

ADVISORY COMMITTEE
Probate Law Revision

Twenty-second Meeting
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Dates) 1:30 p.m., Friday, February 18, 1966
and : and
Times) 9:00 a.m., Saturday, February 19, 1966
Places) Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of December and January meetings.
2. Report on miscellaneous matters (Lundy).
3. Inheritance by nonresident aliens.

Report by subcommittee (Allison, Lisbakken, Lovett, Barrie and Schwabe).

Memorandum containing Schwabe's draft and comment. Copies of this memorandum have been distributed to members.

4. Advancements and retainer.

Report by Frohnmayr (dated December 10, 1965). Copies of this report were distributed to members before the December meeting.

5. Initiation of probate or administration (ORS chapter 115).

Draft of suggested revision of first part of ORS chapter 115 (i.e., ORS 115.010 to 115.350), relating to initiation of probate or administration. Copies of a report by Gilley (dated January 10, 1966) containing this draft were distributed to members before the January meeting. Note: Consideration of this draft will begin with section 6 thereof.

Draft of suggested revision of last part of ORS chapter 115 (i.e., ORS 115.410 to 115.520), relating to executors and administrators generally. Copies of this draft were distributed to members present at the January meeting.

6. Next meeting.

[Note: One and one-half day joint meetings of the advisory and Bar committees are scheduled through August 1966 for the third Saturday of each month, all day, and the preceding Friday afternoon.]

ADVISORY COMMITTEE
Probate Law Revision

Twenty-second Meeting, February 18 and 19, 1966
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The twenty-second meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:30 p.m., Friday, February 18, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Gooding, Husband, Jaureguy and Mapp. Carson, Frohnmayer, Lisbakken and Riddlesbarger were absent.

The following members of the Bar committee were present: Bettis, Braun (arrived 3:10 p.m.), Hornecker, Krause, Lovett, Richardson, Thalhoffer and Warden (arrived 2:30 p.m.). Gilley, Boivin, Copenhaver, Field, Luoma, Rhoten and Tassock were absent.

Also present were Walter L. Barrie, Assistant Attorney General; Peter A. Schwabe, Portland attorney; and Robert W. Lundy, Chief Deputy Legislative Counsel.

Miscellaneous Matters

Dickson reported that Representative Keith D. Skelton, in correspondence to Bettis, continued to express interest in proposed legislation on summary proceedings for administration of small estates of decedents and in having such legislation prepared in time for consideration by the 1967 Oregon legislature. Dickson asked Bettis to advise Representative Skelton that Duncan L. McKay, Patricia A. Lisbakken and William C. Martin, as a committee, were working on proposed small estates legislation for the American Bar Association in connection with the current Model Probate Code project, and to suggest that Representative Skelton communicate with this small estates committee. Bettis also was requested to send to members of the small estates committee copies of his correspondence to Representative Skelton.

Dickson stated that he had been invited to appear at a meeting of title company representatives at Salishan in June and speak on the probate law revision project and the work of the advisory committee in respect thereto. He indicated he would appreciate suggestions by members of the committees on the content of his remarks to the title company

representatives.

Dickson indicated that he and Lundy had corresponded on the subject of ways and means to accelerate the work of the committees, and had agreed that one method to accomplish this purpose would be for members, at the meetings, to devote less time to discussion on the exact wording of revision proposals, and instead to concentrate on identification of problems and determination of policy in the solution thereof. He pointed out that matters discussed and determinations tentatively made thus far and in the near future would be embodied in drafts prepared by Lundy, and that discussion of exact wording could be postponed until those drafts were before the committees for consideration. Lundy remarked that specific wording initially agreed upon might have to be altered in the course of his preparation of drafts constituting segments of the proposed revised probate code, and that such specific wording also might be altered on consideration of those drafts by the committees.

Lundy expressed the suspicion that all members did not receive copies of the minutes of the December meeting, and noted that he had extra copies thereof available for distribution on request. He commented that he had distributed copies of the 1963 edition of the Oregon probate code, with annotations, to members of the Bar committee present at the meeting, and that he would distribute copies of the 1965 statute chapters to members of both committees as soon as they were available. He noted that in December he had distributed copies of current rosters of both committees, and asked members to notify him of any additions, corrections or changes that should be made therein.

Lundy indicated that the Law Improvement Committee had met on Friday, February 11, and that he had reported at that meeting on the progress of the probate law revision project. He stated that members probably were aware of the probate revision project in progress in New York, and remarked that he would endeavor to obtain for members copies of two bills revising most of the New York probate statutes introduced at the 1966 session of the New York legislature.

Zollinger noted that members were familiar with, and some had copies of, the 1965 Washington Probate Code and 1963 Iowa Probate Code, but that there might be recently enacted revised probate codes in other states of which members were not aware. He suggested that Lundy prepare and distribute to members a list of revised probate codes recently enacted in other states, expressing the view that such a list would be helpful as a research aid even though copies of the codes themselves were not available for distribution to members.

Inheritance by Nonresident Aliens

Allison noted that at the December meeting Barrie and Schwabe had expressed their views and recommendations on the matter of inheritance by nonresident aliens and the present Oregon reciprocity statute (i.e., ORS 111.070) governing this matter. He pointed out that at the December meeting the committees had approved in principle a "benefit" statute on inheritance by nonresident aliens, with no reciprocity requirement, and that the chairman had appointed a subcommittee, consisting of himself, Lisbakken, Lovett, Barrie and Schwabe, to prepare such a statute and submit it to the committees at this meeting. Allison stated that Schwabe had prepared a proposed statute, copies of which had been distributed to members of both committees before the meeting. [Note: See Memorandum, February 7, 1966, from Lundy to members of both committees, on "rights on non-resident aliens to take property by succession or testamentary disposition ORS 111.070."]

Allison commented that the subcommittee had revised Schwabe's proposed statute to some extent. He distributed to members present copies of the revised proposed statute, which read as follows:

"1. Where, at the time of distribution of an estate, the probate court finds that an heir, legatee, devisee, or distributee is an alien not residing within the United States or its territories, who would not receive the benefit, use, or control of the money or other property due him, the probate court shall order that the administrator or executor of said estate sell and convert said property into cash and that the money due said alien be deposited to his credit at interest in a savings account in a bank or banks in the State of Oregon. The passbook or other evidence of such deposit shall be delivered to the clerk of the court. Such sales of property shall be made pursuant to the procedure prescribed by the statutes for the sale of real and personal property by decedents' estates.

"The money to be deposited shall be subject to the expenses of such sales and such sums as the court may fix and allow for the services of the administrator or executor, and his attorney, and of the attorney or attorney in fact, if any, representing the alien in said proceeding.

"2. Any money so deposited shall be withdrawn and distributed only upon the order of the court which

ordered the deposit. A petition for an order authorizing withdrawal shall be filed by the alien heir, legatee, devisee, or distributee, or, if deceased, by a personal representative appointed by said court. The petition shall allege that at the time of filing the alien heir, legatee, devisee, or distributee, or, if deceased, his heirs or beneficiaries, would receive the benefit, use, or control of the money. The court shall fix a time and date certain for the hearing of said petition and shall order that written notice thereof be given not less than thirty days prior thereto to the State Land Board of Oregon, to the bank in which said funds are deposited, and to the consular representative of the country of which the alien is, or if deceased was, a citizen.

"If at such hearing the court determines that the petitioner or, if deceased, his heirs or beneficiaries, would receive the benefit, use, or control of said money, the court shall make an order that the money, including the interest accrued thereon, be paid to the petitioner or to his attorney in fact, subject to the costs and expenses of the recovery proceeding as allowed and approved by the court.

"3. If no order for withdrawal of any money so on deposit is made within twenty years from the date of the entry of the order directing the deposit, such money, including the interest accrued thereon, shall be disposed of as escheated property.

"4. Section 111.070 ORS is hereby repealed."

Allison pointed out that Barrie had suggested, and he agreed, that some provision should be made for notice to the State Land Board of the initiation of an estate proceeding in which there was a possibility of escheat under the nonresident alien inheritance statute, and for making the Land Board a party in such an instance. Allison commented that such a provision should not be incorporated in the nonresident alien inheritance statute itself, but instead should be set forth in conjunction with subsection (2) of ORS 115.310, relating to service of copies of petitions for appointment of administrators upon the Land Board. He proposed the following wording for such a provision:

"Where the petition for appointment of a personal representative discloses that there are nonresident alien heirs or beneficiaries, the petitioner shall immediately serve upon the clerk of the State Land Board, as provided by ORS 16.770 to 16.810, 16.850 and

16.860, a copy of the petition, and no order appointing the personal representative shall be granted by the court or entered until after due proof of service has been filed with the clerk of the court having jurisdiction in such proceedings."

Barrie indicated his objection to the revised proposed statute in several particulars. He objected, first, to interest on deposits going to nonresident aliens, and suggested that such interest be used to defray some of the considerable expense incurred by the state, especially expert witness fees, in participating in the one or more proceedings that would be instituted by each nonresident alien to withdraw a deposit. In answer to a question by Allison, Barrie expressed the view that court allowed and approved "costs and expenses of the recovery proceeding" provided for in paragraph number 2 of the revised proposed statute would not adequately reimburse the state for expense incurred, and pointed out that he was advocating the proposition that the Land Board should receive all interest earned by deposits. In response to a question by Bettis, Barrie commented that there was no assurance that ultimate escheat of deposit principal and interest in some cases would result in reimbursement of the state, and that even if such reimbursement finally resulted, the state would be compelled to wait a considerable period of time therefor. Zollinger indicated that he favored leaving interest on deposit and subject to the same disposition as principal.

Barrie suggested that the time period for recovery of the deposit be reduced from 20 to 10 years, and referred to the 10-year period for recovery of escheated property provided for in ORS 120.130. In response to a question by Thalhofer, Schwabe expressed his opinion that the 20-year period for recovery of a deposit was too long, especially if other eligible heirs of the decedent were to be allowed to claim the deposit after expiration of the nonresident alien heir recovery period. There appeared to be general agreement that the nonresident alien heir recovery period should be reduced to 10 years.

Zollinger noted that, under the Uniform Disposition of Unclaimed Property Act, certain bank deposits were presumed abandoned if activity of a certain nature did not occur in respect to such deposits within a seven-year period [Note: See ORS 98.306], and thereupon were to be paid to the State Land Board [Note: See ORS 98.362]. He also indicated that the owner of property presumed abandoned and paid or delivered to the Land Board was not entitled to income accruing thereafter [Note: See ORS 98.372]. He expressed

the view that a deposit awaiting recovery by a nonresident alien heir would be subject to the abandoned property statutes, and suggested, and Barrie agreed, that a specific exemption of such a deposit would be necessary if the committees did not desire application of the abandoned property statutes thereto. Schwabe noted that paragraph number 2 of the revised proposed statute specified that money deposited was to be "withdrawn and distributed only upon the order of the court which ordered the deposit," and expressed the view that this specification precluded application of the abandoned property statutes. Zollinger disagreed with the view expressed by Schwabe, and, in response to questions by Allison, pointed out that it was the owner of a bank deposit, in this case the nonresident alien heir and not the court or clerk thereof, whose activity prevented presumed abandonment and who received notice of abandonment proceedings, with opportunity to claim, under the abandoned property statutes.

