

ADVISORY COMMITTEE

Probate Law Revision
fourth

Thirty-~~third~~ Meeting

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

Dates) 1:30 p.m., Friday, March 17, 1967
and : and
Times) 9:00 a.m., Saturday, March 18, 1967
Place : Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland, Oregon

Suggested Agenda

1. Approval of minutes of February meeting.
2. Miscellaneous matters.
3. Ancillary Administration (Mr. Mapp and Mr. Riddlesbarger).
4. Persons Presumed Dead (Mr. Allison and Mrs. Braun).
5. Inheritance Tax (Report by Mr. Carson, Mrs. Braun and Miss Lisbakken).
6. Drafts of the following:
 - (a) Intestate Succession.
 - (b) Wills.
 - (c) Advancements.
 - (d) Effect of Ill&gitimacy.
 - (e) Effect of Adoption.
 - (f) Family Rights.
7. Next meeting.

ADVISORY COMMITTEE
Probate Law Revision

Thirty-fourth Meeting, March 17 and 18, 1967
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The Thirty-fourth 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, March 17, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

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

The following members of the Bar committee were present: Braun, Gilley, Krause, McKay, McKenna (left at 4:30 p.m.), Piazza, Thomas (arrived at 2:10 p.m.), Richardson and Bettis. Biggs, Lovett, Meyers, Kraemer, Mosser, Silven, Thalholfer, Pendergrass, Copenhaver and Warden were absent.

Also present: James Sorte from the staff of Legislative Counsel.

Minutes of February Meeting

There being no objection, the minutes of the last meeting (February 17, 18, 1967) were approved as submitted.

Miscellaneous Matters

Judge Dickson advised the committees that Butler and Judge Thalhofer had called and indicated that they would not be able to attend the meeting. Sorte reported that Carson had called him and indicated that he would not be able to attend the March meeting.

Dickson advised the committees that he had been in contact with Senator Husband, and that Husband indicated the date for hearings on bills in the Senate dealing with estate and tax matters would be held on March 21, 1967, at 3 p.m. Dickson asked for an expression of opinion of the members of the committees as to whether or not the committees should attempt to influence any pending legislation. Zollinger indicated that he would prefer to inform Husband that the committees were aware of

the pending legislation, but that the committees would not sponsor or oppose any of the pending bills. Dickson advised the committees that he would write to Senator Husband and advise him that the committees were aware of the pending legislation, but that the committees felt that they should not take any action at the present time.

Ancillary Administration

Professor Mapp explained to the committees that he had re-drafted his draft of ancillary administration so that it would reflect the action of the committees at the February meeting. He further advised the committees that he had traveled to Portland early Friday to confer with Zollinger concerning some of the wording of the drafts. [Note: The draft is Appendix A to these minutes].

Section 1

Mapp explained that Section 1 of his draft would authorize an Oregon court to admit a will to probate with no further proof than that the will was admitted to probate in the domiciliary state.

Section 2

Mapp explained that the provisions of section 2 provide that if the domiciliary state refused to admit a will this would be binding on the Oregon courts unless the domiciliary refused to admit the will on grounds that would not be grounds for refusal in Oregon.

Zollinger suggested that the following be added as the end of section 2: "This rule shall apply in the absence of collusion or fraud in the rejection of the will in the state of domicile."

There followed a discussion of the extent to which the judgments and decrees of a sister state should be followed. The committees finally agreed that full faith and credit did not require that the Oregon courts defer to judgments and decrees of other states when the judgments and decrees affected land with a situs in Oregon.

Allison asked whether or not the committees had previously voted on the question of what evidence would be required for the admission of a will to probate in an Oregon court. Mapp explained that it was his understanding that the committees had favored admission of a will of a nondomiciliary decedent upon proof that the will had been admitted at the domiciliary court.

Section 3

Mapp read section 3.

Section 4

Mapp read section 4. Dickson asked whether the draft was meant to authorize ancillary administration in both testate and intestate situations and Mapp replied in the affirmative.

Riddlesbarger questioned the title of section 1, and the committees agreed that the title should be "Granting of letters".

Dickson suggested that the draft contain a provision that the proof to a court in Oregon include evidence that the administration in the domiciliary jurisdiction was not closed.

