

MASON'S MINNESOTA STATUTES

1927

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BY THE SUBSEQUENT LEGISLATION OF 1925
AND 1927

AND ALSO EMBRACING LAWS OMITTED FROM THE GENERAL STATUTES
1923, AND THE LAWS OF THE 1925 AND 1927 SESSIONS OF THE
LEGISLATURE UNDER APPROPRIATE CLASSIFICATION.

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PART III.

CIVIL ACTIONS AND PROCEEDINGS

CHAPTER 74

PROBATE COURTS

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GENERAL PROVISIONS

8690. Establishment, sessions, etc.—A probate court, which shall be a court of record having a seal, is established in each county. The office of the probate judge shall be kept open at the county seat at all reasonable hours, and the court shall always be open for the transaction of business. A general term of such court shall be held on the first Monday in each month, and special terms at such times and places in the county as the judge may deem advisable. (3622) [7200]

PROBATE COURTS GENERALLY

1. Jurisdiction in general—The jurisdiction of the probate courts is defined by the constitution (see Const. art. 6 § 7). It is neither a common law nor statutory jurisdiction (84-289, 292, 87+783). It is expressly limited and restricted to the estates of deceased persons and persons under guardianship (77-218, 221, 79+828). Within its sphere this jurisdiction is exclusive. The constitution gives to probate courts the entire and exclusive jurisdiction over the estates of deceased persons and persons under guardianship, in the same manner and to the same extent that it gives to the district court jurisdiction over civil cases in law and equity arising out of other matters of contract or tort (30-277, 281, 15+245; 37-225, 233, 33+792; 61-444, 446, 64+48; 63-5, 11, 65+91; 68-388, 391, 71+402; 71-241, 244, 73+859; 71-371, 373, 74+148; 83-215, 218, 86+1; 84-353, 355, 87+944; 86-140, 147, 90+378; 95-455, 104+301. See 77-218, 79+828). But the jurisdiction of probate courts to determine claims against the estates of decedents is not exclusive except as provided by statute. Claims *ex delicto* are prosecuted in the district court (55-111, 56+583). The legislature cannot enlarge or diminish the jurisdiction conferred by the constitution but it may regulate its exercise by prescribing modes of procedure to be followed by the court in exercising it, including the process or proceedings by which the jurisdiction shall attach to a particular estate (37-225, 232, 33+792; 40-236, 238, 41+977). The exclusive jurisdiction of the probate courts cannot be interfered with by injunction issued out of the district court (71-371, 373, 74+148. But see 113-1, 129+136). The powers of the probate courts are not only general but plenary in cases where they are authorized to act. They are not courts of limited jurisdiction in the ordinary sense of that term (86-140, 146, 90+378). Their jurisdiction is general and as respects the subjects committed to them they have all the powers that any court has (29-27, 35, 11+136; 61-335, 341, 63+880; 66-454, 457, 69+330). They have implied power to do what is essential to such powers as are expressly conferred (37-225, 233, 33+792; 82-324, 327, 84+1017, 86+333; 83-215, 218, 86+1). They have not the general equity powers of courts of general jurisdiction (103-325, 115+173. See, also, 105-444, 117+830). The district court as a court of chancery may not interfere with the exercise of the constitutional powers of the probate court, but in the interest of justice may exercise ancillary jurisdiction to aid that court. Held competent for the district court to restrain an executor from fraudulently disposing of testator's shares of stock (113-1, 129+136). When a probate court legally probates a will or appoints a first administrator it thereby acquires jurisdiction to direct and control the administration; and such jurisdiction continues over the administration, as one proceeding, until its close (37-225, 33+792; 47-527, 529, 50+698; 61-444, 447, 64+48). Jurisdiction over the estate of a deceased person attaches when general jurisdiction is invoked by presentation of a proper petition. Failure to give proper notice of hearing on petition for appointment of administrator, by publication of citation for full time required by statute, is an irregularity which renders subsequent proceedings voidable and subject to be set aside on motion or appeal. But giving such notice, by proper publication, is not necessary to confer jurisdiction over the estate, and validity of subsequent proceedings cannot be questioned in collateral proceeding (105-30, 117+235).

2. Jurisdiction of estates of deceased persons—The jurisdiction of the probate courts over the estates of deceased persons is for the purpose of administering such estates and includes all matters necessarily pertaining to the proper administration of them (40-236, 238, 41+977). Estates are settled and administered by executors and administrators under the jurisdiction, supervision and control of the probate courts (37-225, 233, 33+792). Such courts have power to take charge of, preserve and distribute according to law the property of decedents (33-94, 95, 22+10; 40-236, 238, 41+977); to construe wills (30-277, 15+245; 95-455, 104+301); and to determine who are creditors, legatees, devisees and next of kin (40-236, 239, 41+977). To give rise to such jurisdiction there must be a death and ownership of property by the deceased (86-140, 146, 90+378).

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

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

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

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

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

estate of the deceased (33-176, 178, 180, 22+251; 44-5, 7, 46-79; 62-29, 36, 64+99. Contra 16-494, 447). The existence of assets is essential to administration (44-5, 7, 46+79). The substantial facts accomplished by administration are the payment of debts and the distribution of the residue of the property (89-303, 305, 94+869).

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

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

6. Held to have jurisdiction.—To make an election for an insane person to take under a will (30-277, 15+245; 22-336, 354, 20+324; 37-225, 233, 33+792; 88-404, 93+314); to construe a will whenever such construction is necessary to the administration of the estate of a deceased person (30-277, 282, 15+245; 95-455, 104+301); to order paid out of the estate of an insane person the witness' fees and attorney's fees incurred in proceedings for his restoration to capacity (72-19, 74+899); to compel an accounting by an executor after his discharge leaving the estate unadministered (83-215, 86+1); to render a decree of heirship as provided by 1897 c. 157 (86-140, 90+378); to determine a claim to an estate on a contract by the decedent to make a will in favor of the claimant (69-136, 72+59).

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

8. Presumption of jurisdiction.—The probate court is a court of superior jurisdiction and it enjoys the same presumptions of jurisdiction as the district court. Its judgments and decrees are not subject to collateral attack for want of jurisdiction not affirmatively appearing on the face of the record (29-27, 11+136; 37-225, 230, 33+792; 40-254, 255, 41+972; 41-325, 332, 43+385; 60-49, 51, 61+826; 61-18, 22, 63+1; 61-335, 340, 63+880; 68-320, 322, 71+396; 86-140, 146, 90+378; 90-177, 179, 95+1109; 122-1, 141+851; 124-492, 145+378).

8691. Judge—Election—Bond.—There shall be elected in each county a probate judge, who, before he enters upon the duties of his office, shall execute a bond to the county board in the penal sum of one thousand dollars, to be approved by said board, conditioned for the faithful discharge of his duties, and for the faithful application of all moneys and effects that may come into his hands in the execution of the duties of his office, which bond, with his oath of office, shall be filed with the register of deeds. (3623) [7201]

8692. Deliver books to successor.—Whenever the term of office of any probate judge expires he shall deliver over to his successor in office all books and papers in his possession relating to his office, and upon failure so to do within five days after demand by his successor he shall be guilty of a gross misdemeanor. (3624) [7202]

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

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

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

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

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

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

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

6. A record of orders, in which shall be recorded all orders, decrees, and judgments made by the court, except orders allowing or disallowing claims, orders directing the publication of notices, and interlocutory and non-appealable orders. (3625) [7203]

Except as provided by § 8857 (61-18, 63+1; 103+885) the records import absolute verity and are not subject to collateral attack (22-393; 29-27, 11+136; 37-330, 33+907; 40-254, 41+972; 60-49, 51, 61+826; 61-18, 63+1). In making entries it is not necessary to use the seal of the court (26-201, 207, 2+497). Entries may be made by the clerk under the direction of the judge. They should be made promptly, but a delay, even of years, is not fatal, at least if made during the term of the judge (29-27, 39, 11+136). Letters of guardianship are properly recorded under subd. 4 and such record is competent evidence without the production of the original letters and without accounting for them (29-27, 11+136). An order granting or denying the application of a person under guardianship to be restored to capacity should be recorded under subd. 6. Interlocutory orders defined (83-58, 60, 85+917).

8694. Court first acquiring jurisdiction has exclusive jurisdiction.—Jurisdiction acquired by a probate court shall preclude the subsequent exercise of jurisdiction by any other probate court over the same matter, except as otherwise specially provided by law. (3626) [7204]

Cited (105-30, 117+235).

130-270, 153+521.

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

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

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

2. If a non-resident, dying within or without this state, in any county wherein he left property, or into which any property belonging to his estate shall come; and such administration first legally granted shall extend to all the assets of the decedent in this state. (3627) [7205]

This was designed to prevent conflict between the probate courts of the several counties and to remove doubt as to the proper probate court to apply to in any case (37-225, 233, 33+792). In case of a non-resident proceedings must be had in a county where there is property of the estate subject to administration. And this is so although the proceedings are based on a will probated in another state (48-37, 50+932. See 45-242, 244, 47+790). A right of action for the death of a non-resident is an "asset" giving the court of the county where the injury resulting in death was inflicted jurisdiction (44-5, 46+79). Deposit account in a bank held property in the state (115-73, 131+1010). Cited (105-30, 117+235). Jurisdiction to appoint special administrator to sue for non-resident's death in this state (129-280, 152+413). Jurisdiction over assets suffices regardless of domicile (141-137, 169+539). Jurisdiction in Indian allottee's heirship (155-77, 192+364).

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

8696. Judge, when disqualified by interest—Every probate judge shall be disqualified from acting as such in any matter in which he, or his wife, or any of his or her kin nearer than first cousins, shall be interested as heir, executor, administrator, guardian, devisee, legatee, or creditor; in any matter involving the probate or interpretation of any will drawn or witnessed by him; in the determination of any question in which he shall be a necessary witness; and in any matter involving the property right of any person in respect to which he is or has been the attorney or counsel of such party. (3628) [7206]

8697. Judge of probate may act in any county when sitting judge is disqualified—Whenever so disqualified, any probate judge may, and when it is made to appear by the verified petition of any person interested or his attorney that such ground of disqualification exists he shall, make an entry in his records, reciting such grounds, and by order appoint the probate judge of any county to hear, try, and determine the matters as to which such disqualification relates. Whenever, by reason of necessary absence, any probate judge shall be unable to act, he shall request, in writing, the probate judge of any county to act in his place in all matters arising during such absence. And the judge so appointed or requested shall attend for that purpose at such times as may be necessary. The expenses of the judge so acting shall be paid by the county in which he shall be so called to act. (R. L. '05 § 3629, G. S. '13 § 7207, amended '23 c. 401 § 1)

8698. When a judge becomes insane—Whenever the verified petition of five voters of any county is presented to a judge of the district court of such county, stating that the probate judge of such county is insane, such judge shall examine into such alleged insanity in the manner provided by law for like examinations by probate judges. If upon the examination such probate judge is found to be insane or incapacitated to act by reason of mental disability, the district judge shall certify such findings to the governor, who shall thereupon declare the office of such probate judge vacant, and fill the same by appointment. (3630) [7208]

8699. Clerk of probate court—Every probate judge may appoint a clerk, who shall perform the duties assigned him by law or such judge. Such appointment shall be in writing, signed by the judge, and filed in the office of the clerk of the district court of the county in which the same is made. Before entering upon the duties of his office, such clerk shall execute a bond to the county board, with sufficient sureties to be approved by said board, in the penal sum of five hundred

dollars, conditioned for the faithful discharge of his duties. Said bond, with his oath, shall be filed and recorded in the office of the register of deeds, and an action may be maintained on said bond by any party aggrieved by the violation of the conditions thereof. (3631) [7209]

As to counties having 300,00 inhabitants. Clerk may authenticate and certify copies of the records (86-140, 148, 90+378). He may make entries in the records under the supervision of the judge (29-27, 39, 11+136).

8700. Judge or clerk not to be counsel—No judge or clerk of any probate court shall be counsel or attorney in any action or proceeding for or against any legatee, heir, creditor, executor, administrator, guardian or ward over whom, or whose estate or accounts, he has jurisdiction by law, nor shall either of them give counsel or advice, or draw or prepare any paper relating to any estate which is or may be brought before such court, except citations, orders, decrees, executions, warrants, or subpoenas issuing out of such court. Nor shall any such clerk, or the law partner of any probate judge or clerk, appear or practice as attorney in any matter or proceeding before such probate court. Nor shall any probate judge keep or hold his official office with any practicing attorney. (R. L. § 3632, amended '11 c. 44 § 1) [7210]

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

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

2. To issue citations, subpoenas, and attachments, to make orders, judgments, and decrees, to issue all necessary executions, warrants, or processes to enforce them, and to issue commissions to take depositions of witnesses whose testimony is wanted in any matter pending in such court, when the witness is without the state, or is within the State and lives more than one hundred miles from the place of holding such Court; or is about to go out of the State, not intending to return in time for the hearing; or is so sick, infirm or aged as to make it probable that he will not be able to attend the hearing. Provided, that if a deposition so taken is to be used in any matter on which there is a contest, then notice to the taking of the deposition and the time and place thereof, shall be given to the adverse party, the same as provided for the giving of notice for the taking of depositions to be used in any other Court of record;

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

4. To correct, modify or amend its records to conform to the facts and to correct its final decrees so as to include therein property omitted from the same or from administration. (R. L. '05 § 3633, G. S. '13 § 7211, amended '23 c. 256 § 1)

1. **Conforming records to the facts—**84-289, 295, 87+783; 93-350, 101+496. See 65-60, 67+808; 77-533, 80+702.
2. **Vacating orders, judgments and decrees—**The court may vacate an order, judgment or decree procured by fraud, misrepresentation, or through surprise or excusable inadvertence or neglect (§ 8933 subd. 8; 32-142, 19+651; 32-155, 157, 19+973; 71-250, 255, 73+966; 82-324, 327, 84+1017, 86+333. See 57-109, 58+682; 61-335, 63+880). The court may change a former order by vacating it entirely or in part, by substituting another for it, or by vacating it in part and substituting something else in lieu thereof. The court cannot modify a judgment after the time for taking an appeal therefrom (93-350, 101+496). An order admitting a will to probate may be vacated to allow a contest (71-250, 73+966). An order allowing a claim may be vacated to allow the claim to be contested (32-142, 19+651. See 53-529, 55+733). A

final decree of distribution may be vacated to allow a claim to be presented against the estate (89-440, 95-211). It should require a very strong case to vacate such a decree after the lapse of two years (39-212, 215, 39-399). The probate of a will cannot be vacated for failure to appoint a guardian ad litem for minors interested in the estate (30-202, 14-887). The court loses power to vacate its orders and judgments when the subject matter passes beyond its jurisdiction (33-94, 22+10. See 65-60, 63, 67-808). A final decree of distribution cannot be set aside to the prejudice of bona fide purchasers from distributees (97-150, 106+344). Power to vacate its decrees is same as in district court (138-99, 163+1031). Plenary jurisdiction (133-124, 158+234). Irregularities in procedure in revoking or amending its orders, not assailable in collateral proceeding (150-291, 185+254).

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

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

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

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

For court rules, see appendix in front of tables.

8704. Certified copies—The probate court shall furnish a certified copy of any paper on file or of record in such court, upon payment therefor at the rate of ten cents per folio, and twenty-five cents for each certificate. (3634) [7212]

8705. Decisions, when filed—The decision of any issue of law or fact shall be in writing, and filed in said court within ninety days after submission unless prevented by sickness or unavoidable casualty. This provision shall be construed as mandatory, and the county auditor shall not sign or issue a warrant for the salary of the probate judge, or any instalment thereof, unless the voucher for such warrant is accompanied by an affidavit of the judge that all matters submitted to him for decision ninety days or more prior to the filing of such affidavit have been decided as herein required, unless a decision has been prevented by sickness or casualty, in which case the reasons for the delay shall be specifically stated, and the making of a false affidavit shall be sufficient cause for complaint to the governor. (3635) [7213]

8706. Definitions—The word "representative," when used in these laws with reference to probate courts

and proceedings therein, shall be construed as including executors, administrators, special administrators, administrators with the will annexed, administrators de bonis non, and guardians. The word "minor" means a male under the age of twenty-one years, or a female under the age of eighteen years. (3636) [7214]

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

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

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

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

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

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

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

SALARY AND CLERK HIRE IN PARTICULAR COUNTIES.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROBATE PRACTICE

8708. Proceedings, how begun—Every proceeding in the probate court shall be commenced by petition, briefly setting forth the ground of the application, and signed by or on behalf of the party making the same, and be verified as in the case of pleadings in civil actions. (3638) [7227]

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

Cited (105-30, 117+235).

128-116, 150+387.

209+640, note under § 8924.

8709. Notice of hearing, when required—Before proceeding, the court shall require notice to be given to all persons interested, in the following cases:

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

In all other cases, unless in this chapter otherwise provided, such notice shall be given as the court may direct. (3639) [7228]

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

8710. Notice by citation—Additional notice—For the purposes of such notice, the court shall issue its citation, requiring all persons interested to show cause, if any they have, at a time and place specified, why the petition therein referred to should not be granted; and such citation shall be served by three weeks' published notice. The court, in its discretion, may cause other or further notice to be given to such persons as it may deem proper. (3640) [7229]

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

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

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

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

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

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

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

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

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

8713. Notice in certain cases—Every citation to an individual requiring him to perform a particular duty, if he resides in the state and his residence is known, shall be served upon him personally eight days before the day of hearing, or such less time as the court in such citation shall direct. (3641) [7230]

8714. Will of alien—Notice—Whenever application is made to the Probate Court for letters of administration of an intestate estate by any person other than the widow or next of kin of a decedent; or whenever application is made to the Probate Court to prove a will; and the decedent in either case was a native of a foreign country, the Probate Court shall cause notice of the time and place of hearing to be served by mail on the consular representative of such country, if there be one in this state; otherwise upon the Secretary of State, who shall forward the same to the chief diplomatic representative of such country at Washington.

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

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

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

8715. Further notice—The court may require notice to be given in addition to the notices hereinbefore provided for, to designated parties known to be interested, by mailing the same, or by publication in a newspaper printed in other than the English language, or in such other manner as it may order. (3643) [7232]

8716. Notice of filing orders—Every probate judge, at the time of filing any appealable order, judgment, or decree, shall cause notice of such filing to be given, either personally or by mail, to all parties interested who have appeared of record on the hearing or to their attorneys: Provided, that this section shall not apply in uncontested cases or where final decision was made at the time of hearing. (3644) [7233]

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

8717. Notice of petition to remove representative—The probate court on its own motion may, and on petition of any person interested in the estate shall, cite the representative to appear and show cause why he should not be removed. Whenever such representative resides in the county, such citation shall be served upon him personally or by leaving a copy at his last usual place of abode with some person of suitable age and discretion then resident therein; when he resides out of the county and his residence is known, by mail; and when unknown, by publication. (3645) [7234]

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

Cited (118-514, 137+291).

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

AUDITOR

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

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

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

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

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

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

DESCENT OF PROPERTY

8718. Real estate in general—Posthumous children
—When any person dies seized of any lands, tenements, or hereditaments, or any right thereto, or entitled to any interest therein, in fee simple or for the life of another, not having lawfully devised the same, they shall descend as hereinafter provided. And for all the purposes of this chapter a posthumous child shall be considered as living at the death of its parent. (8646) [7236]

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

8719. Homestead—The homestead of such decedent shall descend, free from any testamentary or other disposition thereof to which the surviving spouse, if there be one, shall not have consented in writing, and exempt from all debts which were not valid charges thereon at the time of such death, as follows:

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

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

3. In all other cases such homestead may be disposed of by decedent's last will. If not so disposed of, it shall descend the same as his other real estate, but exempt from his debts if inherited by his surviving children or the issue of children deceased. (3647 [7237])

The exemption of the homestead from the debts of the deceased is absolute, that is, it does not depend on the occupancy of the land by the surviving spouse as a home. But it is not exempt from the debts of the surviving spouse unless it is actually occupied as a home (31-168, 17+280; 50-264, 52+862; 71-108, 73+639). The rights of the surviving spouse do not depend upon any formal selection of the homestead (28-13, 8+830). The assent in writing of the surviving spouse to a testamentary disposition of a homestead may, at least if there are children, be executed after the decease of the testator. An antenuptial contract, cutting off homestead right of husband and his statutory one-third interest in his wife's property, not prohibited (100-408, 111+305). See 72-81, 75+111. A testamentary disposition of a homestead assented to by the surviving spouse does not render the property liable for the debts of the testator (72-95, 75+112). A failure to exercise the right of election under § 8722 has the same effect on a testamentary disposition of a homestead as a written assent, and it has this effect although the result is to cut off rights of surviving children in the homestead (75-53, 77+551). The provisions of § 8722 are not applicable where there is no child nor the issue of a deceased child surviving the testator (79-267, 82+635). The word "surviving" in the statute refers to the time of the death of the testator and not to the time the will was executed (75-2, 77+420). If the surviving spouse renounces the will the homestead descends to such spouse and the children unaffected by the will (86-91, 90+127). The homestead rights of a widow are limited to the land which her husband had actually devoted to homestead purposes and was occupying at the time of his decease (54-190, 55+960). Where a homestead has been lost by removal and failure to file the statutory notice it does not descend to the surviving spouse as such (40-172, 41+1059). A surviving spouse cannot be allowed to waive a claim to the homestead fixed by law and take a part thereof to the injury of other parties interested in the distribution of the decedent's estate (45-323, 47+973). Children by a former marriage stand on the same footing as children of the marriage existing at the time of the decedent's death (95-343, 104+137). If there are no children a surviving spouse takes an absolute title to the homestead (89-482, 95+307). The estate of a surviving spouse in case there are children is an absolute unconditional estate for life (31-168, 17+280; 42-189, 193, 44+53). It is not qualified by or subject to a distinct or independent right of occupancy by the children. The surviving spouse has the sole right to the use, enjoyment and disposition of such estate during his or her life without regard to the children (42-189, 193, 44+53). Such estate is a freehold (85-83, 89, 88+419. See 28-13, 8+830). Collateral heirs take subject to the debts of the decedent (62-380, 64+924, 65+348). Cited (61-552, 554, 64+47; 62-135, 137, 64+165; 66-209, 212, 68+974; 66-327, 340, 69+31; 105-444, 117+830). Disposition within subd. 3 (140+337).

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

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

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

Upon death the homestead descended, a life estate to his wife and the remainder in fee to his children. 157-266, 196+258.

8720. Distribution and descent of property—The surviving spouse shall also inherit an undivided one-third of all other lands of which decedent at any time during coverture was seized or possessed, to the disposition whereof, by will or otherwise, such survivor shall not have consented in writing, except such as have been transferred or sold by judicial partition proceeding or appropriated to the payment of decedent's debts by either execution or judicial sale, by general assignment for the benefit of creditors, or by insolvency or bankruptcy proceedings, and subject to all judgment liens. But the land so inherited shall be subject in their just proportion to such debts of the decedent as are not paid out of his personal estate. The residue of such other lands, or, if there be no surviving spouse, then the whole thereof, shall descend, subject to the debts of the intestate, in the manner following:

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

Second—if there is no surviving child and no lawful issue of any deceased child, and the intestate leaves a surviving spouse, then the whole estate shall descend to such spouse.

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

Fourth—if there be no surviving issue nor spouse, nor father nor mother, his estate shall descend in equal shares to his brothers and sisters, and to the lawful issue of any deceased brother or sister, by right or representation.

Fifth—if the intestate leaves neither issue, spouse, father, mother, brother nor sister his estate shall descend to his next kin in equal degree, except that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote.

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

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

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

1. **Nature of wife's interest in husband's realty**—It was formerly held that the statutory interest of a wife in her husband's realty given by this section was merely

an enlargement of common law dower and ought to be construed in accordance with common law rules regarding dower (34-159, 24+920; 35-291, 293, 28+920; 46-477, 479, 49+251; 51-406, 53+717; 54-352, 56+46). It is now held that such interest is purely statutory without any of the essential features of dower and that it is not to be construed in accordance with common law rules regarding dower (55-274, 56+828; 71-61, 73+640; 75-4, 77+421). During the husband's life the wife's interest is inchoate and contingent. It is not an estate or even a vested interest. It is a mere expectancy (35-291, 28+920; 85-83, 88+419; 102-253, 113+632). But it is an interest which the law recognizes and which the wife may protect (25-516; 74-273, 77+139; 79-267, 271, 82+635; 91-45, 97+452). On the death of the husband it becomes vested at once (55-274, 56+828; 62-135, 138, 64+155), and becomes a free-hold estate if such was the estate of the husband (85-83, 89, 88+419). The right which a wife has by virtue of 1875 c. 40 and 1876 c. 37 in the lands of her husband during coverture is inchoate and contingent, and may, at any time before it becomes consummate by death of husband, be diminished or entirely taken away by the legislature (102-114, 112+1020, 113+382). Wife is not necessary party to action against husband for purpose of having determined that he held title to land as mortgagee, and not as owner, and is bound by judgment (102-253, 113+632). Signature of wife as witness to contract by husband for sale of his real estate held not written consent. Such contract may be specifically enforced as to him (107-177, 119+948).

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

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

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

2. **Nature of husband's interest in wife's realty.**—The nature of a husband's interest in his wife's realty other than her homestead is the same as her interest in his (see cases under note 1). It is not the common law estate by curtesy, but is a purely statutory interest (75-4, 7, 77+421). See 100-408, 111+305.

3. **Title vests on death of ancestor.**—Under this section the title to lands of an intestate vests in the surviving spouse and heirs immediately on his death without administration proceedings. Their estate is subject to alienation and devise and attachment. A purchaser, whether at a voluntary or compulsory sale, acquires the estate subject to the rights of creditors. The estate is not subject to the lien of a judgment rendered against the intestate before his death but not docketed until thereafter (62-135, 64+155). Whether a widow, who has murdered her husband for purpose of acquiring his real property, may inherit quaere. Decree of probate court assigning to widow her statutory interest in the real estate held final (105-444, 117+830).

4. **Liability for debts.**—The interest of a surviving spouse under this section is subject to the payment of debts in the course of administration the same as the estate of other heirs (55-274, 56+828; 66-209, 212, 68+974; 71-61, 73+640; 75-4, 77+421; 93-489, 494, 101+797), but it can be so subjected only in administration proceedings (43-403, 45+853; 75-4, 77+421). Prior to 1901 c. 33 the inchoate interest of one spouse was unaffected by a sale on execution against the other spouse (51-406, 53+717; 53-73, 77, 54+1055; 71-61, 65, 73+640; 74-273, 277, 77+139; 75-4, 7, 77+421; 89-432, 440, 95+216, 769; 91-45, 48, 97+452). This section does not refer to secured creditors (62-135, 138, 64+155). 1901 c. 33 excepting lands divested by execution or judicial sale, by assignment for creditors, or by insolvency or bankruptcy proceedings, applies to cases in which marriage and seisin occurred prior to its enactment (102-114, 112+1020, 113+382).

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

6. **Assent to disposition.**—Quitclaim deed signed by husband and wife will bar statutory interest of wife (37-452, 59+533). Interest of spouse subject to equitable doctrine of election or estoppel (32-336, 20+324. See 96-202, 104+958).

7. **Election.**—The provisions of § 8722 are applicable to this section (72-81, 75+111; 72-95, 75+112).

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

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

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

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

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

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

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

8722. **Election.—Interpretation.—Devise not additional.**—If the will of a deceased parent makes provision for a surviving spouse in lieu of the rights in his estate secured by statute, unless such survivor, by an instrument in writing filed in the probate court in which such will is proved within six months after the probate thereof, shall renounce and refuse to accept the provisions of such will, such spouse shall be deemed to have elected to take thereunder, and no devise or bequest to a surviving spouse shall be treated as adding to the right or interest secured to such survivor by statute, unless it clearly appears from the contents of the will that such was the testator's intent: Provided, that if the title to the homestead be in litigation, and the same be not determined within the six months aforesaid, then said spouse may so elect within thirty days after said litigation is concluded. (3649) [7239]

Applicable to testamentary disposition of homestead. Assent in writing may be executed after decease of testator (72-81, 75+111; 72-95, 75+112). Inapplicable where there is no child nor issue of a deceased child surviving the testator (79-267, 82+635). Failure to file writing renouncing and refusing to take under will is an election to take under will (72-32, 74+1020). Failure to elect has same effect on testamentary disposition of homestead as a written assent and it has this effect although the result is to cut off the rights of surviving children in the homestead (75-53, 77+551). If a surviving spouse renounces a will the homestead descends to such spouse and the children unaffected by the will (86-91, 90+127). Failure to elect held not to affect judgment lien (77-138, 79+660). Election to take under will held not to affect creditors (72-95, 75+112). Election of widow to take under will bars her from claiming realty conveyed by her husband during coverture without her consent (42-14, 43+563; 105-310, 117+518). Widow held not put to an election by provisions of a will (32-513, 21+725). See (105-310, 117+518). Election by court or guard-

ian for insane widow (30-277, 15+245; 32-336, 354, 20+324; 37-225, 233, 33+792; 88-404, 93+314; 114-329, 131+323). Under former statutes (32-336, 20+324; 34-159, 24+920; 46-477, 49+251). Right to renounce is personal to survivor, and does not pass to his or her personal representative or heirs (114-329, 131+323).
122-191, 142+129; 129-442, 152+845; 135-300, 100+1016; 136-83, 161+395, 161+1056; 140-298, 168+13; 145-253, 177+126.
138-402, 197+352, note under § 8726.

8723. Illegitimate child—An illegitimate child shall inherit from his mother the same as if born in lawful wedlock, and also from the person who, in writing and before a competent attesting witness, shall have declared himself to be his father; but such child shall not inherit from the kindred of either parent by right of representation, unless during his lifetime his parents intermarry, in which case he shall no longer be deemed illegitimate. (3650) [7240]

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

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

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

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

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

8724. Estate of illegitimate child—If any illegitimate child dies intestate and without lawful issue, his estate shall descend to his mother, or, in case of her prior decease, to her heirs at law. (3651) [7241]

8725. Degrees, how computed—The degree of kindred shall be computed according to the rules of the civil law, and kindred of the half blood shall inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift from one of his ancestors, in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance. (3652) [7242]

122-191, 142+123.

8726. Minor children to receive such allowances as selected by guardian—Personal Estate—Distribution—When any person dies owning personal property, or any interest therein, the same shall be disposed of and distributed as follows:

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

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

3. The widow or children or both, constituting the family of the decedent, shall have such reasonable allowance out of his personal estate as the probate court deems necessary for their maintenance during the settlement of the estate according to their circumstances, which in case of an insolvent estate shall not be longer than one year after administration is granted, nor in any case after the distributive share of the widow in the residue of the personal estate has been assigned to her; and such reasonable allowance may be made by the court when the husband or father has left a will, as well as when he dies intestate.

4. If from the inventory of an intestate estate it appears that the value of the whole estate does not exceed the sum of one hundred and fifty dollars in addition to the allowances made for the widow and children, the court, after the payment of the funeral charges and expenses of administration, shall assign for the use and support of the widow or the children, or both, constituting the family of the decedent, the whole of said estate.

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

6. The residue, if any, of the personal estate shall be distributed as follows: One-third thereof to the surviving spouse, if any, free from any testamentary disposition thereof to which such survivor shall not have consented in writing; the remainder of such residue, or, if there be no surviving spouse, then the whole thereof, except as otherwise disposed of by will, shall be distributed in the same proportions to the same persons and for the same purposes as prescribed for descent of real estate by Sec. 9235, subdivision 1-6; provided, however, that if the intestate leaves no spouse nor kindred, his personal property, if any, shall escheat to the State.

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

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

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

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

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

1. Subd. 1—Right to allowance absolute. Appropriation of prescribed amount by widow and sale by her before formal order of allowance sustained (39-334, 40+156). Her abandonment of the husband does not forfeit her rights. Right of selection survives to her personal representative (103-448, 115+265). Widow has no right to select money or other property in lieu thereof (119-325, 133+428).

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

2. Subd. 2—Allowance may be made before inventory and appraisal (95-304, 104+535), and before election under § 8722 (64-315, 67+69). May be made out of rents and profits of realty (64-315, 67+69). Widow electing to take under will not entitled to allowance in addition to provisions of will, as against other devisees (64-315, 67+69). Statutory allowances received during administration held not payments upon a widow's annuity under an antenuptial contract (30-80, 14+259).

3. Subd. 6—Provision giving one-third to surviving spouse not consenting to other testamentary disposition is new (see for former rule (32-513, 515, 21+725; 35-291, 28+920; 88-404, 93+314). See 100-384, 111+278; 129-442, 152+845; 137-239, 163+285; contract as waiver of allowance (141-103, 109+478; 145-163, 176+177); applicable to foreign widow (152-149, 188+207; 194+768).

4. Cited—55-300, 308, 56+1115; 61-552, 554, 64+47; 66-209, 212; 68-974; 66-327, 340, 69+31; 81-197, 206, 83+538; 106-484, 119+217; 125-353, 147+278; 127-223, 149+303.

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

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

141-151, 169+529.

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

8729. Application to determine descent—Whenever any person dies leaving real estate, or some interest therein, and no will has been proved nor any administration granted thereon in this state within five years after his death, or real property has been omitted in the administration or in the final decree, any person claiming an interest in such real estate may petition the probate court of the county wherein the same or any part thereof is situated to determine its descent and assign it to the persons entitled thereto. (3654) [7245]

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

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

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

8730. Contents of petition—Such petition, which shall be verified, shall state that more than five years have passed since decedent's death, that no will has been probated nor any administration granted in this state, or if administration was had, that real property was omitted in the administration or final decree, and shall give the name of the decedent, the time and place of his death, the contents of his will, if he left one, and the names and residences of his heirs, and of his devisees, if any, according to the best information of said petitioner; and it shall contain a description of such real estate, and disclose the interest of the decedent and of the petitioner therein. (3655) [7246]

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

sons interested to show cause, at a time and place therein fixed, why the same should not be granted, and notice of such hearing shall be given in the manner prescribed by law upon an application for a final decree. All parties interested may appear and be heard thereon, and the court, in its discretion, may require that issues be framed and may confine the proofs to such issues. (3656) [7247]

8732. Action by the court—If, upon such hearing, it transpires that such decedent died testate, his will shall be admitted to probate upon the proofs required by law in other cases. And in all cases the court shall hear and determine the facts, and enter its decree, assigning and distributing all such real estate to the persons entitled thereto, which decree shall have the force and effect of a final decree of the probate court, and may be appealed from in like manner. A certified copy of any such decree may be filed for record with the register of deeds, who shall record the same, and enter in his reception book the name of the decedent as grantor, and the names of the persons to whom said real estate is assigned, as grantees. (3657) [7248]

211+578, note under § 8729.

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

122-190, 142+132.

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

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

WILLS—EXECUTION, EFFECT, ETC.

8735. Who may make a will—How executed—Every person of full age and sound mind, by his last will in writing, signed by him, or by some person in his presence and by his express direction, and attested and subscribed in his presence by two or more competent witnesses, may dispose of his estate, real and personal, or any part thereof, or right or interest therein; and the words "every person" shall include married women. (3659) [7250]

In General.

158-402, 197+852, note under § 8726.

A will must be signed by the testator in the presence of the subscribing witnesses, or, if not so signed, the testator must acknowledge to such witnesses that the signature thereto attached is his, or in some other way unequivocally indicate to them that the will about to be signed by them as witnesses is his last will, and has been signed by him. The right to dispose of property by will is statutory and the statutory mode of execution must be followed with reasonable strictness. If it is not the will is void (79-101, 81+758; 81-30, 83+439; 105-88, 117+155. See 97-491, 106+598; 103-286, 114+838). If the witnesses sign in the immediate and conscious presence of the testator it is not necessary that he should see them do so. It is not necessary that he should formally request them to attest his will (25-39). Where the witnesses subscribed the will in a room adjoining that in which the testator lay in bed but immediately after signing showed him their signatures and he pronounced it "all right" after examination. It was held sufficient (80-180, 83+58; 97-348, 107+141). Where another signs for the testator by the latter's "express direction" the direction must precede the signing and the signing must be in obedience to the direction. Subsequent acquiescence by the testator is alone insufficient. If the direction is by gestures they must be as unambiguous as words (45-361, 47+1069). Signature by mark (103-286, 114+838). An attestation of alterations in a will held insufficient (20-245, 220. See 76-237, 79+104). A letter acknowledging a debt as a proper claim against the estate of the writer held not a will because not attested (73-266, 76+27). Query whether a contract to make a will executed and attested as prescribed by this section may be treated as a will (69-136, 72+59). What constitutes a "sound mind" (27-280, 6+791, 7+144; 38-112, 35+726; 39-204, 39+143; 42-273, 44+61; 57-307, 311, 59+199; 83-324, 86+408; 86-163, 90+319; 97-349, 107+141; 103-286, 114+838). A will, void because testator was not of sound mind, cannot be held invalid as to personal property and valid as to real estate (96-484, 105+677). Undue influence (97-181, 106+898). Though a will, prepared from instructions and signed by testator upon assurance that it expresses his wishes, is invalid if the language does not in legal effect make the provisions intended, it is not necessarily invalid if by the will, construed in connection with the statutes of inheritance, the property passes to the persons intended (97-349, 107+141).

122-194, 142+130.

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

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

Mental Capacity and Undue Influence.

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

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

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

Evidence examined, and held sufficient to warrant a

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

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

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

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

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

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

Construction of Disposition.

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

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

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

Contract to Make Will.

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

8736. Competency of witnesses—If a witness to a will is competent at the time of his attestation, his subsequent incompetency shall not prevent the probate and allowance of such will, nor shall a mere charge on the land of the testator for the payment of his debts prevent a creditor from being a competent witness to his will. (3660) [7251]

56-33, 57+219.

8737. Nuncupative wills—Nuncupative wills shall not be valid unless made by a soldier in actual service or by a mariner at sea, and then only as to personal estate. (3661) [7252]

8738. Wills made out of the state—A will made out of the state and valid according to the laws of the state or country in which it was made, or of the testator's domicile, if in writing and signed by the testator, may be proved and allowed in this state, and shall thereupon have the same effect as if it had been executed according to the laws of this state. (3662) [7253]

122-194, 142+129.

8739. Legacy to subscribing witness—A beneficial devise or legacy made in a will to a subscribing witness thereto shall be void, unless there be two other competent subscribing witnesses who are not beneficiaries thereunder. But if such witness would have been en-

titled to any share of the testator's estate in the absence of a will, then so much of the share that would have descended or have been distributed to him as will not exceed the value of the devise or bequest shall be assigned to him by the probate court in its decree of distribution from the part of the testator's estate included in such void bequest. (3663) [7254]

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

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

8740. Probate necessary and conclusive—No will shall be effectual to pass either real or personal estate unless duly proved and allowed in the probate court or on appeal. Such probate shall be conclusive as to the due execution of a will. (3664) [7255]

The probate of a will is conclusive that it was duly executed in conformity with the statute by the person purporting to execute it; that he had legal capacity to execute it; and that it was his last will. It does not determine the legal effect of the will or of its various provisions (26-259, 2+945; 33-509, 511, 24+301; 45-429, 47+1133; 47-171, 176, 49+679; 144-457, 175+913).

8741. Written wills, how revoked or canceled—No will in writing, except in the cases hereinafter mentioned, shall be revoked or altered otherwise than by some other will in writing, or by some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses; but nothing in this section shall prevent the revocation implied by law from subsequent change in the condition or circumstances of the testator. (3665) [7256]

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

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

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

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

156-253, 194+633, note under § 8765.

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

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

8743. Duty of custodian of will—A person who has the custody of a will shall forthwith, after notice or information of the death of the testator, deliver such will into the probate court which has jurisdiction thereof, or to the executor named in the will; and if a person, without reasonable cause, neglects so to deliver a will after being duly cited for that purpose by such court, he shall be deemed guilty of contempt of court. (3667) [7258]

138-279, 158+396.

8744. Child born after death of testator to take same share unless omission was intentional—If any

child of a testator, born after the death of such testator, has no provision made for him by his father in his will or otherwise, he shall take the same share of his father's estate that he would have taken if the father had died intestate unless it appears that such omission was intentional. (R. L. '05 § 3668, G. S. '13 § 7259, amended '15 c. 343 § 1)

125-43, 145+625.

8745. Child not provided for in will—If a testator omits to provide in his will for any of his children or the issue of a deceased child, they shall take the same share of his estate which they would have taken if he had died intestate, unless it appears that such omission was intentional, and not occasioned by accident or mistake. (3669) [7260]

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

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

160-276, 199+914.

8746. From what estate such share taken—If an after-born child, or a child or the issue of a child omitted in the will, takes a portion of a testator's estate under the provisions of §§ 8744, 8745, such portion shall first be taken from the estate not disposed of by will, if any; if that be insufficient, so much as is necessary shall be taken from all the devisees and legatees in proportion to the value of what they respectively receive under such will. But if the obvious intention of the testator in relation to some specific devise, bequest, or other provision of the will would thereby be defeated, then such specific devise, legacy, or provision may be exempted from such apportionment, and a different apportionment be adopted, in the discretion of the court. (3670) [7261]

8747. Devisee or legatee dying before testator—If a devise or legacy be made to a child or other relative of the testator, who dies before the testator, but leaves issue who survive the testator, such issue, unless a different disposition be made or required by the will, shall take the same estate which such devisee or legatee would have taken if he had survived. (3671) [7262]

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

8748. Construction of devise—Every devise of land shall convey all the estate of the testator therein, unless it appears by the will that he intended to convey a less estate. (3672) [7263]

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

8749. After-acquired property—All property acquired by the testator after making his will shall pass thereby in like manner as if possessed by him at the time when he made his will, unless a different intention manifestly and clearly appears from the will. (3673) [7264]

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

8750. Deposit of wills—A will in writing inclosed in a sealed wrapper, indorsed upon which is the name of the testator, his place of residence, the day when, and the person by whom, it is delivered, may be deposited with the probate judge of the county where the testator lives, by the testator or by any person for him, and such judge shall receive and safely keep the same, and give a certificate of its deposit. During the testator's lifetime such will shall be delivered only to him or upon his written order, witnessed by at least two subscribing witnesses and duly acknowledged. After the testator's death, and at the first session of the probate court after notice thereof, it shall be publicly opened and retained by the probate judge. He shall give notice thereof to the executor therein named,

if any there be, otherwise to the persons interested in its provisions, or, if the jurisdiction of the case belongs to any other court, he shall deliver the same to the executor named therein, or to some trusty person interested in its provisions, to be presented to such other court. These provisions shall apply to all wills heretofore deposited with probate judges. (3674) [7265]

PROBATE OF WILLS

8751. Who may petition for—Any executor, devisee, or legatee named in a will, or any other person interested in the estate, at any time after the death of the testator, may petition the probate court of the proper county to have the will proved, whether the same be in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the state, or a nuncupative will. (3675) [7266]

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

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

8752. Contents of petition—Every petition for the probate of a will shall show:

1. The jurisdictional facts.
2. The name and residence of the person named as executor, if known, and the name of the person for whom letters are prayed.
3. The names, ages, and places of residence of the heirs and devisees of the decedent, so far as known to the petitioner.
4. The probable value and character of the property of the estate, real and personal.

No defect of form or in the statement of facts contained in the petition shall invalidate the probate of a will. (3676) [7267]

8753. Filing petition—Notice—Proof and allowance of will—Such petition shall be filed in the probate court, and thereupon the court shall appoint a time and place for proving the will, and cause notice thereof to be given as provided by law. At the time appointed, the court shall hear proof and allow or disallow the will. If the probate is not contested, the court may admit the same to probate on the testimony of one of the subscribing witnesses only, if such witness testifies that the will was executed in all respects as required by law, and that the testator was of full age and sound mind at the time of its execution. (3677) [7268]

Statutory notice gives court jurisdiction (30-202, 14+887). Appointment of guardians ad litem for infants not essential (30-202, 14+887. See 32-158, 20+124; 62-29, 36, 64+99). The only facts adjudicated by the probate of a will are the validity of its execution and that it is the subsisting will of the testator (45-429, 430, 47+1133; 47-171, 49+697). The legal effect of the will is not before the court (25-259, 260, 2+945; 33-509, 511, 24+301; 47-171, 176, 49+697). The burden is on the proponent to prove the due execution of the will in conformity with the statute (40-371, 42+286; 79-101, 106, 81+758). He must prove that the testator was sane (40-371, 42+286). Proof of execution by affidavit of one of the witnesses held insufficient (71-250, 254, 73+966). A judgment creditor of an heir may contest the probate (45-429, 47+1133; 71-241, 244, 73+859). An order allowing a will may be vacated to permit a contest (71-250, 73+966). An order allowing a will on insufficient proof is not void (71-250, 254, 73+966). Where a probate court legally probates a will it thereby acquires jurisdiction to direct and control the administration; and such jurisdiction continues over the administration, as one proceeding, until its close (37-225, 33+792; 47-527, 529, 50+698; 61-444, 447, 64+48). Where petitioner for probate of will assumed position of contestant, the others assumed position of proponents, and such contest resulted in order admitting will to probate from which contestant appealed to district court, proponents were estopped from raising question that contestant had elected to take under will and was estopped from contesting it (97-491, 106+958).

132-380, 157+505.

160-56, 199+438, note under § 8756.

8754. Testimony of other than subscribing witnesses—If none of the subscribing witnesses reside in the state at the time appointed for proving the will, the court, in its discretion, may admit the testimony of other witnesses to prove the sanity of the testator and the due execution of the will, and as evidence of such execution may admit proof of the handwriting of the testator and of the subscribing witnesses. (3678) [7269]

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

8755. Objections, when filed—No one shall be heard to contest the validity of a will unless the grounds of objection thereto are stated in writing and filed in court before the time appointed for proving the will. (3679) [7270]

144-458, 175+914.

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

160-56, 199+438, note under § 8756.

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

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

8756. Proof required in case of contest—Whenever the probate of a will is contested, all the subscribing witnesses thereto who are within the state, and are competent and able to testify, shall be produced and examined. The death, absence from the state, or disability of any such witness shall be shown to the court by affidavit. (3680) [7271]

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

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

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

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

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

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

8757. Certificate of proof of will—Evidence—Every will, when proved as provided in this chapter, shall have a certificate of such proof indorsed thereon or annexed thereto, signed by the judge of the probate court and attested by its seal; and every will so certified, and the record thereof, or a transcript of such record, certified by the judge of the probate court and attested by its seal, may be read in evidence in all the courts within this state, without further proof. (3681) [7272]

8758. When subsequent will is presented—If, upon the hearing on the petition for proof of will, another instrument in writing, purporting to be a subsequent will, or codicil or revocation of said will, or any part thereof, shall be presented in opposition thereto, said

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

129-460, 152+872.

FOREIGN WILLS

8759. Wills proved elsewhere—Every will duly proved and allowed outside of this state, in accordance with the laws in force in the place where proved, may be allowed, filed, and recorded in any county in which the testator left property upon which such will may operate. (3683) [7274]

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

122-193, 142+130.

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

8760. Filing—Petition—Notice—When a copy of such will, and of the probate thereof, duly authenticated, shall be presented to the court by the executor or other person interested in the will, with a petition for its allowance and for letters, the court shall appoint a time and place of hearing, notice of which shall be given as in the case of an original petition for the probate of a will. (3684) [7275]

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

8761. Hearing proofs of probate of foreign will—If on the hearing the court shall find from the copies before it that the probate of such will was granted by a court of competent jurisdiction, and it does not appear that the order or decree so granting it is not still in force, the copy and the probate thereof shall be filed and recorded, and the will shall have the same force and effect as if originally proved and allowed in such court. (3685) [7276]

45-29, 47+311.

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

the court shall grant letters testamentary, or of administration with the will annexed, which shall extend to all the estate of the testator in this state. Such estate, after payment of debts and expenses of administration, shall be disposed of according to such will, so far as it may operate upon it, and the residue as is provided by law in cases of estates in this state belonging to persons who are residents of any other state or county. (3686) [7277]

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

8763. Ancillary administration—In all cases of administration in this state of the estates of decedents who were non-residents, upon payment of the expenses of administration and of the debts here proved, the residue of the personalty shall be distributed according to the terms of the will applicable thereto, if there be a will, or according to the law of the decedent's domicile. Or the court, in its discretion, may direct that it be transmitted to the personal representative of the decedent at the place of such domicile, to be disposed of by him. And the real estate not sold in the course of administration shall be assigned according to the will, if there be one; otherwise, according to the laws of this state. (3687) [7278]

45-242, 244, 47+790.

Cited (119-325, 138+428).

122-190, 142+129.

LOST OR DESTROYED WILLS

8764. Petition—Proof—The petition for the probate of a lost or destroyed will, or one which is without the state and cannot be produced in court, shall set forth the provisions of the will, and such provisions shall be embodied in the notice of hearing thereon. The probate court shall take testimony as to the execution and validity of such will, and the same may be established by parol or other evidence. All testimony taken shall be reduced to writing, signed by the witnesses, and filed in said court. (3688) [7279]

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

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

156-253, 194+633, note under § 8765.

8765. Wills to be proved by clear and satisfactory evidence.—No such will shall be established unless the same is proved to have been in existence at the time of the testator's death, or to have been fraudulently destroyed in his lifetime, nor unless its provisions are clearly and distinctly proved by clear and satisfactory evidence. (R. L. '05 § 3689, G. S. '13 § 7280, amended '17 c. 334 § 1)

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

194+633.

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

8766. Provisions to be certified—When such will is established, the provisions thereof must be distinctly stated and certified by the judge, which certificate shall be filed and recorded, and letters testamentary or of administration with the will annexed shall be issued thereon, in the same manner as upon wills produced and duly proved. (3690) [7281]

NUNCUPATIVE WILLS

8767. Proceedings and proof—Nuncupative wills, at any time within six months after the testamentary

words are spoken by the decedent, may be admitted to probate on petition and notice, as provided for in case of other wills. The petition shall allege that the testamentary words, or the substance thereof, were reduced to writing within thirty days after they were spoken, which writing shall accompany the petition. No such will shall be admitted to probate except upon the evidence of at least two credible and disinterested witnesses. (3691) [7282]

GRANTING LETTERS TESTAMENTARY

8768. When granted—When a will has been duly proved and allowed, the court shall issue letters testamentary thereon to the executor named therein, if he is legally competent, and accepts the trust and gives bond as required by law; otherwise, such court shall grant letters of administration with the will annexed. (3692) [7283]

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

8769. Failure of executors—If a person named as executor in a will has died or refused to accept the trust, or, after being duly cited for that purpose, neglects to accept the same, or for twenty days after the probate of the will neglects to give bond according to law, the court shall grant letters to the other executors, if there are any competent and willing to accept the trust; and in all cases where the executors named in a will are not all appointed, those receiving letters shall have the same authority to act, in every respect, as all would when duly appointed, and acting together. If there be no other executor competent and willing to accept the trust, the court shall appoint as administrator with the will annexed the person who would have been entitled to administration had there been no will. (3693) [7284]

8770. When executor a minor—When a person named as executor in a will, is, at the time of the probate thereof, under full age, the other executor, if any, who accepts the trust, shall administer the estate until the minor arrives at full age, when, upon giving bond according to law, he may be admitted as a joint executor of such will. (3694) [7285]

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

GRANTING LETTERS OF ADMINISTRATION

8772. Persons entitled to letters of administration—Administration of the estate of a person dying intestate shall be granted to one or more of the persons hereinafter mentioned, and in the following order:

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

2. If all such persons are incompetent or unsuitable, or refuse to accept, or if the surviving spouse or next of kin, for thirty days after the death of the intestate, neglect to apply for administration, the same may be granted to one or more of the principal creditors, if any such are competent and willing to take it, or to some other person who may be interested in the administration of the estate. If the decedent was born in any foreign country and left no known surviving spouse or next of kin residing in the United States, and the surviving spouse or next of kin neglect for

thirty days after his death to apply for administration, the same may be granted to the consul or other representative of the country in which the decedent was born, residing in this state, who has filed a copy of his appointment with the secretary of state, or to such person as he may select, if suitable and competent to discharge the trust. But the court in any case arising under this subdivision shall have the discretion to appoint one or more creditors, or other persons interested, or to appoint any suitable or competent person interested in the estate by purchase or otherwise.

3. If the person so appointed neglects for thirty days, after written notice of such appointment, under the seal of the probate court, served personally or by mail, to file the oath and bond required by law and the court, such neglect shall be deemed a refusal to serve, and the court may appoint such other person or persons as are entitled to administer such estate. Such person may be appointed without notice. (R. L. '05, § 3696; G. S. '13, § 7287; amended '17, c. 513, § 1; '25, c. 135, § 1)

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

Cited (118-514, 137+291).

129-279, 152+413.

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

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

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

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

1. The jurisdictional facts.
2. The names, ages, and places of residence of the heirs so far as known to the petitioner.
3. The probable value of the real and personal property and the general character of the real estate.
4. The name and address of the person for whom administration is prayed.

No defect of form or in the statement of facts contained in the petition shall invalidate the proceedings. (3697) [7288]

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

8774. Hearing—Contest—Granting letters—On filing such petition, the court shall by order fix a time and place for hearing the same. Any person interested may contest the petition or oppose the appointment of the person for whom letters are prayed, on the ground of incompetency, or his own right to administration, by filing written objections, stating the ground thereof, at or before the time fixed for the hearing. On the hearing, proof of service of the notice being filed, the court shall hear the proofs offered by all parties, and order the issue of letters of administration to such person as it deems entitled thereto. (3698) [7289]

Letters of administration issued by a court having jurisdiction are not subject to collateral attack for error or irregularity (23-84; 26-303, 3+697; 37-225, 33+792; 40-7, 11, 41+232. See 25-347; 29-27, 38, 11+136). In all cases to which the administrator, as such, is a party, for the purpose of showing his representative capacity and authority to act in the premises, the letters are at least prima facie evidence of every fact on which such capacity and authority depend, including the death of the person on whose estate they issued (26-303, 3+697. See 33-176, 180, 22+251). De facto administrator (37-225, 230, 33+792). When a probate court legally appoints a first administrator it thereby acquires jurisdiction to direct and control the administration; and such juris-

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

8775. Administration revoked on proving will—If after granting administration on an estate, as of an intestate decedent, a will is proved and allowed, the court shall by order revoke the administration, and the powers of such administrator shall cease, and he shall surrender his letters to the court and render an account of his administration within such time as the court shall direct. In such case the executor of the will shall be entitled to sue for and collect all goods, chattels, rights, and credits of the decedent remaining unadministered, and be admitted to prosecute any suit commenced by the administrator before the revocation of his letters. (3699) [7290]

47-20, 22, 49+392.

8776. Administrator with will annexed—In case no executor is named in a will, or the executors named therein are dead or refuse to act, or neglect to qualify, administration with the will annexed shall be granted to such person as would have been entitled thereto if the decedent had died intestate. Such administrator shall have all the powers and perform all the duties of an executor, and may sell and convey real estate where the executor is empowered so to do by the terms of the will: Provided, that if a person named in the will as executor shall qualify before such administrator is appointed, letters testamentary may be issued to him. (3700) [7291]

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

8777. Administrator de bonis non—If a sole or surviving executor or administrator dies, resigns, or is removed before having fully administered an estate, the probate court, with or without notice, shall grant letters of administration with the will annexed, or otherwise as the case may require, to a suitable person to administer the goods and estate of the decedent not already administered. Such administrator shall have the same power and proceed in the same manner as the original executor or administrator. He may prosecute or defend any action commenced by or against the original executor or administrator, and have execution on any judgment recovered in the name of such original executor or administrator. (3701) [7292]

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

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

8778. Special administrator—Whenever the appointment of an executor or administrator is necessarily delayed, or for any reason the probate judge determines that it is necessary or expedient, he may, with or without notice, appoint a special administrator, to take charge of the estate so long as such judge deems it necessary, and no appeal shall be allowed from the appointment of such administrator. (3702) [7293]

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

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

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

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

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

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

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

8784. Powers and duties—A special administrator may collect all personal property of the decedent, care for, gather and secure crops, and preserve all such property for the executor or administrator who may afterwards be appointed, and for that purpose may commence and maintain actions as an administrator. He may, by leave of the court, sell personal property, take charge of the real property, and lease the same for a term not exceeding one year, and do all other

things necessary for the preservation of the estate. But he shall not be liable to an action by any creditor, or be called upon in any way to pay the debts of the decedent. (3703) [7294]

Powers strictly limited as herein prescribed. No power to avoid fraudulent conveyances or to contract generally (71-453, 73-1099; 72-441, 75-699; 92-411, 100-233). Right of appeal (96-484, 105-677). See (108-129, 121-606).

