 22 N. E. 479.

73 Manning v. Manning, 61 Ga. 137.

74 Civ. Code, §§ 648, 656; Levi v. Longini, 82 Minn. 324, 86 N. W. 334; Estate of Leavens, 65 Wis. 440, 27 N. W. 324.

with the said A. B.; that attached hereto and made a part hereof, and marked "Ex. A," "Ex. B," and "Ex. C," is the account of your petitioner as guardian, the receipt of the said A. B. for the amount found due him on such account, together with the written consent of the said A. B. for the discharge of your petitioner as guardian.

Your petitioner therefore prays that said court may approve the same, release petitioner as guardian, and the sureties upon his official bond from liability in relation to said guardianship.

Dated this ——— day of ———, 19—.

(Signed) C. D.

[Add verification.]

Form No. 257.

ORDER APPROVING FINAL ACCOUNT, AND RELEASING GUARDIAN.

[Title of Cause and Court.]

Now, on this ——— day of ———, 19—, this cause came on for hearing on the final account of C. D., guardian of the said A. B., and the said A. B. being present in court, and having attained his majority, and the court having examined said account and all the transactions of the said C. D. as guardian as aforesaid, finds that said account is just and correct, and that there is due the said A. B. from the said C. D. the sum of ——— dollars. It is therefore ordered that the said C. D. pay forthwith to the said A. B. the said sum of ——— dollars, and, upon payment of the same and filing the receipt therefor, said C. D., guardian, and E. F. and G. H., the sureties upon his official bond, be discharged and released from all further liability or responsibility in relation to said guardianship.

Said C. D. having filed a receipt from said A. B., for the sum of ——— dollars, it is further ordered that said C. D., together with E. F. and G. H., the sureties upon his official bond, be and they hereby are released from all further responsibility in relation to said guardianship.

(Signed) J. K.,
County Judge.

§ 561. Liability of sureties on guardian's bond.

The sureties upon a guardian's bond are liable for the lawful disbursement or delivery of all the assets of

the estate as determined by the order of the county court.[75] The liability does not terminate with the ward becoming of age or the removal of disability,[76] but continues for four years after the discharge of the guardian,[77] provided that if at the time of the discharge the party entitled to bring the action is out of the state or under disability to sue, the action may be commenced within five years after the return of such person to the state, or after such disability shall be removed.[78]

In Oregon the limitation is three years.[79]

Sureties upon a sale bond are liable for a loss or misappropriation of the proceeds of the sale, including a loss occurring on account of a failure to comply with the orders of the county court for its investment.[80] Unless such proceeds have been mingled with other assets and the loss occurred in connection with the loss of such other assets, it is but justice to the first bondsmen that the ward should look to the sureties on the sale bond for reimbursement.[81]

A guardian of two or more wards appointed by the same letters and giving but one bond, together with

75 Bond v. Lockwood, 31 Ill. 212; Hunt v. State, 53 Ind. 321; State v. Brown, 73 N. C. 81; Taylor v. Hemingway, 181 Ky. 158; McDonald v. Meadows, 1 Met. (Ky.) 507.

76 In re Walling, 35 N. J. Eq. 105; Higgins v. State, 87 Ind. 292.

77 Civ. Code, § 13; Goble v. Simeral, 67 Neb. 276, 93 N. W. 235.

78 Civ. Code, § 13.

79 L. O. L. § 1334.

80 Mattoon v. Cowing, 13 Gray (Mass.), 387; McKim v. Morse, 130 Mass. 439.

81 Henderson v. Coover, 4 Nev. 409; Madison County v. Johnston, 51 Iowa, 152, 50 N. W. 492; Potter v. State, 23 Ind. 607.

his sureties, is liable to a ward in proportion to his interest in the estate.[82]

§ 562. Release of sureties.

By virtue of the statute of limitations, the sureties upon a guardianship bond are released on the expiration of four years from the date of his discharge.[83] They are also discharged by a settlement made out of court by a ward of full age and with a full knowledge of all the transactions of the guardian with the property of the estate.[84] If such settlement is set aside for fraud, misrepresentation or suppression of facts, the effect is to renew the bond and reinstate the liability of the sureties.[85] The payment by the guardian to the ward of the amount found due him on final accounting in the county court releases the sureties, but setting aside the account reinstates the bond.[86]

The death of a surety in no manner affects the liability of his cosureties,[87] nor does the giving of a cumulative bond.[88]

The release of a cosurety, by the ward, without the knowledge or consent of the other sureties,[89] or an agreement between the guardian and ward, after the

82 Hooks v. Evans, 68 Iowa, 52, 25 N. W. 925; Pursley v. Hayes, 22 Iowa, 11; Ordinary v. Heishon, 42 N. J. L., 15.

83 Section 561, *supra.*

84 Seward v. Didier, 16 Neb. 64, 20 N. W. 12.

85 Ela v. Ela, 84 Me. 423, 24 Atl. 893; Douglass v. Ferris, 138 N. Y. 192, 33 N. E. 1041.

86 Johnson's Heirs v. Chandler's Heirs, 15 B. Mon. (Ky.) 584; Aaron v. Mandel, 78 Ky. 427.

87 Winslow v. People, 117 Ill. 152, 7 N. E. 135.

88 State v. Saunders, 60 Ind. 562; Baum v. Lynn, 72 Miss. 932, 18 South. 428.

89 Tyner v. Hamilton, 51 Ind. 259.

latter becomes of full age, for a valuable consideration, to extend the time for payment of the amount found due the ward,[90] discharges the bond.

The county court has no power to discharge the sureties except on approval of the final account and payment and delivery of the money and property therein directed to be made to the ward. The ward should bring suit within a reasonable time after the allowance of the account, and if he neglects to do so, the sureties on the bond may bring an action to compel him to commence an action within a reasonable time or consent to their discharge.[91]

§ 563. Action on guardian's bond.

An action on a guardian's bond accrues when the amount due the ward or the predecessor of the former guardian has been ascertained by the county court on the final accounting.[92] The statute of limitations runs from the date of the discharge of the guardian, and not from the date of the allowance of the account.[93]

It is not necessary to obtain leave of the court as in the case of executors' or administrators' bonds. The action may be brought as soon as the order is entered and compliance therewith refused, and is of course brought by the former ward in his own name.[94] In the case of the death of a surety, the amount due from

90 People v. Seeley, 146 Ill. 189, 32 N. E. 458.

91 Vermilya v. Bunce, 61 Iowa, 605, 16 N. W. 735.

92 Ball v. Le Clair, 17 Neb. 39, 22 N. W. 118; Bisbee v. Gleason, 21 Neb. 534, 32 N. W. 578.

93 Goble v. Simeral, 67 Neb. 276, 93 N. W. 335.

94 Bisbee v. Gleason, 21 Neb. 534, 32 N. W. 578.

the guardian may be filed as an absolute or contingent claim against his estate.[95]

Guardians' bonds are construed about as strictly in favor of the ward and against the sureties as they well can be. Their contract is to make good to the minor whatever may be lost by the improper or unlawful act of the guardian. No doctrine of estoppel or consent can be effective, as against minors, to authorize or excuse misconduct by their guardians, or to relieve from the liability in fact assumed by those who have guaranteed against such misconduct.[96] Of technical defenses to the action there are scarcely any. The sureties cannot set up any irregularities in the appointment of the guardian, nor can they deny his appointment, where the bond contains proper recitals,[97] nor if the bond is in proper form, can they in any way question its validity;[98] nor can they show that the misappropriation of the ward's funds by their principal occurred after, instead of before, he became of age. It is immaterial when the misappropriation occurred.[99]