Bettis commented that if a deposit made to the credit of a nonresident alien heir was subject to the abandoned property statutes, the court apparently would lose control over it after seven years. Barrie remarked that abandoned property paid or delivered to the State Land Board was held subject to claim at any time [Note: See ORS 98.392]. Zollinger suggested that the provision for escheat for nonresident alien heir deposits was not entirely appropriate if the abandoned property statutes applied to such deposits. After further discussion, Dickson stated that it appeared there was general agreement that the abandoned property statutes should not apply to nonresident alien heir deposits.

Barrie suggested, and Richardson agreed, that the revised proposed statute should include a requirement that a nonresident alien heir allege new evidence as to his receiving benefit, use or control in his second and each subsequent petition for withdrawal of a deposit. Schwabe commented that, as a practical matter even in the absence of a statutory requirement, such allegation of new evidence would always be made. In response to a question by Gooding, Schwabe indicated that, to his knowledge, in other states having "benefit" statutes the incidence of repeated claims by nonresident alien heirs was very small. In response to a question by Allison, Barrie pointed out that a determination by a court as to benefit, use or control by one citizen of a particular country was not necessarily controlling as to subsequent claims by that citizen or other citizens of the same country. Barrie indicated that proof of foreign law was a question of fact in this state and that there might be a change in the law of a particular country or in the government thereof

within a relatively short period of time. Dickson expressed agreement with the suggestion that allegation of new evidence be required by the revised proposed statute.

Zollinger noted that the estate might be closed when a proceeding for withdrawal of a nonresident alien heir deposit is brought, and asked whether the proceeding should be a separate one or the estate reopened for the purpose. In response to a question by Barrie, Schwabe indicated his guess that under the New York "benefit" statute the withdrawal proceeding was handled as a part of the estate proceeding, but without reopening the estate. Schwabe commented he saw no objection to institution of a withdrawal proceeding under the name or file number of the estate proceeding, even though the estate had been closed, and pointed out that the personal representative would not be a party to the withdrawal proceeding. Zollinger remarked that he was inclined to favor making the withdrawal proceeding a separate one, complete in itself, on the ground that certain records in the estate proceeding might not be proper for consideration in the withdrawal proceeding. Allison noted that the revised proposed statute did not specify the nature of the withdrawal proceeding, except to the extent of indicating that the court that ordered the deposit also was to order withdrawal and distribution, and expressed the view that the statute need not so specify, but pointed out that one advantage of handling the withdrawal proceeding as a part of the estate proceeding lay in the court order of deposit being made in the estate proceeding. There appeared to be general agreement that the withdrawal proceeding should be brought under the name or file number of the estate proceeding, but with no necessity of reopening the estate or making the personal representative a party.

Lundy noted that paragraph number 3 of the revised proposed statute provided for disposal of deposited money as escheated property if not withdrawn upon court order within a certain period of time, and asked whether other eligible heirs would be entitled to claim the money on expiration of the nonresident alien heir claim period. Barrie responded that under the present reciprocity statute (i.e., subsection (3) of ORS 111.070) other eligible heirs were entitled to property that would have gone to the nonresident alien heir if he had been eligible, but that under the revised proposed statute this would not occur, and that ORS 120.130 would not be applicable for the purpose of allowing other eligible heirs to take after expiration of the nonresident alien heir claim period.

Jaureguy posed the situation of several specific

bequests under a will, one of which was to a nonresident alien, and a residuary bequest, and asked whether, under the revised proposed statute, the specific bequest to the nonresident alien would escheat to the state, rather than go to the residuary legatee, if the nonresident alien did not prove his eligibility within the claim period. Barrie responded, and Dickson agreed, that escheat would result in the situation posed. Jaureguy indicated that he did not favor this result. Allison commented that the subcommittee had proceeded on the understanding that the nonresident alien heir deposit and withdrawal procedure constituted a post-distribution matter, after all other eligible heirs and beneficiaries had received their shares, and that the state would receive the deposit if not withdrawn within the claim period on petition of the nonresident alien heir or his personal representative.

After further discussion, Allison moved, seconded by Krause, that the revised proposed statute be rereferred to the subcommittee (i.e., Allison, Lisbakken, Lovett, Barrie and Schwabe) for the purpose of reducing the nonresident alien heir claim period to 10 years, with other eligible heirs being entitled to claim a deposit on expiration of the period without withdrawal and distribution to the nonresident alien heir. Motion carried. Zollinger suggested, and Dickson agreed, that the subcommittee should consider a provision that if, within the 10-year period, a nonresident alien heir was unable to establish his eligibility to receive a deposit, the deposit would be distributed upon petition to those who would take upon death intestate of the nonresident alien, and otherwise to those who would take by succession from the decedent. It was also agreed that the subcommittee should take into consideration the matters of exemption of nonresident alien heir deposits from application of the abandoned property statutes, requirement of allegation of new evidence in second and subsequent petitions for withdrawal by nonresident alien heirs and initiation of withdrawal proceedings as a part of the original estate proceedings. Dickson stated that consideration of the report of the subcommittee would be scheduled for the Friday afternoon session of the March meeting of the committees.

Lundy noted that the California Law Revision Commission had studied the matter of inheritance by nonresident aliens and in 1959 had recommended a "benefit" statute in lieu of the existing California reciprocity statute, but that the California legislature apparently had not approved this recommendation. He asked if the subcommittee would be interested in considering the California study and proposal. Schwabe indicated that he had information on the California

study and proposal which the subcommittee might consider if interested.

Barrie stated he would like to be recorded as opposed in principle to the proposed "benefit" statute, and that he would express such opposition when the matter came before the Oregon legislature for consideration. Dickson commented that it would be helpful if Barrie, notwithstanding his opposition, would continue to work with the subcommittee.

At this point (3 p.m.) Barrie and Schwabe left the meeting.

Jaureguy stated he would like to be recorded as opposing prevention of inheritance by nonresident aliens who are citizens of countries that do not permit inheritance by aliens.

Initiation of Probate or Administration

The committees resumed consideration, begun at the January meeting, of a draft of proposed legislation relating to initiation of probate or administration and primarily encompassing the matters covered by ORS 115.010 to 115.350, which had been prepared by Gilley, with assistance by Krause and Hornecker, and distributed in the form of a report to all members of both committees before the meeting.

Testimony of attesting witnesses (section 6). Krause referred to section 6 of the draft, relating to testimony of attesting witnesses, and moved, seconded by Bettis, that it be approved. Motion carried.

Allison suggested that Lundy, in drafting section 6 for insertion in the proposed revised probate code, should delete, in paragraph c, the word "however" and should substitute "be made" for "not be made by affidavit, but." He also suggested deletion of "by affidavit, by deposition, or in open court" in paragraph d of section 6.

Contest of will (section 7). Krause noted that section 7 of the draft, relating to contest of will, was derived from ORS 115.180, but with elimination of provision for extension of the time for contest by persons under legal disability and provision for contest of foreign wills.

Dickson and Jaureguy questioned termination of the right of a minor to contest a will before he attained majority. Bettis commented that a minor's interest in contesting a will would in most cases probably be represented

by relatives or friends. Hornecker remarked, and Dickson agreed, that a person who stood to benefit from a minor's failure to contest and who was in a position to inform the minor of his rights, might be inclined to neglect to inform the minor. Bettis noted that there were both advantages and disadvantages in such a situation, but expressed the view, with which Allison agreed, that the advantage of not holding open the right to contest for a long period of time probably was paramount.

Thalhofer pointed out that the Iowa statute on will contests allowed one year for the purpose and did not extend the time for persons under legal disability (see section 308, 1963 Iowa Probate Code). Allison noted that the comparable Washington statute contained no provision for persons under legal disability (see section 11.24.010, 1965 Washington Probate Code).

In response to a question by Jaureguy, Zollinger suggested that a minor who failed to contest a will within the six-month period would later have recourse in an independent action for fraud if such had occurred to preclude him from asserting his right to contest.

Zollinger moved, seconded by Allison, that section 7 be approved. Motion carried.

Letters testamentary (section 8). Krause pointed out that section 8 of the draft, relating to issuance of letters testamentary, was the same as ORS 115.190. Lundy asked if the terminology used in paragraph b of section 8 was consistent with that used in the banking statutes. Zollinger responded that there was consistency of terminology. He suggested, and Dickson agreed, that if paragraph b was duplicated in the banking statutes, paragraph b might be deleted.

Zollinger moved, and it was seconded, that section 8 be approved. Motion carried.

Issuance of letters of administration where will declared inoperative; form of letters testamentary and of administration (section 9). Krause noted that section 9 of the draft, relating to issuance of letters of administration where wills are declared inoperative and containing forms for letters testamentary and of administration, was a combination of ORS 115.200, 115.210 and 115.350.

Allison referred to the first paragraph of section 9 and asked whether there was a distinction between declaring a will inoperative and setting it aside. Butler suggested

that a will might be valid, but at the same time inoperative because property purporting to pass thereunder was subject to a contract or trust. Allison asked whether, in the situation mentioned by Butler, letters testamentary would be revoked and letters of administration issued. Dickson responded that in the situation posed the estate would be closed. Butler remarked that the will might be inoperative as concerned the disposition of the property, but that proceedings begun with issuance of letters testamentary might continue to completion for other purposes.

Zollinger expressed objection to the terminology of the first paragraph of section 9 as to a will being set aside, on the ground that it was the order admitting the will to probate, rather than the will itself, that was set aside.

Richardson suggested, and Zollinger agreed, that the wording of the forms for letters should be modernized. Zollinger noted that the forms set forth in section 9 included the words "this, therefore, authorizes," and commented, and Dickson agreed, that letters do not authorize a personal representative to act, but are merely evidence thereof. Zollinger also suggested, and Dickson agreed, that the letters indicate the date on which the authority of the personal representative to act begins.

Gooding expressed the view, with which Dickson agreed, that there should be a single form for letters designated as letters of personal representative or letters of representation. Bettis asked if Gooding's suggestion contemplated blanks in the single form for insertion of "executor," "administrator" or some other proper designation. Gooding responded that, under his suggestion, only the designation "personal representative" would be used. Zollinger commented, and Bettis and Allison agreed, that there were instances in which it was important to know whether a personal representative was an executor or administrator.

Gooding moved, seconded by Hornecker, that there be a single form for letters and that this form should refer to a "personal representative" only, and not to an "executor," "administrator" or some other proper designation. Motion failed.

Zollinger moved, seconded by Bettis, that there should be separate forms for letters testamentary and of administration, and that, in accordance with a suggestion by Dickson, Richardson be assigned the task of improving the wording of section 9, including that of the forms set forth

therein. Motion carried.