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

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

8785. Inventory, etc.—A special administrator shall make and return a true inventory of all the goods, chattels, rights, credits, and effects of the decedent which come to his possession or knowledge, and account for all such property received by him, whenever required by the court. Upon granting letters testamentary or of administration the power of such special administrator shall cease, and he shall forthwith deliver to the executor or administrator all the property in his hands. The executor or administrator may prosecute to final judgment any action commenced by such special administrator, and may have execution on any judgment recovered in his name. (3704) [7295]

166-320, 207-639, note under § 8784.

REPRESENTATIVES—GENERAL PROVISIONS

8786. General powers and duties.—Every executor and administrator shall be entitled to the possession of all real and personal estate of the decedent which has not been set apart for the surviving spouse or children, and shall be charged with all such property. He shall receive the rents and profits of the real estate until the estate is settled, or until delivered over, by order of the probate court, to the heirs or devisees. He shall keep in tenable repair all houses, buildings, and fixtures thereon which are under his control. He may himself, or jointly with the heirs or devisees, maintain an action for the possession of the real estate or to quiet title to the same. (3705) [7296]

Pending administration an executor or administrator may recover possession of realty in the possession of an heir without showing that such recovery is necessary for the purposes of administration (81-121, 97-648; 97-509, 104-962). He may sue for the possession of realty without an order of court (22-249; 33-220, 224, 224-383). In action to determine adverse claims, plaintiff's administrator properly substituted as plaintiff (102-256, 113-689). The statute is not operative in favor of the executor until he has proved the will (16-509, 460). The title to realty vests immediately in the heir or devisee on the death of the ancestor with right of possession until the executor or administrator asserts his right under the statute (14-65, 49; 25-22, 25; 26-259, 261, 2-945. See 29-418, 13-197; 34-330, 336, 26-9; 38-179, 183, 36-451; 85-152, 156, 84-433; 91-121, 123, 97-648; 92-310, 100-47). The representative has no title to or interest in the realty save only the privilege to claim the possession during administration (29-418, 420, 13-197). A representative may lease the realty but only for the term of administration (31-70, 16-490; 42-427, 429, 44-313). He may recover for trespass to the realty if he takes possession (29-418, 13-197; 32-81, 19-391). Formerly he could not maintain an action to quiet title before taking possession (14-65, 49). Adverse possession of an ancestor is not interrupted during a reasonable time for the appointment of an administrator (45-545, 48-407). Ejectment will lie against a representative in possession of the realty (83-445, 86-450). The title to personalty vests in the representative on his appointment and he has a right to reduce it to his possession; not in his own right, however, but as a trustee, and for a particular purpose (61-552, 554, 64-47; 89-303, 94-869). He may dispose of it without an order or license of the court (25-22, 24). Jurisdiction of district court to restrain execu-

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

166-320, 207-639, note under § 8784.

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

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

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

8787. Liability—Collection of debts, etc.—No executor or administrator shall make profit by the increase, nor suffer loss by the decrease or destruction without his fault, of any part of the personal estate, but he shall account for the excess when he sells for more than the appraisal, and not be responsible for the loss when he sells for less, if such sale appears to be beneficial to the estate. He shall not be accountable for debts due decedent which remain uncollected without fault on his part, but where he neglects or unreasonably delays to raise money by collecting debts or selling real or personal estate, or neglects to pay over the money in his hands, and by reason thereof the value of the estate is lessened, or unnecessary costs or interest accrues, or the persons interested suffer loss, the same shall be deemed waste, and the executor or administrator shall be charged in his account with the damages sustained. He shall not purchase any claim against the estate he represents, and where he pays less than the full amount of a claim he shall charge in his account only the sum actually paid. (3706) [7297]

Liable for not collecting debts (25-22, 25). Liable for interest on trust funds used for his personal advantage (62-408, 65-74). The bona fide payment of a debt due a person dying intestate, made to the sole heir at law of the deceased, will, if equity requires it, operate as a discharge of the debtor from liability to a subsequently appointed administrator (61-552, 64-47). Loss of assets (133-422, 158-703).

8788. Allowances to executors, etc.—Every executor, administrator and guardian shall be allowed all necessary expenses in the care, management, and settlement of the estate, including proper and reasonable fees paid to attorneys, and for his own services such fees as are provided by law or fixed by the court; but when the decedent, by his will, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless by an instrument in writing, filed in the probate court, he renounces all claim for compensation provided by the will. When costs are allowed against an executor, administrator or guardian, in any proceeding in any court, he shall pay the same out of the estate, as an expense of administration, and the same shall be allowed to him in his administration account; whenever a person named as executor in any will or codicil defends such will or codicil, either for the purpose of having it admitted to probate, sustained as the will of decedent making lawful disposition of his estate, or establishing the intent of the testator, such court may allow out of the estate of decedent to such person, whether successful or not, his reasonable fees and expenses, reasonable attorneys' fees and the necessary disbursements of such proceeding.

Provided, that costs, disbursements and attorneys' fees paid or incurred in actions or proceedings in court shall not be allowed if it appear that such actions

or proceedings were prosecuted or resisted without just cause. (R. L. '05 § 3707, G. S. '13 § 7298, amended '21 c. 210 § 1).

Allowance for costs (29-295, 13+131). Attorney's fees denied in proceeding to charge estate of deceased executor (76-132, 78+1039). A representative who is not guilty of wilful default, misconduct or gross negligence in the management of his trust is entitled to compensation (62-408, 65+74). There can be no legitimate charges of administration when there is no estate to administer (57-109, 58+682). Apportioning compensation of joint executors (136-204, 161+497).

8789. Representative may resign—A representative may resign his trust at any time, but such resignation shall not be effectual for any purpose until the court shall have examined and allowed his final account, and made an order accepting such resignation. (3708) [7299]

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

8790. Removal—Whenever a representative becomes insane or otherwise incapable of discharging his trust or unsuitable therefor, or has mismanaged the estate, or has failed to file an inventory of his account, or to perform any order or decree of the probate court, or has absconded, the court may remove him. (3709) [7300]

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

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

8791. Accounting by administrator of deceased representative—Whenever a sole or surviving representative dies, his executor or administrator, immediately upon his appointment, shall file in the probate court an account of the administration of the decedent, together with a petition for the allowance of such account and the discharge of the bondsmen of such deceased representative. Such petition shall be heard and account examined in the same manner and on the same notice as is provided by law for the final settlement of administration accounts and distribution of estates. But if such estate has not been fully administered by the decedent, the bondsmen shall not be discharged or relieved from liability until a successor is appointed and qualified. (3710) [7301]

76-132, 78+1039.

8792. Foreign executor, etc., may act, when—An executor, administrator, or guardian appointed in another state or country, upon filing for record with the register of deeds of the proper county an authenticated copy of his letters or other record of his appointment, may assign, release, satisfy, or foreclose any mortgage, judgment, or lien, belonging to the estate represented by him, on real or personal property, in the same manner as such representative appointed in this state could do. Such foreign representative may act by his attorney in fact, appointed by power executed in the manner required by law for a conveyance, and filed for record with the register of the county where such act is performed. (3711) [7302]

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

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

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

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

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

INVENTORY AND APPRAISAL OF ESTATES

8794. Inventory to be returned—Within three months after his appointment, every executor and administrator shall make and return to the court a verified inventory and appraisal of all the real and personal estate of the decedent which shall have come to his possession or knowledge. Such property shall be classified therein as follows: 1. Real estate. 2. Furniture and household goods. 3. Wearing apparel and ornaments. 4. Stock in banks and other corporations. 5. Mortgages, bonds, notes and other written evidence of debt. 6. All other personal property. (R. L. '05 § 3712; G. S. '13 § 7305, amended '19 c. 385 § 1)

8795. Appraisal—The property inventoried shall be appraised by two or more disinterested persons appointed by the court for that purpose, and if any part of such property is situated in any other county the court may, in its discretion, appoint appraisers in such other county. The appraisers shall set down opposite each item of the inventory, in figures, the value thereof in money, and foot up by itself the amount of each class, and forthwith deliver such inventory and appraisal, certified by them, to the executor or administrator. (3713) [7306]

SETTING ASIDE HOMESTEADS, ETC.

8796. Petition—After the inventory has been returned to the court, the surviving spouse, or in case there be none the children, or when they are minors their guardian, may petition the court to set aside the homestead and assign the personal property allowed by law. Such petition shall show the right of the parties, and, if made by or for the children, their names and ages, a description of the homestead claimed, and of the personal property selected, and the appraised value thereof. (3714) [7307]

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

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

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

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

8797. Order—Upon the filing of such petition, if it appears that the petitioner is entitled to have the homestead set aside and such allowance of personal property made, the court shall make an order setting apart such homestead and assigning such personal property, and shall enter upon the inventory the items so allowed. The property so set aside shall be delivered by the executor or administrator to the person entitled thereto, and shall not be treated as assets in his hands. (3715) [7308]

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

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

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

COLLECTION OF ASSETS

8798. Compounding claims—When a debtor of a decedent is unable to pay his debts in full, the executor or administrator may, with the consent of the court, compound with such debtor on receipt of a fair and just dividend of his effects. (3716) [7309]

8799. Foreclosure of mortgages—When any mortgagee of real estate, or any person to whom a mortgage is assigned, dies without having foreclosed such mortgage, all the interest in the mortgaged premises conveyed by such mortgage and the debt secured thereby shall be considered as personal assets in the hands of the executor or administrator; and he shall have the same right to foreclose the mortgage or collect the debt as the decedent could have had if living, and he may complete any proceeding commenced by decedent for such purpose. (3717) [7310]

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

8800. Release, redemption, purchase at sale—When redemption is made, or a sale of the premises had, by virtue of a power of sale contained therein or otherwise, the executor or administrator shall receive the money paid, and execute any necessary satisfaction, release, or receipt. If, upon foreclosure sale, the mortgaged premises are bid in by the executor or administrator for such debt, he shall be seized of the same for the persons who would have been entitled to the money had the premises been redeemed or purchased at such sale by some other person. (3718) [7311]

8801. Legal title of real estate to vest in guardian under certain circumstances—Any real estate purchased by an executor or administrator as such at a foreclosure sale, or sale on execution for the recovery of a debt due the estate, shall be held, reported, and may be sold and conveyed as the personal estate of the decedent; and if not so sold it shall be assigned and distributed to the same persons and in the same proportions as if it had been part of the personal estate of the decedent, but the legal title of all real estate so acquired, or in any other manner whatever acquired, by a foreign executor, administrator or guardian, shall vest in such executor, administrator or guardian, who shall represent the interest of all parties concerned, and shall have full power of disposition over such real estate. (R. L. § 3719, amended '11 c. 345 § 1; '15 c. 40 § 1) [7312]

8802. Property fraudulently conveyed—Whenever the property of a decedent available for the payment of his debts is insufficient to pay the same in full, the executor or administrator may recover any property, real or personal, which said decedent may have disposed of with intent to defraud his creditors, or by conveyance which for any reason is void as to them. And upon the application of a creditor and the payment of or security for such part of the expenses as the court shall direct, such representative shall prosecute all actions necessary to recover the property so disposed of. (3720) [7313]

Inapplicable to special administrator (71-453, 73+1099). Not exclusive. Creditor may proceed independently (79-299, 303, 82+589). Replevin held to lie (24-383). Cited (46-380, 382, 49+186; 81-107, 108, 83+469). Creditor may proceed independently (139+509). Cited (118-514, 137+291).
120-311, 149-240, 183+287.

8803. Same—Disposal of recovered property—All real estate recovered as provided in § 8802 shall be sold under license from the court, for the payment of debts, in the same manner as if the decedent had died seized thereof, and the proceeds of all personal estate recovered as aforesaid shall be appropriated for payment of the debts in the same manner as other assets in the hands of the executor or administrator. (3721) [7314]

8804. Complaint for embezzlement, etc.—If any executor or administrator, heir, legatee, creditor, or other person interested in the estate of any deceased person, complains to the probate court, in writing, that any person is suspected to have concealed, embezzled, carried away, or disposed of any money, goods, or chattels of the decedent, or that such person has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings which contain evidence of or tend to disclose the right, title, interest, or claim of the decedent to any real or personal estate, or any claim or demand, or any last will and testament of the decedent, the court may cite such suspected person to appear before it, and may examine him on oath upon the matter of such complaint. (3722) [7315]

8805. Refusal of person cited to appear—If the person so cited refuses to appear and submit to such examination or to answer such interrogatories as may be put to him touching the matter of such complaint, he shall be deemed guilty of contempt, and punished therefor according to law. All such interrogatories and answers shall be in writing, signed by the party examined, and filed in the probate court. (3723) [7316]

8806. Embezzlement before letters issue—If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the personal estate of a decedent, such person shall be liable, in an action by the executor or administrator for the benefit of such estate, for double the value of the property so embezzled or alienated. (3724) [7317]

8807. Property in hands of coroner—Whenever personal property of a decedent comes into the hands of any coroner, and there is no proper person to receive it, he shall immediately return an inventory of all such property to the probate court. (3725) [7318]

8808. May be sold, when—Proceeds, how disposed of—If no one entitled to such property demands the same within six months, the coroner shall report that fact to the court, which may order the same sold at public auction by such coroner upon such notice as it directs. The coroner shall sell the same as directed and make report thereof. He shall be allowed his reasonable expenses for the care and sale of the property, and deposit the remainder of the proceeds of such

sale with the county treasurer in the name of the decedent. The treasurer shall give the coroner duplicate receipts therefor, one of which he shall file with the county auditor and the other in the probate court. In case an executor or administrator shall qualify within six years from the time of such deposit, the treasurer shall pay the same to said executor or administrator. (3726) [7319]

CLAIMS AGAINST ESTATES

8809. Order limiting time to present claims—Upon granting letters testamentary or of administration the court shall make an order limiting the time for creditors to present claims against the estate, and fixing the time and place when and where proofs will be heard and such claims examined and adjusted. The time so limited shall not be more than one year, nor less than six months, unless it shall appear by affidavit that there are no debts, in which case the limitation may be three months: Provided, that when it shall appear from the petition for letters that the decedent left no property except his homestead and such personal estate as is allowed by law to the surviving spouse or minor children, no order in respect to claims need be made. (3727) [7320]

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

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

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

8810. Order published—Three weeks' published notice of such order shall be given, and the last publication shall be made within six weeks after the order is filed. (3728) [7321]

8811. Extension of time for cause—For cause shown, and upon notice to the executor or administrator, the court, in its discretion, may receive, hear, and allow a claim when presented before the final settlement of the administrator's or executor's account, and within one year and six months after the time when notice of the order was given. (3729) [7322]

Allowance of claim after time limited discretionary. Relief should be freely granted when no injury can result to innocent parties and administration will not be delayed (24-134; 34-296, 25+631; 42-54, 43+692; 46-92, 48+460; 47-281, 50+197; 67-51, 69+609, 908; 79-257, 82+580; 90-172, 175, 95+1110. See 171 Fed. 1, 96 C. C. A. 107). Court has jurisdiction to set aside a final decree of distribution to allow a creditor to file a claim (89-440, 95+211). Showing to be made on application. Compliance with § 8812 (46-92, 48+460). Limitation of one year and six months (61-361, 366, 63+1069; 77-59, 61, 79+651). Mode of reviewing order (24-134; 28-381, 10+209; 72-434, 75+700). Discretionary upon apparent merit (123-58, 142+945). Laches and no abuse of discretion (133-174, 157+1075; 145-346, 177+355; 152-279, 188+326).

162-63, 202+60, note under § 8812.

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

8812. Claims, how presented or barred—All claims against the estate of a decedent, arising upon contract, whether due, not due, or contingent, must be presented to the court for allowance, within the time fixed by the order, or be forever barred: Provided, that contingent claims arising on contract, which do not become absolute and capable of liquidation before final settlement, need not be so presented or allowed. Claims presented for allowance shall be itemized, and be verified by an affidavit of the claimant or his agent or attorney showing the balance due, that no payments have been made thereon that are not credited, and that there are no

offsets thereto known to the affiant. Any such claim may be pleaded as an offset or counterclaim in any action brought against the claimant by the executor or administrator. If the claim presented be contingent, or not due, the particulars thereof shall be stated. (3730) [7323]

1. In general—Inapplicable to claims ex delicto (55-111, 56+583. See 84-381, 383, 87+941; 65-162, 167, 67+987); to claims arising out of administration, including funeral expenses (46-526, 49+286); or where a guardian has been appointed for a mentally incompetent person (86-395, 90+1051). Debts to be allowed and paid out of the estate of a deceased person must be such as were incurred, or such as arise on obligations entered into, by him. Obligations incurred by the representative are not such (52-1, 5, 53+1015). Demand for whole or part of estate is not (111-352, 127+11). Claim by third person that he is owner of property in hands of administrator is not (179 Fed. 137). Compliance with statute cannot be waived by representative (79-377, 82+669). It is the duty of the representative to pay taxes on the estate but they are probably not claims which are required to be presented and allowed under this section (see 28-13, 8+830; 35-215, 28+256; 63-61, 65+119; 92-411, 414, 100+233).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The evidence sustains the verdict of the jury finding

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

2. Contingent claims—A contingent claim is one where the liability depends on some future event, which may or may not happen, and therefore makes it wholly uncertain whether there ever will be a liability (61-361, 364, 63+1069; 75-481, 489, 78+95; 85-134, 136, 88+439). A contingent claim which does not become absolute and capable of liquidation during administration need not be presented to the probate court and is not allowable therein (61-361, 63+1069; 61-520, 63+1072; 66-246, 68+1063; 72-232, 75+220). See 114-34, 129+1049. If a contingent claim becomes absolute after the time limited for presenting claims but before final settlement application must be made for leave to file or the claim will be barred (85-134, 88+439; 90-172, 176, 95+1110; 137 Fed. 42, 69 C. C. A. 22). A contingent claim which becomes absolute before the expiration of the time limited for presenting claims must be presented or it will be barred (75-481, 489, 78+95). Under former statutes (25-466; 26-433, 4+1113; 48-174, 200, 50+1117).

3. Effect of not presenting—Claims required to be presented are forever barred if not presented (84-381, 383, 87+941). No action can be maintained thereon against heirs (47-382, 50+367; 65-107, 108, 67+893). After an estate is closed an action will not lie in the federal courts on a claim provable under this section (23 S. Ct. 52, 187 U. S. 211, 47 L. Ed. 147).

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

5. Held not provable—A claim arising on tort (55-111, 56+583); a claim for funeral expenses (46-526, 49+286); a claim against a person under guardianship (86-395, 90+1051); a claim against sureties on a guardian's bond (61-361, 63+1069); a claim for taxes and insurance payable by a lessee (61-520, 63+1072); a claim for an assessment on stock (66-209, 68+974; 70-519, 73+416); a claim against a surety on an assignee's bond (72-232, 75+220; 77-59, 79+651); a claim against a stockholder for the enforcement of his constitutional liability (56-420, 57+1065; 80-432, 436, 83+377); a claim against a stockholder on bonus stock (48-174, 200, 50+1117); a claim against a surety on an administrator's bond (25-466); a claim for money paid at the request of an executor to relieve an estate from an incumbrance (62-1, 53+1015). Liability of estate of surety on administrator's bond (114-34, 129+1049). Claims paid without having been allowed (130-462, 153+876). Reimbursement for necessities (137-115, 162+1060; 141-406, 170+229). What constitutes a "claim" (144-89, 174+442). Presentation (145-348, 177+356).

8813. Offset against claims—The executor or administrator, on or before the time set for hearing claims, shall file in the court a statement, in writing, of all offsets which he claims in favor of the estate against any of the claims filed, and the court, in its discretion, may allow the executor or administrator additional time for so filing an offset, and may set a day for hearing both the claim and offset. (3731) [7324]

164-57, 204+546.

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

8815. Actions against executors or administrators—No action at law shall lie against an executor or administrator for the recovery of money upon any demand against the decedent allowable by the probate court, and no claim against a decedent shall be a charge upon his estate unless presented to the probate court for allowance within five years after his death: Provided, that nothing in this section shall be construed as preventing an action to enforce a lien existing at the date of decedent's death, nor as affecting the rights of a creditor to recover from the next of kin, legatees, or devisees to the extent of assets received. (3733) [7326]

Inapplicable to claims not provable in the probate

court (55-111, 112, 56+583; 61-520, 624, 63+1072; 90-172, 175, 95+1110). Liability of estate of surety on administrator's bond not affected (114-34, 129+1049). Claim of third person that he is owner of property in hands of administrator not within section (179 Fed. 137). Meaning of action (103-325, 115+173). Allowance of claim not presented within five years erroneous but not subject to collateral attack (71-371, 74+148). Five year limitation (72-232, 234, 75+220). Limitation applies though no administration had (89-303, 306, 94+869). Proviso cited (61-361, 363, 63+1069). Claim held barred (80-385, 390, 83+348. See 63-296, 300, 65+464). Lien existing at time of decedent's death (39-28, 38+634). Cited (65-246, 247, 68+18; 86-140, 144, 90+378).

158-14, 196+655, note under § 8812.

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

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

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

8816. Order adjudicating claim—Effect—Interest—Upon the adjudication of any claim, the court shall make its order allowing or disallowing the same, which order shall have the effect of a judgment for or against the estate, as the case may be. Such order shall contain the date of adjudication, the amount allowed, the amount disallowed, and shall be attached to the claim with the offsets, if any. The claim allowed shall bear interest at the legal rate. (3734) [7327]

The allowance of a claim has the effect of a judgment against the estate and is conclusive on all persons interested therein (25-22; 40-296, 300, 41+1033; 47-118, 49+684; 47-193, 197, 48+608, 49+665; 79-299, 304, 82+589), and the statute of limitations does not run on the original claim (79-299, 304, 82+589). Claim defined (111-352, 127+11). The court may vacate an allowance of a claim to allow a contest thereon (32-142, 19+651. See 53-529, 55+738). Interest (70-140, 143, 72+965). Cited (61-361, 365, 63+1069; 96-342, 105+66). U. S. circuit court decree on claim against estate (125-363, 147+246; 141-406, 170+229; 145-346, 177+356).

8817. Balance against claimant, how collected—When a balance is allowed against a claimant and in favor of the estate, and no appeal is taken within the time provided therefor, the court may issue execution for such balance, which shall be collected in the same manner as an execution issued out of the district court. (3735) [7328]

8818. Actions pending against a decedent—All actions pending against a decedent at the time of his death may, if the cause of action survives, be prosecuted to final judgment, and the executor or administrator may be admitted to defend the same. If judgment be rendered against the executor or administrator the court rendering it shall certify the same to the probate court, and it shall be paid in the same manner as other claims against the estate. (3736) [7329]

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

8819. Administrator may sue—Balance—Nothing in this chapter shall prevent an administrator or executor from beginning any action, or from prosecuting to final judgment any action begun by the decedent, for the recovery of any debt or claim. The defendant in such action may set off any claim he has against the estate, instead of presenting the same to the probate court, and, if the final judgment be in his favor, the same shall be certified by the court rendering it to the probate court and shall be considered the true balance. (3737) [7330]

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

8820. Joint debtor—Estate, how liable—Whenever two or more persons are indebted on any joint contract, or upon a judgment founded on a joint contract, and one of them dies, his estate shall be liable therefor, and the amount thereof may be allowed by the probate court the same as though the contract had been joint and several or the judgment had been against him alone. (3738) [7331]

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

8821. Judgment on appeal to be certified to probate court—Upon the determination of an appeal from the allowance or disallowance of any claim or part thereof, the district court shall certify to the probate court the decision or judgment rendered therein. (3739) [7332]

PAYMENT OF DEBTS AND LEGACIES

8822. Time limited for settlement of estates—At the time of granting letters testamentary or of administration, the court shall make an order allowing the executor or administrator reasonable time, not exceeding eighteen months, for the settlement of the estate. But for good cause shown by the executor or administrator, such time may be extended, not exceeding one year at a time. (3740) [7333]

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

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

8823. Time, when another administrator is appointed—When an executor or administrator dies, resigns, or becomes incapable of discharging his trust, and another administrator is appointed, the probate court may extend the time for the settlement of the estate beyond the time originally allowed, not exceeding one year at a time, and not exceeding one year beyond the time which the court might by law allow to the original executor or administrator, as provided in § 8822. (3741) [7334]

8824. Executor, etc., not disqualified to act, when—After the expiration of the time finally limited, an executor or administrator shall not be disqualified from doing anything necessary to settle the estate which he might have done before, unless removed by the probate court, but he shall not be relieved from any liability or penalty incurred by his failure to settle the estate within the time limited. (3742) [7335]

8825. Real estate may be sold, when—When there is not sufficient personal estate in the hands of the executor or administrator to pay all the debts and legacies and the allowance to the widow and minor children, the probate court may, on petition of the executor or administrator, order the sale of the real estate, or so much thereof as may be necessary, to pay the same. (3743) [7336]

The personal property is the primary fund for the payment of debts, legacies, etc., while the real estate is only a secondary fund for that purpose (25-22, 25; 26-259, 261, 2-945). Allowance of widow pending administration may be paid out of the rents and profits of the real estate (64-315, 67+69). When the estate cannot be equitably divided the entire estate, including the third of a surviving spouse, may be sold (93-489, 101+797). Waiver of homestead exemption (122-1, 141+851).

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

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

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

8827. Order of payment when estate insolvent—If the assets which the executor or administrator has received and which can be used for the payment of debts are not sufficient therefor, he shall, after paying the expenses of administration, pay the debts against the decedent in the following order:

1. Funeral expenses.
2. Expenses of last sickness.
3. Debts having preference by laws of the United States.
4. Taxes.
5. Debts duly proven to be due to other creditors:

Provided, that no debt or claim for which the creditor holds a mortgage, pledge, or other security shall be so paid until the creditor shall have first exhausted his security or shall have released or surrendered the same. (3745) [7338]

Preferences allowed (30-209, 214, 14+895; 35-215, 217, 28+256; 61-520, 525, 63+1072). Exhaustion of mortgage security (70-77, 78, 72+826). Liability of representative for funeral expenses (46-526, 49+286). After preferred claims are paid all other creditors are to be paid pro rata (62-135, 140, 64+155). Cited (139+300). 120-142, 146-6, 177+658.

8828. No preference to be given—No preference shall be given in the payment of any debt over any other debts of the same class, nor shall a debt due and payable be entitled to preference over debts not due. (3746) [7339]

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

8829. Payment in case of an appeal—Whenever an appeal is taken from the decision of the probate court allowing or disallowing any claim, in whole or in part, the executor or administrator shall not pay the same until it has finally been determined on such appeal, but he shall retain in his hands sufficient assets to pay the same in like proportion as other claims of the same class. (3747) [7340]

8830. Further order of distribution, when—If the whole of the debts and legacies were not paid by the

first distribution, and the whole assets have not been distributed, or if other assets afterward come to the hands of the executor or administrator, the court may, from time to time, make further order for the distribution of the assets. (3748) [7341]

8831. Payment of secured debts—Whenever a creditor of the deceased has a mortgage, pledge, or other security for his debt, the executor or administrator may, without proof thereof being made to the court, pay such debt or the interest thereon, as the same shall mature; but no such payment shall be made unless the same shall appear to be for the best interests of the estate, and the probate court, after hearing application therefor, shall so order. Such order may be made with or without notice, as the court may deem best. (3749) [7342]

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

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

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

8832. Provisions in will as to payment of debts—When the testator makes provision by his will, or designates the estate to be appropriated for the payment of debts, expenses of administration, or family expenses, they shall be paid according to the provisions of the will, and out of the estate thus appropriated. If the provisions made by the will, or the estate appropriated, is not sufficient to pay such debts and expenses, so much of the estate, real and personal, as is not disposed of by the will, if any, shall be appropriated according to the provisions of the law for that purpose. (3750) [7343]

162-63, 202+60, note under § 8831.

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

142-283, 171+928.

DISPOSAL OF REALTY BY REPRESENTATIVES

8834. Real estate of decedent may be sold when—The real estate of a decedent including the homestead of such decedent or ward may be sold under license of the probate court in the following cases:

1. When the personal estate of a decedent is insufficient to pay his debts, the legacies, if any, and the expenses of administration, or the court shall deem it for the best interests of the estate and of all persons interested therein; provided that such homestead shall not be sold except on the ground that it is for the best interests of all persons interested therein and with the written consent of the life tenant therein; the proceeds of any such sale of a homestead shall be considered real estate and distributed to the same persons and in the same share as if it had remained real estate.

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

3. When the income of the estate of a ward is insufficient to maintain him and his family, or to educate the ward when a minor; or when it appears that it would be for the benefit of the ward that his real estate or any part thereof should be sold, and the proceeds thereof put at interest or invested in other real estate, in first mortgages on real estate, or bonds of the United States or of this state, or municipal or school district bonds of this state, or in the improvement or protection of any other real estate of the ward. (R. L. '05 § 3751, G. S. '13 § 7344, amended '21 c. 268 § 1)

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

122-1, 141+851.

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

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

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

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

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

8835. Real estate mortgaged or leased, when—Whenever it shall appear that the interests of all persons concerned will be better protected by mortgaging or leasing such real estate, including the homestead of such decedent, than by selling the same, the court may, by license, authorize the mortgaging or leasing thereof, including the homestead of such decedent, and may authorize the representative to agree to the extension or renewal of an existing mortgage or lease. (R. L. '05 § 3752, G. S. '13 § 7345, amended '23 c. 295 § 1)

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

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

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

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

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

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

fied petition to the court appointing him, setting forth what personal estate has come into his hands; the disposition thereof; how much, if any, remains undisposed of, the debts outstanding against the decedent or ward, so far as can be ascertained, and, if it be the estate of a decedent, the legacies unpaid, if any; a description of all the real estate including the homestead of a decedent, and the condition and value of the several tracts; the names and residences, so far as known, of all persons interested therein, and, if unknown, a statement of that fact; and facts showing grounds for such sale, mortgage or lease; if a sale, mortgage or lease of a homestead is petitioned for the petition shall set forth the grounds and reasons why it will be for the best interests of all persons interested in said homestead that the same be sold, mortgaged or leased. The Court is empowered to license the representative to mortgage the decedent's homestead to pay off existing incumbrances, but in such case the petition to mortgage must be executed, or assented to in writing by the surviving spouse, if any, and the remaindermen or their guardian in case they are minors, or their representative in case they are deceased. (R. L. '05 § 3753, G. S. '13 § 7348, '21 c. 268 § 2; '23 c. 295 § 2)

Debts outstanding may be stated in gross (19-117, 85). Meaning of "condition" of the several tracts (19-338, 292). A general petition covers the third of a surviving spouse (55-274, 56+823). Petition must be made within reasonable time after allowance of claims (40-296, 41+1033. See 54-448, 454, 56+53; 80-385, 390, 83+348). If a representative is licensed to sell by a court having jurisdiction a proper petition is not essential to a valid sale (83-354, 86+342).

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

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

8837. Notice—Order to show cause—If it appears from such petition that license ought to be granted for any of the reasons set forth therein, the court shall make an order directing all persons interested in such estate to appear at a time and place therein named, and show cause, if any there be, why license should not be granted as prayed. Such order shall be served upon all persons interested in such estate by three weeks' published notice. (3754) [7349]

8838. Proceedings on hearing—At the time and place fixed in such order, upon proof of the due publication thereof, the court shall hear all proper evidence for or against the prayer of such petition. When satisfied that a sale of the whole or some portion of the real estate is necessary or for the best interests of the estate or ward, the court may order the sale of the whole or so much and such part of the real estate described in the petition as it deems necessary or beneficial, and if satisfied that the interests of the estate will be better subserved by mortgaging or leasing such real estate it may authorize such mortgage or lease. (3755) [7350]

8839. Whole estate may be sold, when—Whenever it appears to the court that it is necessary to sell a part of the real estate of a decedent or ward, and that by a sale of such part the residue, or some specified part or piece thereof, would be greatly injured, the court may license a sale of the whole estate, or such part thereof as may be judged necessary, and most for the interest of all concerned. (3756) [7351]

93-489, 101+797.

8840. Bond to prevent sale—License shall not be

granted if any of the persons interested in the estate shall give bond to the judge of probate in such sum and with such sureties as he directs and approves, conditioned to pay all the debts, legacies, and expenses of administration, so far as personal property of the estate is insufficient therefor, within such time as the court may direct. But this section shall not apply to cases wherein it appears to the court that it would be for the best interests of the estate of the decedent, and of all the persons interested therein, that the said real estate or any part thereof, not specifically disposed of by the will of the deceased, be sold. (3757) [7352]

8841. License to sell, mortgage or lease—Sale on contract for deed—The license shall describe the land to be sold, mortgaged, or leased. It may specify the order in which several tracts shall be sold, and shall direct whether the land shall be sold at private sale or public auction. If any part of such real estate has been devised, and not charged in such devise with the payment of debts, it shall direct that part not so devised to be sold first, and, if any lands have been sold by heirs and devisees, it shall direct the remainder to be sold first. When the petition is to mortgage lands, the license shall fix the maximum amount and rate of interest for which the mortgage may be given, and specify for what purpose the proceeds shall be used. Such license shall be and remain in force until revoked by the court; Provided, that no sale at private sale shall be made or confirmed under said license after one year from its date, unless the land so sold shall have been reappraised under order of the court within thirty (30) days next before such sale.

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

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

8842. Bond and oath before sale—Every representative licensed to sell or mortgage real estate shall give bond before sale, as provided hereafter in the subdivision on probate bonds. Before fixing the time and place of sale, if at public auction, and before making the sale, if at private sale, he shall take and subscribe an oath that in disposing of the estate which he is licensed to sell he will use his best judgment in fixing on the time and place of sale, and will exert his

utmost endeavors to dispose of the same advantageously to all persons interested therein, which oath shall be filed in the probate court before confirmation of sale. (3759) [7354]

Sufficiency of bond (51-97, 52+1079; 66-454, 458, 69+330). Effect on appeal of no finding by trial court as to filing of bond (33-220, 222, 22+383). Sufficiency of oath (11-384, 278; 50-105, 52+381). Proof of filing oath (45-380, 47+1134). Additional security and not a substitute bond (135-347, 160+859).

8843. Sale at public auction—Notice—When the license directs a sale at public auction, three weeks' published notice of the time and place of sale shall be given, and the court may order further notice whenever deemed advisable. The notice shall describe the land with reasonable certainty. Such sale shall be in the county where the lands are situated, between 9 o'clock a. m. and the setting of the sun on the same day. When the lands are contiguous, and lie in two or more counties, the notice may be given and sale made in either. (3760) [7355]

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

8844. When at private sale, must be appraised—If, on hearing, the court is satisfied that it will be for the best interests of the estate to sell the whole or some part of the land at private sale, it shall so order. But before any land shall be sold at private sale it shall be reappraised by two or more competent persons to be appointed by the court, who, before entering upon their duties, shall take and subscribe an oath to faithfully appraise such land at its full cash value. Such oath and the order of their appointment shall be filed with the court. The court may in such case also order such notice as it deems advisable to be given by the representative before sale is made. No such land shall be sold at private sale for less than its appraised value. (3761) [7356]

8845. Part sold at public and part at private sale—On the hearing of a petition for sale of lands, the court may license the sale of a part of the land at public auction, and of another part at private sale. In either case the license shall describe the land to be sold thereunder. (3762) [7357]

8846. Guardian may join with sane spouse for transfer of real estate—The homestead of a ward having a spouse shall not be sold or mortgaged by his guardian unless such spouse shall join in the deed or mortgage, nor shall the sale or mortgage of any land of a ward by his guardian in any manner affect the interests or estate of such spouse therein, unless he or she shall join in the conveyance; provided, that if the spouse of such ward has been adjudged insane or incompetent to transact his or her business, or manage his or her estate, it shall not be necessary for such insane or incompetent spouse to join in such conveyance, but a guardian of such insane or incompetent spouse shall first be appointed by the probate court of the proper county, and such guardian shall join in such conveyance after first being authorized so to do by order of such probate court. (R. L. '05 § 3763, G. S. '13 § 7358, amended '15 c. 258 § 1)

8847. Representative not to purchase—No representative making the sale shall directly or indirectly purchase or be interested in the purchase of any part of the real estate so sold, and all sales made contrary to the provisions of this section shall be void. (3764) [7359]

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

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

8848. Adjournment of sale—The executor, administrator, or guardian may adjourn the sale from time to time, as he may deem for the best interests of all persons concerned, but not exceeding three months in all. Each adjournment shall be publicly announced at the time and place fixed for the sale, and, if for more than one day, further notice thereof shall be given by posting or publication, or both, as the circumstances will admit. (3765) [7360]

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

8849. Sale of interest held under contract—Whenever a decedent dies entitled under contract of purchase to any interest in land, such interest may be sold in the same cases, and in like manner, as lands of which he died seized. And in case there are any payments thereafter to become due upon such contract, such sale shall be made subject thereto, and shall not be confirmed until the purchaser shall execute a satisfactory bond to the administrator, for the benefit and indemnity of all persons entitled to the interest of decedent in such lands, conditioned for the payment of all sums unpaid on the contract. (3766) [7361]

8850. Same—Upon the confirmation of such sale, the administrator shall assign the contract, which shall vest in the purchaser, his heirs and assigns, all the right, title, and interest of all persons entitled to the interest of the decedent in such land, and all the right and interest of all such persons in such contract, and the purchaser shall, by such sale, acquire all rights and remedies against the vendor of such land as decedent would have, if living. The proceeds of such sale shall be disposed of, in all respects, in the same manner as the proceeds of sales of lands of which the decedent died seized. (3767) [7362]

8851. Sales, etc., subject to charges—When the estate of a decedent or ward is in any way liable for any charge upon the lands thereof, by mortgage or otherwise, such lands may be sold by the representative, subject to such charges, but the sale shall not be confirmed by the court until the purchaser executes a bond to the representative, approved by the court, conditioned to save said estate and such representative harmless, or unless such charge shall be first satisfied and released by the owner or holder thereof. The representative may sell the whole or any part of the interest of the decedent or ward in any tract of land charged with any incumbrance, and upon release of the tract so sold may apply the proceeds of such sale or sales to the payment of the incumbrance until the same is fully paid, and he shall account only for the balance remaining as proceeds of the estate. (3768) [7363]

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

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

8852. Sales of land by foreign administrator, etc.—In all cases where no executor, administrator, or guardian has been appointed in this state, a foreign executor, administrator, or guardian may file an authenticated copy of his letters in the probate court of any county in this state in which there is real estate of such decedent or ward, after which he may be licensed by such court to sell or mortgage real estate, as in the case of resident representatives; and such foreign representatives may act by resident attorney in fact, duly appointed for that purpose. (3769) [7364]

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

8853. Damages for taking for public use—Whenever the land of a decedent or ward is desired for any public purpose by any person or corporation having the power of eminent domain, the representative may agree upon and adjust the damages that would result from a taking thereof, and, upon payment of such damages being made, may convey the land, or any right therein, so desired. But no such agreement or conveyance shall be valid unless approved by the probate court. (3770) [7365]

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

8854. Approval, how obtained—Such approval may be obtained upon filing in such court a verified petition of the person or corporation and the representative, setting forth the name of the decedent or ward, the name of the person or corporation with whom the agreement is made, a description of the land taken and for what purpose, the amount to be paid, and that such amount is the full value of the land taken, and the damages to the remainder. The agreement, signed by the parties, shall be attached to the petition. (3771) [7366]

8855. Petition, approval, effect—Upon the filing of such petition and agreement, the court shall hear and determine the same without notice, and, after hearing, the court, if satisfied that the agreement is just and equitable, shall make an order approving the same, and the petition, agreement, and order shall be recorded. A certified copy of such order and agreement may be filed for record with the register of deeds of the county wherein such land is situated, and when so filed shall be notice to everybody. (3772) [7367]

8856. Report of sale—Resale—Confirmation—The representative making a sale shall immediately report in writing his proceedings under the license to the court, with due proof that notice of sale has been given. Thereupon the court shall inquire into the regularity and fairness of the sale, and may examine any person under oath touching the same. If it appears that there has been any irregularity or unfairness, or that the sum bid is less than the value, or that a sum sufficiently in excess of such bid to warrant a new sale may be obtained, it shall vacate such sale and order another, notice of which shall be given, and the sale conducted in all respects as if no previous sale had taken place. But if it appears that the first sale was regularly and fairly conducted, and that the sum bid was not disproportionate to the value of the property, or not sufficiently so to warrant the expense of a new sale, the court may confirm such sale and order a conveyance under it. (3773) [7368]

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

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

8857. Sale not to be avoided, when—In case of an action relating to any estate sold by a representative in which an heir or person claiming under the decedent, or a ward or person claiming under him, shall contest the validity of the same, it shall not be avoided on account of any irregularity in the proceedings if it appears:

1. That the representative was licensed to make the sale by the probate court having jurisdiction.

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

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

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

5. That the premises were sold in the manner required by the order of license, and the sale confirmed by the court, and that they are held by one who purchased them in good faith. (3774) [7369]

Whenever the records of a probate court are silent or wanting in material particulars, as to the five essentials of a valid sale as herein prescribed, the sale may be collaterally attacked within the time limited by § 8859 (95-225, 103+885). Otherwise if the record shows affirmatively compliance with such requirements (61-18, 63+1). If a representative is licensed to sell by a court having jurisdiction the sale cannot be impeached collaterally for errors in the proceedings which culminated in the license (89-253, 256, 94+679, and cases cited under subd. 1 below). Substantial compliance with the statute relating to sales is sufficient. This section is to be liberally construed as a curative act. The probate records relating to sales must be liberally construed and titles depending on such records sustained notwithstanding any mere irregularities or technical omissions therein as to the five essentials (66-454, 69+330; 83-354, 356, 86+342). Subd. 1 (11-384, 278; 28-202, 9+731; 29-27, 39, 11+136; 37-330, 33+907; 45-380, 382, 47+1134; 83-354, 86+342; 89-253, 256, 94+679). Subd. 2 (11-347, 247; 51-97, 102, 52+1079; 66-454, 458, 69+330; 95-153, 103+897). Subd. 3 (45-380, 382, 47+1134). Subd. 4 (38-325, 37+449; 49-210, 51+915; 51-97, 52+1079; 95-225, 103+885; 95-153, 103+897). Subd. 5 (26-487, 493, 5+359; 95-153, 103+897). 122-7, 141+853; 150-290, 185+252.

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

8858. Validity not affected by irregularity—If the validity of a sale is drawn in question by a person claiming adversely to the title of the decedent or the ward, or claiming under a title that is not derived from or through the decedent or ward, the sale shall not be void on account of any irregularity in the proceedings, if it appears that the representative was licensed to make the sale by a probate court having jurisdiction, and that he did accordingly execute and acknowledge in legal form a deed for the conveyance of the premises. (3775) [7370]

26-487, 493, 5+359.

8859. Limitation of actions to recover—No action for the recovery of real estate sold by an executor or an administrator hereunder shall be maintained by any heir or other person claiming under the decedent, unless it is begun within five years next after the sale. And in case of real estate sold by a guardian no action for its recovery shall be maintained by or under the ward, unless it is begun within five years next after the termination of the guardianship: Provided, that minors and others under legal disability to sue when the right of action first accrues may begin such action at any time within five years after the disability is removed. (3776) [7371]

Constitutional (24-288; 47-527, 50+698). A statute of repose and retroactive (95-153, 103+897). Inapplicable to party in possession defending title derived from ward against the affirmative attack of one relying on a guardian's sale (30-107, 14+462). Applicable to void as well as irregular sales. To set the statute running it is sufficient if there is a sale in fact by a representative licensed by the proper court (19-338, 292; 37-1, 32+784; 95-153, 103+897). Not limited to actions of ejectment (77-1, 7, 79+494). A conveyance held sufficient to set the statute running (95-153, 103+897). Formerly the statute included an exception in favor of non-residents (33-220, 22+383; 95-153, 103+897). What is administrator's sale (105-30, 117+235). Cited (26-487, 493, 5+359; 45-380, 383, 47+1134).

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

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

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

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

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

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

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

8861. Representative or guardian authorized to convey real estate in certain cases—When any person under contract, in writing, to convey any real estate, dies or becomes insane or incompetent before making the conveyance, the probate court may direct the representative or guardian, or the guardian of any minor who may take the vendor's interest in such real estate or any part thereof by descent or devise from such decedent, to convey such real estate to the person entitled thereto in all cases where such decedent, if living, or such ward, if sane or competent, might be compelled to convey. (R. L. '05 § 3777, G. S. § 7376, amended '15 c. 223 § 1)

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

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

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

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

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

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

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

8867. Petition—Notice of hearing—On presentation of a petition by any person claiming to be entitled to such conveyance, setting forth a description of the land and the facts upon which such claim for conveyance is based, the probate court shall fix a time and place of hearing, and cause three weeks' published notice thereof to be given. (3778) [7377]

8868. Hearing and action thereon—At the time appointed for hearing after due proof of publication of notice, the court shall hear all proper evidence both for and against granting the petition, and, if satisfied that the conveyance should be made, it shall order the representative to execute such conveyance to the petitioner; otherwise it shall dismiss the petition. (3779) [7378]

40-236, 41+977.

8869. Conveyance—Effect—Order recorded—If no appeal is taken from such order within the time limited therefor by law, or if the same is affirmed on appeal, the administrator or guardian shall execute the conveyance as directed, and a certified copy of the order shall be recorded with the deed in the office of the register of deeds in the county where the land lies. Such conveyance shall be as effectual to pass the estate

contracted for as if executed by the decedent while living, or the ward while sane or competent. (3780) [7379]

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

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

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

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

8870. Effect of recording—Where no conveyance has been executed, the record of a certified copy of the order in such register of deeds' office shall be as effectual to give the person entitled to the conveyance a right to the possession of the lands and to hold them as though the conveyance had been made pursuant to the decree. (3781) [7380]

8871. Heirs of purchaser may prosecute proceedings—If the person to whom the conveyance was to be made dies before the commencement of proceedings, or before the conveyance is completed, any person who would have been entitled to the estate under him, as heir, devisee, or otherwise, in case the conveyance had been made according to the terms of the contract, or the executor or administrator of such person, for the benefit of the person so entitled, may commence such proceedings or prosecute the same if already commenced; and the conveyance shall thereupon be so made as to vest the estate in the persons so entitled to it or in the administrator for their benefit. (3782) [7381]

8872. Platting by representatives—Whenever a guardian shall deem it for the best interests of his ward that the land of such ward be platted, or an executor or administrator shall think it necessary or beneficial to all persons interested to plat any tract of land in his charge as such, he may, with the approval of the probate court, cause a plat thereof to be made, and may execute and file the same for record, in like manner and with like effect as if he were the owner. (3783) [7382]

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

ACCOUNTING—DISTRIBUTION—FINAL SETTLEMENT

8873. Account to be rendered, when—Every executor and administrator shall render an account of his administration within the time allowed for the settlement of the estate, and at such other times as the court may require, until the estate is wholly settled. (3784) [7383]

Conclusiveness of intermediate accountings (78-325, 81+7). Jurisdiction of probate court to compel an accounting exclusive. Not lost by discharge of representative leaving estate unadministered (83-215, 86+1). 126-321, 148+282. 159-90, 198+141.

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

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

8874. Partial distribution—If the court shall deem it proper, a portion of the estate may be assigned to the persons entitled thereto, before the final settlement, and, to that end, the court may require the administrator or executor, when necessary, to settle his account to date, and may make such other orders as may be proper. (3785) [7384]

151-374, 186+699.

212+902, note under § 8873.

8875. Same — Finality — Bond—Such assignment shall be final both as to the persons entitled to said estate and as to the proportions in which they are entitled to the same. All subsequent assignments of such estate shall be to the same persons and in the same proportions as determined by such decree. But no distribution of any part of an estate shall be made until the expiration of the time limited by the court for filing and allowance of claims, nor until a bond in at least double the amount of the claims, filed against said estate and remaining unpaid, is given to the judge of probate, with such surety as the court directs, to secure payment of the debts of the deceased, unpaid legacies and expenses of administration. (3786) [7385]

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

142-99, 170+916.

212+902, note under § 8873.

8876. Attorney given lien upon legacy for services rendered—When any heirs, devisee, or legatee has appeared by attorney, said attorney may acquire a lien upon the distributive share or legacy of such heirs, devisee or legatee in any estate for compensation for such services as he may have rendered respecting such distributive share, by serving upon the executor or administrator, before such decree is made, as notice of his intent to claim a lien for his agreed compensation, or the reasonable value of his services, and filing such notice, with proof of service thereof, in the probate court. The amount of such lien shall be determined and allowed by the probate court at the time of hearing a petition for partial or general distribution of the estate in which such lien has been filed, and any money or property decreed therein to such heir or legatee shall be decreed subject to such lien. Either party may appeal to the district court in the manner provided by section 7492, General Statutes of 1913 [8985], from such determination of the probate court. The executor or administrator shall satisfy said lien out of any money or property so decreed, and for that purpose may, by order of the probate court, sell so much of such property as will satisfy said lien claim and the expenses of sale. (R. L. '05 § 3787, G. S. '13 § 7386, amended '19 c. 61 § 1)

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

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

8877. Petition for final settlement and distribution—When the estate is fully administered, the representative shall apply to the court to fix a time and

place for adjusting and allowing his final account, and to assign the residue of the estate to the persons entitled thereto. The final account shall be filed with the petition. (3788) [7388]

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

8878. Notice not necessary, when—Order for hearing and notice—Upon filing said petition, the court shall make an order fixing a time and place for hearing the same, and cause three weeks' published notice thereof to be given, and may order such further notice as it deems advisable; provided that, when death of the deceased is caused by the wrongful act or omission of any person or corporation and such deceased leaves no estate other than the claim for the injury caused by the same act or omission and a personal representative of the decedent has been appointed by the Probate Court only for the purpose of maintaining an action on said claim or recovering the same, such order or notice thereof need not be published. (R. L. '05 § 3789, G. S. '13 § 7389, amended '21 c. 62 § 1)

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

8879. Proceedings on hearing—On hearing such petition, the court may examine the representative on oath and hear all proper testimony offered, touching on account, or relating to, the distribution of the estate. If all taxes, including personal property taxes, assessed against the estate, have been paid so far as there were funds to pay them, and the account is found correct, it shall be settled and allowed, if incorrect, it shall be corrected under the direction of the court, and then settled and allowed. Upon such settlement, the court shall determine who are entitled to the residue of the estate, and shall then or thereafter make its decree, assigning such residue to the persons entitled thereto by law. (R. L. § 3700, amended '07 c. 434, § 1) [7390]

The expenses of administration, including funeral expenses, are to be allowed hereunder (46-526, 528, 49+286). Guardians ad litem need not be appointed for minor heirs or legatees interested in the estate (32-158, 20+124). In settling the accounts of representatives the court should be governed by broad principles of equity. The representative should be permitted to show the real nature of his transactions and their fairness, unimpeded by technical rules (91-299, 305, 97+1046). Conclusiveness of order allowing a final account, including items allowed on intermediate accountings (78-325, 81+7). An item in an account held sufficiently specific (91-299, 97+1046). Expenses of hunting for heirs or next of kin or for looking after one's own interest in the estate are not allowable as expenses of administration (57-21, 58+684). An administrator held chargeable with profits of his attorney in purchasing and selling a life estate in the real estate for which the administrator was trustee (94-433, 103+217). Surety on administrator's bond (126-445, 148+302; 136-126, 161+392).

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

8880. Decree of distribution—Contents—Certified copies—Record of—In such decree the court shall name the distributees and describe the proportion or part to which each is entitled. A certified copy of any decree of distribution of real estate may be filed for record with the register of deeds of any county in which any of the lands therein described are situated. The register of deeds shall enter in his reception book the name of the decedent as grantor, and the names of the distributees as grantees, making a separate entry for each person so taking lands in such county as grantee under the decree:

Provided, that before a certified copy of any decree of distribution of real estate is recorded in the office

of the register of deeds, it shall be presented to the county auditor of the county in which such real estate is situated, who shall transfer the same, and note upon every such certified copy "Transfer entered," over his official signature. Unless such statement is made upon such certified copy, the register of deeds shall refuse to record the same. Provided further, that whenever said decree of distribution embraces real estate or other property situated in more than one county, each of the registers of deeds of said several counties shall not unless otherwise requested by the party filing the instrument, enter upon the records of his office descriptions therein contained of real estate or other property appearing from the face of said decree not to be situated in the county in which he holds office; he shall indicate omissions herein prescribed in the record by the words "and other property situated in..... County or Counties, Minnesota," inserted in the record at the points where the omissions occur. (3791) [7391] (Amended '27, c. 395)

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

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

2. Necessity of—A decree of distribution is necessary to close the administration and relieve the representatives (58-29, 59+956), and to charge the representatives for non-payment of legacies (32-163, 20+127). It is not necessary to transfer the title of realty (25-22, 25); or of personalty (89-303, 94+869). A representative may pay over funds to the party entitled thereto as heir without an order of court. Such an order simply protects him and his sureties from subsequent claims (81-434, 84+332. See 91-299, 305, 97+1046).

3. Powers of court—In making distribution the court has power to determine the succession of the property of the deceased subject to administration and the rights of creditors. It determines who are the heirs or devisees and what part of the estate is, after administration, to be assigned to the share of each (34-330, 336, 26+9; 69-136, 138, 72+59; 71-255, 268, 73+967). In making distribution the court necessarily determines the legal effect of a will (84-353, 355, 87+944). Its jurisdiction for such purposes is exclusive (30-277, 282, 15+245; 95-455, 104+301). The construction of the will by the court on final distribution is only for the purposes in hand. It is a conclusive adjudication that the persons to whom the distribution is made are the only persons entitled to the property distributed as devisees or legatees under the will and of that fact only. For any other purposes or upon any other questions it is coram non judge (71-255, 268, 73+967). The court has no power to determine the rights of one claiming through the acts of an heir or devisee the real estate to which such heir or devisee succeeds (34-330, 26+9; 44-526, 47+171; 69-136, 138, 72+59; 71-241, 244, 73+859). But such a claimant may appear in the probate court, demand an accounting, and oppose proceedings to divest the heir or devisee of his share and to vest the same in others as distributees (45-429, 47+133; 71-241, 73+859). The court has power to determine a claim to the estate under a contract with the decedent to make a will in favor of the claimant (69-136, 72+59).

4. Effect of decree—The effect of a decree of distribution is to transfer the title to the personality and the right of possession of the realty from the personal representative to the distributees, devisees or heirs. The property then ceases to be the estate of the deceased person, and becomes the individual property of the distributees, with full right of control and possession and with the right of action for it against the personal representative if he does not deliver it to them (25-22, 25; 61-91, 92, 63+255; 84-289, 294, 87+783). If the court has jurisdiction the decree of distribution is conclusive on all persons interested in the estate whether under disability or not, or whether in being or not. Administration proceedings are in rem, acting directly on the res, which is the estate of the deceased. The decree is a judgment in rem binding on all the world and not subject to collateral attack (26-259, 262, 24+945; 62-29, 64+99; 72-32, 36, 74+1020; 75-321, 324, 78+3; 86-140, 147, 90+378; 93-233, 101+68. See 46-61, 63, 48+454; 83-98, 103, 85+937, 86+444). The decree is not evidence of heirship as against strangers (46-61, 48+454). The effect of a decree of distribution is to divest the probate court of jurisdiction of the property distributed and prior to 1903 c. 195 it was held that it divested the probate court of jurisdiction of the estate (37-160, 33+912; 40-296, 41+1033; 61-91, 63+255; 84-289, 87+783; 23 S. Ct. 52, 187 U. S. 211, 47 L. Ed. 147).

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

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

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

8881. **Decree after discharge of executor, etc.**—Where an executor or administrator has been discharged, and by neglect or other cause no final decree assigning the residue of the estate has ever been entered, an heir, devisee, legatee, or any one claiming by, through, or under any one of them, may petition the court for the assignment of the residue to the persons entitled thereto by law, and the court shall make an order for hearing, which shall be published according to law. If on hearing it appears that such decree should be entered, the court shall determine the rights of all persons to the residue, and make decree accordingly, assigning such residue to the persons entitled thereto. (3792) [7392]

8882. **Opening decree of distribution made without notice**—Any decree of distribution made without due notice may be set aside, for want of such notice, by the court in which it was entered, upon the petition of any person interested in the property which it purports to assign. Three weeks' published notice of hearing upon such petition shall be given. And if it shall appear that all debts of the decedent, and all claims upon his estate, have been paid or provided for, the court shall assign such estate to the persons entitled thereto. (3793) [7393]

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

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

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

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

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

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

8886. **Discharge of representative**—Whenever the probate court shall find, upon petition, that any executor, administrator, or guardian has fully executed his trust, and has paid over to the persons entitled thereto all money and other property in his hands as such, said court may enter an order finally discharging him and his bondsmen from further liability. (3794) [7399]

See following section.