A settlement made by a guardian in the county court after due notice is final and binding on his sureties in an action on the bond, and his absence at the hearing is no defense.[100] The sureties have nothing to do with the decision of the county court on the amount due, except to pay it if their principal does not, and they can-

95 Brooks v. Rayner, 127 Mass. 268; Cotton v. State, 64 Ind. 573.

96 Hutson v. Jenson, 110 Wis. 26, 85 N. W. 689.

97 Shroyer v. Richmond, 16 Ohio St. 455; Hayden v. Smith, 49 Conn. 83.

98 Vincent v. Starks, 45 Wis. 458.

99 Judge of Probate v. Cook, 57 N. H. 450.

100 Bisbee v. Gleason, 21 Neb. 534, 32 N. W. 578; Cross v. White, 80 Minn. 413, 83 N. W. 393; Jacobson v. Anderson, 72 Minn. 426, 75 N. W. 607.

not be heard on the hearing.[101] They cannot set up as a defense that the guardian paid the money into court. It must be paid to the ward.[102] They cannot set up that their signatures were obtained by fraud, or by an agreement to secure other signatures, or by any other arrangement or agreement of which the court or the parties to be protected had knowledge.[103]

Form No. 258.

PETITION ON GUARDIAN'S BOND.

[Title of Cause and Court.]

The plaintiff complains of the defendants for that on the ——— day of ———, 19—, defendant C. D. was, in the county court of ——— county, Nebraska, appointed guardian of the estate of this plaintiff, who was at that time a minor of the age of ——— years, residing in said county and state.

(2) That on said date, said C. D., together with E. F. and G. H., executed and delivered to the county judge of said county of ——— the following obligation in writing: [Copy bond in full.]

(3) That said instrument was duly approved by the county judge of said county, and letters of guardianship thereupon issued out of and under the seal of the said county court to the said C. D., and he entered upon the duties of said guardianship, and collected a large amount of money belonging to said estate and said minor, to wit, the sum of ——— dollars; that all of said money came into the hands of the said C. D., guardian as aforesaid, on or before the ——— day of ———, 19—, and that all thereof still remains in the hands of the said C. D., guardian as aforesaid.

(4) That on the ——— day of ———, 19—, the plaintiff demanded a settlement of the matters of his said estate with said C. D., and said C. D. has failed and refused to settle said business as guardian; that on the ——— day of ———, 19—, the county court of said county duly issued its citation to the said C. D. to appear

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101 Braiden v. Mercer, 44 Ohio St. 339, 7 N. E. 155; Badger v. Daniel, 79 N. C. 372.

102 Jacobson v. Anderson, 72 Minn. 426, 75 N. W. 607.

103 Brown v. Probate Judge, 42 Mich. 501, 4 N. W. 195; Vincent v. Starks, 45 Wis. 458; State v. Hewitt, 72 Mo. 603; State v. Lewis, 73 N. C. 138.

before said court on the ——— day of ———, 19—, and settle said business, and pay over the said money to plaintiff as required by law and the terms of said bond, which citation was, on the ——— day of ———, 19—, duly served on the said C. D.

(5) That on the ——— day of ———, 19—, said county court made an order finding the amount due the plaintiff from said C. D. to be the sum of ——— dollars, and requiring payment thereof to be made to said plaintiff, in the words and figures following [copy order settling guardian's account], and that the defendant C. D. has neglected and refused, and still neglects and refuses, to pay said sum to this plaintiff.

(6) That plaintiff is of lawful age, and entitled to the full use and control of his estate.

(7) That there is therefore due the plaintiff from defendants, C. D., E. F., and G. H., on said bond, the sum of ——— dollars, with interest at the rate of seven per cent per annum from the ——— day of ———, 19—.

Plaintiff therefore prays for judgment against the defendants, C. D., E. F., and G. H., for the sum of ——— dollars, with interest thereon at the rate of seven per cent per annum from the ——— day of ———, 19—, and costs of this suit.

(Signed) A. B.,
By W. B. C., His Attorney.

[Add verification.]

§ 563a. Appeals in guardianship matters.

All final orders and decrees of the county court in guardianship matters may be taken to the district court by appeal or error in the same way as in probate matters.[104] The rule permitting the guardian to appeal without giving a bond is the same as in the case of an executor or administrator. If the appeal is from the order allowing the final account, or any other decree adverse to him, he must give bonds the same as any other appellant.[105]

104 See Chapter XXXV.

105 In re Williams' Guardianship (Neb.), 151 N. W. 161; Rhea v. Brown, 4 Neb. Unof. 461, 94 N. W. 716; In re O'Brien's Estate, 80 Neb. 125, 113 N. W. 1001.

CHAPTER XL.

ADOPTION OF CHILDREN.

§ 564. Adoption—Definition.
565. Who may Adopt a Child.
566. Consent of Parents or Guardians.
567. Proceedings for Adoption.
568. Notice of Hearing.
569. Hearing on the Petition.
570. Decree of Adoption.

§ 564. Adoption—Definition.

Adoption of a child is the act or proceeding by which the parent or parents release their right to the care and custody of the child and their claim to his earnings, and such child is taken into the family of another and has conferred on him the rights and privileges of an heir.[1] It is a civil law, right or proceeding, and therefore dependent entirely on the statutes.[2]

The Nebraska statutes provide for a full adoption, by which the child takes the name of the adopting parents, becomes subject to their exclusive custody and control, and inherits from them the same as though born to them in lawful wedlock; and a limited or conditional adoption, by which the child is taken into the custody and control of the adopting parents under conditions or limitations either concerning their rights over him or his rights in their estate.[3]

Under the Oregon statutes, a full adoption is the only one provided for, with the exception that the decree

1 Rapalje & Lawrence's Law Dict.; Bouvier's Law Dict.; Non-She-Po v. Wa-Win-Ta, 37 Or. 215, 62 Pac. 15.

2 Non-She-Po v. Wa-Win-Ta, 37 Or. 215, 62 Pac. 15; Teal v. Sevier, 26 Tex. 516.

3 Rev. Stats., c. 18, §§ 80, 84, [1619], [1623].

may provide that the child take the name of the adopting parents.[4]

The court is without power to enter a decree for the adoption of any but minor children.[5]

As the word "minor" is not used in L. O. L., section 7083, it would seem that adults might be adopted, according to the construction placed on like statutes in other states.[6]

§ 565. Who may adopt a child.

Any person of lawful age and a resident of this state, though unmarried,[7] may adopt a child, provided, however, that a married person cannot adopt a child without the consent of the other spouse, unless the parties have lawfully separated and the party not seeking adoption is not capable of giving consent.[8]

In Oregon the consent of the husband or wife to the adoption is required in all cases.[9]

A husband and wife may jointly adopt a child as their own,[10] or either parent may adopt a child with the consent of the other.[11] If the child is over fourteen years of age, his consent is also necessary.[12]

4 L. O. L., § 7095.

5 Rev. Stats., c. 18, § 76, [1615].

6 Collamore v. Learned, 171 Mass. 99, 50 N. E. 518; Markover v. Krause, 132 Ind. 294, 31 N. E. 1047; In re Moran, 151 Mo. 555, 52 S. W. 377.

