

ADVISORY COMMITTEE
Probate Law Revision

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

Dates) 1:30 p.m., Friday, April 15, 1966
and : and
Times) 9:00 a.m., Saturday, April 16, 1966
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of February and March meetings.
2. Reports on miscellaneous matters.
3. Inheritance by nonresident aliens.
 - a. Time of determination of benefit, use or control in proceeding to withdraw deposit.
 - b. Notice to State Land Board.
4. Establishing foreign wills and ancillary administration.
Report by Mapp and Riddlesbarger, and consideration of Uniform Probate of Foreign Wills Act and Uniform Ancillary Administration of Estates Act.
5. Form of letters testamentary and of administration.
Revised draft on form of letters by Richardson and Zollinger.
6. Support of surviving spouse and minor children; homestead.
Report and recommendation for revision of ORS 113.070, 116.005 to 116.025, 116.590 and 116.595 by Allison.
7. Claims against decedents' estates.
Report and recommendation for revision of ORS 116.510 to 116.595, 117.030 and 117.110 to 117.180 by Gooding.
See: Report from Gooding, dated April 1, 1966, containing "Rough Draft on Claims Against Decedents' Estates."

Report from Gooding on "Creditor's Rights,"
which was distributed in the spring of 1965.

8. Powers and duties of executors and administrators generally; discovery of assets; inventory and appraisal.

Report and recommendation for revision of
ORS 116.105 to 116.465 by Butler.

9. 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-fourth Meeting, April 15 and 16, 1966
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The twenty-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, April 15, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Frohnmayer, Husband, Lisbakken and Mapp (arrived 2:25 p.m.). Carson, Gooding, Jaureguy and Riddlesbarger were absent.

The following members of the Bar committee were present: Bettis, Gilley, Braun, Copenhaver, Krause and Richardson. Boivin, Field, Hornecker, Lovett, Luoma, Rhoten, Tassock, Thalhofer and Warden were absent.

Also present were Peter A. Schwabe, Portland attorney; and Robert W. Lundy, Chief Deputy Legislative Counsel.

Minutes of February and March Meetings

Zollinger moved, and it was seconded, that reading of the minutes of the last two meetings (February 18 and 19, 1966, and March 18 and 19, 1966) be dispensed with and that they be approved as submitted. Motion carried unanimously.

Miscellaneous Matters

Appraisal of decedents' estates. Lundy reported that the Legislative Counsel's office had received a letter from State Representative Edward Branchfield, Medford, new Chairman of the Bar Committee on Law Revision, in which Representative Branchfield indicated he was receiving criticism of the present Oregon statutory method of determining compensation of appraisers of decedents' estates (i.e., ORS 116.425) from real estate appraisers. Lundy noted that Representative Branchfield's letter had been accompanied by letters from Portland officers of the Society of Real Estate Appraisers and American Institute of Real Estate Appraisers, and that the Legislative Counsel's office subsequently had received similar letters from other officers of the

Society of Real Estate Appraisers in Eugene, Portland and Roseburg. Lundy pointed out that the criticism of ORS 116.425 was based on what was thought to be a conflict between the statutory maximum compensation schedule geared to appraised value and a provision of the Code of Ethics of real estate appraisers declaring it unethical for an appraiser "to make his compensation contingent upon the amount of damages which may be decreed by the court deciding the issues from the exercise of the right of eminent domain or other similar issues."

Lundy stated that he had informed Representative Branchfield that the real estate appraiser compensation matter would be brought to the attention of the advisory and Bar committees and had described to Representative Branchfield the bill on appraisal proposed by the committees and introduced, but not enacted, at the 1965 session of the Oregon legislature (i. e. , Senate Bill 308) and the action on that bill by the Senate and House Committees on Judiciary. After brief discussion, Dickson asked Lundy to communicate with the Oregon branches of the Society of Real Estate Appraisers, American Institute of Real Estate Appraisers and National Association of Security Dealers, requesting that these organizations submit, prior to the May meeting of the committees, any suggestions for revision of ORS 116.420 and 116.425 and any comment on Senate Bill 308 (1965) as originally introduced. Lundy also was asked to forward to Butler any suggestions or comment received from real estate appraisers and security dealers.

Wills for minors. Lundy commented that Mr. T. J. Starker, Corvallis, a member of the advisory committee assisting in the Law Improvement Committee's forestry law revision project, had raised, in a conversation with the Legislative Counsel staff member assigned to that project, the question of whether a parent should be authorized to make a will for a minor child; for example, in the instance in which a grandparent had made a substantial outright gift to minor grandchildren, with the possibility that, if the grandchildren and their parents were to die in a common disaster, the gift would return to the grandparent. It was suggested that, in the instance given, the gift to the minor grandchildren should have been in the form of a trust. Problems involved in permitting a parent to make a will for a minor child were noted. No action was taken on this matter.

1965 ORS chapters on probate. Lundy indicated that the 1965 ORS chapters on probate finally were available for distribution to members and insertion in their copies of the Oregon probate code. He distributed sets of the 1965 ORS chapters to members present, and stated he would mail sets to members not present.

Revised probate codes in other states. Lundy commented that he had

completed his assignment to prepare a list of revised probate codes recently enacted in other states, and that copies of this list had been mailed to all members of both committees before the meeting, together with copies of the minutes of the March meeting.

Uniform Simultaneous Death Act. Lundy noted that the committees previously had approved ORS chapter 112 (i.e., the Uniform Simultaneous Death Act) without change. He pointed out that ORS chapter 112 had been enacted in 1947, and was the Uniform Act adopted by the National Conference of Commissioners on Uniform State Laws in 1940. He indicated that the National Conference had adopted certain amendments to the Uniform Act in 1953, and asked if the committees wished to consider these 1953 amendments. Lundy commented that, according to available information, 44 states had adopted the 1940 version of the Uniform Act, and that nine states, six of which had adopted the 1940 version, had adopted the 1953 version. After brief discussion, it was agreed that Lundy should schedule the 1953 amendments to the Uniform Act for consideration by the committees at a future meeting.

Determining validity of will in testator's lifetime. Lundy stated that Professor Hans A. Linde, School of Law, University of Oregon, had suggested to him several months before that the committees might wish to consider authorization for a procedure to determine the validity of a will during the testator's lifetime and registration of the will if so determined to be valid. In response to a question by Richardson, Lundy indicated that it was his impression the determination procedure would encompass execution formalities, but that he was not sure determination of competency of the testator was contemplated. Zollinger expressed the view, with which Frohnmayer agreed, that the primary value of such a determination procedure would be ascertaining the competency of the testator. Allison suggested that the matter of undue influence also could be resolved in such a determination procedure. After further brief discussion, it appeared that members were interested in pursuing the matter, and Lundy was requested to communicate with Professor Linde and invite him to submit a more detailed proposal for consideration by the committees.

Inheritance by Nonresident Aliens

Time of determination of benefit, use or control in proceeding to withdraw deposit. Allison noted that at the March meeting a revised draft on inheritance by nonresident aliens had been considered. Note: See Minutes, Probate Advisory Committee, 3/18,19/66, pages 3 to 57, and that in the course of discussion of the draft a question had arisen as to the time to which evidence of benefit, use or control should be directed in a

proceeding to withdraw a deposit. He pointed out it had been decided to postpone action on this matter until this April meeting, in order to obtain Schwabe's views thereon.

Allison indicated that he had discussed the matter with Schwabe, and they had concluded that the court, in a withdrawal proceeding, should determine the issue of benefit, use or control as of the time the court order was made. He commented that he had communicated this conclusion by letter to other members of the subcommittee on inheritance by non-resident aliens and to Dickson.

