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October 11, 1965

To: All Members of the 1965-66 Oregon State Bar committee on Probate Law and Procedure

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NOTICE OF NEXT MEETING

↙ Please note October meeting is cancelled

DATE AND TIME: Meeting begins 1:15 p.m. on Friday, November 19, 1965 and continues on Saturday November 20.

PLACE: Judge Dickson's Courtroom, 244 Multnomah County Court-house, Portland, Oregon.

- AGENDA:
1. Continuation of discussion concerning advancements and retainer.
 2. Consideration of Bills redrafted pursuant to decisions made at this September meeting, including primarily the section on inheritance from victims of murder.
 3. Consideration of the chapter on wills --- presentation by Mr. Riddlesbarger.
 4. Consideration of the reciprocal rights of inheritance - non-resident aliens.

Minutes of the September 18, 1965 meeting and proposals 1, 2, 3, 4, 5 and 6 will be mimeographed and mailed to all members of the 1964-65 and 1965-66 committees, as well as members of the Oregon Probate Law Revision Advisory Committee.

cc: All Members, 1965-66 and 1965-64 committee.
All Members, Oregon Probate Law Revision Advisory Committee.

To: Members, 1965-66 OSB Committee on Probate Law and Procedure
Please indicate by signing and returning the colored copy in enclosed envelope, whether or not you will be able to attend the November 19-20 meeting.

() I will attend

() I will be unable to attend

Signature

PROBATE LAW REVISION

ADVISORY COMMITTEE

Minutes

November 17, 1965
November 18, 1965

Meeting convened at 1:30 P.M. Friday, November 17, 1965, in Judge Dickson's Courtroom, Portland, Oregon. The following members of the Advisory Committee were present:

Judge William L. Dickson
Clifford E. Zollinger
Stanton W. Allison
Herbert E. Butler
Wallace P. Carson

Otto J. Frohnmayer
R. Thomas Gooding
Nicholas Jaureguy
William P. Riddlesbarger
Patricia A. Lisbakken

The following members of the Probate Law and Procedure Committee were present:

Wade P. Bettis
Robert W. Gilley
Patricia Braun
Campbell Richardson
John C. Warden

John M. Copenhaver
J. Ray Rhoten
Charles M. Lovett
Donald G. Krause
Joseph J. Thalhofer

Dickson reported he and Zollinger attended meeting with parent committee in Mr. Love's office, and that parent Committee is anxious to have the Probate Code revision completed by August, 1966.

1. RIGHTS OF PERSON FELONIOUSLY CAUSING DEATH OF ANOTHER - Proposal #7.

Frohnmayer reported that Allison and Zollinger had reviewed the effect of felonious death upon inheritance. Distributed to all members present was a drafted rewrite of the material that had been gone over at the last meeting.

Jaureguy questioned the title, as it did not appear one feloniously causing death has any "rights." Zollinger noted a slayer does have a right to a one-half interest for life in property owned by the entirety, and Allison advised all titles would be reviewed and revised where necessary by Lundy.

Sections 1 and 2 were discussed at the last meeting.

Section 3 has been revised in accordance with prior discussions to eliminate the words "dower" and "curtesy."

Section 4 has been revised in accordance with prior discussions to eliminate the words "by devise or legacy from the decedent" and to substitute therefor "by will of the decedent or by trust."

Sections 5 and 6 were discussed at the last meeting and have been revised in accordance with general agreement that making a slayer a constructive trustee for the benefit of other people is probably not realistic, and that it would be better if such property were to immediately pass to the heirs of decedent. As to entirety property, the slayer would be entitled only to a life estate of the one-half interest. Hargrove v. Taylor, 236 Or. 451, was discussed. Reference to joint tenancy has been eliminated. Riddlesbarger noted the section originally provided for "one-half of the rents and profits during his lifetime," but a life tenancy involves obligations, such as payment of taxes, etc., so language has been revised to provide a one-half interest for life.