7 Krug v. Davis, 87 Ind. 590.

8 Rev. Stats., c. 18, § 78, [1617].

9 L. O. L., § 7083.

10 Clarkson v. Hatton, 143 Mo. 47, 44 S. W. 761.

11 In re Williamson, 102 Cal. 70, 36 Pac. 407.

12 Rev. Stats., c. 18, § 79, [1618]; L. O. L., § 7087.

§ 566. Consent of parents or guardians.

No legitimate child can be adopted without the consent of its parents or surviving parent, excepting only in cases where such parent or parents have relinquished the custody of the child to any person, association or corporation, been deprived of such custody by a court of competent jurisdiction, or have willfully abandoned and failed to contribute to the support of such child for the period of six months.[13] Consent to the adoption of an illegitimate minor child must be given by the mother, if living.[14]

If the child is in the custody of a legally appointed guardian, the consent of such guardian is necessary.[15] If one parent has had the exclusive and actual custody and control of the minor child for the period of six months last preceding the application for adoption, for the support of which the other parent shall have, without just cause or fault, contributed nothing whatever during such period, such parent having such custody or control may consent to its adoption.[16]

Both parents, the surviving parent if one be dead, or the mother of an illegitimate child, may by a written instrument executed in the presence of at least one witness, and acknowledged before any officer authorized by law to acknowledge deeds, relinquish the custody and control of such child to any person, association or corporation, and therein authorize such per-

13 Rev. Stats., c. 18, § 77, [1616].

14 Rev. Stats., c. 18, § 77, [1616].

15 Rev. Stats., c. 18, § 77, [1616]; L. O. L., § 7084.

16 Rev. Stats., c. 18, § 77, [1616], subd. 3.

son, association or corporation to procure the adoption of such child by some suitable person.[17]

Under the Oregon statute, if neither of the parents are living and the child has no guardian, his next of kin in this state may give such consent, and if there is no next of kin, the court may appoint some suitable person to act in the proceeding as next friend, and give or withhold such consent.[18]

A guardian is without authority, except by order of the court appointing him, to consent to the adoption of his ward, and must therefore make application to the court and procure an order for that purpose.[19] Consent of the parents need not be in writing. It is sufficient if they are in court at the date of the hearing on the petition and make no objection.[20]

§ 567. Proceedings for adoption.

The county court of the county in which the party desiring to adopt the child resides has exclusive original jurisdiction over the adoption proceedings.[21] Adoption is not, in a strict sense, a judicial proceeding, but more in the nature of a contract entered into under judicial sanction after statutory requirements have been complied with. The court must obtain jurisdiction over the child, the parents, and the party or parties seeking to adopt him, and has no power to enter a decree of adoption unless it appear that such

17 Rev. Stats., c. 18, § 77, [1616].

18 L. O. L., § 7084.

19 Rev. Stats., c. 18, § 77, [1616], subd. 7.

20 Milligan v. McLaughlin, 94 Neb. 171, 142 N. W. 675.

21 Rev. Stats., c. 18, § 80, [1619]; Milligan v. McLaughlin, 94 Neb. 171, 142 N. W. 675.

consent has been given, or that the facts and circumstances clearly place the proceeding among those exceptions in which the consent of the parents to the adoption of the child by the particular parties is not necessary.[22]

The proceeding is commenced by the filing of a petition under oath by the parties desiring to adopt the child, stating that they freely and voluntarily adopt said minor child, and if the adoption is a limited one, the conditions thereof should also be set out.[23] The consent of the parent or parents, or the guardian or person, association or corporation having custody of the child, and relinquishment of his control to the end that he may be adopted by the petitioners, should be filed with the petition, and must be filed before the decree is entered.[24] A guardian must obtain an order from the court under whose seal his letters issued empowering him to give such consent.[25]

Under the Oregon statutes, if either parent is imprisoned in the state's prison, under a sentence of not less than three years, or has willfully deserted and neglected to provide proper care and maintenance for the child for one year next preceding the time of filing the petition, the court shall proceed as if such parent were dead, and in its discretion may appoint some suitable person to act in the proceedings as next friend of the child and give or withhold consent to his adoption.[26]

22 Tiffany v. Wright, 79 Neb. 10, 112 N. W. 331; Ferguson v. Jones, 17 Or. 204, 20 Pac. 842.

23 Rev. Stats., c. 18, § 80, [1619]; L. O. L., § 7083.

24 Rev. Stats., c. 18, § 80, [1620].

25 Rev. Stats., c. 18, § 79, [1619], subd. 7; L. O. L., § 7084.

26 L. O. L., § 7085.

Form No. 259.

RELINQUISHMENT BY PARENTS AND CONSENT TO ADOPTION.

Whereas, we, A. B. and C. B., husband and wife, of the county of ——— and state of ———, are the parents of E. B., a minor male child, who was born at ———, in the county of ———, and state of ———, on the ——— day of ———, 19—, and said child now is and always has been in our lawful custody and control; and

Whereas, G. H. and L. H., his wife, of the city of ———, county of ———, and state of Nebraska, desire to adopt said child [if on certain terms or conditions, state same in full], and are suitable and competent persons to adopt said E. B., and it is for the best interests of said E. B. that said adoption be made:

Now, therefore, we, said A. B. and said C. B., his wife, do hereby voluntarily relinquish all our right to the custody and control over said minor child E. B., and all claim and interest in and to the wages of said minor child, to the end that said child shall be adopted by said G. H. and L. H. [if on terms and conditions state same in full], and we do hereby freely consent to such adoption.

In testimony whereof we have hereunto set our hands this ——— day of ———, 19—.

(Signed) A. B.
C. B.

Witness:
(Signed) L. M.

State of Nebraska,
——— County,—ss.

On this ——— day of ———, 19—, before me, the undersigned, a notary public duly commissioned in and for said county, personally came A. B. and C. B., to me known to be the identical persons described in and who executed the foregoing relinquishment, and acknowledged the same to be their voluntarily act and deed.

Witness my hand and official seal this ——— day of ———, 19—.
(Seal) (Signed) C. F. D.,
Notary Public.

Form No. 260.

RELINQUISHMENT BY ONE PARENT AND CONSENT TO ADOPTION.

Whereas, A. B., of the county of ———, and state of ———, is the mother of E. B., a male child, who was born at ———, in the county of ———, and state of ———, on the ——— day of ———, 19—; and

Whereas, on the ——— day of ———, 19—, in a certain action pending in the district court of ——— county, Nebraska, wherein said A. B. was plaintiff and C. B., the husband of said A. B., and the father of said child, was defendant, a decree of said court was made and entered granting said A. B. a divorce from said C. B., and also awarding her, said A. B., the custody and control of said E. B., the issue of said marriage; [that said A. B. has had the actual and exclusive custody and control of said minor child for the six months last preceding the date of this relinquishment, and that during said period of six months said C. B. has willfully neglected to provide for his family and has contributed nothing toward the support of said child]; [C. B., the husband of said A. B., and the father of said child, departed this life on the ——— day of ———, 19—].

[Balance follow Form No. 259, page 938.]

Form No. 261.

RELINQUISHMENT BY CORPORATION AND CONSENT TO ADOPTION.