Allison suggested that the result he proposed (i. e., that the court, in a withdrawal proceeding, should determine benefit, use or control as of the time of its order) would be achieved by deletion of the third sentence of section 2 of the revised draft, reading: "The petition shall allege that at the time of filing the alien heir, legatee, devisee, or, if deceased, his heirs or beneficiaries, would receive the benefit, use or control of the money." He moved, seconded by Lisbakken, that the sentence referred to be deleted. Motion carried unanimously.

Subsequent petition for withdrawal. Allison referred to the third paragraph of section 2 of the revised draft, relating to allegation of new and changed conditions in subsequent petitions for withdrawal of a deposit, and commented that the new and changed conditions should occur after denial of the last previous petition, rather than after the filing of that petition. He moved, seconded by Lisbakken, that "denial" be substituted for "filing" in the paragraph referred to. Motion carried unanimously.

Moneys deposited. Allison referred to the second paragraph of section 1 of the revised draft, and noted that at the March meeting a suggestion had been made that the paragraph be revised to read: "The money to be deposited shall be the proceeds of sale remaining after payment therefrom of the expenses of such sale and such sums * * *." He indicated he had discussed this matter with Schwabe, that Schwabe had expressed the view that in most cases the property involved would be money and not other property requiring sale and conversion to money, and that the wording of the revised draft was appropriate in this regard and need not be revised as suggested at the March meeting.

In response to a question by Zollinger, Schwabe commented that if the inheritance of a nonresident alien consisted of an undivided one-half interest in real property, this interest would be sold and converted to money for deposit. Braun and Zollinger questioned whether provision for partition should not be made in this situation. Schwabe remarked that the sale for deposit purposes would be necessary only if the inheritance of a

nonresident alien was not reduced to money in the regular course of administration, including sale for distribution purposes.

Braun questioned whether the wording of the second paragraph of section 1 (i.e., "shall be subject to") made it sufficiently clear that sale expenses and compensation of personal representative and attorneys would be deducted before deposit of the moneys. It was agreed that pre-deposit deduction was intended, and several suggestions for clarification of the wording to more clearly express this intention were made. Frohnmayer suggested "there shall be deducted from the money to be deposited." Schwabe suggested "from the money to be so deposited shall first be paid." It was agreed that clarification of the wording should be left to Lundy in the course of drafting.

Petition for withdrawal by personal representative of nonresident alien. Zollinger noted that the first paragraph of section 2 of the revised draft provided that if a nonresident alien heir was dead, a petition for withdrawal of the deposit should be filed by a personal representative of the nonresident alien appointed by the court that ordered the deposit. He questioned the necessity of limiting authorization for such filing to a personal representative so appointed, particularly where a personal representative of the nonresident alien already had been appointed by another court. Allison and Schwabe referred to problems involved in permitting a personal representative appointed in a foreign country to file the petition.

Zollinger suggested that there might be instances of a personal representative of a nonresident alien appointed by an Oregon court other than the court that ordered the deposit, and expressed the view, with which Frohnmayer agreed, that such a personal representative should be permitted to file a petition for withdrawal. Schwabe expressed the opinion that instances referred to by Zollinger would be extremely rare, but indicated he saw no objection to providing for filing of a petition by a personal representative of the nonresident alien "appointed by said court or any other court in the State of Oregon."

Braun suggested, and Zollinger agreed, that the authority to file a petition need not be limited to a personal representative of the nonresident alien appointed by an Oregon court, and that "appointed by said court" should be deleted. In response to a question by Frohnmayer, Schwabe commented that he would have no objection to permitting a personal representative appointed in Oregon or some other state to file the petition, but noted that in many foreign countries a personal representative was either a different functionary than contemplated in this country or one not used at all. Schwabe indicated his preference for

limiting authorization for filing the petition to a personal representative appointed by the court that ordered the deposit so that all aspects of the estate proceeding be in the same court.

Frohnmayr moved, and it was seconded, that "a court of this state" be substituted for "said court" in the second sentence of the first paragraph of section 2. Motion carried unanimously.

In response to questions by Lundy, Schwabe remarked that in most cases a personal representative of a nonresident alien would be appointed solely for the purpose of filing the petition to withdraw and distributing the moneys if withdrawn by court order, but that such personal representative would be treated the same as any other personal representative and, for instance, would be required to publish notice to creditors.

Costs and expenses allowed in deposit and withdrawal proceedings. Frohnmayr referred to the second paragraph of section 2 of the revised draft, and suggested that use of both "allowed" and "approved" in the provision for costs and expenses of the withdrawal proceeding was unnecessary. Zollinger noted that "fix and allow" was used in the second paragraph of section 1. Schwabe and Allison expressed a preference for "allowed," this word implying affirmative action on the part of the court. It apparently was agreed that only one word describing action by the court was necessary, and that selection of the proper word should be left to Lundy as draftsman.

Allison moved, seconded by Gilley, that the revised draft on inheritance by nonresident aliens, with changes previously agreed upon or left to Lundy as draftsman, be approved. Motion carried unanimously.

At this point (2:45 p.m.) Schwabe left the meeting.

Notice to State Land Board. Lundy noted that a rough draft on notice of estate administration, embodied in a report by Bettis, Krause and himself, dated March 14, 1966, and considered at the March meeting, contained a provision for notice to the State Land Board by a personal representative if any known heir or any legatee or devisee of the decedent was an alien not residing within the United States or its territories. Lundy commented that this provision had been opposed at the March meeting on the ground that it would require notice in many instances in which deposit and ultimate escheat would not occur and in which the Land Board would have no interest, and that he had been asked to obtain the views of Walter A. Barrie, Assistant Attorney General, on this matter.

Lundy reported that Barrie had offered two suggestions, expressing a preference for the first, as follows: (1) Notice to the Land Board only where nonresident aliens were the only heirs, devisees or legatees, or (2) notice to the Land Board where nonresident aliens were citizens of countries listed by the Land Board as those whose citizens would not have the benefit, use or control of inheritances from United States decedents, although such a list would be difficult to compile, keep current and adequately publicize.

Zollinger moved, seconded by Lisbakken, that Barrie's first suggestion (i.e., notice to the Land Board only where nonresident aliens were the only heirs, devisees or legatees) be approved. Motion carried.

Braun suggested that notice should be given to the Land Board when nonresident aliens were the only heirs, devisees or legatees other than the personal representative, but other members did not appear to favor this suggestion.

Form of Letters Testamentary and of Administration

Zollinger remarked that a rough draft on issuance and form of letters of representation, embodied in a report by Richardson and Lundy, dated March 14, 1966, had been considered at the March meeting, that a number of suggestions for change in the proposed statutory forms of letters had been made and that he and Richardson had been assigned to prepare and submit revised forms. Zollinger distributed to members present copies of revised forms of letters, as follows:

"LETTERS TESTAMENTARY

No. _____

"THIS CERTIFIES that the will of _____, deceased, has been proved and _____ has (have) been appointed and is (are) at the date hereof the duly appointed, qualified and acting _____ of the will and (executor(s) or administrator(s) with the will annexed) estate of said decedent.

"IN WITNESS WHEREOF, I, as Clerk of the _____ Court of

the State of Oregon for the County of _____, in which proceedings for administration upon said estate are pending, do hereto subscribe my name and affix the seal of said court this _____ day of _____, 1966.

_____ Clerk of the Court

By _____
Deputy

"LETTERS OF ADMINISTRATION

No. _____

"THIS CERTIFIES that _____ has (have) been appointed and is (are) the duly appointed, qualified and acting administrator(s) of the estate of _____, deceased, and that no will of said decedent has been proved in this court.

"IN WITNESS WHEREOF, I, as Clerk of the _____ Court of the State of Oregon for the County of _____, in which proceedings for administration upon said estate are pending, do hereto subscribe my name and affix the seal of said court this _____ day of _____, 1966.