Thalhofer questioned the meaning of the phrase "letters to an administrator of the partnership with the will annexed" in the last paragraph of section 9. Lundy commented that apparently the phrase referred to a procedure under statutes repealed in 1943 (see chapter 426, Oregon Laws 1943) and replaced with a procedure presently described in ORS 116.450 to 116.465.

Copy of will and of order to heirs, legatees and devisees (section 10). Krause referred to section 10 of the draft, relating to personal representatives mailing copies of wills and orders admitting them to probate to heirs, legatees and devisees, and noted that the section was based upon ORS 115.220, but with the requirements that orders admitting wills to probate, as well as the wills themselves, be mailed and that the mailing be to heirs, as well as legatees and devisees.

Richardson noted that section 10 required mailing of copies of the will and order to heirs, legatees and devisees "named therein," and asked whether "therein" referred to the will or the order, pointing out that the will would not name heirs who also were not legatees or devisees in the usual situation and that the committees had previously decided that the petition for probate should include identification of all heirs, including but not limited to legatees and devisees. [Note: See Minutes, Probate Advisory Committee, 1/14,15/66, page 19.] Krause suggested, and Dickson agreed, that the problem raised by Richardson would be resolved by deletion of "named therein" in section 10.

Several members commented on the burden imposed upon a personal representative by the requirement of mailing copies of a will to all heirs, legatees and devisees, and especially to heirs other than legatees and devisees. Dickson commented that this matter had been the subject of much debate by Bar probate committees for many years. Zollinger remarked that the burden was justified only to the extent of the hazard to heirs in not being notified of the initiation of the probate proceeding. Husband indicated that he was aware that there probably were instances of estates being probated without the knowledge of some heir, but questioned whether any abuses had occurred in such instances.

Allison stated that he did not object strongly to mailing copies of a will to legatees, devisees and heirs otherwise named in the will, since those persons were necessarily involved in the estate proceeding, but that in most instances

mailing copies to heirs not named in the will was not only burdensome but an invitation to fruitless inquiry and in the end, in most cases, purposeless. Bettis commented, and Butler agreed, that such mailing appeared to constitute an invitation to contest the will, which would be unwarranted and unsuccessful in most cases. Allison pointed out, and Bettis agreed, that another problem was ascertaining the names and addresses of all heirs. Butler indicated that he favored reversion to the situation existing before enactment of ORS 115.220 in 1963, when only published notice to creditors was required, and commented that a requirement of notice to heirs was not likely to make a personal representative any more honest.

Gooding suggested, and Zollinger agreed, that the six-month period for contesting a will was an argument in favor of prompt notice to all heirs. Mapp commented that notice should be sent to all heirs whose identity and location could reasonably be determined. Butler noted that section 10 did not specify a particular time within which copies of a will were required to be mailed, and provided for proof of mailing at or before the hearing of the final account. He remarked that the will contest period in some instances might have expired by the time such a copy was received by an heir.

A number of substitutes for mailing copies of a will and order of admission to probate to heirs were proposed. Husband suggested a copy of the petition instead of the order. Zollinger suggested a notice stating that the will was admitted to probate and that a copy of the will might be obtained on request. Krause suggested a copy of the letters testamentary. Jaureguy commented that an heir would not be able to ascertain from the letters whether or not he was named in the will. Bettis suggested a published notice to heirs. Thalsofer pointed out that published notice would not likely come to the attention of heirs who did not reside in the publication area. Zollinger suggested that mailing a copy of the will and order to legatees and devisees be retained, but that notice mailed to other heirs consist of a statement that the decedent died leaving a will that made no provision for the heir to whom the statement was addressed.

Dickson proceeded to ascertain the desires of the committees on several issues. It appeared that a majority of the members present (1) favored some kind of notice of the initiation of probate, whether or not there was a will, (2) opposed notifying only those persons named in a will,

and (3) favored notifying heirs as well as those persons named in a will. A discussion of the nature of the notice followed. Zollinger commented that persons named in a will should receive a copy thereof. Braun expressed the view, with which Krause agreed, that a notice stating that the will had been admitted to probate and a named personal representative appointed was sufficient without a copy of the will itself. Warden asked whether it would not be desirable to mail a copy of the will to all heirs.

Bettis moved, seconded by Krause, that a combined notice of initiation of administration of a decedent's estate and to creditors should be published as presently required in the case of notice to creditors, and that a copy of this notice and of the will, if any, be mailed to all persons named in the will and heirs of the decedent, so far as they and their addresses were known, to their last known addresses. Motion carried.

Zollinger remarked that he supposed the published notice would be directed to heirs and creditors, instructing heirs as to the period within which to contest the will, if any, and creditors as to the period within which to file claims. In response to a question by Dickson, Bettis indicated that the mailing should be done "forthwith," "immediately" or promptly" upon the entry of the order admitting the will to probate or appointing the administrator where there was no will, but expressed the view that a specific time limitation did not appear to be necessary. Braun suggested that proof of mailing should be filed within six months. Husband commented that such proof should be filed within a much shorter period of time than six months. Zollinger remarked that a 30-day time limit should be adequate. Dickson expressed the view that reasonable specific time periods for mailing and filing proof thereof should be provided.

Warden pointed out that ORS 115.220, upon which section 10 was based, had been amended by legislation enacted in 1965 to exempt the personal representative from mailing a copy of a will to himself if he was also a legatee or devisee. [Note: See chapter 514, Oregon Laws 1965.]

Dickson assigned to Bettis and Krause the task of preparing a revision of section 10, taking into consideration the adopted motion made by Bettis and subsequent discussion thereof, and of submitting it to the committees for consideration.

In response to a question by Hornecker, Lundy noted that

the matter of notice to the State Land Board of initiation of an estate proceeding had been discussed at the January meeting in connection with paragraph c of section 3 of the draft. [Note: See Minutes, Probate Advisory Committee, 1/14,15/66, pages 24 and 25.] It was pointed out that paragraph c of section 3 provided that if the petition for appointment of an administrator did not set forth the name of any heir, the petitioner should serve upon the Land Board a copy of the petition, with no order appointing the administrator granted until after proof of such service.

Dickson suggested that provision for notice to the State Land Board might be included in section 10 of the draft, as revised by Bettis and Krause. Zollinger commented that he saw no reason to mail a copy of a will to the Land Board, even though the testator left no heirs, and suggested that the notice to the Land Board of a proceeding to appoint an administrator when there were no heirs, as specified in paragraph c of section 3, was sufficient.

Braun pointed out that in the discussion of paragraph c of section 3 at the January meeting doubt was expressed as to the necessity of notifying the State Land Board before appointment of an administrator, and indicated that she favored notice to the Land Board at the same time as notice under section 10. In response to a question by Allison, Zollinger expressed the view that the Land Board probably could contest a will as an interested person under section 7 of the draft. Butler stated that he was not in favor of providing for notice to the Land Board; that such a requirement was a further complication of probate proceedings and an extra detail for a personal representative to remember.

Gooding moved, seconded by Thalhofer, that paragraph c of section 3 be approved as the only notice to the State Land Board. On a vote by the advisory committee only, motion failed.

Zollinger moved, seconded by Butler, that paragraph c of section 3 be deleted. Motion carried.

Gooding moved that the substance of paragraph c of section 3 be incorporated in section 10 and taken into consideration in the revision thereof by Bettis and Krause. Butler moved to amend Gooding's motion by adding the limitation that notice to the State Land Board be given only in intestate situations. Gooding accepted Butler's amendment, and Thalhofer seconded the amended motion. In response to a question by Allison, Bettis interpreted the effect of the amended motion to be that the Land Board should be notified

after appointment of an administrator if there were no heirs, legatees or devisees. Allison commented that it would be desirable to obtain the reaction of the Land Board to a change in the time and kind of notice to it. He suggested that the Land Board probably desired notice before appointment of an administrator in the case of probable escheat in order to be able to take action necessary to protect property that might escheat, and that the Land Board's interest in this regard probably was proper. Dickson, Thalsofer and Warden indicated that in their experience the Land Board had not participated in proceedings for appointment of administrators.

Zollinger requested a division of the question on Gooding's motion as amended, and Dickson submitted the motion in two parts. On the first part (i.e., incorporation of the substance of paragraph c of section 3 in section 10, with reference to Bettis and Krause for revision), motion carried. On the second part (i.e., limiting notice to the State Land Board to intestate situations), motion carried.

Lundy commented that he sometimes had occasion to converse on an informal and unofficial basis with the Clerk of the State Land Board, and asked whether, in the course of such a conversation, he should attempt to ascertain the reaction of the Clerk to the proposal on notice to the Land Board just approved by the committees. It was agreed that Lundy should do this.

Appointment of special administrator (section 11).
Dickson referred to section 11 of the draft, relating to appointment of special administrators, and commented that there was frequent need for a special administrator to handle the matter of burial and certain minor details involved when the coroner had the unclaimed body of a decedent. Krause remarked that section 11 did not appear to be applicable in the situation described by Dickson, since there probably was no property of the decedent in danger of being lost, injured or depreciated.

Zollinger expressed the view that the function of a special administrator should be to preserve a decedent's estate likely to suffer loss or injury by reason of lapse of time before appointment of a regular personal representative, and that the authority of the special administrator should be limited to that necessary to perform this function. He suggested, and Jaureguy agreed, that section 11 should specify that the special administrator take charge of the property in danger of being lost, injured or depreciated, rather than all of the estate.

Lundy referred to the present statute on appointment of temporary guardians (i.e., ORS 126.141), and asked if there was any similarity between the function of a temporary guardian and a special administrator. He pointed out that, under ORS 126.141, a temporary guardian was subject to terms and conditions prescribed by the court in the order of appointment.

Dickson suggested, and Allison agreed, that section 11 needed some revision and that the matter of proper provision for special administrators should be referred to a member for redrafting and submission to the committees for consideration at the Saturday session of the meeting. Zollinger commented that the revision of section 11 should encompass provision limiting the function of a special administrator to property in danger of being lost or injured and some provision for disposal of the body of the decedent. Dickson assigned to Zollinger the task of revising section 11.

Proceedings when will found after administration granted (section 12). Krause moved, seconded by Bettis, that section 12 of the draft, relating to proceedings when a will was found and proven after administration had been granted, be approved. Motion carried.

Richardson pointed out that his revision of section 9 of the draft, pursuant to the assignment previously made to him, might necessitate some change in the wording of section 12. Dickson added the matter of necessary revision of section 12 to Richardson's assignment as to section 9.