Whereas, on the ——— day of ———, 19—, A. B. and C. B., his wife, of the county of ——— and state of ———, parents of E. B., a minor male child then of the age of ———, executed and delivered in the manner provided by law, to the L. M. Co., a corporation organized and existing under the laws of the state of Nebraska, having power under its articles of incorporation to have the custody and control of minor children, with the power to relinquish its right to such custody and control to the end that such minor children may be adopted by competent and suitable persons, their certain instrument in writing hereto attached, made a part hereof and marked "Ex. A," thereby relinquishing said child to said corporation and authorizing said corporation to procure the adoption of said minor child by some suitable person, and that said minor child, E. B., is now in the custody and control of said corporation, and said

corporation is entitled to the disposition of the person of said child; and

Whereas, G. H. and L. H., his wife, residing at ———, in the county of ——— and state of Nebraska, desire to adopt said child [if upon conditions, state same in full]; that said G. H. and L. H. are suitable and proper persons to adopt said E. B., and it is for the best interests of said E. B. that said adoption should be made:

Now, therefore, the said L. M. Co. hereby relinquishes all its right to the custody and control over said minor child, E. B., to the end that said child shall be fully adopted by said G. H. and L. H., his wife [upon the terms and conditions above set forth], and said L. M. Co. hereby fully consents to such adoption.

In testimony whereof the said L. M. Co. has caused this instrument to be executed by its president and secretary this ——— day of ———, 19—.

(Signed) L. M. Co.,
By H. F. C., President,
D. C. P., Secretary.

Witness:
(Signed) R. S.

State of Nebraska,
——— County,—ss.

On this ——— day of ———, 19—, before me, the undersigned, a notary public duly commissioned in and for said county, personally came H. F. C. and D. C. P., president and secretary, respectively, of the L. M. Co., and acknowledged their execution of said instrument as their voluntary act and deed for and in behalf of said company.

Witness my hand and official seal this ——— day of ———, 19—.
(Seal) (Signed) C. F. D.,
Notary Public.

Form No. 262.

RELINQUISHMENT OF CUSTODY OF CHILD BY PARENT.

Know all men by these presents, that I, C. B., mother of E. B., an illegitimate minor child of the age of ——— years, and which said child was born at ———, in the county of ——— and state of ———, on the ——— day of ———, 19—, do hereby voluntarily relinquish all my right to the custody of and power and control over my said minor child to the L. M. Co., a corporation, and I do

hereby authorize and empower said L. M. Co. to procure the adoption of said minor child, E. B., by some suitable person.

Dated this ——— day of ———, 19—.

(Signed) C. B.

Witness:

G. H.

[Add acknowledgment, close of Form No. 259.]

Form No. 263.

PETITION BY CORPORATION GUARDIAN FOR CONSENT TO ADOPTION.

In the County Court of ——— County, Nebraska.

In the Matter of the Adoption of E. B., a Minor Child.

Comes now the L. M. Co., and respectfully represents unto the court that it is a corporation organized and existing under and by virtue of the laws of the state of Nebraska; that on the ——— day of ———, 19—, letters of guardianship out of and under the seal of the county court of said county were issued to said L. M. Co., appointing it guardian of the person and property of one E. B., a minor child of the age of ——— years, on account of the cruelty, neglect, and unsuitableness of the parents of said minor child, and that said L. M. Co. now has the lawful custody and control of said child, and is entitled to the disposition of the person of said child, with the consent and approval of the said court from which said letters of guardianship issued.

That G. H. and L. H., of the county of ——— and state of Nebraska, desire to adopt said child; that said G. H. and L. H., his wife, are suitable and proper persons to adopt said E. B., and that it is for the best interests of said E. B. that said adoption should be made.

Said L. M. Co. therefore prays that said county court may consent to the adoption of said E. B., a minor child, by said G. H. and L. H., his wife, and to relinquish all right to the custody and control of said minor child.

Dated this ——— day of ———, 19—.

[Add verification.]

Form No. 264.

ORDER AUTHORIZING GUARDIAN TO CONSENT TO ADOPTION.

In the County Court of ——— County, Nebraska.

In the Matter of the Adoption of E. B., a Minor Child.

On reading and filing the petition of the L. M. Co., a corporation, praying for permission to authorize said L. M. Co. to consent to the adoption of E. B., a minor ward of said L. M. Co., by G. H, and L. H., his wife, of said county, it is ordered that said L. M. Co. be authorized and empowered to relinquish to said G. H. and L. H. his wife, all its rights to the custody and control over said minor child, E. B., and to consent to the adoption of said minor child by said G. H. and L. H., his wife.

Dated this ——— day of ———, 19—.

(Signed) J. K.,
County Judge.

Form No. 265.

CONSENT OF CHILD OVER FOURTEEN YEARS OF AGE TO ADOPTION.

I, E. B., a minor of the age of ——— years, do hereby consent that a decree of the county court of ——— county, Nebraska, be made for my adoption by G. H. and L. H., his wife, of ———, in said county.

Dated this ——— day of ———, 19—.

(Signed) E. B.

Witness:
(Signed) L. M.

Form No. 266.

PETITION FOR ADOPTION OF CHILD.

In the County Court of ——— County, Nebraska.

In the Matter of the Adoption of E. B., a Minor Child.

Come now G. H. and L. H., his wife, and respectfully show unto the court that they are residents of said ——— county; that one E. B. is a minor child, who was born to A. B. and E. B., his wife, at ———, in the county of ———, and state of ———, on the ——— day of ———, 19—; that the said parents of said E. B. have executed their written relinquishment and consent to the adoption of said child by your said petitioners, which said instrument is filed herewith.

Your petitioners declare that they and each of them do freely and voluntarily adopt said E. B. as their own child [upon terms and conditions following ———]; that it is their wish to bestow upon said minor child equal rights, privileges and immunities of children born to them in lawful wedlock, and that the name of said child be changed to E. H.

Wherefore, your petitioners pray that said court will fix a time for the hearing on this petition, that notice thereof be given to all persons interested as provided by law, that on said hearing a decree of adoption be made and entered by said court bestowing on said child all the rights, privileges and immunities of children born to them in lawful wedlock [if conditional or limited adoption, state conditions], and that the name of said child be changed to E. H.

(Signed) G. H.
L. H.

§ 563. Notice of hearing.

On the filing of the petition it is the duty of the court to fix a date for the hearing thereon, which must be not less than fourteen days subsequent thereto. Personal service of the notice on the parents, if residents of the state, must be ordered by the court; if they are nonresidents, service by publication for four weeks in some newspaper must be had, the publication to be completed ten days before the date of hearing.[27]

Under the Oregon practice, if a parent does not consent to an adoption, a copy of the petition and order

27 Rev. Stats. c. 18, § 83, [1621]. The word "may" is used in the statute in place of "must," but it was plainly the intent of the legislature that some notice be given the absent and nonresident parent. The well-recognized principle of statutory construction by which the word "may" is construed as "must," when necessary to carry out the legislative intent, or when the statute requires the performance of an act for the sake of justice or the public good, and in which the rights of private parties are involved, has been followed in this state from an early day, and clearly applies to the foregoing section. See Kelley v. Morse, 4 Neb. 224; People v. Buffalo County Commrs., 4 Neb. 150.

thereon must be served on him personally if within the state, and if not, be published once each week for three successive weeks in some newspaper printed in the county, the last publication to be at least four weeks from the date of hearing. Like notice is required when the child has no parent living and no guardian or next of kin in this state, and the court may order such further notice as it deems necessary or proper.[28]

Form No. 267.