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

145-163, 176+178.

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

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

8888. **Deposit with county treasurer**—If it shall appear that any part of the money on hand has not been paid over because the person entitled thereto cannot be found in the state, or his place of residence is unknown, or has not appeared and claimed and received his share of the estate according to the decree of distribution within one year after the date of the decree, or for any good and sufficient reason the same has not been paid over, the court may direct the petitioner to deposit the same with the county treasurer, taking duplicate receipts therefor, one of which he shall file

with the county auditor, and one in the probate court. Upon filing such receipts the petitioner shall be entitled to the discharge provided for in § 8886. (R. L. § 3795, amended '09 c. 57 § 1) [7401]

8889. Subsequent disposal of fund—Money so deposited shall be credited to the county revenue fund; but upon application made to the probate court within twenty-one years after such deposit, and upon personal notice to the county attorney and county treasurer, it may direct the county auditor to issue to the person entitled thereto his warrant for the amount thereof. No interest shall be allowed or paid thereon, and if not claimed within said twenty-one years no recovery thereof shall be had. (3796) [7402]

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

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

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

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

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

ADVANCEMENTS

8895. What are, how treated—Any estate, real or personal, given by an intestate in his lifetime, to a child or other lineal descendant, when expressed in the gift or grant as an advancement or charged in writing by the intestate as such, or so acknowledged by the child or other descendant, shall be deemed an advancement to such heir, and treated as part of the estate of such intestate in the distribution of the same, and shall be taken by such heir toward his share of the estate. When the amount advanced exceeds the share of such heir he shall receive nothing in the distribution, but shall not be required to refund any part of such advancement. When the amount so received is less than his share, he shall be entitled to enough more to make up his full share. (3797) [7404]

79-377, 379, 82+669.

125-115, 145+785.

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

8896. How considered — Value, how estimated—When such advancement is made in real estate the value thereof shall, for the purpose of distribution, be considered a part of the real estate to be divided, and when it is in personal estate as a part of the personal estate; and when in either case it exceeds the share of real or personal estate, respectively, that would have come to such heir, he shall not refund any part of it, but shall receive so much less out of the other part of the estate as will make his whole share equal to that of other heirs entitled to a like amount with him. When the value of the estate so advanced is expressed in the conveyance, or in the charge thereof made by the intestate, or in the acknowledgment of the heir receiving it, that shall be its value in the distribution; otherwise, it shall be estimated according to its value when given, as nearly as can be ascertained. (3798) [7405]

8897. When heir dies before intestate—When a child or other lineal descendant, to whom an advancement has been made, dies before the intestate, leaving issue, such advancement shall be taken into consideration in the distribution of the estate, and the amount thereof shall be allowed by the representatives of such heir, the same as though such advancement had been made directly to them. (3799) [7406]

8898. When to be determined—Value, how determined—All questions as to advancements made or alleged to have been made by the intestate to any heir shall be heard and determined by the court at the time of final settlement, and every such advancement shall be specified in the decree distributing and assigning the estate. For the purpose of determining what proportion any one who has received an advancement is entitled to, the court shall ascertain the value of the entire residue of such estate, by ordering an appraisal, or in such other manner as it may deem best. (3800) [7407]

148-461, 152+621.

PARTITION

8899. When granted—When, upon the hearing of the petition for a decree of distribution, the estate to be assigned to two or more persons is in common and undivided, and the respective shares are not separated and distinguished, partition may be made on the petition of any person interested. Upon such petition be-

ing made, the court may appoint three disinterested persons as referees to make partition, and shall issue a warrant to them for that purpose. Unless otherwise directed by the court, the referees shall make partition of all the real estate situated within the state; but if there be real estate in different counties, the court may appoint different referees for each county, and in such case the real estate in each county shall be divided separately, as if there were no other estate to be divided by the court. Such referees shall have power, but shall not be required, to divide specific tracts. (3801) [7408]

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

8900. Shares, how set out—The several shares in the real and personal estate shall be set off to each individual, in proportion to his right as determined by the court, by metes and bounds or descriptions, so that the same can be easily distinguished, unless any two or more of the parties interested consent to have their shares set off so as to be held by them in common and undivided. (3802) [7409]

8901. Indivisible estate—Assignment—When any such real estate cannot be divided without prejudice or inconvenience to the owners, the court may assign the whole to one or more of the parties entitled to share therein, who will accept it, and pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction. In such case, the true value shall be ascertained by appraisers appointed by the court for that purpose. (3803) [7410]

8902. Indivisible tract—When any tract of land or tenement is of greater value than either party's share in the estate to be divided, and cannot be divided without injury to the same, it may be set off by the referees to either of the parties who will accept it, and pay or secure to one or more of the others such sums as the referees award to make the partition equal, and they shall make their award accordingly. Such partition shall not be confirmed until the sums so awarded are paid to the parties entitled thereto or secured to their satisfaction. (3804) [7411]

8903. Guardians and agents—Notice—Before partition is made the court shall appoint guardians for all minors and insane persons interested in the estate to be divided for whom guardians have not already been appointed, and discreet persons as agents of parties who reside out of the state and are not otherwise represented. The warrant shall recite such appointments, and the referees shall give notice to all persons interested in the partition, their guardians or agents, of the time when they will proceed to make partition. (3805) [7412]

8904. Report—Confirmation—Decree—The referees shall make written report of their proceedings to the court; and the court may, for sufficient cause, set it aside, and appoint other referees, or direct the same referees to make another partition. When the report is confirmed it shall be recorded, and the court shall make a decree assigning the estate to the persons entitled thereto in accordance therewith. (3806) [7413]

8905. Expenses of partition—If at the time of the partition or distribution the executor or administrator has retained sufficient effects in his hands which may lawfully be applied to that purpose, the expenses of such partition or distribution may be paid by him, when it appears to the court just and equitable, and not in-

consistent with the intention of the testator. But if there be no such effects the expenses shall be paid by the parties interested, in proportion to their respective shares or interests in the premises, as shall be determined by the court. If any person neglects to pay the sum so assessed against him, the court may issue execution therefor in favor of the person entitled thereto. (3807) [7414]

8906. Agent for non-resident—When an estate is assigned by decree of court, as herein provided, to any person residing out of the state and having no agent therein, and it is necessary that some person be authorized to take possession and charge of the same for his benefit, the court may appoint an agent for that purpose, as well as to act for such absent person in the partition. Such agent shall give bond to the judge, to be approved by him, faithfully to manage and account for such estate, and the court may examine and allow his account, and award a reasonable sum out of the estate for his services and expenses. (3808) [7415]

PROBATE BONDS

8907. Bonds, when required, conditions—Every representative, before entering upon the duties of his trust, shall give a bond in such sum as the court directs, with sufficient sureties, conditioned for the faithful discharge of all the duties of his trust according to law. (3809) [7416]

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

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

8908. When executor is residuary legatee—When the executor of a will or administrator with the will annexed, is the sole or residuary legatee thereunder, instead of the bond required by § 8907 he may give bond in such sum and with such sureties as the court shall direct, conditioned only for the payment of debts and legacies of the testator, and in such case he shall not be required to return an inventory. (3810) [7417]

8909. Joint or separate bonds—When two or more persons are appointed joint executors, administrators, or guardians, the court may take a separate bond from each, or a joint bond from all. (3811) [7418]

8910. Bond before sale—Before any representative shall proceed under a license to sell or mortgage real estate, he shall give a bond in such amount and with such sureties as the judge shall require and approve, conditioned for the faithful discharge of his duties under said license, and to account for and pay over according to law all moneys received on account thereof. (3812) [7419]

8911. Guardians and sureties discharged, when—Whenever a guardian's annual account is adjusted and settled, and it appears that the proceeds of any sale or mortgage of real estate have been included in such account, if the original general bond given on his appointment is found to be then sufficient, or, if insufficient, upon the filing and approval of a new and sufficient general bond, the court, by its order, may cancel any sale bond previously given, provided that when a new bond is given the sureties thereon shall be liable for the full amount of personalty shown by such account as settled to be in the guardian's hands. (3813) [7420]

135-346, 160+859.

8912. Bonds, run to whom—How approved and prosecuted—All bonds authorized or required by law in proceedings in the probate court, or in respect of any estate under administration therein, save as other-

wise expressly provided, shall be approved by the probate judge, and shall run to such judge and his successors in office; and, in case of breach of any condition thereof, such bond may be prosecuted by leave of said court in the name and for the benefit of any person interested. (3814) [7421]

Statute of limitations runs on bond from final decree of distribution (83-199, 86+18). Leave of court a prerequisite to an action against sureties on a guardian's bond (96-161, 104+833). Leave of court not a part of the cause of action and need not be alleged in complaint (61-261, 369, 63+1069; 83-199, 201, 86+18). Who may maintain action on bond (see 16-494, 447; 22-261; 23-295; 24-116; 26-93, 1+841; 28-150, 9+626; 31-271, 17+618). An administrator de bonis non is an "interested" person and may sue on his predecessor's bond (32-158, 20+124. See, also, 98-151, 107+961). Legatees cannot sue on bond until after order of court directing payment of legacies (32-163, 20+127). When a bond is joint and several an action will lie against only one of the obligors (26-93, 1+841). Right to present claim on bond to probate court for allowance (26-433, 4+1113). Jurisdiction of district court. Liability of the sureties. (98-151, 107+961)

137-100, 162+1054.

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

8913. Additional bonds — Whenever any probate court becomes satisfied that the bond of any representative is insufficient, it may require an additional bond on its own motion or upon the petition of any one interested in the estate of the decedent or ward; and a refusal or failure to furnish such bond within a reasonable time shall be sufficient cause for removal. (3815) [7422]

96-161, 104+833.

8914. Sureties on bonds, how and when discharged— Upon application of any surety on a probate bond to be discharged from further liability as such, the court shall order the principal therein to furnish a new bond within ten days after service upon him of such order. On failure to furnish such new bond, such principal shall be removed, and required to render and settle his account at the earliest practicable time. When the new bond has been given and approved, the surety shall be discharged from liability for any subsequent act or omission of such principal, and the court shall so order. Upon application of such surety, the court shall require the principal, as soon as practicable, to render and settle an account of all his prior doings. (3816) [7423]

8915. Probate court to examine bonds, when—At least once in each year every probate judge shall carefully examine all bonds on file in his office and in force pending the settlement of estates, for the purpose of ascertaining the solvency of the sureties thereon, and, if satisfied that any such bond is insufficient, he shall order an additional bond to be given. (3817) [7424]

GUARDIANS AND WARDS

8916. Appointment of guardians not to be effective under certain conditions—Whenever it appears necessary or convenient, the probate court may appoint a guardian for either the person or estate, or both, of any minor who has no guardian appointed by will, and who is a resident of the county, or who resides without the state and has property within the county; provided, however, that notice shall first be given in such manner as the court may direct to the parents of such minor, if living, and if no parent is living, or if the whereabouts of both parents is unknown, then to the next of kin or custodian of the person of such minor; and provided further that no appointment by the pro-

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

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

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

8917. By whom nominated and appointed—If the minor be under the age of fourteen years, such appointment may be made on petition of a relative or of some other person on behalf of the minor. If above the age of fourteen years, he may nominate his own guardian, who, if approved by the court, shall be appointed. If not so approved, or if the minor resides out of the state, or if, after being duly cited by the court, he neglects for ten days to nominate a suitable person, the court may appoint his guardian in the same manner as if he was under the age of fourteen years. A minor may make such nomination before a justice of the peace, a notary public, or a city or town clerk, who shall certify the fact to the probate court. (3819) [7426]

Nominations by minors over fourteen (77-70, 74, 79+598; 86-224, 231, 90+360, 1133). Appointment when minor is under fourteen may be without notice (81-370, 84+120). 209+640, note under § 8924.

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

8918. When ward attains age of fourteen—When a guardian has been appointed by the court for a minor under the age of fourteen years, the minor at any time after he attains that age, unless such guardian is a testamentary guardian, may select his own guardian, subject to the approval of the court. (3820) [7427]

77-70, 74, 79+598.

8919. Testamentary guardians—Same—The father with the written consent of the mother, and the mother with the written consent of the father, may by will appoint a guardian of their minor children, whether born at the time of making the will or afterwards, to continue during their minority or a less time, and if either parent dies without having appointed a testamentary guardian, the survivor may by will appoint such guardian. Such guardian, within thirty days after probate of the will, or after he has knowledge of his appointment, and in case of appeal within thirty days after final determination of such appeal, shall file with the probate court his acceptance of the trust and give bond to be approved by the court. Thereupon a certificate shall be issued to him, under the hand and seal of the court reciting his appointment by will, his acceptance and qualification. He shall then have the same powers and perform the same duties, with respect to the person and estate of the ward, as a guardian appointed by the probate court. Such guardian shall at all times be subject to the jurisdiction, direction and orders of the probate court, and may be removed by such court for good cause. If any guardian so appointed by will does not accept the trust and qualify within the time limited, he shall be deemed to have renounced the appointment, and the probate court may

then appoint a guardian as in other cases. (G. S. 1894 § 4539, amended '05 c. 256 § 1) [7428]
83-366, 368, 86+351.

8920. Guardian of estate only—The probate court, in its discretion, may appoint a guardian of the estate only of a ward, and commit the custody of such ward to some other person; and the court may, from time to time, direct the guardian to pay to the custodian such sums of money for the maintenance and education of such ward as it shall deem reasonable and proper. (3822) [7429]

8921. Married women may be guardians—A woman shall not be disqualified by reason of her marriage from acting as guardian, and the marriage of a female guardian shall not terminate her guardianship. (3823) [7430]

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

8923. Guardian ad litem—Nothing contained in this chapter shall affect or impair the power of any court to appoint a guardian to protect the interest of any minor interested in any suit or proceeding commenced or to be commenced, or other matter pending therein, at any time. (3825) [7432]

8924. Guardian for insane or incompetent persons—The probate court may appoint a guardian or guardians of any person who, by reason of old age or loss or imperfection of mental faculties, is incompetent to have the management of his property, or one who by excessive drinking, gaming, idleness, or debauchery so spends or wastes his estate as to be likely to expose himself or his family to want or suffering. Such appointment may be made upon the petition of the county board, or of any relative or friend of such person, which petition shall set forth the facts, and be verified by the affidavit of the petitioner that he believes the facts stated to be true. (3826) [7433]

Evidence held sufficient to sustain order of appointment (90-366, 96+1134). Order of appointment held conclusive on *habeas corpus*. Authority of guardian to take ward out of jurisdiction of court (86-310, 90+769). Evidence held to sustain finding that person was, by infirmities of old age, incompetent to manage his property (107-130, 119+791).

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

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

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

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

8925. Notice of hearing—Upon the presentation of such petition the court shall make an order fixing a time and place for hearing the same, and cause personal service thereof to be made upon the person for whom a guardian is sought at least fourteen days prior to the date of such hearing. If such person is an inmate of a state hospital for the insane, a like notice shall be served upon the superintendent of such hospital. Provided, that when such insane or incompetent person or such spendthrift is a resident of this state but cannot be found therein and his whereabouts are unknown and have been unknown for more than one year prior to the presentation of such petition or

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

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

48-58, 60, 50+934.

209+640, note under § 8924.

8926. Hearing—Appointment—At the time fixed the court shall consider all competent evidence offered for and against the petition, and if it appears that a guardian should be appointed the court shall appoint not exceeding two persons as guardian or guardians of his person and estate. (3828) [7435]

48-58, 60, 50+934.

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

8927. Filing copy of petition, notice, etc.—Effect—As soon as the required notice shall have been given to the person for whom a guardian is asked, the petitioner or any person interested may cause a copy of the petition, and of the notice and proof of service thereof, to be filed for record with the register of deeds in any county in which real estate owned by the person proposed to be put under guardianship is situated; and, if a guardian be appointed on such petition, all contracts except for necessities, and all gifts, sales, and transfers of real or personal property, made by the ward after such filing before the termination of the guardianship, shall be void. (3829) [7436]

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

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

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

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

8928. Insane persons—Special guardian—The judge before whom any person examined on a petition for inquiry as to sanity is found to be insane, shall make special inquiry as to his property, and, when he has property within the jurisdiction of the court needing care and attention, shall appoint a special guardian of such property until he is discharged from the hospital for the insane, or a guardian is duly appointed by petition and qualified as required by law. Such guardian, in the performance of his duties, shall be governed by the general laws relating to guardians. (3830) [7437]

8929. How restored—Any person who has been so declared insane or incompetent, or his guardian, relative, or friend, may petition the probate court in which he was declared insane or incompetent to have his right to be restored to capacity judicially determined. Upon filing such petition the court shall fix a day for hearing, and cause personal notice thereof to be given to the guardian, if there be one in the state. Such guardian, relative, or friend, or any other person permitted by the court, may contest the right to the relief demanded. Witnesses may be called and examined at the request of any party interested or by the court on its own motion. If it be found that such person is of sound mind and capable of taking care of himself and his property, the court shall adjudge him restored to capacity; and unless it be a minor, the guardianship shall thereupon cease. (3831) [7438]

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

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

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

8931. Guardian for non-resident—Whenever a person liable to be put under guardianship is a non-resident and has property in this state, any friend of such person, or any one interested in his estate, in expectancy or otherwise, may petition the probate court of any county in which there is any estate of such non-resident for the appointment of a guardian for such absent person; and after such notice to all persons interested as the court shall order, and a full hearing and examination, the court may appoint a guardian. Such guardian shall have the same powers and duties with respect to any estate of the ward within this state, and to the person of the ward, if he comes to reside therein, as are prescribed for other guardians. (3832) [7440]

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

8932. Bond and oath—Every person appointed guardian, before letters are issued to him, shall give bond as hereinbefore provided, and, before entering upon the duties of his trust, he shall take and subscribe an oath to faithfully perform all the duties of such guardian according to law. (3833) [7441]

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

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

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

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

8933. Guardians of minors—General powers—The guardian of a minor shall have the custody of his ward and charge of his education, and the care and management of his estate, unless otherwise specified in his appointment. Unless sooner discharged according to law, he shall continue as such guardian until the minor arrives at full age. But the father and mother are the natural guardians of their minor children, and, being themselves competent to transact their own business and not otherwise unsuitable, they are equally entitled to their custody and the care of their education. If either dies or is disqualified to act, the guardianship devolves upon the other. (3834) [7442]

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

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

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

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

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

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

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

8934. Conditions in order of appointment—The court, with the consent of the person to be appointed guardian of a minor, may insert in the order of appointment conditions in respect to the care, treatment, education, and welfare of the minor not otherwise obligatory. The performance of such conditions shall be a part of the guardian's duties and be covered by his bond. (3835) [7443]

8935. Education of minor—When paid out of estate—Whenever a minor child of a living parent has property sufficient for his maintenance and education in a manner more expensive than such parent can reasonably afford, under all the circumstances, the expenses of the education and maintenance of such minor may be defrayed out of his own property, in whole or in part, as shall be deemed reasonable by the court. (3836) [7444]

152-401, 189-124.

8936. Guardian to make and return inventory—Every guardian, within three months after his appointment, shall make and return to the probate court an inventory and appraisal of all the property, real and personal, belonging to his ward which has come to his possession or knowledge. If the ward be a non-resident at the time of the appointment, the inventory shall include only his property within this state. Such inventory and appraisal shall be made in the same manner as in estates of decedents. (3837) [7445]

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

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

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

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

8938. Management of estate of ward—Every guardian shall manage the estate of his ward economically, applying the income and profits thereof, so far as may be necessary, to the suitable maintenance and support of the ward and his family, if he have one; and, if such income and profits be insufficient for that purpose, the guardian, under license from the court, may sell real estate therefor. (3839) [7447]

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

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

8939. Support and education of ward—The guardian shall pay, out of the estate of his ward, the reasonable charges of his support and education in a manner suited to his position in life and the value of his estate. If the available funds are at any time insufficient to meet such charges, the guardian may advance the same, and be allowed therefor in his account. In case the guardian shall refuse or neglect to provide such

suitable support and education, any third person, at the ward's request, may do so and be reimbursed out of such estate. But all such expenditures, however or by whomsoever made, shall be approved and allowed by the probate court before they shall become a valid charge upon the ward's estate. (3840) [7448]

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

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

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

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

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

8943. Debts of ward, how paid—Every guardian appointed under the provisions of this chapter, whether for a minor or other person, shall pay all just debts due from his ward out of the personal property, if sufficient. If not, then the balance shall be paid from the proceeds of his real estate sold under license from the court. (3841) [7452]

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

135-94, 160-187.

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

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

sides, shall have occasion to deal with property of his ward situated within this state, he may file in the probate court of the county in which such property may be an authenticated copy of his letters, and thereupon he shall be authorized to sue for and recover such property, or to receive and receipt for the same, and, if it be personalty, to remove it from the state, subject, however, to the rights therein of citizens of this state. (3842) [7455]

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

8945. Partition of real estate of ward—When real estate is owned by a ward jointly or in common with others, the guardian may have partition thereof, either by proceedings therefor in the district court, or, in case the guardian and ward are not adversely interested in such real estate, by amicable agreement. In case of such partition by agreement, the probate court, upon approving the same, shall enter its order authorizing the guardian to execute all deeds and other instruments necessary to complete said agreement, and to deliver such papers upon receiving from said other joint or common owners full relinquishment of their interests in that part of said real estate apportioned to the ward. (3843) [7456]

8946. Improvement of real estate—A guardian may, with the approval of the probate court, contract for any improvement of the real estate of his ward, including the erection or maintenance of a line fence or party wall. (3844) [7457]

8947. Investment of funds—Whenever a guardian has funds in his hands belonging to his ward he may petition the probate court, setting forth the estate of his ward, real and personal, and the amount of money which he desires to invest, with the facts upon which such petition is based, and any circumstances tending to show the expediency of such investment. The court, if satisfied that such investment is advisable and for the best interest of the ward, may, without notice, order the guardian to make such investment. (3845) [7458]

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

8948. Annual accounts of guardians—Hearing and settlement—Notice—Every guardian shall render to the court annually a verified account of his guardianship for the preceding year, containing an itemized statement of all property received by him at the beginning or remaining in his hands at the last settlement, what has since been received, what he has expended or invested since his last accounting, and a statement in detail of what remains in his hands, with the estimated value of each item thereof. Whenever it shall appear to the court to be for the best interest of the ward so to do, such court, upon its own motion, may, and upon the request of the guardian or any other person interested, shall, appoint a time for the hearing and settlement of such accounts and cause three weeks' published notice thereof to be given. In all cases wherein the ward or the guardian in his behalf is or has been in receipt of compensation or other allowances or insurance payable or paid by the Federal government or its agencies, the court shall appoint a time for the hearing and settlement of such account, and cause such notice thereof to be given as may be directed by the court. At the time and place of hearing, the court shall examine such account, hear all proper evidence offered in reference thereto, adjust and settle the same, and make an order allowing or disallowing it in whole or in part, and in such order shall specify the amount and description of the per-

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

8949. Final account—Notice—When the disability of any person under guardianship is removed, or he dies or the guardian resigns, the guardian shall render a final account of his guardianship to the probate court, and turn over all property of his ward in his possession to such ward or his legal representative. Upon the filing of such final account, with a petition for its settlement and allowance, the court shall make an order fixing a time and place for hearing thereon, and cause personal service thereof to be made upon said ward, if he is in the state, or in case of resignation, upon the guardian appointed in place of the guardian resigning if there be such newly appointed guardian, at least fourteen days before the date of hearing, and, if the ward be not in the state or is dead, service of said order shall be made by three weeks' published notice. Provided, if said nonresident ward is alive, personal service upon said ward in the state of his residence, or personal service upon the guardian of said ward appointed in the state of the residence of such ward at least fourteen days before the day of hearing shall be sufficient. The proof of the service without the state, as aforesaid, to be by the affidavit of the person making the same and made before an authorized officer having a seal. (R. L. § 3847, amended '13 c. 38 § 1) [7460]

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

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

8950. Order allowing final account—At the time and place so fixed for hearing the court shall examine such account, and hear all proper testimony offered for and against its allowance, and, if satisfied that such account should be allowed in whole or in part, the court shall so order. Upon such allowance the court shall make an order discharging the guardian, and, if no action upon such guardian's bond shall have been commenced within ninety days after such discharge, the court may discharge the sureties on the bond. (3848) [7461]

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

8951. Appointment of special guardian—When there shall be delay in appointing a guardian for the person or estate of a minor, or when it shall appear to the court to be necessary, it may appoint a special guardian for the minor until the cause of the delay or the necessity for such appointment shall cease and a guardian be appointed. Such special guardian may be appointed without notice, and no appeal therefrom shall be allowed. All provisions of law relating to guardians shall apply to such special guardian as far as applicable, and upon the filing and approval of his bond letters of guardianship shall issue to him. (3849) [7462]

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

ian appointed under § 8951 shall institute any proceeding for selling or mortgaging any real estate of his ward or dispose of any of his personal property without license from the probate court. (3850) [7463]

COMMITMENT OF FEEBLE-MINDED, INEBRIATES AND INSANE PERSONS

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

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

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

209+640, note under § 8924.

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

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

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

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

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

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

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

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

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

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

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

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

The District court shall be deemed to have jurisdic-

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

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

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

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

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

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

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

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

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

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

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

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

8968. Proceedings when residence is questioned—Whenever the auditor of the county to which costs and expenses have been certified denies that such person has a legal residence in his county, he shall send such certificate with a statement of his claim in reference thereto to the state board of control who shall immediately investigate and determine the question of residence and certify its findings to the auditor of each of said counties. Such decision shall be final unless an appeal is taken therefrom within thirty days after its filing. Such appeal may be to the district court of the county from which such person was committed. ('17 c. 344 § 16)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

142-285, 171+929.

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

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

142-285, 171+929.

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

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

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

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

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

APPEALS

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

trict court from a judgment, order, or decree of the probate court may be taken by any party aggrieved in the following cases:

1. An order admitting a will to probate and record or refusing the same.
2. An order appointing an executor, administrator, or guardian, or removing him, or refusing to make such appointment or removal.
3. An order authorizing or refusing to authorize real property to be sold, mortgaged, or leased, or confirming or refusing to confirm such sale, mortgaging, or leasing.
4. An order allowing or disallowing the claim of a creditor against the estate, or disallowing a counterclaim, in whole or in part, to the amount in either case of twenty dollars or more.
5. An order or decree by which a legacy or distributive share is allowed or payment thereof directed, or such allowance or direction refused, when the amount in controversy exceeds twenty dollars.
6. An order setting apart property, or making an allowance for the widow, the widow and children, or children, or refusing the same.
7. An order allowing the account of an executor, administrator, or guardian, or refusing to allow the same, when the amount allowed or disallowed exceeds twenty dollars.
8. An order vacating or refusing to vacate a previous order, judgment, or decree alleged to have been procured by fraud, misrepresentation, or through surprise or excusable inadvertence or neglect.
9. An order or decree directing or refusing a conveyance of real estate.
10. A final judgment or decree assigning the residue of the estate of a decedent.
11. An order denying an application for the restoration to capacity of any person under guardianship. (3872) [7490]

Subd. 1 (32-443, 21+474; 47-171, 177, 49+697; 96-142, 104+765; 117-247, 125+980). Subd. 2 (25-347, 354; 32-466, 21+555; 83-58, 85+917; 83-366, 86+351; 96-142, 104+765, overruled by 1901 c. 147). Subd. 3 (19-117, 85; 91-115, 97+647). Subd. 4. Allowing claim (20-442, 395; 28-381, 382, 10+209; 72-434, 75+700; 111-352, 127+11). Disallowing claim (51-241, 53+463; 62-321, 64+822; 76-132, 134, 78+1039). 136-329, 162+356; 142-287, 171+930. Subd. 5 (45-323, 324, 47+973; 72-165, 166, 75+123; 192+342); Subd. 6 (79-267, 271, 82+635. See 45-323, 47+973). Subd. 7 (65-335, 336, 68+44; 84-493, 87+1012; 97-130, 106+338; 97-150, 106+344). Subd. 8 (30-202, 204, 14+887; 32-142, 19+651; 32-155, 157, 19+973; 33-94, 95, 22+10; 71-250, 73+966; 82-324, 327, 84+1017, 86+333; 93-350, 101+496; 138-99, 163 +1031). Subd. 9 (see 33-94, 22+10). Subd. 10 (72-165; 75+123; 75-2, 3, 77+420, overruled by 1899 c. 27). Subd. 11 (83-58, 85+917, overruled by 1901 c. 147). Appeal from a part of a final order or judgment (20-442, 395; 84-493, 87+1012; 93-98, 100+473. See 96-342, 105+66). 133-124, 155+906; 141-131, 169+539; 150-291, 185+254.

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

Order appointing an administrator is final and appealable. 160-217, 198+910.

Cases appealed from probate court are tried de novo in district court. 160-217, 199+910.

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

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

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

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

8984. Who entitled to appeal—An appeal under § 8983, subd. 4 may be taken by the representative or by the creditor, and when the representative declines to appeal in such case any person interested in the estate as creditor, devisee, legatee, or heir may appeal in the name of such representative and by the same proceedings: Provided, that the person appealing in such case shall give a bond, conditioned to secure the estate from damages and costs, and also to secure the intervening damages and costs to the adverse party. In all other cases the appeal can be taken only by a party aggrieved, who appeared and moved for or opposed the order or judgment appealed from, or who, being entitled to be heard thereon, did not appear and take part in the proceedings. (3873) [7491]

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

2. **In other cases**—An aggrieved party is one who, as heir, devisee, legatee or creditor, has what may be called a legal interest in the assets of the estate and their due administration (35-193, 28+219; 82-96, 97, 84+653. See 81-370, 84+120). A debtor of the estate is not such a party (35-193, 28+219). An heir may appeal although he did not appear and take part in the proceedings. Upon the death of such heir a special administrator may perfect the appeal (96-434, 105+677. See 106-454, 119+405). An executor, propounding will by which he is nominated, may appeal from order denying probate (117-247, 135+980).
126-450, 148+303; 129-249, 152+541; 136-327, 162+356.

8985. Appeal, how and when taken—No appeal shall be effectual for any purpose unless the following requisites are complied with by the appellant within thirty days after notice of the order, judgment, or decree appealed from:

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

2. In case any person other than the representative appeals, he shall execute a bond, with sureties, to the judge, conditioned that he will prosecute his appeal with due diligence to a final determination, pay all costs and disbursements, and abide the order of court therein. But no appeal from an order, judgment, or decree shall be taken after six months from the entry thereof. (3874) [7492]

Notice may be served on the attorney of the proponent of a will (32-443, 21+474). Amendment of notice held unauthorized (76-323, 324, 79+176). Notice must specify the order, judgment or decree appealed from (96-142, 104+765). Notice construed as an appeal from the whole of the order. Notices to be construed liberally (96-342, 105+66). Defect in bond not jurisdictional (38-9, 35+473). Undertaking sufficient (35-307, 29+131). Notice of appeal from decree assigning residue to devisee properly served on executor alone (106-454, 119+405). Within what time appeal may be taken (111-352, 127+11).
132-176, 156+285; 133-20, 157+709.

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

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

8986. Return—Upon filing such notice of appeal

and proof of service, the probate court shall forthwith make and return to the district court a certified transcript of all the papers and proceedings upon which the order, judgment, or decree appealed from is founded, together with copies of the order, judgment, or decree, the notice of appeal with proof of service thereof, and the bond. The district court, when necessary, may require a further or amended return. (3875) [7493]

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

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

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

8987. Appeal suspends order—Such appeal shall suspend the operation of the order, judgment, or decree appealed from until the appeal is determined or the district court shall otherwise order. The court shall have discretionary power, for cause shown, to require the appellant to give further security for the payment of damages which may be awarded against him in consequence of such suspension, in case he fails to obtain a reversal of the order, judgment, or decree so appealed from. But nothing herein contained shall prevent the probate court from appointing special administrators or special guardians, or to prevent special administrators or guardians appointed prior to such appeal from continuing to act as such. (3876) [7494]

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

149-87, 182+915.

8988. Notice of trial, etc.—Upon appeal the cause may be brought on for trial by either party on eight days' notice, which shall be served upon the attorney of the adverse party, or, if he have none, shall be deposited for him with the clerk of the district court. On or before the first day of the term for which the cause is noticed, the appellant shall cause it to be entered on the calendar; otherwise the appeal shall be dismissed. When placed on the calendar, the cause shall be tried and determined in the same manner as if originally commenced in such court. (3877) [7495]

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

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

8989. Proceedings in certain cases—Trial—If the appeal be from the allowance or disallowance of a claim or counterclaim, the district court, on or before the second day of the term, shall direct pleadings to be made up as in civil actions, defining the issues to be tried. Such appeal shall then be heard and tried in the same manner as other issues of fact are heard and tried in such court. All other appeals shall be tried by the court without a jury, unless the court orders the whole issue or some specific question of fact involved therein to be tried by jury or referred. (3878) [7496]

Trial without pleadings an irregularity merely (37-453, 35+177). Issues which may be formed (70-46, 72+319; 83-366, 369, 86+351). Right to jury trial statutory; not constitutional (47-451, 50+598). Findings of jury conclusive on court until set aside for cause (26-391, 407, 44+685; 27-280, 6+791, 7+144). Answering and proceeding to trial without objection held to give the district court jurisdiction (65-162, 167, 67+987. See 106-353, 119+57, cited under § 8990).

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

8990. When judgment affirmed—When reversed—
 Whenever the appellant fails to prosecute his appeal, or the order, judgment, or decree appealed from or brought up on certiorari is sustained by the district court on the merits, it shall enter judgment affirming the decision of the probate court, with costs. Upon filing in the probate court a certified transcript of the judgment of the district court, the same proceedings shall be had as if no appeal had been taken. But in case such order, judgment, or decree is reversed or modified, the district court shall make the order or decree which should have been made by the probate court, in case it can do so, and, if it cannot, it shall remand the case to the probate court, with direction to make such order or decree, or proceed as it may otherwise direct. Such final judgment shall be certified by the district court to the probate court, and upon filing the same in such court it shall proceed as directed by the district court if any direction is made. In case the judgment of the district court requires no action by the probate court, then such judgment shall be substituted in place of the original order, judgment, or decree, and like proceedings shall be had as when so ordered by the probate court. If the district court remands the case to the probate court with directions, the probate court shall comply with such directions in a summary manner, without notice. (3879) [7497]

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

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

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

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

8991. Costs—The party prevailing on the appeal shall be entitled to costs and disbursements, to be taxed as in a civil action. If judgment be rendered against the estate, they shall be an adjudicated claim against it; and if the judgment be against a claimant against the estate, either for costs or on a counterclaim, execution may issue as in other cases. (3880) [7498]

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

8992. Judgment, execution, etc.—Whenever the order, judgment or decree appealed from is affirmed, judgment shall be rendered against the appellant and his sureties on the appeal bond, and execution may issue against him and his sureties. (3881) [7499]

CHAPTER 75

COURTS OF JUSTICES OF THE PEACE

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1940 Supplement
To
Mason's Minnesota Statutes
1927

(1927 to 1940)
(Superseding Mason's 1931, 1934, 1936 and 1938
Supplements)

Containing the text of the acts of the 1929, 1931, 1933, 1935, 1937 and 1939 General Sessions,
and the 1933-34, 1935-36, 1936 and 1937 Special Sessions of the Legislature, both new and
amendatory, and notes showing repeals, together with annotations from the
various courts, state and federal, and the opinions of the Attorney
General, construing the constitution, statutes, charters
and court rules of Minnesota together with digest
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Part III. Civil Actions and Proceedings

CHAPTER 74

Probate Courts

GENERAL PROVISIONS
PROBATE COURTS GENERALLY

§§8690, 8691, 8691-1 [Repealed].

Repealed Mar. 29, 1935, c. 72, §196, post §8992-196, effective July 1, 1935, 12:01 a. m. Reenacted as shown below:

- 8690, see 8992-1.
- 8691, see 8992-5.

ANNOTATIONS UNDER REPEALED SECTIONS

8690. Establishment, sessions; etc.

1. Jurisdiction in general.

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

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

Probate court has no jurisdiction to determine title to real estate between heirs and strangers to proceedings. Merchants' & Farmers' State Bank v. O., 189M528, 250 NW366. See Dun. Dig. 7779.

Where alleged revocation of will is effected by four "living trusts," so called and validity and efficacy of latter are challenged by issue properly framed, probate court has jurisdiction to determine that issue in order to get at ultimate one, of which it is only court with original jurisdiction, whether will is entitled to probate. O'Connor, 191M34, 253NW18. See Dun. Dig. 7770.

Probate court has exclusive original jurisdiction of estates of deceased persons and persons under guardianship by virtue of constitutional investment. Legislature may not curtail or limit general jurisdiction thus conferred, but exercise thereof may be regulated by statute. Gilroy's Estates, 193M349, 258NW584. See Dun. Dig. 7770b.

2. Jurisdiction of estates of deceased persons.

Judgments are not subject to collateral attack and district court cannot in an independent action in equity amend a decree of distribution for mere errors in making up the final account by the administrator. 175M68, 220NW466.

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

Administration of an estate of a decedent is a proceeding in rem and jurisdiction is not obtained if there are no assets of decedent within the territorial jurisdiction of the probate court. 176M445, 223NW683.

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

District court has no jurisdiction to enjoin administrator from selling land under license of probate court. Mundinger v. B., 188M621, 248NW47. See Dun. Dig. 7770, 7770c.

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

6. Held to have jurisdiction.

Probate court has jurisdiction to render decree of distribution of homestead to establish a record title, ancillary jurisdiction to determine who are heirs to homestead, to determine limits of or what part of a larger tract of land constitutes homestead, and to sell homestead if parties consent and it is deemed advisable, even though not for payment of debt. Christianson v. O., 191M166, 253NW661. See Dun. Dig. 2725, 3585b, 3652, 4219a.

7. Held not to have jurisdiction.

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

8691. Judge—Election—Bond.

Vacancy to be filled by next election where appointee is appointed more than 30 days prior thereto. Op. Atty. Gen., Feb. 9, 1934.

County board cannot require county attorney or judge of probate to furnish corporate surety bonds and cannot refuse to accept, arbitrarily, a proper personal bond when tendered, but such officers must pay their own premium. Op. Atty. Gen. (121a-3), Mar. 2, 1935.

A probate judge who executed a bond "to the state" before the passage of Laws 1935, c. 72, instead of to "the county board" should now file a new bond under the new act. Op. Atty. Gen. (348a), June 3, 1935.

On going into effect of Laws 1935, c. 72, Art. II, §5, A, it is highly desirable, if not necessary, that new bonds be

executed in conformity with new law. Op. Atty. Gen. (347a), June 14, 1935.

§§8692 to 8706 [Repealed].

Repealed Mar. 29, 1935, c. 72, §196, post §8992-196, effective July 1, 1935, 12:01 a. m. Reenacted as shown below:

- 8692, see 8992-10.
- 8693, see 8992-3.
- 8694, see 8992-187.
- 8695, see 8992-187.
- 8696, see 8992-7.
- 8697, see 8992-8.
- 8698, see 8992-9.
- 8699, see 8992-14.
- 8700, see 8992-12.
- 8701, see 8992-2.
- 8702, see 8992-11.
- 8703, see 8992-11.
- 8704, see 8992-4.
- 8705, see 8992-6.
- 8706, see 8992-185.

ANNOTATIONS UNDER REPEALED SECTIONS

8694. Court first acquiring jurisdiction; etc.

A conflict between probate courts of two counties as to which shall exercise jurisdiction over the estate of a person deceased held a question of venue rather than jurisdiction. Martin v. M., 188M408, 247NW516. See Dun. Dig. 7773(94).

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

8695. Counties in which administration shall be had.

Martin v. M., 188M408, 247NW516; note under §8694. Testamentary disposition of personality is governed by laws of state in which decedent was domiciled. Kimmel's Estate, 193M233, 258NW304. See Dun. Dig. 1555, 10256g.

Restatement of conflict of laws as to domicile and Minnesota decisions compared. 15MinnLawRev668.

8696. Judge, when disqualified by interest.

Judge of probate may also act as secretary of production credit association, organized to refinance chattel mortgage loan. Op. Atty. Gen., Feb. 23, 1934.

8697. Judge of probate may act in any county; etc.

A probate judge of a county sitting in place of a judge who is ill should refer to himself as "acting judge" rather than "visiting judge." Op. Atty. Gen. (347g), Nov. 3, 1934.

8701. Incidental duties of probate court.

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

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

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

1. Confirming records to the fact.

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

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

2. Vacating orders, judgments and decrees.

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

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

Application to vacate decree of descent rendered by probate court on ground of mistake in both judicial dis-

cretion, and on appeal the district court exercises a like discretion. 179M315, 229NW133.

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

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

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

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

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

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

Probate courts are courts of record and their orders and judgments are not subject to collateral attack in field entrusted to them by constitution, but a motion by a ward to expunge erroneous statements from record is not a collateral attack. Carpenter's Guardianship, 203M477, 251NW867. See Dun, Dig. 7784.

8702. Judges of probate courts to hold annual sessions. Probate judge is not entitled to reimbursement from the county for his expenses in attending a convention of the Probate Judge's Association. Op. Atty. Gen., Feb. 9, 1931.

County is obligated to pay actual and necessary expenses incurred by probate judge in attending assembly at capitol. Op. Atty. Gen. (347d), May 23, 1934.

8704. Certified copies.

This section does not warrant a fee for making return on appeal to district court under Mason's Stat. 1927, §8936. Op. Atty. Gen., Apr. 30, 1929.

8706. Definitions.

174M354, 219NW286; note under §9251.

Legislature may fix the age at which a delinquent child shall attain majority different from that fixed for other children. State v. Patterson, 247NW573, 186M492, 249NW187. See Dun, Dig. 4431.

Delinquent girl committed to home school for girls is not entitled as a right to release because she is more than 18 years old. Op. Atty. Gen. (840a-5), Apr. 24, 1937.

8706-1. Salary of Judge of Probate in certain counties.—That from and after January 1, 1929, the compensation of the judges of the Probate Court in all counties of this state now or hereafter having a population of 240,000 or more inhabitants, shall be \$7,500 per annum, which salary shall be paid in equal monthly installments out of the county treasury of such counties upon warrants of the county auditor out of any funds of the county not otherwise appropriated. (Act Mar. 28, 1929, c. 96, §1.)
Saved from repeal. See §8992-196, post.

8706-2. Salaries and clerk hire not to be affected by decrease in valuation.—Neither the salary nor allowance for clerk hire of any judge of probate shall be decreased during the term for which he was elected or appointed by reason of any decline in the population of the county or by a decrease in the valuation of the county, but such salary and clerk hire shall be paid during the balance of such term of office in the amounts authorized prior to such reduction in population, or by a decrease in valuation of the county. (Act Feb. 26, 1931, c. 30.)

Saved from repeal. See §8992-196, post.

See §997-1, Mason's Minn. Stat. 1927.

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

8706-3. Clerks and employees of probate courts in certain counties.—In all counties of this state having, or which hereafter may have, a population of more than 250,000 and less than 350,000 inhabitants, the personnel of the probate court, other than the judge, shall consist of one clerk, two deputy clerks, one reporter and such other employees as the judge shall

determine. The total amount of the salaries of such clerk, deputy clerks, reporter and employees shall be \$21,600 per annum or such part thereof as may be determined by the judge. The salary of each shall be in such amount as the judge shall determine; but the salary of the clerk shall not exceed \$4,100, that of one deputy clerk shall not exceed \$3,500, that of the other deputy clerk shall not exceed \$2,500.00, all of which salaries shall be paid out of the county treasury in monthly installments upon the certificate of the judge. (Act Apr. 24, 1935, c. 283, §1; Apr. 15, 1939, c. 280.)

Saved from repeal. See §8992-196, post.

8706-4. Laws repealed.—Laws 1915 Chapter 142, as amended by Laws 1917 Chapter 434, as amended by Laws 1919 Chapter 304, as amended by Laws 1921 Chapter 336, as amended by Laws 1923 Chapter 307, as amended by Laws 1929 Chapter 391 and all other acts or parts of acts inconsistent herewith are hereby repealed. (Act Apr. 24, 1935, c. 283, §2.)
Saved from repeal. See §8992-196, post.

8706-5. Minimum salary of Judge of Probate.—The minimum annual salary of the judge of the probate court, in all counties of this state, except as hereinafter provided, shall be the same amount as provided by law for the year 1930, regardless of any decrease in valuation, any change in population or any other factor on which such salary may have been based. (Mar. 24, 1937, c. 94, §1.)

Maximum salary of judge of probate of Todd County is fixed by §8707, but it is governed as to minimum by Laws 1937, c. 94 [§§8706-5 to 8706-10]. Op. Atty. Gen. (347i), Nov. 23, 1937.

8706-6. Salary of probate judge in certain counties.—In all counties having a population of more than 8500 inhabitants according to the federal census for 1930, where the salary of the judge of the probate court was less than \$1800 for the year 1930, the minimum annual salary in any such county shall be the sum of \$1800 per annum. Provided, however, that this section shall not apply to any county, which, when described by the number of full or fractional congressional townships, the 1935 assessed valuation, exclusive of money and credits and the population, according to the 1930 federal census, shall come within any of the following classifications: 19 to 21 townships, valuation \$4,500,000 to \$4,800,000, population 9500 to 9900 inhabitants; 29 to 31 townships, valuation \$1,700,000 to \$2,000,000, population 9400 to 9700 inhabitants; 20 to 22 townships, valuation \$3,500,000 to \$3,700,000, population 10,000 to 10,700 inhabitants. (Mar. 24, 1937, c. 94, §2; July 14, 1937, Sp. Ses., c. 42.)

In view of §1993, in determining salary of judge of probate assessed valuation should be determined by figuring Class 3b and Class 3c property at 33½% and 40% of full and true value. Op. Atty. Gen. (104a-9), June 12, 1937.

8706-7. Minimum salaries in certain counties.—In all counties having a population of less than 8500 but more than 5000 inhabitants according to the federal census for 1930, where the salary of the judge of the probate court was less than \$1500 for the year 1930, the minimum annual salary in any such county shall be the sum of \$1500 per annum. (Mar. 24, 1937, c. 94, §3.)

8706-8. Salary of Judge of Probate fixed by general law.—Except for the minimum amounts as herein provided, the salary of the judge of the probate court shall be as otherwise provided by law. (Mar. 24, 1937, c. 94, §4.)

Maximum salary of judge of probate of Todd County is fixed by §8707, but it is governed as to minimum by Laws 1937, c. 94 [§§8706-5 to 8706-10]. Op. Atty. Gen. (347i), Nov. 23, 1937.

8706-9. Application of Act.—This act shall not apply to any county where the salary of the judge of the probate court is fixed by Laws 1933, Chapters 16, 76, 143, 166, 212, 234, 432 or Laws 1935, Chapter 361, or laws of the extra session of 1935-36, Chapter 27, nor to any county where such salary has

been, or may be fixed by any other law passed at the 1937 session of the Legislature. (Mar. 24, 1937, c. 94, §5.)

Probate court of Lincoln County is excluded from operation of this act. Op. Atty. Gen. (3471); May 25, 1937.

8706-10. Provisions severable.—If any part, section or provision of this act shall be found to be unconstitutional or invalid by any court of competent jurisdiction, it shall not affect the remainder of this act. (Mar. 24, 1937, c. 94, §6.)

Sec. 7 of Act Mar. 24, 1937, cited, provides that the Act shall take effect from its passage.

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

Saved from repeal. See §8992-196, post.

SALARY AND CLERK HIRE IN PARTICULAR COUNTIES

Laws 1915, c. 142, as amended, repealed Apr. 24, 1935, c. 283, §2. See §8706-3, 8706-4.

Laws 1929, cc. 20, 161. Repealed, 1939, c. 99, §20.

Act Apr. 14, 1937, c. 230, effective May 1, 1937, amends Laws 1925, c. 91, §6, as amended, and provides that in counties having 41 to 43 townships and 25,000 to 30,000 population, the probate judge shall receive \$2,040 salary, and \$900 clerk hire, all fees to be paid into the county treasury.

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

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

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

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

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

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

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

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

Counties containing 16 to 18 townships, with tax valuation of \$8,000,000 to \$10,000,000. Laws 1931, c. 141, fixes salary of probate judge at \$2,150, with allowance for clerk hire as provided by law.

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

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

Act Feb. 3, 1937, c. 11, amends '21, c. 351, §1, to apply to counties with 70 to 75 townships, assessed valuation of \$1,000,000 to \$5,000,000, and population of 7,000 to 7,500, but makes no change in amounts of salaries.

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

Act Mar. 19, 1937, c. 69, effective July 1, 1937, amends Laws 1933, c. 16, to make salary of members of county board \$720, of auditor \$2,500, and traveling expenses in the state of Minnesota.

See §8997-4a to 997-4h.

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

Act Mar. 19, 1937, c. 70, §9, effective July 1, 1937, amends Laws 1933, c. 76, but makes no change.

See §8997-4a to 997-4h.

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

Laws 1933, c. 96, §3-1, added. Laws 1935, c. 23, effective Jan. 1, 1935.

Act Jun. 15, 1936, Sp. Ses. 1935-36, c. 27, amends Laws 1933, c. 96.

See §8997-4a to 997-4h.

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

See §8997-4a to 997-4h.

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

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

Act Apr. 13, 1933, c. 219, §1, provides that in counties having assessed valuation of not more than \$6,000,000 and population of not more than 12,500 the county board shall fix the salaries of subordinate county employees. This section seems to be invalid as not expressed in the title of the act. Section 2 authorizes the county board, in counties having assessed valuation, excluding moneys and credits, of \$2,500,000 to \$3,000,000, population of 9,000 to 10,000, and area of 29 to 31 congressional townships, to fix the salaries of all subordinate county employees.

Laws 1933, c. 219, does not apply to Clearwater County and §1 thereof is not within title of act. Op. Atty. Gen. (104a-3), Feb. 5, 1935.

Act Apr. 15, 1933, c. 281, provides that in counties having 100 or more congressional townships and assessed valuation, including moneys and credits, of \$4,000,000 to \$6,000,000 the probate judge shall receive \$1,400 per annum, and clerk hire to be fixed by the county board.

See §8997-4a to 997-4h.

Act Mar. 23, 1937, c. 91, repeals Laws 1933, c. 281, and provides that in counties having 100 to 105 townships and population of 12,000 to 16,000 the 1931 salary rate shall apply, regardless of decrease in valuation or change in population or other factor. Salary to be governed by general law, except as to minimum fixed. County board to fix clerk hire.

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

Act Apr. 12, 1937, c. 193, amends Laws 1921, c. 437, as amended, and provides that in counties having 44 to 45 townships, assessed value of \$8,000,000 to \$14,000,000, and population of 25,500 to 26,000, the probate judge's salary shall be \$2,520 and fees for certified copies, and \$1,200 clerk hire if actually paid or due.

Act Apr. 26, 1937, c. 491, amends Laws 1921, c. 437, as amended, to make salary of the probate judge \$2,520 and clerk hire \$1,200.

See §8997-4a to 997-4h.

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

See §8997-4a to 997-4h.

Laws 1936, c. 191. Counties having city of second class and 19 to 21 townships and population from 34,000 to 40,000 and valuation from \$25,000,000 to \$30,000,000, judge of probate shall receive \$3,000 per year and clerk shall receive from \$1,080 to \$1,500 per year.

Laws 1935, c. 223. Counties having population of 6,000 to 6,800 and more than 16 townships, probate judge to receive \$1,200 per year plus \$50 for each \$1,000,000 assessed valuation.

Laws 1935, c. 283. Salaries of employees in probate courts in counties having population of 220,000 to 330,000, shall be \$21,000. Laws repealed.

Laws 1935, c. 373. Counties having population in excess of 400,000 may appoint court reporter and additional clerk for probate court.

Laws 1935, c. 381. Counties having 30 to 36 townships and area of less than 670,000 acres and valuation of \$10,000,000 to \$20,000,000 and population of 22,000 to 30,000, probate judge shall receive \$2,250 per year.

Act Jan. 13, 1936, c. 16, Sp. Ses. 1935-36, provides that in counties with 15 to 17 townships and assessed value of \$4,000,000 to \$5,000,000, probate judge shall receive \$1550 per annum and clerk hire.

Act Jan. 18, 1936, Sp. Ses. 1935-36, c. 37, provides that in counties having not less than 48 townships, 1,000,000 to 1,500,000 acres, 15,000 to 30,000 census and assessed valuation of \$5,000,000 to \$25,000,000, salary of probate judge shall be fixed at \$2,000 to \$2,500 and clerk hire at \$600 to \$900, and ratifies salaries theretofore fixed in certain of said counties.

Act Jan. 18, 1936, Sp. Ses. 1935-36, c. 56, provides that in counties having second class city, population of 34,000 to 40,000, assessed value of \$25,000,000 to \$30,000,000, the

salary of the probate judge shall be \$3000, and clerk \$1080 to \$1500. Repealing Laws 1935, c. 191.

Act Jan. 24, 1936, Sp. Ses. 1935-36, c. 79, provides that in counties having 19 to 21 townships, population of 34,000 to 40,000, and assessed valuation of \$28,000,000 to \$35,000,000, the probate judge shall receive \$3000 and the clerk \$1200 to \$1500.

Act Mar. 2, 1937, c. 54, amends Laws 1935-36, Sp. Ses., c. 79, §1, by making it applicable to counties with population of 34,000 to 45,000, and assessed value of \$28,000,000 to \$45,000,000.

Act July 14, 1937, Sp. Ses., c. 22, amends Act Jan. 18, 1935-36, Sp. Ses., c. 79, to make it apply to counties having 34,000 to 45,000 inhabitants and \$28,000,000 to \$45,000,000 assessed valuation.

Act Jan. 30, 1937, c. 7, provides that in counties with 16 to 18 townships, area of 500 to 600 square miles, assessed valuation of \$8,000,000 to \$11,000,000, and population of 17,000 to 19,000, the probate judge shall receive a salary of \$2,400 and fees as provided by law.

Act Feb. 17, 1937, c. 33, provides that in counties with area of 970 to 1,000 square miles, and population of 20,000 to 27,000, the probate judge shall receive \$2,500 and such clerk hire allowance as may be fixed by the county board.

Act Feb. 18, 1937, c. 34, provides that in counties having population of 20,000 to 22,000, assessed value of \$7,000,000 to \$10,000,000, and total acreage of 550,000 to 652,000; the probate judge shall receive \$2,500 and clerk hire allowed by county board not exceeding \$1,500.

Act Feb. 24, 1937, c. 36, provides that in counties having area of 490 to 510 square miles and population of 18,000 to 25,000, the probate judge shall receive \$2,500 and clerk hire to be fixed by the probate judge not to exceed \$1,300.

Act Feb. 24, 1937, c. 37, provides that in counties having an area of 372,000 to 373,000 acres and 18 to 20 townships, the probate judge shall receive \$2,400, and clerk hire of \$800 per year, and such further sum not exceeding \$400 in any one year to be determined and paid as provided by law.

Act July 14, 1937, Sp. Ses., c. 44, §1, amends Act Feb. 24, 1937, c. 37, §1, by providing that the acreage named shall be exclusive of any lake or water area, and that the assessed valuation, exclusive of moneys and credits, shall be \$10,000,000 or more.

Section 2 of such act also amends Act Apr. 2, 1937, c. 133, §1, by excluding such water areas, by providing for population of 12,500 or over, and assessed valuation, exclusive of moneys and credits, of \$5,000,000 or over.

Section 3 of such act also amends Act Apr. 2, 1937, c. 134, §1, by making a similar change, with population of 18,000 or over, and assessed valuation, exclusive of moneys and credits, of \$6,000,000 or over.

Laws 1937, c. 70, §0. Amended. Laws 1939, c. 286. Act Apr. 2, 1937, c. 133, provides that in counties containing 425,000 to 427,000 acres, and 18 to 20 townships, the probate judge shall receive a salary of \$2,400, and for clerk hire \$750 and further sum not exceeding \$450 per year.

Act Apr. 2, 1937, c. 134, provides that in counties containing 400,000 to 402,000 acres, and 18 to 20 townships, the probate judge shall receive \$2,400, and \$750, and further sum not exceeding \$450 per year for clerk hire.