Publication of notice by executor or administrator (section 13). Husband asked whether some clarification of the matter of notice to creditors was needed in the situation in which a will had been admitted to probate, the executor had published the notice and then a later will was found and proven. Zollinger remarked that a similar problem would arise in situations under section 12 of the draft or otherwise when one personal representative replaced another. He suggested that perhaps the new personal representative should publish a new notice to creditors, but with some time limitation thereon taking into consideration the notice published by the previous personal representative. He called attention to section 11.40.150, 1965 Washington Probate Code, which reads as follows:

"In case of resignation, death or removal for any cause of any personal representative, and the appointment of another or others, after notice has been given by publication as required by RCW 11.40.010, by such personal representative first appointed, to persons to file their claims against the

decedent, it shall be the duty of the successor or personal representative to cause notice of such resignation, death or removal and such new appointment to be published two successive weeks in a legal newspaper published in the county in which the estate is being administered, but the time between the resignation, death or removal and such publication shall be added to the time within which claims shall be filed as fixed by the published notice to creditors unless such time shall have expired before such resignation or removal or death: PROVIDED, HOWEVER, That no such notice shall be required if the period for filing claims was fully expired during the time that the former personal representative was qualified."

Allison noted that the committees had previously approved a combined published notice to heirs and creditors, and asked whether in the substituted personal representative situation new notice to heirs as well as creditors would be necessary. Dickson commented, and Allison agreed, that the situations referred to were of frequent occurrence, and that the notice aspects thereof should be clarified. Dickson assigned the task of proposing such clarification and necessary revision of section 13 of the draft to Bettis and Krause, who had previously been assigned the matter of notice and the revision of section 10 of the draft.

The meeting was recessed at 5:20 p. m.

The meeting was reconvened at 9:10 a.m., Saturday, February 19, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Carson, Frohnmayer, Gooding, Husband, Jaureguy and Mapp.

The following members of the Bar committee were present: Bettis, Braun, Hornecker, Krause, Lovett, Richardson, Thalhofer (arrived 11 a.m.) and Warden.

Also present was Lundy.

Initiation of Probate or Administration (continued)

Copy of will and of order to heirs, legatees and devisees (section 10). Dickson noted that there had been a considerable amount of discussion on section 10 of the draft and generally on the matter of notice of initiation of administration of

decedents' estates at the meeting the previous day, and some disagreement among members as to whether such notice should be required and, if so, the nature thereof. He commented that this matter of notice had been a controversial one with Bar committees over the years. He pointed out that Bettis and Krause had been requested to prepare a proposal on the subject for consideration at the joint meeting of the committees in March, and suggested that certain other members might be asked to act as dissenters to that proposal. Dickson appointed Allison, Carson and Zollinger as a subcommittee of dissenters to offer criticism of the Bettis and Krause proposal and to prepare and submit an alternative proposal. Zollinger requested that copies of the Bettis and Krause proposal be sent to members of the subcommittee of dissenters within the next three weeks.

Dickson remarked, on behalf of the members who were judges, that the probate courts should not be involved in the matter of notice of initiation of probate or administration, for example as recipients of requests from heirs for copies of wills. He expressed the view that such notice should be the responsibility of personal representatives or their attorneys.

Appointment of special administrator (section 11).
Zollinger noted that at the meeting the previous day he had been assigned the task of preparing a revision of section 11 of the draft, relating to appointment of special administrators, and proceeded to distribute to members present copies of his revision, which read as follows:

"Section 11. Appointment of Special Administrator

"If any property of a decedent is in danger of being lost, injured or depreciated pending the appointment and qualification of a personal representative of the estate of the decedent, the court may appoint a special administrator to take charge of such property. The petition for his appointment shall specify the property subject to such danger and the danger to which it is subject. He shall qualify by giving bond approved by the court in such amount as the court shall require, conditioned upon the faithful performance of his duties. He may incur expenses for the funeral and burial or other disposition of the remains of the decedent in a manner suitable to the condition in life of the decedent and for the protection of any property of the estate of the decedent against danger of loss or injury. He may sell perishable property of the

estate of the decedent to prevent loss from deterioration. A special administrator shall not approve or reject creditor's claims or pay claims or expenses of administration or take possession of assets of the decedent's estate other than those which are in danger of being lost, injured or impaired pending the appointment and qualification of a personal representative. Upon the appointment and qualification of a personal representative of the decedent the powers of the special administrator shall cease and he shall make and file his final account and deliver to the personal representative assets of the estate in his possession. If the personal representative shall object to the final account of the special administrator, the court shall hear such objections and, whether or not objections be interposed, shall examine such final account. To the extent approved by the court, the reasonable fees of the special administrator and all expenses properly incurred by him, including the reasonable fees of his attorneys, shall be paid by the personal representative as expenses of administration."

Zollinger commented that revised section 11 reflected his idea of the role of a special administrator, which should be to function only in those circumstances where certain matters could not be delayed until appointment of a regular personal representative. In response to a question by Dickson, Zollinger indicated that the principal difference between the revised section and provisions on the same subject found in the probate codes of other states was that the latter usually authorized a special administrator to take possession of all assets of the estate. Dickson expressed the view that the revised section would satisfactorily resolve the problem he had raised the previous day as to unclaimed bodies of decedents in the custody of the coroner.

Allison suggested, and Dickson agreed, that the account of a special administrator should not be referred to as a "final" account. Zollinger indicated he had no objection to deletion of "final" before "account" in revised section 11.

Allison noted that the first reference to property of a decedent in revised section 11 employed the phrase "lost, injured or depreciated," while subsequent references used "loss or injury" and "lost, injured or impaired," and suggested that the terminology on the danger to property should be the same throughout the section. He also suggested, and Zollinger agreed, that "deteriorated" should be substituted for "depreciated." Carson suggested that the authority of a

special administrator to sell perishable property be conditioned on prevention of "loss, injury or deterioration," rather than "loss from deterioration," and Zollinger remarked that he did not object to this broadening of the condition.

Jaureguy commented that revised section 11 gave him the impression that a special administrator could sell perishable property and exercise other powers without court orders of approval, and expressed the view that a special administrator should be subject to court supervision to the same extent as a regular personal representative. Frohnmayer suggested that sale of perishable property should be subject to court approval, but, in response to a question by Zollinger, expressed the view, with which there appeared to be general agreement, that the exercise of other powers, such as funeral arrangements and incurring expense to protect property against loss, need not be conditioned on court orders.

In response to a question by Husband, Zollinger indicated that the matter of who was qualified to be appointed as special administrator should be left to the discretion of the court.

Richardson noted that revised section 11 required that the petition for appointment of a special administrator specify the property subject to danger, and asked whether a special administrator would be able to protect property not mentioned in the petition but later discovered to be in danger. Zollinger responded that he had this matter in mind when he prepared the revised section, and pointed out that the authority of the special administrator described in the section was not limited to that property described in the petition. He expressed his opinion, with which Frohnmayer agreed, that the section was sufficiently clear on this point, but indicated that he was willing to leave any necessary clarification to Lundy, such as insertion of "so far as known" after "property" in the sentence on the petition, or insertion of "any" before "perishable" or "whether or not listed in the petition" after "decedent" in the sentence on the authority to sell.

Allison moved, seconded by Jaureguy, that revised section 11, with the suggested changes, be approved. Motion carried.

Dickson commented that revised section 11 perhaps should precede the sections on appointment of regular personal

representatives in the arrangement of the proposed revised probate code.

Advancements

Frohnmayr referred to and commented upon his report on advancements, which had been distributed to members of both committees prior to the December meeting. [Note: A copy of this report is contained in the Appendix to these minutes.]

Frohnmayr pointed out that section 1 of the draft set forth in his report on advancements, unlike comparable provisions of the Iowa, Washington and Model Probate Codes, did not limit the doctrine of advancements to persons entitled to inherit at the time advancement was made, but specified that the doctrine was applicable to any person entitled to inherit, which would include persons not heirs at the time of advancement but subsequently becoming heirs before the death of the intestate.

Frohnmayr commented that a surviving spouse presumably would be a "person entitled to inherit" referred to in section 1 of the draft, and referred to ORS 111.130, whereby an advancement to issue of an intestate is excluded in computing the part to be given to the surviving spouse. He noted that the committees previously had agreed to retain ORS 111.130 in the proposed revised probate code, with amendment substituting "surviving spouse" for "widow" and "share to which the surviving spouse is entitled" for "part to be given to the widow, but the widow shall only be entitled to receive the one-half of the residue, after deducting the value of the advancement." [Note: See section 10, Committee Proposal #6.] He expressed the view that amended ORS 111.130 would cause undue complication of the scheme of computation under the proposed advancement statutes, and suggested that amended ORS 111.130 be deleted. He posed the situation of an intestate with a \$50,000 estate survived by one son, who had received a \$25,000 advancement, and a widow, and explained that, in this situation, if amended ORS 111.130 were retained, the widow would receive \$25,000, whereas if amended ORS 111.130 were deleted, the widow would receive \$37,500 pursuant to section 1 of the draft. Allison moved, seconded by Zollinger, that the previous action retaining amended ORS 111.130 be rescinded and that the amended section be deleted. Motion carried.

Frohnmayr posed two other situations and explained the application of section 1 of the draft thereto. In the situation of an intestate with a \$50,000 estate survived only by four sons, one of whom had received a \$10,000

advancement, he pointed out that the son who received the advancement would receive \$5,000 of the intestate estate and the other three sons would receive \$15,000 each. Frohnmayer noted that if, in the same situation, the advancement to the one son had been \$25,000, that one son would receive nothing from the intestate estate and each of the other three sons would receive one-third of \$50,000.

Frohnmayer stated that section 1 of the draft limited the doctrine of advancements to intestacy as to the entire estate, and, in response to a question by Jaureguy, commented that one reason for such a limitation probably was complication in attempting to apply the doctrine in cases of partial intestacy. Mapp expressed the view that advancements should be considered in partial intestacy situations. He suggested that, in view of the requirement of ORS 111.120 and section 2 of the draft that an advancement be evidenced in writing, the theory need not be employed that a decedent who had disposed of any of his property will was presumed to have made all such disposition he desired. He remarked that a testator might deliberately make an advancement to apply against an intestate share. Allison and Zollinger indicated that they favored application of the advancements doctrine in partial intestacy, and Carson and Frohnmayer, on the theory that existence of a will should rule out the statutory presumption of intent which formed the basis for the doctrine, expressed opposition. Allison moved, seconded by Zollinger, that section 1 of the draft be amended to make it applicable to partial as well as entire intestacy, and that the section be approved as so amended. On a vote by the advisory committee only, motion failed.

Frohnmayer moved, seconded by Carson, that section 1 of the draft be approved without change. Motion carried.

Frohnmayer pointed out that section 2 of the draft was comparable to ORS 111.120 in requiring written evidence of advancement, and asked if the requirement of written evidence should be perpetuated. Allison expressed the view that written evidence of advancement should be required, noting that the doctrine of advancements was based on presumed intention of a decedent and suggesting that intention of absolute gift was more common than intention of advancement and that if a decedent desired that a gift be an advancement, he should so specify in writing. Zollinger commented that the question was whether it was more desirable to have the certainty of the written evidence rule than to allow other proof of the actual fact situation. He indicated that he favored the approach of the pertinent provision of the 1963 Iowa Probate Code (section 224) that a

gratuitous inter vivos gift was presumed an absolute gift and not an advancement, but that this presumption was rebuttable. In response to a question by Frohnmayer, Lundy stated that section 11.04.041, 1965 Washington Probate Code, included a provision substantially the same as the Iowa provision. Richardson indicated his agreement with Zollinger's position as to consideration of evidence other than written in determining whether an advancement had been intended. Zollinger moved, seconded by Richardson, that the Iowa provision be substituted for section 2 of the draft. On a vote by the advisory committee only, motion failed.