NOTICE OF HEARING ON PETITION FOR ADOPTION.

In the County Court of ——— County, Nebraska.

In the Matter of the Adoption of E. B., a Minor Child.

All persons interested will take notice that on the ——— day of ———, 19—, G. H. and L. H., his wife, filed their petition in said court praying for a decree for the adoption of said E. B., and that said petition will be heard by said court in the county court room in said county on the ——— day of ———, 19—, at the hour of 9 A. M., at which time and place objections to the prayer of said petition will be considered.

Dated this ——— day of ——, 19—.

(Seal)

(Signed) J. K.,
County Judge.

§ 569. Hearing on the petition.

All the jurisdictional requirements of the statute, which are consent of the parents, with the exception of those cases where, by reason of abandonment, relinquishment or removal from the control of the parents or other statutory cause, such consent is not necessary, and issue and service of notice, must be fully complied with. The parents by appearing at the hearing and making no objections give their consent the same as though by a formal instrument.[29] Where abandon-

28 L. O. L., § 7086.

29 Milligan v. McLaughlin, 94 Neb. 171, 142 N. W. 675.

ment by one parent is alleged, it being at common law a relinquishment of custody,[30] the same must be established by competent proof.[31] When jurisdiction has been obtained, a substantial compliance with other requirements is all that is necessary.[32]

The child and the person desiring to adopt him must be personally present in court, and if the court finds that it is for the best interest of the child, a decree of adoption shall be entered in accordance with the terms and conditions of the consent and petition.[33]

Under the Oregon practice, if the court is satisfied from the petition and consent of the identity and relations of the persons, and that the petitioner is of sufficient ability to bring up the child, and furnish suitable support and education, having reference to the degree and condition of the parents, and that it is fit and proper that such adoption shall take effect, a decree shall be made setting forth the facts, and ordering that from the date of the decree the child shall, to all legal intents and purposes, be the child of the petitioner.[34]

If the decree changes the name of the child, it is the duty of the county judge to include the same in his annual report to the secretary of state of all changes of names by the act of his court.[35]

30 Stansberry v. Berton, 7 Watts & S. (Pa.) 364.

31 Ferguson v. Jones, 17 Or. 204, 20 Pac. 842; Winans v. Lupie, 47 N. J. Eq. 302, 20 Atl. 969.

32 In re Edds, 137 Mass. 346; Nugent v. Powell, 4 Wyo. 173, 33 Pac. 23; Ferguson v. Herr, 64 Neb. 649, 94 N. W. 542.

33 Rev. Stats. c. 18, § 82, [1621].

34 L. O. L., § 7068.

35 L. O. L., § 7096.

Form No. 268.

DECREE OF ADOPTION.

In the County Court of ——— County, Nebraska.

In the Matter of the Adoption of E. B., a Minor Child.

Now, on this ——— day of ———, 19—, this cause came on for hearing on the petition of G. H. and L. H., his wife, for the adoption of E. B., a minor male child of the age of ——— years; and on the relinquishment and consent to such adoption by ———, the ——— of said child. Said petitioners and said minor child, E. B., were present in court in person.

Upon an examination of the premises and the evidence, the court finds that all persons interested in said adoption have been duly notified of the time and place for the hearing of this petition, as required by law and the order of this court, and are now before the court; that the facts set forth in said petition are true; that G. H. and L. H., his wife, who have petitioned this court to adopt said child, are proper and suitable persons to adopt said child, and that it is for the best interests of said child that it should be so adopted.

It is therefore considered, ordered, and adjugded by the court that the right to the custody of and power and control over said minor child, and all claims and interest in and to the wages of said minor child by the said ———, shall and do cease and determine from and after this date, and that the said E. B. be and he hereby is declared the adopted child of said G. H. and L. H., upon the terms and conditions following: [State terms and conditions of adoption, if any.]

That the relations of parent and child be and hereby are established between said E. B. and said G. H. and L. H.; that said E. B. be and now henceforth is subject to the exclusive custody and control of said G. H. and L. H., and shall take and henceforth bear the surname of said H., and shall possess and enjoy all the rights, privileges, and immunities of children born in lawful wedlock [subject to the conditions above set forth].

(Signed) J. K.,
County Judge.

§ 570. Decree of adoption.

A decree of adoption bestows upon the child the rights, privileges, duties and immunities as of a child born in lawful wedlock of the adopting party, except-

ing as otherwise in the decree provided,[36] and relieves his natural parents from all obligations for his care and support.[37] The child is not entitled to inherit through the adopting parents by right of representation, nor can he take property limited to the heir or heirs of the body or bodies of such parents.[38]

The decree is a final one, and subject to appeal by any person against whom the same may be made or who is affected thereby.[39]

Under the Oregon practice, a parent who has not had notice of the proceeding may at any time within one year after actual notice apply to the circuit court to reverse the decree, and such court has power, after due notice, to reverse the same if it appears that any of the material allegations are untrue.[40] An appeal by the child may be taken by his next friend, and no bond is necessary.[41]

It stands on a somewhat different footing from other county court decrees. The parties to it cannot by their own acts nullify or revoke it,[42] and there is authority to the effect that it is not open to collateral attack, and is conclusive on the parties to the proceeding and their privies,[43] but where it partakes more of the nature of a judicial decree of a court of inferior jurisdiction,

36 Rev. Stats., c. 18, § 84, [1623]; L. O. L., § 7089.

37 Rev. Stats., c. 18, § 84, [1623]; L. O. L., § 7090.

38 Meader v. Archer, 65 N. H. 214, 23 Atl. 521; Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628; L. O. L., § 7089. See, also, §439, *supra.*

39 Rev. Stats., c. 18, § 85, [1624]; L. O. L., § 7081.

40 L. O. L., § 7092.

41 L. O. L., § 7091.

42 Janes v. Cleghorn, 54 Ga. 9.

43 Nugent v. Powell, 4 Wyo. 173, 33 Pac. 23; In re Johnson's Estate, 98 Cal. 531, 33 Pac. 460; Barnard v. Barnard, 119 Ill. 93, 8 N. E. 320.

and unless all the jurisdictional facts appear on the record itself, it is void on collateral attack,[44] and is not an estoppel as against one who did not consent to it and was not served with notice as the law requires.[45] Where the adopting parties and the parents all appeared before the county court of a county other than that in which the petitioners resided, and a decree was entered without objection and with the consent of the parents, it has been held not subject to collateral attack.[46]

The adoption of a child as an heir does not necessarily give him a share in the estate of his adoptive parents. While his standing in reference to their property would be the same as a child born to them, such parent may devise or bequeath his property to others.[47]

44 Morris v. Dooley, 59 Ark. 483, 28 S. W. 30, 430.
45 Ferguson v. Jones, 17 Or. 204, 20 Pac. 842.
46 Milligan v. McLaughlin, 94 Neb. 171, 142 N. W. 675.
47 Pemberton v. Perrin, 94 Neb. 718, 144 N. W. 164.

TABLE OF PROCEEDINGS—NEBRASKA.

Table showing time required to be given and method of service of notice or citation in proceedings in probate and guardianship matters in county court.