Butler questioned whether "heirs" was broad enough to include devisees and legatees. It is noted that when a code section of definitions is prepared, it shall include definition of "heirs" as including devisees and legatees.

In answer to inquiry as to whether or not such property would pass free of probate, Dickson pointed out that Proposal #1 has provided title to a decedent's real and personal property is subject to the rights of the surviving spouse, minor children, and claims for which the estate is liable. In answer to question as to why there is differentiation between property held as a tenant by the entirety and that held with others with a right of survivorship, Hargrove v. Taylor, supra, held one has a constitutional right to retain property and cannot be deprived of it without due process of law. Thus, all Committee can do is legislate as to rights of inheritance. Forfeiture of the slayer's interest would violate constitutional rights. Zollinger mentioned that Committee had decided not to taint blood, thus property could still pass under appropriate circumstances to heirs of a slayer.

Section 5 (1) of the redraft was amended in accordance with Zollinger proposal to read as shown in Proposal #7, attached hereto, and upon motion carried was approved as amended.

Section 5 (2). Allison read redraft and noted it provides the slayer shall take nothing of his victim. The intent is that upon the death of one co-owner, the decedent's interest would vest in the survivors other than the slayer, and upon the death of a second co-owner, his title would vest in the then remaining persons. The slayer would still retain his same right to receive his share of the profits, but no greater right than he had before his crime. Braun questioned what would happen with a joint bank account, if the slayer could withdraw all proceeds from that account and spend them. Zollinger agreed that he could, but the slayer would be accountable to the other survivors and would have to return the proceeds of the account. Frohnmayer suggested problem of slayer being final survivor among three or more persons might be left for consideration under the law of restitution, that the slayer should not be deprived of property he already has, but should be prevented from enrichment by his slaying.

Rhoten expressed concern as to what would happen if the slayer outlived a blameless survivor. Allison stated the primary purpose of the section is to deprive the slayer of the fruits of his crime, not to reward the estate of the decedent. Where there are a number of joint tenants, as long as the estate continues until the death of the final survivor one of these tenants will be entitled to possession and to a share of the rents, profits, etc. There is no intent to deprive the slayer of these. The only intent is to deprive the slayer of the fruits of his crime. Krause pointed out that even though the slayer may have changed the rights of other survivors he does not himself benefit. Zollinger and Carson believed this problem should be left for the Courts to decide, that the slayer should take nothing as a survivor of his victim but his rights in relation to other tenants should be determined by the Court.

Riddlesbarger questioned whether or not this subsection actually passes title as stated in Section 2, and Zollinger and Dickson replied that by providing the slayer shall take nothing as a survivor among the owners, he has been cut off completely as a survivor, and when he is cut off provision is made for the passage of title.

The remote possibility of a slayer killing seventeen co-owners by the use of dynamite was discussed, and it was agreed the simultaneous death act would in such case be applicable.

Section 5(2) upon motion carried was approved as shown in Proposal No. 7, attached hereto.

Section 5(3). Allison pointed out the language had been slightly changed from the original draft and now more clearly expresses the same thought. In answer to query by Gooding, Zollinger explained the intent is the provision shall apply to any trust arising because a greater proportion of the property has been contributed by one party than by another, that it is applicable to an implied as well as express contract, to a constructive as well as resulting trust. Whether the ownership is legal or equitable, an agreement between the parties should control. Jaureguy questioned whether (3) is necessary and believed it might be misleading, e.g., in the event of an agreement between the parties and one kills another. Zollinger advised the source of this provision is the Washington code and Wade, 49 Harvard Law Review 715, and that his first reaction was it might not be necessary, but because the source is reliable the language has been slightly revised so it is more understandable.

Frohmayer cited the original language from the Washington statute: "or any trust arising because a greater proportion of the property has been contributed by one party than the other," and Wade, Harvard Law Review, supra, to the effect this is intended to cover the situation where there are three or more joint tenants or obligees. When the slayer then kills, it will be impossible to say that any particular portion of the property vests in the estate of the decedent. An attempt is here made to indicate when a resulting trust or agreement between the parties should be enforced. Frohmayer felt it would confuse the purpose of this statute to leave (3) in,

as purpose is to keep the wrongdoer from profiting in spite of his agreement.