Act Apr. 6, 1937, c. 148, provides that in counties containing 22 to 25 townships, population of 33,500 to 37,000, the probate judge shall receive \$1,800 for clerk hire.

Act Apr. 8, 1937, c. 182, provides that in counties having 13,500 to 15,000 inhabitants, assessed valuation of \$6,000,000 to \$7,000,000, and 20 to 22 townships, the probate judge shall receive \$2,000 per year.

Act Apr. 12, 1937, c. 202, provides that in counties having 21,500 to 22,000, 19 to 21 townships, and 718 to 720 square miles, the probate judge shall receive \$1,200 per year for clerk hire.

Act Apr. 14, 1937, c. 217, effective May 1, 1937, provides that in counties having area of 380 to 400 square miles, more than 37,000 platted lots, and population of over 29,000, the probate judge's salary shall be \$2,800. Effective May 1, 1937. This act is amended Apr. 21, 1937, c. 341, to change the figures "29,000" to "20,000."

Laws 1937, c. 230. Repealed, 1939, c. 99, §20.

Act Apr. 19, 1937, c. 283, §1, provides that in counties having 20 to 22 townships, 10,000 to 10,700 inhabitants, and assessed valuation, exclusive of moneys and credits, of \$3,500,000 to \$3,700,000, the salary of the probate judge shall be \$1,800, as a minimum, maximum to be governed by existing law.

Act Apr. 19, 1937, c. 283, §2, provides that in counties having 29 to 31 townships, population of 9,400 to 9,700, and assessed value, exclusive of money and credits, of \$1,700,000 to \$2,000,000, the minimum salary of the probate judge shall be \$1,500, maximum to be governed by existing law.

Laws 1937, c. 54. Amended, Laws 1939, c. 273.

Laws 1937, c. 54, Sp. Ses. Repealed, 1939, c. 99, §20.

Act Mar. 31, 1939, c. 99, fixes the salary and expenses of judges of probate, and their clerks, in counties having 41 to 43 congressional townships, assessed valuation, exclusive of money and credits, of \$6,000,000.00 to \$12,000,000.00, and population of 25,000 to 30,000, and repeals Laws 1921, c. 437; Laws 1925, c. 91; Laws 1929, cc. 20, 161; Laws 1933, c. 432; Laws 1937, c. 230; Laws 1937, Sp. Ses., c. 54.

Act Apr. 1, 1939, c. 131, provides that in counties having a population of 24,000 to 25,000, assessed valuation, in-

cluding moneys and credits, of not less than \$14,000,000 for 1938, and 23 to 25 congressional townships, the probate judge's salary shall be \$2400.

Apr. 14, 1939, c. 247, salary of deputy is by its description applicable only to Jackson County.

Act Apr. 15, 1939, c. 273, amending '37, c. 54, §2, is by its description applicable only to Winona County.

Act Apr. 15, 1939, c. 274, amending '33, c. 166, §86, 11, 13, is by its description applicable only to Cass County.

Act Apr. 17, 1939, c. 286, amending '37, c. 70, §9, is by its description applicable only to Lake of the Woods County.

Act Apr. 17, 1939, c. 296, and repealing '35, c. 191, is by its description applicable only to Olmsted County.

Counties containing a city of the second class and having 18 to 21 townships shall pay probate judge \$3,000 and clerks \$1,500. Laws 1939, c. 296.

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

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

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

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

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

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

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

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

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

County officers whose terms expire on first Monday of January are entitled to compensation for days of service rendered in month of January up to time that their successors qualify and take office. Op. Atty. Gen. (104a-9), Dec. 1, 1934.

Clerks and employees in probate court are to be compensated pursuant to Laws 1935, c. 72, §13, compensation to be fixed by judge. Op. Atty. Gen. (348b), July 26, 1935.

Power of fixing salary for clerk hire in office of probate court is vested in judge of probate. Op. Atty. Gen. (347b), Oct. 17, 1935.

Maximum salary of judge of probate of Todd County is fixed by §8707, but it is governed as to minimum by Laws 1937, c. 94 [§§8706-5 to 8706-10]. Op. Atty. Gen. (347i), Nov. 23, 1937.

Allowance of fifteen cents per folio for all records made by probate judge is only fee that judge is entitled to receive under §8654, and county is only required to pay money where parents of child do not have sufficient means, and such fees are payable upon a certificate of the judge and need not be presented to and audited by county board. Op. Atty. Gen. (346c), Feb. 11, 1938.

Salary of probate judge may be reduced by legislative act during term. Op. Atty. Gen. (347i), March 10, 1939.

Clerk hire in county governed by Laws 1937, c. 34, is to be fixed by judge of probate with approval of county commissioners. Op. Atty. Gen. (347B), Feb. 28, 1939.

Clerk hire is to be fixed by judge of probate within extreme statutory limitations, and no action by county board is required. Op. Atty. Gen. (348a), Feb. 17, 1939.

Under Laws 1915, c. 63, value of automobiles in Itasca County should properly be added to assessed valuation of all property in determining salary, and any fraction of one million dollars must be ignored entirely in the computation. Op. Atty. Gen. (347i), March 31, 1939.

PROBATE PRACTICE

§§8708 to 8710 [Repealed].

Repealed Mar. 29, 1935, c. 72, §156, post §8992-196, effective July 1, 1935, 12:01 a. m. Reenacted as shown below:

8708, see §892-186.
8709, see §892-188.
8710, see §892-188.

ANNOTATIONS UNDER REPEALED SECTIONS

8708. Proceedings, how begun.

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

An order appointing a guardian made by probate court without petition in a matter within its jurisdiction was void and of no effect, and such was true of a petition which did not contain prima facie facts bringing person within class subject to guardianship. Carpenter's Guardianship, 203M477, 281NW867. See Dun. Dig. 7777.

8700. Notice of hearing when required.

Real estate assigned by final decree passes out of the control and is discharged from further administration, and thereafter neither the probate court nor the district court on appeal has authority to vacate the decree without notice to the persons who then hold title to such real property. 175M524, 222NW63.

General jurisdiction of probate court attaches at once upon presentation to it of a proper petition by some person entitled to take such action. Notice and opportunity to be heard is a matter of legislative favor and not essential to jurisdiction and power of court to administer estate. Gilroy's Estate, 193M349, 258NW584. See Dun. Dig. 1641, 7783e.

8710-1. Certain probate proceedings legalized.—

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

Saved from repeal. See §892-196.

§§8711 to 8717, 8717-1 to 8717-19, 8718 to 8720 [Repealed].

Repealed Mar. 29, 1935, c. 72, §196, post §892-196, effective July 1, 1935, 12:01 a. m. Reenacted as shown below:

- 8711, see 892-15.
- 8712, see 892-188.
- 8715, see 892-6.
- 8717-1, see 892-22.
- 8717-2, see 892-22.
- 8717-3, see 892-22.
- 8717-4, see 892-23.
- 8717-5, see 892-23.
- 8717-6, see 892-24.
- 8717-7 to 8717-19, see 892-16 to 892-19.
- 8718, see 892-31.
- 8719, see 892-27.
- 8720, see 892-29.

ANNOTATIONS UNDER REPEALED SECTIONS

8714. Will of alien—Notice.
When a naturalized citizen dies within this state leaving property therein, it is not necessary to serve a notice of the time and place of hearing upon the consular representative of the county of his birth. Nilsson, 174M28, 218NW235.

8716. Notice of filing orders.
The notice required by this section does not affect the time for appeal. Anderson, 180M570, 231NW218.

8717-11. Trial and hearing by referee; etc.
This section automatically makes the decision of the referee that of the court, and appealable as such. Parker's Estate, 183M191, 236NW206. See Dun. Dig. 7786.

8719. Homestead.
Carey v. E., 194M127, 260NW320; note under 8722.
A devise of homestead by will, duly consented to in writing by spouse, conveys homestead free from claims of general creditors, unless will expressly makes homestead subject to payment of debts. Overvold v. N., 186M359, 243NW439. See Dun. Dig. 4211.

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

Where surviving spouse, at time will was executed, duly consented in writing to disposition of homestead as made in will, such consent validates disposition made, and it is immaterial then whether or not will makes any

provision for such spouse. Overvold v. N., 186M359, 243NW439. See Dun. Dig. 10206a.

Where woman dies without issue and leaving a surviving spouse and will devising most of her property to brothers and sisters, and spouse renounces will, surviving spouse is entitled to be appointed administrator with will annexed or to select appointee, brothers and sisters not being "next of kin." Long v. C., 194M238, 260NW314. See Dun. Dig. 3561a.

Where a testator imposed a legacy as a charge upon real estate part of which was a homestead, it was improper for probate court to license a sale of entire tract either to pay debts or expenses of administration or legacies. Following in re Anderson's Estate, 202Minn 513, 279NW266, 116ALR82, the proper method of procedure is to devise homestead subject to lien. Schultz' Estate, 203M565, 282NW471. See Dun. Dig. 3615a.

8720. Distribution and descent of property.

Carey v. E., 194M127, 260NW320; note under 8722.

¼. In general.
A new note given to sole heir of payee in old note, whose estate was not probated, was supported by a good consideration, where new note had effect of extending time of payment for several years, and heir forebore his legal right to qualify himself as administrator and to immediately bring action on old note. Onsrud v. P., 261NW(Wis)541.

½. Priority of death.
Evidence held to justify special verdict to effect wife survived husband, though wife was shot first. 171M475, 214NW469.

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

2. Nature of husband's interest in wife's realty.
Where woman dies without issue and leaving a surviving spouse and will devising most of her property to brothers and sisters, and spouse renounces will, surviving spouse is entitled to be appointed administrator with will annexed or to select appointee, brothers and sisters not being "next of kin." Long v. C., 194M238, 260NW314. See Dun. Dig. 3561d.

3. Title on death of ancestor.
Right of dower in improvements made by grantee subsequent to spouse's death. 16MinnLawRev315.

10a. Distribution of damages for wrongful death.

176M130, 222NW643.

§8720-1. [Repealed.]

Repealed Mar. 29, 1935, c. 72, §196, post §892-196, effective July 1, 1935, 12:01 a. m.

Where soldier holding war risk insurance certificate died testate, and brother named as beneficiary was also named as residuary legatee, and brother died later testate, and present value of unpaid monthly installments was paid to administrator of soldier's estate, fund must be distributed as if soldier had died intestate to those entitled to be distributees at time of soldier's death, as it could not have been intention of soldier to bequeath to brother fund that could only come into existence through brother's death. Sponberg v. L., 187M650, 245NW636.

§§8721 to 8733, 8733-1, 8734 to 8786, 8786-1, 8787 to 8792. [Repealed.]

Repealed Mar. 29, 1935, c. 72, §196, post §892-196, effective July 1, 1935, 12:01 a. m. Reenacted as shown below:

- 8721, see 892-194.
- 8722, see 892-47.
- 8723, see 892-32.
- 8724, see 892-33.
- 8725, see 892-30.
- 8726(1), see 892-28.
- 8726(2), see 892-28.
- 8726(3), see 892-28.
- 8726(6), see 892-29.
- 8726(7), see 892-29.
- 8727, see 892-189.
- 8728, see 892-190.
- 8729, see 892-79.
- 8730, see 892-80.
- 8731, see 892-81.
- 8732, see 892-81.
- 8733, see 892-195.
- 8733-1, see 892-195.
- 8734, see 892-193.
- 8735, see 892-34.
- 8736, see 892-35.
- 8737, see 892-36.
- 8738, see 892-37.
- 8739, see 892-38.
- 8740, see 892-50.
- 8741, see 892-39.
- 8742, see 892-40.
- 8743, see 892-49.
- 8744, see 892-41.
- 8745, see 892-42.
- 8746, see 892-43.
- 8747, see 892-44.

8748, see 8992-45.
 8749, see 8992-46.
 8750, see 8992-48.
 8751, see 8992-51.
 8752, see 8992-52.
 8753, see 8992-53.
 8754, see 8992-55.
 8755, see 8992-54.
 8756, see 8882-53.
 8757, see 8992-56.
 8758, see 8992-57.
 8759, see 8992-64.
 8760, see 8992-65.
 8761, see 8992-65.
 8762, see 8992-65.
 8763, see 8992-66.
 8764, see 8992-61.
 8765, see 8992-62.
 8766, see 8992-63.
 8767, see 8992-36.
 8768, see 8992-58.
 8769, see 8992-58.
 8770, see 8992-59.
 8771, see 8992-60.
 8772, see 8992-68.
 8773, see 8992-69.
 8774, see 8992-70.
 8775, see 8992-71.
 8776, see 8992-73.
 8777, see 8992-72.
 8778, see 8992-74.
 8779, see 8992-74.
 8780, see 8992-76.
 8782, see 8992-78.
 8783, see 8992-74, 8992-78.
 8784, see 8992-75.
 8785, see 8992-76, 8992-77.
 8786, see 8992-89.
 8786-1, see 8992-98.
 8787, see 8992-90.
 8788, see 8992-118.
 8789, see 8992-120.
 8790, see 8992-121.
 8791, see 8992-123.
 8792, see 8992-67.

ANNOTATIONS UNDER REPEALED SECTIONS

8722. Election—interpretation, etc.
Overvoid v. N., 186M359, 243NW439; notes under §8719.
 Election to accept will, held effective, in view of this section though there was attached copy of contract making election conditional on contract being held valid. 180M134, 230NW576.
 District court, in suit in equity by trustees for instructions, had jurisdiction to determine validity of contract under which widow made her election under will. 180M134, 230NW576.

Administrator of widow, who died before electing, took under the statute. *Stampka's Estate*, 168M283, 210NW 85. See Dun. Dig. 2726.

Surviving husband became vested immediately on the death of wife (who was not a parent) with title to statutory share of wife's realty and he could not be divested thereof without some affirmative action to take under will. *Carey v. B.*, 194M127, 260NW320. See Dun. Dig. 2726.

Wife's will having made ample provision for husband in lieu of statutory rights, husband could not take both under will and statute. *Id.* See Dun. Dig. 2726.

Where surviving spouse is mentally incompetent to choose whether to take under will or statute, probate court should make choice or direct guardian to do so. *Id.* See Dun. Dig. 2726.

Where administrators of deceased husband's estate sought to effect election in behalf of his estate (he having survived his wife but dying before making choice) so as to take under statute rather than under wife's will, held that husband's best interests, while living, required election to take under will, and that probate court erred in granting petition of representatives of his estate to take under statute. *Id.* See Dun. Dig. 2726.

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

8723. Illegitimate child.
 One claiming rights as heir by reason of acknowledgment of parentage, held barred by laches from asserting his rights. 179M315, 229NW133.

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

8725. Degrees, how computed.
Op. Atty. Gen., Sept. 9, 1930; note under §8720.

8726. Minor children to receive such allowance; etc.
 Minnesota probate court had complete jurisdiction over property of estate of a non-resident in the hands of an ancillary administrator appointed by it and could dispose of the same in accordance with the provisions of Minnesota Statutes. *Fults' Estate*, 177M334, 225NW152.

War risk insurance becoming part of estate of an intestate, is to be distributed according to applicable laws

of descent, subject to claims of creditors. *Hallbom*, 189 M383, 249NW417. *Aff'd* 291US473, 54SCR497. See Dun. Dig. 2719a.

Testamentary disposition of personalty is governed by laws of state in which decedent was domiciled. *Kimme's Estate*, 193M233, 258NW304. See Dun. Dig. 1555, 10256g.

A widow of a deceased soldier who was guilty of open and notorious illicit cohabitation with another may not take any part of war risk insurance fund as a distributee from her deceased husband's estate, upon distribution after the "present value" of the unpaid installments of such insurance is paid to estate of deceased soldier, after death of named beneficiary. *Bergstrom's Estate*, 194M 97, 259NW548. See Dun. Dig. 2733.

It was proper for ancillary Minnesota executrix to show, and for court to find, reasonable value of attorney's services in defending an action brought by one claiming to be entitled to proceeds of two insurance policies, payable to decedent's estate; widow having selected proceeds of policies as personal property out of which she desired her allowance to be paid. *Zimmerman's Estate*, 195M38, 261NW467. See Dun. Dig. 3644c.

1. Subd. 1.
 Allocation of \$500 as provided for in this section was merely a form of distribution as affecting right of administrator to appeal under §8933. *Nelson's Estate*, 194 M297, 260NW205. See Dun. Dig. 7785.

Administrators of husband's estate had right to make personal selection of \$500 out of money left by wife in addition to provisions made for him under her will. *Carey v. B.*, 194M127, 260NW320. See Dun. Dig. 2731(19).

2. Subd. 3.
 A widow of a nonresident, having received her full allowance out of personal property of decedent's estate in domiciliary state as provided by its statutes, is not entitled in ancillary proceedings here to receive a like allowance under laws of this state. *Zimmerman's Estate*, 195M38, 261NW467. See Dun. Dig. 2732.

3. Subd. 6.
 Where woman dies without issue and leaving a surviving spouse and will devising most of her property to brothers and sisters, and spouse renounces will, surviving spouse is entitled to be appointed administrator with will annexed or to select appointee, brothers and sisters not being "next of kin." *Long v. C.*, 194M238, 260NW314. See Dun. Dig. 3561d.

8724. Application to determine descent.
 Probate court has jurisdiction over homestead in regular probate proceedings after 5 years. *Christianson v. O.*, 191M166, 253NW661. See Dun. Dig. 2725, 3585b, 3652, 4219a.

Petition to probate court for decree of heirship is optional and not exclusive method of procedure. *Id.*

8732. Action by the court.
 179M315, 229NW133.

8735. Who may make a will, etc.
 Laws 1931, c. 259, validates holographic wills bearing date between Mar. 29 and Mar. 31, 1927, and transmitting personal property. Repealed. See §8992-195, post.
Carey v. B., 194M127, 260NW320; note under 8722.

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

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

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

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

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

Provision in will: "And it is my will and I do hereby direct that my executor, hereinafter named, shall handle my estate in his own way, but for the best interest of all of my heirs," did not add to or detract from duties and responsibilities imposed by law upon executor. *Marchildon v. M.*, 188M38, 246NW676. See Dun. Dig. 3565a.

No charitable trust is invalid because it violates rule against perpetuities. *Lundquist v. F.*, 193M774, 259NW9. See Dun. Dig. 7480.

Where testator willed \$2,000 to a church, to be paid by residuary legatees, residuary legatees to take subject to payment of this \$2,000, devise to the church is a charge or lien upon share going to residuary legatees; residuary legatees are personally liable for payment of \$2,000 if they accept residuary devise; but if residuary legatees do accept requirement that they pay \$2,000 to church does not violate article 1, §16, of constitution, for nothing compels legatees to accept. *Id.* See Dun. Dig. 1653, 10286, 10287h.

Wills are ambulatory and are effective only as of date of death. *Id.* See Dun. Dig. 10204.

Evidence held to support finding that decedent never published instrument as his will. *Ploetz v. F.*, 194M434, 260NW517. See Dun. Dig. 10221.

Agreement of principal beneficiary of will to give dissatisfied heir one-half of property in consideration of

his refraining from contesting will on ground of undue influence will be specifically enforced if dissatisfied heir acted in good faith. *Schultz v. B.*, 195M301, 262NW877. See Dun. Dig. 10243k.

Incorporation of other document or paper by reference. 17MinnLawRev527.

Joint and mutual wills. 19MinnLawRev95.

1a. Signature.

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

A purported will properly denied probate on testimony of subscribing witnesses that the maker's signature was neither affixed in their presence nor acknowledged as such to them. *Coleman*, 192M86, 255NW481. See Dun. Dig. 10214.

2. Mental capacity and undue influence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Construction of will.

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

When will gives an absolute title in fee and by later clauses expressed in terms of wish or direction makes inconsistent or repugnant dispositions, it will be held that the title in fee is in the devise first named and that the other provisions are void. 176M446, 223NW783.

Will providing for equal distribution except that certain beneficiaries were to receive a certain amount more than "one-sixth thereof" construed. 177M266, 225NW17.

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

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

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

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

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

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

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

Under *Mason's U. S. C. A.*, Title 38, §514, insured veteran's will must be construed and given effect according to law of state where he resided at his death. *Sponberg v. L.*, 187M650, 247NW679. See Dun. Dig. 10301f.

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

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

Where a bequest is accompanied by a direction that inheritance tax be paid out of residue, it is in effect a bequest of specified sum, plus such an amount that, when the tax is computed on aggregate and deducted therefrom, specified legacy remains. *Bowlin*, 189M196, 248NW741. See Dun. Dig. 10274.

Main object in construing a will is to ascertain intention of testator. *Jacobson v. M.*, 191M143, 253NW365. See Dun. Dig. 10257.

Not only language used in particular part of will, but whole instrument and situation of testator at time will was made should be considered in construction. *Id.* See Dun. Dig. 10259.

Doctrine of cy pres involves notion of approximating intention of donor when his exact intention is not to be carried out for some reason. *Lundquist v. F.*, 193M474, 259NW9. See Dun. Dig. 9893.

The cardinal rule of construction, to which all others must bend, is that intention of the testator, as expressed in language used in will, shall prevail, if it is not inconsistent with rules of law. *Ordean's Will*, 195M120, 261NW706. See Dun. Dig. 10257.

Intention is to be gathered from everything contained within four corners of will, read in light of surrounding circumstances. *Id.*

When language is free from doubt no room is left for construction or interpretation. *Id.*

4. Persons taking and their respective shares.

Levings v. F., 192M143, 255NW828; note under §8043.

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

Where a will gave a life estate with right to all income and unrestricted power of disposition of the principal, there was a complete merger of the legal and equitable interest in the life estate and, hence, no trust. *Julian v. N.*, 192M136, 255NW622. See Dun. Dig. 10291.

Under a will giving a life estate with right to all income and unrestricted power of disposition of the principal, remainderman held entitled to an admitted cash balance which was part of the property subject to the life estate and remained undisposed of at the life tenant's death. *Id.* See Dun. Dig. 3171.

Language of will held to mean that wife took entire estate and that later clauses thereof were directory only and not intended imperatively to control or limit wife's title. *Hasey's Estate*, 192M582, 257NW498. See Dun. Dig. 10281c.

Where a testator gives an absolute title, without limitation and by later clauses in his will expressed in terms of wish or direction makes inconsistent dispositions, title passes to beneficiary first named, and subsequent provisions are inoperative. *Id.*

Although will mentions "the First Lutheran Church of Battle Lake," whereas true name of church is "the First Evangelical Lutheran Church at Battle Lake, Minnesota," trust is not invalid, since it appears from evidence that testator intended this church and that it was commonly known by former and not by latter name. *Lundquist v. F.*, 193M474, 259NW9. See Dun. Dig. 10262.

Distinction between specific, demonstrative and general legacies. 15MinnLawRev728.

Time at which class described as heirs is to be ascertained. 18MinnLawRev486.

4½. Vesting of interests.

Testamentary trust giving income to daughter for life and upon her death the corpus to be distributed in equal shares to her offspring, each to receive one-half thereof upon attaining age of 25 years and other half upon attaining age of 35 years and in event of no offspring property to go to others, held to vest trust fund in daughter's offspring upon her death, and, in event of none living at her death, fund to go to others. *Jacobson v. M.*, 191M143, 253NW365. See Dun. Dig. 10274, 10278, 10297.

5. Contract to make will.

Where plaintiff's father and mother made mutual and reciprocal wills devising to survivor a life estate with remainder over to plaintiff and others, plaintiff is entitled to specific performance regardless of fact that after death of mother, father remarried and changed his will. *Mosloski v. G.*, 191M170, 253NW378. See Dun. Dig. 10207a.

Evidence held to sustain finding that deceased promised plaintiff child certain land for services so that child was entitled to specific performance after father's death. *Id.* See Dun. Dig. 10207.

Child held not estopped to sue for specific performance under reciprocal mutual wills of parents by having signed a petition for administration of his father's estate or by taking a lease on land in question. *Id.* See Dun. Dig. 3217, 8772.

Conversation before marriage between a testator and members of his family wherein the former announced his mere intention or plans concerning the disposition of his property, properly held not to impose contractual obligation upon any one. *Hanefeld v. F.*, 191M547, 254NW321. See Dun. Dig. 10207.

If there was a contract between husband and wife whereby latter was bound to make agreed testamentary disposition of property left her by her husband, his will held of such nature that, coupled with other evidence of testator's intention, it was properly held that agreement between husband and wife had been abrogated, and that disposition made of his property by husband's will was intended to be absolute. *Id.*

While in cases involving specific performance of contract to will real property, contract must be shown by more than a mere preponderance of evidence, such is not true as to a contract to pay for services rendered at

death. *Empenger v. E.*, 194M219, 259NW795. See Dun. Dig. 10207.

In proceeding to recover for services rendered deceased by claimant, his daughter-in-law, pursuant to an alleged contract to pay her at his death, court erred in refusing to instruct jury that services of wife with respect to family household belong to husband; that he may waive his right to compensation therefor from another party and consent that wife receive same, provided there is no question of set-off or counterclaim against husband, but where such appears it must be shown that one to be charged with payment of compensation acquiesced in payment to wife. *Id.* See Dun. Dig. 4261.

Evidence held to sustain finding that plaintiff had not promised to make a will or execute any other instrument that property she should receive from defendants under settlement was to go back to them or their heirs upon plaintiff's death. *Schultz v. B.*, 195M301, 262NW877. See Dun. Dig. 10243k.

Contracts to devise. 19MinnLawRev95.

Validity of oral agreement to execute mutual wills bequeathing personality. 20MinnLawRev238.

8738. Wills made out of the state.

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

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

8741. Written wills, how revoked or canceled.

Where circumstances raise inference that testator meant revocation of old will to depend on efficacy of the new disposition intended to be substituted, such will be the effect of the legal transaction, and if new will is inoperative and fails because of formal defects, the original will remains in force. *Nelson's Estate*, 183M295, 236NW469. See Dun. Dig. 10227.

Revocation rests upon intent and is an act of the mind which must be demonstrated by some outward and visible sign of revocation. *Nelson's Estate*, 183M295, 236NW469. See Dun. Dig. 10227.

Evidence held insufficient to invoke doctrine of "dependent relative revocation." *Nelson's Estate*, 183M295, 236NW469. See Dun. Dig. 10227.

Revocation of will held to have resulted from testator's own acts. *Nelson's Estate*, 183M295, 236NW469. See Dun. Dig. 10226.

Evidence held sufficient to prove revocation of a will. *Nelson's Estate*, 183M295, 236NW469. See Dun. Dig. 10226.

Statutory presumption of revocation of a will because of change in condition or circumstances is conclusive, and no evidence admissible to rebut it. *O'Connor*, 191M34, 253NW18. See Dun. Dig. 10225b, 10233.

Where after making a will testator disposes of practically all of his property, leaving nothing of substance upon which will can operate, either as to general plan or any substantial detail, there is revocation as matter of law. *Id.* See Dun. Dig. 10234.

Proof of a second will was some evidence of destruction of prior wills. *Mosloski v. G.*, 191M170, 253NW378. See Dun. Dig. 10230.

While a mutual will may be revoked as far as concerns proceedings in probate court, a beneficiary of a compact after survivor has accepted provisions of spouse's will and then died, may obtain specific performance of devise to him. *Id.* See Dun. Dig. 10207.

Wills are revocable, but contracts to make wills are irrevocable without consent of the parties. *Jannetta v. J.*, 285NW619. See Dun. Dig. 10226a.

8742. Will revoked by marriage or divorce.

Where plaintiff's father and mother made mutual and reciprocal wills devising to survivor a life estate with remainder over to plaintiff and others, plaintiff is entitled to specific performance regardless of fact that after death of mother, father remarried and changed his will. *Mosloski v. G.*, 191M170, 253NW378. See Dun. Dig. 10207a.

The old common-law rule that subsequent marriage revoked a woman's will did not apply where will was made pursuant to an antenuptial agreement giving woman full power to dispose of her own property. *Kelly*, 191M280, 254NW437. See Dun. Dig. 10229.

By this statute all wills are revoked by marriage regardless of existence of an antenuptial agreement. *Kelly*, 191M280, 254NW437. See Dun. Dig. 10229.

8743. Duty of custodian of will.

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

8745. Child not provided for by will.

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

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

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

Admissibility of extrinsic evidence to prove intentional omission of testator's child from will. 15MinnLawRev 255.

8746. From what estate such share taken.

Where sole and residuary legatee predeceased testator, and inmate of the Minnesota Soldier's Home, lapsed

legacy should be disposed of in accordance with §4366. *Op. Atty. Gen.* (394e), Jan. 24, 1935.

8747. Devisee or legatee dying before testator.

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

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

Widow, under bequest of specific article "in addition to the amount now allowed her by law" held to take what she would have received in case of intestacy, with specific article, and her share of lapsed bequest falling into estate by the death of one of the children without issue before death of testator. 32M513, 21NW 725.

8751. Who may petition for.

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

8753. Filing petition—Notice; etc.

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

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

Where the testator himself produces the will and asks the witnesses to sign as such, it may be presumed that he has signed it, although he does not so state and the witnesses do not see his signature. 174M13, 218NW 447.

In action by son for specific performance of mutual reciprocal wills executed by father and mother, sufficient foundation held laid for reception in evidence of carbon copy of father's mutual will. *Mosloski v. G.*, 191M170, 253NW378. See Dun. Dig. 3279.

8755. Objections, when filed.

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

8756. Proof required in case of contest.

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

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

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

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

Proponents must establish due execution of will, and contestant must prove undue influence. 180M256, 230NW 781.

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

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

The testimony of an attesting witness to a will impeaching the testamentary capacity of the testator is subject to close scrutiny, and should be viewed and weighed with caution. *Jensen v. M.*, 185M284, 240NW 656. See Dun. Dig. 10246d.

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

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

Evidence held so conclusive that will presented for probate was made and published by deceased; that she was competent; and that no undue influence had induced its making, that court rightly directed jury to so find. *Schuch v. A.*, 190M504, 252NW335. See Dun. Dig. 10212, 10221, 10243.

8758. When subsequent will is presented.

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

8763. Ancillary administration.

Minnesota probate court had complete jurisdiction over property of estate of a nonresident in the hands of ancillary administrator appointed by it and could dispose of the same in accordance with the provisions of

Minnesota statutes. *Fults' Estate*, 177M334, 225NW 152.

A widow of a nonresident, having received her full allowance out of personal property of decedent's estate in domiciliary state as provided by its statutes, is not entitled in ancillary proceedings here to receive a like allowance under laws of this state. *Zimmerman's Estate*, 195M38, 261NW467. See Dun. Dig. 2732.

It was proper for ancillary Minnesota executrix to show and for court to find, reasonable value of attorney's services in defending an action brought by one claiming to be entitled to proceeds of two insurance policies, payable to decedent's estate; widow having selected proceeds of policies as personal property out of which she desired her allowance to be paid. *Id.* See Dun. Dig. 3644c.

8768. When granted.

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

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

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

Order of probate court appointing executor cannot be attacked collaterally, remedy being by appeal from such order. *Lehman v. N.*, 191M211, 253NW663. See Dun. Dig. 3563.

Effect of merger or consolidation on right of corporation to qualify as executor. 15MinnLawRev816.

8769. Failure of executors.

Right of testator to appoint successive executors. 19 MinnLawRev709.

8772. Persons entitled to letters of administration.

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

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

Validity of marriage between survivor and deceased may be drawn in question in probate court. *O'Connor*, 191M34, 253NW18. See Dun. Dig. 7770.

Order appointing an administrator is not a final judgment or determination of who are heirs of decedent or entitled to receive estate after administration is completed so as to bar review of that question on appeal from final decree. *Pirle*, 191M233, 253NW889. See Dun. Dig. 389, 398.

Where woman dies without issue and leaving a surviving spouse and will devising most of her property to brothers and sisters, and spouse renounces will, surviving spouse is entitled to be appointed administrator with will annexed or to select appointee, brothers and sisters not being "next of kin." *Long v. C.*, 194M238, 260NW314. See Dun. Dig. 3561d.

8774. Hearing—Contest, etc.

Order appointing administrator, not appealed from, becomes final except in a direct attack thereon on ground of fraud or mistake. *Pirle*, 191M233, 253NW889. See Dun. Dig. 3563.

8776. Administrator with will annexed.

Where woman dies without issue and leaving a surviving spouse and will devising most of her property to brothers and sisters, and spouse renounces will, surviving spouse is entitled to be appointed administrator with will annexed or to select appointee, brothers and sisters not being "next of kin." *Long v. C.*, 194M238, 260NW 314. See Dun. Dig. 3561d.

8777. Administrator de bonis non.

Probate court, by virtue of broad grant of power bestowed by the constitution and in conformity with statutory enactment directing its exercise, may appoint an administrator d. b. n. with or without notice, when a proper petition, made by one authorized by statute so to do, is presented to it, provided authority of prior representative has been extinguished and there remains property theretofore unadministered. *Gilroy's Estate*, 193M349, 258NW584. See Dun. Dig. 1641, 3583, 7783e.

8778. Special administrator.

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

8786. General powers and duties.

Judgment in state court in action between administrator and heir held conclusive in subsequent action in federal courts involving title to the same real estate. *Lamoreaux v. Lamoreaux*, (USCCA8), 26F(2d)47.

Judgment in an action brought by an administrator within scope of his statutory power is binding on the heirs. Rule applied where administrator sued one in possession of land for an accounting of rents and profits and the defendant by cross-bill had a deed from him-

self to the deceased declared a mortgage. 171M423, 214NW267.

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

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

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

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

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

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

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

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

An executor has no general or implied authority to invest or loan money of estate; and if it is desirable to do either, it should be done only under authority of probate court; otherwise he is directly responsible for money invested or loaned. *Marchildon v. M.*, 188M38, 246NW676. See Dun. Dig. 3571.

An executor is a fiduciary and as such is required to exercise highest degree of good faith in discharge of his official duties. *Janke's Estate*, 193M201, 258NW311. See Dun. Dig. 3565.

8787. Liability—Collection of debts, etc.

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

Right of set-off or application of securities held for payment of a depositor's indebtedness to a bank exists against administrator of debtor's estate. *Browning v. E.*, 189M375, 249NW573. See Dun. Dig. 3670.

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

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

Executor who was also managing officer in bank in which deceased during his lifetime had deposited his funds was liable for negligence in failing to withdraw funds from bank prior to its closing. *Janke's Estate*, 193M201, 258NW311. See Dun. Dig. 3576.

8788. Allowances to executors; etc.

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

An executor who misappropriates funds forfeits right to compensation. *Marchildon v. M.*, 188M38, 246NW676. See Dun. Dig. 3646.

A guardian who mismanaged estate of his incompetent ward and misapplied proceeds thereof was properly denied compensation for his services. *Galloway v. H.*, 189M66, 248NW329. See Dun. Dig. 4122.

8789. Representative may resign.

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

8790. Removal.

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

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

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

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

On appeal to district court from order of probate court refusing to appoint legally competent person executor, it is improper for district court to affirm on ground that litigation already had disclosed that there may be ground for his removal after appointed. In re Betts' Estate, 185M627, 243NW58. See Dun. Dig. 7795.

Widow upon whose petition special administrator was appointed to maintain action for death under Federal Employers' Liability Act cannot have such administrator removed except for good cause, there being minor children interested in proceeds. Peterson v. C., 137M 228, 244NW823. See Dun. Dig. 3666.

Evidence warranted removal of an executor of an estate of a deceased person for acts of omission and commission. Matteson v. M., 187M291, 245NW382. See Dun. Dig. 3666.

An order of the probate court denying a motion to revoke a prior order appointing an administrator is not appealable. Firlc, 191M233, 253NW889. See Dun. Dig. 7786.

8791. Accounting by administrator; etc.

Where, after death of ward, probate court has finally settled guardian's account and determined amount of money remaining in hands of guardian, and has ordered such money to be paid to representative of ward's estate, and guardian dies before such payment is or can be made, it then devolves upon administrator of guardian's estate to complete settlement of guardian's account and make such payment out of fund in hands of guardian at time of his death. Winjum v. J., 191M 294, 253NW881. See Dun. Dig. 4115.

8792. Foreign executor; etc.

Curative act: Act Apr. 5, 1939, c. 147, §5. See Appendix 5, ¶21, post.

8793. Certain foreclosures legalized.

Saved from repeal. See §8992-196, post.

8794 to 8800, 8800-1, 8801 to 8832.

Repealed Mar. 29, 1935, c. 72, §196, post §8992-196, effective July 1, 1935, 12:01 a. m. Reenacted as shown below:

8794, see 8992-87.
8795, see 8992-88.
8796, see 8992-94.
8797, see 8992-94.
8798, see 8992-91.
8799, see 8992-92.
8800, see §8992-93.
8801, see 8992-93.
8802, see 8992-95.
8803, see 8992-95.
8804, see 8992-191.
8805, see 8992-191.
8806, see 8992-96.
8807, see 8992-97.
8808, see 8992-97.
8809, see 8992-100.
8810, see 8992-100.
8811, see 8992-101.
8812, see 8992-101.
8813, see 8992-101.
8814, see 8992-103.
8815, see 8992-107.
8816, see 8992-104.
8817, see 8992-105.
8818, see 8992-106.
8819, see 8992-106.
8820, see 8992-102.
8822, see 8992-113.
8823, see 8992-113.
8824, see 8992-113.
8825, see 8992-146.
8827, see 8992-108, 8992-109.
8828, see 8992-111.
8831, see 8992-110.
8832, see 8992-112.

Annotations under §8796.

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

Annotations under §8797.

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

Annotations under §8798.

From the distributive share of money due a legatee from the estate of a decedent, the debt of the legatee may be deducted, even though such debt is barred by the statute of limitations. Lindmeyer's Estate, 182M 607, 235NW377. See Dun. Dig. 3661a, 5694.

Annotations under §8799.

Trial court had absolute power to vacate prior order and to make contrary findings where this statute had been overlooked, even though moving party produced no newly discovered evidence. Lehman v. N., 191M211, 253NW663. See Dun. Dig. 15, 16, 5121a, 6312.

Authorizes executor to complete mortgage foreclosure proceedings begun by mortgagee. Id.

Annotations under §8800.

See note under §8799.

Annotations under §8800.

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

Annotations under §8811.

United Fruit Co. v. U. S., (USCCA5), 33F(2d)665. Orth v. Mehlhouse, (USDC-Minn), 36F(2d)367. Simons, 192M43, 255NW241; note under §8815. State v. Fosseen, 192M108, 255NW816; note under §8812. Court properly allowed claim to be filed after six months period. 174M102, 218NW456.

Failure of trustee for bondholders to file a claim in probate court against estate of a deceased co-surety within time specified by statute does not relieve other surety from liability. First Minneapolis Trust Co. v. N., 192M 307, 256NW240. See Dun. Dig. 9104.

Annotations under §8812.

Simons, 192M43, 255NW241; note under §8815.

1. In general.

Receiver of national bank, having no knowledge of the death of a shareholder, held not barred by this section, though he failed to file the claim before the closing of the estate. Gilbertson v. M., (USCCA8), 32 F(2d)665.

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

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

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

Under the authority of Coulter v. Goulding, 98M68, 107NW323, 8AnnCas778, evidence was properly received showing the ability of deceased to pay the claim, the payment of which was in dispute. His business habits relative to paying his bills might also have been shown. 178M90, 225NW918.

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

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

A creditor holding securities for his claim has the option, after the debtor's death, to enforce his securities or to file his claim in probate court as a general creditor of the estate. Browning v. E., 189M375, 249NW573. See Dun. Dig. 35930.

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

Compensation payable weekly to minor dependants of an employee is absolute, direct, and primary obligation of employer and, where employer dies after award is made, it is barred if not presented to and allowed by probate court in administration of his estate, so that no action can be maintained against distributees to recover to extent of assets received. Stitz v. R., 192M297, 256NW 173. See Dun. Dig. 3592a.

In proceeding to recover for services rendered deceased by claimant, his daughter-in-law, pursuant to an alleged contract to pay her at his death, court erred in refusing to instruct jury that services of wife with respect to family household belong to husband; that he may waive his right to compensation therefor from another party and consent that wife receive same, provided there is no question of set-off or counterclaim against husband, but where such appears it must be shown that one to be charged with payment of compensation acquiesced in payment to wife. Empenger v. E., 194M219, 259NW795. See Dun. Dig. 4261.

While in cases involving specific performance of contract to will real property, contract must be shown by more than a mere preponderance of evidence, such is not true as to a contract to pay for services rendered at death. Id. See Dun. Dig. 1737.

2. Contingent claims.

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

A claim, on an unconditional guaranty of the payment of principal and interest on a bond at maturity is not a conditional claim against the estate of a deceased guarantor. It is a claim certain in amount and having a fixed maturity. As to bonds not due at the time of the death of the guarantor, it is a claim "not due" and, as such, must be presented to probate court for allowance against estate of guarantor within time allowed for

filing of claims or within one year and six months' period provided by statute. *State v. Fosseen*, 192M108, 255 NW816. See Dun. Dig. 3593, 3593a, 3593b.

Annotations under §8813.

172M68, 214NW895, note under §8812.

Annotations under §8814.

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

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

Annotations under §8815.

A claim upon a promissory note held as collateral is a claim upon contract for the recovery of money and must be filed, but where judgment is rendered against an executor or administrator in his official capacity in a state or federal court and is presented to probate court while administration is pending and before distribution by final decree, it must be allowed as a claim against the estate. 175M624, 222NW68.

Statute does not authorize a probate court to allow a claim against a decedent's estate after expiration of five years from his death, where such claim during said five years remains contingent, but becomes absolute prior to distribution of estate. *Simons*, 192M43, 255NW241. See Dun. Dig. 3593.

Annotations under §8816.

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

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

Annotations under §8820.

Stitz v. R., 192M297, 256NW173; note under §8812.

Annotations under §8822.

When does interest begin to run on legacies. 16Minn LawRev226.

Annotations under §8820.

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

Annotations under §8827.

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

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

It was proper for ancillary Minnesota executrix to show and for court to find reasonable value of attorney's services in defending an action brought by one claiming to be entitled to proceeds of two insurance policies, payable to decedent's estate; widow having selected proceeds of policies as personal property out of which she desired her allowance to be paid. *Zimmerman's Estate*, 195M38, 261NW467. See Dun. Dig. 3644c.

Annotations under §8828.

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

Annotations under §8820.

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

8833. Claim for maintenance of patient in state institutions.

Saved from repeal. See §8992-196, post.

Section 8976 was not repealed by §8833 and state does not have a claim against estate of deceased person who leaves children or spouse. Op. Atty. Gen. (349h), Apr. 3, 1934.

DISPOSAL OF REALTY BY REPRESENTATIVES

8834 to 8972, 8872-1, 8873 to 8927, 8927-1, 8927-2, 8928 to 8975.

Repealed Mar. 29, 1935, c. 72, §196, post §8992-196, effective July 1, 1935, 12:01 a. m. Reenacted as shown below:

- 8834, see 8992-146.
- 8835, see 8992-146.
- 8836, see 8992-147.
- 8837, see 8992-147.
- 8838, see 8992-148.
- 8839, see 8992-148.
- 8841, see 8992-148, 8992-149.
- 8842, see 8992-152.
- 8843, see 8992-150.
- 8844, see 8992-151.
- 8845, see 8992-147.
- 8847, see 8992-90.
- 8849, see 8992-153.
- 8850, see 8992-153.
- 8851, see 8992-154.
- 8853, see 8992-156.
- 8854, see 8992-156.
- 8855, see 8992-156.
- 8856, see 8992-155.
- 8857, see 8992-162.

- 8858, see 8992-162.
- 8859, see 8992-163.
- 8861 to 8871, see 8992-158.
- 8872, see 8992-157.
- 8873, see 8992-114.
- 8874, see 8992-116.
- 8875, see 8992-116.
- 8876, see 8992-119.
- 8877, see 8992-114.
- 8879, see 8992-115.
- 8880, see 8992-115, 8992-117.
- 8886, see 8992-124.
- 8887, see 8992-124.
- 8888, see 8992-126.
- 8889, see 8992-126.
- 8891, see 8992-171.
- 8892, see 8992-171.
- 8895, see 8992-127.
- 8896, see 8992-128.
- 8897, see 8992-127.
- 8898, see 8992-128.
- 8907, see 8992-82.
- 8909, see 8992-83.
- 8910, see 8992-152.
- 8911, see 8992-85.
- 8912, see 8992-84.
- 8913, see 8992-85, 8992-152.
- 8914, see 8992-86.
- 8916, see 8992-129, 8992-130.
- 8917, see 8992-130.
- 8918, see 8992-130.
- 8919, see 8992-130.
- 8920, see 8992-129, 8992-135.
- 8922, see 8992-142.
- 8923, see 8992-129.
- 8924, see 8992-129, 8992-130.
- 8925, see 8992-133.
- 8926, see 8992-133, 8992-134.
- 8927, see 8992-132.
- 8927-1, see 8992-136.
- 8927-2, see 8992-136.
- 8928, see 8992-141.
- 8929, see 8992-143.
- 8931, see 8992-129, 8992-130.
- 8933, see 8992-129, 8992-135.
- 8935, see 8992-135.
- 8937 to 8943, see 8992-135.
- 8944, see 8992-67.
- 8946, see 8992-135.
- 8947, see 8992-135.
- 8948, see 8992-137, 8992-138, 8992-139.
- 8949, see 8992-137, 8992-138, 8992-139.
- 8950, see 8992-139.
- 8951, see 8992-141.
- 8952, see 8992-141.
- 8954, see 8992-173.
- 8955, see 8992-173.
- 8956, see 8992-174.
- 8957, see 8992-174.
- 8958, see 8992-175.
- 8959, see 8992-175.
- 8960, see 8992-176, 8992-179, 8992-183, 8992-184.
- 8961, see 8992-176.
- 8962, see 8992-176.
- 8963, see 8992-174.
- 8964, see 8992-178.
- 8966, see 8992-177.
- 8967, see 8992-177.
- 8968, see 8992-177.
- 8969, see 8992-181.
- 8970, see 8992-175.
- 8971, see 8992-182.
- 8973, see 8992-180.
- 8974, see 8992-180.
- 8975, see 8992-175.

Annotations under §8834.
Christianson v. O., 191M166, 253NW661; note under §8690, note 6.

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

Annotations under §8835.

172M504, 215NW857; note under §8834.

Annotations under §8836.

172M504, 215NW857; note under §8834.

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

Annotations under §8831.

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

Annotations under §8873.

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

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

Duty of an executor is to settle estate and make distribution without delay. *Marchildon v. M.*, 188M38, 246 NW676. See Dun. Dig. 3641b.

Decision on hearing of intermediate account of administrator held to constitute approval of act of bank in applying deposit of decedent to payment of notes held by it. *Browning v. E.*, 189M375, 249NW573. See Dun. Dig. 3649a.

Annotations under §8874.

It was not error to credit executor for money spent in maintenance of family of decedent and schooling of minors. *Marchildon v. M.*, 188M38, 246NW676. See Dun. Dig. 3644a, 3658.

Annotations under §8870.

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

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

Burns v. N., 285NW885; note under §8992-124.

4. Effect of decree.

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

Real estate assigned by final decree passes out of the control of the court and is discharged from further administration, and thereafter neither the probate court nor the district court on appeal has authority to vacate the decree without notice to the persons who then hold title to such real property. 176M524, 222NW68.

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

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

A decree distributing estate of a person deceased is a judgment in rem, binding as such upon all the world, and claimants excluded by such a decree cannot recover any of property from distributees, upon ground of fraud, without first having decree vacated. *Murray v. C.*, 191M460, 254NW605. See Dun. Dig. 3660.

5. Enforcement of decree.

A demurrer to an answer in a suit against an administrator personally and his surety for money assigned a widow in final decree, was properly sustained, where answer admitted assignment in decree but sought to interpose as counterclaims alleged indebtedness to estate. *Saunderson v. H.*, 190M431, 252NW83. See Dun. Dig. 3585b, 7662.

Annotations under §8880.

The statute of limitations commences to run against an action on a bond of an administrator from the time of the entry of the final decree of distribution. *Burns v. N.*, 285NW885. See Dun. Dig. 3580.

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

Annotations under §8887.

Burns v. N., 285NW885; note under §8992-124.

Annotations under §8888.

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

Annotations under §8880.

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

Annotations under §8907.

Freeborn County Nat. Bank & Trust Co. v. G., 190M327, 251NW671; note under §8910.

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

Sureties on bond of guardian of incompetent are liable for defalcation of guardian occurring before bond was executed but after resignation of predecessor and filing of final account, approved by probate court as part of same transaction wherein bond in question was approved and filed. *Lindquist v. T.*, 188M62, 247NW506. See Dun. Dig. 4103.

Surety on sale bond of an administrator, upon making good his principal's default in not accounting for proceeds of sale, is not entitled to contribution from sureties on administrator's general bond. *Hartford Accident & I. Co. v. A.*, 192M200, 256NW185. See Dun. Dig. 1921, 3090.

Annotations under §8909.

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

Annotations under §8910.

Action on bond 15 years after sale held barred by laches. 178M401, 227NW355.

Sureties on sale bond of guardian were not liable for guardian's failure to account for interest received on purchase money mortgage taken with approval of probate court, such interest being income on general prop-

erty of estate rather than receipt under license to sell. *Slewert v. A.*, 187M71, 244NW337. See Dun. Dig. 4108a (40).

Where a guardian, licensed to sell real estate of his ward, sells same on terms of part cash and for balance a purchase-money mortgage, and probate court confirms such sale, mortgage so taken becomes an authorized and approved security held by guardian, under his general power, as part of estate of his ward, and is not thereafter held under any power derived from license to sell. *Freeborn County Nat. Bank & Trust Co. v. G.*, 190M327, 251NW671. See Dun. Dig. 4110, n. 50.

Surety did not, by receiving annual premiums on bond, estop itself to deny liability for money which guardian held under his general power. *Id.* See Dun. Dig. 4103.

Surety on sale bond of an administrator, upon making good his principal's default in not accounting for proceeds of sale, is not entitled to contribution from sureties on administrator's general bond. *Hartford Accident & I. Co. v. A.*, 192M200, 256NW185. See Dun. Dig. 1921, 3090.

Annotations under §8912.

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

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

Annotations under §8914.

Bromen v. O., 185M409, 241NW54; note under §8907. A surety for one guardian may show that a liability incurred was a continuing one for the purpose of obtaining contributions from the sureties of the other guardian. *Southern Surety Co. v. T.*, 179M40, 228NW326.

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

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

Annotations under §8916.

Where father died a resident of Wisconsin and domiciled therein, the mother having predeceased him, leaving four minor children, domicile of children remains in that state, and courts thereof have jurisdiction to determine all matters pertaining to guardianship of the persons of such children, including as well all property to them belonging and having a situs within that state. *State v. Hedberg*, 192M193, 256NW91. See Dun. Dig. 2813, 4099.

The domicile of a minor child is that of its parent. Upon death of the parent, the domicile of the child continues, during its minority, to be the same as was that of deceased parent, subject to certain exceptions. *Id.* See Dun. Dig. 2813.

Annotations under §8924.

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

Evidence held to support finding that daughter of incompetent was qualified to be appointed guardian as against contention that she was improvident. *Dahmen's Guardianship*, 192M407, 256NW891. See Dun. Dig. 4332.

Selection of guardian of an incompetent is a matter peculiarly within discretion of appointing court, and an appellant who seeks to overthrow decision is required clearly to establish error. *Dahmen's Guardianship*, 192M407, 256NW891. *Id.* See Dun. Dig. 4332.

Order appointing a guardian was void where petition did not prima facie state facts that would bring ward within class subject to guardianship. *Carpenter's Guardianship*, 203M477, 281NW867. See Dun. Dig. 4332, 7783.

Annotations under §8929.

Conclusion that competency was not shown sustained. 171M227, 213NW898.

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

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

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

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

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

Annotations under §8933.

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

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

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

A parent has a natural right to custody of his child, but this right yields to best interests of child. State v. Miller, 187M152, 244NW685; State v. Markson, 187M176, 244NW687. See Dun. Dig. 7297.

Mother was given custody of boy 12 years old in preference to very old grandparents with whom it had lived since a baby. State v. Markson, 187M176, 244NW 687.

Money deposited by a guardian in a bank in his name as guardian, without any order of court, remains under control and in hands of guardian after, as well as before, such deposit. Winjum v. J., 191M294, 253NW831. See Dun. Dig. 4107.

Final order of probate court settling guardian's account and fixing amount of money remaining in hands of guardian, and ordering payment thereof to representative of deceased ward's estate, not having been appealed from, is conclusive and cannot be collaterally attacked in this action. Id. See Dun. Dig. 4125a.

Evidence does not compel a conclusion that plaintiff gratuitously assumed support of defendant's child without expectation of recompense. Knutson v. H., 191M420, 254NW464. See Dun. Dig. 7302.

Quasi contractual obligation imposed by law upon a father to support his minor child and to compensate others who, in his default, assume duty to nurture and educate such child, places him in same situation as if he had made an express contract to compensate, without specifying time of payment or termination of arrangement. Id.

Best interest of minor child is controlling force in determining custody. State v. Hedberg, 192M193, 256NW91. See Dun. Dig. 4433b.

On evidence in a habeas corpus proceeding, mother of a minor child held entitled to its custody. State v. Sivertson, 194M380, 260NW622. See Dun. Dig. 7297.

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

Annotations under §8930.

See §8992-87.

Annotations under §8937.

Suit on behalf of a minor should proceed in his name, by his guardian, rather than in name of latter on behalf of minor. Borowski v. S., 183M102, 246NW540. See Dun. Dig. 4461.

Annotations under §8938.

Where a guardian embezzled funds of his ward and paid them to a bank, all representatives of latter supposing that he was using his own funds and having no reason to think otherwise, guardian cannot recover fund from bank in absence of a showing that recovery is necessary to protect ward from loss, primary liability in such case being upon guardian and his sureties. Galloway v. S., 193M104, 258NW10. See Dun. Dig. 783, 4103, 4122.

Annotations under §8939.

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

Annotations under §8947.

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

Where guardian keeps funds of his wards in a bank, of which he is an active officer, in time certificates of deposit, savings and checking accounts, without bonds or security required by order of probate court being given, bank becomes trustee ex maleficio of funds and claim of present guardian against bank is entitled to a preference. Schendel v. P., 194M162, 259NW692. See Dun. Dig. 4107.

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

Annotations under §8949.

When a person under guardianship dies, guardianship terminates, but probate court retains jurisdiction over guardian and property for purpose of hearing and settling final account of guardian. Winjum v. J., 191M294, 253NW881. See Dun. Dig. 4115a.

When a ward dies, his property in hands of his guardian, passes to representative of ward's estate but guardian has right to retain possession of property for time necessary to settle his final account. Id.

Probate court passes upon amount and validity of expenses paid or incurred by guardian and determines what compensation guardian is to receive for his services. It determines any and all matters incident to account. The court then determines amount of money or

property, or both, remaining in hands of guardian after payment of allowed expenses and fees and orders guardian to pay or deliver remaining money or property, or both, to the representative of the deceased ward's estate. Id. See Dun. Dig. 4117a.

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

Annotations under §8950.

Winjum v. J., 191M294, 253NW881; note under §8949. An order duly made by the probate court settling the final account of a guardian is conclusive on the guardian, and cannot be attacked collaterally by him. Trapp v. T., 182M537, 235NW29. See Dun. Dig. 4125a(21).

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

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

In a proceeding to examine and allow accounts of trustees, a decree of final distribution of probate court entered two years earlier cannot be collaterally attacked. Trust Created in and by Fogg's Will, 193M397, 259NW6. See Dun. Dig. 7784, 9945.

Annotations under §8953.

Notice of cancellation of contract served upon vendee one day before discharged as sane by decree of probate court, was valid, there being no guardian and vendee being on parole. McKinley v. S., 183M325, 247NW 389. See Dun. Dig. 4519, 4531, 10091.

Evidence held to justify finding that defendant was feeble-minded, warranting an order committing him to custody of state board of control. State Board of Control v. F., 192M412, 256NW662. See Dun. Dig. 4523.

Annotations under §8954.

Superintendent must release a voluntary inebriate inmate from institution three days after he demands his release, unless within the three days he has made application with judge of probate to have inebriate committed by such court. Op. Atty. Gen., Nov. 29, 1933.

Annotations under §8955.

Op. Atty. Gen., Nov. 29, 1933; note under §8954.

Annotations under §8956.

Provision giving probate court jurisdiction to commit insane person does not violate Const. Art. 6, §7. Op. Atty. Gen. (248b-3), Feb. 19, 1935.

Annotations under §8957.