_____ Clerk of the Court

By _____
Deputy"

Zollinger pointed out that the revised forms did not call for insertion of the date of death of the decedent, as had been suggested at the March meeting, for the reason that in most cases that information was not material

for the purpose of letters. It was suggested that the letters include the decedent's Social Security number. Husband expressed the view that it would be useful to have the county of probate or administration set forth at the beginning of the forms, in addition to appearing in the body of the court clerk's certificate. Butler pointed out that use of the statutory forms was permissive, rather than mandatory, and that additional information, therefore, might be included in the forms actually used where necessary or desired.

Frohmayer moved, seconded by Braun, that the forms of letters submitted by Zollinger and Richardson be approved. Motion carried.

Support of Surviving Spouse and Minor Children; Homestead

Allison pointed out that he had been assigned to report on the subject of support of surviving spouse and minor children and homestead and to recommend revision of ORS 113.070, 116.005 to 116.025, 116.590 and 116.595. He distributed to members present copies of a proposed draft on the subject and copies of notes on the proposed draft, which he had prepared in fulfillment of his assignment. [Note: A copy of the proposed draft and notes thereon constitutes the Appendix to these minutes.]

Homestead. Allison noted that in Oregon, as well as in other states, there was a close relationship between the homestead exemption for probate purposes and the homestead exemption from execution. He commented that this relationship gave rise to a number of problems, but expressed the view that it would be difficult and unwise to sever the relationship and establish different standards for probate homestead and execution homestead.

Allison pointed out that section 1 of the proposed draft, defining "homestead," used the same wording as the execution homestead statute (i.e., ORS 23.240). Zollinger and Butler expressed the view that while the definition of homestead for exemption from execution purposes, with its maximum value of \$7,500, might be appropriate in determining descent, devise or setting apart free of creditor claims, that definition was not appropriate in determining possession by surviving spouse and minor children under section 2 of the draft. Allison noted that possession under section 2 extended only to the time of filing of the inventory, and commented that the value limitation on homestead was not significant during this period. He indicated that section 2 of the draft was identical to ORS 116.005, which used "homestead" in the same sense as defined in section 1, and commented that, therefore, no change in the law was being proposed. Bettis

suggested that the homestead exempt from inheritance tax (see ORS 118.070), in which value was not a factor, should be considered for purposes of the right of occupancy by surviving spouse and minor children.

Mapp expressed the view, with which Bettis and Dickson agreed, that homestead and other property exempt from execution were not appropriate for consideration in determining support of surviving spouse and minor children during probate.

Allison referred to sections 3 and 4 of the proposed draft, relating to descent and devise of homestead free of certain judgments and claims, and explained that these sections were substantially the same as ORS 116.590 and 116.595. He commented that Gooding had suggested, and he agreed, that these two sections might be combined because of their similarity in wording, but that this matter could be left to Lundy as draftsman.

Husband noted that homestead passing by descent or devise under sections 3 or 4 of the draft was specifically subject to claims of the State Public Welfare Commission for public assistance, but not so subject to claims of the Oregon State Board of Control for care and maintenance of institutionalized decedents, and questioned the preference of welfare claims over institution claims. Allison commented that this preference appeared in the present statutes, and perhaps represented an exercise of greater diligence on the part of the Welfare Commission in obtaining security for recovery of public assistance paid.

Zollinger pointed out that homestead passing under section 3 or 4 was declared to be "subject to and charged with" certain expenses, costs, charges and claims, with no specific requirement that these be satisfied first out of other property of the estate.

Setting aside homestead and exempt personal property. Allison referred to section 5 of the proposed draft, relating to setting aside homestead and exempt personal property to surviving spouse or minor children, and indicated that this section was based upon ORS 116.010, with addition of provision for petition by surviving spouse or minor children and deletion of existing provision specifying the use of property so set aside. He suggested that the section also should provide for service of a copy of the petition on the personal representative.

In response to a question by Krause, Allison commented that he had drafted the provision requiring the petition for setting aside to be filed within 60 days after the filing of the inventory in order that it might be determined

early in the probate proceeding what property was available for payment of claims and other distribution. He indicated that under the present statute the setting aside might take place at any time during the probate proceeding, and expressed the view that this gave rise to undesirable uncertainties in administration. Bettis remarked that he was in favor of some time limitation on setting aside exempt property, but that 60 days was too short a period and that the period selected should, in so far as possible, be uniform with other periods of time prescribed in the probate statutes, such as the period for electing to take against will. Husband stated that he was aware that in many cases a surviving spouse would delay seeking the setting aside of exempt property in order to see how the situation developed and then determine whether the setting aside was necessary or desirable, but indicated he had seen no great amount of abuse in this practice and that he favored allowing a surviving spouse sufficient time to exercise this privilege.

In response to a question by Mapp, Allison commented that specific kinds of property exempt from execution when owned by a decedent would be exempt similarly when acquired by others from the decedent's estate through setting aside or otherwise. Frohnmayer remarked that exemption from execution was a sort of yardstick measuring the right of surviving spouse and minor children in the setting aside process.

Support of surviving spouse and minor children. Allison referred to section 6 of the proposed draft, relating to allowance for support of surviving spouse and minor children, and explained that the section was based on section 11 of a Wisconsin draft [Note: See Staff Report No. 2, Materials on Family Rights in Decedents' Estates, June 1964, page 2] and was different in several respects from ORS 116.015. He pointed out that the allowance under section 6 would continue during administration, and would be limited to one year only if the estate was insolvent. In response to a question by Butler, Allison noted that the court, in determining the allowance, could consider assets and income available for support outside the probate estate, and expressed the view that this was a desirable feature not in the present statute.

Setting aside small estates. Allison referred to section 7 of the proposed draft, relating to setting aside nonexempt estates of small value to surviving spouse and minor children as in the case of property exempt from execution, and indicated that this section was the same as ORS 116.020, but with the maximum value of the small nonexempt estate increased from \$1,000 to \$2,500. He suggested that the aims of section 7 and section 5 might be satisfied by increasing the maximum value in section 7 to \$10,000

over and above exempt personal property and by limiting section 5 to the setting aside of exempt personal property.

New approach to support and other family rights. Dickson commented that the present concept of homestead in connection with family rights in probate, with its relationship to the homestead exempt from execution, the problems incident thereto and the litigation arising therefrom, should be abandoned in favor of surviving spouse and minor children to occupy the family dwelling for a specified period, perhaps one year, and in addition thereto, provision for support of such spouse and children during probate and upon distribution. In response to questions by Braun and Gilley, Dickson commented that the approach he was suggesting would permit the surviving spouse to select an abode more suitable than the family dwelling if desired and to retain items of property which under present statutes were exempt from execution, but not be limited to such items.

Frohmayer moved, seconded by Copenhaver, that the present concept of homestead in connection with family rights in probate be abandoned, and that a new approach to support and other family rights be explored. Motion carried.

Frohmayer indicated that there were at least three aspects of family rights to be explored in undertaking a new approach to the matter: (1) Possession of the family place of abode, (2) allowance for a period of time corresponding with the period of probate or lesser period and (3) some provision after probate.

Braun suggested, and Dickson agreed, that at least some of the support allowance should be paid out of income of the estate in order to obtain a tax deduction therefor. She commented that this should be authorized by statute.

Dickson remarked that family rights provision in the case of public assistance recipients or, perhaps, persons receiving care and maintenance at state institutions should not be the same as in other cases. Zollinger indicated he was inclined to differ on this point, and would express his views when this matter was considered in more detail.

At this point (4 p.m.) Bettis left the meeting.

Zollinger proposed the following draft as a starting point only in evolving a new approach to support and other family rights:

"(1) The surviving spouse and minor or incompetent children of a

a decedent may remain in their place of abode, owned by the decedent, free from claims of creditors, heirs or devisees, for a term of one year from the date of decedent's death.