Section 5 (3), upon motion carried, is deleted.

Section 6. Discussion as to precise language to convey intent that the life estate of the decedent should be measured by the decedent's life expectancy according to mortality tables. Carson, Jauregui and Bettis submitted a language version which provided for normal life expectancy rather than the use of "standard tables" after Zollinger pointed out life expectancy tables sometimes categorize people by living conditions, e.g., in retirement homes, various communities, etc., and intent here is to tie the expectancy to an average person rather than to decedent himself.

Section 6, as rewritten and set forth in Proposal #7 attached hereto, upon motion made and carried, was approved in its entirety.

Section 7. Allison stated this is the former Section IX, which was tentatively approved at the last meeting. Upon motion carried, Section 7 was approved.

Section 8. Allison stated this is original Section X, that question had arisen at the last meeting as to the desirability of including reference to disability insurance; that Mr. Zollinger had questioned insurance people and had been told none had ever heard of disability insurance being payable to a beneficiary other than the disabled; therefore, reference to such insurance is omitted. Zollinger pointed out reference had been inserted to profit sharing, pension plans and employee benefit provisions.

Section 8 (1) and (2). After slight language revision as set forth in Proposal #7 attached hereto, was, upon motion carried, approved.

Section 9. Allison advised this is former Section XI, the language of which was at the last meeting tentatively approved, and that this Section 9 approximates the former section. It was determined that written notice should be given only by a claimant, that language should be added to provide disposition of property could be withheld upon receipt of such notice. Riddlesbarger pointed out that if a claimant gives notice of a claim is made one nevertheless makes a payment, he is not necessarily relieved from liability. The protection lies in the withholding of payment until determination, not in the making of payment.

Section 9 as amended, upon motion carried, was approved as set forth in Proposal #7 attached hereto.

Section 10. Allison stated this is former Section XII. In answer to inquiry as to whether a discharge in bankruptcy is a defense to a suit for breach of trust, Gooding advised that such breach is not dischargeable. Thus, by having the slayer hold the trust in trust, there is an advantage over a mere liability. Allison noted that once a matter is adjudicated the purchaser has the matter as a matter of record, and prior to adjudication, there is no payment.

Section 10 as amended to read "provisions" rather than "terms" of this chapter, as set forth in Proposal #7 attached hereto, was, upon motion carried, approved.

Section 11. Upon motion carried, approved without change.

Section 12. Upon motion carried, approved without change.

Rights of Persons Feloniously causing Death of Another, as set forth in Appendix hereto, approved for submission to Lundy as Proposal #7.

2. WILLS.

Riddlesbarger distributed copies of a redraft of his chapter on Wills, and noted that originally he had included a section of definitions. Since the matter of definitions has been postponed by the Committee, such will eventually either appear at the beginning of this chapter or at the beginning of this chapter or at the beginning of the Probate Code, to be used throughout.

Section 1. Discussion as to the proper age at which one may be permitted to make a will. Riddlesbarger noted a great majority of other states use the age 18, as does the Mundorff Code. Upon motion carried, both Committees approved the age of 18.

It was noted it had been the aim of the Committees to forego the use of excessive terminology, and the section was accordingly reworded. As now written, the section provides one who has lawfully married does not subsequently lose his capacity to make a will by reason of divorce, even though he may yet be under the age of 18.

Section 1 now reads as set forth in the rewritten draft attached hereto, and as thus amended, approved upon motion carried.

Section 2. It is noted the section on definitions shall include definition of "will" as including a codicil, thus term "codicil" omitted. Riddlesbarger recommended ORS 114.050 be eliminated, since having reduced the age to 18 years, nuncupative wills do not appear necessary. Allison advised in Alaska experience proved deathbed wills were full of traps and should be eliminated.