Proceeding.	Time.	Service.
All applications for appointment of special administrators.	None.	None.
Hearing on account of special administrator.	None.	None.
Petition for probate of will, or for appointment of administrator.	As ordered by the court.	Publication for three weeks or as ordered by the court.
Application for allowance for support.	None, or as ordered by court.	None, or as ordered by court.
All special proceedings.	As ordered by court.	Personal.
Notice to creditors.	Not less than six nor more than eighteen months.	Publication for four weeks from date of order fixing time.
Application to dispense with administration.	As ordered by court.	Publication for thirty days.
Application for determining succession to property.	As ordered by court.	As ordered by court.
Petition to compel filing of inventory.	As ordered by court.	Personal.
Application for removal of executor or administrator.	As ordered by court.	Personal. By publication on nonresident.
Application of special administrator for license to sell personal property.	None.	None.

Proceeding.	Time.	Service.
Annual account of executor or administrator.	None.	None.
Application for additional security on bond.	As ordered by court.	Personal.
Application for sale of personal property by executor or administrator.	As ordered by court.	As ordered by court.
Application of special administrator for license to sell partnership interest.	As ordered by court.	As ordered by court.
Report of special administrator, partnership matters.	None, or as ordered by court.	None, or as ordered by court.
Application for license to mortgage real estate.	As ordered by court.	None.
Report of executor or administrator on mortgaging real estate.	None.	None.
Application to compromise claim.	None.	None.
Application for permission to bring suit to set aside conveyance of decedent.	None.	None.
Hearing on final account and petition for distribution.	As ordered by court.	Waiver by parties, or by publication. Usual practice for three weeks.
Notice to creditors to call for their money.		Publication for three weeks.
Other applications in connection with the administration.	As ordered by court.	None, or as ordered by court.

GUARDIANS.

Proceeding.	Time.	Service.
Application for guardianship of minor.	As ordered by court.	None, except where custody of person or property may be taken from parent. In such cases as ordered by court.
Application for temporary guardianship of incompetent.	None.	None.
Application for guardianship of person previously adjudged insane.	None.	None.
Application for guardianship of other incompetent.	Not less than fourteen days.	Personal.
Application for guardianship of spendthrift.	Not less than ten days.	Personal.
Application to mortgage real estate.	Not less than ten days.	Personal.
Report on mortgaging real estate.	None.	None.
Applications for orders for sales of personalty, for allowances for support or education, and in regard to investments or management of estate.	As ordered by court.	None, or as ordered by court.
Annual account of guardian.	None.	None.
Final account of guardian and petition for discharge.	As ordered by court.	Waiver by ward. Publication or personal service as ordered by court. Usual publication three weeks.

Proceeding.	Time.	Service.
Application for adoption of child.	Not less than fourteen days.	Personal, or publication four weeks at least ten days prior to date set for hearing.

In all cases where personal service is required by the statute or as ordered by the court, the interested parties, if competent and of lawful age, may waive same, or enter their appearance. In proceedings where both the time for hearing and the service of the notice are as ordered by the court, such court may proceed *instanter* if the interested parties are present, or if the application is one which in his opinion warrants the entry of the order on a proper showing, without notice. In administration proceedings an *ex parte* order for the payment of any of the expenses of the administration of the estate, or to an heir or legatee, may be attacked on the hearing on the final account. A petitioner should always designate the newspaper in which the publication of any notice is to be made.

TABLE OF PROCEEDINGS—OREGON.

Table showing time required to be given and method of service of citation in proceedings in probate, guardianship and adoption matters in Oregon county court.

Proceeding.	Time.	Service.
All applications for appointment of special administrators.	None.	None.
Hearing on account of special administrator.	None.	None.
Application for probate of will in common form, appointment of general or partnership administrator.	None, or as ordered by court.	None.
Applications for allowance for support.	None, or as ordered by court.	None, or as ordered by court.
All special proceedings.	As ordered by court.	Personal.
Action to contest will.	As in civil cases.	As in civil cases.
Notice to creditors.	Six months.	Publication for four weeks from date of notice.
Appeal to county court from rejection of claim by executor or administrator.	Ten days.	Personal.
Petition to compel filing of inventory.	As ordered by court.	Personal.
Application for new bond.	As ordered by court.	Personal.
Application for removal of executor or administrator.	As ordered by court.	Personal.
Periodical account of executor or administrator.	None.	None.
Applications for sale of personal property.	As ordered by court.	None.

TABLE OF PROCEEDINGS—OREGON.

Proceeding.	Time.	Service.
Application for sale of real estate.	Not less than ten days from date of service.	Personal on residents of state. Publication not less than four weeks for nonresidents.
Notice of sale.		Private sale. Publication of notice for four weeks and posting three notices.
Confirmation of sales of real estate.	Fifteen days from date of return.	None.
Confirmation of executor's sales under power.	Fifteen days from date of filing report.	None.
Account of partnership administrator.	As ordered by court.	None, or as ordered by court.
Application for redemption of mortgaged property.	As ordered by court.	None, or as ordered by the court, if petition by mortgagee.
Application to determine amount due mortgagee from proceeds of sales of real estate.	Ten days.	Personal, or as ordered by court.
Application to compromise claim.	None.	None.
Application for order to bring suit to set aside conveyance of decedent.	None.	None.
Hearing on final account and petition for distribution.	Not less than four weeks.	Publication for four weeks, once a week or oftener.

TABLE OF PROCEEDINGS—OREGON.

Proceeding.	Time.	Service.
Application of heir, devisee or legatee for share of estate before close of administration.	Ten days before term.	Personal.
Other applications in connection with the administration.	As ordered by court.	None, or as ordered by court.

GUARDIANS.

Proceeding.	Time.	Service.
Application for guardianship of minor.	As ordered by court.	None, or as ordered by court.
Application for temporary guardian of incompetent.	None.	None.
Application for guardianship of insane or incompetent.	Ten days.	Personal, or as ordered by court.
Application for guardianship of spendthrift.	Ten days.	Personal.
Annual account of guardian.	None.	None.
Application for removal of of guardian.	As ordered by court.	Personal. Nonresident by publication.
Application for discharge of guardian of spendthrift or incompetent or insane.	As ordered by court.	As ordered by court.
Application for new bond.	As ordered by court.	As court may direct.
Application for sale of real estate.	Not less than four nor more than eight weeks.	Personal, not less than ten days from date of hearing or publication for three weeks.

TABLE OF PROCEEDINGS—OREGON.

Proceeding.	Time.	Service.
Notice of sale.		Private sale. Publication of notice for four weeks and posting three notices.
Confirmation of sale.	Fifteen days from date of return.	None.
Applications for orders for sales of personal property, allowances for support, or education, and in regard to investment of assets and management of the estate.	As ordered by court.	None, or as ordered by court.
Final account.	As ordered by court.	Waiver by ward. Publication or personal service as ordered by court.