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

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

Attorney general at request of State Board of Control appears in behalf of the state, and duty of county attorney is to represent alleged insane person or if such person retains other counsel, to remain neutral. Op. Atty. Gen. (248b-3), Feb. 19, 1935.

Annotations under §8959.

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

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

Annotations under §8960.

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

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

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

Where a person is found to be feeble-minded, it is for state board of control to determine whether he shall be placed in a state institution or other home or be left in his present home under supervision. State Board of Control v. F., 192M412, 256NW662. See Dun. Dig. 4523.

Finding of district court in one proceeding to have one adjudged feeble-minded that defendant was not so feeble-minded as to justify committing him to custody of board of control was not res adjudicata in a subsequent proceeding, proceeding not being an action at law or governed strictly by rules applicable in a law suit. Id. See Dun. Dig. 4523.

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

Annotations under §8961.

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

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

Insane patient in veterans' hospital cannot be transferred to state hospital with new commitment. Op. Atty. Gen. (1001f), Jan. 28, 1935.

Transfer of veteran operates to discharge him from commitment of state hospital but not from commitment to veterans' hospital. Op. Atty. Gen. (243b-8), Apr. 2, 1935.

Annotations under §8966.

Expenses of feeble-minded hearing are to be paid only on order of probate court. Op. Atty. Gen. (679), June 18, 1934.

Annotations under §8967.

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

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

Fact that one makes application for poor aid, which is not granted, does not prevent him from gaining a new settlement by residing in county for one year. Op. Atty. Gen., Nov. 2, 1933.

Annotations under §8969.

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

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

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

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

Saved from repeal. See §8992-196, post.

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

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

Section 8976 was not repealed by §8883 and state does not have a claim against estate of deceased person who leaves children or spouse. Op. Atty. Gen. (349h), Apr. 3, 1934.

Where person was committed to institution for feeble-minded from county in which parents resided, and paid for support at institution for some years and then moved to another county, the county of commitment and not the county to which parents moved is liable to the state for the support of the inmate. Op. Atty. Gen. (679c), July 20, 1935.

Where child was committed to private institution and it was later determined to commit it to state public school at Owatonna, county where child was first committed as a dependent child determines county liable for its support, regardless of where parents moved and location of private institution. Op. Atty. Gen. (840a-6), July 23, 1935.

Where mother of illegitimate had a legal settlement in St. Louis County at time baby was born in Minneapolis, and child was brought into juvenile court of Hennepin county on charge of dependency and was under the care of the Catholic central bureau for a number of years, and meanwhile mother remarried and left the state, proper settlement of child on being adjudged feeble-minded and placed under guardianship of state board of control was St. Louis County, which county is responsible for him. Op. Atty. Gen. (339a-2), July 30, 1935.

Welfare board is not responsible for support of feeble-minded, epileptic and insane persons receiving institutional care. Op. Atty. Gen. (125a-64), July 28, 1937.

8977 to 8982.

Saved from repeal. See §8992-196, post.

APPEALS

8983 to 8992. [Repealed.]

Repealed Mar. 29, 1935, c. 72, §196, post §8992-196, effective July 1, 1935, 12:01 a. m. Reenacted as shown below:

8983, see 8992-164.

8984, see 8992-166.

8985, see 8992-166.

8986, see 8992-167.

8987, see 8992-168.

8988, see 8992-169.

8989, see 8992-169.

8990, see 8992-170.

Annotations under §8983.

180M195, 230NW584.

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

Fraud or misrepresentation held not shown. 174M23, 218NW235.

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

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

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

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

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

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

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

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

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

Order appointing an administrator is appealable. Firie, 191M233, 253NW889. See Dun. Dig. 7786.

An order of the probate court denying a motion to revoke a prior order appointing an administrator is not appealable. Id.

Order appointing administrator does not create an estoppel by verdict or findings so as to bar review of

question of who are heirs or heir of decedent, on appeal from final decree. *Id.* See Dun. Dig. 3562b.

A separate order of probate court, made after appointment of administrator and prior to petition for a final decree, purporting to determine who is sole heir of decedent, is not final or appealable, and may be reviewed on appeal from final decree of distribution. *Id.* See Dun. Dig. 389, 7786.

An administrator, after full administration of estate, is not, as such administrator, aggrieved by decree of distribution which merely assigns estate to various heirs. *Nelson's Estate*, 194M297, 260NW205. See Dun. Dig. 7785.

Allocation of \$500 provided for in §8726 was merely a form of distribution as affecting right of administrator to appeal. *Id.* See Dun. Dig. 7785.

An administratrix who appeals from an order of probate court removing her from office and appointing another in her place need not file an appeal bond, order removing her being suspended until determination of appeal. *Johnson v. L.*, 194M300, 260NW295. See Dun. Dig. 7791.

Probate courts are courts of record and their orders and judgments are not subject to collateral attack in field entrusted to them by constitution, but a motion by a ward to expunge erroneous statements from record is not a collateral attack. *Carpenter's Guardianship*, 203M477, 281NW867. See Dun. Dig. 7784.

Subd. E.

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

Statement in *Savela v. Erickson*, 138M93, 99, 163NW1029, 1031, that relief from "surprise, or excusable inadvertence or neglect," might be justified under this subdivision, was an inadvertent statement, since statute merely authorizes an appeal. *Simon*, 187M399, 246NW31. See Dun. Dig. 7784(2).

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

Annotations under §8084.

1. From allowance or disallowance of claims.

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

2. In other cases.

Where probate court by its decree of distribution assigned commuted value of unpaid installments of war risk insurance to insured's mother, who was not a beneficiary under his will the administrator *c. t. a.*, as appointed protector of estate, had right to appeal to district court. *Leonard*, 191M388, 254NW594. See Dun. Dig. 7785.

Annotations under §8085.

179M133, 228NW551.
Betts' Estate, 185M627, 240NW904; note under §8983. An appeal must comply with the provisions of this section and jurisdiction cannot be conferred on the district court by consent. 174M133, 218NW546.

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

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

While notice by mail, as authorized by §9242, is not applicable to the probate court, actual notice is sufficient to start the running of limitations under this section, and where a letter is actually received (the usual presumption in that respect being applicable) the requirement as to service of notice is satisfied. 180M670, 231NW218.

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

Statute requires that notice of appeal from probate to district court be served and filed with proof of service within 30 days after notice of decision appealed from. *Otting v. P.*, 188M401, 247NW804. See Dun. Dig. 7788(47).

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

Questions as to whether proper proof of claim was filed in probate court and as to whether a copy of notice of appeal was delivered to the probate judge for the benefit of nonappearing parties, not being raised in probate court, cannot be considered on appeal. *Devenney's Estate*, 195M265, 256NW104. See Dun. Dig. 7794, 7795.

Party appealing from decree of probate court has six months in which to perfect appeal unless appellant is served with notice of entry of decree, in which event

he has thirty days thereafter only. *Id.* See Dun. Dig. 7788.

Notice of appeal from probate court actually received through the mail was equivalent of personal service. *Id.* See Dun. Dig. 7789.

Section §692 authorizes an appellant to post an undertaking in lieu of bond. *Id.* See Dun. Dig. 7791.

Notice of appeal from order allowing claim in part and disallowing claim in part held sufficient. *Id.* See Dun. Dig. 7789.

(2).

In a proceeding to examine and allow the accounts of trustees, a decree of final distribution of probate court entered two years earlier cannot be collaterally attacked. *Trust Created in and By Fogg's Will*, 193M379, 259NW6. See Dun. Dig. 7784, 9945.

An administratrix who appeals from an order of probate court removing her from office and appointing another in her place need not file an appeal bond, order removing her being suspended until determination of appeal. *Johnson v. L.*, 194M300, 260NW295. See Dun. Dig. 7791.

Annotations under §8086.

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

Annotations under §8087.

An administratrix who appeals from an order of probate court removing her from office and appointing another in her place need not file an appeal bond, order removing her being suspended until determination of appeal. *Johnson v. L.*, 194M300, 260NW295. See Dun. Dig. 7791.

Annotations under §8088.

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

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

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

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

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

On appeal to district court from an order of the probate court amending a final decree of distribution after the time for appeal from such decree had expired the trial is *de novo*, and, there being no pleadings in the district court, that court must determine the right to amendment upon the petition filed in the probate court and the proof in support thereof. 181M528, 233NW305. See Dun. Dig. 7794(76).

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

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

Annotations under §8089.

Order of probate court settling account of administrator is conclusive on sureties on bond. *McDonald's Estate*, (USDC-Minn), 42F(2d)266. See Dun. Dig. 3580f.

District court is without jurisdiction of settlement of accounts of administrator except on appeal. *McDonald's Estate*, (USDC-Minn), 42F(2d)266. See Dun. Dig. 2759(28).

District court, on appeal from order of probate court, has inherent equity power and jurisdiction to permit or compel a set-off on equitable grounds. An agreement for a set-off is one ground for allowing it in equity. *Browning v. E.*, 189M375, 249NW573. See Dun. Dig. 7795.

Annotations under §8090.

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

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

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

Practice in district court of moving for a new trial after a trial *de novo* and findings made affirming the probate court, and in appealing from the order denying the new trial is not commended. *Walker's Estate v. M.*, 183M325, 236NW485. See Dun. Dig. 294, 300, 7796.

MINNESOTA PROBATE CODE

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ARTICLE I.—POWERS, ETC., OF COURT.

8992—1. General provisions.—A probate court, which shall be a court of record having a seal, is established in each county. The court shall be open for the transaction of business at the county seat at all reasonable hours. Hearings may be had at such times and places in the county as the court may deem advisable. The necessary and reasonable traveling expenses of the judge, referee, reporter, clerks, and employees in attending hearings in places other than the county seat shall be paid by the county. (G. S. 8690) (Act Mar. 29, 1935, c. 72, §1.)

Annotations under former act, see ante, §8690.

A suit by third parties against surviving partners of a firm, to recover on liabilities of firm and of surviving partners, is within jurisdiction of district court, and not probate court. *Fulton v. O.*, 195M247, 262NW570. See Dun. Dig. 7779.

Probate proceedings are in rem; res being property of deceased owner. *Mahoney's Estate*, 195M431, 263NW465. See Dun. Dig. 7771.

Jurisdiction of probate court continues until close of proceedings. *Id.* See Dun. Dig. 7777a.

In administering estate probate court applies equitable principles and exercises equitable powers; but it is not possessed of independent jurisdiction in equity over controversies between representative of estate with strangers to proceedings, claiming adversely, nor of collateral actions. *State v. Probate Court of Hennepin County*, 199M297, 271NW879. See Dun. Dig. 7776.

Probate court has exclusive original jurisdiction of estates of deceased persons, but manner in which that jurisdiction is exercised is subject to regulation by legislature, and it may constitutionally limit jurisdiction of probate court to hear certain kinds of claims, and time to present claims, and probate court does not have power to extend time for filing claims which become absolute during period limited for filing claims beyond one year and six months from time notice of order was given, nor may compliance with statute be waived by a representative. *Flewell*, 201M407, 276NW732. See Dun. Dig. 3592a, 7770b, 7770c.

With probate court lies exclusive jurisdiction to construe and determine validity of wills and provisions thereof for purposes of administration, and to determine

amount of distributive shares thereunder. *Peterson's Estate*, 202M31, 277NW529. See Dun. Dig. 7770c, 7770d, 7771, 7778.

Specific performance of a contract to make a will disposing of property may be granted in the district court by a judgment against the representative, heirs, legatees, and devisees without interfering with the probate court's exclusive jurisdiction of estates of decedents. *Jannetta v. J.*, 285NW619. See Dun. Dig. 7770c.

Probate court has jurisdiction to administer estates of deceased persons and to determine rights to property so far as they depend on devolution, testate or intestate, but it has no general jurisdiction, and has no jurisdiction to grant specific performance or determine property rights as between third parties and representative, heirs, legatees and devisees. *Id.* See Dun. Dig. 7776.

Probate court possesses no independent jurisdiction in equity or at law over controversies between the representative of an estate, or those claiming under it, with strangers claiming adversely, nor of collateral actions. *Marquette Nat. Bank v. M.*, 287NW233. See Dun. Dig. 3658, 7779.

8992—2. Powers.—In addition to its general powers, the probate court shall have power:

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

2. To issue citations, subpoenas, and attachments, to make orders, judgments, and decrees, to issue executions, warrants, or processes to enforce them, and to authorize the taking of depositions of witnesses either within or without the state in any matter pending in such court; provided, that in any contested matter notice of the taking of the deposition shall be given as provided by law.

3. To adjourn any hearing with or without terms, provided that when objection is made the adjournment shall be only for cause shown by affidavit or otherwise.

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

5. To order any representative to surrender and deliver property to his successor or to distribute it.

6. To punish for contempt, including contempt committed in proceedings before the referee, clerk, or auditor. (G. S. 8701) (Act Mar. 29, 1935, c. 72, §2.)

Annotations under former act, see ante, §8701.

Orders of probate court allowing claims of creditors have effect of judgments which are final unless appealed from. *National Surety Co. v. E.*, (USCCA8), 88F(2d)399.

Original jurisdiction of administration proceedings, and matters necessarily incident thereto, is exclusively and completely vested in probate court. *State v. Probate Court of Hennepin County*, 199M297, 271NW879. See Dun. Dig. 7770c.

Probate court held without jurisdiction to hear and determine petition of executrix to have contract made by her with third parties annulled for fraud. *Id.* See Dun. Dig. 7771.

Probate court does not adjudicate claims of third persons against heirs or contracts made by or between them. *Schaefer v. T.*, 199M610, 273NW190. See Dun. Dig. 7770.

Probate courts may apply the equitable doctrine of estoppel in any matter involved in administration. *Clover v. P.*, 203M337, 281NW275. See Dun. Dig. 7776.

Probate court is by constitution vested with complete jurisdiction over estates of deceased persons and persons under guardianship. *State v. Probate Court of Hennepin County*, 204M5, 283NW545. See Dun. Dig. 7770.

When there is conflict between representative and his attorney in respect to services rendered and fees to be paid therefor, issues presented thereby should be determined by a court of general jurisdiction, as probate court has no jurisdiction in such cases. *Id.* See Dun. Dig. 7775.

Probate court in administering estate applies equitable principles and exercises equitable powers, it possesses no independent jurisdiction in equity or at law over controversies between representatives of estate, or those claiming under it, with strangers claiming adversely, nor of collateral actions. *Id.* See Dun. Dig. 7776.

Conclusion of court committing person as insane could be amended by court by inserting a specific finding that patient was dangerous to the public, and patient could be detained under amended warrant. *Op. Atty. Gen.* (346), May 4, 1938.

(4.) When probate court has made order for sale of real estate of an estate and it has been sold and sale confirmed and deed executed to purchasers and administrator discharged, matter is out of jurisdiction of probate court, and it cannot entertain an application for review and set aside sale proceedings. *Mahoney's Estate*, 195M431, 263NW465. See Dun. Dig. 7777a.

Neither probate court nor district court on appeal obtained jurisdiction of person or subject matter under a petition requesting that order releasing guardian be set aside and that guardian be ordered to account, guardian having moved out of state and service being attempted by publication, proceeding not being one in rem, and res having disappeared. *Sellers v. S.*, 196M143, 264NW 425. See Dun, Dig. 5141, 7784.

Record sustains trial court in affirming probate court's orders vacating and setting aside its previous order setting apart a homestead, on ground of fraud. *Flanagan's Estate*, 196M140, 264NW433. See Dun, Dig. 7784.

Probate courts are courts of record and their orders and judgments are not subject to collateral attack in field entrusted to them by constitution, but a motion by a ward to expunge erroneous statements from record is not a collateral attack. *Carpenter's Guardianship*, 203M 477, 281NW867. See Dun, Dig. 7774.

8992-3. Books of record.—The court shall keep the following books of record:

1. An index in which files pertaining to estates of deceased persons shall be indexed under the name of the decedent, those pertaining to guardianships under the name of the ward, those pertaining to an insane, inebriate, feeble-minded, or epileptic person under the name of such person, those pertaining to wills deposited pursuant to Section 48, under the name of the testator. After the name of each file shall be shown the file number, and if ordered by the court, the book and page of the register in which the documents pertaining to such file are listed, and the date of the filing of the first document. (As amended Apr. 26, 1937, c. 435, §1.)

2. A register, properly indexed, in which shall be listed under the name of the decedent, ward, insane, inebriate, feeble-minded, or epileptic person, or testator, all documents filed pertaining thereto and in the order filed. Such list shall show the name of the document, the date of the filing thereof, and shall give a reference to the volume and page of any other book in which any record shall have been made of such document.

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

4. A record of bonds, properly indexed, in which shall be recorded all bonds filed; provided that bonds not in excess of \$250.00 may be entered instead of recorded. Whenever a bond is entered and not recorded, the entry shall show the name of the estate, guardianship, or other proceedings, the name of the principal, the name and address of each surety, the amount, and the date of approval. (As amended Apr. 26, 1937, c. 435, §2.)

5. A record of letters, properly indexed, in which shall be entered all letters testamentary, of administration, and of guardianship issued.

6. A record of claims, properly indexed, in which shall be entered under the title of the estate all claims filed against such estate and all offsets thereto. It shall show the number of the claim, the date of filing, the name of the claimant, the amount of the claim, the date of adjudication, the amounts allowed and disallowed, and the final balance.

7. A record of orders, properly indexed, in which shall be recorded all orders, judgments, and decrees, except orders allowing or disallowing claims and non-appealable orders. (G. S. 8693) (Act Mar. 29, 1935, c. 72, §3.)

8992-4. Copies.—The court shall furnish a return on appeal or a certified, exemplified, or authenticated copy of any paper on file or of record upon payment therefor at the rate of ten cents per folio, and twenty-five cents for each certificate. (G. S. 8704) (Act Mar. 29, 1935, c. 72, §4.)

Annotations under former act, see ante, §8704.
On appeal by the state to the supreme court from probate court, state need not pay the \$10 to cover fees in supreme court but must pay \$5 covering return of certified copy of notice of appeal and bond, and must pay fees for transcript, certified copies, etc., such fees not going to the state. Op. Atty. Gen. (346c), Aug. 12, 1936.
It is not necessary for a special administrator to ask for and pay for a certified copy of his letters as a condition precedent to his appointment, but if he desires

a certified copy of a paper on file or of record he must pay fee required. Op. Atty. Gen. (346c), June 12, 1939.

ARTICLE II.—PERSONNEL.

A.—JUDGE.

8992-5. Bond.—There shall be elected in each county a probate judge who before he enters upon the duties of his office shall execute a bond to the State in the amount of one thousand dollars, approved by the county board and conditioned upon the faithful discharge of his duties. Such bond with his oath shall be recorded in the office of the register of deeds and filed in the office of the secretary of state after approval as to form by the attorney general. The premiums on such bond and the expenses of such recording and filing shall be paid by the county. An action may be maintained on such bond by any person aggrieved by the violation of the conditions thereof. (G. S. 8691) (Act Mar. 29, 1935, c. 72, §5; Apr. 26, 1937, c. 435, §3.)

Annotations under former act, see ante, §8691.
A probate judge who executed a bond to "the state" instead of to "the county board" before the passage of this act should now execute a new bond pursuant to this act. Op. Atty. Gen. (347a), June 3, 1935.

On going into effect of this act it is highly desirable, if not necessary, that new bonds be executed and filed in conformity with this act. Op. Atty. Gen. (347a), June 14, 1935.

8992-6. Filing of decisions.—The decision of every issue of law or fact shall be in writing and shall be filed within ninety days after submission unless prevented by illness or casualty. This provision shall be construed as mandatory, and the county auditor shall not sign or issue a warrant for the salary of the judge or any installment thereof unless the voucher for such warrant is accompanied by an affidavit of the judge that all matters submitted to him for decision ninety days or more prior to the filing of such affidavit have been decided as herein required, unless a decision has been prevented by illness or casualty in which case the reasons for delay shall be specifically stated.

Upon the filing of any appealable order, judgment, or decree, except in uncontested matters or where the final decision was announced at the hearing, the court shall give notice by mail of such filing to each party, or his attorney, who appeared of record at the hearing. (G. S. 8705, 8716) (Act Mar. 29, 1935, c. 72, §6.)

Annotations under former act, see ante, §8716.

8992-7. Disqualification.—The following shall be grounds for disqualification of any judge or referee from acting in any matter: (1) that he or his wife or any of his or her kin nearer than first cousin shall be interested as representative, heir, devisee, legatee, ward, or creditor in the estate involved therein; (2) that it involves the validity or interpretation of a will drawn or witnessed by him; (3) that he may be a necessary witness in such matter; (4) that it involves a property right in respect to which he has been engaged or is engaged as an attorney, or (5) that he was engaged in a joint enterprise for profit with the decedent at the time of death or that he is then engaged in a joint enterprise for profit with any person interested in such matter as representative, heir, devisee, legatee, ward, or creditor. Whenever grounds for disqualification exist, the judge may, and upon proper petition of any person interested in the estate must, request the probate judge of another county to act in his stead in such matter. (G. S. 8696) (Act Mar. 29, 1935, c. 72, §7.)

Annotations under former act, see ante, §8696.

8992-8. Substitution of judges.—Whenever the disqualification, absence, or illness of the resident judge exists, or whenever in his opinion the interest of the public or of any person interested in any matter requires that the probate judge of another county act in the stead of the resident judge, any other judge may act upon the request of the resident judge, or in the event of his incapacity, upon the request of the

presiding judge of the district court in the county wherein such matter is pending. Any order, judgment, decree, or other writing signed by such acting judge shall have the same force and effect as if signed by the resident judge. The reasonable and necessary expenses of the acting judge shall be paid by the county in which he is called to act. (G. S. 8697) (Act Mar. 29, 1935, c. 72, §8.)

Annotations under former act, see ante, §8697.

Section does not authorize appointment of probate judge of another county to act for a deceased probate judge. Op. Atty. Gen. (348), May 25, 1938.

8992-9. Insanity of judge.—Whenever a verified petition of five voters of any county is presented to a judge of the district court stating that the probate judge of such county is insane and incapacitated to act by reason of mental disability, such district judge shall examine into such alleged insanity or mental disability in the manner provided by law for examinations of insane persons by probate judges. If upon the examination such probate judge is found to be insane or incapacitated to act by reason of mental disability, the district judge shall certify such findings to the governor, who shall thereupon declare the office of such probate judge vacant, and fill the same by appointment. (G. S. 8698) (Act Mar. 29, 1935, c. 72, §9.)

8992-10. Delivery to successor.—Whenever the term of office of any judge expires, he shall deliver to his successor all books, records, and papers in his possession relating to his office. Upon his failure to do so within five days after demand by his successor, he shall be guilty of a gross misdemeanor. (G. S. 8692) (Act Mar. 29, 1935, c. 72, §10.)

8992-11. Annual assemblage—Rules.—The judges of the probate courts shall assemble at the Capitol on the second Wednesday after January 1st of each year at ten o'clock in the forenoon or at such other place and time as may have been designated at the preceding assemblage, and any twenty of them shall constitute a quorum. When so assembled such judges shall formulate and adopt rules and make such revision and amendment thereof as they may deem expedient conformably to law, and the same shall take effect from and after the publication thereof as directed by them. Such rules shall govern all the probate courts of this State, but in furtherance of justice the court may relax or modify them or relieve a party from the effect thereof on such terms as may be just. The reasonable expenses of the judges attending such meetings shall be paid by their respective counties. (G. S. 8702, 8703) (Act Mar. 29, 1935, c. 72, §11.)

Annotations under former act, see ante, §8702.

8992-12. Not to be counsel.—No judge, referee, clerk, deputy clerk, or employee of any probate court, or the law partner of any of them, shall be counsel or attorney in any action or proceedings for or against any devisee, legatee, heir, creditor, representative, or ward over whom, or whose estate, claim, or accounts such court has jurisdiction. Except in matters relating to commitments, none of them shall give counsel or advice, or draw or prepare any paper relating to any matter which is or may be brought before such court, except orders, judgments, decrees, executions, warrants, certificates, or subpoenas issuing out of such court. No judge, referee, or clerk shall keep or hold his official office with any practicing attorney. (G. S. 8700) (Act Mar. 29, 1935, c. 72, §12.)

8992-13. Salaries.—The salaries of the judges, referees, clerks, reporters, and employees shall be as provided by law, but the salaries of the clerks and employees shall be fixed by the judge within the limits provided by law, notwithstanding the provisions of Section 196. (Act Mar. 29, 1935, c. 72, §13.)

Probate court is only court of original jurisdiction for settlement and allowance of accounts of administrators, and its judgments are final unless appealed from in man-

ner provided by statute. National Surety Co. v. E., (US CCA8), 88F(2d)399.

Probate court reporter need not attach seal to his acknowledgments. Op. Atty. Gen. (346G), May 22, 1935.

Clerks and employees in probate court are to be compensated pursuant to Laws 1935, c. 72, §13, compensation to be fixed by judge. Op. Atty. Gen. (348b), July 26, 1935.

Power of fixing salary for clerk hire in office of probate court is vested in judge of probate. Op. Atty. Gen. (347b), Oct. 17, 1935.

Clerk hire is to be fixed by judge of probate within extreme statutory limitations, and no action by county board is required. Op. Atty. Gen. (348a), Feb. 17, 1939.

Salary of probate judge may be reduced by legislative act during term. Op. Atty. Gen. (347i), March 10, 1939.

B.—CLERKS.

8992-14. Appointment—Powers.—The judge may appoint a clerk, deputy clerks, and employees as provided by law, to hold office during his pleasure, who shall perform the duties imposed by law and such judge. Such appointments shall be in writing and filed in such court. Before entering upon the duties of his office, each clerk and deputy clerk and, if ordered by the court, any employee shall execute a bond to the State in the amount of one thousand dollars approved by the county board and conditioned upon the faithful discharge of his duties. Such bond with the oath of the appointee shall be recorded in the office of the register of deeds and filed in the office of the secretary of state after approval as to form by the attorney general. The premiums on such bonds and the expenses of such recording and filing shall be paid by the county. An action may be maintained on such bond by any person aggrieved by the violation of the conditions thereof. A clerk or deputy clerk may take acknowledgments, administer oaths, authenticate, exemplify, or certify copies of instruments, documents, or records of the court, and when so ordered may hear and report to the court the testimony of any witnesses and the interrogatories and objections of counsel. (G. S. 8699) (Act Mar. 29, 1935, c. 72, §14; Apr. 26, 1937, c. 435, §4.)

Providing clerk hire on application to county board, see §997-4m.

Clerk has no authority to act after death of probate judge. Op. Atty. Gen. (348), May 25, 1938.

8992-15. Orders by clerk.—The judge may authorize the clerk or any deputy clerk to issue orders for hearing petitions for general administration, for the probate of any will, for determination of descent, for sale, lease, mortgage, or conveyance of real estate, for the settlement and allowance of any account, for partial or final distribution, for commitment, orders limiting the time to file claims and fixing the time and place for the hearing thereon, and to issue notice of the entry of any order. The issuance of any such order or notice by the clerk or deputy clerk shall be prima facie evidence of his authority to issue it. (G. S. 8711) (Act Mar. 29, 1935, c. 72, §15; Apr. 26, 1937, c. 435, §5.)

Clerk has no authority to act after death of probate judge. Op. Atty. Gen. (348), May 25, 1938.

C.—REFEREE.

8992-16. Appointment—Bond.—The judge of the probate court of any county in this state now or hereafter having a population of not less than four hundred thousand inhabitants may appoint one referee in probate who shall be a resident of such county and an attorney at law duly admitted in this state. He shall hold office during the pleasure of the judge appointing him. Such appointment shall be in writing and filed in such court. Before entering upon the duties of his office, he shall execute a bond to the State in the amount of one thousand dollars approved by the county board and conditioned upon the faithful discharge of his duties. Such bond with the oath of the appointee shall be recorded in the office of the register of deeds and filed in the office of the secretary of state after approval as to form by the attorney general. The premiums on such bond and the expenses of such recording and filing shall be paid by

the county. An action may be maintained on such bond by any person aggrieved by the violation of the conditions thereof. (L. '29, c. 271; L. '31, c. 302) (Act Mar. 29, 1935, c. 72, §16; Apr. 26, 1937, c. 435, §6.)

Annotations under former act, see ante, §§8717-7, 8717-10.

8992-17. Compensation, etc.—Such referee shall receive from the county as compensation for his services a salary of three thousand six hundred dollars per annum payable from the general funds of the county not otherwise appropriated, at the same time and in the same manner and subject to the provisions of law applicable to the compensation of the judge. The county shall furnish him with a suitable office in the court house or in some other suitable place or places designated by the judge. The judge may assign to the referee from the court's clerks and employees such clerical help as may be necessary to enable him properly to discharge his duties. (L. '29, c. 271; L. '31, c. 302) (Act Mar. 29, 1935, c. 72, §17.)

Annotations under former act, see ante, §§8717-7, 8717-10.

Act Apr. 17, 1937, c. 269, provides that in counties of over 400,000 inhabitants probate referees shall receive salary of \$4,200.

8992-18. Reference.—After such appointment the judge by order may refer to the referee any matter, cause, or proceeding pending in such court. In all matters so referred the referee shall find the facts and report the findings to the judge. In all matters referred and reported the referee may append his signature to the order or decree of the court; and whenever his signature shall be so appended, it shall constitute conclusive evidence that the matter was referred, heard, and reported in the manner required by law and the order of the court therein, provided that the failure of the referee to append his signature to any such order or decree shall not affect its validity. (L. '29, c. 271; L. '31, c. 302.) (Act Mar. 29, 1935, c. 72, §18.)

Annotations under former act, see ante, §§8717-7, 8717-10.

8992-19. Delivery of books, etc.—Whenever the term of office of such referee expires or is terminated, he shall deliver to his successor or to the judge all books and papers in his possession relating to his office. Upon his failure to do so within five days after demand by his successor or the judge, he shall be guilty of a gross misdemeanor. (L. '29, c. 271; L. '31, c. 302.) (Act Mar. 29, 1935, c. 72, §19.)

Annotations under former act, see ante, §§8717-7, 8717-10.

D.—REPORTER.

8992-20. Appointment and duties.—The judge may appoint a competent stenographer as reporter and secretary in all matters pertaining to his official duties to hold office during his pleasure. Such reporter shall make a complete record of all testimony given and all proceedings had before the court upon the trial of issue of fact except in commitment proceedings. He shall inscribe all questions in the exact language thereof, all answers thereto precisely as given by the witness or sworn interpreter, all objections made and the grounds thereof as stated by counsel, all rulings thereon, all exceptions taken, all admissions made, all oral stipulations, and all oral motions and orders. When directed by the judge, he shall make a record of any matter or proceeding and without charge shall read to or transcribe for such judge any record made by him. Upon completion of every trial or proceeding, such reporter shall file his stenographic record in the manner directed by the judge. Upon request of any person and payment of his fees by such person, he shall furnish a transcript. The reporter may take acknowledgments, administer oaths, and certify copies of his stenographic record or transcript thereof. (Act Mar. 29, 1935, c. 72, §20.)

8992-21. Compensation—Transcript Fees.—Where the salary of the reporter is not provided for by law, his compensation shall be paid by the representative as an expense of administration or guardianship, or by the party or parties presenting or contesting the proceedings reported, as the court may determine. In addition to the salary fixed by law or compensation fixed by the court, the reporter shall receive for transcripts furnished such fees as may be fixed by the court not exceeding those allowed by law to the district court reporters of the same county. (Act Mar. 29, 1935, c. 72, §21.)

8992-21a. Court reporters for probate court in certain counties.—The judge of probate of any county now having or which may hereafter have a population of 400,000 inhabitants or over, may appoint a competent stenographer as court reporter and secretary, who shall be paid a salary of \$1800.00 per annum; and in addition to said salary the court reporter may also be paid such fees for transcripts of evidence made in relation to probate hearings, as the judge of probate shall fix and allow, and appoint one additional clerk who shall be a competent stenographer, who shall be paid a salary of \$1200.00 per annum. (Act Apr. 29, 1935, c. 373, §1.)

8992-21b. To be additional employee.—The reporter and clerk mentioned in section 1 hereof shall be employed and appointed in addition to the clerk, deputy clerks and employees now provided by law, to hold office during the pleasure of the judge of probate and shall perform the duties imposed by law and such judge, and their salary shall be paid from the county funds in the same manner as prescribed for the payment of other employees of such court. (Act Apr. 29, 1935, c. 373, §2.)

E.—AUDITOR.

8992-22. Appointment.—The court may appoint an auditor in any matter involving an annual, partial, or final account, or the amount due on a claim or an offset thereto. Such appointment may be made with or without notice and on the court's own motion or upon the petition of the representative or of any person interested in the estate or guardianship. (G. S. 8717-1, 8717-2, 8717-3) (Act Mar. 29, 1935, c. 72, §22.)

8992-23. Powers.—The auditor shall have the same power as the court to set hearings, grant adjournments, compel the attendance of witnesses or the production of books, papers, and documents, and to hear all proper evidence relating to such matter. He shall report his findings of fact to the court. (G. S. 8717-4, 8717-5) (Act Mar. 29, 1935, c. 72, §23.)

8992-24. Compensation.—The auditor shall be allowed such reasonable fees, disbursements, and expenses as may be determined by the court and shall be paid by the representative as expenses of administration or guardianship or by the person applying for such audit as the court may determine. (G. S. 8717-6) (Act Mar. 29, 1935, c. 72, §24.)

ARTICLE III.—INTESTATE SUCCESSION.

8992-25. Definition of estate.—As used in this article, the word "estate" shall include every right and interest of a decedent in property, real or personal, except such as are terminated or otherwise extinguished by his death. (Act Mar. 29, 1935, c. 72, §25.)

Rights of inheritance are purely statutory. *Reilly v. S.*, 196M376, 265NW284. See Dun. Dig. 2719.

Where two persons perish in a common disaster, there is no presumption that because of age, health, sex or strength, one survived other. *Miller v. M.*, 198M497, 270 NW559. See Dun. Dig. 3434.

8992-26. Descent of cemetery lot.—Subject to the right of interment of the decedent therein, a cemetery lot or burial plot unless disposed of as provided in G. S. 7582 shall descend free of all debts as follows:—

1. To his surviving spouse, a life estate with right of interment of such spouse therein, and remainder over to the person or association who would be entitled to the fee if there were no spouse.

2. If there be no surviving spouse, then to his eldest surviving son. *brother and sister*

3. If there be no surviving son, then to his eldest surviving daughter. *brother and sister*

4. If there be no surviving daughter, then to his youngest surviving brother.

5. If there be no surviving brother, then to his youngest surviving sister. *children*

6. If there be no surviving spouse, son, daughter, brother, nor sister of the decedent, then to the cemetery association or private cemetery in trust as a burial lot for the decedent and such of his relatives as the governing body thereof shall deem proper. Such cemetery association or private cemetery, or with its consent any person to whom such lot shall so descend, may grant and convey the same to any of the decedent's parents, brothers, sisters or descendants. A crypt or group of crypts or burial vaults owned by one person in a public or community mausoleum shall be deemed a cemetery lot. Grave markers, monuments, memorials, and all structures lawfully installed or erected on any cemetery lot or burial plot shall be deemed to be a part of and shall descend with such lot or plot. (G. S. 7581) (Act Mar. 29, 1935, c. 72, §26.)

8992-27. Descent of homestead.—(a) Where there is a surviving spouse, the homestead shall descend free from any testamentary or other disposition thereof to which such spouse has not consented in writing or by election to take under the will as provided by law, as follows:

1. If there be no surviving child or issue of any deceased child, to the spouse;

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

(b) Where there is no surviving spouse and the homestead has not been disposed of by will, it shall descend as other real estate.

(c) Where the homestead is disposed of by a will which does not otherwise provide and in all cases where the homestead descends to the spouse or children or issue of deceased children, it shall be exempt from all debts which were not valid charges thereon at the time of decedent's death; in all other cases, it shall be subject to the payment of the items mentioned in Section 29. No lien or other charge against any homestead which is so exempted shall be enforced in the probate court, but the claimant may enforce such lien or charge by an appropriate action in the District Court. (G. S. 8719) (Act Mar. 29, 1935, c. 72, §27; Apr. 26, 1937, c. 435, §7.)

Annotations under former act, see ante, §8719. Upon death of spouse holding fee title to homestead surviving spouse takes homestead right not by right of survivorship, but as property set apart by law for benefit of surviving spouse or children. Maruska v. E., (US-DC-Minn), 21FSupp841.

Record sustains trial court in affirming probate court's orders vacating and setting aside its previous order setting apart a homestead, on ground of fraud. Flanagan's Estate, 196M140, 264NW433. See Dun. Dig. 7784.

On death of homesteader title in fee vests in children, subject only to life estate of widow, and no waiver or other act of widow can impair rights secured to children, and cannot convert homestead into assets of estate. Kohrt v. M., 203M494, 282NW129. See Dun. Dig. 2721, 4220.

Widow who had life estate only under decree of distribution of homestead could not encumber right of child in remainder by entering into an agreement with an attorney to give a lien upon the property for services to be rendered. Id. See Dun. Dig. 2722, 4220.

Where a testator imposed a legacy as a charge upon real estate part of which was a homestead, it was improper for probate court to license a sale of entire tract either to pay debts or expenses of administration or legacies. Following in re Anderson's Estate, 202Minn 513, 279NW266, 116ALR82, the proper method of procedure is to devise homestead subject to lien. Schultz' Estate, 203M565, 282NW471. See Dun. Dig. 3614d.

Where homestead is disposed of by will which does not otherwise provide and in all cases where homestead descends to spouse or children or issue of deceased children, homestead of deceased recipient of old age assistance is not subject to claims of county or state agencies. Op. Atty. Gen. (521p-3), Apr. 6, 1936.

Claim of county for money paid as assistance against state of deceased recipient is same as claim of common creditor and is not preferred. Op. Atty. Gen. (521g), Apr. 15, 1936.

Where there are no children and nearest heirs at law are cousins, homestead is subject to payment of claim for old age assistance. Op. Atty. Gen. (521p-3), March 1, 1939.

(c) Sections of Probate Code which deprive probate court of jurisdiction over claims against homestead and which confer such jurisdiction upon district court are not in violation of constitutional provision which gives probate court exclusive jurisdiction of estates of deceased persons. Peterson's Estate, 198M46, 268NW707. See Dun. Dig. 7770c.

Homestead of old age assistance recipient is exempt after his death, though he leaves only adult children. Op. Atty. Gen. (521p-3), July 28, 1938.

Homestead is subject to payment of claim for old age assistance furnished to decedent where he left no spouse or children or issue of deceased children. Op. Atty. Gen. (521G), April 5, 1939.

8992-28. Allowances to spouse, etc.—When any person dies, testate or intestate,

1. The surviving spouse shall be allowed from the personal property of which the decedent was possessed or to which he was entitled at the time of death, the wearing apparel, and, as selected by him, furniture and household goods not exceeding five hundred dollars in value, and other personal property not exceeding five hundred dollars in value.

2. If there be no surviving spouse, the minor children shall receive the property specified in the preceding subsection, as selected in their behalf.

3. During administration, but not exceeding eighteen months unless an extension shall have been granted by the court, or if the estate be insolvent not exceeding twelve months, the spouse or children or both constituting the family of the decedent shall be allowed such reasonable maintenance as the court may determine.

4. In the administration of an estate of a non-resident decedent, the allowances received in the domiciliary administration shall be deducted from the allowances under this section. (G. S. 8726 (1, 2, 3). (Act Mar. 29, 1935, c. 72, §28.)

Annotations under former act, see ante, §8726. Interest of a surviving spouse in an estate may be lost by estoppel. Clover v. P., 203M337, 281NW275. See Dun. Dig. 2733.

(1) Consent of husband to take under will of wife which left him nothing, did not affect his right to personality under this subdivision. McBride's Estate, 195M319, 263NW105. See Dun. Dig. 10301g.

8992-29. Descent of property.—Except as provided in Sections 26 and 27, and subject to the allowances provided in Section 28, and the payment of the expenses of administration, funeral expenses, expenses of last illness, taxes, and debts, the estate, real and personal, shall descend and be distributed as follows:

1. Personal property: To the surviving spouse one-third thereof free from any testamentary disposition thereof to which such survivor shall not have consented in writing or by election to take under the will as provided by law.

2. Real property: To the surviving spouse an undivided one-third of all real property of which the decedent at any time while married to such spouse as seized or possessed, to the disposition whereof by will or otherwise such survivor shall not have consented in writing or by election to take under the will as provided by law, except such as has been transferred or sold by judicial partition proceedings or appropriated to the payment of the decedent's debts by execution or judicial sale, by general assignment for the benefit of creditors, or by insolvency or bankruptcy proceedings, and subject to all judgment liens.

3. If a spouse and only one child or the issue of a deceased child survive, the share of the spouse un-

der the provisions of Subsections 1 and 2 hereof shall be one-half instead of one-third.

4. Subject to the preceding provisions of this section, the whole estate, real and personal, except as otherwise disposed of by will shall descend and be distributed as follows:

(a) In equal shares to the surviving children and to the issue of deceased children by right of representation;

(b) If there be no surviving child nor issue of any deceased child, and if the intestate leave a surviving spouse, then to such spouse;

(c) If there be no surviving issue nor spouse, then to the father and mother in equal shares, or if but one survive, then to such survivor;

(d) If there be no surviving issue, spouse, father nor mother, then to the surviving brothers and sisters, if any, and to the issue of any deceased brother or sister in equal shares if all are of equal degree and, if not, then in equal shares to those in the nearest degree and by right of representation to those in a more remote degree.

(e) If there be no surviving issue, spouse, father, mother, brother, sister, nor issue of any deceased brother or sister, then in equal shares to the next of kin in equal degree, except that when there are two or more collateral kindred in equal degree claiming through different ancestors, those who claim through the nearest ancestor shall take to the exclusion of those claiming through an ancestor more remote.

5. If a minor die leaving no spouse nor issue surviving, all of his estate that came to him by inheritance or will from his parent shall descend and be distributed to the other children of the same parent, if any, and to the issue of any deceased child of such parent in equal shares if all are of equal degree and, if not, then in equal shares to those in the nearest degree and by right of representation to those in a more remote degree; failing all such, it shall descend and be distributed by intestate succession as in other cases. (G. S. 8720, 8726 [6], [7]) (Act Mar. 29, 1935, c. 72, §29; Apr. 26, 1937, c. 435, §8; Apr. 15, 1939, c. 270, §3.)

6. If the intestate leave no spouse nor kindred, the estate shall escheat to the state. (G. S. 8720, 8726 [6], [7]) (Act Mar. 29, 1935, c. 72, §29; Apr. 26, 1937, c. 435, §8; Apr. 15, 1939, c. 270, §§1-3.)

Annotations under former act, see ante, §§8720, 8726. Where a person dies intestate, title to his personal property vests in administrator for purpose of administration, while title to real estate passes immediately to heirs. Miller's Estate, 196M543, 265NW333. See Dun. Dig. 2722.

If one is entitled to specific performance of an oral contract to adopt, he may establish such right in an action to establish heirship. Firle's Estate, 197M1, 265NW818. See Dun. Dig. 8773.

Where there is no surviving child, a surviving spouse who renounces a will takes one-half of property of testator. Pagel's Estate, 202M96, 277NW417. See Dun. Dig. 10301a.

Statute governing descent of estates of intestates may in case of doubt be resorted to as an aid in construction of a will. Thompson's Estate, 202M648, 279NW574. See Dun. Dig. 10272a.

Issue take per stirpes and not per capita, except when property descends to next of kin in which case those in equal degree take per capita. Id. See Dun. Dig. 2722a.

Evidence held wholly inadequate to establish an estoppel on the part of son from taking his statutory share of his father's intestate estate. Beler's Estate, 284NW833. See Dun. Dig. 2723.

Where testator does not, by will, dispose of whole of his estate, no mere negative words of exclusion can prevent rest of property from passing under statutes of descent and distribution. Id. See Dun. Dig. 10206.

Right of a state to contest will. 23MinnLawRev250.

(4).

Where father individually and as special administrator brought action for death of infant son, and a settlement was made, mother is entitled to half, after deducting medical, funeral expenses and attorney's fees and other disbursements, though she suffered no pecuniary loss by reason of the death, having deserted family years before. Murphy v. D., 200M345, 274NW515. See Dun. Dig. 2617.

(4) (d).

Amended. Laws 1939, c. 270, §1.

(4) (e).

Amended. Laws 1939, c. 270, §2.

(5).

Amended. Laws 1939, c. 270, §3.

8992-30. Degree of kindred.—The degree of kindred shall be computed according to the rules of the civil law. Kindred of the half blood shall inherit equally with those of the whole blood in the same degree unless the inheritance comes to the intestate by descent, devise, or bequest from one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance. (G. S. 8725) (Act Mar. 29, 1935, c. 72, §30.)

Annotations under former act, see ante, §8725.

8992-31. Posthumous child.—A posthumous child shall be considered as living at the death of its parent. (G. S. 8718) (Act Mar. 29, 1935, c. 72, §31.)

8992-32. Illegitimate as heir.—An illegitimate child shall inherit from his mother the same as if born in lawful wedlock, and also from the person who in writing and before a competent attesting witness shall have declared himself to be his father; but such child shall not inherit from the kindred of either parent by right of representation. (G. S. 8723) (Act Mar. 29, 1935, c. 72, §32.)

Annotations under former act, see ante, §8723.

At common law, an illegitimate child had no right of inheritance from its father. Reilly v. S., 196M376, 265NW284. See Dun. Dig. 826.

Illegitimate child failed to show that illegitimacy proceedings in Wisconsin were such as to meet requirements of statute. Id. See Dun. Dig. 826, 827.

Where employee entered into an agreement to marry on a certain date and was killed several days before date set for marriage and after banns of marriage had been published by church, and 8½ months after death girl bore a child of the employee, there was no marriage and child was not entitled to compensation under workmen's compensation act. Guptil v. E., 197M211, 266NW748.

8992-33. Heirs to illegitimate.—If any illegitimate child dies intestate and without spouse or issue who inherit under the law, his estate shall descend to his mother, or in case of her prior decease to her heirs other than such child. (G. S. 8724) (Act Mar. 29, 1935, c. 72, §33.)

ARTICLE IV.—WILLS.

8992-34. Requisites.—Every person of sound mind, not a minor, may dispose of his estate, or any part thereof, or any right or interest therein, by his last will in writing, signed by him or by some person in his presence and by his express direction, and attested and subscribed in his presence by two or more competent witnesses. (G. S. 8735) (Act Mar. 29, 1935, c. 72, §34.)

Annotations under former act, see ante, §8735.

1. In general.

Where insured abandoned his wife leaving impression of having committed suicide and married another in a distant city and formed a corporation with another person and each member of corporation took out a life insurance policy making trust company beneficiary and legal owner of stock of corporation, insurance money going to wife of person first dying, and stock of corporation to surviving business associate, there was created a conventional life insurance trust which was contractual and a transaction inter vivos rather than testamentary, and original wife of insured had no right to insurance money, if trust agreement contemplated that second wife should be beneficiary. Soper's Estate, 196M60, 264NW427. See Dun. Dig. 10203.

Trust deposit in savings bank held not testamentary in character. Coughlin v. F., 199M102, 272NW166. See Dun. Dig. 10202c.

Right of one spouse to accept by gift inter vivos, or take under will of other spouse, is not affected by an antenuptial agreement between them, except where it is found that by such gift or agreement it was intended that there be satisfaction or redemption thereof. Berg v. B., 201M179, 275NW836. See Dun. Dig. 4251, 4285.

Where decision hinges upon oral evidence of that which statute of frauds and statute of wills require to be in writing, oral evidence to establish facts claimed must be clear, unequivocal, and convincing. Ives v. P., 204M142, 283NW140. See Dun. Dig. 10203a.

A testator, if competent, has power to dispose of his property in any way he chooses by a properly executed will provided there is no undue influence. Mazanec's Estate, 204M406, 283NW745. See Dun. Dig. 10205.

2. Mental capacity and undue influence.

To make a case of undue influence, will must express mind and intent of someone else and not the testator.

Mazanec's Estate, 204M406, 283NW745. See Dun. Dig. 10238.

There must be evidence that undue influence was in fact exerted, and it is not sufficient to show that a party benefited by will had motive and opportunity to exert such influence. *Id.* See Dun. Dig. 10240.

Burden of proving undue influence is on contestant. *Id.* See Dun. Dig. 10240.

A relationship of confidence between testator and a beneficiary is not sufficient to prove undue influence, but it must be shown that influence was exerted in a special degree to procure a will peculiarly acceptable to beneficiary. *Id.* See Dun. Dig. 10243.

Proof of undue influence must be clear and convincing, and not merely raise a mere suspicion or conjecture. *Id.* See Dun. Dig. 10243.

Mere inequality, however great, in distribution of property among children or relative, is not evidence of undue influence, nor is it made such by evidence of an impaired mind. *Id.* See Dun. Dig. 10243.

Evidence sustains finding that testator had sufficient mental capacity to make a will. *Osbon's Estate*, 286NW 306. See Dun. Dig. 10212.

Jury was justified in finding that will was not result of undue influence on part of sister. *Id.* See Dun. Dig. 10243.

S. Construction of will.

Testator's intent as to whether annuity bequeathed to widow in lieu of her statutory rights was payable in any event or only out of income must be ascertained from a consideration of the entire instrument in the light of the surrounding circumstances, giving the language its ordinary meaning. *Congdon*, (CCA8), 99F(2d) 318.

When unrestrained by statute, it is intent of donor and not character of donee's obligation which controls availability and disposition of his gift. *Erickson v. E.*, 197M71, 266NW161. See Dun. Dig. 10257.

Will creating a trust in residue of testator's estate, income to be distributed to widow and eight children or to grandchildren by right of representation, the principal to be distributed to beneficiaries in five-year installments, no title either in principal or income to vest in beneficiaries until actual distribution to them, and beneficiaries to have no power to assign, transfer, anticipate, or dispose of their interests prior to distribution, created a valid spendthrift trust, both as to corpus and income of trust estate, which protected same during transmission to and until actually received by beneficiaries. *Id.* See Dun. Dig. 10287d.

Church held to have acted within terms of gift for hospital purposes in delaying construction of building during period of high prices and in changing plan during a period of depression, and there was no such unreasonable delay as to require forfeiture of bequest or declaration of a resulting trust. *Wyman v. T.*, 197M62, 266NW 165. See Dun. Dig. 10287.

Prime purpose of construction is to arrive at intent of testator. *Pagel's Estate*, 202M96, 277NW417. See Dun. Dig. 10257.

To carry out intention of testatrix is controlling factor guiding court in construing a will, and where general purpose and intent is clearly apparent, directions must be rigidly adhered to. *Peterson's Estate*, 202M31, 277 NW529. See Dun. Dig. 10257.

Extrinsic evidence or parol testimony may be received to disclose a latent ambiguity as to identity of a legatee or beneficiary in a will, and same sort of evidence is admissible to remove ambiguity disclosed. *Id.* See Dun. Dig. 10260.

Important thing is to ascertain intention of testator. *First Minneapolis Trust Co.*, 202M187, 277NW899. See Dun. Dig. 10257.

All provisions of a will should be harmonized and given meaning if possible. *Id.* See Dun. Dig. 10259.

Primary object in construction of a will is to ascertain intent and meaning of testator. *Thompson's Estate*, 202 M648, 279NW574. See Dun. Dig. 10257.

In construing will court may properly consider situation of testatrix, probable duration of trust, condition of life beneficiaries, manner of disposal of vast fortune, legal skill of draughtsman, discrimination shown in use of terms in different bequests, plan of distribution, statutes of descent of property of intestates, and such rules as have been shown by experience to be of aid in ascertaining intention of testatrix, but may not remake will by construction or ignore its plain language. *Id.* See Dun. Dig. 10257.

Will held to contemplate conversion of entire estate into cash, and not to distribute any real estate. *Marquette Nat. Bank v. M.*, 287NW233. See Dun. Dig. 3133.

4. Persons taking and their respective shares.

Where testator provided that wife was to have one-third of crop of a certain farm or that she could sell property retaining a portion of proceeds, by accepting one-third of crop for a period of years she made her election and was precluded from claiming thereafter a right to dispose of property. *Stucky v. B.*, 198M445, 270 NW141. See Dun. Dig. 10300.

Will construed to bequeath widow annuity payable in any event and not only out of income. *Congdon*, (CCA8), 99F(2d) 318.

Specific bequests are not favored by the law. *Pagel's Estate*, 202M96, 277NW417. See Dun. Dig. 10275a.

Will creating a trust held not to create a special bequest in favor of brothers and sisters of testator. *Id.* See Dun. Dig. 10275a.

A devise or bequest, although in form an outright gift, made to institution whose sole reason for existence and whose entire activity is charitable, is in purpose and practical effect a charitable trust, and takes, not beneficially, but as trustee, to use gift in furtherance of particular charity designated in will. *Peterson's Estate*, 202M31, 277NW529. See Dun. Dig. 1418.

Where there is no surviving spouse or child the homestead passes by virtue of a residuary clause unless a contrary intention appears. *Anderson's Estate*, 279NW266. See Dun. Dig. 10276a.

Will providing that upon death of survivor of two daughters of testatrix "the property shall be divided and turned over, one-half thereof to the living issue of each daughter, if there then be such issue of each, whether of the first or succeeding generations," required distribution as of time of death of survivor of one-half of trust fund to living children of one daughter in equal shares and the other one-half to living children of other daughter in equal shares to exclusion of three grandchildren then living. *Thompson's Estate*, 202M648, 279NW 574. See Dun. Dig. 10265a.

Children do not take concurrently or in competition with living parents unless intention of testator that they shall so take may be clearly ascertained from will. *Id.* See Dun. Dig. 10265a.

A devisee or legatee or heir, otherwise entitled to contribution from other devisees or legatees or heirs of the same class on account of payment of testator's debt, has no right of contribution where party paying debt is primarily liable for such payment by reason of its being a charge on share of estate received by him by provisions of will or decree of court. *Parten v. T.*, 204M200, 283NW 408. See Dun. Dig. 10287.

Where holding company was organized and until his death conducted by testator and settlor of trust, fact that he took all increases of capital as income is inadmissible to show that his trustee and life tenant could do the same, the trust instrument (the will) limiting her to income. *Clarke's Will*, 204M574, 284NW876. See Dun. Dig. 10272c.

4½. Vesting of interests.

Neither corpus nor income of spendthrift trust could be reached to satisfy claims for alimony or support money for children. *Erickson v. E.*, 197M71, 266NW161. See Dun. Dig. 9890.

Intention of testator to postpone vesting of legacies of his nine children in his residuary estate until time of entry of decree of distribution appears so plainly from will, taken as a whole, that no rules of construction can be allowed to frustrate it. *Jennrich's Estate*, 197M162, 266NW461. See Dun. Dig. 10257.

Record does not furnish any ground upon which to hold that share of a daughter, who died after final account of executor was filed, but before a hearing thereon and rendition of final decree, vested because of dilatory tactics of executor. *Id.* See Dun. Dig. 10278.

5. Contract to make will.

Specific performance will lie to enforce family arrangement or settlement of property rights involving promise of widow to will property to children in equal shares. *Anderson v. A.*, 197M252, 266NW841. See Dun. Dig. 10207.

An oral agreement, entered into between a mother and her nine children that children transfer to mother their interests in estate of their intestate father in consideration of mother leaving her estate in equal shares to children, and its full performance by children, was proven by clear, positive and convincing testimony. *Id.*

In action for specific performance of contract to will or leave property, burden is upon plaintiff to show by full and satisfactory proof, fact of contract and its terms. *Hauge v. N.*, 197M493, 267NW432. See Dun. Dig. 8806.

In action for specific performance of a contract to leave property by will, evidence held to sustain finding that contract was made in writing between decedent and plaintiff, through his father, was performed by plaintiff, and was of such domestic and personal character that it could not be liquidated in money. *Hanson v. B.*, 199M70, 271NW127. See Dun. Dig. 10207.

Corporate beneficiary under a will not making motion to dismiss action by certain heirs for specific performance of an agreement to distribute part of estate to heirs of deceased, waived defect in parties from omission of certain nieces and nephews of decedent, it appearing that enforcement of agreement was for benefit of all heirs, who otherwise would have received nothing, and there being no foundation for claim that corporation might be compelled to defend other litigation, and there having been no motion to have other parties brought in as additional parties. *Schaefer v. T.*, 199M610, 273NW190. See Dun. Dig. 7323, 7328, 7329.