"(2) Upon petition of the surviving spouse or the guardian of the estates of minor or incompetent children, the court shall award such property or funds of the estate as shall appear to be reasonable or provide for an allowance for support during the period of administration, not exceeding 21 months.

"(3) The court may by order provide an allowance to the surviving spouse for the support of such spouse and any minor children, or to the minor children alone if there be no surviving spouse, in an amount adequate for support during the administration of the estate. In making or denying such order the court shall take into consideration all assets and income available for the support of the spouse and children outside the probate estate. The allowance hereunder shall have priority over debts, funeral expenses, expenses of last illness and administration expenses; but if the estate is insolvent, the allowance may not be granted for more than one year after date of death.

"(4) Such petition shall be served on the personal representative, who shall state in response thereto the nature and value of the items of the estate and the charges and expenses payable from the assets of the estate available for such payment."

In response to questions by Husband and Frohnmayer, Zollinger pointed out that his draft did not specifically provide for protection of the mortgagee of property awarded to a surviving spouse under subsection (2) of the draft or, on the other hand, specifically exempt the surviving spouse from making mortgage payments. He commented that the manner of protecting a mortgagee of awarded property would be in the discretion of the court. Dickson commented that if the court determined that a surviving spouse was entitled to support in a certain amount, it could award an encumbered automobile as a part of that amount, but the award would not relieve the surviving spouse of responsibility for making payments on the encumbrance. Zollinger indicated he contemplated that the court would have discretion to award real property, as well as personal property.

Allison suggested that the committees should consider whether the concept of property set aside in fee to surviving spouse and minor children should be retained, and if so, the extent to which such property should be free of expenses and claims. He commented that such setting aside amounted to an inheritance.

Krause posed the situation of a specific devise of the house in which the surviving spouse was residing to a child of the testator and asked whether, under Zollinger's draft, the court could award the house to the surviving spouse and thus defeat or postpone the devise. Zollinger responded that he thought his answer would be affirmative. He commented that, under his draft, it would be within the power of the court in the exercise of its discretion to make an award of any property of the estate to the surviving spouse or minor children without exception and free from claims of creditors, heirs or devisees.

Frohnmayr suggested that Zollinger's proposal, in so far as it authorized award of property free from claims, was a change in present law that might be difficult to convince the legislature to accept. Gilley questioned whether probate judges might not oppose the proposal on the ground that it would impose considerable responsibility upon them without definite guidelines for exercise of discretion. Husband indicated, and Butler agreed, that he was not inclined to favor an award of property free from funeral expenses and expenses of administration. Dickson remarked that he favored Zollinger's proposal, commenting that most homes were owned by husband and wife by the entirety and had a value of more than \$7,500.

Allison expressed the view that award of property to a surviving spouse appeared unnecessary in the intestate situation, where the spouse would receive at least an undivided one-half interest in fee under the committees' proposal, or in the case of election against will, where the spouse would receive an undivided one-fourth interest in fee under the committees' proposal. In response to a question by Frohnmayr, Allison commented that, at least in the intestate situation, the award of property should not be treated as a part of support during probate, but should be handled separately as a sort of support after probate, the latter being a new concept involving a number of problems.

Dickson suggested, and it was agreed, that several subcommittees should be appointed to prepare independently and submit for consideration at the joint meeting of the committees in May different proposals for support and other family rights. Dickson appointed subcommittees for the purpose as follows: Subcommittee #1: Gilley and Krause; subcommittee #2: Husband and Mapp; subcommittee #3: Allison, Braun and Lisbakken.

The meeting was recessed at 4:45 p. m.

The meeting was reconvened at 9 a.m., Saturday, April 16, 1966, in

Chairman Dickson's courtroom, 244 Multnomah County Courthouse,
Portland.

All members of the advisory committee were present.

The following members of the Bar committee were present: Bettis (arrived 9:30 a.m.), Gilley, Braun (arrived 9:20 a.m.), Copenhaver, Krause, Lovett (arrived 9:30 a.m.), Richardson and Warden.

Also present was Lundy.

Arrangement of Proposed Revised Probate Code

Lundy indicated that he had prepared a tentative outline, or arrangement, of provisions to be included in the proposed revised Oregon probate code. He distributed to members present copies of the outline, with one column showing the arrangement of chapters of most of the present probate code and another column showing a possible arrangement of chapters of the revised code, as follows:

<u>Present ORS title 12</u> <u>(Estates of Decedents)</u>		<u>Proposed ORS title 12</u> <u>(Estates of Decedents)</u>	
Chapter 111	Descent and Distribution	Chapter 111	General Provisions
Chapter 112	Uniform Simultaneous Death Act	Chapter 112	Intestate Succession
Chapter 113	Dower and Curtesy; Election Against	Chapter 113	Wills
Chapter 114	Wills	Chapter 114	Commencing Estate Proceedings; Personal Representatives
Chapter 115	Initiation of Probate or Administration	Chapter 115	Administration of Estates Generally
Chapter 116	Administration of Estates	Chapter 116	Claims, Distribution, Accounting and Closure
Chapter 117	Settlement and	Chapter 117	Estates of Persons Presumed Dead; Small Estates

Chapter 118	Inheritance Tax	Chapter 118	Inheritance Tax
Chapter 119	Gift Tax	Chapter 119	Gift Tax
Chapter 120	Escheat; Estates of Persons Presumed to be Dead	Chapter 120	Escheat
Chapter 121	Actions and Suits Af- fecting Decedents' Estates and Admini- stration	Chapter 121	Actions and Suits Affecting Estates
Chapters 122 to 125	<u>Reserved for expansion</u>	Chapters 122 to 125	<u>Reserved for expansion</u>

Lundy commented that the arrangement of chapters of the revised code was fairly conservative in terms of change from the present arrangement, but that there would be considerably more change in arrangement of sections within chapters and grouping together of sections relating to the same subject presently found in more than one chapter or widely separated in the same present chapter.

Lundy pointed out that the number of chapters in ORS title 12 was limited, but that there were four unused chapters at the end of the title available for use. He noted that chapters 118 and 119, relating to inheritance and gift tax and consisting of over 100 sections that probably would largely be unaffected by the revision, created somewhat of a problem in the matter of arrangement by their location, not too logically, in the middle of ORS title 12. In response to a question by Dickson, Lundy commented that relocation of the chapters on inheritance and gift tax at the end of the title would involve renumbering, re-indexing and reannotating a large number of sections not otherwise affected by the revision.

Lundy indicated that one of his aims in preparing the tentative outline had been to make the first chapter available for general provisions on probate, and that the tentative outline did this by shifting provisions on intestate succession from present chapter 111 to proposed chapter 112. He stated he contemplated that proposed chapter 111 would contain general definitions, general provisions on the probate court and probate commissioners and, since they applied both in intestate and testate situations, provisions on simultaneous death, persons feloniously causing death of another and inheritance by nonresident aliens. He noted that proposed chapter 112 was entitled "Intestate Succession," while the present chapter on intestacy was entitled "Descent and Distribution," and commented that

the probate codes of most other states used one or the other of these designations. He remarked that proposed chapter 112 might include provisions on general rules of inheritance, advancements, effect of adoption and illegitimacy, election against will and abolition of dower and curtesy. Lundy indicated that most of present chapter 113 (i.e., provisions on dower and curtesy) would be repealed by the revision, and that proposed chapter 113 could be used for provisions on wills -- execution, revocation, effect of particular legacies and devises, testamentary additions to trusts, pretermitted children, witnesses as beneficiaries and custodians.

Lundy commented that the contents of proposed chapters 114, 115 and 116 would correspond roughly with the contents of present chapters 115, 116 and 117, but that the sections in these chapters might be substantially rearranged. He indicated that he contemplated that all provisions on claims would be grouped together. In response to a question by Gilley, Lundy remarked that he had located claims provisions in proposed chapter 116 with provisions on distribution and accounting because there appeared to be some logical relationship and because proposed chapter 115, another logical location for claims provisions, contained so many other sections, Zollinger expressed the view that provisions on claims should be in the same chapter with sale provisions, even though this might result in a chapter with a great many sections.