Frohnmayer moved, seconded by Zollinger, that section 2 be amended by substituting "advanee" for "donee," and approved as so amended. Motion carried.

Frohnmayer moved, seconded by Zollinger, that section 3 of the draft be approved without change. Motion carried.

Zollinger referred to section 4 of the draft, providing that an advancement was to be valued as of the time made, and asked whether it was not more reasonable to value an advancement as of the time of the decedent's death. Allison, Dickson and Frohnmayer expressed their opinions that valuation as of the time an advancement was made was more reasonable, and that consideration of increases or decreases in value subsequent to the time of making an advancement would result in inequities and create problems outweighing any advantages of such consideration. Frohnmayer noted that the Iowa provision (section 225, 1963 Iowa Probate Code) specified valuation of an advancement as of the time when the advancee came into possession or enjoyment or as of the date of death of the intestate, whichever occurred first. Frohnmayer moved, seconded by Allison, that section 4 of the draft be approved without change. Motion carried.

Frohnmayer moved, seconded by Zollinger, that a section repealing ORS 111.110 to 111.170, inclusive, be added to the draft. Motion carried.

Retainer

Frohnmayer referred to and commented upon his report on retainer, which had been distributed to members of both committees prior to the December meeting. [Note: A copy of this report is contained in the Appendix to these minutes.] He called attention to the differences between the Iowa (section 471, 1963 Iowa Probate Code) and Model Probate Code (section 187) provisions on retainer set forth in his report.

He noted that the Iowa provision applied to indebted distributees and distributees taking as heirs of deceased indebted legatees or devisees, whereas the Model provision applied only to indebted distributees. He pointed out that the Iowa provision made retainer prior and superior to other rights against distributees and not barred by statutes of limitations or discharge in bankruptcy, while the Model provision made distributees entitled to any defense that would be available in direct proceedings against them for recovery of the debts.

Richardson commented that neither the Iowa nor Model provision appeared to cover the situation involving a beneficiary of a testamentary trust who was indebted to the estate, since the beneficiary would not be a distributee. He expressed the view that the factual situations involving persons benefiting from an estate who were indebted thereto were so varied that it would be almost impossible to codify the rules of retainer to be applied in each case, and suggested that the proposed statute on retainer specify that it was not complete in its coverage of retainer situations. Allison remarked, and Richardson agreed, that not in every instance of a testamentary trust would a beneficiary thereunder in fact receive anything, as, for example, in the case where a beneficiary dies before receiving anything under a trust or in the case of a discretionary trust. Zollinger suggested that retainer be limited to distributees and not apply to the trust situation.

Zollinger moved, seconded by Frohnmayer, that the doctrine of retainer be limited to those cases in which a distributee was indebted to the decedent's estate. Motion carried.

Zollinger remarked that the next question was whether an indebted distributee should be allowed to assert statute of limitations, discharge in bankruptcy and usual defenses available in an action to recover debt under the retainer doctrine, and indicated he was inclined to favor the approach of the Model provision making such defenses so available to the distributee. Allison expressed agreement with Zollinger's view, on the ground that a personal representative should have no better right to recover a debt than the decedent himself. Carson commented that he did not approve the idea of a distributee employing bankruptcy to avoid paying a debt to a decedent who left him an inheritance. In response to a question by Frohnmayer, Zollinger expressed his opinion that the specification in the Iowa provision that retainer was prior and superior to rights of judgment creditors, heirs and assigns of a distributee was an accurate statement of the applicable law whether or not there was retainer.

Frohnmayr noted that the Iowa provision referred to a distributee who took as an heir of a deceased legatee or devisee indebted to the estate, and commented that the meaning of this reference was somewhat obscure. Carson suggested that the reference might contemplate a situation in which a distributee took by representation. Richardson remarked that the reference might contemplate a situation involving a testamentary disposition to one person, but if he did not survive the testator, to another person; that is, a substitution or alternative bequest or devise.

Allison moved, seconded by Zollinger, that the Iowa provision on retainer be approved. Motion carried. Zollinger suggested, and it apparently agreed, that the matter of retainer against a distributee who claimed through an heir indebted to the estate should be clarified.

Executors and Administrators Generally

The committees began consideration of a draft of proposed legislation relating to executors and administrators generally and primarily encompassing the matters covered by ORS 115.410 to 115.520, which had been prepared by Hornecker and Krause, with assistance by Gilley, and distributed in the form of a report to members of both committees present at the meeting.

Qualifications of executors and administrators (first section). Hornecker referred to the first section of the draft, relating to qualifications of executors and administrators, and commented that "personal representative" should be substituted for "executor or administrator" in this and other sections of the draft. He noted that the comparable Washington provision on qualifications of personal representatives was section 11.36.010, 1965 Washington Probate Code.

Husband referred to subsection (5) of the first section, under which a nonresident could be a personal representative if he appointed a resident agent to accept service, and commented that he had approved such a provision as to guardians (ORS 126.161(5)), but questioned whether it was desirable as to personal representatives. It was pointed out that such a provision on nonresident personal representatives appeared in section 96, Model Probate Code, and Richardson indicated that nonresidents were allowed to serve as personal representatives in California and Washington. Zollinger expressed the view, with which Dickson agreed, that nonresidents should be allowed to act as personal representatives;

that this was as appropriate in the case of personal representatives as in the case of guardians.

Frohnmayr suggested that a nonresident personal representative should be required to file a bond in all cases, and Zollinger indicated he would not object to such a requirement. The location of such a requirement was discussed, and insertion of the requirement in the first section, in the second section or in both was suggested. Frohnmayr proposed insertion of "who has failed to file a bond or" after "state" in subsection (5) of the first section, and insertion of "or in any event upon the appointment of a nonresident of this state who has failed to file a bond" after "estate" in subsection (4) of the second section.

Dickson noted that the first section did not continue the disqualification of judicial officers to be personal representatives as provided in ORS 115.410, and asked whether judicial officers should not be so disqualified. Zollinger expressed the view, with which Frohnmayr agreed, that there were some circumstances in which a judge should be allowed to serve as personal representative and that this matter should be determined on an individual basis. Dickson indicated he favored an across-the-board disqualification, but, in answer to a question by Hornecker, remarked that pro tem judges need not be so disqualified. Husband commented that he recognized the possibility of conflict of interest in a judge serving as personal representative, but expressed the opinion that in most instances judges would decline such service. In response to a question by Braun, Dickson argued that the matter of qualification of judges to serve as personal representatives was a basic one and not of ethics in particular cases. Warden suggested disqualification of probate court judges, and Dickson commented that it was not always clear who was a probate judge, noting that when he was absent any Multnomah County circuit judge could sit as probate judge. Husband suggested, and it apparently was agreed, that a disqualification of Supreme Court, circuit court, district court and county court judges be added to the first section. In response to a question by Lundy, Dickson indicated that the disqualification would apply only to judges of this state.

Allison suggested substitution of "attorney" for "person" in subsection (4) of the first section. Lundy commented that a suspended or disbarred attorney technically was not an "attorney."

Dickson asked whether "finds suitable" in the first

sentence of the first section would adequately cover the situation of an attorney whose activities were being investigated by a Bar grievance committee. Allison asked whether the Bar office maintained a record of resignations by attorneys who were being so investigated. Carson suggested, and Zollinger agreed, that an attorney be disqualified to act as personal representative if he submitted a special resignation when charges of professional misconduct against him were under investigation or disciplinary proceedings were pending, under the rule of admission recently adopted by the Supreme Court (Rule N, adopted September 28, 1965, and published in 82 Advance Sheets No. 1, January 26, 1966). Zollinger commented, and Frohnmayer agreed, that this disqualification provision might specifically refer to this rule on special resignations. Lundy noted that such a reference probably would have to be to the rule as it existed on a particular date. Carson suggested that the disqualification provision contain the wording of the rule rather than refer to the rule as such. There appeared to be general agreement that such a disqualification provision should be added to the first section as a separate subsection, and that the wording thereof should be left to Lundy.

The meeting was recessed at 12:30 p.m.

The meeting was reconvened at 1:45 p.m. All members of the advisory committee, except Butler, Lisbakken and Riddlesbarger, were present. The following members of the Bar committee were present: Bettis, Braun, Field (arrived 2:10 p.m.), Hornecker, Krause, Lovett, Richardson and Thalsofer. Also present was Lundy.

Qualifications of executors and administrators (first section). The committees continued discussion of the first section of the draft, relating to qualifications of executors and administrators. Hornecker noted that one of the grounds for disqualification was conviction of a felony (subsection (3)), but that the first section did not include conviction of a misdemeanor involving moral turpitude, which was a ground for disqualification under ORS 115.410. Zollinger suggested that the court finding of suitability might be sufficient to cover this matter. Richardson commented that the court in most cases probably would not be aware of convictions of misdemeanors involving moral turpitude. He expressed the views that the finding of suitability would not adequately cover this matter and that the disqualification for conviction of such a misdemeanor should be specified if it was intended to have it apply. Lundy pointed out that the meaning of "moral turpitude" was

not clear. Frohnmayer moved, seconded by Zollinger, that specific provision on disqualification for conviction of a misdemeanor involving moral turpitude should not be included in the first section. Motion carried.

Dickson referred to subsection (1) of the first section, and commented that he assumed "incompetent" had the meaning ascribed to it in the guardianship statutes (ORS 126.006(3)). Zollinger expressed the view that the definition of "incompetent" in ORS 126.006(3) was not the meaning that should be given to "incompetent" in describing persons disqualified to be personal representatives. Lundy noted that the definition in ORS 126.006(3) had not been designed particularly for the provision on qualifications of guardians (ORS 126.161), but for description of prospective wards. Jaureguay commented that the court finding of suitability covered "an incompetent." Zollinger responded that suitability and competence were not the same thing. In answer to a question by Lundy, Dickson indicated that the disqualification should include more than mentally ill persons; that spendthrifts, for example, should be included. Lundy suggested the possibility of substituting "a person under legal disability" for "an incompetent" in subsection (1) of the first section.

Hornecker moved, seconded by Richardson, that the first section, with addition of subsections disqualifying attorneys who had submitted special resignations under the rule on admissions previously discussed and judges of the Supreme Court, circuit court, district court and county court of this state, and with insertion of "failed to file a bond" in subsection (5), be approved. Motion carried.

Necessity and amount of bond; bond notwithstanding will (second section). Hornecker referred to the second section of the draft, relating to necessity and amount of bond of a personal representative, and called attention to provisions on bond contained in the 1963 Iowa Probate Code (sections 169 to 187), 1965 Washington Probate Code (sections 11.28.180 to 11.28.235) and Model Probate Code (sections 106 to 119). He suggested that "annual income from the real and personal property" be substituted for "annual rents and profits of and from the property" in paragraphs (a) and (b) of subsection (1) of the section.