Zollinger indicated that he would also require that the personal representative appoint an attorney for the service of process while the administration was open in Oregon. Zollinger also favored requiring the personal representative to furnish proof of payment of taxes prior to discharge as personal representative.

Mapp read the following revision subsection (1) of section 4: "Any domiciliary personal representative, including a non-resident of this state or a foreign corporation, upon the filing of an authenticated copy of the domiciliary letters with the probate court, may be granted letters in this state."

There followed a discussion of the action taken by the committees at the February meeting with relation to the question of whether or not the committees had decided to allow a foreign corporation to act as personal representative.

Zollinger said that he would have the draft provide that a foreign personal representative be required to appoint an irrevocable power of attorney prior to letters being granted to him. Richardson questioned a requirement that the appointment of a power of attorney be irrevocable. Gilley cited examples of situations where it would be necessary to revoke a power of attorney, as for example if the personal representative became incompetent.

Frohnmayr pointed out to the committees that the present Oregon law provides that a foreign corporation is required to list a registered office and registered agent. He indicated that he would also require that the foreign corporation file their post office address.

Bettis called attention to prior minutes of the committees where the minutes reflected that the committees had previously agreed that any person whom the court finds qualified could serve in the capacity of personal representative. Gilley expressed approval of the previous action and indicated that he felt that the language previously adopted was broad enough to cover the appointment of a personal representative from a sister state.

Section 5

Mapp read section 5. Mapp moved that there be deleted from the draft subsection (2) of section 5. Motion carried.

There followed a discussion of whether or not the term "ancillary personal representative" is appropriate in view of the general tenor of what the committees had approved. Dickson appointed a committee consisting of Zollinger, Carson and Sorte to draft a proposed definition of the term "ancillary personal representative."

Section 6

The committees next considered the type of authentication of documents that should be required for the proof of the admission of a will in the domiciliary state. Zollinger suggested that ORS 115.160 and 28 USC 1739 both required a three-way authentication and that those two sections required more than the section of the draft. Mapp was of the opinion that the usual requirements for authentication require more than is necessary. He pointed out that if the clerk that prepares the certificate is dishonest he could forge all of the authentication anyway.

Frohnmayr asked that the committees take up consideration of what documents would be required to prove a will being probated in a domiciliary jurisdiction. Richardson expressed the view that the committees would have to have certain minimum documents to satisfy the title companies. Allison suggested that the petition should contain the names of the heirs and devisees, and that the proof required should be at least the petition for letters and the order admitting the will to probate in the domiciliary jurisdiction. He indicated that without the names of the heirs and devisees one would not know if there was a praetermitted heir.

Riddlesbarger read the Iowa code section concerning proof of the admission of a will in a foreign state and suggested adoption of the substance of that section.

Frohnmayr pointed out that making copies and transcripts can be an expensive undertaking. He cited as an example taking the will of a citizen of the United States and having it translated into Spanish for probate in a court in Mexico.

Mapp suggested that subsection (1) of section 6 be reworded to read: "Proof required by this act shall be copies of the letters of administration, or of a will and the order admitting it to probate and establishment may be made by copies certified by the attestation of the clerk of the court or other official having custody of the documents."

Zollinger suggested that he would favor requiring that there also be a declaration that there was no contest pending in the domiciliary jurisdiction. He indicated that he did not favor an Oregon court being bound by a determination admitting a will to probate in a sister state.

Allison suggested that in subsection (1) of section 1 following "may be admitted to probate" there should be added "upon petition therefore and upon proof that it stands probated."

Frohnmayr suggested that the committees change section 6 and use the word "certified" in the place of "attested."

Time Schedule for the Proposed Code

There followed a discussion of how the committees should proceed to draft the proposed code. Sorte explained to the committees that he had discussed the matter with Lundy, and it was Lundy's belief that at some point the committees should stop meeting for a period of two or three months to allow a draftsman to put the entire code together. Many of the members of the committees disagreed. It was decided that at the April meetings of the committees all of the areas not previously covered should be covered. Judge Dickson said that by the May meeting he would like a draft of all of the areas covered and at that point the committees could begin the second look at the entire draft of the probate code.