Dickson commented that the arrangement of chapters set forth in the tentative outline appeared to be an improvement over the present arrangement, but expressed the view that it was inadequate. He remarked that the present sections on claims, for example, were so scattered that some were often overlooked by attorneys, and that all such provisions should be collected together. He suggested that escheat provisions should be located with intestate succession or with distribution. He indicated that intestate succession and wills provisions might be combined in one chapter, and Lundy noted that such a combination appeared in the probate codes of some other states.

Allison expressed a preference for combination of provisions on escheat and estates of persons presumed dead in a chapter toward the end of ORS title 12. He noted that proposed chapter 117 included small estates, and asked whether this contemplated the few existing sections on small estates (i.e., ORS 116.020 and 116.025) or the new summary procedure for administration of small estates to be proposed by the committees. Lundy responded that the latter was contemplated.

Zollinger expressed the views that the arrangement of chapters in the tentative outline constituted a good point of departure and that it would

not be necessary to have a separate chapter for every subject so long as all sections on a particular subject were grouped together in separate divisions in a chapter. Frohnmayer agreed that the number of major headings was not as important as the proper grouping and arrangement of sections under such headings. He suggested that some members of the committees, with their experience in using the present probate code, should work with Lundy in evolving an outline of the revised code, and asked whether the outlines of the 1965 Washington Probate Code, 1963 Iowa Probate Code, proposed 1966 New York Probate Code and Model Probate Code would be helpful in preparing the Oregon outline. Lundy commented that the outlines of these other probate codes might be helpful in suggesting possible groupings of sections, but not too much so as to arrangement of chapters, since the general classification and numbering systems of compiled statutes of other states was different from those used in ORS.

Dickson appointed three subcommittees to prepare independently proposed outlines of the revised code and send them to Lundy for his comment and consideration by the committees at a future meeting. The subcommittees so appointed were: Subcommittee #1: Frohnmayer, Mapp and Warden; subcommittee #2: Copenhaver, Gooding and Thalhofer; subcommittee #3: Dickson, Lisbakken and Richardson.

Nonresident Personal Representatives

Lundy noted that at the March meeting the advisory committee had voted to disqualify nonresidents from appointment as personal representative in Oregon and that he had been asked to obtain information on whether probate codes recently enacted in other states permitted the appointment of nonresidents as personal representative. He presented his report, based upon a survey of the probate codes of 50 jurisdictions (i.e., 49 states and the District of Columbia), pointing out that some jurisdictions specifically prohibited nonresident personal representatives; some specifically allowed them, usually with conditions such as appointment of a resident agent for service of process; and some had no specific provision on the subject, apparently leaving the matter to case law or court discretion. He commented that some states had a different rule for executors than for administrators.

Lundy stated that his survey of probate codes of other jurisdictions disclosed that 30 jurisdictions allowed both nonresident executors and administrators, nine prohibited both nonresident executors and administrators and 11 allowed nonresident executors but prohibited nonresident administrators. He noted that of the 11 jurisdictions having probate codes revised within the past 20 years, seven allowed both nonresident executors and administrators, one prohibited both nonresident executors and administrators and three

allowed nonresident executors and administrators, and commented that these revisions apparently had not changed prior law on the subject.

Richardson reported that a study he had seen corresponded basically with Lundy's survey, and had indicated that nonresident personal representatives were prohibited in 10 states, foreign corporations not qualified to do business in the state were prohibited from acting as personal representatives in 24 states and nonresident personal representatives were allowed in other states with various conditions attached.

Butler asked whether the probate codes of other states allowing nonresident personal representatives on condition of appointment of resident agents for service of process specified any liability of a resident agent for failure of the nonresident personal representative to comply with probate court orders. Lundy responded that he did not recall seeing any such specification in the probate codes of other states. Frohnmayer commented that it might be difficult to find someone to act as resident agent of a nonresident personal representative if the agent were to be made liable for acts or failures to act by the personal representative, and that the bond of the personal representative afforded some protection. Butler expressed the view that in practice the bond might be inadequate protection.

In response to a question by Allison, Lundy indicated that his survey of the probate codes of other states did not extend to distinctions between individual and corporate personal representatives. In answer to questions by Braun and Allison, Butler and Zollinger expressed their opinions that a nonresident corporate personal representative would have to qualify to do business in Oregon to be appointed in this state.

Gilley suggested that the matter of a nonresident personal representative would arise most often when a testator wished to name a close relative as executor, and commented that a Portland testator should be able to name his son in Vancouver, Washington, as executor. Butler pointed out that authorization for nonresident personal representatives would not be limited to such situations, and questioned whether a testator should be permitted to name his son in Paris, France, as executor.

Zollinger moved, seconded by Riddlesbarger, that nonresident executors be allowed, on condition that they give bond, notwithstanding waiver of bond by will, and appoint a resident agent for service of process. Motion carried advisory committee (voting yes: Zollinger, Allison, Frohnmayer, Gooding, Jaureguy, Mapp and Riddlesbarger; voting no: Butler, Carson, Husband, Lisbakken and Dickson). Motion failed Bar committee (voting

yes: Gilley and Braun; voting no: Bettis, Copenhaver, Krause, Lovett, Richardson and Warden).

Braun moved that nonresident administrators be allowed, with bond and resident agent. Motion failed for lack of second.

Claims Against Decedents' Estates

Gooding submitted for consideration by the committees his rough draft on claims against decedents' estates, which was embodied in a report, dated April 1, 1966, mailed to all members of both committees before the meeting. He noted that he had prepared and mailed to members in early 1965 a report entitled "Creditor's Rights," which had reviewed and commented upon the present Oregon statutes on claims and certain comparative legislation, but which had not contained a draft of proposed legislation.

Gooding commented that in preparing the rough draft dated April 1, 1966, he had consulted and drawn upon the present Oregon statutes, the Mundorff code (i.e., the proposed code of probate procedure prepared by the Bar Committee on Probate Law and Procedure and recommended in 1942) and the current probate codes of Iowa, Missouri and Texas, all three of which had borrowed to some extent from the Model Probate Code. He pointed out that the sections of the rough draft were grouped, adopting the pattern of the 1963 Iowa Probate Code, under three general headings: "Time and Manner of Filing Claims," "Classification, Allowance and Payment of Debts and Charges" and "Denial and Contest of Claims."

Filing of claims (section 1). Gooding explained that section 1 of the rough draft, relating to filing of claims, was based on section 153, Mundorff code, and differed from present Oregon law in requiring that a claim be filed with the clerk of the court, with proof of service of a statement of such claim having been made upon the personal representative. He commented that the Iowa and Texas probate codes provided for filing a claim in duplicate with the clerk, who was to mail one copy to the personal representative.

In response to a question by Frohnmayer, Dickson indicated he saw no reason to require that all claims be filed with the clerk and to do so would impose an unreasonable burden on the clerk, but that, on the other hand, a creditor should have some recourse if a claim presented to the personal representative was not acted upon. He suggested that claims not acted upon by the personal representative might be filed with the clerk. Mapp commented that when the committees had discussed the personal representative's published notice to creditors at the March meeting he had been bothered somewhat by the concept that claims be presented to the personal

representative as a particular person rather than the holder of an office. He agreed that all claims should not be required to be filed with the clerk, but suggested that creditors might be authorized to file with the clerk, as an alternative to presentment to the personal representative, with provision for the clerk to forward filed claims to the personal representative. Mapp remarked that his suggestion would provide protection to creditors, especially in those cases in which a personal representative was replaced.