Discussion on the second section centered primarily on three issues: (1) Whether bond should be required in all cases, except in certain instances when a will declared otherwise; (2) whether the amount of bond should be more in

the discretion of the court or determined in accordance with the statutory standards as presently provided in ORS 115.430; and (3) whether personal sureties, as well as corporate, should be authorized.

Hornecker noted that, under subsection (5) of the second section, the court was empowered to exercise discretion in decreasing or increasing the amount of a bond. Zollinger expressed the view that the court should have more discretion initially in fixing the amount of a bond. Frohnmayer commented, and Zollinger agreed, that the minimum prescribed in subsection (1) of the second section would be too high in some cases. Bettis expressed his opinion that there were instances in which no bond should be required.

Dickson stated that in his opinion the amount of a bond should be in the discretion of the court and that personal surety bonds should not be authorized. He noted that in many cases the need for protection of the estate was minimal, and that if the court had more discretion in fixing the amount of bond, it could require a minimum bond of \$1,000 in such cases, for which the premium was \$10. Hornecker indicated he opposed allowing the court more discretion in fixing the amount of bond, suggesting that the court in such case would have to rely upon representations by attorneys for estates and in some instances this would result in too little protection for such estates. Dickson remarked that a number of instances in which estates had suffered loss by reason of defalcating personal representative were those in which a will had specified that no bond be required, and expressed the view that protection against dishonesty could not always be assured.

Hornecker also objected to prohibition of personal surety bonds. Husband commented that the use of personal surety bonds had the advantage of reducing expense to the estate. Krause suggested that personal sureties might be permitted in small estates, such as those having a value of less than \$1,000. Allison commented that in some cases personal surety bond afforded no more protection than in cases where a will dispensed with the requirement of bond, and that if a court determined that protection really was needed, it should specify a surety company bond, but otherwise be empowered to allow a personal representative to act without bond.

Zollinger noted that a guardian was required to have a bond "with sufficient surety or sureties, in such amount as the court determines necessary for the protection of

the ward and the estate of the ward, and conditioned upon the faithful discharge by the guardian of his authority and duties according to law," with the bond to be approved by the court (ORS 126.171). He suggested that it might be appropriate to adapt the guardian bond requirement for the personal representative bond requirement. Richardson pointed out that all guardians were required to be bonded, and objected to such a requirement in the case of personal representatives.

In response to a question by Carson, Dickson indicated that he did not favor authorizing the court to dispense with bond altogether, on the ground that this would impose an undue burden on the court, which of necessity had to rely to a considerable extent on information supplied by estate attorneys. Dickson commented, and Jaureguay agreed, that there should be some bond, however small, to protect every estate.

Frohnmayr moved, seconded by Gooding, that the court should require bond in such amount as the court determined necessary, but not less than \$1,000. Motion carried.

Allison asked if anyone had any information as to recoveries or attempted recoveries on personal surety bonds, indicating that he had no knowledge on this matter. He commented that personal sureties usually were friends of the personal representative or perhaps the surviving spouse, and undertook to act as surety as a personal favor. Frohnmayr remarked that in some instances personal sureties became unavailable, and that an advantage of corporate surety bond was that the surety company was likely to maintain close observation of the administration of the estate. Carson expressed the view that use of corporate surety bonds only might lead to increased premiums and more expense to estates. Field noted that surety companies were becoming more concerned about their risk in fiduciary bond matters. Dickson expressed the opinion that corporate surety bond premiums were not likely to increase, especially if satisfactory personal representatives were appointed.

Bettis moved, seconded by Frohnmayr, that the bond required by the court be a corporate surety bond. Motion carried. Zollinger indicated he voted in favor of the motion somewhat reluctantly. Dickson and Zollinger pointed out that the adopted motions on court requirement of bond and on corporate surety bond did not apply when a will declared no bond was required and the court did not override the will on this matter (subsection (4) of the second section).

Carson suggested that the second section should contain some specific criteria for the court to consider, but not be bound by, in fixing the amount of bond of a personal representative. Dickson indicated he would not object to inclusion of such criteria, although he did not believe it necessary. Zollinger suggested that subsection (3) of the section might be used as one such criterion. Frohnmayer commented that such criteria should include the proper performance by the personal representative of his duties, the protection of creditors and beneficiaries of the estate, the size and liquidity of the estate and the income it produced and the probable amount of indebtedness and taxes.

Dickson expressed the view that the petition for probate or appointment of an administrator should contain information to aid the court in fixing the amount of bond. In response to a question by Thalhofer, Lundy pointed out that the committees had agreed previously that the petition should contain "the estimated value of the property belonging to the decedent and sufficient information concerning the value of the property to enable the court to fix the bond, if any." [Note: See Minutes, Probate Advisory Committee, 1/14,15/66, page 20.] Field suggested, and Jaureguy and Dickson agreed, that the petition should include information on the nature of the property of the decedent, as well as the estimated value thereof. Dickson proposed, and it apparently was generally agreed, that the petition should contain, in lieu of the wording quoted above, "the nature and estimated value of the property belonging to the decedent." Richardson commented, and Dickson agreed, that the nature and estimated value of the property should be set forth "so far as known." In response to a question by Braun, Dickson agreed that the court would be relying on information supplied by an estate attorney as to nature and estimated value of property until the inventory was filed.

At this point (3:10 p.m.) Bettis and Krause left the meeting.

Dickson commented that, in view of action previously taken by the committees, subsections (2) and (3) of the second section could be deleted, although they might form the basis for criteria to be considered by the court in fixing the amount of bond. Zollinger noted that subsection (4) should be retained, and recalled that the committees previously had revised the subsection in connection with bond of nonresident personal representatives in all cases. He commented that subsections (5) and (6) still were appropriate and should be retained.

Frohnmayr stated that he and Hornecker would undertake to redraft the second section in accordance with action taken thereon by the committees, and submit the redraft for consideration at the March meeting. Dickson requested that Frohnmayr and Hornecker include the third, fourth and fifth sections of the draft in their redraft, and Frohnmayr agreed to do so.

For the benefit of Frohnmayr and Hornecker, Allison suggested the following revision of subsection (1) of the second section:

"(1) No executor or administrator shall, except as stated in this section, act as such until he files with the clerk of the court a bond executed by a surety company qualified to transact surety business in this state, in favor of all interested parties conditioned upon the executor or administrator faithfully performing the duties of his trust according to law, in an amount within the discretion of the court but not less than \$1,000, having in mind the probable value of the personal property of the estate, the probable value of the annual income from the real and personal property of the estate, and the probable financial liabilities of the estate."

Other bond provisions (third, fourth and fifth sections).
Zollinger suggested that the third section of the draft, relating to when sureties may become severally liable for portions of bond, was not appropriate in view of action taken on the second section and that it could be deleted. He commented that the fourth section, relating to when new and sufficient bond may be required, should be retained.

Zollinger referred to the fifth section of the draft, relating to effect of new bond or failure to give it, and indicated dislike of the provision therein for automatic termination of a personal representative's authority, his removal and revocation of his letters when he failed to give a new bond. Dickson suggested that the second sentence of the fifth section be deleted. He also remarked that the first sentence of the section was not appropriate when an additional bond, rather than a new replacement bond, was required; that is, in the case of additional bond the sureties on the original bond should not be discharged. Frohnmayr suggested, and Dickson and Zollinger agreed, that the first sentence might be unnecessary and could be deleted.

Removal of executor or administrator; grounds and procedure (sixth section). Dickson referred to the sixth

section of the draft, relating to removal of an executor or administrator, and stated that often it was not possible to obtain personal service of citation on a personal representative and that some provision should be made for supplemental or substituted service, perhaps on the personal representative and the surety on his bond in the first instance, and if the personal representative could not be found, on the estate attorney. Allison suggested that if personal service on the personal representative could not be made, notice might be given as ordered by the court.

Husband commented that substituted service when a personal representative could not be found might not satisfy standards of due process for removal of the personal representative. Zollinger expressed the opinion that there was no right to act as personal representative that was protected by due process, and that the court, after reasonable effort was made to notify the personal representative, should be able to remove him. Dickson commented that if a personal representative were to be surcharged, due process would require adequate notice and opportunity to be heard, and that it would be desirable to remove and surcharge in the same proceeding. Zollinger remarked that substituted service on a personal representative's attorney might not satisfy due process for surcharge. Dickson proposed that the court first remove the personal representative and then direct that he account within a certain number of days.

Gooding suggested, and Jaureguy agreed, that "to the probable loss of the applicant or the estate" in the sixth section should be deleted.

Frohnmayr and Hornecker were assigned to redraft the sixth section in accordance with the apparent intent of the committees, and to submit the redraft for consideration at the March meeting. It was also agreed that this assignment should include consideration and any necessary revision of the seventh section (duty of court as to executors and administrators), eighth section (continuation of administration after death, resignation, removal or change of status of executor or administrator), ninth section (rights and powers of remaining or new administrator) and tenth section (resignation of executor or administrator).

Zollinger referred to subsection (2) of the eighth section of the draft, and suggested that the substance thereof might be covered in the banking statutes (ORS chapter 711). Frohnmayr indicated he would check on this matter.

Allison and Dickson commented that, in connection with the tenth section of the draft, the court should approve the resignation of a personal representative and perhaps the personal representative should publish notice of his intention to resign.

Minutes of December and January Meetings

No objection being raised, Dickson ordered that reading of the minutes of the last two meetings (December 17 and 18, 1965, and January 14 and 15, 1966) be dispensed with and that they be approved as submitted.

Next Meeting of Committees

The next joint meeting of the committees was scheduled for Friday, March 18, 1966, at 1:30 p.m., and the following Saturday, March 19, in Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

Matters to be considered at the March meeting were discussed. Dickson recalled that a report and revised draft on inheritance by nonresident aliens by the subcommittee on that subject (Allison, Lisbakken, Lovett, Barrie and Schwabe) previously had been scheduled for consideration at the Friday afternoon session of the March meeting.

Other matters tentatively placed on the agenda for the March meeting were: (1) Revised drafts on bonds and removal, death and resignation of personal representatives by Frohnmayer and Hornecker; (2) a revised draft on issuance and form of letters testamentary and of administration by Richardson; (3) revised drafts on notice of initiation of estate administration by Bettis and Krause and by a subcommittee of dissenters (Allison, Carson and Zollinger); (4) a report on heirship determination, both generally and as to pretermitted heirs, by the subcommittee on the subject (Riddlesbarger, Braun, Gilley, Mapp and Zollinger); (5) a report by Riddlesbarger on the phrase "the validity of which is determinable by the law of this state" in the testamentary additions to trusts draft otherwise approved at the December meeting; (6) consideration of ORS 115.110, 115.130 and 115.990, relating to delivery of wills by custodians or possessors; (7) drafts of revisions of ORS 114.060 and 115.160, relating to foreign wills, by Mapp and Riddlesbarger, and consideration of the Uniform Probate of Foreign Wills Act; and (8) a progress report on probate courts and jurisdiction by the

subcommittee on the subject (Thalhofer, Copenhaver, Field, Gooding and Warden).