Probate court has no jurisdiction over proceedings for specific performance of contract to will property, as a specific performance must be sought in district court in equity, and district court upon appeal from probate court has no jurisdiction to decree specific performance, since it may exercise only appellate jurisdiction. *Roberts' Estate*, 202M217, 277NW549. See Dun. Dig. 35331, 3658, 7795, 10207.

An oral agreement to will all property in consideration of support for life was indivisible and part relating to

personalty was not enforceable in probate court, entire agreement being within statute of fraud. *Id.* See Dun. Dig. 8883.

In action for specific performance of a contract to make a will, plaintiffs claim as owners, and it is not necessary for them to show that defendants are insolvent or have threatened to convey property involved. *Jannetta v. J.*, 285NW619. See Dun. Dig. 8789a.

A party may bind himself by contract to make a testamentary disposition of his property. *Id.* See Dun. Dig. 10207.

Specific performance will be granted to children, who have fully performed, on their part, a contract made with their parent for testamentary disposition of his estate consisting of real and personal property, in the nature of a family settlement, where it appears that parent and children all had interests in property which children transferred to parent under an agreement that he would leave property, or so much thereof as remained, to them at his death. *Id.* See Dun. Dig. 10207.

Contract to will property must be proved by clear positive and convincing evidence. *Id.* See Dun. Dig. 10207.

That contract to will property is oral does not bar specific performance if usual conditions relating to specific performance obtain. *Id.* See Dun. Dig. 10207.

Children may be entitled to specific performance of agreement between father and mother to make joint and mutual wills giving survivor a life estate with remainder to children. *Id.* See Dun. Dig. 10207.

Contracts to transfer property on death of promisor. 23MinnLawRev112.

6. Contracts of beneficiaries for distribution.

A will cannot be modified by agreement between beneficiaries, but that does not estop them from contracting among themselves to make such disposition of their property rights thereunder as they may deem best suited to their respective interests. *Schaefer v. T.*, 199M610, 273 NW190. See Dun. Dig. 10243k.

Where a person, knowing that a testator, in giving him a devise or bequest, intends it to be applied for benefit of another, either expressly promises, or by his action at time implies, that he will carry out testator's intention into effect, and property is left to him in faith on part of testator that such promise will be kept, promisor will be held as a trustee *ex maleficio*. *Ives v. P.*, 204M142, 283NW140. See Dun. Dig. 9919.

Equity looks with favor on arrangement made between members of family with respect to distribution of property at death. *Jannetta v. J.*, 285NW619. See Dun. Dig. 10207.

8992-35. Competency of witnesses.—If a witness to a will is competent at the time of his attestation, his subsequent incompetency shall not prevent the admission to probate of such will, nor shall a mere charge on the real estate of the testator for the payment of his debts prevent a creditor from being a competent witness to his will. (G. S. 8736) (Act Mar. 29, 1935, c. 72, §35.)

8992-36. Nuncupative wills.—Nuncupative wills shall not be valid unless made by a soldier in actual service or by a mariner at sea, and then only as to personal estate. To entitle such a will to probate, the testamentary words, or the substance thereof, must be reduced to writing within thirty days after they were spoken; the petition for probate must be filed within six months after they were spoken. In addition to the facts otherwise required, the petition shall allege the date, before whom the same were spoken, and by whom the same were reduced to writing. Such writing shall accompany the petition. No such will shall be admitted to probate except upon testimony of at least two credible and disinterested witnesses. (G. S. 8737, 8767) (Act Mar. 29, 1935, c. 72, §36.)

8992-37. Wills made elsewhere.—A will made out of this state may be admitted to probate if executed according to the laws of this state, or if in writing, signed by the testator and valid according to the laws of the state or country in which it was made or of the testator's domicile. (G. S. 8738) (Act Mar. 29, 1935, c. 72, §37.)

Annotations under former act, see ante, §8738.

8992-38. Beneficiary a witness.—A beneficial devise or bequest made in a will to a subscribing witness thereto shall be void unless there be two other competent subscribing witnesses who are not beneficiaries thereunder. If such witness would have been entitled to any share of the testator's estate in the absence of a will, then so much of such share as will not exceed the value of the devise or bequest shall be assigned to him from the part of the estate included

in the void devise or bequest. (G. S. 8739) (Act Mar. 29, 1935, c. 72, §38.)

8992-39. Revocation.—No will in writing shall be revoked or altered otherwise than by some other will in writing; or by some other writing of the testator declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself or by another person in his presence by his direction and consent. When so done by another person, the direction and consent of the testator and the facts of such injury or destruction shall be proved by at least two witnesses. Nothing in this section shall prevent the revocation implied by law from subsequent change in the condition or circumstances of the testator. (G. S. 8741) (Act Mar. 29, 1935, c. 72, §39.)

Annotations under former act, see ante, §8741.

8992-40. Revocation by marriage or divorce.—If after making a will testator marries, the will is thereby revoked. If after making a will the testator is divorced, all provisions in such will in favor of the testator's spouse so divorced are thereby revoked. (G. S. 8742) (Act Mar. 29, 1935, c. 72, §40.)

Annotations under former act, see ante, §8742.

8992-41. After-born child.—If any child of the testator, including a posthumous child, born after the making of a will has no provision made for him by the testator by will or otherwise, he shall take the same share that he would have taken if the testator had died intestate unless it appears that such omission was intentional and not occasioned by accident or mistake. (G. S. 8744) (Act Mar. 29, 1935, c. 72, §41.)

8992-42. Omitted child.—If a testator omits to provide in his will for any of his children or the issue of a deceased child, they shall take the same share of his estate which they would have taken if he had died intestate unless it appears that such omission was intentional and not occasioned by accident or mistake. (G. S. 8745) (Act Mar. 29, 1935, c. 72, §42.)

Annotations under former act, see ante, §8745.

A pretermitted grandchild who by contract with children of testator acquired an interest in residue of his estate is a party aggrieved by an order of probate court allowing a claim against estate, and entitled to appeal to district court. *Burton's Estate*, 203M275, 281NW1. See Dun. Dig. 7785.

A pretermitted child or grandchild must assert his rights in probate court before final decree of distribution. *Id.* See Dun. Dig. 10206e.

Burden is upon those claiming under terms of will to prove that omission of grandchild as beneficiary was intentional. *Id.*

8992-43. Apportionment.—If the person takes a portion of a testator's estate under the provisions of Section 41 or 42, such portion shall first be taken from the estate not disposed of by the will; if that be insufficient, so much as is necessary shall be taken from all the devisees and legatees in proportion to the value of what they respectively receive under such will. But if the obvious intention of the testator in relation to some specific devise, bequest, or other provision of the will would thereby be defeated, then such specific devise, bequest, or provision may be exempted from such apportionment, and a different apportionment adopted in the discretion of the court. (G. S. 8746) (Act Mar. 29, 1935, c. 72, §43.)

Annotations under former act, see ante, §8746.

8992-44. Deceased beneficiary.—If a devise or bequest be made to a child or other blood relative of the testator who dies before the testator leaving issue who survive the testator, such issue shall take the same estate which such devisee or legatee would have taken if he had survived, unless a different disposition be made or required by the will. (G. S. 8747) (Act Mar. 29, 1935, c. 72, §44.)

Annotations under former act, see ante, §8747.
Set-off against substituted legatee of debt owed testator by original legatee. 23MinnLawRev398.

8992-45. Quantity devised.—Every devise of real estate shall convey all the estate of the testator therein subject to liens and encumbrances thereon unless a different intention appears from the will. (G. S. 8748) (Act Mar. 29, 1935, c. 72, §45.)

A "lien" is a hold or claim which one person has upon property of another as security for some debt or charge. Marquette Nat. Bank v. M., 287NW233. See Dun. Dig. 5577.

8992-46. After-acquired property.—All property acquired by the testator after making his will shall pass thereby in like manner as if possessed by him at the time when he made his will, unless a different intention clearly appears from the will. (G. S. 8749) (Act Mar. 29, 1935, c. 72, §46.)

8992-47. Renunciation and election.—If a will make provision for a surviving spouse in lieu of the rights in the estate secured by statute, such spouse shall be deemed to have elected to take under the will, unless he shall have filed an instrument in writing renouncing and refusing to accept the provisions of such will within six months after the filing of the certificate of probate. For good cause shown, the court may permit an election within such further time as the court may determine. No devise or bequest to a surviving spouse shall be considered as adding to the rights in the estate secured by Article III, Sections 27 and 29 to such spouse, unless it clearly appears from the contents of the will that such was the testator's intent. (G. S. 8722) (Act Mar. 29, 1935, c. 72, §47.)

Annotations under former act, see ante, §8722.
Voluntary written consent of husband to take under will of wife was binding upon him though he received no consideration and was left nothing under the will. McBride's Estate, 195M319, 263NW105. See Dun. Dig. 10301g.

Evidence held to sustain finding that surviving husband voluntarily consented to take under will of deceased wife. *Id.*

Consent of surviving husband to take under will of wife, which left him nothing, did not affect his right to personality descending to him under §28. *Id.*

8992-48. Deposit of wills.—A will in writing inclosed in a sealed wrapper upon which is indorsed the name and address of the testator, the day when, and the person by whom it is delivered, may be deposited in the probate court of the county where the testator resides. The court shall give a certificate of its deposit and shall retain such will. During the testator's lifetime, such will shall be delivered only to him or upon his written order witnessed by at least two subscribing witnesses and duly acknowledged. After the testator's death, the court shall open the will publicly and retain the same. Notice shall be given to the executor named therein and to such other persons as the court may designate. If the proper venue is in another court, the will shall be transmitted to such court; but before such transmission a true copy thereof shall be made by and retained in the court in which the will was deposited. (G. S. 8750) (Act Mar. 29, 1935, c. 72, §48.)

8992-49. Duty of custodian.—After the death of a testator, the person having custody of his will shall deliver it to the court which has jurisdiction thereof. Every person who neglects to deliver a will after being duly ordered to do so shall be guilty of contempt of court. (G. S. 8743) (Act Mar. 29, 1935, c. 72, §49.)

Annotations under former act, see ante, §8743.

8992-50. Probate essential.—No will shall be effectual to pass either real or personal estate unless duly admitted to probate. Such probate shall be conclusive as to the due execution of a will. (G. S. 8740) (Act Mar. 29, 1935, c. 72, §50.)

ARTICLE V.—PROBATE OF WILLS.

8992-51. Petitioners.—At any time after the death of the testator, any executor, devisee, or legatee named in a will, or any other person interested in the estate may petition the court of the proper county to

have the will admitted to probate, whether the same is in his possession or not, is lost, is destroyed, or is without the state. (G. S. 8751) (Act Mar. 29, 1935, c. 72, §51.)

Annotations under former act, see ante, §8751.

8992-52. Contents of petition.—Every petition for the probate of a will shall show:

1. The jurisdictional facts.
2. The names, ages, and addresses of the heirs, legatees, and devisees of the decedent so far as known to the petitioner.
3. The probable value and general character of the real and personal property, and the probable amount of the debts.
4. The name and address, if known, of the person named as executor, and the name and address of the person for whom letters are prayed. (G. S. 8752) (Act Mar. 29, 1935, c. 72, §52.)

8992-53. Hearing and proof.—Upon the filing of such petition, the court shall fix the time and place for the hearing thereof, notice of which shall be given pursuant to Article XIX, Section 188. If probate is not contested, the court may admit the will on the testimony of one of the subscribing witnesses; but if contested, all the subscribing witnesses who are within the state and competent and able to testify shall be produced and examined. If the instrument is not allowed as the last will and if the estate should be administered, the court shall grant administration to the person or persons entitled thereto. (G. S. 8753, 8756) (Act Mar. 29, 1935, c. 72, §53.)

Annotations under former act, see ante, §§8753, 8756.

A proceeding for probate of a will is in rem, and constructive notice is sufficient, and a decree admitting will to probate is binding on everyone interested in estate, whether they appear at the hearing or not and whether they have actual notice or not. Mahoney's Estate, 195M 431, 263NW465. See Dun. Dig. 7783e.

There was no error in permitting proponents of will to introduce contents of a previous revoked will. Osborn's Estate, 286NW306. See Dun. Dig. 10246.

In will contest there was no error in refusal to permit divorced wife of decedent to testify as to a conversation with testator which had occurred during marriage. *Id.* See Dun. Dig. 10312.

8992-54. Objections.—No person may contest the validity of a will unless the grounds of objection thereto are stated in writing and filed at or before the time of the hearing. (G. S. 8755) (Act Mar. 29, 1935, c. 72, §54.)

Annotations under former act, see ante, §8755.

In contest of will of mother question of right of parties in property transferred to mother by children following death of father was not properly before court. Mazanec's Estate, 204M406, 283NW745. See Dun. Dig. 10245b.

8992-55. Secondary evidence.—If no subscribing witness competent to testify resides in the state at the time appointed for proving the will, the court may admit the testimony of other witnesses to prove the capacity of the testator and the execution of the will, and as evidence of such execution may admit proof of the handwriting of the testator and of the subscribing witnesses. (G. S. 8754) (Act Mar. 29, 1935, c. 72, §55.)

8992-56. Certificate of probate.—When proved as herein provided, every will shall have indorsed thereon or annexed thereto a certificate by the court of such proof. Every will so certified and the record thereof, or a duly certified transcript of such record may be read in evidence in all the courts within this state without further proof. (G. S. 8757) (Act Mar. 29, 1935, c. 72, §56.)

8992-57. Will in opposition.—If, after a petition for the probate of a will has been filed, another instrument in writing purporting to be the last will or codicil shall be presented, proceedings shall be had for the probate thereof, and thereupon the hearing on the petition theretofore filed shall be adjourned to the time fixed for the hearing of the subsequent petition. At such time proof shall be had upon all of such wills, codicils, and all matters pertaining thereto, and the court shall determine which of such instruments,

if any, should be allowed as the last will. (G. S. 8758) (Act. Mar. 29, 1935, c. 72, §57.)

Annotations under former act, see ante, §8758.

8992-58. Appointment of representative.—Upon the admission of the will to probate, the court shall appoint a representative and fix the amount of his bond as required by law. If any executor named in the will is found by the court to be suitable and competent to discharge the trust, he shall be appointed. If no executor was named in the will, or if no named executor is found by the court to be willing, suitable, and competent, the court shall appoint the person entitled to administration in case of intestacy as administrator with the will annexed. If any person appointed does not qualify within twenty days, the court may vacate his appointment and grant letters to the other executors. Upon the filing of the oath, acceptance and bond as required by law, letters shall issue. (G. S. 8768, 8769) (Act Mar. 29, 1935, c. 72, §58.)

Annotations under former act, see ante, §§8767, 8769.

Executor named in will is not entitled to appointment as such unless he be both "suitable and competent," and finding of unsuitability was sustained on evidence that, by pending litigation, named executor was put in a position of hostility to numerous legatees and their interests, and latter in an attitude of ill will toward him. *Holterman's Estate*, 203M519, 282NW132. See Dun. Dig. 3564.

8992-59. Named executor a minor.—When a person named as executor is a minor at the time of the admission of the will to probate, any other representative appointed and qualifying may administer the estate. When the minor attains majority, he may be appointed co-representative. (G. S. 8770) (Act Mar. 29, 1935, c. 72, §59.)

8992-60. No executor of executor.—The executor of an executor shall not administer as such executor on the estate of the first testator. (G. S. 8771) (Act Mar. 29, 1935, c. 72, §60.)

ARTICLE VI.—LOST AND DESTROYED WILLS.

8992-61. Petition and hearing.—The petition for the probate of a lost or destroyed will, or one which is without the state and cannot be produced in court shall set forth the provisions of the will in addition to the requirements of Article V, Section 52. Such provisions in such particularity as the court may direct shall be embodied in the notice of hearing, which notice shall be given pursuant to Article XIX, Section 188. (G. S. 8764) (Act Mar. 29, 1935, c. 72, §61.)

8992-62. Sufficiency of proof.—No such will shall be established unless it is proved to have remained unrevoked nor unless its provisions are clearly and distinctly proved. (G. S. 8765) (Act Mar. 29, 1935, c. 72, §62; Apr. 26, 1937, c. 435, §9.)

8992-63. Certification.—When such will is established, the provisions thereof shall be distinctly stated and certified by the court and filed and recorded. Letters shall issue thereon as in the case of other wills. (G. S. 8766) (Act Mar. 29, 1935, c. 72, §63.)

ARTICLE VII.—ESTATES OF NONRESIDENTS.

8992-64. Wills proved elsewhere.—Any will duly proved and allowed outside of this state in accordance with the laws in force in the place where proved, may be filed and allowed in any county in which the testator left property upon which such will may operate. (G. S. 8759) (Act Mar. 29, 1935, c. 72, §64.)

Situs of chose in action on insurance policy as an asset for purposes of administration. 23MinnLawRev221.

8992-65. Allowance.—Upon the filing of a duly authenticated copy of such will and of the order, judgment, or decree admitting it to probate, with the petition of the executor or any person interested in the estate for its allowance and for letters, the court shall fix the time and place for the hearing thereof, notice of which shall be given pursuant to Article XIX, Section 188. If such will was admitted to probate by a court of competent jurisdiction and if the order, judgment, or decree of admission to probate is still in force, the court shall allow the will and ap-

point a representative as if the will were originally proved and allowed in such court. (G. S. 8760, 8761, 8762) (Act Mar. 29, 1935, c. 72, §65.)

8992-66. Administration.—The estate of a non-resident decedent shall be administered in the same manner as an estate of a resident decedent. Upon the payment of the expenses of administration, of the debts and other items here proved, and of the inheritance taxes, the residue of the personalty shall be distributed according to the terms of the will applicable thereto; or if the terms of the will be not applicable thereto, or if there be no will, it shall be distributed according to the law of the decedent's domicile; or the court may direct that it be transmitted to the domiciliary representative to be disposed of by him. The real estate not sold in the course of administration shall be assigned according to the terms of the will applicable thereto, or if the terms of the will be not applicable thereto, or if there be no will, it shall descend according to the laws of this state. (G. S. 8763) (Act Mar. 29, 1935, c. 72, §66.)

Annotations under former act, see ante, §8763.

8992-67. Foreign representative.—Upon the filing for record in the office of the register of deeds of the proper county of an authenticated copy of his letters or other record of his authority and a certificate that the same are still in force, a representative appointed by a court of competent jurisdiction in another state or country may assign, extend, release, satisfy, or foreclose any mortgage, judgment, or lien, or collect any debt secured thereby belonging to the estate represented by him. Real estate acquired by a foreign representative on foreclosure or execution sale shall be held, sold, mortgaged, or leased pursuant to Section 93. (G. S. 8792, 8944) (Act Mar. 29, 1935, c. 72, §67; Apr. 26, 1937, c. 435, §10.)

Effect of statutory right to sue on right to possession of realty by foreign administrator. 23MinnLawRev373.

ARTICLE VIII.—GENERAL ADMINISTRATION.

8992-68. Persons entitled.—General administration of the estate of a person dying intestate shall be granted to one or more of the persons hereinafter mentioned, suitable and competent to discharge the trust, and in the following order:

The surviving spouse or next of kin or both, as the court may determine, or some person or persons selected by them or any of them.

If all such persons are incompetent or unsuitable or do not accept, or if the surviving spouse or next of kin do not file a petition therefor within thirty days after the death of the intestate, administration may be granted to one or more of the creditors, or to the nominee or nominees of such creditor or creditors. If the decedent was born in any foreign country or left heirs in any foreign country, and the surviving spouse or next of kin do not file a petition therefor within thirty days after his death, administration may be granted to the consul or other representative of such country, if he resides in this state and has filed a copy of his appointment with the secretary of state, or to the nominee or nominees of such consul or representative.

Whenever the court determines that it is for the best interest of the estate and all persons interested therein, administration may be granted to any other person suitable and competent to discharge the trust whether interested in the estate or not.

If the person appointed does not file the required oath, acceptance, and bond within ten days after notice of such appointment, served in such manner as the court may direct, the court with or without notice may vacate the appointment and appoint such other person or persons as may be entitled to administer such estate. (G. S. 8772) (Act Mar. 29, 1935, c. 72, §68.)

Annotations under former act, see ante, §8772.

That widow as administratrix listed property in inventory as belonging to estate does not estop her from making claim that it was held in trust for her. *Reifsteking's Estate*, 197M315, 267NW259. See Dun. Dig. 3593h.

When a husband acquires possession of the separate property of the wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit in the absence of evidence that she intended to make a gift of it to him. *Id.* See Dun. Dig. 4259.

On petition for appointment of administrator, evidence held not to rebut presumption that person, missing for well over seven years and from whom there had been no tidings, a portion of whose estate, if any there be, was claimed by appellant as next of kin, was no longer living at expiration of seven-year period, there being no unusual circumstances appearing to explain absence. *Hokanson's Estate*, 193M428, 270NW689. See Dun. Dig. 3434.

8902-69. Contents of petition.—Every petition for general administration shall show:

1. The jurisdictional facts.
2. The names, ages, and addresses of the heirs so far as known to the petitioner.
3. The probable value and general character of the real and personal property and the probable amount of the debts.
4. The name and address of the person for whom administration is prayed. (G. S. 8773) (Act Mar. 29, 1935, c. 72, §69.)

8902-70. Hearing.—Upon the filing of such petition, the court shall fix the time and place for the hearing thereof, notice of which shall be given pursuant to Article XIX, Section 188. Any person interested in the estate may contest the petition or oppose the appointment of the person for whom letters are prayed by filing written objections stating the ground thereof, at or before the time of the hearing. Upon proof of the petition, the court shall appoint an administrator and fix the amount of his bond as required by law. Upon the filing of the oath, acceptance, and bond as required by law, letters shall issue. (G. S. 8774) (Act Mar. 29, 1935, c. 72, §70.)

Annotations under former act, see ante, §8774.

On objection to petition for appointment of administrator, on ground that objector was common-law wife of decedent, burden of proof was upon objector to show that there was in fact a marriage contract. *Welker's Estate*, 196M447, 265NW273. See Dun. Dig. 3562b.

Right of a state to contest will. 23MinnLawRev250.

8902-71. Subsequent admission of will.—If, after the appointment of a general administrator, a will is admitted to probate, the powers of such administrator shall cease, and he shall proceed to a final accounting according to law. The new representative shall continue the administration. (G. S. 8775) (Act Mar. 29, 1935, c. 72, §71.)

8902-72. Administrator D. B. N.—If the sole or surviving representative dies or his authority is otherwise terminated before the estate is fully administered, the court with or without notice shall appoint a successor to administer the estate not already administered. Such successor shall have the same powers and duties as his predecessor. (G. S. 8777) (Act Mar. 29, 1935, c. 72, §72.)

Annotations under former act, see ante, §8777.

Administrator *de bonis non* had right to bring action against estate of former administrator and surety on bonds to recover amount unaccounted for by former administrator prior to his death, having right to collect and enforce claims of estate. *Beckman v. B.*, 202M328, 277NW 355. See Dun. Dig. 3583b.

8902-73. Administrator C. T. A.—Where a will is admitted to probate and a representative other than the person named therein as executor has been appointed and has qualified, such representative shall have all the powers and perform all the duties of an executor including the power to sell, convey, mortgage, and lease real estate where the executor is empowered to do so by the terms of the will. (G. S. 8776) (Act Mar. 29, 1935, c. 72, §73.)

Annotations under former act, see ante, §8776.

ARTICLE IX.—SPECIAL ADMINISTRATION.

8902-74. Appointment.—Upon a showing of necessity or expediency, the court with or without notice may appoint a special administrator whether a petition for general administration or proof of will has been filed or not. There shall be no appeal from any order appointing or refusing to appoint a special ad-

ministrator. (G. S. 8778, 8779) (Act Mar. 29, 1935, c. 72, §74.)

Annotations under former act, see ante, §8778.

No appeal lies from an order appointing a special administrator, but it is possible that mandamus might lie. *Op. Atty. Gen.* (346c), June 12, 1939.

Summary probate proceedings under new code. 19Minn LawRev833.

8902-75. Powers.—A special administrator shall collect the assets and conserve the estate, unless his powers are limited by the court in the order of appointment and in the letters to the performance of specified acts. Upon a showing of necessity or expediency, the court with or without notice may expressly confer upon a special administrator power to perform any or all acts in the administration of the estate, not exceeding the powers conferred by law upon general administrators. (G. S. 8784) (Act Mar. 29, 1935, c. 72, §75.)

8902-76. Inventory and appraisal.—Within fourteen days after appointment, a special administrator shall file an inventory and appraisal of the personal property according to the requirements of Article XII A. (G. S. 8780, 8785) (Act Mar. 29, 1935, c. 72, §76.)

8902-77. Termination of powers.—Upon the granting of letters testamentary or of general administration, the power of a special administrator shall cease unless otherwise expressly ordered by the court. (G. S. 8785) (Act Mar. 29, 1935, c. 72, §77.)

8902-78. Final account and discharge.—Upon the termination of his power, a special administrator shall file his final account with his petition for the settlement and allowance thereof. The court with or without notice shall adjust, correct, settle, and allow or disallow such account. Upon allowance of the account and upon the filing of vouchers for all disbursements, and the balance, if any, having been paid to the person entitled thereto, the court shall discharge such special administrator and his sureties. (G. S. 8782, 8783) (Act Mar. 29, 1935, c. 72, §78.)

ARTICLE X.—DETERMINATION OF DESCENT.

8902-79. Essentials.—Whenever any person has been dead for more than five years and has left real estate or any interest therein, and no will has been admitted to probate nor administration had in this state; or whenever real estate or any interest therein has not been included in a final decree, any person interested in the estate or claiming an interest in such real estate may petition the probate court of the county of the decedent's residence or of the county wherein such real estate or any part thereof is situated to determine its descent and to assign it to the persons entitled thereto. (G. S. 8729) (Act Mar. 29, 1935, c. 72, §79.)

Annotations under former act, see ante, §8729.

8902-80. Contents of petition.—Such petition shall show so far as known to the petitioner:

1. The name of the decedent, the date and place of his death, his age and address at such date, and whether testate or intestate.
2. The names, ages, and addresses of his heirs, executors, legatees, and devisees.
3. That no will has been admitted to probate nor administration had in this state; or if a will has been admitted to probate or administration had, that real estate or some interest therein was not included in the final decree.
4. A description of the real estate, and if a homestead, designated as such, the interest therein of the decedent, the value thereof at the date of his death, and the interest therein of the petitioner.
5. If the decedent left a will which has not been admitted to probate; such will shall be filed and the petition shall contain a prayer for its admission to probate. If a will has been admitted to probate or if administration has been had, certified copies of such instruments in the prior administration as the court

may direct shall be filed. (G. S. 8730) (Act Mar. 29, 1935, c. 72, §80.)

8992-81. Decree of descent.—Upon the filing of such petition, the court shall fix the time and place for the hearing thereof, notice of which shall be given pursuant to Article XIX, Section 188. Upon proof of the petition and of the will if there be one, the court shall allow the same and enter its decree assigning the real estate to the persons entitled thereto pursuant to the will if there be one, otherwise pursuant to the law of intestate succession in force at the time of the decedent's death. No decree shall be entered until after the determination and payment of inheritance taxes. (G. S. 8731, 8732) (Act Mar. 29, 1935, c. 72, §81; Apr. 26, 1937, c. 435, §11.)

Annotations under former act, see ante, §8732.

ARTICLE XI.—BONDS.

8992-82. Condition.—Every representative, except as provided by Section 134 [§8992-134] and G. S. 7733, before entering upon the duties of his trust shall file a bond in such amount as the court directs, with sufficient sureties, conditioned upon the faithful discharge of all the duties of his trust according to law. (G. S. 8907) (Act Mar. 29, 1935, c. 72, §82.)

Annotations under former act, see ante, §8907.

In action against company which assumed obligations of surety on bond of administratrix arising after certain date, finding of probate court that reasonable time in which administratrix should have applied and sold real estate expired on a date after such assumption by defendant, held necessary to ultimate finding of probate court that administratrix was liable to estate. *National Surety Co. v. E.*, (USCCA8), 88F(2d)399.

In action on bond of administratrix against company which assumed obligation of surety arising after specified date, answer claiming indebtedness of administratrix, as found by probate court, was not one within liability assumed by defendant involved only interpretation of contract and did not preclude summary judgment on the pleadings. *Id.*

Corporation assuming obligations of surety company arising after specified date, which company was surety on bond of administratrix, after consent of administrator de bonis non to the assumption agreement, became the principal obligator and liability of former surety was secondary only. *Id.*

Order of probate court surcharging account of administratrix with profit she realized and for loss sustained by estate from her failure to sell real estate, held conclusive in action on bond against company which assumed obligations of surety arising after specified date. *Id.*

Where defendant-corporation had assumed obligations of surety company arising after specified date, and administratrix who purchased note and mortgage of estate and profited thereafter by collecting it in full, failed to account therefor after such specified date, defendant was liable. *Id.*

Findings of probate court surcharging account of administratrix for failure to sell real estate within ten years after allowance of claims of creditors, held to mean property had the value found and that neglect of administratrix resulted in loss to the estate after date on which defendant-company assumed obligations of surety on bond of administratrix. *Id.*

Damage arising from failure of administratrix to sell real estate within reasonable period determined by probate court did not occur before expiration of such reasonable period as regarded liability of surety. *Id.*

Suit by administrator brought in district court against former administrator for failure to turn over moneys belonging to estate, was not binding as to judgment and findings as to sureties on former administrator's bond who had no notice or opportunity to defend. *First Nat. Bank & Trust Co. v. N.*, (DC-Minn), 25FSupp392.

In probate bonds the surety undertakes that principal will obey all orders of probate court, and consequently places himself in privity to any proceeding therein. *Id.*

Where surety on administrator's bond assumed liability for all losses thereunder, except "losses arising from or caused by acts committed prior to May 1, 1933," it was not liable for losses occasioned by acts of administrator committed prior to such date, regardless of when the loss actually occurred. *Id.*

An administrator has the duty to make good any loss to the end of his stewardship, and the surety on bond insures performance of that duty. *Id.*

Where administrator dissipated entire assets of estate prior to date of assumption of liability by surety, surety could not be held liable on theory that it was liable for administrator's default in failing to reimburse the estate upon demand made after its liability commenced. *Id.*

Surety on bond of executor is liable only for delinquencies by executor as such, and not for any delinquencies as trustee following distribution by decree. *Shave v. U.*, 199M538, 272NW597. See Dun. Dig. 35801.

Where executor embezzled trust funds and by final decree and fraudulent representations had himself appointed as trustee and distribution made to himself, limitations did not begin to run against liability on executor's bond until discovery of fraud by beneficiary. *Id.* See Dun. Dig. 35807.

In action by administrator de bonis non against administrator de bonis non with will annexed of estate of former administrator and surety on his bond, defendant's surety, as subrogee, could set off claims of former administrator as heir of the estate, as against claim that heirs of former administrator were necessary parties to action and had not been joined, though estate of former administrator had been fully probated and estate closed. *Beckman v. E.*, 202M328, 277NW355. See Dun. Dig. 35839.

The statute of limitations commences to run against an action on a bond of an administrator from the time of the entry of the final decree of distribution. *Burns v. N.*, 285NW885. See Dun. Dig. 35807.

8992-83. Joint or separate bonds.—When two or more persons are appointed joint representatives, the court may approve a separate bond from each or a joint bond from all (G. S. 8909) (Act Mar. 29, 1935, c. 72, §83.)

Annotations under former act, see ante, §8909.

8992-84. Approval and prosecution.—Except as otherwise expressly provided, all bonds in proceedings in the probate court shall be approved by the judge and shall run to such judge and his successors in office. In case of breach of any condition thereof, an action on such bond may be prosecuted by leave [of] or such court in the name and for the benefit of any person interested. (G. S. 8912) (Act Mar. 29, 1935, c. 72, §84.)

Annotations under former act, see ante, §8912.

8992-85. Increase and reduction.—The court on its own motion, or upon the petition of any person interested in the estate, may require a bond in addition to or in lieu of any bond on file. Upon the settlement and allowance of an account, the liability under the new bond shall be limited to the property with which the representative is chargeable at the time of such settlement and allowance, and to the acts and omissions of the representative occurring thereafter. Whenever an account is settled and allowed and the bond is found to be more than sufficient, the court may reduce the amount of the bond or cancel any bond found to be unnecessary. (G. S. 8911, 8913) (Act Mar. 29, 1935, c. 72, §85.)

8992-86. Discharge on surety's application.—Upon application of any surety, the court shall order the representative to account and to file a new bond. Upon the settlement and allowance of the account and the filing of the new bond, the surety shall be discharged. (G. S. 8914) (Act Mar. 29, 1935, c. 72, §86.)

Annotations under former act, see ante, §8914.

ARTICLE XII.—MANAGEMENT OF ESTATE.

A.—INVENTORY AND APPRAISAL.

8992-87. Contents of inventory.—Within one month after his appointment unless a longer time has been granted by the court, every representative shall make and exhibit to the court a verified inventory of all the estate of the decedent or ward which shall have come to his possession or knowledge. Such property shall be classified therein as follows: (1) real estate, with plat or survey description, and if a homestead, designated as such, (2) furniture and household goods, (3) wearing apparel, (4) corporation stocks described by certificate numbers, (5) mortgages, bonds, notes, and other written evidence of debt, described by name of debtor, recording data, or other identification, (6) all other personal property accurately identified. All encumbrances, liens, and other charges on any item shall be stated. (G. S. 8794) (Act Mar. 29, 1935, c. 72, §87.)

Annotations under former act, see ante, §8794, see also, ante, §8936.

8992-88. Appraisal.—If the inventory lists no property other than moneys of the United States, no appraisal shall be required; otherwise, the property shall be appraised at its full and fair value as

of the date of death, or in a guardianship as of the date of the appointment of the guardian, by two or more disinterested persons appointed by the court. Within two months after appointment unless a longer time has been granted by the court, the appraisers shall set down in figures opposite each item after deducting the encumbrances, liens, and charges, the net value thereof and show the total amount of each class, and of all classes, and forthwith deliver such inventory and appraisal certified by them, to the representative who shall immediately file the same. Such appraisers shall be allowed such reasonable fees, necessary disbursements and expenses as may be fixed by the court and shall be paid by the representative as expenses of administration or guardianship. (G. S. 8795) (Act Mar. 29, 1935, c. 72, §88.)

B.—COLLECTION OF ASSETS.

8992-89. Possession.—Every representative shall be entitled to the possession of and charged with all property of the decedent which has not been set apart for the surviving spouse or children. He shall collect the rents and earnings thereon until the estate is settled or until delivered by order of the court to the heirs, legatees, or devisees. He shall keep in tenable repair all buildings and fixtures under his control. He may by himself or with the heirs or devisees maintain an action for the possession of the real estate or to quiet title to the same. (G. S. 8786) (Act Mar. 29, 1935, c. 72, §89.)

Annotations under former act, see ante, §8786.

A claim by representatives of a deceased person against third party, not heirs or devisees of deceased, is within jurisdiction of probate court. *Fulton v. O.*, 195M247, 262 NW570. See Dun. Dig. 3588.

Money and property in hands of representatives of an estate are subject to garnishment. *Id.* See Dun. Dig. 3966.

Where money was deposited, both as consideration for option to purchase considerable amount of stock and also with right to accept stock equivalent to amount of deposit, and depositor elected to take smaller amount of stock just after death of other party, there existed no right to rescind and recover amount of money deposited by reason of delay in appointment of administrator. *Miller's Estate*, 196M543, 265NW333. See Dun. Dig. 3565c.

Where a person dies intestate, title to his personal property vests in administrator for purpose of administration, while title to real estate passes immediately to heirs. *Id.* See Dun. Dig. 3567, 3568.

Personal representative is entitled to rents of land accruing only from time he asserts his right of possession for purposes of administration, and until that time, both title and possession, with right to rents, are in heirs without accountability therefor to representative. *Bowen v. W.*, 203M599, 281NW256. See Dun. Dig. 3586c.

A foreign executor or administrator is not authorized to maintain an action based upon possessory rights in real estate of decedent. *Id.* See Dun. Dig. 3678.

The representative of an estate, upon appointment and qualification, becomes vested, for the purpose of administration, with title and right to immediate possession of all personal property belonging to decedent's estate, including earnings, income, increase, accretions, and accessions of or to such property, but is limited to purposes of administration. *Butler's Estate*, 284NW889. See Dun. Dig. 3568.

A judgment granting specific performance of contract to will property does not in any manner interfere with personal representative's possession of property during administration and enforces trust against such property only after every legitimate demand of administration has been satisfied. *Jannetta v. J.*, 285NW619. See Dun. Dig. 3568.

Effect of statutory right to sue on right to possession of realty by foreign administrator. 23MinnLawRev373.

8992-90. Liability.—No representative shall make a profit by the increase, nor suffer loss by the decrease or destruction without his fault, of any part of the estate, but he shall account for the excess when he sells for more than the appraisal and shall not be responsible for the loss when he sells for less if such sale appears to be beneficial to the estate. He shall not be accountable for debts due the decedent which remain uncollected without fault on his part; but if he neglects or unreasonably delays to raise money by collecting debts or selling property, or neglects to pay over the money in his hands and by reason thereof the value of the estate is lessened, or unnecessary costs, interest, or penalties accrue, or the persons interested suffer loss, the same shall be deemed waste

and the representative shall be charged in his account with the damages sustained. He shall not purchase any claim against the estate nor shall he purchase directly or indirectly or be interested in the purchase of any property sold by him. (G. S. 8787, 8847) (Act Mar. 29, 1935, c. 72, §90.)

Annotations under former act, see ante, §8787.

This statute makes it duty of an administrator to take possession of real estate and sell it within reasonable time after debts are determined. *National Surety Co. v. E.*, (USCCA8), 88F(2d)399.

At common law a sale by an administrator to himself was not void but voidable at election of heirs, but such a sale is fraudulent as a matter of law and interested heirs may exercise their option to avoid it without proving more than mere fact of selling. *Sprain's Estate*, 199M511, 272NW779. See Dun. Dig. 3624.

Word "void" in G. S. 1923, §8847, construed to mean that sales are voidable at election of those interested in land, timely exercised. *Id.*

Where sale proceedings in probate court have culminated in an order confirming a sale, directing a conveyance and execution of a deed to purchasers, such proceedings cannot be attacked by moving to vacate order of confirmation in probate court or by appealing from such order of confirmation, but must be attacked in an appropriate direct action to which purchasers, subsequent purchasers, and encumbrancers are duly made parties. *Id.* See Dun. Dig. 3627.

A legatee who urges executor to retain certain assets is estopped from contending that he was negligent in doing so. *Clover v. P.*, 203M337, 281NW275. See Dun. Dig. 3645.

Beneficiaries of an estate may conclude themselves by acquiescing in or consenting to improper allowances. *Id.* See Dun. Dig. 3653a.

A settlement by a guardian with his wards after they become of age, by which he pays them balance due to them on a note and mortgage payable to him as guardian and they in turn release and discharge him and agree to assign to him their interest in note and mortgage as part of settlement, does not make guardian interested in a purchase of ward's property sold by him or in a claim against ward's estate. *Baumann v. K.*, 204M240, 283 NW242. See Dun. Dig. 4107.

8992-91. Accord with debtor.—Whenever it appears for the best interest of the estate, the representative may on order of the court effect a fair and reasonable compromise with any debtor or other obligor. (G. S. 8798) (Act Mar. 29, 1935, c. 72, §91.)

Annotations under former act, see ante, §8798.

8992-92. Foreclosure of mortgages.—The representative shall have the same right to foreclose a mortgage, lien, or pledge, or collect the debt secured thereby as the decedent would have had if living or the ward would have had if competent, and he may complete any such proceeding commenced by such decedent or ward. (G. S. 8799) (Act Mar. 29, 1935, c. 72, §92.)

A mortgage of land is no longer a conveyance, but creates only a mere lien or security. *Hatlestad v. N.*, 197M640, 268NW665. See Dun. Dig. 6145.

8992-93. Realty acquired.—When a foreclosure sale, or a sale on execution for the recovery of a debt due the estate is had, or redemption is made, the representative shall receive the money paid and execute the necessary satisfaction or release. If bid in by the representative, or if bid in by the decedent or ward and the redemption period expired during the administration of the estate or guardianship without redemption the real estate shall be treated as personal property, but any sale, mortgage, or lease thereof shall be made pursuant to Article XVI, unless otherwise provided in the will. If not so sold, mortgaged, or leased, the real estate, or if so sold, mortgaged, or leased, the proceeds shall be assigned or distributed to the same persons and in the same proportions as if it had been part of the personal estate of the decedent, unless otherwise provided in the will. (G. S. 8800, 8801) (Act Mar. 29, 1935, c. 72, §93; Apr. 26, 1937, c. 435, §12.)

Annotations under former act, see ante, §8800.

8992-94. Property set apart.—After the inventory and appraisal has been filed, the surviving spouse, or in case there be none, the children, or when they are minors, their guardian may petition the court to set apart the homestead and the personal property allowed in Article III, Section 28. Such petition shall

show the names, ages, and relationship of the parties, a description of the homestead claimed and of the personal property selected, and the appraised value thereof. Upon proof of such petition, the court shall set apart such homestead and personal property. The property so set apart shall be delivered by the representative to the persons entitled thereto, and shall not be treated as assets in his hands, but the homestead shall be included in the partial or final decree of distribution. (G. S. 8796, 8797) (Act Mar. 29, 1935, c. 72, §94.)

Annotations under former act, see ante, §§8796, 8797.

8992-95. Property fraudulently conveyed.—Whenever the property available for the payment of debts is insufficient to pay the same in full, the representative may recover any property which the decedent may have disposed of with intent to defraud his creditors, or by conveyance or transfer which for any reason is void as to them. Upon the application of any creditor and upon making the payment of or providing security for the expenses thereof as directed by the court, the representative shall prosecute all actions necessary to recover the property. (G. S. 8802, 8803) (Act Mar. 29, 1935, c. 72, §95.)

A creditor may sue on his own behalf to set aside a fraudulent conveyance made by decedent prior to his death, right of personal representative of fraudulent debtor to bring suit not being exclusive. *Lind v. O., 204M30, 282NW661.* See Dun. Dig. 3587.

Equity will not lend its aid either to a grantor who seeks to impeach a fraudulent conveyance, or personal representative suing for benefit of his estate, though statute permits personal representative in some cases to sue for benefit of creditors. *Id.* See Dun. Dig. 3587.

8992-96. Property converted.—If any person embezzles, alienates, or converts to his own use any of the personal estate of a decedent or ward before the appointment of a representative, such person shall be liable for double the value of the property so embezzled, alienated, or converted. (G. S. 8806) (Act Mar. 29, 1935, c. 72, §96.)

8992-97. Disposal by coroner.—Whenever personal property of a decedent has come into the custody of any coroner and has not been surrendered as hereinafter provided and no will has been admitted to probate or no administration has been had within three months after the decedent's death, the coroner after the expiration of said time shall file in the probate court an inventory of all such property and a finger print of each finger of each hand of the decedent. Wearing apparel and such other property as the coroner determines to be of nominal value, may be surrendered by the coroner to the spouse or to any blood relative of the decedent. If no will is admitted to probate nor administration had within six months after death, the coroner shall sell the same at public auction upon such notice and in such manner as the court may direct. He shall be allowed reasonable expenses for the care and sale of the property, and shall deposit the net proceeds of such sale with the county treasurer in the name of the decedent, if known. The treasurer shall give the coroner duplicate receipts therefor, one of which he shall file with the county auditor and the other in the court. If a representative shall qualify within six years from the time of such deposit, the treasurer upon order of the court shall pay the same to such representative. (G. S. 8807, 8808) (Act Mar. 29, 1935, c. 72, §97; Jan. 18, 1936, Ex. Ses., c. 48.)

Coroner is required to file an inventory and sell property of nominal value, if there is not enough property to pay administration expenses and turn over proceeds to county treasurer even in cases where there is a surviving spouse, parent, child, brother or sister who under ordinary circumstances would be the persons entitled to it. *Op. Atty. Gen. (103d), July 3, 1935.*

Coroner is required to file fingerprints whenever personal property of a decedent comes into his hands and no will has been admitted to probate or no administration has been had, and this duty is not affected by identity or lack of identity of the deceased. *Id.*

The word "immediately" requires that report should be filed as soon as possible after data has been ascertained and assembled. *Id.*

Report of coroner should contain detailed information. *Id.*

Coroner should not file report until three months has elapsed. *Op. Atty. Gen. (103d), Apr. 6, 1936.*

Report should contain name of decedent, date of death, place of death, cause of death, residence, place of birth, occupation, and a general description of the body, in addition to inventory and finger prints. *Id.*

It is not necessary for coroner to file finger prints in probate court except in case where personal property of a decedent comes into his hands and no will has been admitted to probate or no administration has been had, and it is not necessary to file such finger prints where property is of nominal value and has been properly turned over to spouse or to any blood relative of decedent. *Id.*

8992-98. Continuation of business.—Upon a showing of advantage to the estate the court with or without notice may authorize a representative to continue and operate any business of a decedent or ward for the benefit of his estate, under such conditions, restrictions, regulations, and requirements, and for such period of time as the court may determine. (L. 1929, c. 188) (Act Mar. 29, 1935, c. 72, §98.)

Annotations under former act, see ante, §8786-1.

8992-99. Abandonment of property.—Whenever any property is valueless, or is so encumbered, or is in such condition that it is of no benefit to the estate, the court, upon such notice as it may direct to be given, may order the representative to abandon the same. (Act Mar. 29, 1935, c. 72, §99.)

C.—CLAIMS.

8992-100. Notice to creditors.—In the order for hearing a petition for the probate of a will or for general administration or in a subsequent order, the court shall limit the time for creditors to file claims and fix the time and place for the hearing on such claims, notice of which shall be given pursuant to Article XIX Section 188. The time so limited shall be four months from the date of the filing of such order. If it appears from the petition that the decedent left no property except such as may be allowed to the spouse and children under Article III Section 28, or such as is exempt from the claims of creditors, or such as may be recovered in an action for death by wrongful act, or if more than five years have elapsed since the decedent's death, no order in respect to claims need be made. (G. S. 8809, 8810) (Act Mar. 29, 1935, c. 72, §100.)

Annotations under former act, see ante, §8809.

Sections of Probate Code which deprive probate court of jurisdiction over claims against homestead and which confer such jurisdiction upon district court are not in violation of constitutional provision which gives probate court exclusive jurisdiction of estates of deceased persons. *Peterson's Estate, 197M344, 268NW707.* See Dun. Dig. 7770c.

Time within which to file a claim against estate of a decedent, not barred during his lifetime, is governed by limitation of probate code, and not by the general statute of limitations. *Anderson's Estate, 200M470, 274NW621.* See Dun. Dig. 3592a.

8992-101. Filing of claims.—All claims against a decedent arising upon contract, whether due or not due, shall be barred forever unless filed in court within the time limited. For cause shown and upon notice to the representative the court may receive, hear, and allow a claim presented before the final settlement and allowance of the representative's account and within one year after the date of the filing of the order to file claims.

Contingent claims arising upon contract which do not become absolute and capable of liquidation within the time limited shall not be filed. Any such contingent claim which becomes absolute and capable of liquidation after the expiration of the time limited but before the settlement and allowance of the final account may be filed and heard on notice to the representative, if the court in its discretion shall so order, notwithstanding the provisions of Section 107. If allowed it shall be paid as other claims, but only out of the assets with which the representative is chargeable at the time of the filing of such claim. No such claim shall be so filed or allowed unless administration of the estate was commenced within five years after the death of the decedent.

Claims shall be itemized and verified and shall show the address of the claimant and all payments and offsets known to the claimant. Any such claim may be pleaded as an offset or counterclaim in any action brought against the claimant by the representative. On or before the hearing on claims, the representative shall file a statement of all offsets claimed. (G. S. 8811, 8812, 8813) (Act Mar. 29, 1935, c. 72, §101.)

Annotations under former act, see ante, §§8811, 8812, 8813.

Where deceased executed a promissory note secured by a mortgage on real estate, and mortgage was foreclosed, and proceeds applied on note, leaving a large amount unpaid, district court did not err in rendering judgment against estate for such balance. Nelson's Estate, 195M 144, 262NW145. See Dun. Dig. 3593p.

On a claim against his father's estate for services rendered, it was not error to admit evidence of value of a farm deeded to son upon payment by son's wife of an amount much less than value of farm, upon issue of whether or not there was a promise to pay for such services in addition to value of farm over amount so paid. Delva's Estate, 195M192, 262NW209. See Dun. Dig. 3601.

Conversations prior to or at time deed was given in which father indicated his intentions in regard to claimant, were admissible. Id.

Evidence that a note was given by the son to the father long after the deed was given was admissible as showing a situation inconsistent with the claimed debt. Id.

Rents and taxes to accrue in future under a lease for a term of years is a contingent claim and not properly a claim against estate of lessee. Wishnick's Estate, 199 M153, 271NW244. See Dun. Dig. 3593c.

No abuse of judicial discretion is shown in denying petition of lessors to extend time for filing claims in estate of deceased lessee and permit them to file and assert their claim as lessors for rents to accrue in future upon a lease for a term of years. Id. See Dun. Dig. 3598.

In proceeding against estate of decedent, where only question involved was whether money given decedent was a loan and not result of agency for purpose of investment by decedent, court did not err in refusing to permit testimony and exhibits showing that deceased had made certain payments to claimants after date of loan, such payments being conceded by claimant who stated that they were in nature of gifts, payment not being an issue in case. Jache's Estate, 199M177, 271NW452. See Dun. Dig. 3599.

Contract of decedent to pay son for services rendered may be shown by a fair preponderance of evidence, and need not be shown by evidence that is clear, satisfactory and convincing. Hage v. C., 199M533, 272NW777. See Dun. Dig. 3599.

Evidence sustained finding that there existed an implied contract to pay for services rendered at request of deceased mother during her lifetime. Id. See Dun. Dig. 7307.

Fact that child rendered services for mother under expectation of compensation was insufficient to support claim against estate of parent, in absence of showing that parent understood that services were not gratuitous. Anderson's Estate, 199M588, 273NW89. See Dun. Dig. 7307.

In absence of any evidence to contrary, payments made by mother to daughter caring for her will be considered as having been made out of a sense of gratitude and not as an acknowledgment of indebtedness or an intention to pay for services. Id.

In trial of claim by daughter against estate of mother for services rendered after 1925, contents of letter written by mother to daughter in 1918, requesting here to come home and help with farm work because sons had gone to war, were properly excluded as irrelevant and of no probative value. Id.

Probate court does not adjudicate upon claims of third persons against living heirs or upon contracts made by or between them. Schaefer v. T., 199M610, 273NW190. See Dun. Dig. 7770, 10286e.

Probate court has exclusive original jurisdiction of estates of deceased persons, but manner in which that jurisdiction is exercised is subject to regulation by legislature, and it may constitutionally limit jurisdiction of probate court to hear certain kinds of claims, and time to present claims, and probate court does not have power to extend time for filing claims which become absolute during period limited for filing claims beyond one year and six months from time notice of order was given, nor may compliance with statute be waived by a representative. Flewell, 201M407, 276NW732. See Dun. Dig. 7770b, 7770c.

A contingent claim is one where liability depends upon some future event which may or may not occur so that duty to pay may never become absolute. Id. See Dun. Dig. 3593.

Double liability of a stockholder in a state bank is a claim arising on contract, but is contingent until assessment is made by commissioner of banks, and if a contingent claim becomes absolute within time limited by probate court for filing of claim, it must be presented

within that time or be barred. Id. See Dun. Dig. 3593.

Application to file claim should be in the form provided by §8992-186. Daggett's Estate, 204M513, 283NW 750. See Dun. Dig. 3598.

Requirement of notice and showing of cause cannot be waived by representatives. Id. See Dun. Dig. 3598.

Application, notice, and showing of cause is mandatory. Id. See Dun. Dig. 3598.

Claim for money and credits taxes is not one which is required to be filed in probate court. Op. Atty. Gen. (614f), Apr. 16, 1936.

8992-102. Joint debtor.—Whenever two or more persons are indebted on any joint contract, or upon a judgment founded on a joint contract, and one of them dies, his estate shall be liable therefor, and the amount thereof may be allowed by the court the same as though the contract had been joint and several or the judgment had been against him alone, but without prejudice to right to contribution. (G. S. 8820) (Act Mar. 29, 1935, c. 72, §102.)

Annotations under former act, see ante, §8820.

Fact that claim for services rendered father and mother was properly assertable against father's estate, would not prevent assertion of claim against mother's estate, she dying subsequent to father, provided she was a party to the employment contract. Hage v. C., 199M533, 272NW 777. See Dun. Dig. 3604.

8992-103. Claims barred.—No claim or offset there-to shall be allowed which was barred by the statute of limitations during the decedent's lifetime. (G. S. 8814) (Act Mar. 29, 1935, c. 72, §103; Apr. 15, 1939, c. 270, §4.)

Annotations under former act, see ante, §8814.

Time within which to file a claim against estate of a decedent, not barred during his lifetime, is governed by limitation of probate code, and not by the general statute of limitations. Anderson's Estate, 200M470, 274NW621. See Dun. Dig. 3592a.

8992-104. Adjudication on claim.—Upon the adjudication of any claim, the court shall make its order allowing or disallowing the same, which order shall have the effect of a judgment. Such order shall show the date of adjudication, the amount allowed, the amount disallowed, and shall be attached to the claim and the offsets, if any. An allowed claim shall bear interest at the legal rate. (G. S. 8816) (Act Mar. 29, 1935, c. 72, §104.)

Annotations under former act, see ante, §8816.

Jurisdiction of probate court to vacate its orders and judgment is as great as power possessed and exercised by district court in like or similar matters. Jordan's Estate, 199M53, 271NW104. See Dun. Dig. 7784.

If probate court lacked power to permit filing of outlawed claim and power to allow claim so filed, its action in so doing was invalid and subject to direct attack even after time for review by appeal or motion had expired. Flewell, 201M407, 276NW732. See Dun. Dig. 3592a, 7784.

If order allowing a claim in probate has effect of judgment, right of action thereof is not outlawed for 10 years. Marquette Nat. Bank v. M., 287NW233. See Dun. Dig. 5150.

8992-105. Execution on offset.—When a balance is allowed against a claimant, the court may issue execution for such balance, which shall be collected in the same manner as an execution issued out of the district court. (G. S. 8817) (Act Mar. 29, 1935, c. 72, §105.)

8992-106. Actions pending.—All actions wherein the cause of action survives may be prosecuted to final judgment, notwithstanding the death of any party, and in such case the representative may be substituted therein in the stead of the deceased party. If judgment be rendered against the representative, it may be certified to the probate court and shall be then paid in the same manner as other claims against the estate. The defendant in any action commenced by a decedent or representative may set off a claim against the decedent's estate notwithstanding such claim has not been filed in the probate court. (G. S. 8818, 8819) (Act Mar. 29, 1935, c. 72, §106.)

In action by administrator de bonis non against administrator de bonis non with will annexed of estate of former administrator and surety on his bond, defendant's surety, as subrogee, could set off claims of former administrator as heir of the estate, as against claim that heirs of former administrator were necessary parties to

action and had not been joined, though estate of former administrator had been fully probated and estate closed. *Beckman v. B.*, 202M328, 277NW355. See Dun. Dig. 3583b.

8992-107. Actions precluded.—No action at law shall lie against a representative for the recovery of money upon any claim required to be filed by Section 101 [§8992-100]. Except as provided in Section 101 [§8992-101] with reference to contingent claims, no claim against a decedent shall be a charge upon his estate unless filed in the probate court within five years after his death and within the time limited under Section 100 [§8992-100] or extended under Section 101 [§8992-101]. Nothing in this section shall be construed as preventing an action to enforce a lien existing at the date of decedent's death nor as affecting the rights of a creditor to recover from the next of kin, legatees, or devisees to the extent of the assets received, upon any claim not required to be filed by Section 101 [§8992-101], or upon any contingent claim arising upon contract which did not become absolute and capable of liquidation until after the time limited under Section 100 [§8992-100] or extended under Section 101 [§8992-101] or until five years after the death of the decedent. (G. S. 8815) (Act Mar. 29, 1935, c. 72, §107.)

Annotations under former act, see ante, §8815.

Time within which to file a claim against estate of a decedent, not barred during his lifetime, is governed by limitation of probate code, and not by the general statute of limitations. *Anderson's Estate*, 200M470, 274NW621. See Dun. Dig. 3592a.

Probate court had no jurisdiction to receive or allow claims which remained contingent for more than five years after death of decedent. *Flewell*, 201M407, 276NW 732. See Dun. Dig. 3592a.