Frohnmayr moved, seconded by Jaureguy, that a claim not be required to be filed with the clerk of the court unless rejected. Motion carried. It also was agreed that in revising section 1, "four months" should be substituted for "six months" in accordance with action taken by the committees at the March meeting reducing the period for presenting claims. Note: See Minutes, Probate Advisory Committee, 3/18,19/66, page 28/, and "present" should be substituted for "serve."

In response to a question by Zollinger, Gooding pointed out that failure to present a claim within four months under revised section 1 was not an absolute bar; that section 4 of the rough draft allowed claims after the four-month period where the personal representative waived the limitation or claimants were entitled to equitable relief due to peculiar circumstances.

Contents of a claim (section 2). Gooding pointed out that section 2 of the rough draft, relating to contents of a claim, was based on ORS 116.515, with the additional requirement that the claim contain the names and addresses of the claimant and his attorney.

After brief discussion, it was agreed that the claim should be verified by affidavit as required by section 2. Dickson suggested that written evidence, or a copy thereof, should accompany the claim, rather than the authorization in section 2 for the personal representative to demand such written evidence. Gilley commented that a creditor should not be required in every instance to surrender original written evidence of his claim. Carson remarked that requirement of a copy of written evidence should not preclude demand for the original by the personal representative.

Gilley moved, seconded by Frohnmayr, that section 2 be approved without change. Motion carried.

Defects of form (section 3). Gooding indicated that section 3 of the rough draft, relating to waiver of defects of form of claims, was based on section 302, Texas Probate Code. In response to a question by Riddlesbarger, Gooding commented that a defect of form, for example,

might occur where a creditor signed but failed to verify a claim or a notary affixed his seal but did not sign his certificate.

Zollinger remarked that section 3 would afford protection to a personal representative in the payment of claims presented not in strict compliance with statutory requirements. Allison expressed the view that deeming the failure of a personal representative to file written objections to defects of form to be a waiver of such defects might create problems, and perhaps a trap, for the personal representative in the denial of claims.

Dickson suggested, and Frohnmayer agreed, that section 3 might be revised to authorize a personal representative to waive defects of form of claims or exhibits attached thereto, with no provision on deeming waiver by failure to object within 60 days after presentment. In response to a question by Riddlesbarger, Frohnmayer remarked that payment of the claim would be evidence of waiver. Lundy asked whether it would be necessary in section 3 to refer specifically to exhibits attached to claims. He commented that if a reference to "claims" alone in section 3 did not include exhibits, perhaps such references in other sections of the rough draft should be examined to determine whether "or the exhibits attached to it" should be added thereto.

Frohnmayer moved, seconded by Braun, that section 3 be revised to read "any defect of form or insufficiency of the claim presented may be waived by the personal representative," leaving the problem of insuring that "claim" included exhibits attached thereto to Lundy as draftsman. Motion carried unanimously.

Limitation on filing (section 4). Gooding referred to section 4 of the rough draft, relating to limitation on filing claims, and pointed out that the provision that the limitation would not bar claimants entitled to equitable relief due to peculiar circumstances was derived from section 410, 1963 Iowa Probate Code. He commented that section 154, Mundorff code, allowed late filing of claims when failure to file in time was due to mistake, inadvertence, surprise or excusable neglect, which were the same grounds specified in the present Oregon statute (i.e., ORS 18.160) on relief from judgments, decrees and orders.

Dickson questioned the advisability of the provision in section 4 permitting the personal representative to waive the filing limitation, and suggested that, except in cases where equitable relief was available, there should be an absolute bar against claims after a definite or determinable period of time. He expressed the view that the present nonclaim

statute (i.e., ORS 116.510) was not just, fair or fully understood. Zollinger commented that if creditors were foreclosed after a short period of time at the beginning of estate proceedings, they would be left to pursue a remedy against distributees of the estate, and expressed the opinion that this also would not be just. Dickson remarked that remedies against distributees was a matter of equitable relief, which was discussed in First Nat. Bank v. Connolly, (1943) 172 Or. 434, and Borge v. Traaen, (1938) 158 Or. 454.

Allison noted that under present law a creditor who presented his claim within six months was preferred as to payment, and a creditor who presented a claim after the six-month period and before filing of the personal representative's final account was not barred, but would be paid only after payment of claims presented within the six-month period. He expressed the view that if the estate was solvent and the late-presented claim was valid, there was no injustice in permitting payment of the claim. Riddlesbarger questioned allowing a creditor an unlimited amount of time to present a claim, and indicated he favored requiring that a claim be presented within the four-month period previously approved by the committees or be barred. Gilley pointed out that, under present law, late presentment of claims was penalized by loss of priority of payment, and commented that he favored allowing claims to be presented and paid as long as an estate was being administered and if diligent creditors had priority in payment.

Frohnmayr commented that he agreed generally with the views expressed by Allison and Gilley as to allowing presentation of claims after a four-month preference period, but indicated he also favored some definite subsequent cut-off time when an estate remained open for a long time. He remarked that a personal representative should not have to accept claims, for example, after a federal tax return was filed and while the estate was still open. Gooding noted that section 154, Mundorff code, provided for deduction from payment on a late-presented claim of tax that would not have been paid or charged if the claim had been presented within the limitation period. Frohnmayr remarked that the cost of allowing a late-presented claim would not be limited to additional tax, but also would involve expense of preparing and filing additional tax returns and delay in distribution of the estate.

Frohnmayr suggested, and Dickson and Gilley agreed, that claims should be barred if not presented within 12 months unless the final account was filed sooner, and that the sooner filing of the final account also should bar subsequent presentment of claims. In response to a question by Mapp,

Dickson indicated that the four-month claim presentment period for obtaining priority of payment would be retained under Frohnmayer's suggestion and a final account could be filed, if otherwise possible, after expiration of the four-month period. In response to a question by Butler, Dickson noted that if a partial distribution of the estate was made before claim presentment was barred, a distributee could be required, under ORS 117.361, to give bond as protection against later claims.

Frohnmayer moved, seconded by Butler, that claims be barred if not presented within 12 months or before the filing of the final account, whichever occurred first; that claims filed within four months should be paid on a priority basis; and that the revised substance of sections 1 and 4 should be combined in one section. Motion carried.

Carson suggested that it might be legally possible, under present law, to file a final account before expiration of the six-month period and thereby cut off presentation of claims. Dickson commented that he had never seen this done and that the clear intention of present law was contrary, but supposed it possible theoretically. Carson suggested, and Riddlesbarger and Dickson agreed, that this possibility should be negated specifically in the revised code.

Funeral charges (section 5). Gooding stated that section 5 of the rough draft, relating to incurring and paying funeral charges, was the same as ORS 117.150.

Zollinger noted that the persons authorized by the first sentence of section 5 to incur funeral charges on account of the estate before administration was granted did not include, for example, a close friend of the decedent. Dickson suggested that the first sentence might be deleted. In answer to questions by Riddlesbarger, Gilley and Dickson commented that if the personal representative or anyone else made the funeral arrangements and assumed the expense thereof, he would have a valid and high priority claim therefor against the estate, subject to the test of reasonableness applied by the court, and that the first sentence did not afford significantly more protection in this regard. Allison expressed the view that the first sentence did not necessarily protect a funeral director, and remarked that the first sentence made liability of the estate dependent upon who incurred the funeral charges, rather than upon the fact that such charges constituted a proper claim against the estate.

Gilley moved, seconded by Warden, that the first sentence of section 5 be deleted, and the balance of the section be approved. Motion carried.

Butler suggested that "burial" of the decedent was too limited a term, and commented that "final interment" might be more appropriate. Richardson proposed use of "disposition of the remains." Dickson indicated, and it was agreed, that selection of the proper terminology, to encompass all kinds of interment or cremation, and incidents thereto such as funeral, cemetery and monument, should be left to Lundy as draftsman.