Frohnmayr told that committee that the Uniform Commissioners were planning a six weeks meeting during the summer of 1967 in Colorado Springs, Colorado, and they hoped, after the session in Colorado, that they will have a final uniform draft of a probate code.

Zollinger suggested that if there is a uniform draft by summer perhaps the committees would consider the uniform draft and the draft of the committees, and adopt as much of the language of the uniform drafts as possible.

Dickson indicated that his plan is to have all of the drafts by the May meeting and the same people that drafted a given area could again be assigned to redraft that area. He suggested that without a complete draft it was difficult to remember the exact action the committees had taken.

Ancillary Administration

The committees next discussed whether or not the determination of a sister state that a will be admitted to probate should be binding on an Oregon court.

Piazza favored having the Oregon courts bound by a determination of a sister state admitting a will to probate. McKay was opposed to the Oregon court being bound by an order of a sister state.

Zollinger also moved that the matter of ancillary administration not be contained in a particular chapter of the code, but rather the various provision be placed in whatever chapter to which they related. The motion was seconded and carried.

Riddlesbarger moved that consideration of the matter of ancillary administration be tabled. Braun seconded the motion and the motion carried.

The meeting recessed at 5:40 p.m.

The meeting was reconvened at 9:00 a.m., Saturday, March 18, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

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

The following members of the Bar committee were present: Braun, Gilley, Krause, Meyers, McKay, McKenna (arrived 11:45 a.m.), Piazza, Thomas (arrived 11:00 a.m.), Richardson and Bettis. Absent were Biggs, Lovett, Kraemer, Mosser, Silven, Thalholfer, Pendergrass, Copenhaver and Warden. Also present was Sorte from Legislative Counsel Committee.

Persons Presumed Dead

Allison explained to the committees that at the February meeting he was asked to prepare a new draft on persons presumed dead incorporating into the draft the language of the Uniform

Act. [Note: A copy of this draft, as it was before action by the committees at the March 1967 meeting, is Appendix B to these minutes]. Allison also explained that subsection (2) of the draft was prepared by Pat Braun. He indicated that the time lapse between a person becoming missing and the initiation of a probate is five years in Iowa and Washington.

There followed a discussion concerning the nature of the search that would be required prior to administration of the estate of a missing person. Husband favored the same search as that required prior to publication of summons. Mapp favored a provision that would allow the type of the inquiry to be left up to the descretion of the court. Zollinger favored diligent inquiry. Dickson advised the committees that he had experienced a good deal of success in locating missing persons by sending a letter to the Social Security Administration, containing a stamped, addressed envelope using the name of the missing person as the addressee.

Allison read the proposed draft. Allison explained that the person petitioning for administration is somewhat of a adversary of the missing person. He indicated that the Iowa code provides for the appointment of a third person to represent the missing person.

Dickson suggested that there be added to the first section a requirement that notice be sent as he described earlier and that this notice be sent to the Social Security Administration.

Zollinger suggested that there should be, in the new code, a provision for the appointment of a receiver when there were no facts upon which to base a presumption of death.

The committees then discussed the period of time that should lapse prior to any action by relatives of the missing person. Frohnmayer was of the opinion that the time lapse should be flexible. Allison favored an absolute minimum period of 30 days.

Riddlesbarger asked whether it was the purpose of the committees to have the draft of Allison replace the chapter on persons presumed dead and the chapter on missing persons and Dickson said that was the purpose.

Braun asked whether the date of death is the date of the petition or the date the person became noticed to be missing. Zollinger advised her that the date of death should be the date of the petition. Mapp suggested adding a section setting forth that the court shall hear and determine the date and time of death.

Zollinger moved that the time lapse before the presumption would become operable be shortened from five to three years. Frohnmayer seconded the motion and the motion carried.

A question arose as to whether changing the time lapse prior to operation of the presumption would necessitate amending the statutes on evidence. Dickson appointed Richardson and Mapp to look into the question and report back at the next meeting.

Piazza asked who would pay the costs if a missing person returned. Gilley favored the person petitioning for letters paying the costs if the missing person returned. Riddlesbarger favored charging the estate with the costs. Frohnmayer indicated that the court should determine who would pay costs if the missing person returned. The committees adopted the suggestion of Frohnmayer.