An executrix represented estate in her official capacity, and there is no defect of parties defendant in an action against her in that capacity to enforce a lien upon property of the estate, notwithstanding that she is the widow, no question of homestead being involved. *Marquette Nat. Bank v. M.*, 287NW233. See Dun. Dig. 3558.

Statute of limitations did not begin to run against an action to enforce a lien upon a distributive share of an estate of a decedent, evidenced by an assignment as security, until entry of decree of distribution of estate. *Id.* See Dun. Dig. 5602.

8992-108. Priority of debts.—If the applicable assets of the estate be insufficient to pay the following in full, the representative shall make payment in this order:

1. Expenses of administration.
2. Funeral expenses.
3. Expenses of last illness.
4. Debts having preference by laws of the United States.
5. Taxes.
6. Other debts duly proved. (G. S. 8827) (Act Mar. 29, 1935, c. 72, §108.)

Annotations under former act, see ante, §8827.

Evidence that decedent had paid claimant interest on money held to show that money was loaned to decedent and that he was not merely an agent of claimant for purpose of investment. *Jache's Estate*, 199M53, 271NW 452. See Dun. Dig. 3599.

8992-109. Secured debts.—When a claimant holds any security for his debt, he may file his claim, which may be allowed conditioned upon the claimant surrendering the security to the representative or exhausting the security. In either case, a report there-of shall be filed within the time fixed by the court. Upon his failure to comply with the order, the claim shall be disallowed. Upon his compliance with the order, the court shall make a final order on such claim, either allowing it in full if the security has been surrendered, or for any remaining amount found to be due on the debt if the security has been exhausted. The claim so allowed shall be paid as other debts duly proved. (G. S. 8827) (Act Mar. 29, 1935, c. 72, §109.)

Annotations under former act, see ante, §8827.

Secured claims may properly be presented to and allowed by probate court, but it is not necessary that this be done to preserve lien and right to resort to property covered by it. *Marquette Nat. Bank v. M.*, 287NW233. See Dun. Dig. 35930.

It is necessary for lien claimant before he can share in general assets of estate of a decedent to first exhaust his security or release or surrender it. *Id.* See Dun. Dig. 35930, 3593p.

Where bank made loan to residuary legatee and took assignment of borrower's interest in estate as security, and its claim on note was allowed in probate court in proceeding to administer estate of such residuary legatee, district court had plenary jurisdiction of an action by bank against personal representative of the residuary legatee to enforce lien on interest of such legatee in the first estate and to determine ownership of fund distributed to such legatee by decree of probate court, probate court having no jurisdiction in such matters. *Id.* See Dun. Dig. 3658, 7770, 7776, 7779.

8992-110. Encumbered assets.—When any assets of the estate are encumbered by mortgage, pledge, or otherwise, the representative may pay such encumbrance or any part thereof, whether or not the holder of the encumbrance has filed a claim, if it appears to be for the best interest of the estate and if the court, with or without notice, shall have so ordered. No such payment shall increase the share of the devisee, legatee, or heir entitled to receive such encumbered assets, unless otherwise provided in the will. (G. S. 8831) (Act Mar. 29, 1935, c. 72, §110.)

8992-111. Preferences prohibited.—No preference shall be given in the payment of any debt over any other debt of the same class, nor shall a debt due and payable be entitled to preference over debts not due. (G. S. 8828) (Act Mar. 29, 1935, c. 72, §111.)

Annotations under former act, see ante, §8828.

8992-112. Payment under will.—When a will designates the property to be appropriated for the payment of debts or other items, it shall be applied to such purpose. (G. S. 8832) (Act Mar. 29, 1935, c. 72, §112.)

ARTICLE XIII.—ACCOUNTING AND DISTRIBUTION.

8992-113. Duration of administration.—Every executor, general administrator, or administrator with the will annexed shall have one year from the date of his appointment to the settlement of the estate. A special administrator or an administrator de bonis non shall have such time not exceeding one year as the court may determine. For cause shown the period herein limited may be extended by the court, not exceeding one year at a time. The representative shall not be disqualified thereafter in any way, unless removed; but he shall not be relieved from any loss, liability, or penalty incurred by his failure to settle the estate within the time limited. (G. S. 8822, 8823, 8824) (Act Mar. 29, 1935, c. 72, §113.)

Annotations under former act, see ante, §8822.

8992-114. Filing of account.—Within the time limited every representative shall file a file [sic] a verified account of his administration and petition the court to settle and allow his account and to assign the estate to the persons entitled thereto. The representative shall also account at such other times as the court may require; the hearing on such account shall be had upon such notice as the court may direct. (G. S. 8873, 8877) (Act Mar. 29, 1935, c. 72, §114.)

Annotations under former act, see ante, §8873.

The exclusive authority to adjust accounts between the administrator and estate rests in the probate court. *First Nat. Bank & Trust Co. v. N.*, (DC-Minn), 25FSupp392.

8992-115. Hearing and decree.—Upon the filing of such petition, the court shall fix the time and place for the hearing thereof, notice of which shall be given pursuant to Article XIX, Section 183, except as provided in Sections 78, 114, and 125. Unless otherwise ordered, the representative shall, and other persons may, be examined relative to the account and the distribution of the estate. If all taxes payable by the estate have been paid so far as there are funds to pay them and the account is correct, it shall be settled and allowed; if incorrect, it shall be corrected and then settled and allowed.

Upon such settlement and allowance the court shall determine the persons entitled to the estate and assign

the same to them by its decree. The decree shall name the heirs and the distributees, describe the property and state the proportion or part thereof to which each is entitled. In the estate of a testate decedent, no heirs shall be named in the decree unless all of the heirs be ascertained. No final decree shall be entered until after the determination and payment of inheritance taxes except as provided in Section 189.

If all of the creditors have consented in writing, the court with or without notice may assign the estate, if insolvent, without conversion thereof into money, to such creditors in the proportions to which each is entitled.

If any liquidated demand for money arising on contract or if any unsatisfied judgment for the payment of money, whether or not unenforceable because of lapse of time or discharge in bankruptcy, exists in favor of decedent at the time of his death against an heir, legatee, or devisee, and not forgiven or otherwise specifically disposed of in the will, or if any judgment recovered by the representative against an heir, legatee, or devisee has not been paid during administration, the amount thereof shall be considered a part of the estate for purposes of distribution and taken by such heir, legatee, or devisee as a part of his share of the personality.

If such amount exceeds such beneficiary's share of the personality, the real property assigned to him shall be subjected in the decree to a lien in favor of the other heirs or beneficiaries in accordance with their respective shares.

If such demand or judgment became unenforceable prior to decedent's death, no interest after it became unenforceable shall be included and the total amount charged against such heirs, legatee, or devisee shall in no event exceed the value of his share of the estate. In the event of an escheat of part of the estate no such lien shall be imposed upon any other part of the estate in favor of the State of Minnesota.

Any beneficiary hereunder shall not be required to pay any inheritance tax and no inheritance tax shall be payable as to him on that part of said estate created by the set-off hereinbefore provided and inherited by said beneficiary, which said beneficiary would not otherwise have been required by law to pay because said demand so set off was unenforceable as to said beneficiary because of lapse of time or a discharge in bankruptcy.

Upon its own motion or upon the request of any party, without the determination or payment of inheritance taxes, the court may enter into an interlocutory decree, determining the persons entitled to the estate, naming the heirs and distributees, describing the property and stating the proportion or part thereof to which each is entitled. Such interlocutory decree shall be final as to the persons entitled to distribution, and as to the part or portion of the estate each is entitled to receive, but it shall not have the effect of assigning the estate to such persons. (G. S. 8879, 8880) (Act Mar. 29, 1935, c. 72, §115; Apr. 26, 1937, c. 435, §13; Apr. 15, 1939, c. 270, §5.)

Annotations under former act, see ante, §§879, 880. *Burns v. N.*, 235NW885; note under §8992-124. To the extent that defendant assumed obligations arising after specified date of surety on bond of administratrix, it was bound to same obligations that bound the surety company and was estopped by order of probate court surcharging account of administratrix for profit she had realized and for loss sustained by estate from her failure to sell real estate within reasonable time determined by probate court. *National Surety Co. v. E.*, (USCCA8), 88F(2d)399.

Judgment of probate court charging administrator's account with amount which he failed to turn over to estate was binding upon surety on administrator's bond. *First Nat. Bank & Trust Co. v. N.*, (DC-Minn.), 25FSupp392.

When final decree in probate issues, rights of parties to take property of decedent is therein and thereby determined, and even will cannot be used to impeach the decree. *Mahoney's Estate*, 195M431, 263NW465. See Dun, Dig. 3660.

Decree of distribution need not determine effect of conditions imposed upon legatees after receipt of legacy, such effect lying beyond scope of its jurisdiction, a mere

reference to language of will being sufficient. *Wyman v. T.*, 197M62, 266NW165. See Dun, Dig. 3658.

If there is ambiguity or conflict in terms of decree of distribution, its absence should not be so construed as to defeat manifest purpose of testator. *Id.* See Dun, Dig. 3660.

Probate court, being without jurisdiction to enforce contract between beneficiaries of will as to distribution of property, only determines way property should go to beneficiaries under terms of will. Beneficiaries must resort to a court of general jurisdiction. *Schaefer v. T.*, 199M610, 273NW190. See Dun, Dig. 10243c.

A final decree of distribution of probate court is not subject to collateral attack and void for uncertainty of description, where it assigns all property of deceased to heir entitled thereto without having described property with particularity, even though such property is not described in inventory. *Baumann v. K.*, 204M240, 283NW242. See Dun, Dig. 3660.

A decree of distribution is not the source of title for it simply declares what the law has ordained. All it does is to adjudicate upon the devolution of decedent's property as of the date of his death. *Butler's Estate*, 284NW 889. See Dun, Dig. 3660.

Absent fraud, undue influence, or mistake, contracts between heirs of decedent as to division, sale, or other disposition of an ancestor's property are valid and will be enforced. *Id.* See Dun, Dig. 3653a.

A decree of distribution, including construction of a will, is conclusive upon heirs, devisees, legatees, creditors of decedent, and personal representative. *Marquette Nat. Bank v. M.*, 287NW233. See Dun, Dig. 3660, 3778(23, 24).

Death of residuary legatee prior to enforcement of lien created by assignment of his interest in estate cannot affect right of assignee. *Id.* See Dun, Dig. 3661b.

8992-116. Partial distribution.—A partial distribution of an estate may be made before final settlement in the manner and upon the notice provided for final distribution. No decree of partial distribution shall be entered until after the determination and payment of inheritance taxes on the property thereby distributed. Such decree shall be final as to the persons entitled to such distribution and as to their proportions, and except where such decree includes only specific bequests or devises, as to the persons entitled to, and their proportions of the whole estate. No distribution shall be made until after the expiration of the time limited for the filing of claims, nor until a bond has been filed to secure the payment of unpaid claims and bequests, and the unpaid expenses of the administration, funeral, and last illness, and taxes. (G. S. 8874, 8875) (Act Mar. 29, 1935, c. 72, §116.)

Annotations under former act, see ante, §8874. Decree of partial distribution determines validity of bequest and power of legatee to take and use it for purpose directed by decree, and decree becomes final in absence of appeal, and only open question is proper construction and scope of decree. *Wyman v. T.*, 197M62, 266 NW165. See Dun, Dig. 3654.

Probate court in making recital in so-called finding of fact held not to have effect of construing terms or conditions or purposes of gift, but merely a recitation of reasons which led to decree of distribution. *Id.* See Dun, Dig. 3660.

Widow was estopped by reason of her acquiescence for several years with knowledge of condition of estate from objecting to prior payment in full of other legatees of estate. *Clover v. P.*, 203M337, 281NW275. See Dun, Dig. 3653a.

8992-117. Recording decree.—A certified copy of any decree of distribution may be filed for record in the office of the register of deeds of any county. It shall not be necessary to pay real estate taxes in order to record such certified copy, but the same shall be first presented to the county auditor for entry upon his transfer record and shall have noted thereon "Transfer entered" over his official signature. Upon request, the court shall furnish a certified copy of any decree of distribution, omitting the description of any property except that specified in the request, but indicating omissions by the words "other property omitted." Such copy and its record shall have the same force and effect as to property therein described as though the entire decree had been so certified and recorded. (G. S. 8880) (Act Mar. 29, 1935, c. 72, §117.)

Annotations under former act, see ante, §8880.

8992-118. Allowance to representative.—Every representative shall be allowed his necessary expenses incurred in the execution of his trust and shall have such compensation for his services as the court shall deem just and reasonable. An attorney performing

services for the estate at the instance of the representative shall have such compensation therefor out of the estate as the court shall deem just and reasonable. Where, upon demand the representative refuses to prosecute or pursue a claim or asset of the estate or a claim is made against him on behalf of the estate and any party interested shall then by his own attorney prosecute or pursue and recover such fund or asset for the benefit of the estate, such attorney shall be allowed such compensation out of the estate as the court shall deem just and reasonable and commensurate with the benefit to the estate from the recovery so made. If a decedent by will makes provision for the compensation of his executor, that shall be taken as his full compensation unless he files a written instrument renouncing all claim for the compensation provided for in the will. Such amounts shall be allowed as credits to the representative in his account or at any time during administration, the representative may apply to the court by petition for an order directing the payment of his compensation (in whole or in part) out of the estate, and any attorney having rendered services as aforesaid may by petition apply to the court for an order directing the payment to him (in whole or in part) of such attorney's fees out of the estate. Upon payment by the representative of the whole amount allowed his attorney by the court the representative shall be fully released and discharged from all liability on account of such attorney's services.

Whenever any person named as executor in a will or codicil defends it or prosecutes any proceedings in good faith and with just cause, for the purpose of having it admitted to probate, whether successful or not, or if any person successfully oppose the allowance of any will or codicil, he shall be allowed out of the estate his necessary expenses and disbursements in such proceedings together with such compensation for his services and those of his attorneys as the court shall deem just and proper. (G. S. 8788) (Act Mar. 29, 1935, c. 72, §118; Apr. 15, 1939, c. 270, §6.)

Annotations under former act, see ante, §8788.

Allowance of attorney's fee is to personal representative as such and not to attorney. *State v. Probate Court of Hennepin County*, 199M297, 273NW636. See Dun. Dig. 699, 3644c.

Estate is not liable to an attorney for his services at instance of an executor or administrator, but latter is himself liable in a suit by attorney. *State v. Probate Court of Hennepin County*, 204M5, 283NW545. See Dun. Dig. 702.

Representative in performance of his official duties is authorized to retain services of attorneys, and to incur reasonable expenses in that regard, but allowance is to representative as such and not to attorney. *Id.* See Dun. Dig. 3644a.

When there is conflict between representative and his attorney in respect to services rendered and fees to be paid therefor, issues presented thereby should be determined by a court of general jurisdiction, as probate court has no jurisdiction in such cases. *Id.* See Dun. Dig. 7771.

The amount allowed a representative of an estate for professional services rendered by his attorney held not so inadequate as to require supreme court to set aside the findings made by the trial court. *Fitzgerald's Estate*, 285NW285. See Dun. Dig. 3644a.

8992-119. Attorney's lien.—When any attorney at law has been retained to appear for any heir, devisee, or legatee, such attorney may perfect his lien upon the client's interest in the estate for compensation for such services as he may have rendered respecting such interest, by serving upon the representative before the decree of distribution is made, a notice of his intent to claim a lien for his agreed compensation, or the reasonable value of his services, and by filing such notice with proof of service thereof. The perfecting of such a lien, as herein provided, shall have the same effect as the perfecting of a lien as provided in Section 5695, Mason's Minnesota Statutes, 1927, and such lien may be enforced and the amount thereupon determined in the manner therein provided. (G. S. 8876) (Act Mar. 29, 1935, c. 72, §119; Apr. 15, 1939, c. 270, §7.)

8992-120. Resignation of representative.—A representative may resign his trust at any time, but his resignation shall not be operative until the court shall have examined and allowed his final account and has made an order accepting such resignation. (G. S. 8789) (Act Mar. 29, 1935, c. 72, §120.)

Annotations under former act, see ante, §8789.

8992-121. Removal of representative.—Whenever a representative becomes insane or otherwise mentally incompetent, or unsuitable, incompetent, or incapable of discharging his trust, or has mismanaged the estate, or has failed to perform any duty imposed by law or by any lawful order of the court, or has absconded, or has ceased to be a resident of this state, the court may remove him. The court on its own motion may, and on the petition of any person interested in the estate shall, order the representative to appear and show cause why he should not be removed. Service of such order may be made either upon the representative or his sureties, personally or by mailing a copy to him or any of them at the address given in the file, or in such other manner as the court may direct. (G. S. 8790) (Act Mar. 29, 1935, c. 72, §121; Apr. 26, 1937, c. 435, §14.)

Annotations under former act, see ante, §8790.

8992-122. Discharge upon resignation or removal.—Notwithstanding the resignation of a representative or his removal by the court, he and his surety shall not be discharged from liability until a successor has been appointed and qualified and has received for the unadministered property. (Act Mar. 29, 1935, c. 72, §122.)

8992-123. Account of deceased or insane representative.—Whenever a sole or the last surviving representative dies, or becomes insane or otherwise mentally incompetent, his representative, upon appointment, shall file an account and petition for the settlement and allowances thereof, and if proper, for distribution. If the estate has not been fully administered, the surety shall not be discharged until a successor has been appointed and qualified and received for the unadministered property. (G. S. 8791) (Act Mar. 29, 1935, c. 72, §123.)

Annotations under former act, see ante, §8791.

In action by administrator de bonis non against administrator de bonis non with will annexed of estate of former administrator and surety on his bond, defendant's surety, as subrogee, could set off claims of former administrator as heir of the estate, as against claim that heirs of former administrator were necessary parties to action and had not been joined, though estate of former administrator had been fully probated and estate closed. *Beckman v. B.*, 202M328, 277NW355. See Dun. Dig. 3583b.

8992-124. Discharge of representative.—Whenever any representative has paid or transferred to the persons entitled thereto all of the property in the estate, paid all taxes required to be paid by him and has filed proof thereof, and has complied with all the orders and decrees of the court and with the provisions of law, and has otherwise fully discharged his trust, the court shall finally discharge him and his sureties. Whenever any bequest or devise to a testamentary trustee amounts to more than five hundred dollars and the will contains no express waiver, the representative shall not be discharged until a trustee has qualified in a court of competent jurisdiction and until proof of such qualification and a receipt by the trustee have been filed. No representative who has received any funds for death by wrongful act shall be discharged until he has filed a certified copy of the order, judgment, or decree of distribution of the court wherein such funds were recovered, and vouchers from the persons entitled to such funds, or copies thereof, certified by the clerk of such court.

Provided, that whenever a minor child shall receive personal property not to exceed the sum of \$200, the Judge of Probate Court may order and direct representatives of estates to make payment thereof to the parent or parents, custodian, or the person, corporation or institution with whom such minor child may be, for the benefit, support, maintenance and educa-

tion of such minor child, or may direct the deposit thereof in a savings bank in the name of such minor child, and when so deposited in a savings bank, the book showing such deposit to be retained by the Probate Court, and no funds shall be withdrawn from such savings bank until such minor child shall have reached majority, unless by order of the Probate Court. (G. S. 8886, 8887) (Act Mar. 29, 1935, c. 72, §124; Apr. 26, 1937, c. 435, §15.)

Annotations under former act, see ante, §8886.

The statute of limitations commences to run against an action on a bond of an administrator from the time of the entry of the final decree of distribution. *Burns v. N.*, 285NW885. See Dun. Dig. 3580f.

Representative filing receipts covering all property ordered distributed in final decree with exception of certain moneys which were owing by designated heirs and for which they received credit on note owing the estate, but refused to sign receipt, is not entitled to discharge. *Op. Atty. Gen.* (349a-11), Jan. 10, 1939.

8992-125. Summary proceedings.—In a special administration, general administration, or in the administration of the estate of a person dying testate, if the court has determined that the decedent had no estate, or that the property has been destroyed, abandoned, lost, or rendered valueless, and that no recovery has been had nor can be had therefor, or if there be no property except such as has been recovered for death by wrongful act, or such as is exempt from all debts and charges in the probate court, or such as may be appropriated for the payment of the allowances to the spouse and children mentioned in Section 28, expenses of administration, funeral expenses, expenses of last illness, debts having preference under laws of the United States, and taxes, the representative by order of the court may pay the same in the order named, and file his final account with his petition for the settlement and allowance thereof. Thereupon the court with or without notice may adjust, correct, settle, allow, or disallow such account, and if the account be allowed, summarily determine the heirs, legatees, and devisees in its final decree assigning to them their share or part of the property with which the representative is charged upon the allowance of his final account, and close the administration.

If upon the hearing of a petition for summary assignment or distribution, for special administration, general administration, or for the probate of a will, the court determines that there is no need for the appointment of a representative and that the administration should be closed summarily for the reason that all of the property in the estate is exempt from all debts and charges in the probate court, a final decree may be entered, with or without notice, assigning such property to the persons entitled thereto pursuant to the terms of the will, or if there be none pursuant to the law of intestate succession in force at the time of the decedent's death. (Act Mar. 29, 1935, c. 72, §125; Apr. 26, 1937, c. 435, §16.)

Sections of Probate Code which deprive probate court of jurisdiction over claims against homestead and which confer such jurisdiction upon district court are not in violation of constitutional provision which gives probate court exclusive jurisdiction of estates of deceased persons. *Peterson's Estate*, 198M45, 268NW707. See Dun. Dig. 7770c.

8992-126. Unclaimed money.—If any part of the money on hand has not been paid over because the person entitled thereto cannot be found or refuses to accept the same, or for any other good and sufficient reason the same has not been paid over, the court may direct the representative to deposit the same with the county treasurer, taking duplicate receipts therefor, one of which he shall file with the county auditor and the other in the court. Money so deposited shall be credited to the county revenue fund. Upon application to the probate court within twenty-one years after such deposit, and upon notice to the county attorney and county treasurer, the court may direct the county auditor to issue to the person entitled thereto his warrant for the amount thereof. No interest shall be allowed or paid thereon, and if not

claimed within such time no recovery thereof shall be had. (G. S. 8888, 8889) (Act Mar. 29, 1935, c. 72, §126.)

Annotations under former act, see ante, §8888, 8889.

ARTICLE XIV.—ADVANCEMENTS.

8992-127. Definition.—Any property given by an intestate in his lifetime to a child or other lineal descendant when expressed in the gift or grant as an advancement or charged in writing by the intestate as such, or so acknowledged by the child or other descendant, shall be deemed an advancement to such heir, and treated as part of the estate of such intestate in the distribution of the same, and shall be taken by such heir toward his share of the estate. When the amount advanced exceeds the share of such heir, he shall receive nothing in the distribution, but he shall not be required to refund any part of such advancement. When the amount so received is less than his share, he shall be entitled to enough more to make up his full share. When a child or other lineal descendant to whom an advancement has been made dies before the intestate, leaving issue, such advancement shall be deducted in the distribution of the estate as though made directly to such issue. (G. S. 8895, 8897) (Act Mar. 29, 1935, c. 72, §127.)

District court had jurisdiction of an action to specifically enforce family settlement wherein deceased agreed to will property to children in equal shares, though one of the children had received an advancement or loan which he, at time of agreement, stated should be deducted from his share in the mother's will to be made, as against contention that probate court had exclusive jurisdiction. *Anderson v. A.*, 197M252, 266NW841. See Dun. Dig. 7770c, 8773.

An advancement is an irrevocable gift in praesenti of money or property to a child by a parent to enable donee to anticipate his inheritance to extent of gift. *Beler's Estate*, 284NW833. See Dun. Dig. 2722f, 2724a, 3658.

There is a well defined distinction between an advancement and a debt or loan. In the former there is a transfer of property without consideration, hence no obligation of repayment; in the latter the consideration for the loan is the obligation of repayment. *Id.* See Dun. Dig. 2722f, 2724a, 3658.

Although an advancement is in the nature of a gift, it differs from the ordinary gift in that, while the property or money given need not be returned or repaid, it must be accounted for by the donee upon the distribution of the estate of the donor. *Id.* See Dun. Dig. 2722f, 2724a, 3658.

Doctrine of advancements is based upon assumed desire of donor to equalize distribution of his estate amongst his children, and very foundation for rule prevents doctrine from applying unless ancestor dies wholly intestate. *Id.* See Dun. Dig. 2722f, 2724a, 3658.

In order that a transfer of property from a parent to his child shall be considered an advancement, it must appear that an intention existed, coincident with the transaction, to treat it as an anticipation of the child's share of the donor's estate if the latter should die intestate. *Id.* See Dun. Dig. 2722f, 2724a, 3658.

Evidence held not to show any release by the son to his father of the former's expectancy as an heir of the father. *Id.* See Dun. Dig. 2723.

8992-128. Valuation.—When such advancement is made in real estate, the value thereof for the purpose of distribution shall be considered a part of the real estate to be divided, and when it is in personal estate, as a part of the personal estate; and when in either case it exceeds the share of real or personal estate, respectively, that would have come to such heir, he shall not refund any part of it, but shall receive so much less out of the other part of the estate as will make his whole share equal to that of other heirs entitled to a like amount with him. When the value of the estate so advanced is expressed in the conveyance, or in the charge thereof made by the intestate, or in the acknowledgment of the heir receiving it, that shall be its value in the distribution; otherwise, it shall be estimated according to its value when given, as nearly as can be ascertained. All questions as to advancements made, or alleged to have been made, by the intestate to any heir shall be heard and determined by the court at the time of settlement, and every such advancement shall be specified in the decree distributing and assigning the estate. For the purpose of determining what proportion any one who has received an advancement is en-

titled to the court shall ascertain the value of the entire residue of such estate, by ordering an appraisal or in such other manner as it may deem best. (G. S. 8896, 8898) (Act Mar. 29, 1935, c. 72, §128.)

ARTICLE XV.—GUARDIANSHIPS.

8902-129. Persons subject.—The court may appoint one or two persons suitable and competent to discharge the trust as guardians of the person or estate or of both of any person who is a minor, or who because of old age, or imperfection or deterioration of mentality is incompetent to manage his person or estate, or of any person who because of excessive intoxication, gambling, idleness, or debauchery, so spends or wastes his estate or injures his person as to be likely to expose himself or his family to want or suffering, provided such person is a resident of the county or being a non-resident of this state has property in the county. No guardian of the person of any minor shall be appointed while proceedings for his care and custody are pending in any juvenile court of this state. Nothing herein contained shall diminish the power of any court to appoint a guardian to serve or protect the interest of any minor or other person under disability in any proceedings therein, nor abridge the rights of the father and mother, if suitable and competent, as the natural guardians of their minor children. (G. S. 8916, 8920, 8923, 8924, 8931, 8933) (Act Mar. 29, 1935, c. 72, §129.)

Annotations under former act, see ante, §§8916, 8924, 8933.

Mere ill health or physical ailments do not warrant placing a person under guardianship. Carpenter's Guardianship, 203M477, 281NW867. See Dun. Dig. 4332.

Proceedings are not adversary in nature but rather partake of character of a proceeding by state in its character of parens patriae, and manner and method of determining facts rest in sound discretion of trial court, controlled, in a general way, by rules of ordinary judicial procedure. Strom's Guardianship, 286NW245. See Dun. Dig. 4523.

Finding that appellant was incompetent held sustained by evidence. Id. See Dun. Dig. 4577.

Jurisdiction of our probate courts is founded upon constitutional grant. The powers so granted are plenary, and the jurisdiction of that court is to be liberally construed. Its jurisdiction over persons under guardianship is in its origin exclusive, where person alleged to be incompetent was found by probate court to be competent, and on appeal district court reversed, finding person incompetent, and inasmuch as probate court never passed upon or decided question of who should be guardian of such incompetent person, district court should have remanded case to probate court for appointment of guardian, as its jurisdiction is appellate only, not original. Id. See Dun. Dig. 7771a.

Guardianship and commitments under probate code. 20 MinnLawRev 333.

8902-130. Petitioners.—Any person may petition for the appointment of a guardian or guardians for any person believed to be subject to guardianship, provided that the petition of a person over the age of fourteen years for the appointment of a guardian or guardians of his own person or estate, and the petition of any person nominated by the will of a deceased parent with the written consent of the other parent if living and not under disability, for the appointment of a guardian or guardians for their minor child shall have priority over the petition of any other person. When any minor under guardianship attains the age of fourteen years, he may petition for the appointment of a guardian or guardians nominated by him in lieu of the guardians theretofore appointed. (G. S. 8916, 8917, 8918, 8919, 8924, 8931) (Act Mar. 29, 1935, c. 72, §130.)

Annotations under former act, see ante, §§8916, 8924.

There is no distinction between a veteran and a non-veteran, and spouse of insane veteran has no preference, but court inclines to appointment of spouse as guardian. Op. Atty. Gen. (346d), Aug. 28, 1935.

8902-131. Contents of petition.—The petition shall show (1) the name and address of the person for whom a guardian is sought, (2) the date and place of his birth, (3) if he be a minor, the names and addresses of his parents, or if the parents be dead or have abandoned the minor, the names and addresses of his custodians and of any person named as testamentary guardians in the will of a decedent, (4) if

he be not a minor, the names and addresses of his nearest kindred, (5) if he be married, the name and address of his spouse, (6) the reasons for the guardianship, (7) the probable value and general character of his real and personal property and the probable amount of his debts, (8) the names, ages, addresses, and occupation of the proposed guardians. (Act Mar. 29, 1935, c. 72, §131.)

One who recognizes the need of being placed under guardianship may petition therefor and waive notice of hearing, but petition must on its face indicate existence of a proper case for guardianship. Carpenter's Guardianship, 203M477, 281NW867. See Dun. Dig. 4332, 7777, 7783.

8902-132. Lis pendens.—After the filing of the petition, a certified copy thereof may be filed for record in the office of the register of deeds of any county in which any real estate owned by the ward is situated and if a resident of this state, in the county of his residence. If a guardian be appointed on such petition, all contracts except for necessities, and all transfers of real or personal property made by the ward after such filing and before the termination of the guardianship shall be void. (G. S. 8927) (Act Mar. 29, 1935, c. 72, §132.)

Law aims to protect property and estate of one who is in fact incapable of doing so for himself, but his incapacity cannot be changed from a shield of protection to a rapier of offense. Schultz v. O., 202M237, 277NW918. See Dun. Dig. 4522.

An action on contract will lie in district court against an insane person under guardianship. Id. See Dun. Dig. 4532.

8902-133. Notice of hearing.—If the petition be made by the person for whom a guardian is sought, or by a parent, custodian, or testamentary guardian of a minor under the age of fourteen years, the court may hear the same with or without notice. In all other cases, upon the filing of the petition the court shall fix the time and place for the hearing thereof. At least fourteen days prior to such time, personal service shall be made upon the ward. If he have a spouse, cutodian, or if there be a testamentary guardian named in the will of a decedent, notice shall be given to such persons and to such of the nearest kindred and in such manner as the court may direct. If he be an inmate of any hospital or asylum, notice by mail shall be given to the superintendent thereof. If he be a nonresident or if after diligent search he cannot be found in this state, notice shall be given in such manner and to such persons as the court may determine. (G. S. 8925, 8926) (Act Mar. 29, 1935, c. 72, §133.)

Annotations under former act, see ante, §8926.

Service of notice of guardianship hearing is to be personally on ward and by mail to superintendent of hospital or asylum. Op. Atty. Gen. (88a-14), Oct. 8, 1935.

8902-134. Hearing—Appointment.—Upon proof of the petition, the court shall appoint one or two persons suitable and competent to discharge the trust as general guardians of the person or estate or of both. Upon the filing of a bond in such amount as the court may direct and an oath according to law, or upon the filing of an acceptance of the trust pursuant to G. S. 7733, letters of guardianship shall issue. If there be no personal property, the court may waive the filing of a bond, but if the guardian receives or becomes entitled to any such property, he shall immediately file a report thereof and a bond in such amount as the court may direct. (G. S. 8926) (Act Mar. 29, 1935, c. 72, §134.)

Annotations under former act, see ante, §8926.

A judgment or order, in proceedings for appointment of a guardian of an incompetent person and taking from such person the management of his property, is admissible in evidence in any litigation whatever, but not conclusive, to prove that person's mental condition at time order or judgment is made or at any time during which judgment finds person incompetent. Champ v. E., 197M 49, 266NW94. See Dun. Dig. 4524.

A person may be insane on some subjects but still be able to manage his property and affairs. Schultz v. O., 202M237, 277NW918. See Dun. Dig. 4519.

Judgment in proceedings for appointment of a guardian of an incompetent person is admissible in evidence, but not conclusive, in any litigation, to prove mental condition of person at time judgment is rendered, or at

any time during which judgment finds person incompetent, though an adjudication of insanity and commitment to an insane asylum is evidence of insanity. *Id.* See *Dun. Dig.* 4517.

Order appointing a guardian should indicate that person subjected to guardianship has been found in fact incompetent, otherwise record fails to disclose jurisdiction. *Carpenter's Guardianship*, 203M477, 281NW867. See *Dun. Dig.* 4332.

8992-135. Guardian's duties.—A guardian shall be subject to the control and direction of the court at all times and in all things. A general guardian of the person shall have charge of the person of the ward. A general guardian of the estate shall (1) pay the reasonable charges for the support, maintenance, and education of the ward in a manner suitable to his station in life and the value of his estate; but nothing herein contained shall release parents from obligations imposed by law for the support, maintenance, and education of their children, (2) pay all just and lawful debts of the ward and the reasonable charges incurred for the support, maintenance, and education of his wife and children, and upon order of the court for the support of any person unable to earn a livelihood who is or may become legally entitled to support from the ward, (3) possess and manage the estate, collect all debts and claims in favor of the ward, or with the approval of the court compromise the same, and invest all funds, except such as may be currently needed for the debts and charges aforesaid and the management of the estate, in such securities as are authorized by G. S. 7714 and approved by the court, except as provided in G. S. 7735. (G. S. 8920, 8933, 8935, 8937 to 8943, 8946, 8947) (Act Mar. 29, 1935, c. 72, §135.)

Annotations under former act, see ante, §§8933, 8937 to 8939, 8947.

Under federal statute authorizing suits by incompetent insured persons on war risk insurance policies within three years after removal of their disabilities, guardian of an insane veteran was entitled to sue after the definite periods of limitations had expired but before his ward's disability was removed, such right of action being that of his ward. *Johnson v. U. (USCCA3)*, 87F(2d)940.

The guardian of an incompetent takes no legal estate in property of his ward. *Id.*

"May" is permissive and a guardian is not absolutely liable for loss because he did not obtain approval of court to investment. *Champ v. E.*, 197M49, 266NW94. See *Dun. Dig.* 4526.

Duties of a guardian in respect of investment of his ward's funds are similar to duties of a trustee. *Id.* See *Dun. Dig.* 4107.

Evidence sustains findings that appellant ward was in fact of sound mind, capable of handling her own affairs, and that she approved of and consented to certain investments when and as made by guardian of her estate. *Id.* See *Dun. Dig.* 4526.

Law requires of trustee more than good faith and honest judgment; his judgment must be enlightened and guided by approved rules applicable to investment of trust funds, bearing in mind that funds must be guarded carefully and invested cautiously. *Id.*

Evidence sustains judgment of district court charging guardian with funds of ward invested in a second mortgage on real estate, which investment was unsafe and negligently made. *Fredrick v. K.*, 197M524, 267NW473. See *Dun. Dig.* 4110.

An insane person may sue and be sued, though he should appear by a next friend, general guardian, or guardian ad litem, but power of district court to appoint guardian and hear cases is not taken away by statute authorizing probate courts to appoint general guardian. *Schultz v. O.*, 202M237, 277NW918. See *Dun. Dig.* 4529.

Contract of an insane person is not void but voidable. *Id.* See *Dun. Dig.* 4522.

A guardian, other than a parent or natural guardian, is under no obligation to support his ward out of his own means. *County of Stearns v. F.*, 203M11, 279NW707. See *Dun. Dig.* 4526.

Judge of probate has jurisdiction to authorize general guardian to compromise and settle a claim for injuries sustained by a minor as a result of an automobile accident, though claim has not been sued on and is not therefore pending in district court. *Op. Atty. Gen.* (346d), March 3, 1938.

Guardianship funds may not be invested in paid up stock of a building and loan association operating under supervision of Banking Division of State of Minnesota. *Op. Atty. Gen.* (346d), March 1, 1939.

8992-136. Transfer of venue.—When it is for the best interest of the ward or his estate, the venue may be transferred to another county. Upon the filing of a petition by any person interested in the ward or

in his estate, the court shall fix the time and place for the hearing thereof, notice of which shall be given to such persons and in such manner as the court may direct. Upon proof that a transfer of venue is for the best interest of the ward or his estate, and upon the settlement and allowance of the guardian's accounts to the time of such hearing, the court shall transmit the entire file to the court of such other county in which all subsequent proceedings shall be had. (G. S. 8927-1-2) (Act Mar. 29, 1935, c. 72, §136.)

Where a person is committed to guardianship of state board of control as feeble-minded in certain county and she is paroled and goes to live in another county, any interested person may petition probate court of committing county to change venue to residence of the ward for the purpose of making a petition for restoration to capacity. *Op. Atty. Gen.* (679b), July 18, 1935.

Change of venue may be had from one county to another in a feeble-minded proceeding, wherein state board of control is given custody of person. *Op. Atty. Gen.* (679a), Aug. 11, 1938.

8992-137. Filing of accounts.—Except where expressly waived by the court, every guardian annually shall file a verified account covering the period from the date of appointment or his last account. At the termination of the guardianship, or upon the guardian's removal or resignation, he or his surety, or in the event of his death or disability, his representative or surety shall file a verified final account with a petition for the settlement and allowance thereof. Every account shall show in detail all property received and disbursed, the property on hand, the present address of the ward and of the guardian, and unless the guardian be a corporation, the amount of the bond, the names and addresses of all sureties thereon, that each unincorporated surety is a resident of this state, is not under disability, and is worth the amount in which he justified. (G. S. 8948, 8949) (Act Mar. 29, 1935, c. 72, §137.)

Annotations under former act, see ante, §8949. *Strom's Guardianship*, 286NW245; note under §8992-139. Court on its own motion or upon petition of guardian or upon petition of any one interested in ward or in his estate, shall fix a time for hearing on account of guardian of insane person. *Op. Atty. Gen.* (248c-4), Mar. 31, 1936.

8992-138. Notice of hearing on account.—The court on its own motion may, or upon the petition of the guardian or any person interested in the ward or his estate shall, fix the time and place for the hearing on any account, notice of which shall be given in such manner and to such persons as the court may direct. Wherever any funds have been received from the Veterans' Administration, notice by mail shall be given to the Regional Office having charge thereof. (G. S. 8948, 8949) (Act Mar. 29, 1935, c. 72, §138.)

Annotations under former act, see ante, §8949.

8992-139. Adjudication on account.—Unless otherwise ordered, the guardian shall, and other persons may, be examined on the hearing. If the account be correct, it shall be settled and allowed; if incorrect, it shall be corrected and then settled and allowed. The order of settlement and allowance shall show the amount of the personal property remaining. Upon settlement of the final account, and upon delivery of the property on hand to the person entitled thereto, the court shall discharge the guardian and his sureties. Any person for whom a guardian has been appointed and who has become of age or has been restored to capacity may show to the court that he has settled with his guardian and may petition for the guardian's discharge without further hearing. Upon such petition, the court may discharge the guardian and his sureties. (G. S. 8948, 8949, 8950) (Act Mar. 29, 1935, c. 72, §139.)

Annotations under former act, see ante, §§8949, 8950. Neither probate court nor district court on appeal obtained jurisdiction of person or subject matter under a petition requesting that order releasing guardian be set aside and that guardian be ordered to account, guardian having moved out of state and service being attempted by publication, proceeding not being one in rem, and res having disappeared. *Sellers v. S.*, 196M143, 264NW425. See *Dun. Dig.* 5141, 7784.

There was no error on accounting of guardian in admission of evidence as to a statement made by guardian,

before his appointment, as to what fees he would charge, if appointed. *Fredrick v. K.*, 197M524, 267NW473. See Dun. Dig. 4122.

Court did not err in reducing amount allowed by probate court for services of guardian. *Id.*

Matter of determining a guardian's compensation and necessary expenses in discharge of his official duty is primarily for probate court as one having original jurisdiction in respect thereof. District court has jurisdiction only upon appropriate appeal to review propriety and validity of items composing it. It has no original jurisdiction with respect to such. *Strom's Guardianship*, 286 NW245. See Dun. Dig. 4122.

8992-140. Succeeding guardian.—If a guardian dies, resigns, or is removed, the court with or without notice may appoint a successor. (Act Mar. 29, 1935, c. 72, §140.)

8992-141. Special Guardian.—Upon a showing of necessity or expediency, the court with or without notice may appoint a special guardian of the person or estate or both of any person designated in Section 129, whether a petition for general guardianship has been filed or not. There shall be no appeal from any order appointing or refusing to appoint a special guardian. A special guardian of the person shall have charge of the person of the ward. A special guardian of the estate shall collect the assets and conserve the estate, unless his powers are limited by the court in the order of appointment and in the letters to the performance of specified acts. Upon a showing of necessity or expediency, the court with or without notice may expressly confer upon a special guardian power to perform any or all acts in the administration of the guardianship, not exceeding the powers conferred by law upon general guardians.

Within fourteen days after appointment, a special guardian of the estate shall file an inventory and appraisal of the personal property according to the requirements of Article XII A. Upon the granting of letters of general guardianship, the power of a special guardian shall cease, and he shall proceed forthwith to a final accounting. Whenever a special guardian has been appointed to protect the ward's interest in any matter wherein the interest of the general guardian appears to conflict with that of the ward, or to protect the ward's interest upon suspension of an order of removal of a general guardian by appeal, the power of such special guardian shall not cease until terminated by the court. (G. S. 8928, 8951, 8952) (Act Mar. 29, 1935, c. 72, §141.)

8992-142. Termination.—A guardianship of a minor shall terminate upon his death or upon his attainment of legal age. The marriage of a female ward under guardianship as a minor only and not under a juvenile court guardianship shall terminate the guardianship of her person but not of her estate, provided that such guardianship shall not affect her capacity to join with her husband in instruments involving his interest in real estate. The guardianship of a ward other than a minor shall terminate upon his death or upon his restoration to capacity. Whenever there is no further need for any guardianship, the court may terminate the same upon such notice as it may direct. (G. S. 8922) (Act Mar. 29, 1935, c. 72, §142.)

Female under 21 is a minor, and a guardian must be appointed to minor receiving monthly compensation as a child of a deceased world war veteran, and conveyances of land must be by guardian. *Op. Atty. Gen.* ((498c), Nov. 4, 1937.

Guardianship of female child had in Probate Court before passage of Laws 1937, c. 435 [§§8992-3(1) to 8992-186], is to be continued until she reaches age of twenty-one. *Op. Atty. Gen.* (346d), Dec. 9, 1937.

8992-143. Restoration to capacity.—Any person who has been adjudicated insane or inebriate, or any person who is under guardianship (except as a minor, or as a feeble-minded or epileptic person, or a person under guardianship in the juvenile court), or his guardian, or any other person interested in him or his estate may petition the court in which he was so adjudicated to be restored to capacity. Upon the filing of such petition, the court shall fix the time and place for the hearing thereof, notice of which shall

be given to the State Board of Control if he was under its control and has not been discharged by it, and to such other persons and in such manner as the court may direct.

Any person may oppose such restoration. Upon proof that such person is of sound mind and capable of managing his person and estate, and that he is not likely to expose himself or his family to want or suffering, the court shall adjudge him restored to capacity.

In proceedings for the restoration of an insane or inebriate person, the court may appoint two duly licensed doctors of medicine to assist in the determination of the mental capacity of the patient. The court shall allow and order paid to each doctor so appointed the sum of five dollars per day for his services and fifteen cents for each mile traveled. Upon such order the county auditor shall issue a warrant on the county treasurer for the payment thereof. If the court notifies the county attorney he shall attend the hearing and if he deems it for the best interest of the public he shall oppose the restoration in the probate court and appellate courts.

If such person has been adjudged insane or inebriate by a court of a county wherein he had no settlement, the petition for restoration may be filed in the court of the county of his settlement in which shall be filed certified copies of such instruments of the file of the court of commitment as the court may direct. The court wherein restoration is granted or denied shall transmit to the court of commitment a certified copy of the order granting or denying restoration. The expenses of such certified copies and of such transmittal shall be paid by the county of such person's settlement. If the venue has been transferred, no proceedings need be had in the court from which the venue was transferred. (G. S. 8929) (Act Mar. 29, 1935, c. 72, §143; Apr. 15, 1939, c. 270, §8.)

Annotations under former act, see ante, §8929.
District court on appeal from order of probate court denying petition for restoration of incompetent capacity and appointment of a new guardian had authority to appoint guardian ad litem, where authority of incompetent's attorney was questioned. *Foust's Guardianship*, 195M289, 262NW875. See Dun. Dig. 7794.

District court on appeal from order of probate court dismissing petition for restoration of incompetent to capacity and appointment of a new guardian had right to permit questioning of authority of attorney to take appeal from probate court for the incompetent. *Id.*

Probate court of another county where patient has no legal settlement and from which he has not been committed has no jurisdiction to discharge patient. *Op. Atty. Gen.* (6), Jan. 4, 1938.

Probate court hearing one petition for restoration may treat a second petition in longhand as merely request of an insane person and disregard it. *Op. Atty. Gen.* (248b-8), Jan. 19, 1939.

Discharge by superintendent of state hospital for insane does not restore patient to capacity but there must be a proceeding under this section. *Op. Atty. Gen.* (248B-8), July 20, 1939.

8992-143a. Discharge of guardian of feeble-minded or epileptic persons.—When it appears to the state board of control that a person committed to its guardianship as a feeble-minded or epileptic person is no longer in need of guardianship or supervision for his own or the public welfare, the board may petition the court of commitment, or the court to which the venue has been transferred, for its discharge as such guardian, stating facts in support of its petition. (Apr. 17, 1937, c. 255, §1.)

8992-143b. Petition—hearing.—Upon the filing of such petition the court shall fix the time and place for the hearing thereof, notice of which shall be given as the court may direct. Upon proof of the petition the court shall make an order discharging the state board of control as the guardian of such person. (Apr. 17, 1937, c. 255, §2.)

ARTICLE XVI.—SALES, ETC., OF REALTY

8992-144. Definitions.—As used in this article, the word "mortgage" shall include an extension of an existing mortgage, subject to the provisions of Section 159 [§8992-159]; the word "lease," unless the

context otherwise indicates, means a lease for more than three years. (Act Mar. 29, 1935, c. 72, §144.)

8992-145. Lease for three years or less.—The court with or without notice may direct a lease for three years or less of any real estate (including a homestead if the written consent of the spouse has been filed) whenever it appears to be for the best interest of the estate and of the persons interested in such real estate. (Act Mar. 29, 1935, c. 72, §145.)

8992-146. Reasons for sale, mortgage, lease.—The court may direct a sale, mortgage, or lease of any real estate of a decedent whenever the personal property is insufficient to pay the allowances to the spouse and children, expenses of administration, funeral expenses, expenses of last illness, taxes, debts, and bequests, or whenever it shall determine such sale, mortgage, or lease to be for the best interests of the estate and of the persons interested in such real estate. The proceeds of any such sale, mortgage, or lease which may be available for distribution shall be distributed to the same persons and in the same shares as if it had remained real estate.

The court may direct a sale, mortgage, or lease of any real estate of a ward whenever the personal property is insufficient to pay his debts and other charges against his estate, or to provide for the support, maintenance, and education of the ward, his wife, and children, or whenever it shall determine such sale, mortgage, or lease to be for the best interest of the ward.

The homestead of a decedent when the spouse takes any interest therein or the homestead of a ward shall not be sold, mortgaged, or leased unless the written consent of the spouse has been filed. Unless the written consent of all persons who take any interest therein has been filed, the homestead of a decedent shall not be mortgaged except for the purpose of extending, renewing, or satisfying an existing mortgage and paying the taxes, assessments, liens, encumbrances, repairs, and incidental expenses or other items necessary to procure such mortgage. (G. S. 8825, 8834, 8835) (Act Mar. 29, 1935, c. 72, §146.)

Annotations under former act, see ante, §§8834, 8835.

Duties of a guardian in respect of investment of his ward's funds are similar to duties of a trustee. *Champ v. B.*, 197M49, 266NW94. See Dun. Dig. 4107.

Evidence sustains findings that appellant ward was in fact of sound mind, capable of handling her own affairs, and that she approved of and consented to certain investments when and as made by guardian of her estate. *Id.* See Dun. Dig. 4526.

Homestead of one dying without surviving spouse or child may not be sold to pay legacies merely because personal estate is insufficient for that purpose. *Anderson's Estate*, 202M513, 279NW266. See Dun. Dig. 3615a.

Where no spouse or child survives testator, and homestead is devised, if will discloses intent to charge homestead with payment of such part of legacies as personal estate is insufficient to pay, normally homestead should be decreed to persons to whom it was devised subject to such payment, leaving to a court of equity enforcement of charge. *Id.* See Dun. Dig. 3615a.

Where a testator imposed a legacy as a charge upon real estate part of which was a homestead, it was improper for probate court to license a sale of entire tract either to pay debts or expenses of administration or legacies. Following in *re Anderson's Estate*, 202Minn 513, 279NW266, 116ALR82, the proper method of procedure is to devise homestead subject to lien. *Schultz's Estate*, 203M565, 282NW471. See Dun. Dig. 3615.

8992-147. Petition, notice, hearing.—A representative may file a petition to sell, mortgage, or lease alleging briefly the facts constituting the reasons for the application and describing the real estate involved therein. The petition may include all the real estate of the decedent or ward or any part or parts thereof. It may apply for different authority as to separate parcels. It may apply in the alternative for authority to sell, mortgage, or lease. Upon the filing of such petition, the court shall fix the time and place for the hearing thereof. Notice of the hearing shall state briefly the nature of the application made by the petition and shall be given pursuant to Article XIX, Section 188. Upon the hearing, the court shall have full power to direct the sale, mortgage, or lease of all the real estate described in the petition, or to

direct the sale, mortgage, or lease of any one or more parcels thereof, provided that any such direction shall be within the terms of the application made by the petition. (G. S. 8836, 8837, 8845) (Act Mar. 29, 1935, c. 72, §147; Apr. 26, 1937, c. 435, §17.)

Annotations under former act, see ante, §8836. Finding that reasonable time in which administratrix should have applied and sold real estate expired on certain date, held within authority of probate court, in action against company which assumed obligations of surety of administratrix arising after a subsequent date. *National Surety Co. v. E.*, (USCCA8), 88F(2d)399.

Probate court, in surcharging account of administratrix, properly found ten years was reasonable time in which administratrix should have applied and sold real estate. *Id.*

Defects and errors in petition to mortgage land were immaterial where all objections were heard, and money was accounted for on final accounting and land distributed subject to mortgage. *Mahoney's Estate*, 195M431, 263 NW465. See Dun. Dig. 3630.

8992-148. Order for sale, mortgage, lease.—The order shall describe the real estate to be sold, mortgaged, or leased, and may designate the sequence in which the several parcels shall be sold, mortgaged, or leased. If the order be for a sale, it shall direct whether the real estate shall be sold at private sale or public auction. When the purpose of a sale, mortgage, or lease is to pay debts, bequests, or other items, the real estate shall be sold, mortgaged, or leased in the following sequence: (1) real estate devised charged with the payment of such debts, bequests, or other items (2) real estate not specifically devised (3) real estate specifically devised but not so charged. An order to mortgage shall fix the maximum amount of the principal and the maximum rate of interests and shall direct the purpose for which the proceeds shall be used. An order for sale, mortgage, or lease shall remain in force until terminated by the court, but no private sale shall be made after one year from the date of the order unless the real estate shall have [been] reappraised under order of the court within three months preceding the sale. (G. S. 8838, 8839, 8841) (Act Mar. 29, 1935, c. 72, §148; Apr. 26, 1937, c. 435, §18.)

Annotations under former act, see ante, §8841.

Act Apr. 26, 1937, cited omits the word "been" in brackets.

8992-149. Terms of sale.—The court may order a sale of real estate for cash, part cash and a purchase-money mortgage of not more than fifty per cent of the purchase price, or on contract for deed. The initial payment under a sale on contract shall not be less than ten per cent of the total purchase price, and the unpaid purchase price shall bear interest at a rate of not less than four per cent per annum and shall be payable in reasonable monthly, quarterly, semi-annual, or annual payments, and the final installment shall become due and payable not later than ten years from the date of the contract. Such contract shall provide for conveyance by quitclaim deed, which deed shall be executed and delivered upon full performance of the contract without further order of the court. In the event of termination of the interest of the purchaser and his assigns in such contract, the real estate may be resold under the original order and a reappraisal within three months preceding the sale. A sale of the vendor's interest in real estate sold by the representative on contract may be made under order of the court with or without notice upon an appraisal of such interest within three months preceding the sale; no such sale shall be made for less than its value as fixed by such appraisal. (G. S. 8841) (Act Mar. 29, 1935, c. 72, §149; Apr. 26, 1937, c. 435, §19.)

Annotations under former act, see ante, §8841.

8992-150. Public sale.—If a sale at public auction be ordered, three weeks' published notice of the time and place of sale shall be given. Proof of publication shall be filed before the confirmation of the sale. Such publication and sale may be made in the county where the real estate is situated or in the county of the probate proceedings. If the parcels to be sold are contiguous and lie in more than one county, notice may

be given and the sale may be made in either of such counties or in the county of the probate proceedings. The representative may adjourn the sale from time to time, if for the best interests of the estate and the persons concerned, but not exceeding three months in all. Every adjournment shall be announced publicly at the time and place fixed for the sale, and if for more than one day further notice thereof shall be given as the court may direct. (G. S. 8843, 8848) (Act Mar. 29, 1935, c. 72, §150.)

8992-151. Private sale.—If a private sale be ordered, the real estate shall be reappraised by two or more disinterested persons under order of the court, which reappraisal shall be filed before the confirmation of the sale. No real estate shall be sold at private sale for less than its value as fixed by such appraisal. (G. S. 8844) (Act Mar. 29, 1935, c. 72, §151.)

Appraisal is necessary only in event of sale, and irregularity in appraisal by appraisers was immaterial where land was only mortgaged. *Mahoney's Estate*, 195M431, 263NW465. See Dun. Dig. 3636.

8992-152. Additional bond.—If the bond of the representative be insufficient, before confirmation of a sale of [sic] lease or before execution of a mortgage he shall file an additional bond in such amount as the court may require. (G. S. 8842, 8910, 8913) (Act Mar. 29, 1935, c. 72, §152.)

Annotations under former act, see ante, §8910.

Editorial note.—"Of" following sale in line 3 of text in 1936 Supplement should be "or" but was enacted "of."

8992-153. Sale of contract interest.—Whenever a person entitled under contract of purchase to any interest in real estate dies, or whenever a ward is entitled under contract of purchase to any interest in real estate, such interest may be sold for the same reasons and in the same manner as other real estate of a decedent or ward. Before confirmation the court may require the filing of a bond conditioned to save the estate harmless. Upon confirmation, the representative shall assign the contract and convey by quitclaim deed. The proceeds of such sale in the estate of a decedent shall be disposed of in the same manner as the proceeds of sales of real estate of which the decedent was seised. (G. S. 8849, 8850) (Act Mar. 29, 1935, c. 72, §153.)

8992-154. Sale subject to charge.—When the estate of a decedent or ward is liable for any charge, mortgage, lien, or other encumbrance upon the real estate therein, the court may refuse to confirm the sale or lease until after the filing of a bond in such amount as the court may direct conditioned to save the estate harmless. (G. S. 8851) (Act Mar. 29, 1935, c. 72, §154.)

Annotations under former act, see ante, §8851.

8992-155. Confirmation.—Upon making a sale or lease, the representative shall file his report thereof. Upon proof of compliance with the terms of the order, the court may confirm the sale or lease and order the representative to execute and deliver the proper instrument. (G. S. 8856) (Act Mar. 29, 1935, c. 72, §155.)

Statutes are to be liberally construed so as to uphold title derived from sales made in probate proceedings, and substantial compliance only is required. *Mahoney's Estate*, 195M431, 263NW465. See Dun. Dig. 3617a.