Lundy was requested, and he agreed, to send to all members of both committees as soon as possible a list of all matters tentatively scheduled for consideration at the March meeting.

It was decided to postpone consideration of ORS chapter 116, relating to administration of estates, until the April meeting. Zollinger pointed out that preliminary review of ORS chapter 116, except that part relating to claims against estates, had been assigned to Allison, Butler and himself, and that the work had been subdivided as follows: Allison, ORS 116.005 to 116.025, 116.590 and 116.595, plus ORS 113.070 and 120.310 to 120.400; Butler, ORS 116.105 to 116.465; and Zollinger, ORS 116.705 to 116.990.

The meeting was adjourned at 3:45 p. m.

APPENDIX

(Minutes, Probate Advisory Committee Meeting, February 18 &
19, 1966

The following report on advancements and retainer was prepared by Mr. Frohnmayer and distributed to members of the advisory and Bar committees prior to the December meeting:

December 10, 1965

To: All Members of the Probate Law Revision Advisory Committee
and
Oregon State Bar Committee on Probate Law and Procedure

From: Otto J. Frohnmayer

Gentlemen:

Please find enclosed copies of the following:

1. Proposal covering Advancements.
2. Proposal covering Retainer.

These are being sent to you pursuant to the suggestion of Judge Dickson in the event that these subjects will be gotten to at the meeting on December 17 and 18.

Yours very truly

Otto J. Frohnmayer

OJF:lm

encls.

ADVANCEMENTS

A preliminary study and draft of revisions for the Oregon law on advancements was prepared by Mr. Ken Shetterly for the September 18, 1965, meeting of the Advisory Committee. At that meeting it was concluded that the doctrine should logically extend not only to issue of the intestate but also to any heir. The following draft relies mainly on section 310 of the Uniform Probate Code. Mr. Shetterly's draft appears to have followed the Iowa Code. The Iowa code and the new Washington code both follow the Model Probate Code quite

closely. Since the Uniform Code appears to represent the latest thinking on the subject, this draft follows the Uniform Code where it varies from the Model Code.

I suggest that the existing statute provisions: ORS 111.110 to 111.170, inclusive, be repealed and the following language substituted.

Section 1

If a person dies intestate as to his entire estate, property transferred in his lifetime as an advancement to a person entitled to inherit a part of the estate is to be counted toward the advancee's intestate share and to the extent that it does not exceed the intestate share is to be included in computing the estate to be distributed.

Comments

1. This changes present Oregon law by expanding the doctrine to any person taking by intestate succession, as opposed to the present limitation to the issue of the intestate.

2. Since the intestate's share of real and personal property will be the same for all takers under the descent and distribution provisions, there is no need to distinguish as between the real and personal property as is done in present ORS 111.150.

3. This draft, unlike the Iowa, Washington and Model Probate codes, does not specify that the person to whom the advancement was made would have been entitled to inherit a part of the estate had the intestate died at the time of making the advancement. The present draft merely specifies that the doctrine applies to any person entitled to inherit a part of the estate. Hence this draft would expand the doctrine of advancements to apply to persons who would not have been heirs had the intestate died at the time of the advancement but who subsequently become heirs prior to the death of the intestate.

4. Presumably the definition section will specify that a surviving spouse is an "heir." This changes present Oregon law as found in ORS 111.130. The proposed amendment to

ORS 111.130 contained in section 10 of Proposal No. 6 of this committee's proposals to the legislature would seem unduly to complicate the scheme of computation and its omission is suggested.

5. This section specifies that the doctrine of advancements applies only to intestacy and only to a person who dies intestate as to his entire estate. This limitation would not, however, seem to affect the holding of the case of Clark v. Clark, 125 Or 333, 342, 267 P 534, 537, which held that a will might direct that a previous gift be considered an advancement in the determination of the shares into which an estate is to be divided.

Section 2

A gratuitous inter vivos transfer is not an advancement unless the intestate expressed that intention in writing or the donee acknowledged it in writing.

Comments

1. This draft, which follows the Uniform Code, differs from the Iowa, Washington and Model Probate codes (which provide that such presumption is rebuttable) by providing that the presumption of a gift may be accomplished only by writing of the donor or the donee. The Uniform Code is actually in accord with the more limited application of the statute of frauds already extant in Oregon law--ORS 111.120. Since the Uniform Code is later and since it does not change existing Oregon law, it is to be preferred over the Model Code. The early case of Seed v. Jennings, 47 Or 464, 83 P 872 (1905) is in conflict with both the old Oregon statute and this new draft. That case suggested the common law presumption that a voluntary conveyance of property by a parent to a child is presumed to be an advancement, unless it is proved to be a gift. This dictum was contrary to the statutory law in force at the time and would, in any event, seem to be repealed by the suggested version, reversing the presumption and making it rebuttable only by evidence in writing.

Section 3

If the advancee dies before the intestate, leaving a

lineal descendant who takes from the intestate, the advancement is to be taken into account in the same manner as if it had been made to the descendant. If the descendant is entitled to a smaller share of the estate than the advancee would have been entitled, the descendant shall be charged only with the proportion of the advancement as the amount he would have inherited in the absence of the advancement bears to the amount the advancee would have inherited in the absence of the advancement.

Comments

1. This section is a substitute for ORS 111.170. It is virtually identical to the Model Probate Code (section 29(c)), Iowa code (section 226), Washington code (section 11.04.041) and Uniform Probate Code (section 310) provisions. In this way the person to whom an advancement is made is charged for it whether he takes per capita or by representation. See generally, Model Probate Code comment at page 67.

Section 4

An advancement is to be valued as of the time of the advancement.

Comments

1. This adopts subsection (d) of section 310 of the Uniform Probate Code. It represents a change from the Washington, Iowa and Model Probate codes which value the advancement at the time when the advancee came into possession or enjoyment, or at the time of the death of the intestate, whichever first occurs. It also changes present Oregon law (ORS 111.160) which provides for valuation by the donor or donee in any one of three different writings or its estimated value when granted. The former method presents a difficulty in that the writings in which the

valuation may be expressed could conceivably be inconsistent with one another. In 1 Jaureguy & Love, Oregon Probate Law and Practice in sections 41-46, this problem is noted. The authors suggest that the valuation expressed in a deed would control over a differing valuation acknowledged by the donee. The new Uniform Probate Code section here obviates this problem and provides only for an objective determination of the value of the advancement at only one point in time.

RETAINER

It would seem desirable to codify the old common law of "right of retainer," although it has been suggested that this equitable right need not depend on statutory authorization. See Security Inv. Co. v. Miller, 189 Or 246, 218 P 2d 966 (1950). It is suggested that the new provision be fitted into chapter 116 or 117 (dealing with claims against the estate or with the settlement and distribution).

The following are two codifications of the right of retainer:

A. Iowa Probate Code, section 471 reads as follows:

When a distributee of an estate is indebted to the estate, or if a distributee takes as an heir of a deceased devisee indebted to the estate, the amount of such indebtedness, if due, or the present worth of the indebtedness, if not due, shall be treated as an off-set and retained by the personal representative out of any testate or intestate property, real or personal, of the estate to which such distributee is entitled. The right of set-off and retainer shall be prior and superior to the rights of judgment creditors, heirs or assigns of such distributee and shall

not be barred by the statute of limitations nor by a discharge in bankruptcy.

Comment

1. This provision specifically enlarges the provisions of the Model Probate Code (section 187) to include distributees. It specifically make the right of retainer superior to the rights of creditors, heirs or assigns of the distributee and does not permit the right to be barred by lapse of time or discharge in bankruptcy. It codifies present Iowa law.

B. Section 187 of the Model Probate Code reads as follows:

When a distributee of an estate is indebted to the estate, the amount of the indebtedness, if due, or the present worth of the indebtedness, if not due, may be treated as an off-set by the personal representative against any testate or intestate property, real or personal, of the estate to which such distributee is entitled; but such distributee shall be entitled to the benefit of any defense which would be available to him in a direct proceeding for the recovery of such debt.

Comment

1. This substantially follows Ohio law, except for the last clause which follows the Alabama code and marks a departure from the common law rule according to which the right of retainer was permitted with respect to debts barred by the statute of limitations or a discharge in bankruptcy. This prevents litigation which has arisen in connection with these matters. The meaning of "off-set" is very broad (see Model Probate Code, section 144 and comment thereto) and includes unliquidated as well as liquidated claims.

The two sections as presented should give the committee a choice of approaches. The Iowa code gives a broader meaning

to the right. The main differences are with respect to the rights of other claims to the estate property, and with respect to other debts and claims barred by the statute of limitations. For further reference see the following cases dealing with this right:

1. Stanley v. U. S. National Bank, 110 Or 648, 224 P 835 (1924). In this case the legacy to a legatee who was the defaulting administrator of the estate, was deemed automatically set-off by the claims of the other heirs for misappropriated property and was good even as against a bona fide purchaser.

2. Boise Payette Lumber Company v. National Surety Corporation, 167 Or 553, 118 P 2d 1066 (1941).

3. Security Inv. Co. v Miller, 189 Or 246, 218 P 2d 966 (1950).

4. See also as to the right of retainer the following: 1 ALR 991; 30 ALR 775; 75 ALR 878; 110 ALR 1384; 26A CJS Descent and Distribution, section 711; 53 Calif. L. Rev. 224 (March 1965).

MEMORANDUM
February 7, 1966

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Robert W. Lundy
Chief Deputy Legislative Counsel

Subject: Rights of nonresident aliens to take property by
succession or testamentary disposition (ORS 111.070).

At the joint meeting of the Advisory and Bar Committees on December 17, 1965, a subcommittee was appointed to prepare and submit to the committees at their joint meeting in February 1966 proposed legislation on inheritance by nonresident aliens. See Minutes, Probate Advisory Committee, 12/17,18/65, page 4. Members of the subcommittee are Mr. Stanton W. Allison, Miss Patricia A. Lisbakken, Mr. Charles M. Lovett, Mr. Walter L. Barrie and Mr. Peter A. Schwabe.

In letters addressed to Judge William L. Dickson and dated January 21 and 22, 1966, Mr. Schwabe set forth a draft of a proposed statute on inheritance by nonresident aliens and commented thereon. This memorandum contains the substance of that draft, with certain changes in form and style, and comment, for consideration at the meeting to be held Friday, February 18, 1966. It was my thought that this memorandum would present the contents of those letters in a form more convenient for such consideration than copies of the letters themselves.