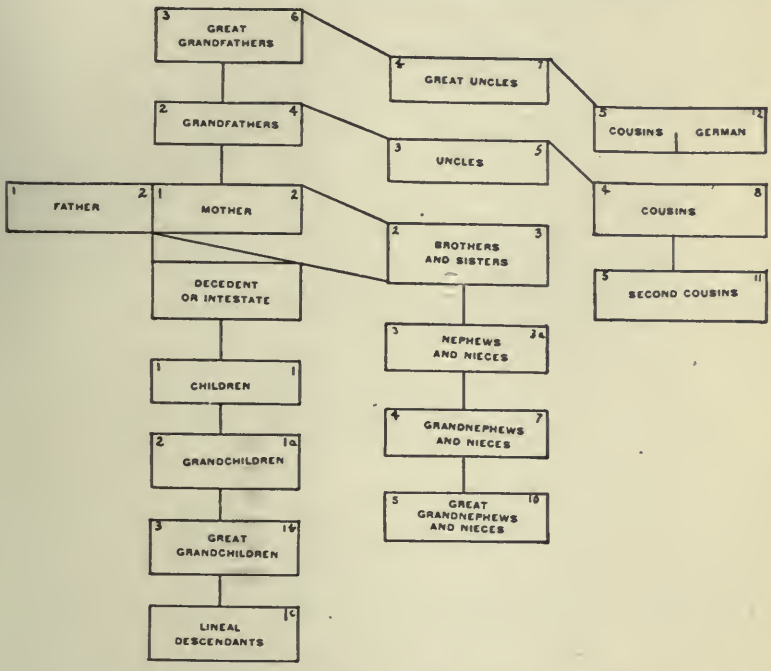
ADOPTION.

Proceeding.	Time.	Service.
Petition for adoption of child, parents consenting.	As ordered by court.	None, or as ordered by court.
Petition for adoption of child, parents not consenting.	Seven weeks.	Personal service or publication for at least three weeks, last publication four weeks from date of hearing, on nonresidents.

Where no service of citation is required, and in cases where the method of service is as ordered by court, if the petition is in proper form, clearly showing that the party is entitled to the order, it being

substantially a formal matter, the court may act on it at once. When service of a citation is had by publication, the paper in which it appears is designated by the county judge.

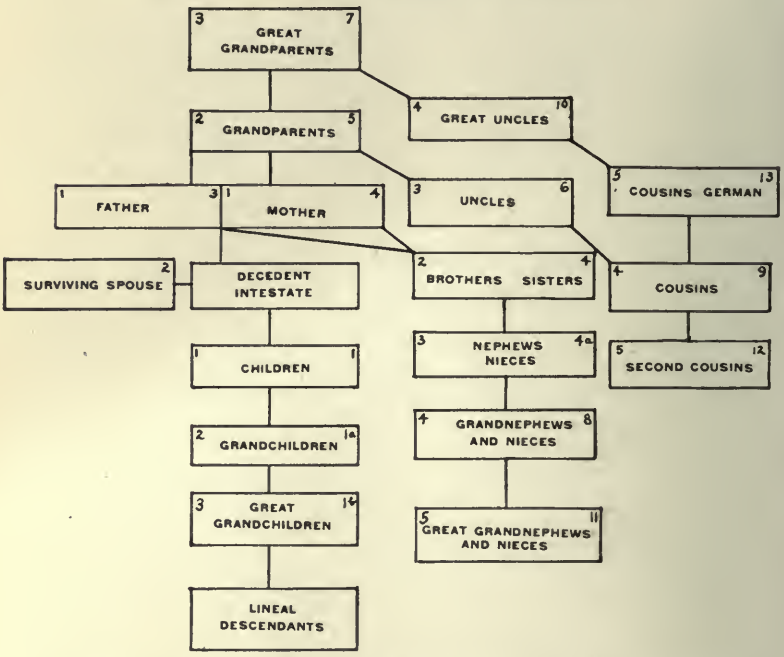
TABLE OF DESCENT OF REAL PROPERTY AND OF DEGREES OF KINSHIP OF NEBRASKA.



This table shows graphically the order of inheritance of real estate and the degrees of relationship to the decedent. The figures in the upper right-hand corners of the squares give the order of inheritance, and those in the upper left-hand corners the degrees of relationship, thus indicating the cases in which the right to inherit is not determined solely by the degree of kinship. For example, grandnephews and cousins are each within the fourth degree, but the former class inherit before the latter, because the latter are descended from a more remote ancestor. The small letters following the figures indicate that the parties take by right of representation. Lineal de-

scendants of children take in preference to collaterals. The surviving spouse is neither an heir nor of the next of kin, but takes a share or interest in the estate by virtue of the marital relation, and is therefore omitted from the table.

TABLE OF DESCENT OF REAL PROPERTY AND OF DEGREES OF KINSHIP OF OREGON.



The figures and letters in the squares have the same meaning as in the Nebraska table. The degrees of kinship are the same. The surviving spouse takes by inheritance in the case of failure of issue, but is not of the next of kin within the usual definition of the term.

LIFE EXPECTANCY TABLES.

Ages.	Actuaries' Table.	American Table.	Carlisle Table.
15	44.96	45.50	45.00
16	44.27	44.85	44.27
17	43.58	44.19	43.57
18	42.88	43.53	42.87
19	42.19	42.87	42.17
20	41.49	42.20	41.46
21	40.70	41.53	40.75
22	40.09	40.85	40.04
23	39.39	40.17	39.31
24	38.08	39.49	38.59
25	37.98	38.81	37.86
26	37.27	38.12	37.14
27	36.56	37.43	36.41
28	35.86	36.73	35.69
29	35.15	36.03	35.00
30	34.43	35.33	34.34
31	33.72	34.63	33.68
32	33.01	33.92	33.03
33	32.30	33.21	32.36
34	31.58	32.50	31.68
35	30.87	31.78	31.00
36	30.15	31.07	30.32
37	29.44	30.35	29.64
38	28.72	29.62	28.96
39	28.00	28.90	28.28
40	27.28	28.18	27.61
41	26.56	27.45	26.97
42	25.84	26.72	26.34
43	25.12	26.00	25.71
44	24.40	25.27	25.09
45	23.69	24.54	24.46
46	22.97	23.81	23.82
47	22.27	23.08	23.17
48	21.56	22.36	22.50
49	20.87	21.63	21.81
50	20.18	20.91	21.11
51	19.50	20.20	20.39
52	18.82	19.49	19.68
53	18.16	18.79	18.97
54	17.50	18.09	18.28

LIFE EXPECTANCY TABLES.

Ages.	Actuaries' Table.	American Table.	Carlisle Table.
55	16.86	17.40	17.58
56	16.22	16.72	16.89
57	15.59	16.05	16.21
58	14.97	15.30	15.55
59	14.37	14.74	14.92
60	13.77	14.10	14.34
61	13.18	13.45	13.82
62	12.61	12.86	13.31
63	12.05	12.26	12.81
64	11.51	11.67	12.30
65	10.97	11.10	11.79
66	10.46	10.54	11.27
67	9.96	10.00	10.75
68	9.47	9.47	10.23
69	9.00	8.97	9.70
70	8.54	8.48	9.18
71	8.10	8.00	8.65
72	7.67	7.55	8.16
73	7.26	7.11	7.72
74	6.86	6.68	7.33
75	6.48	6.27	7.01
76	6.11	5.88	6.69
77	5.76	5.49	6.40
78	5.42	5.11	6.12
79	5.09	4.74	5.80
80	4.78	4.39	5.51
81	4.48	4.05	5.21
82	4.18	3.71	4.93
83	3.90	3.39	4.65
84	3.63	3.08	4.39
85	3.36	2.77	4.12
86	3.10	2.47	3.90
87	2.84	2.18	3.71
88	2.59	1.91	3.59
89	2.35	1.66	3.47
90	2.11	1.42	3.28
91	1.89	1.19	3.26
92	1.67	.98	3.37
93	1.47	.80	3.48
94	1.28	.64	3.53

INTEREST TABLE.