ORS 114.050 upon motion carried shall be repealed. Motion carried to incorporate provision in repeal to protect wills executed prior to this act.

Discussion as to desirability of admitting to probate in Oregon holographic wills which are valid where made, but invalid here. Dickson noted this is wide open field for fraud, and of those he had seen most wills written by decedent defy construction. Possibility discussed of having provision elsewhere in probate code for ancillary proceedings. Motion carried to delete second proviso in Section 2.

ORS 114.060, upon motion carried, shall be repealed and savings clause shall appear in repealing act to provide for wills executed prior to the act.

Section 2, upon motion carried, approved to read as set forth in rewritten draft.

Section 3. Riddlesbarger reported identical with present statutory provision. Upon motion carried, approved to read as set forth in rewritten draft.

Section 4 discussed, determined age of witness should be raised from 16 to 18 years. As thus amended, upon motion carried, approved. [Note, however, on November 18 entire section is deleted.]

Meeting temporarily adjourned at 6:05 P.M.

Meeting reconvened at 8:30 A.M., Saturday, November 18, 1965 in Judge Dickson's Courtroom. All members of Advisory Committee present except Thomas W. Mapp and Robert W. Lundy. Following members of Probate Law and Procedure Committee were present:

Wade P. Bettis
Robert W. Gilley
Patricia Braun
Campbell Richardson
John C. Warden
John M. Copenhaver

J. Ray Rhoten
Shirley Field
Charles M. Lovett
Donald G. Krause
Joseph J. Thalhofer

Section 4. Carson requested reconsideration of matter of minimum age requirement for a witness. He believed perhaps hundreds of wills now in existence would be rendered void by this change in the law, that frequently law firms employ secretaries just out of high school who act as witnesses. Oregon Code presently provides as to competency of witnesses generally, and he saw no reason to change requirements for probate code. ORS 44.020 and ORS 44.030 were discussed and the competent witness as therein defined being one who can perceive and can relate his perceptions to others, and the application as to a witness to a will. Richardson believed there is no reason competency should be defined differently for attesting a will than for witnessing any other act. He stated it is question of weight of evidence, rather than admissibility. Allison pointed out by requiring minimum age you are placing further condition on validity of will submitted for probate.

Section 4 upon motion carried was deleted.

Section 5 read by Riddlesbarger. Jaureguy noted if a will is executed under undue influence and codicil is later executed which refers to that will, the codicil (if valid) validates the will. Upon motion carried, Section 5 deleted.

Sections 6, 7 and 8 are referred to Richardson and Riddlesbarger for review and discussion at next meeting.

Section 9. Dickson noted Oregon law has repudiated dependent relative revocation. Reported Iowa Code defines will to include instrument which merely revokes a will. Frohnmayer suggested definition of "will" should include a revocation. Section 9 with housekeeping amended approved upon motion carried to read as set forth in rewritten draft.

Section 10 Riddlesbarger stated is present law. Zollinger noted execution of subsequent will is not necessarily revocation of prior will, except to extent wills conflict. Allison reminded Committees intended definition will describe will as including codicils and revocation.

Warden reported that 129 Or. 77 provides word "republish" does not mean to re-execute. Publication signifies an act of declaration or making known to witnesses that testator understands instrument is to be his last will and testament. Frohnmayer reported in Washington destruction or cancellation of subsequent will shall not revive prior will. Zollinger reminded Committees under definition of will as including codicil, if codicil is destroyed, will is then ineffective. Riddlesbarger advised Ohio Code provides no will which shall be revoked or become invalid shall be revived other than by execution of another will or codicil in which it is incorporated by reference. Jaureguy believed if revocation is in writing, a testamentary instrument, and it evidences intention to revive earlier will, it should so do.

Section 10 upon motion carried amended to read as set forth in rewritten draft.