Mr. Schwabe's Draft

Section 1. (1) Where it shall appear to the probate court at the time of distribution of an estate that an alien heir, legatee, devisee or distributee not residing within the United States or its territories would not have the benefit or use or control of the money or other property due him, the probate court may order that the administrator or executor

of said estate sell and convert said property into cash and that the money due said alien be deposited to his credit at interest in a savings account in a bank or banks in the State of Oregon. The passbook or other evidence of such deposit shall be delivered to the clerk of the court. Such sales of property other than cash shall be made pursuant to the procedure prescribed by the statutes for the sales of real and personal property by the guardian of the estate of a nonresident spendthrift. The money to be deposited shall be subject to the expenses of such sales and such sums as the court may fix and allow for the services of the administrator or executor, his attorney and an attorney or attorney in fact, if any, representing the alien in said proceeding.

(2) (a) Any money so deposited shall be withdrawn and disposed over only upon the order of the court which ordered the deposit. A petition for an order authorizing withdrawal shall be filed by the heir, legatee, devisee or distributee and shall allege that at the time of filing said petition he would have the benefit or use or control of the money. The court shall fix a time and date certain for the hearing of said petition and shall order that notice thereof be given in the manner as provided by law for the giving of notice of the hearing on the final account of an executor or administrator and notice of said hearing shall further be given not less than twenty days prior thereto to the State Land Board of Oregon and to the bank or banks in which said

funds are deposited.

(b) If at such hearing the court determines that the petitioner would have the benefit or use or control of said money, the court shall make an order that the money, including the interest accrued thereon, be withdrawn and paid over to the petitioner or to his attorney in fact, subject to the costs and expenses of the recovery proceeding as allowed and approved by the court.

(3) In the event the alien heir, legatee, devisee or distributee shall die prior to receiving the money on deposit to his credit, a withdrawal petition as provided in subsection (2) of this section may be filed by the personal representative of his estate appointed by the probate court in which the original decedent's estate from which the money was derived was administered. Such petition shall allege that the person in whose name the money is on deposit would, if then living, have the benefit or use or control of said money. In all other respects the procedure shall be the same as if the petition were filed by the heir, legatee, devisee or distributee himself.

(4) If no petition for withdrawal of any money so on deposit is filed either by the heir, legatee, devisee or distributee himself, or, if he has died, by the personal representative of his estate as provided in subsection (3) of this section, within twenty years from the date of the entry of the order directing the deposit, such money,

including the interest accrued thereon, shall be disposed of as escheated property.

Section 2. ORS 111.070 is repealed.

Mr. Schwabe's Comment

In his letter of January 21, Mr. Schwabe stated:

"Pursuant to Mr. Allison's letter to me of December 20, 1965, I have now prepared and respectfully submit herewith draft of a proposed statute to replace ORS 111.070. In this I have, basically, adopted the custodial, withholding principle of the New York, Pennsylvania and Massachusetts statutes, and have endeavored to incorporate the view and desires of the joint committees as reflected on pages one to four of the Minutes of the Joint Meeting held on December 17, 1965. I did deem it advisable to include specific procedural provisions for lack of which the statutes of the other states have been much criticized."

"I trust that the above [i.e., his draft] is in fact along the lines of the committees' thinking and desires and shall of course be pleased to furnish any information or explanation that may be called for. Also I shall be pleased to make any changes or revisions that may be requested and to appear again before the committees if that might aid in the committees' work."

"I should perhaps explain that the references to attorneys in fact were included in the proposed statute for the reason that it may be presumed that in most instances the alien heirs would appear and act through the consular officials of their country as their attorney in fact."

The third sentence of subsection (1) of section 1 of Mr. Schwabe's draft as set forth in his letter of January 21 read as follows:

"Such sales of property other than cash shall be made pursuant to the procedure prescribed by the statutes for the sales of real and personal property by executors or administrators of decedents' estates."

Inheritance by nonresident aliens
Memorandum, 2/7/66
Page 5

In his letter of January 22, Mr. Schwabe referred to the above sentence and stated:

"Since my letter of yesterday it has occurred to me that the provision in the next to the last line on page one that such sales are to be made pursuant to the procedure for the sales of real and personal property by executors or administrators of decedents' estates' might not only raise some problems but be unnecessarily cumbersome and costly. It seems to me that the procedure for the sale of property by a guardian would be much more practical, particularly ORS 126.471 pertaining to a spendthrift ward, as much trouble, time and expense could be saved by having the non-resident alien heir execute a consent to the sale."

REPORT
January 14, 1966

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Gregory T. Hornecker and Donald G. Krause

Subject: Rough Draft on Executors and Administrators
Generally

One of the matters currently under consideration by the Advisory and Bar Committees is revision of ORS chapter 115, relating to initiation of probate or administration and executors and administrators generally.

This report contains a rough draft of a suggested revision of the last part of ORS chapter 115 (i.e., ORS 115.410 to 115.520), relating to executors and administrators generally.

EXECUTORS AND ADMINISTRATORS GENERALLY

Qualifications of executors or administrators. Any qualified person whom the court finds suitable may serve as an executor or administrator. A person is not qualified to serve as an executor or administrator who is:

- (1) An incompetent.
- (2) A minor.
- (3) A person who has been convicted of a felony.
- (4) A person suspended for misconduct or disbarred from the practice of law, during the period of suspension or disbarment.
- (5) A nonresident of this state who has not appointed a resident agent to accept service of summons and process in all actions, suits and proceedings with respect to his

trust and has caused the appointment to be filed in the probate proceedings.

NOTE: This section contains the substance of ORS 126.161 pertaining to the qualifications of guardians and deletes the reference in ORS 115.410 to nonresidents of this state, judicial officers, other than justices of the peace, persons of unsound mind and persons who have been convicted of a misdemeanor involving moral turpitude.

Necessity and amount of bond; bond notwithstanding

will. (1) No executor or administrator shall, except as stated in this section, act as such until he files with the clerk of the court a bond in favor of all interested parties conditioned upon the executor or administrator faithfully performing the duties of his trust according to law, in an amount and with sureties as follows:

(a) With one or more sufficient personal sureties approved by the court, in a sum not less than double the probable value of the personal property of the estate, plus double the probable value of the annual rents and profits of and from the (real) property of the estate; or

(b) If the bond is executed by a surety company qualified to transact surety business in this state, then in a sum not less than the probable value of the personal property of the estate plus the probable value of the annual rents and profits of and from the property of the estate.

(2) When there are securities registered in the decedent's name, which may not be sold or transferred of

record by the executor or administrator without an order of court authorizing such sale or transfer, the required bond shall be based only upon the estimated income to be derived from such securities during the period of administration, unless such securities are ordered by the court to be sold, at which time a further bond shall be required by the court for the full value thereof.

(3) When money of the estate is deposited in a bank or saving and loan association under an arrangement whereby it cannot be withdrawn by the executor or administrator without an order of court authorizing such withdrawal, the required bond shall be based upon only the estimated interest on such deposit unless all or part of such money be ordered withdrawn by the court at which time a further bond shall be required by the court for the money so ordered withdrawn.

(4) When a will declares that no bond shall be required of the executor, he may act upon taking an oath faithfully to perform his trust, without filing a bond. Notwithstanding such provisions in a will, the court may, at any time in its discretion, on its own motion upon the petition of any person interested in the estate, require such executor to give the bond required by this section.

(5) If, upon filing the inventory, or at any time thereafter, it appears to the satisfaction of the court that the bond of the executor or administrator is different

in amount than required by this section, the court may, by order, reduce or increase the bond accordingly.

(6) Nothing in this section shall affect the provisions of ORS 709.230 and 709.240, relating to a trust company acting as executor or administrator.

NOTE: This is ORS 115.430, substituting, however, the word "bond" for the word "undertaking." See, however, Mr. Gilley's suggested addition to ORS 115.430 (i.e., subsection (3)).

When sureties may become severally liable for portions of bond. When the bond prescribed by ORS 115.430 exceeds \$2,000, three or more sureties may become severally liable for portions of that sum, if the aggregate sum for which such sureties become liable equals the amount provided in the bond.

NOTE: This section contains the substance of ORS 115.440.

When new and sufficient bond may be required. When the amount of an executor's or administrator's bond is insufficient, or the sureties therein or either of them have become nonresidents of this state, or are likely to or have become insolvent, the executor or administrator shall be required to give a new and sufficient bond. The application for such new bond may be made by the court on its own motion or by any heir, legatee, devisee, creditor or other person interested in the estate, and in the manner prescribed in ORS 115.470 for the removal of executors and administrators.

NOTE: This section contains the substance of ORS

115.450 with the addition of the provision that the court may upon its own motion require the executor or administrator to post a new bond.

Effect of new bond or failure to give it. The new bond required under ORS 115.450, when filed and approved, discharges the sureties in the former bond from any liability on account of their principal arising from subsequent acts or omission. When a new bond is required, if the executor or administrator fails to comply with the court's order within five days from the entry or within such further time as the order may prescribe, the authority of such executor or administrator ceases and he is deemed removed and his letters revoked.

NOTE: This provision contains the substance of ORS 115.460 with some wording changes and the continued deletion of the word "undertaking" and substitution of the word "bond."

Removal of executor or administrator; grounds and procedure. Any person interested in the estate may apply for the removal of an executor or administrator who has become disqualified for appointment or who, in any way, has been unfaithful to or neglectful of his trust to the probable loss of the applicant or the estate. Such application shall be by petition and upon citation to the executor or administrator. If the court finds the charge to be true, it shall by order remove such executor or administrator and revoke his letters.

NOTE: This provision contains the substance of ORS 115.470 deleting, however, the reference to

an executor or administrator who becomes a nonresident of this state.

Duty of court as to executors and administrators.

When it appears probable to the court that any of the causes for removal of an executor or administrator exists, the court shall cite the executor or administrator to appear and show cause why he should not be removed, and if he fails to appear or show cause, an order shall be made removing him and revoking his letters. It is the duty of the court to exercise supervisory control over an executor or administrator, to the end that he faithfully and diligently performs the duties of his trust according to law.

NOTE: This is ORS 115.490.

Continuation of administration after death, resignation, removal or change of status of executor or administrator. (1)

When an executor or administrator dies, resigns or is removed, if there is a coexecutor or administrator he shall exercise the powers and perform the duties of the trust. If all the executors or administrators die, resign or are removed, administration of the estate remaining unadministered shall be granted to those next entitled, if they qualify.

(2) When a bank or trust company has been appointed as an executor or administrator, and thereafter is converted as provided by law, or is consolidated with another bank or trust company or sells its trust and fiduciary business or its trust department to another bank or trust company, pursuant to any law permitting such conversion, consolidation or sale, the converted, consolidated or purchasing

bank or trust company shall continue and complete the administration of the estate as though it had been originally appointed as the executor or administrator with all the rights, obligations and responsibilities incident thereto.

NOTE: This is ORS 115.500 with one minor deletion.

Rights and powers of remaining or new administrator.

The surviving or remaining executor or administrator, or the new administrator, is entitled to the exclusive administration of the estate, and may maintain any necessary and proper action, suit or proceeding on account thereof, against the executor or administrator ceasing to act, or against his sureties or representatives.

NOTE: This is ORS 115.510.

Resignation of executor or administrator. The court, in its discretion, may allow an executor or administrator to resign, upon his filing an account of his administration.