Section VII

The members added to section VII the following: "If the estate has been distributed the absentee may recover the estate or its proceeds from the distributees if either be in their hands."

Piazza, Thomas and McKay indicated that they would not give the absentee any right to recover the estate or its proceeds from the distributees.

Zollinger moved the adoption of the following language to be added to section VII: "If the estate has been distributed, the absentee may recover, upon demand, within five years of distribution, from the distributees, the estate or its proceeds." Motion carried.

The meeting recessed at 12:05 p.m.

The meeting was reconvened at 1:30 p.m. The following members of the advisory committee were present: Dickson, Zollinger, Allison, Frohnmayer, Husband, Jaureguy, Lisbakken (arrived at 3 p.m.), Mapp and Riddlesbarger. The following members of the Bar committee were present: Braun, Gilley, Krause, Meyers, McKenna, Piazza, Thomas, Richardson and Bettis. Also present was Sorte.

The members of the committees continued their discussion of Allison's draft. Zollinger referred the members to section 516 of the Iowa code and suggested that the committees adopt that section. No formal action was taken.

Zollinger suggested that there be a special provision for the contingency of a sale of property jointly owned by the absentee and another. He indicated that in that event the purchaser should acquire good title and the absentee should have a right against the surviving joint tenant, for a period of five years, to recover the proceeds to the extent of the absentee's prior interest. Piazza asked whether the period of time would run from the time of adjudication of death or distribution, and Zollinger indicated that he would favor the time running from adjudication of death.

There followed a discussion concerning which section of the draft should contain the provision suggested by Zollinger and the committee favored section VII.

There followed a discussion of previous action with reference to section VII and Dickson advised the committee that by previous action the following language was added to section VII: "Upon the hearing the court shall determine the fact and date of death and whether the decedent died testate or intestate. The court may grant letters of administration or deny the relief prayed for in the petition."

Allison expressed concern about whether or not there was sufficient provision for the rights of the absentee if he returned.

Frohmayer suggested that when the chapter on estate of absentees is drafted it reflect the committee's decision to incorporate into the draft section 517 of the Iowa code. Allison was of the opinion that ORS chapter 127 contains the same provisions as 517 of the Iowa code.

Section VII (3)

The committees considered the problem of a lien the absentee would have on his property if he returned. Zollinger moved that subsection (3) of section VIII be deleted. Motion carried.

Frohmayer moved that there be deleted from subsection (1) of Section VIII the following: "... whether prosecuted to judgment or otherwise." Motion carried.

Zollinger proposed the following language for subsection (2) of Section VIII: "All judgments or decrees against the personal representative shall constitute a judgment or decree against the absentee if he be alive, but such judgment or decree

may be vacated upon application by the absentee made within three months after he shall have knowledge of its entry, supported by affidavit denying material facts upon which the right of suit or action was based or alleging facts which would constitute a defense. The action or suit shall thereupon be tried upon the issues so made." Motion carried.

Thomas and Mapp were of the opinion that there should be some finality to the judgment or decree and would favor deleting any right in the absentee to vacate the judgment or decree.

Oregon Legislature

Lisbakken reported on legislation pending at the current Legislative Session. One of the bills in committee would require that estate taxes presently payable by the beneficiary would be paid from the residue of the estate unless the will provided to the contrary. A vote of the committees indicated that the members preferred that these taxes be paid by the beneficiaries rather than from the residue of the estate.

Lisbakken called attention to another bill that if passed would remove the requirement of notice to the State Treasurer.

A third bill would provide that the state could deny a deduction of executors and attorney fees from the gross estate if they were found to be unreasonable by the state. The members of the committees expressed the view that they were opposed to such a measure because the court approved executors and attorneys fees.

Another bill provides for the payment of a \$2 fee for copies of tax clearances.

Sorte called attention to the fact that there has been a change made in the Uniform Simultaneous Death Act since the adoption of that Act by Oregon. Dickson appointed a sub-committee of Frohnmayer and Riddlesbarger to study the matter and report to the committees at the April meeting.