8992-156. Eminent domain proceedings.—Whenever any real estate of a decedent or ward is desired by any person, firm, association, corporation, or governmental agency having the power of eminent domain, the representative may agree in writing upon the compensation to be made for the taking, injuring, damaging, or destroying thereof, subject to the approval of the court. When such agreement has been made, the representative shall file a petition, of which the agreement shall be a part, setting forth the facts relative to the transaction. The court with or without notice shall hear, determine, and act upon the petition. If the court approves the agreement, the representative upon payment of the agreed compensation shall convey the real estate sought to be acquired,

and execute any release which may be authorized. (G. S. 8853, 8854, 8855) (Act Mar. 29, 1935, c. 72, §156.)

8992-157. Platting.—Whenever it is for the best interests of the estate of a decedent or ward, real estate may be platted by the representative under such conditions and upon such notice as the court may order. (G. S. 8872) (Act Mar. 29, 1935, c. 72, §157.)

8992-158. Conveyance of vendor's title.—When any person legally bound to make a conveyance or lease dies before making the same, or when any ward is legally bound to make a conveyance or lease, the court with or without notice may direct the representative to make the conveyance or lease to the person entitled thereto. The petition may be made by any person claiming to be entitled to such conveyance or lease, or by the representative, or by any person interested in the estate or claiming an interest in such real estate or contract, and shall show the description of the land and the facts upon which such claim for conveyance or lease is based. Upon proof of the petition, the court may order the representative to execute and deliver an instrument of conveyance or lease upon performance of the contract. (G. S. 8861 to 8871, inclusive) (Act Mar. 29, 1935, c. 72, §158; Apr. 26, 1937, c. 435, §20.)

Contract to will property, see §8735, note 5, §8992-34, note 5.

8992-159. Mortgage extension.—A representative without order of the court may make an extension of an existing mortgage for a period of five years or less, if the extension agreement contains the same prepayment privileges and the rate of interest does not exceed the lowest rate in the mortgage extended. (Act Mar. 29, 1935, c. 72, §159.)

8992-160. Liability on mortgage note.—No representative shall be liable personally on any mortgage note or by reason of the covenants in any instrument or conveyance executed by him in his representative capacity. (Act Mar. 29, 1935, c. 72, §160.)

8992-161. Title free from tax lien.—The lien of the State for inheritance taxes payable by a representative shall not extend to any right acquired by a purchaser, mortgagee, or lessee through any conveyance made by such representative under a power contained in a will or under order of the court. (Act Mar. 29, 1935, c. 72, §161.)

8992-162. Validity of proceedings.—No sale, mortgage, lease, or conveyance by a representative shall be subject to collateral attack on account of any irregularity in the proceedings if the court which ordered the same had jurisdiction of the estate. (G. S. 8857, 8858) (Act Mar. 29, 1935, c. 72, §162.)

Where sale proceedings in probate court have culminated in an order confirming a sale, directing a conveyance and execution of a deed to purchasers, such proceedings cannot be attacked by moving to vacate order of confirmation in probate court or by appealing from such order of confirmation, but must be attacked in an appropriate direct action to which purchasers, subsequent purchasers, and encumbrancers are duly made parties. *Sprain's Estate*, 199M511, 272NW779. See Dun. Dig. 3627.

8992-162a. Certain deeds validated.—All deeds for the conveyance of real estate made and executed by an administrator or executor of the estate of a deceased person, pursuant to the order of any Probate Court of this State authorizing and directing the making and execution of such instrument, where the execution thereof was otherwise valid, and in which instrument the description of the property conveyed does not correspond with the description set forth in the order of the Probate Court authorizing and directing the making and execution of such instrument, the same are hereby validated and legalized, and such conveyances are hereby made valid as to the property described in the order of the Probate Court authorizing and directing the making and execution of such instrument. (Jan. 21, 1936, Ex. Ses., c. 58, §1.)

8992-162b. Same—pending actions not affected.—Nothing herein contained shall affect any action now pending or commenced within six months from and after the passage of this act to determine the validity of any instrument validated hereby. (Jan. 21, 1936, Ex. Ses., c. 58, §2.)

8992-163. Limitation of action.—No proceeding to have declared invalid the sale, mortgage, lease, or conveyance by a representative shall be maintained by any person claiming under or through the decedent or ward unless such proceeding is begun within five years immediately succeeding the date of such sale, mortgage, lease, or conveyance, provided however, in case of real estate sold by a guardian, no action for its recovery shall be maintained by or under the ward unless it is begun within five years next after the termination of the guardianship; provided further that in cases of fraud, minors and others under legal disability to sue when the right of action first accrues may begin such action at any time within five years after the disability is removed. (G. S. 8859) (Act Mar. 29, 1935, c. 72, §163.)

ARTICLE XVII.—APPEALS.

8992-164. Appealable orders.—An appeal to the district court may be taken from any of the following orders, judgments, and decrees of the probate court:

1. An order admitting, or refusing to admit, a will to probate.
2. An order appointing, or refusing to appoint, or removing, or refusing to remove, a representative other than a special administrator or special guardian.
3. An order authorizing, or refusing to authorize, the sale, mortgage, or lease of real estate, or confirming, or refusing to confirm, the sale or lease of real estate.
4. An order directing, or refusing to direct, a conveyance or lease of real estate under contract.
5. An order permitting, or refusing to permit, the filing of a claim, or allowing or disallowing a claim or counter-claim in whole or in part when the amount in controversy exceeds one hundred dollars.
6. An order setting apart, or refusing to set apart property, or making, or refusing to make, an allowance for the spouse or children.
7. An order determining, or refusing to determine, venue; an order transferring, or refusing to transfer, venue.
8. An order directing, or refusing to direct, the payment of a bequest or distributive share when the amount in controversy exceeds one hundred dollars.
9. An order allowing, or refusing to allow, an account of a representative or any part thereof when the amount in controversy exceeds one hundred dollars.
10. An order adjudging a person in contempt.
11. An order vacating a previous appealable order, judgment, or decree; an order refusing to vacate a previous appealable order, judgment, or decree alleged to have been procured by fraud or misrepresentation, or through surprise or excusable inadvertence or neglect.
12. A judgment or decree of partial or final distribution.
13. An interlocutory decree entered pursuant to Article XIII, Section 115.
14. An order granting or denying restoration to capacity.
15. An order made pursuant to Section 118 directing or refusing to direct the payment of representatives' fees or attorneys' fees, and in such case the representative and the attorney shall each be deemed an aggrieved party and entitled to take such appeal. (G. S. 8983) (Act Mar. 29, 1935, c. 72, §164; Apr. 15, 1939, c. 270, §9.)
16. An order determining, or refusing to determine, inheritance taxes upon a hearing on a prayer for reassessment and redetermination; but nothing herein contained shall abridge the right of direct re-

view by the supreme court. (G. S. 8983) (Act Mar. 29, 1935, c. 72, §164; Apr. 15, 1939, c. 290, §9.)

Annotations under former act, see ante, §8983.
Appeals from probate court are entirely statutory and it is necessary that statute allowing them be complied with. *Van Sloun v. D.*, 199M434, 272NW271. See Dun. Dig. 7784a.

Jurisdiction of district court is limited to appeals seasonably taken in accordance with statutory directions, jurisdiction being statutory only, and not founded upon constitutional grant. *Peterson's Estate*, 202M31, 277NW529. See Dun. Dig. 7770e, 7784a, 7795.

Probate court has no jurisdiction over proceedings for specific performance of contract to will property, as a specific performance must be sought in district court in equity, and district court upon appeal from probate court has no jurisdiction to decree specific performance, since it may exercise only appellate jurisdiction. *Roberts' Estate*, 202M217, 277NW549. See Dun. Dig. 35931, 3658, 7795, 10207.

Maxim that appeals from inferior tribunals are favored in law applies to appeals from probate court to district court. *Dahn v. D.*, 203M19, 279NW715. See Dun. Dig. 7784b.

Order discharging administrator, following one settling his account, is not appealable. *Zebott's Estate*, 203M193, 280NW652. See Dun. Dig. 7786.

(4).
On appeal from probate court to district court, supplemental statements or agreements of parties cannot confer jurisdiction where record or return of probate court shows want of jurisdiction, but where a party duly served with notice of appeal moves district court to dismiss appeal for want of service of such notice on all necessary parties, it may be shown that such mover was only adverse party to appellant in probate court; there being nothing on face of record to contrary. *Nelson's Estate*, 195M144, 262NW145. See Dun. Dig. 7790.

(9).
An order of probate court, made on notice and after hearing, allowing account of a guardian covering a period of some thirteen years, is appealable. *Fredrick v. K.*, 197M524, 267NW473. See Dun. Dig. 294.

Daughters of incompetent have such interest in proper care and conservation of property as to entitle them to appeal, as parties aggrieved, from an order of probate court allowing account of guardian. *Id.* See Dun. Dig. 310.

(15).
Amended. Laws 1939, c. 270, §9.

8992-165. Venue.—Such appeal shall be to the district court of the county of the probate court which made the order, judgment, or decree appealed from, except that an appeal taken from any order, judgment, or decree (other than one determining or refusing to determine venue or transferring or refusing to transfer venue) made before the transfer of venue shall be taken to the district court of the county to which the transfer was made. (Act Mar. 29, 1935, c. 72, §165.)

8992-166. Requisites.—Such appeal may be taken by any person aggrieved within thirty days after service of notice of the filing of the order, judgment, or decree appealed from, or if no such notice be served, within six months after the filing of such order, judgment, or decree. To render the appeal effective (1), the appellant shall serve upon the adverse party or his attorney or upon the probate judge for the adverse person who did not appear, a written notice of appeal specifying the order, judgment, or decree appealed from, and file in the probate court such notice with proof of service thereof; (2) pay to the probate court an appeal fee of three dollars to apply on the fee for the return; and (3) the appellant, other than the state, the Veterans' Administration, or a representative appealing on behalf of the estate, shall file in the probate court a bond in such amount as that court may direct, conditioned to prosecute the appeal with due diligence to a final determination, to pay all costs and disbursements, and to abide the order of the court therein.

The notice of the order, judgment, or decree appealed from, the notice of appeal, and the bond if required, shall be served as in civil actions in the district court.

Whenever a party in good faith gives due notice of appeal and omits through mistake to do any other act necessary to perfect the appeal, the district court may permit an amendment on such terms as may be just. (G. S. 8984, 8985) (Act Mar. 29, 1935, c. 72, §166; Apr. 26, 1937, c. 435, §21.)

Annotations under former act, see ante, §§8984, 8985.

On appeal to district court from order of probate court disallowing a claim filed against an estate, notice of appeal need be served only upon parties who appeared and contested allowance of such claim in probate court. Nelson's Estate, 195M144, 262NW145. See Dun. Dig. 7789.

Administrator may appeal in his representative capacity and without an appeal bond from an order of probate court surcharging and settling his final account. Clover v. P., 197M344, 267NW213. See Dun. Dig. 7785.

Motion to dismiss appeal from probate court because of failure to comply with §8992-169, though grounded on mistake as to extent of relief that would be granted, did not constitute a general appearance which would preclude movant from obtaining relief for failure to serve bond as required by §8992-166, though motion did not specifically state that appearance was "special." Van Sloun v. D., 199M434, 272NW261. See Dun. Dig. 7791.

Court properly dismissed an appeal from order of probate court in which there was no service of bond. *Id.*

Where appellee did not regard failure to serve bond as a matter of any consequence, district court should have relieved appellant of his default. Dahn v. D., 203M19, 279NW715. See Dun. Dig. 7791.

Rule of Van Sloun v. Du Toit, 199Minn434, 272NW261 that service and filing of bond is jurisdictional no longer stands under this section which vests discretion in district court to permit an amendment. Zebott's Estate, 203M193, 280NW652. See Dun. Dig. 7791.

Appellant, from an order of district court dismissing appeal from probate court, cannot successfully assign error for failure to exercise discretion to allow amendment, where the record shows no effort to invoke such discretion. *Id.* See Dun. Dig. 7794.

A pretermitted grandchild who by contract with children of testator acquired an interest in residue of his estate is a party aggrieved by an order of probate court allowing a claim against estate, and entitled to appeal to district court. Burton's Estate, 203M275, 281NW1. See Dun. Dig. 7785.

Motions for relief from defaults are in sound discretion of court and should be made with diligence. Kees' Estate, 285NW836. See Dun. Dig. 7796.

Representative is required to file and serve a bond where appeal is not for interest or advantage of estate but to prevent payment of a claim due from representative to estate. *Id.* See Dun. Dig. 7791.

A finding of lack of diligence on the part of appellants is justified where it appears that they waited four and one-half months with full knowledge of facts before moving to be relieved of their default in failing to serve on appellee appeal bond as required by statute on appeal from probate to district court, during which time they maintained an appeal to supreme court contending that such service of bond was unnecessary. *Id.* See Dun. Dig. 7796.

An appeal from probate court to district court may be dismissed for appellant's failure to comply with requirement of statute that appeal bond be served. *Id.* See Dun. Dig. 7787a.

8992-167. Return.—When an appeal has been effected, the probate court upon payment of the remainder of its fee, if any, forthwith shall return to the district court a certified transcript of the order, judgment, or decree appealed from, the notice of appeal with proof of service thereof, and the bond if required. If the required fee for the return be not paid within twenty days after the appeal has been effected, the district court may dismiss the appeal. If the appeal be taken under section 164, subsection 10, such transcript shall also contain copies of such other documents, papers, and exhibits as the probate court may consider necessary. The district court may require a further or amended return. (G. S. 8986) (Act Mar. 29, 1935, c. 72, §167; Apr. 26, 1937, c. 435, §22.)

Annotations under former act, see ante, §8986.

8992-168. Suspension by appeal.—Such appeal shall suspend the operation of the order, judgment, or decree appealed from until the appeal is determined or the district court shall otherwise order. The district court may require the appellant to give additional bond for the payment of damages which may be awarded against him in consequence of such suspension, in case he fails to obtain a reversal of the order, judgment, or decree so appealed from. Nothing herein contained shall prevent the probate court from appointing special representatives nor prevent special representatives from continuing to act as such. (G. S. 8987) (Act Mar. 29, 1935, c. 72, §168.)

Annotations under former act, see ante, §8987.

On appeal from commitment state board of control is not required to release child from state public school. Op. Atty. Gen. (840a-6), Dec. 28, 1936.

8992-169. Trial.—Within twenty days after perfection of the appeal, the appellant shall file with the clerk of the district court, and serve upon the adverse party or his attorney a clear and concise statement of the proposition, both of law and of fact, upon which he will rely for reversal of the order, judgment, or decree appealed from; within twenty days after such service the adverse party may serve and file his answer thereto and the appellant, within twenty days thereafter, may serve and file a reply. If there be no reply, allegations of new matter in the answer shall be deemed denied. Demurrers shall not be permitted. The district court may allow or require any pleading to be amended, grant judgment on the pleadings, or, if the appellant fail to comply with the provisions hereof, dismiss the appeal.

After issues are so formed, the case may be brought on for trial by either party by the filing and service upon the attorney for the adverse party, or if he have none, then upon the clerk for him, of a notice of trial or note of issue, in accordance with the practice in the district court. Thereupon the cause shall be placed upon the calendar, tried, and determined in the same manner as if originally commenced in that court. All appeals other than those from the allowance or disallowance of a claim shall be tried by the court without a jury, unless the court orders the whole issue, or some specific question of fact involved therein, to be tried by a jury or referred. (G. S. 8988, 8989) (Act Mar. 29, 1935, c. 72, §169.)

Annotations under former act see ante, §§8988, 8989. District court on appeal from order of probate court denying petition for restoration of incompetent capacity and appointment of a new guardian had authority to appoint guardian ad litem, where authority of incompetent's attorney was questioned. Foust's Guardianship, 195M289, 262NW875. See Dun. Dig. 7794.

District court on appeal from order of probate court dismissing petition for restoration of incompetent to capacity and appointment of a new guardian had right to permit questioning of authority of attorney to take appeal from probate court for the incompetent. *Id.*

Neither probate court nor district court on appeal obtained jurisdiction of person or subject matter under a petition requesting that order releasing guardian be set aside and that guardian be ordered to account, guardian having moved out of state and service being attempted by publication, proceeding not being one in rem, and res having disappeared. Seilars v. S., 196M143, 264NW425. See Dun. Dig. 5141, 7784.

District court has discretionary power to determine whether an appellant from probate court should be relieved of a default for failure to file within statutory time, statement of propositions of law and fact upon which he is relying for reversal of an order of probate court. Slingerland's Estate, 196M354, 265NW21. See Dun. Dig. 2740, 7794.

Complaint filed by widow against estate of which she was administratrix to recover property held in trust for her by deceased stated a cause of action as against claim that administratrix and claimant were same person and therefore she could not bring an action against herself. Reifsteck's Estate, 197M315, 267NW269. See Dun. Dig. 3669.

Failure to file within 20 days upon clerk of district court or serve upon adverse party a clear and concise statement of propositions of law and of facts is not necessarily jurisdictional. Van Sloun v. D., 199M434, 272NW261. See Dun. Dig. 7790.

Motion to dismiss appeal from probate court because of failure to comply with §8992-169, though grounded on mistake as to extent of relief that would be granted, did not constitute a general appearance which would preclude movant from obtaining relief for failure to serve bond as required by §8992-166, though motion did not specifically state that appearance was "special." *Id.* See Dun. Dig. 7791.

District court properly dismissed appeal from order of probate court removing co-guardian of an incompetent in absence of a clear and concise statement of propositions of law and fact. Pollock, 201M638, 277NW11. See Dun. Dig. 7790.

Parties cannot by consent give jurisdiction to appellate district court to try a matter not submitted to and determined by probate court. Peterson's Estate, 202M31, 277NW529. See Dun. Dig. 7794.

On appeal from probate court district court exercises probate jurisdiction only. Anderson's Estate, 202M513, 279NW266. See Dun. Dig. 7794.

Where appellant, on appeal from probate court to district court, can be relieved of his defaults in failing to serve appeal bond, which had been filed, and to file and serve within time limited a concise statement of propositions of law and fact upon which he relies for reversal without prejudice to other party, it appearing that appeal was taken in good faith and that defaults were due

to mistake, court should grant an amendment relieving party of his defaults. *Dahn v. D.*, 203M19, 279NW715. See Dun. Dig. 7791.

Jurisdiction of our probate courts is founded upon constitutional grant. The powers so granted are plenary, and the jurisdiction of that court is to be liberally construed. Its jurisdiction over persons under guardianship is in its origin exclusive, where person alleged to be incompetent was found by probate court to be competent, and on appeal district court reversed, finding person incompetent, and inasmuch as probate court never passed upon or decided question of who should be guardian of such incompetent person, district court should have remanded case to probate court for appointment of guardian, as its jurisdiction is appellate only, not original. *Strom's Guardianship*, 286NW245. See Dun. Dig. 7771a.

Jury trial in will cases. 22MinnLawRev513.

8992-170. Affirmance—Reversal.—Whenever the appellant fails to prosecute his appeal, or the order, judgment, or decree appealed from or reviewed on certiorari is sustained, judgment shall be entered in the district court affirming the decision of the probate court. Upon the filing in the probate court of a certified transcript of such judgment, the probate court shall proceed as if no appeal had been taken. If the order, judgment, or decree reviewed is reversed or modified, the district court shall remand the case to the probate court with directions to proceed in conformity with its decision. Upon the filing in the probate court of a certified transcript of such judgment, it shall proceed as directed by the district court. (G. S. 8990) (Act Mar. 29, 1935, c. 72, §170.)

Annotations under former act, see ante, §8990.

District court has no authority to direct probate court to proceed except on appeal from probate court. *Anderson v. A.*, 197M252, 266NW841. See Dun. Dig. 7770e.

8992-171. Judgment—Execution.—The party prevailing on the appeal shall be entitled to costs and disbursements to be taxed as in a civil action. If judgment be rendered against the estate, they shall be an adjudicated claim against it. If judgment be rendered against an appellant other than the State, the Veterans' Administration, or representative appealing on behalf of the estate, judgment shall be entered against the appellant and the sureties on his appeal bond and execution may issue thereon. (G. S. 8891, 8892) (Act Mar. 29, 1935, c. 72, §171.)

Matter of determining a guardian's compensation and necessary expenses in discharge of his official duty is primarily for probate court as one having original jurisdiction in respect thereof. District court has jurisdiction only upon appropriate appeal to review propriety and validity of items composing it. It has no original jurisdiction with respect to such. *Strom's Guardianship*, 286NW245. See Dun. Dig. 7794.

8992-172. Direct appeal to supreme court.—A party aggrieved may appeal direct to the supreme court from an order determining or refusing to determine inheritance taxes upon a hearing on a prayer for reassessment and redetermination. Within thirty days after service of notice of the filing of such order, the appellant shall serve a notice of appeal upon all parties adversely interested or upon their attorneys and upon the probate judge. An appellant, other than the State, the Veterans' Administration, or a representative appealing on behalf of the estate, shall file in the probate court a bond in such amount as that court may direct, conditioned to prosecute the appeal with due diligence to a final determination, pay all costs and disbursements and abide the order of the court therein. The notice of appeal with proof of service and the bond, if required, shall be filed in the probate court within ten days after the service of such notice and the appellant shall pay to such court the sum of fifteen dollars of which ten dollars shall be transmitted to the clerk of the supreme court, as provided by law for appeals in civil actions.

Such appeal shall stay all proceedings on the order appealed from. Whenever a party in good faith gives due notice of appeal from such order and omits through mistake to do any other act necessary to perfect the appeal, or to stay proceedings, the court may permit an amendment on such terms as may be just. Upon perfection of the appeal, the probate court shall transmit to the clerk of the supreme court the ten dollars aforementioned together with a certified copy

of the notice of appeal and bond, if required. The filing thereof shall vest in the supreme court jurisdiction of the cause, and records shall be transmitted to the supreme court, and records and briefs shall be printed, served, and filed, and such appeal shall be heard and disposed of as in the case of appeals in civil actions from the district court. If a settled case be necessary, the probate court may settle a case upon the application of any party. The notice of the hearing upon such application and the case proposed to be settled shall be served on all other parties interested in the appeal at least eight days prior to the hearing. (Act Mar. 29, 1935, c. 72, §172.)

State appealing direct to supreme court from order of probate court determining inheritance taxes may not pay fee to the supreme court. Op. Atty. Gen. (6m), Aug. 3, 1936.

On appeal by the state to the supreme court from probate court, state need not pay the \$10 to cover fees in supreme court but must pay \$5 covering return of certified copy of notice of appeal and bond, and must pay fees for transcript, certified copies, etc., such fees not going to the state. Op. Atty. Gen. (346c), Aug. 12, 1936.

ARTICLE XVIII.—COMMITMENTS.

8992-173. Voluntary hospitalization.—Any insane, inebriate, feeble-minded, or epileptic person desiring to receive treatment at a state institution may be admitted upon his own application, in such manner and upon such conditions as the state board of control may determine. During the time of such treatment and until the expiration of three days after such person in writing demands his release, the superintendent of such institution is authorized and empowered to detain him as though he had been duly committed. If any such person demands his release, the superintendent if he deems such release not to be for the best interest of such person, his family, or the public, shall file a petition for commitment in the probate court of the county wherein such institution is located, within three days after such demand. (G. S. 8954, 8955) (Act Mar. 29, 1935, c. 72, §173.)

Annotations under former act, see ante, §§8954, 8955.

Municipal court has no authority to commit inebriates to or to release them from state hospital. Op. Atty. Gen. (306b-12), July 7, 1937.

8992-174. Institution of proceedings.—Unless otherwise indicated by the context, the word "patient" as used in this article means any person for whose commitment as an insane, inebriate, feeble-minded, or epileptic person, proceedings have been instituted or completed. Any reputable citizen may file in the court of the county of the patient's settlement or presence a petition for commitment setting forth the name and address of the patient and of his nearest relatives and the reasons for the application. If the court determines it to be for the best interest of the patient or of his family or of the public, the court may direct the sheriff or any other person to apprehend the patient and to take him to and confine him for observation and examination, in any hospital or any other place or institution consenting to receive him in the county wherein the proceedings are pending.

The person, hospital, or institution ordered by the court to make such apprehension, conveyance, or confinement, may execute the order on any day and at any time thereof, by using all necessary means, including the breaking open of any door, window or other part of the building, vehicle, boat or other place in which the patient is located, and the imposition of necessary restraint upon the person of such patient.

Upon the filing of such petition, written notice thereof shall be given to the county attorney who shall appear for and protect the rights of the patient, unless other counsel has been retained by or for the patient. If the court determines that the patient is financially unable to obtain counsel and that the interests of the patient require counsel other than the county attorney, or if the county attorney be absent, ill, or disqualified, the court may appoint counsel for him. If the patient has no settlement in this state,

all proceedings shall be stayed until the state board of control shall have consented thereto. (G. S. 8956, 8957, 8963) (Act Mar. 29, 1935, c. 72, §174; Apr. 15, 1939, c. 270, §10.)

Annotations under former act, see ante, §§8956, 8957. "Psychopathic personality" defined. Laws 1939, c. 369.

8992-175. Examination.—The patient shall be examined at such time and place and upon notice to such persons and served in such manner as the court may determine. If he be obviously inebriate, feeble-minded, or epileptic, and if the county attorney consent thereto in writing, the examination may be made by the court; otherwise the court shall appoint two duly licensed doctors of medicine, or in feeble-minded proceedings two persons skilled in the ascertainment of mental deficiency, to assist in the examination. Upon the filing of a petition for the commitment of a feeble-minded or epileptic patient, the court shall fix the time and place for the hearing thereof, of which ten days' notice by mail shall be given to the state board of control, and to such other persons and in such manner as the court may direct.

The examiners and the court shall report their findings upon such forms as may be prescribed by such board, one of which shall be filed in court and another shall be transmitted to such board. The court shall determine the nature and extent of the property of the patient committed and of the persons upon which liability is imposed by law for his care and support, making such findings upon any such forms as may be prescribed by such board, one of which shall be filed in court and another shall be transmitted to such board. (G. S. 8958, 8959, 8970, 8975) (Act Mar. 29, 1935, c. 72, §175.)

Annotations under former act, see ante, §8959. If judge is convinced that he cannot obtain two skilled examiners from residence of his county, it is necessary that he appoint examiners from another county, but determination of a judge that a local physician is capable of acting as an examiner is final. Op. Atty. Gen. (579r), Aug. 14, 1935.

A coroner who is not a salaried officer can act on examining board at insane hearing. Op. Atty. Gen. (390b-2), July 6, 1936.

County coroner may act as medical examiner in insanity hearing and receive fee. Op. Atty. Gen. (248b-5), Aug. 1, 1938.

A judge of probate, as an incident to feeble-minded proceedings, may order an examination of a mentally defective person outside court room, provided the alleged incompetent has an opportunity to be fairly heard. Op. Atty. Gen. (679e), March 9, 1939.

8992-176. Commitment.—If the patient is found to be insane or inebriate, the court shall issue to the sheriff or any other person a warrant in duplicate, committing the patient to the custody of the superintendent of the proper state hospital, or to the superintendent or keeper of any private licensed institution for the care of inebriates or insane persons; provided, however, that such patients are required to pay the necessary hospital charge. If such patient be entitled to care in any institution of the United States in this state, such warrant shall be in triplicate, committing him to the joint custody of the superintendents of the proper state and federal institution. If such federal institutions be unable or unwilling to receive the patient at the time of commitment, he subsequently may be transferred to it upon its request. Such transfer shall discharge his commitment to the state institution and constitute a sole commitment to the federal institution.

If the patient is found to be feeble-minded or epileptic, the court shall appoint the State Board of Control guardian of his person and commit him to its care and custody.

Whenever a defendant in a criminal proceedings has been examined in the probate court, pursuant to an order of the state or federal district court, the probate court shall transmit its findings and return the defendant to such district court, unless otherwise ordered. A duplicate of the findings shall be filed in the probate court but there shall be no petition, property or report, nor commitment, unless otherwise

ordered. (G. S. 8960, 8961, 8962) (Act Mar. 29, 1935, c. 72, §176; Apr. 26, 1937, c. 435, §23.)

Annotations under former act, see ante, §§8960, 8961. Proceedings for commitment to a state asylum are not evidence of incapacity to execute a particular contract, and it is proper to inquire into business acts at or about time of instrument involved in particular case, and declarations, oral or written, tending to show comprehension or noncomprehension of daily occurrences in business are proper elements to be considered. Schultz v. O., 202M237, 277NW918. See Dun. Dig. 4519.

A feeble-minded, dependent child which had been committed to state board of control for specialized care under §§8689-1 to 8689-5, and thereafter adjudged to be feeble-minded and ordered committed to the custody of the state board of control but not admitted to a state institution, is not a charge of the state. County of Stearns v. P., 203M11, 279NW707. See Dun. Dig. 4249.

Sheriff is not obligated to obey an order of state board of control to transport an epileptic to a state institution in the same way as is now done for feeble-minded. Op. Atty. Gen. (88a-26), Sept. 20, 1935.

All inebriates are to be committed to Willmar Hospital. Op. Atty. Gen. (248b-6), Nov. 26, 1937.

Provision in §4535-4 that no inebriate shall be committed for treatment except as may be authorized and committed by state board of control was superseded by §8992-176. Id.

If patient is received by veterans' hospital his commitment to state institution becomes discharged, and if patient escapes and it later apprehended by sheriff, state hospital has no authority to receive him. Op. Atty. Gen. (248b-10), Mar. 30, 1938.

Board of Control need not name sheriff to transport a feeble-minded ward to institution designated, but may designate an agent of county welfare board or some other person to qualify by it for service. Op. Atty. Gen. (679e), March 9, 1939.

Court is not required to name sheriff as person to convey an insane person or an inebriate to an institution. Op. Atty. Gen. (248a-4), April 10, 1939.

Guardianship and commitments under probate code. 20 MinnLawRev 333.

8992-177. Payment of fees, etc.—In each proceedings the court shall allow and order paid to each witness subpoenaed the fees and mileage prescribed by law, to each examiner the sum of five dollars per day for his services and fifteen cents for each mile traveled, to the person to whom the warrant of apprehension is issued the sum of three dollars per day and actual disbursements for the travel, board, and lodging of the patient, of himself, and of authorized assistants, and to the person conveying the patient to the place of detention the sum of three dollars per day and actual disbursements for the travel, board, and lodging of the patient, of himself and of authorized assistants, and to the patient's counsel when appointed by the court, the sum of ten dollars per day. Upon such order the county auditor shall issue a warrant on the county treasurer for the payment thereof.

Whenever the settlement of the patient is found to be in another county, the court shall transmit to the county auditor a statement of the expenses of the apprehension, confinement, examination, commitment, and conveyance to the place of detention. Such auditor shall transmit the same to the auditor of the county of the patient's settlement and such claim shall be paid as other claims against such county. If the auditor to whom such claim is transmitted shall deny the same, he shall transmit it with his objections to the state board of control which shall determine the question of settlement and certify its findings to each auditor. If the claim be not paid within thirty days after such certification, an action may be maintained thereon by the claimant county in the district court of the claimant county against the debtor county. (G. S. 8966, 8967, 8968) (Act Mar. 29, 1935, c. 72, §177.)

Annotations under former act, see ante, §§8966, 8967. Settlement of mother of illegitimate at date of its birth determines county responsible for care of feeble-minded child. Op. Atty. Gen. (840a-6), Aug. 14, 1935.

Expenses of commitment of insane person or feeble-minded person in institution should be paid by county of legal settlement, and not by institution or out of state funds. Op. Atty. Gen. (679e), June 5, 1936.

Welfare board is not responsible for support of feeble-minded, epileptic and insane persons receiving institutional care. Op. Atty. Gen. (125a-64), July 28, 1937.

Feeble-minded ward of board of control may lose pauper settlement in the state, but this does not terminate guardianship of board. Op. Atty. Gen. (88a-14), Oct. 4, 1937.

8992-178. Release before commitment.—Before the delivery of the warrant of commitment, the court may release an insane or inebriate patient to any person who files a bond to the State in such amount as the court may direct, conditioned upon the care and safekeeping of the patient; but no person against whom a criminal proceeding is pending or who is dangerous to the public shall be so released. (G. S. 8964) (Act Mar. 29, 1935, c. 72, §178.)

8992-179. Release after commitment.—Any insane, inebriate, feeble-minded, or epileptic patient committed to the state board of control or any institution under its control, may be released to any person if such board consent thereto or if a bond to the State be filed with such board in such amount as it may fix, conditioned upon the care and safekeeping of the patient and the payment of all expenses, damages, and other items arising from any act of such patient. (G. S. 8960) (Act Mar. 29, 1935, c. 72, §179.)

Annotations under former act, see ante, §8960.

8992-180. Detention.—Upon delivery of an insane or inebriate patient to the institution to which he has been committed, the superintendent thereof shall retain the duplicate warrant and endorse his receipt upon the original which shall be filed in the court [of] commitment. Upon such filing, the court shall transmit a copy of the warrant with all endorsements of the state board of control. After such delivery, the patient shall be under the care, custody, and control of such board until discharged by it or by a court of competent jurisdiction; but no patient found by the committing court to be dangerous to the public shall be released from custody by such board or any institution except upon order of a court of competent jurisdiction. Whenever a patient is paroled, discharged, transferred to another institution, dies, escapes, or is returned, the institution having charge of the patient shall file notice thereof in the court of commitment.

Upon commitment of a feeble-minded or epileptic patient, the state board of control may place him in an appropriate home, hospital, or institution, or exercise general supervision over him anywhere in the state outside any institution through any child welfare board or other appropriate agency thereto authorized by said board of control. (G. S. 8973, 8974) (Act Mar. 29, 1935, c. 72, §180; Feb. 17, 1937, c. 31, §1.)

The word "of" in brackets was omitted from Act Feb. 17, 1937, cited.

Feeble-minded cannot be placed in home, hospital or institution not under control of board of control. Op. Atty. Gen. (679h), May 8, 1936.

Conclusion of court committing person as insane could be amended by court by inserting a specific finding that patient was dangerous to the public, and patient could be detained under amended warrant. Op. Atty. Gen. (346), May 4, 1938.

Person committed to state hospital for dangerous insane cannot be transferred to St. Peter. Op. Atty. Gen. (248a-7), Nov. 19, 1938.

Probate court may authorize direct commitment of a person with psychopathic personality to the asylum at St. Peter if considered dangerous to the public. Op. Atty. Gen. (248B-3), July 7, 1939.

8992-181. Commissioner may act.—Whenever the probate judge is unable to act upon any petition for the commitment of any patient, the court commissioner may act in the place of such judge. (G. S. 8969) (Act Mar. 29, 1935, c. 72, §181.)

Annotations under former act, see ante, §8969.

8992-182. Malicious petition.—Whoever for a corrupt consideration or advantage, or through malice, shall make or join in or advise the making of any false petition or report, or shall knowingly or wilfully make any false representation for the purpose of causing such petition or report to be made, shall be guilty of a felony and punished by imprisonment in the state prison for not more than one year or by a fine of not more than five hundred dollars. (G. S. 8971) (Act Mar. 29, 1935, c. 72, §182.)

8992-183. Restoration of feeble-minded and epileptics.—The state board of control may petition the

court of commitment, or the court to which the venue has been transferred, for the restoration to capacity of a feeble-minded or epileptic patient. Upon the filing of such petition, the court shall fix the time and place for the hearing thereof, notice of which shall be given as the court may direct. Upon proof of the petition, the court shall restore the patient to capacity.

Upon the filing of such petition by any person other than the state board of control and upon payment by the petitioner to such board all expenses in connection with the hearing in such amount as may be fixed by such board for the transportation, board, and lodging of the patient and authorized attendants, the court shall fix the time and place for the hearing thereof, ten days' notice of which shall be given to the state board of control and to such other persons and in such manner as the court may direct. Any person may oppose such restoration. Upon proof that the patient is not feeble-minded or epileptic, the court shall order him restored to capacity at the expiration of thirty days from the date of service of such order upon the state board of control. If restoration be denied, the patient shall be remanded to the state board of control; if restoration be granted, he shall be so remanded for the thirty days aforesaid.

The court may appoint two duly licensed doctors of medicine or two persons skilled in the ascertainment of mental deficiency to assist in the determination of the mental capacity of the patient. The court shall allow and order paid to each person so appointed the sum of five dollars per day for his services and fifteen cents for each mile traveled. Upon such order the county auditor shall issue a warrant on the county treasurer for the payment thereof. If the court notifies the county attorney he shall attend the hearing and if he deems it for the best interest of the public he shall oppose the restoration in the probate court and appellate courts. (G. S. 8960) (Act Mar. 29, 1935, c. 72, §183; Apr. 15, 1939, c. 270, §11.)

Annotations under former act, see ante, §8960.

Where a person is committed to guardianship of state board of control as feeble-minded in certain county and she is paroled and goes to live in another county, any interested person may petition probate court of committing county to change venue to residence of the ward for the purpose of making a petition for restoration to capacity. Op. Atty. Gen. (679b), July 18, 1935.

Petitioner need not advance expenses of probate court, such as cost of medical examiners. Op. Atty. Gen. (88a-14), Oct. 11, 1935.

Guardianship of board of control over a feeble-minded ward can only be terminated in manner provided in this section, and cannot be terminated by adoption. Op. Atty. Gen. (679b-1), Jan. 17, 1938.

8992-184. Appeal.—Notwithstanding the provisions of Article XVII, there shall be no appeal from an order granting or denying the petition of any person other than the state board of control for the restoration to capacity of a feeble-minded or epileptic patient, except as provided in this section. The state board of control may appeal to the district court in the manner prescribed by Article XVII for appeals by the State. Such appeal shall suspend the operation of the order appealed from until final determination of the appeal.

Any person aggrieved other than the state board of control, upon payment by him to such board of all expenses in connection with the hearing in the district court in such amount as may be fixed by such board for the transportation, board, and lodging of the patient and authorized attendants, may appeal to the district court in the manner prescribed by Article XVII. Such appeal shall not suspend the operation of the order appealed from until reversed or modified by the district court. Upon perfection of the appeal, the return shall be filed forthwith. The district court shall give the appeal precedence over every other proceeding therein, and shall hear the matter de novo, without a jury, and in a summary manner. Upon determination of the appeal, judgment shall be entered pursuant to the provisions of Article XVII. (G. S. 8960) (Act Mar. 29, 1935, c. 72, §184.)

Annotations under former act, see ante, §8960.

8992-184a. Psychopathic personality—Definition.—The term "psychopathic personality" as used in this act means the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons. (Act Apr. 21, 1939, c. 369, §1.)

^{§1.} Act is constitutional. State v. Probate Court, 287NW 297.

Act is intended to include those persons who, by a habitual course of misconduct in sexual matters, have evidenced lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on objects of their uncontrolled and uncontrollable desire. Id. See Dun. Dig. 4523.

Statute may not be applied to every person guilty of sexual misconduct or even to persons having strong sexual propensities. Id. See Dun. Dig. 4523.

A "psychopathic personality" is one characterized by a mental disorder. Id. See Dun. Dig. 4523.

^{§2.} While public welfare requires that persons with psychopathic personalities be treated before they have opportunity to injure others, it does not necessarily follow that their malady must excuse them from criminal conduct occurring in the past. State v. Probate Court, 287NW297. See Dun. Dig. 2406, 4523.

8992-184b. Same—Laws relating to insane persons, etc., to apply to psychopathic personalities.—Except as otherwise herein or hereafter provided, all laws now in force or hereafter enacted relating to insane persons, to persons alleged to be insane, and to persons found to be insane, shall apply with like force and effect to persons having a psychopathic personality, to persons alleged to have such personality, and to persons found to have such personality, respectively. Provided however, before such proceedings are instituted, the facts shall first be submitted to the county attorney, who, if he is satisfied that good cause exists therefor, shall prepare the petition to be executed by a person having knowledge of the facts, and shall file the same with the judge of the probate court of the county in which the "patient", as defined in such statutes, has his settlement or is present. The judge of probate shall set the matter down for hearing and for examination of the "patient". The judge may at his discretion exclude the general public from attendance at such hearing. The "patient" may be represented by counsel; and if the court determines that he is financially unable to obtain counsel, the court may appoint counsel for him. The "patient" shall be entitled to have subpoenas issued out of said court to compel the attendance of witnesses in his behalf. The court shall appoint two duly licensed doctors of medicine to assist in the examination of the "patient". The proceedings had shall be reduced to writing and shall become part of the records of said court. From a finding made by such court of the existence of psychopathic personality, the "patient" may appeal to the district court upon compliance with the provisions of the 1938 Supplement to Mason's Minnesota Statutes of 1927, Sections 8992-166, 8992-167, 8992-169, 8992-170. (Act Apr. 21, 1939, c. 369, §2.)

^{§2.} Provisions incorporating by reference all laws now in force or hereafter enacted relating to insane persons, to persons alleged to be insane and to persons found to be insane, is valid and plain and definite. State v. Probate Court, 287NW297. See Dun. Dig. 4523.

Probate court may authorize direct commitment of a person with psychopathic personality to the asylum at St. Peter if considered dangerous to the public. Op. Atty. Gen. (248B-3), July 7, 1939.

8992-184c. Same—Not to constitute defense.—The existence in any person of a condition of psychopathic personality shall not in any case constitute a defense to a charge of crime, nor relieve such person from liability to be tried upon a criminal charge, unless such person is in a condition of insanity, idiocy, imbecility, or lunacy within the meaning of the laws relating to crimes and criminal procedure. (Act Apr. 21, 1939, c. 369, §3.)

8992-184d. Same—Inconsistent acts repealed.—All acts and parts of acts inconsistent herewith are hereby repealed. (Act Apr. 21, 1939, c. 399, §4.)

ARTICLE XIX.—MISCELLANEOUS.

8992-185. Definitions.—As used in this act, the word "representative" unless the context otherwise indicates, shall include executors, general administrators, special administrators, administrators with the will annexed, administrators de bonis non, general guardians, and special guardians. The word "minor" means a person under the age of twenty-one years. (G. S. 8706) (Act Mar. 29, 1935, c. 72, §185; Apr. 26, 1937, c. 435, §24.)

Annotations under former act, see ante, §8706. The then existing statutory rule that women attain majority for all purposes at the age of 18 years was not changed by Rev. Laws 1905, §3636. The age of majority for both sexes is now 21 years. Vlasak v. V., 204M 331, 283NW489. See Dun. Dig. 4431.

Where either party intending to marry is under legal age as defined in Mason's Stat., §8992-185, clerk of court is unauthorized to issue a license for marriage of such persons under Mason's Stat., §8569, without consent of parents or guardian as case may be. Lundstrom v. M., 285NW83. See Dun. Dig. 5788.

Neither Laws 1937, c. 79, nor Laws 1937, c. 435, affect §8569, or any other provisions of marriage law of state, and consent to marriage is required from guardian or parent where female is of full age of 15 years and under 18. Op. Atty. Gen. (300a), May 13, 1937.

Delinquent girl over 18 years of age cannot be committed to home school. Op. Atty. Gen. (840a-5), Aug. 9, 1937.

Female under 21 is a minor, and a guardian must be appointed to minor receiving monthly compensation as a child of a deceased world war veteran, and conveyances of land must be by guardian. Op. Atty. Gen. (498c), Nov. 4, 1937.

Guardianship of female child had in probate court before passage of Laws 1937, c. 435 [§8992-3(1) to 8992-185] is to be continued until she reaches age of twenty-one. Op. Atty. Gen. (346d), Dec. 9, 1937.

Marriage laws were not affected by amendment by Laws 1937, c. 435, §34. Op. Atty. Gen. (498c), May 3, 1938.

Person selling ammunition to one over age of 18 years need not secure written consent of parents or guardian. Op. Atty. Gen. (201a-8), Dec. 1, 1938.

County officer may not appoint person under 21 years of age as a deputy, but may appoint him as a clerk, though position requires a bond. Op. Atty. Gen. (126a-33), Dec. 19, 1938.

Clerk of court should not issue marriage licenses, without consent of parents or guardian of either party who is under 21 years of age. Op. Atty. Gen. (300a), Jan. 30, 1939.

Age of majority of both sexes is now 21 years for all purposes. Op. Atty. Gen. (33B-7), March 10, 1939.

Register of deeds may appoint as a deputy a woman 18 years of age. Op. Atty. Gen. (373a-2), August 8, 1939.

8992-186. Petition.—Every application shall be by petition signed and verified by or on behalf of the petitioner. No defect of form or in the statement of facts in any petition shall invalidate any proceedings. (G. S. 8708) (Act Mar. 29, 1935, c. 72, §186.)

Annotations under former act, see ante, §8708. Application to file claim after expiration of time fixed should be by application provided by this section. Daggert's Estate, 204M513, 283NW750. See Dun. Dig. 3598.

8992-187. Venue.—Proceedings for the probate of a will or for administration shall be had in the county of the residence of the decedent at the time of his death; if the decedent was not a resident of this state, proceedings may be had in any county wherein he left any property or into which any property belonging to his estate may have come. Proceedings for the appointment of a guardian shall be had in the county of the ward's residence, or if he be a nonresident of this state, proceedings may be had in any county in which his property is situated. Such proceedings first legally commenced shall extend to all of the property of the decedent or ward in this state.

If proceedings are instituted in more than one county, they shall be stayed except in the county where first legally commenced until final determination of venue. If the proper venue be determined to be in another county, the court, after making and retaining a true copy of the entire file, shall transmit the original to the proper county and proceedings shall be commenced anew in such proper county. (G. S. 8694, 8695) (Act Mar. 29, 1935, c. 72, §187.)

Annotations under former act, see ante, §§8694, 8695.

8992-188. Notice.—Whenever notice of hearing is required by any provision of this act by reference to this section, such notice shall be given once a week for three consecutive weeks in a legal newspaper designated by the petitioner in the county wherein the proceedings are pending; or if no such designation be made, in any legal newspaper in such county; or if the city or village of the decedent's residence is situated in more than one county, in any legal newspaper in such city or village. The first publication shall be had within two weeks after the date of the order fixing the time and place for the hearing.

At least fourteen days prior to the date fixed for the hearing, the petitioner, his attorney, or agent, shall mail a copy of the notice to each heir, devisee, and legatee whose name and address are known to him; and if the decedent was born in any foreign country, or left heirs, devisees, or legatees in any foreign country, to the consul or representative referred to in Section 68, or if there be none, to the chief diplomatic representative of such country at Washington, D. C., or to the secretary of state at St. Paul, Minnesota, who shall forward the same to such representative.

Proof of such publication and mailing shall be filed before the hearing. No defect in any notice, nor in the publication or service thereof, shall invalidate any proceedings. (G. S. 8709, 8710, 8712) (Act Mar. 29, 1935, c. 72, §188.)

Annotations under former act, see ante, §8709.

8992-189. Erroneous escheat.—Whenever a final decree has been made determining that any property has escheated to the State because the decedent left surviving no spouse nor kindred, or because of the failure of a devisee or legatee to receive under a will admitted to probate, or whenever application is made to prove a will disposing of property escheated to the State, upon the petition of the representative or any person interested in the estate and upon twenty days' notice to the Attorney General and to such other persons as the court may direct, the court may vacate the final decree, admit the will to probate as provided by law, and enter a final decree assigning the escheated property to the persons entitled thereto. (G. S. 8727) (Act Mar. 29, 1935, c. 72, §189.)

In contest between two groups claiming to be heirs of escheated estate, testimony of one of petitioners as to what he had learned from his father respecting death of a near relative was properly received, relating to a matter of family history. *Gravunder's Estate*, 195M487, 263 NW458. See *Dun*, Dig. 2725a.

Each group seeking to establish relationship to decedent must carry burden of proof of showing such and cannot rely upon weakness of claims of opposing group. *Id.*

In a contest between two groups of claimants to an estate, evidence sustains finding that petitioners were decedent's next of kin and as such entitled to estate. *Id.*

8992-190. Escheat returned.—After the determination of the inheritance tax, the State Auditor shall recommend in writing to the Legislature an appropriation for payment, or if the escheat was of realty, a conveyance thereof to the persons designated in such final decree. After such appropriation or authorization for conveyance by the Legislature, and upon payment of the inheritance tax, the auditor shall draw his warrant on the State Treasurer, or execute a proper conveyance of the realty, to the persons designated in such final decree. (G. S. 8728) (Act Mar. 29, 1935, c. 72, §190.)

8992-191. Disclosure proceedings.—Upon the filing of a petition by the representative or any person interested in the estate, alleging that any person has concealed, converted, embezzled, or disposed of any property belonging to the estate of a decedent or that any person has possession or knowledge of any will or codicil of such decedent, or of any instruments in writing relating to such property, the court, upon such notice as it may direct may order such person to appear before it for disclosure. Refusal to appear

or submit to examination, or failure to obey any lawful order based thereon shall constitute contempt of court. (G. S. 8804, 8805) (Act Mar. 29, 1935, c. 72, §191.)

8992-192. No abatement.—No action or proceedings commenced by a representative shall abate by reason of the termination of his authority. (Act Mar. 29, 1935, c. 72, §192.)

8992-193. Murderer disinherited.—No person who feloniously takes or causes or procures another so to take the life of another shall inherit from such person or receive any interest in the estate of the decedent, or take by devise or bequest from him any portion of his estate. No beneficiary of any policy of insurance, or certificate of membership issued by any benevolent association or organizations, payable upon the death or disability of any person, who in like manner takes or causes or procures to be taken the life upon which such policy or certificate is issued, or who causes or procures a disability of such person, shall take the proceeds of such policy or certificate; provided, however, that an insurance company shall be discharged of all liability under a policy issued by it upon payment of the proceeds in accordance with the terms thereof, unless before such payment the company shall have knowledge that such beneficiary has taken or procured to be taken the life upon which such policy or certificate is issued, or that such beneficiary has caused or procured a disability of the person upon whose life such policy or certificate is issued. (G. S. 8734) (Act Mar. 29, 1935, c. 72, §193.)

8992-194. State patents.—Where patents for public lands have been or may be issued, in pursuance of any law of this state, to a person who has died before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentees as if the patent had been issued to the deceased person during life. (G. S. 8721) (Act Mar. 29, 1935, c. 72, §194.)

8992-195. Federal patents.—Whenever any person holding a homestead or tree claim entry under the laws of the United States has died before making final proof and final proof has afterwards been made by his heirs, devisees, or representatives, and a patent has been granted to his "heirs" or "devisees," the district court of the county in which the real estate so patented is situated, may determine who are such heirs or devisees, and may determine their respective shares in such homestead or tree claim. The provisions of the code of civil procedure relating to the determination of adverse claims to real estate insofar as the same may be applicable, shall pertain to and govern the procedure in the action provided for in this section. (G. S. 8733, 8733-1; L. 1921, c. 36, Sec. 2) (Act Mar. 29, 1935, c. 72, §195.)

8992-196. Repeal.—Chapter 74, Mason's Minnesota Statutes of 1927, Chapter 74, the 1934 Supplement to Mason's Minnesota Statutes of 1927 (except laws relating to salaries and clerk hire, curative laws, G. S. 8833, 8976 as amended by Laws 1931, c. 301, 8977, 8979, 8980, 8981, 8982), G. S. 7581, Laws 1931, c. 33, Laws 1931, c. 259, and all other laws inconsistent herewith are repealed. (Act Mar. 29, 1935, c. 72, §196.)

8992-197. G. S. Defined.—Unless the context otherwise indicates, the term "G. S." as used in this act means "Mason's Minnesota Statutes of 1927, Section." The term (G. S.—) or (L.— c.—) at the end of a Section indicates its origin only. (Act Mar. 29, 1935, c. 72, §197.)

8992-198. Constitutionality.—If any part of this act be declared unconstitutional, no other part shall be affected thereby. (Act Mar. 29, 1935, c. 72, §198.)

8992-199. Name of act.—This act may be cited as the Minnesota Probate Code. For convenience only, the table of contents immediately preceding Article I shall be appended to and printed with this act im-

mediately preceding Article I. (Act Mar. 29, 1935, c. 72, §199.)

8992-200. Date of effect.—This act shall take effect and be in force from and after 12:01 A. M., July 1, 1935. (Act Mar. 29, 1935, c. 72, §200.)

CHAPTER 75

Courts of Justices of the Peace

GENERAL PROVISIONS

8993. Jurisdiction limited to county.

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

Jurisdiction of justice of the peace in criminal cases in city of Northfield is limited to cases arising within county but not within city, municipal court having concurrent jurisdiction of misdemeanors committed outside city. Op. Atty. Gen. (266B-11), April 14, 1939.

8994. Place of holding court.

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

If village of Deephaven does not adjoin city of Minneapolis a justice of the peace of the village is not authorized to hold court in Minneapolis. Op. Atty. Gen. (266b-23), Mar. 29, 1938.

8996. Powers—Laws applicable.**2. Practice generally.**

A justice of the peace cannot act as collection agent without license. Op. Atty. Gen. (266a-3), Oct. 4, 1934.

Municipality cannot be compelled to furnish criminal forms to justice of the peace. Op. Atty. Gen. (266a-3), Oct. 4, 1934.

9000. Docket—Contents.**1. In general.**

Justice of peace records are open to inspection of public except illegitimacy proceedings. Op. Atty. Gen. (851), July 1, 1935.

COMMENCEMENT OF ACTIONS

9004. Requisites of process.

One appointed and commissioned by the commissioner of public safety of the city of St. Paul a special police officer, at the request of justice of the peace of 10th and 11th wards to serve process issued out of his court, is entitled to recover of an attorney, practicing in said court, for such process so served, at attorney's request, the fees therefor prescribed by Mason's Minn. St. 1927, §6996. Russ v. K., 285NW472. See Dun. Dig. 3753.

9005. Summons—Service.

174M608, 219NW452; note under §9110.

PLEADINGS AND TRIAL

9029. Title to real estate—Case certified.

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

In action in justice court under unlawful detainer statute, cause is not removable to district court, on ground that title to real estate is involved, unless and until such title comes in issue on evidence presented in that court. Minneapolis Sav. & Loan Ass'n v. K., 198M420, 270NW148. See Dun. Dig. 3784.

EXECUTION

9069. Executions and transcripts where court discontinued.

On adoption of municipal court in city of Springfield all books and records of discontinued justice court are delivered to municipal court which may issue all necessary executions and transcripts. Op. Atty. Gen., Mar. 17, 1934.

REPLEVIN

9072. Writ—When returnable.

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

ATTACHMENT

9084. Where defendant resides in another county.

See Laws Sp. Ses. 1935-36, c. 88, establishing municipal court for St. Cloud.

APPEALS

9092. May be taken, when.

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

9093. Requisites.**¾. Time for appeal.**

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

2. Notice of appeal.

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

It is duty of one appealing from conviction of violation of village ordinance to proceed in same manner as from judgment from justice of the peace in civil actions and not in manner provided in §9129 and it is his duty to serve notice of appeal upon village or its attorney and not upon county attorney. Op. Atty. Gen. (779a-5), Nov. 20, 1935.

3. Miscellaneous.

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

4. Fees.

Two dollar appeal fee applies only to civil actions and not to criminal appeals from justice court to district court. Op. Atty. Gen. (266b-1), May 29, 1934.

9096. Appeals, how tried—Judgment.**1. Appeals on questions of law and fact.**

Where defendant appeals from a judgment rendered by a justice court to a superior court for trial de novo, such appeal constitutes a general appearance in action and amounts to a waiver of any previous want of jurisdiction. Minneapolis Sav. & Loan Ass'n v. K., 198M420, 270NW148. See Dun. Dig. 476, 479.

A party who appeals from justice court to district court upon questions of law and fact waives objections to irregularities in proceedings in justice court, including failure to file complaint. Schutt v. B., 201M106, 275NW413. See Dun. Dig. 5331.

9099. Return or amendment compelled, when.

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

CRIMINAL PROCEEDINGS

9110. Jurisdiction.

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

Waiver gives no such jurisdiction. Id.

Village justices and constables have jurisdiction under criminal acts committed outside village boundaries except offenses committed within the limits of any city or village wherein a municipal court is organized and existing. Op. Atty. Gen., May 19, 1931.

County attorney is under no obligation to prosecute misdemeanor cases before justice of the peace except where duty is specifically imposed by law. Op. Atty. Gen. (121b), Aug. 23, 1937.

Village attorney is required to prosecute all violations of village ordinances before a justice of the peace, but is not obligated to prosecute violations of state laws or give aid, counsel and advice to justice of the peace. Id.

Jurisdiction of justice of the peace in criminal cases in city of Northfield is limited to cases arising within county but not within city, municipal court having concurrent jurisdiction of misdemeanors committed outside city. Op. Atty. Gen. (266B-11), April 14, 1939.

9111. Same—To try and determine.

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

Justice court has no jurisdiction where penalty exceeds three months' imprisonment. Op. Atty. Gen. (266b-21), July 15, 1937.

9112. Complaint—Warrant.

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