Section 11. Riddlesbarger read, advised it is original act as drafted by members of Advisory Committee and submitted to last legislature--passed in Senate, House Committee first tabled, then wrote present compromise. Committee determined no reason to diverge from original position. Upon motion carried, approved as amended to read as set forth in rewritten draft.

Section 12 reserved for later consideration.

Section 13. Bill No. 7 approved by Law Improvement Committee, too late to be submitted to last legislature. Did not receive consideration by full Advisory Committee. Zollinger restated his opinion that specific disposition of property by will should not be changed by a pledge of that property, that pledging should not have effect of a testamentary act. Lively discussion as to whether such act is in fact making a will for testator, and whether section would carry out testator's intent, or would defeat it; whether intent would be different as to encumbrance existing prior to will and one placed against property subsequent thereto, and as to purchase money mortgage and another. Frohnmayer reported Washington, 11.12.070 provides any specifically devised real or personal property which is subject to a mortgage shall be taken subject thereto unless will provides otherwise. It does not include a pledge, etc., and Gilley advised Iowa Code is similar. Field asked result if assets were insufficient to discharge all obligations. Zollinger replied abatement would apply. Frohnmayer pointed out one frequently must warn testators to consider amount of cash which will be available for payment of legacies at time will is probated and counsel percentages rather than dollars.

Motion made to favor partial exoneration. Vote counted, motion lost. Committees polled, lost in Advisory Committee 3 to 6.

Section 13 (1). Motion carried to approve as amended to read as set forth in written draft.

Section 13 (2). Question arose as to whether this subsection should appear in definitions; determined Lundy would later decide. Motion carried to approve as amended as set forth in rewritten draft.

Section 13 (3). Motion carried to approve as amended as set forth in rewritten draft.

Meeting temporarily adjourned at 12:30 P.M.

Meeting reconvened at 1:40 P.M. Present were all members of Advisory Committee except Riddlesbarger, Lundy, Mapp. Members of Probate Law and Procedure Committee present were Gilley, Braun, Warden, Krause and Lovett.

Section 13 (4). Carson read, explained subsection would apply, for instance, to a claim based upon a note secured by a mortgage. Personal representative is subrogated to rights of creditor against devisee or legatee, with right of reimbursement out of specifically devised property to extent devisee does not have right to have debt exonerated. Discussion as to whether there should be lien or subrogation.

Section 13 (4) upon motion carried revised as shown in rewritten draft.

Section 13 (5) upon motion carried revised as shown in rewritten draft.

Agenda for next meeting discussed. Meeting adjourned at 3:25 P.M.

RIGHTS OF PERSON FELONIOUSLY CAUSING DEATH OF ANOTHER

Sec. 1. Definitions. As used in this Chapter.

1. Slayer shall mean one who with felonious intent takes or procures the taking of the life of another.
2. Decedent shall mean any person whose life is so taken.

Sec. 2. Slayer not to benefit from death.

No slayer shall in any way acquire any property or receive any benefit as the result of the death of the decedent, but such property shall pass as provided in the sections following.

Sec. 3. Slayer deemed to predecease decedent.

The slayer shall be deemed to have predeceased the decedent as to property which would have passed from the decedent or his estate to the slayer under the statutes of descent and distribution or would have been acquired by statutory right as the surviving spouse of the decedent.

Sec. 4. Property passing by will or trust.

The slayer shall be deemed to have predeceased decedent as to property which would have passed to or for the benefit of the slayer by will of the decedent or by trust.

Sec. 5. Rights of survivorship.

1. Upon the death of the decedent title to property held by the slayer and decedent as tenants by the entirety or with a right of survivorship shall remain in the slayer to the extent only of an undivided one-half

interest for his lifetime and, subject thereto, shall pass to the heirs, devisees or legatees of the decedent other than the slayer subject to the provisions of Proposal #1.

2. Upon the death of a decedent who, with the slayer and another or others, was the owner of property with a right of survivorship, the slayer shall take nothing as survivor among the owners.

Sec. 6. Reversions, vested remainders, contingent remainders, and future interests.