Unsecured claims not yet due (section 6). Gooding noted that section 6 of the rough draft, relating to payment of unsecured claims not yet due, was derived in part from ORS 117.170 and in part from section 421, 1963 Iowa Probate Code.

Frohnmayr related an experience involving a note under which a decedent was obligated for \$60,000 and which was payable some five years after decedent's death. He commented that in this situation a question arose as to the meaning of "present value" in ORS 117.170, and that he had contended that such value of the note was actual market value, rather than the full \$60,000 discounted at the going rate. He remarked that the question had not been resolved, since the matter was settled out of court.

In response to a question by Riddlesbarger, Frohnmayr expressed the view that "present value" meant value as of the date of death of the decedent. Gooding asked whether the unmatured claim should be "allowed," rather than "satisfied by payment" as provided in section 6. Frohnmayr commented that the wording of section 6 implied that payment was required in all cases, and suggested a better approach would be to allow the claim and treat it as any other claim against the estate, with no alternative provision for investment directed by the court. Zollinger proposed that section 6 be revised to read: "Upon proof of an unsecured claim which will become due at some future time, the same may be allowed in such sum as shall be equal to the value of the obligation at the death of the decedent."

In response to a question by Allison, Dickson commented that section 6 appeared to contemplate no option on the part of a creditor to accept or not to accept early payment of an unmatured claim. Allison remarked that perhaps "only" should be inserted after "may be allowed" in Zollinger's proposed revision of section 6. Butler questioned whether it would be proper to compel a creditor with an unmatured claim to accept early payment based on value at decedent's death, and expressed the view that the creditor should have the privilege of requiring fulfillment of the terms of the obligation if he so desired. Zollinger suggested that subsection (3) of section 8 of the rough draft, providing for one of several alternative

methods of payment of a contingent claim, whereby distribution was made and distributees made liable to the creditor to the extent of their shares received, might be considered as an appropriate method of paying a creditor with an unmatured claim. Butler commented that Zollinger's suggestion retained the objectionable feature of requiring a creditor to accept something different than he originally had bargained for. Frohnmayer suggested that most other creditors were in a similar position in this regard.

Gilley suggested that all the alternative methods of payment of contingent claims set forth in section 8 might be made applicable to unmatured claims. Frohnmayer commented, and Dickson agreed, that he did not favor Gilley's suggestion; that there was a definite distinction between an unmatured claim and a contingent claim, in that the latter might never mature and its current value could not be determined as easily; and that the two types of claims should be treated differently in terms of method of payment.

Dickson indicated he was persuaded that the only matter that needed determination in the case of an unmatured claim was its current value, and that the claim should be allowed in accordance with that determination and payment made in the determined amount in satisfaction of the claim. Allison asked if it was intended that payment satisfy the debt on which the claim was based, and commented that if such was intended, section 6, like the present Oregon statute on unmatured claims (i.e., ORS 117.170), should specify satisfaction by payment. Gilley noted that if an estate was insolvent and payment of claims was reduced on a pro rata basis by reason thereof, the reduced payment of an unmatured claim would not be satisfaction of the sum allowed. He asked whether the payment in such a situation should not be a satisfaction. Dickson asked whether a creditor with an unmatured claim who received payment in a sum less than that allowed would be precluded thereby from obtaining the balance out of after-discovered assets of the estate.

Frohnmayer suggested that a creditor with an unmatured claim should be required to present it so that disposition thereof could be made in the estate proceeding. Mapp pointed out that section 135, Model Probate Code, required the filing of all claims, "whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise." In response to a question by Butler, Mapp commented that the Model Probate Code appeared to contemplate filing of secured as well as unsecured claims (see section 139), but also provided that the filing requirement did not affect or prevent enforcement of a mortgage, pledge or other lien upon property (see section 135(e)).

Zollinger moved, and it was seconded, that section 6 be revised to read: "Claims upon debts not due shall be presented to the personal representative

as other claims. They shall be allowed in such sum as shall be equal to the value of the obligation at the date of decedent's death." Allison moved, seconded by Krause, that the main motion be amended by adding the following sentence, based on ORS 117.170, to revised section 6 proposed by the main motion: "The debt shall be satisfied by the payment of such sum." Motion to amend main motion failed. Main motion carried.

The meeting was recessed at 12 noon.

The meeting was reconvened at 1:15 p. m. All members of the advisory committee were present. The following members of the Bar committee were present: Bettis, Gilley, Bruan, Lovett and Richardson. Also present was Lundy.

Claims Against Decedents' Estates (continued)

Unsecured claims not yet due (section 6) (continued). Zollinger proposed that further consideration be given to Gilley's suggestion, made at the Saturday morning session of the meeting, that the alternative methods of payment of contingent claims set forth in section 8 of the rough draft be made applicable to unmatured claims. Zollinger indicated he favored this approach, expressing the view that the methods of payment described in section 8 were appropriate for both unmatured and contingent claims. He noted that his and Gilley's proposal might be achieved by extending the application of section 8 to unmatured claims or, perhaps preferably, adding to section 6 alternative provisions for payment similar to those in section 8.

Allison commented that the committees previously had approved a revision of section 6 containing a single method for settlement of unmatured claims (i.e., value of the obligation at the date of decedent's death) that was appropriate in such cases, and questioned the desirability of authorizing the use in settlement of unmatured claims of the various alternative methods provided in section 8. Gilley remarked that the alternatives of compromise, retention of funds, distributee liability and other methods ordered by the court described in section 8 appeared as appropriate for unmatured as for contingent claims.

In response to a question by Gooding, Zollinger indicated he saw no reason to distinguish between secured and unsecured unmatured claims in respect to methods of settlement thereof, and commented that the value of security could be considered in determining the value of a secured unmatured claim at the date of decedent's death.

Gilley suggested that one of the alternatives for settlement of an unmatured claim might be determination by the court of the current value of the claim. He noted that subsection (1) of section 8 provided for agreement, arbitration or compromise on current value of a contingent claim by the creditor and personal representative as a method of settlement of the claim, and expressed the view that this should not be the sole method of determination of current value of an unmatured claim.

Braun stated she saw no reason to provide for allowance of an unmatured claim at the value of the obligation at the date of decedent's death if alternatives for payment at maturity were available. Frohnmayer expressed the view that it should be possible to pay unmatured claims at such value and close the estate. Zollinger commented that an unmatured claim might be paid, alternatively, immediately at current value or on a deferred basis from funds set aside for the purpose or by distributees who had given bond to assure payment at maturity, and indicated that if payment was deferred, he favored payment in the amount and according to the terms of the obligation.

Contingent claims (section 8). At Dickson's suggestion, the committees, before taking action on the suggestion that section 6 of the rough draft contain provisions on methods of settlement of unmatured claims parallel to such methods as to contingent claims under section 8, proceeded to consider section 8. Gooding noted that section 8 was derived from section 424, 1963 Iowa Probate Code, in turn adapted from section 140, Model Probate Code.

There was a brief discussion on the distinction between contingent and unliquidated claims. Zollinger commented that a claim in controversy was not necessarily a contingent claim. Frohnmayer remarked that a contingent claim was one that might never ripen into a liability. In response to a question by Gilley, Zollinger stated that a personal injury claim, although unliquidated, uncertain and contested, was absolute if it existed at all, and therefore was not a contingent claim. Riddlesbarger suggested, and Frohnmayer agreed, that the application of section 8 might be broadened to cover unliquidated claims. Dickson suggested treatment of unliquidated claims in a separate section.

Allison referred to the provision of section 1 of the rough draft stating that an action pending prior to decedent's death might be revived without the filing of a claim, and suggested that the examples given in the discussion on unliquidated claims involved actions and not claims. Dickson referred to ORS 121.020, relating to survival of causes of action, and ORS

121.090, relating to actions against personal representatives and the necessity of presenting claims before commencing such actions. Frohnmayer noted that ORS 121.090 tied an action to presentment of a claim. Dickson remarked that the treatment was different. Frohnmayer suggested, and Dickson agreed, that the provisions on actions should be located with the provisions on claims so as not to be overlooked.