Next Meeting

Chairman Dickson directed that the proposed agenda for the April 21, 22, 1967 meeting be as follows:

1. Partial Distribution
2. Inheritance Tax
3. Uniform Simultaneous Death Act
4. Inheritance by Aliens

Adjournment

The meeting was adjourned at 4:20 p. m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, March 17, 18, 1967)
Note: This is the draft without the changes made at the meeting.

REPORT: March 16, 1967

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

From: Thomas W. Mapp

ANCILLARY ADMINISTRATION

Section 1. Ancillary probate based upon domiciliary probate.

(1) The written will of a testator who died domiciled outside this state, which upon probate may operate upon any property in this state, may be admitted to probate upon proof that it stands probated or established in the jurisdiction where the testator died domiciled and is not being contested there. Rights to take against the will are not affected by this section.

Comment: Adapted from §1, Uniform Probate of Foreign Wills Act.

(2) A will offered for probate under this section may, however, be contested for a cause which would be grounds for rejection of a testator who died domiciled in this state.

Section 2. Original probate.

Original probate of the will of a testator who died domiciled outside this state, which upon probate may operate upon any property in this state, may be granted unless the will stands rejected from probate or establishment in the jurisdiction where the testator died domiciled for a cause which would be grounds for rejection of a will of a testator who died domiciled in this state.

Comment: Adapted from §5, Uniform Probate of Foreign Wills Act.

Section 3. Effect of rejection of will at domicile after local probate.

If, after a will has been admitted to probate in this state under section 1 or section 2, the will has been rejected or set

aside in the jurisdiction where the testator died domiciled, for a cause which would be grounds for rejecting or setting aside a will of a testator who died domiciled in this state, probate shall be set aside in this state upon application therefor within the time for contest of wills under the law of the jurisdiction where the testator died domiciled.

Section 4. Granting of ancillary letters.

(1) Any non-corporate domiciliary personal representative, including a nonresident of this state, upon the filing of an authenticated copy of the domiciliary letters with the probate court, may be granted letters in this state.

(2) If application is made for the issuance of letters, any interested person may intervene and petition for the appointment of any person who is eligible under this act or the law of this state. The court may give preference in appointment to the domiciliary personal representative if it finds such preference to be in the best interests of the estate.

(3) No nonresident of this state shall be granted letters until he files with the probate court an irrevocable power of attorney appointing an agent, approved by the court, to accept and be subject to service of process or of notice in any action or proceeding relating to the administration of the estate.

Section 5. Distribution of estate by ancillary personal representative.

(1) If under the law of the jurisdiction where the testator died domiciled the probate or establishment of his will is subject to contest within a period specified after probate or establishment, no property shall be distributed to beneficiaries under the will during such period except upon order of the court. Distribution made by an ancillary personal representative in good faith and pursuant to an order under this subsection operates as a complete discharge to the ancillary personal representative even if the probate or establishment of the will at the domicile is thereafter rejected or set aside for any cause whatever.

(2) No nonresident personal representative may distribute property to beneficiaries of the estate, or be authorized to deliver property to the domiciliary personal representative, until such nonresident personal representative has filed proof with the probate court that any income tax lawfully imposed upon him based upon fees allowed him in this state has been secured or paid.

(3) When administration in this state has been completed and the estate is in a condition to be closed, the court may,

upon application by the ancillary personal representative, authorize the delivery of such property to the domiciliary personal representative as the court finds necessary for the payment of debts, taxes, legacies or other charges upon the estate of the decedent.

Section 6. Authentication and translation.

(1) Proof required by this act of letters, or of a will and the records of judicial proceedings with reference to the probate or establishment thereof, may be made by copies authenticated by the attestation of the clerk of the court, or other official having custody of the documents.

Comment: Adapted from §7 Uniform Probate of Foreign Wills Act.

(2) If the respective documents or any part thereof are not in the English language, verified translations may be attached thereto and shall be regarded as sufficient proof of the contents of the documents unless objection is made thereto. If any person in good faith relies upon probate under this act he shall not thereafter be prejudiced because of inaccuracy of such translations, or because of proceedings to set aside or modify the probate on that ground.

Comment: Based on §7 Uniform Probate of Foreign Wills Act.

Section 7. Application of general law.

Except where special provision is made otherwise, the law of this state relating to wills and to the probate, contest and effect thereof shall apply in the case of a non-domiciliary testator and the law and procedure of this state relating generally to administration and to representatives shall apply to ancillary administration and representatives.