1. Property in which the slayer holds a reversion or vested remainder subject to an estate in the decedent for his lifetime shall pass to the heirs, devisees or legatees of the decedent for a period of time equal to the normal life expectancy of a person of the decedent's sex and of his age at the time of his death; if the particular estate is held by a third person for the lifetime of the decedent it shall continue in such person for a period of time equal to the normal life expectancy of a person of the decedent's sex and of his age at the time of his death.
2. As to any contingent remainder or executory or other future interest held by the slayer, subject to become vested in him or increased in any way for him upon condition of the death of the decedent:

- a. If the interest would not have become vested or increased if he had predeceased the decedent, he shall be deemed to have so predeceased the decedent;
- b. In any case, the interest shall not be vested or increased during a period of time equal to the normal life expectancy of a person of the decedent's sex and of his age at the time of his death.

Sec. 7. Property appointed--powers of revocation or appointment.

1. Property appointed by the will of the decedent to or for the benefit of the slayer shall be distributed as if the slayer had predeceased the decedent.
2. Property held either presently or in remainder by the slayer, subject to be divested by the exercise by the decedent of a power of revocation or a general power of appointment, shall pass to the heirs of the decedent and property so held by the slayer, subject to be divested by the exercise by the decedent of a power of appointment to a particular person or persons or to a class of persons, shall pass to such person or persons or in equal shares to the members of such class of persons exclusive of the slayer.

Sec. 8. Insurance proceeds.

1. Proceeds payable to or for the benefit of the slayer as the beneficiary or assignee of any policy or certificate of insurance or certificate of membership issued by any

benevolent association or organization on the life of the decedent, or as the survivor of a joint life policy, or proceeds under any pension, profit sharing or other plan, shall be paid instead to the personal representative of the decedent, unless the policy, certificate or plan designates some person other than the slayer of his estate as secondary beneficiary to him in which case such proceeds shall be paid to such secondary beneficiary in accordance with the applicable terms thereof.

2. If the decedent is beneficiary or assignee of any policy or certificate of insurance on the life of the slayer, the proceeds shall be paid to the personal representative of the decedent on the death of the slayer, unless the policy or certificate names some other person other than the slayer or his personal representative as secondary beneficiary, or unless the slayer by naming a new beneficiary or assigning the policy or certificate performs an act which would have deprived the decedent of his interest therein if he had been living.

Sec. 9. Payment by insurance company, bank, etc., no additional liability.

Any insurance company making payment according to the terms of its policy or any bank, trustee, or other person performing an obligation to the slayer shall not be subjected to addi-

tional liability by the terms of this chapter if such payment or performance is made without written notice by a claimant of a claim arising pursuant to this chapter. Upon receipt of such notice the person to whom it is directed may withhold any disposition of the property pending determination of his duties.

Sec. 10. Rights of persons without notice dealing with slayer.

The provisions of this chapter shall not affect the rights of any person, who for value and without notice purchases or agrees to purchase from the slayer property which the slayer would have acquired except for the provisions of this chapter, but all proceeds received by the slayer from such sale shall be held by him in trust for the persons entitled to the property under the provisions of this chapter, and the slayer shall also be liable both for any portion of the proceeds which he may have dissipated and for any difference between the actual value of the property and the amount of its proceeds.

Sec. 11. Record of conviction as evidence against claimant of property.

The record of his conviction of having participated in the killing of the decedent with felonious intent shall be admissible in evidence against a claimant of property in any civil action arising under this chapter.

Sec. 12. Severability.

If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application and to this end the provisions of this act are declared to be severable.

WILLS

FORMALITIES

Sec. 1. Who may make wills. Any person 18 years of age or older or who has lawfully married, and who is of sound mind, may dispose of his property by will.

Sec. 2. Will to be in writing; execution; attestation. Every will shall be in writing, signed by the testator, or by some person under his direction and in his presence, and shall be attested by two or more competent witnesses, each subscribing his name thereto in the presence of the testator.