The following table gives the values of an annuity of $1.00, payable at end of each year, at four, five, six and seven per cent interest for from one to fifty years, the interest being compounded annually.

Years	4% Int.	5% Int.	6% Int.	7% Int.
1	.961538	.952381	.943396	.934579
2	1.886095	1.859410	1.833393	1.808018
3	2.775091	2.723248	2.673012	2.624316
4	3.629895	3.545951	3.465106	3.387211
5	4.451822	4.329477	4.212364	4.100197
6	5.242137	5.075692	4.917324	4.766540
7	6.002055	5.786373	5.582381	5.389289
8	6.732745	6.464323	6.209794	5.971299
9	7.435332	7.107822	6.801692	6.515232
10	8.110896	7.721735	7.360087	7.023582
11	8.760477	8.306414	7.886875	7.498674
12	9.385074	8.863252	8.383844	7.942686
13	9.985648	9.393573	8.852683	8.367651
14	10.563123	9.898641	9.249984	8.745468
15	11.118387	10.379658	9.712249	9.107914
16	11.652296	10.837770	10.105895	9.446649
17	12.165669	11.274066	10.477260	9.763223
18	12.659297	11.689587	10.827603	10.059087
19	13.133939	12.085321	11.158116	10.335595
20	13.590326	12.462210	11.469921	10.594014
21	14.029160	12.821153	11.764077	10.835527
22	14.451115	13.163003	12.041582	11.061241
23	14.856842	13.488574	12.303379	11.272187
24	15.246963	13.798642	12.550358	11.469334
25	15.622080	14.093945	12.783356	11.653583
26	15.982769	14.375185	13.003166	11.825779
27	16.329586	14.643034	13.210534	11.986709
28	16.663063	14.898127	13.406164	12.137111
29	16.983715	15.141074	13.590721	12.277674
30	17.292033	15.372451	13.764831	12.409041
31	17.588494	15.592811	13.929086	12.531814
32	17.873552	15.802677	14.084043	12.646555

INTEREST TABLE.

Years	4% Int.	5% Int.	6% Int.	7% Int.
33	18.147646	16.002549	14.230230	12.753790
34	18.411198	16.192904	14.368141	12.854009
35	18.664613	16.374194	14.498246	12.947672
36	18.908282	16.546852	14.620987	13.935208
37	19.142579	16.711287	14.736780	13.117017
38	19.367864	16.867893	14.846019	13.193473
39	19.584485	17.017041	14.949075	13.264928
40	19.792774	17.159086	15.046297	13.331709
41	19.993052	17.294368	15.138016	13.394120
42	20.185627	17.423208	15.224543	13.452449
43	20.370795	17.545912	15.306173	13.506962
44	20.584841	17.662773	15.383182	13.557908
45	20.720040	17.774070	15.455832	13.605522
46	20.884654	17.880067	15.524370	13.650020
47	21.042936	17.981016	15.589028	13.691608
48	21.195131	18.077158	15.650027	13.730474
49	21.341472	18.168272	15.707572	13.766800
50	21.482185	18.255925	15.761861	13.800746

APPENDIX.

SYNOPSIS OF LAWS ENACTED BY THE NEBRASKA LEGISLATURE AT ITS THIRTY-FOURTH SESSION AFFECTING PROBATE, GUARDIANSHIP AND ADOPTION MATTERS IN THE COUNTY COURTS.

Senate File 50. This act amends section 2449 of the Revised Statutes and establishes an entirely new fee system.

It provides that the county judge shall be entitled to the following fees in probate matters: For the settlement of the estate of a decedent, the gross value of which, including real estate, does not exceed $1,000, the sum of $10; where such value is over $1,000 and under $2,000, the sum of $15, and where such value exceeds $2,000, the sum of $35. Such fees are in full of any and all services to be performed by the judge in the settlement of an estate in which no contest arises, and include one copy of the will and probate thereof for record in the office of the registrar of deeds. In other cases, where copies of instruments are necessary, he shall be allowed a fee of fifty cents for the first hundred words and ten cents for each additional hundred words or fraction thereof. In case of a contest he is allowed a fee of $2 for each day consumed. For reappointment of an executor or administrator or appointment of an administrator *de bonis non,* $10, and for proceedings dispensing with the administration of estates, $10.

In cases where proceedings are brought before one judge and concluded before another, the fee based on the value of the estate is to be equally divided between them.

In matters of guardianship or trusteeship the court is allowed the sum of $8 for the appointment of a guardian or trustee, the sum of $1.50 per annum while such matters are pending in court for hearings on reports of such officers, and $3 for each final settlement and discharge.

In adoption matters he is entitled to a fee of $8 for the entire proceeding.

All the above fees are in addition to the printers' fees for the publication of notices required by law to be given in such proceedings.

It went into effect April 15, 1915.

House Roll 613. This act amends section 1235 of the Revised Statutes, by giving the county board jurisdiction to appoint an acting judge, who shall preside over the court whenever the judge is absent from the county, disqualified or incapacitated. He is required to give bond in the same manner as a county judge who has been elected to the office.

It went into effect April 15, 1915.

House Roll 178. This act repeals sections 1536, 1537, 1538 and 1539, Revised Statutes (see sections 135, 136, 137 and 138, *supra*), and provides for the determination of heirship in cases where the party has been dead for two years, possesses real property in this state and no application has ever been made for the appointment of an administrator. Jurisdiction to make such order is vested in the county court of the

county in which the decedent resided, or if a non-resident of the state, of the county in which he died seised of an estate of inheritance in real estate.

Any heir of such decedent or person claiming under mesne conveyances from such heir may file his verified petition in the county court having jurisdiction after the expiration of the two year period, which petition shall set out the residence and date of death of the decedent, a full description of his real estate in this state, an enumeration of all the heirs, and that no application has been made for the appointment of an administrator. If made by a party claiming under a mesne conveyance from an heir, it must set out the nature and extent of his interest.

On the filing of the application a date is fixed for the hearing, which date must be within not less than thirty nor more than sixty days. A notice or citation is issued and service had on all parties interested by publication thereof for three successive weeks in a legal newspaper of the county.

Any person claiming to be an heir may appear at the hearing and establish his rights. If the court has acquired jurisdiction and the allegations of the petition are proved, the court makes an order determining who are the heirs of the decedent. Such order is binding on all the heirs and creditors, excepting only such creditors as have subsisting liens. As it is a final order determining substantial rights of parties, an appeal may be taken to the district court.

Sections 135, 136, 137 and 138, *supra*, are therefore obsolete.

Senate File 68. This act amends section 6632 of the Revised Statutes in regard to the assessment of

the inheritance tax by requiring the court, on the filing of the report of the appraiser, to fix a day for making the appraisement and notify all interested parties, and on that date appraise the property, and from such appraisal and report fix the value of the shares and interests liable for such tax and the amount of the taxes due thereon. The court is also given power in cases where it appears from the petition of an interested party that an estate is not liable for a tax, after notice to the county attorney, to make an order or finding that such estate is not liable.

Senate File 59. Under this act the proceedings for mortgaging real estate by guardians for the purpose of paying existing mortgages are identical with that of executors and administrators.

The acts concerning dispensing with administration, assessment of the inheritance tax and mortgaging land by guardians take effect July 8, 1915.

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MONOLITH PORTLAND CEMENT COMPANY