Comment: Based on §1613 New York Probate Code.

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, March 17, 18, 1967)
Note: This is the draft without the changes made at the meeting.

ESTATES OF ABSENTEES

I

Administration may be had upon the estate of an absentee. A petition therefor must allege, in addition to applicable facts required by ORS _____, whether the absentee when last heard from was a resident or nonresident of this state, and his address at his last known domicile; that he has been absent from his last known place of residence for more than five years, and that during all such period he has not been heard from and his whereabouts has been unknown.

II

Administration also may be had upon the estate of an absentee when the petition therefor alleges, in addition to applicable facts required by ORS _____, that his accidental death at a stated time, location, and circumstance is probable but the fact of the death may be in doubt solely by reason of failure to find or identify the remains of the missing person.

III

Upon filing such petition the court shall set a day for hearing not less than thirty days from such order. A copy of the notice of the hearing on said petition shall be sent by registered mail to the last known residence address of the alleged decedent, and to the alleged distributees of his estate.

IV

The court shall appoint some disinterested person as guardian ad litem to appear at such hearing for the absentee. The court may direct the guardian ad litem to make search for the alleged decedent in any manner which the court may deem advisable, including any or all of the following methods:

(a) By inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent;

(b) By notifying officers of justice and public welfare agencies in appropriate locations of the disappearance of the alleged decedent;

- (c) By engaging the services of an investigation agency.

V

Upon the hearing the court shall determine whether the deceased died testate or intestate and shall grant letters accordingly, or on proper grounds may deny the petition. Such order shall, if uncontested or unappealed from, be final, subject to the following exceptions:

(a) The finding of the fact of death shall be conclusive as to the alleged decedent only if (1) the notice of the hearing on the petition for probate or for the appointment of a personal representative is sent by registered mail addressed to the alleged decedent at his last known residence address and (2), the court finds that the search was made as ordered by the court. If such notice is sent and search made, and the alleged decedent is not dead, he may nevertheless at any time recover the estate from the personal representative if it be in his hands, or he may recover the estate or its proceeds from the distributees, if either be in their hands.

VI

Upon the entry of order establishing the death of the absentee, administration of the estate of such absentee, whether testate or intestate, shall proceed as provided for the estates of other decedents, except as provided in this chapter.

VII

The court shall revoke letters of administration at any time upon due and satisfactory proof that the absentee is in fact alive, after which revocation all the powers of the personal representative shall cease, but all receipts or disbursements of assets and other acts by him before revocation shall remain as valid as though such letters had not been revoked. The personal representative shall settle an account of his administration down to the time of such revocation, and shall transfer all assets remaining in his hands to the person for whose estate he had acted, or to his duly authorized agent. In the event a sale of property has been conducted by the personal representative the absentee has no right, title or interest in or to the property sold but only to the proceeds realized therefrom or so much thereof, if any, as remains in the hands of the personal representative upon the closing of the estate of the absentee.

VIII

- (1) After revocation of letters of administration, the

absentee may be substituted as plaintiff in actions and suits brought by the personal representative, whether prosecuted to judgment or otherwise. He may, in actions or suits previously brought against such personal representative, be substituted as defendant, on application filed by him or by the plaintiff therein, but shall not be compelled to go to trial within less than three months from the time of such application.

(2) Judgments or decrees recovered against the personal representative before revocation of letters may be opened upon application by the absentee, made within three months after such revocation, and supported by affidavit, specifically denying, on the knowledge of the affiant, the cause of action or specifically alleging the existence of facts which would constitute a valid defense; but if within the three months such application is not made, or, being made, the facts shown are adjudged an insufficient defense, the judgment or decree shall be conclusive, saving the defendant's right of appeal, as in other cases.

(3) After the substitution of the absentee as defendant in any judgment or decree, it becomes a lien upon his real estate in the county, and so continues as other judgments unless or until it is set aside by the lower court or reversed by the Supreme Court.

IX

The costs attending the issuance of such letters of administration or their revocation shall be paid out of the estate of the absentee, and costs arising upon an application for letters which are not granted, shall be paid by the applicant.