Sec. 3. Person signing testator's name to sign his own name as witness. Any person who signs the testator's name to any will by his direction shall subscribe his own name as a witness to such will, and state thereon that he signed the testator's name at his request.

Sec. 4. (Deleted.)

Sec. 5. (Deleted.)

Sec. 6, 7 and 8. (Reserved for later consideration.)

REVOCATION

Sec. 9. Express revocation or alteration. A will cannot be revoked or altered otherwise than by another will, or unless the will is 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 and by his direction; and when so done by another person, the direction of the testator and the fact of such injury or destruction must be proved by two or more witnesses.

Sec. 10. When cancellation of the will revives prior will. If, after making a will, the testator shall make a subsequent will, the destruction, cancellation or revocation of such subsequent will shall not revive the earlier will.

Sec. 11. Subsequent marriage or divorce of testator as a revocation. (1) If after making his will the testator marries and the spouse of the testator is living at the time of his death, the will is revoked unless provision has been made for the surviving spouse by a written antenuptial agreement, or marriage settlement, or unless the will evidences the intent of the testator that the will shall not be revoked by the marriage.

(2) If after making his will the testator is divorced or his marriage is annulled, unless the will evidences a different intention, the divorce or annulment revokes all provisions in the will in favor of the former spouse and any provision naming the former spouse as executor, and the effect of the will is the same as though the former spouse had predeceased the testator.

Sec. 12. (Reserved for later consideration.)

Sec. 13. Encumbrance as a revocation of previous will. (1) If property upon which an encumbrance exists at the death of the testator is specifically given by will executed by the testator on or after the effective date of this 1967 Act, the beneficiary thereof shall take the property subject to the encumbrance, and the personal representative shall not be required to make any payment on account of the obligation secured by the encumbrance, except when the will provides otherwise or in the circumstances set forth in subsection (3) or subsection (4) of this 1967 Act.

(2) For the purposes of this 1967 Act, a voluntary encumbrance is a mortgage, trust deed, security agreement or pledge, or a lien arising from labor or services performed or materials supplied or furnished, or any combination thereof, upon or in respect of the real or personal property, and an involuntary encumbrance is any other encumbrance upon the real or personal property, all irrespective of whether the testator was personally liable upon the obligation secured by the encumbrance.

(3) The devisee or legatee of real or personal property specifically devised or bequeathed, unless the will provides otherwise, may require that an encumbrance thereon be fully or partially discharged out of other assets of the testator's estate not specifically devised or bequeathed if:

- (a) The encumbrance is an involuntary encumbrance; or
- (b) The encumbrance is a voluntary encumbrance and
 - (i) The will specifically directs full or partial discharge of the encumbrance out of other assets, but a provision in the will for payment of the debts of the testator shall not, of itself, constitute such direction; or
 - (ii) The personal representative receives rents or profits, or both, from the property and the devisee or legatee requests that he apply all or part of the rents or profits, or both, in full or partial discharge of the obligation secured by the encumbrance, in which event the personal representative shall apply the rents or profits, or both, upon principal or interest, or both, owing upon the obligation, as requested; or
 - (iii) Any beneficiary under the testator's will requests, in a writing subscribed by the beneficiary and delivered to the personal representative, that the obligation secured by the encumbrance be fully or partially discharged out of property, or the proceeds of sale thereof, which otherwise would pass to the beneficiary.

(4) If a claim based upon an obligation secured by a voluntary encumbrance on specifically devised property is presented and paid or if specifically devised real property that is subject to a voluntary encumbrance is redeemed and if the beneficiary is not entitled to exoneration, the personal representative shall have a lien upon such property in the amount so paid, which lien shall be administered upon as an asset of the estate.

(5) If property upon which an encumbrance exists at the death of the testator is specifically devised by a will executed before the effective date of this 1967 Act, the rights of the beneficiary of such property in respect of exoneration thereof out of other assets of the estate shall be determined in accordance with the law in effect at the time of the execution of the will.