Dickson commented that methods of payment of unmatured, unliquidated and contingent claims should be provided for in three separate sections. Bettis indicated he favored this idea, remarking that the methods of payment employed for each type of claim, even though substantially parallel, probably would differ in certain respects. Riddlesbarger moved, seconded by Braun, that the three types of claims be handled separately as suggested. Motion carried.

Frohnmayer referred to the method of payment of contingent claims described in subsection (1) of section 8 (i.e., agreement, arbitration or compromise by creditor and personal representative), and suggested that the wording used for unmatured claims (i.e., "value of the obligation at the date of decedent's death") might be substituted for "its probable present worth" in subsection (1). Zollinger commented that the wording used for unmatured claims was not appropriate for contingent claims, and suggested that Frohnmayer's objection might be satisfied by deletion of "present" in subsection (1). Butler remarked, and Frohnmayer agreed, that with deletion of "present" the clause "according to its probable worth" was unnecessary and could be deleted.

Dickson commented that if there was to be a general provision authorizing a personal representative to compromise or compound claims against the estate, as in the case of debts due the estate under ORS 116.130, a special provision, such as subsection (1) of section 8, for a particular kind of claim was not necessary. Gooding noted that the rough draft did not contain such a general provision. Dickson suggested there should be such a provision, perhaps similar to section 147, Model Probate Code, as follows:

"When a claim against the estate has been filed or suit thereon is pending, the creditor and personal representative may, if it appears for the best interests of the estate, compromise the claim, whether due or not due, absolute or contingent, liquidated or unliquidated. In the absence of prior authorization or subsequent approval by the court, no compromise shall bind the estate."

Riddlesbarger expressed the view that subsection (1) of section 8 should be retained, even though there was a general provision on compromise of

claims against an estate, with a reference to the general provision in subsection (1). He moved, seconded by Braun, that subsection (1), with "according to its probable present worth" deleted and a reference to a general provision on compromise of claims added, be approved. Motion carried.

Braun referred to subsection (2) of section 8, indicated she did not favor keeping an estate open for the purpose of paying a contingent claim and suggested deletion of subsection (2), commenting that the distributee bond method under subsection (3) was sufficient for the purpose. Butler pointed out that keeping the estate open for a short period might be more desirable in some cases than requiring distributee bond.

In response to a question by Frohnmayer, Zollinger suggested that "for this purpose" in that part of subsection (2) of section 8 relating to keeping an estate open up to two years was unnecessary. Riddlesbarger disagreed, commenting that there might be other purposes for keeping the estate open.

Frohnmayer indicated he favored requiring a distributee bond, in addition to distributee liability, to assure payment of a contingent claim after distribution, if this was the method of payment designated by the court. Bettis commented that the distributee bond should be a corporate surety bond. Zollinger remarked that subsection (2) of section 8 appeared to contemplate distribution and closure of the estate after two years if the contingent claim had not become absolute and been paid, and asked whether the distributees would be liable for the claim if they did not give bond, indicating he did not favor discharge of distributee liability if bond was not given. Mapp noted that the comparable provision of the Model Probate Code (i.e., section 140(b)) made distributees liable in such a situation, and authorized the bond requirement in addition thereto.

Lovett suggested, and Richardson agreed, that subsection (2) of section 8 might be revised by deletion of all after the first semicolon. Allison commented that if final distribution was made without a contingent claim having been paid, distributees should be required to give corporate surety bond for satisfaction of the claim.

Mapp moved, and it was seconded, that Lundy should prepare a revision of section 8 for consideration by the committees that would authorize the court to provide for alternative methods for payment of contingent claims by: (1) Agreement by creditor and personal representative, (2) withholding of sufficient funds by personal representative, (3) requiring distributees to give corporate surety bond to assure payment of claim, or (4) such other

method as the court might order. Motion carried. Note:
This motion was superseded later by assignment of revision of section 8
to a subcommittee consisting of Carson, Gooding and Riddlesbarger. /

Dickson stated that the court should have authority to provide for one or any combination of the several methods of payment described in revised section 8, or to direct abandonment of a method previously prescribed in favor of another.

Secured claims and procedure (section 7). Gooding explained that section 7 of the rough draft, relating to secured claims and procedure, was based on sections 422 and 423, 1963 Iowa Probate Code. Allison commented that "order of the court" should be substituted for "judgment" in the third sentence of section 7, first line on page 4 of Gooding's report.

Allison noted that section 7 contained different provisions for secured claims not yet due and secured claims due, while provision for unsecured claims not yet due was made in section 6. He suggested that the treatment of these types of claims in the rough draft was somewhat confusing.

In response to a question by Gooding, Zollinger indicated he was in favor of treating all secured claims whether due or not yet due, in the same manner. Zollinger expressed the view that a creditor with a secured claim should be able to present the claim for the full amount of the debt and not have to surrender the security until the claim was paid or limit the claim to a deficiency determined by compromise to exist after exhaustion of the security. He commented that, in the case of an insolvent estate, it might be appropriate, however, to limit the secured creditor to a pro rata share of the amount of the debt remaining after exhaustion of the security.

Allison remarked that ordinarily a creditor would not have recourse to security unless there was a default in the obligation secured, and that in the case of an obligation not yet due, default would not occur before the obligation matured. Zollinger commented that a secured creditor should be permitted to present his claim for the unmatured debt despite the existence of the security, the same as a creditor with an unsecured unmatured claim, and obtain payment on whatever basis was provided for unmatured claims. Frohnmayer questioned whether a secured creditor should be permitted to mature the obligation by presenting a claim, even though the obligation was not in default and the creditor therefore had no recourse on the security. Zollinger expressed the view that the secured creditor had a legitimate

claim and should be permitted to establish it. He indicated he would be willing to leave the method of payment of the claim to the discretion of the court.

Mapp compared sections 6 and 7 with similar provisions of the 1963 Iowa Probate Code (sections 421, 422 and 423) and Model Probate Code (sections 138 and 139), noting some of the instances in which the Iowa provisions differed from those of the Model. He pointed out, for example, that the Model specified that "the court shall allow" claims not due, while Iowa and section 6 of the rough draft provided that such claims "may" be paid in a certain manner. He commented that the Model appeared to require the filing of all claims, even those secured, with failure to file leaving a secured creditor recourse only to his security. In response to questions by Frohnmayer, Mapp affirmed that the committees had previously agreed that unsecured unmatured claims had to be presented and would be allowed at value of the obligation at the date of decedent's death, and that this was similar to the Model provisions. Zollinger noted that the committees subsequently had agreed generally on parallel various methods for payment of unmatured, unliquidated and contingent claims.

Butler commented that subsection (1) of section 7 appeared to confer a privilege on a secured creditor not available if the debtor were living. He indicated that in the case of a purchase money mortgage in default, there would be no deficiency judgment against a living debtor, yet subsection (1) appeared to permit something similar against a deceased debtor's estate. In response to a question by Dickson, Mapp stated that the Model Probate Code appeared to require that a mortgagee mature the claim not in default. Dickson remarked that he did not favor this approach, pointing out that, for example, a creditor holding a mortgage at 4-1/2% interest, which was favorable to a surviving spouse, could mature the claim and deprive the surviving spouse of the favorable interest rate.

Zollinger suggested that a sensible disposition of a secured claim would be to have the amount allowed by the personal representative or court, with authority in the court to determine the method of settlement, in the light of the particular circumstances, by immediate payment, by retention of funds for subsequent payment and keeping the estate open a short period for this purpose or by distribution and requiring distributee bond to assure payment. He expressed the view that the secured creditor should not be compelled to forego recourse against the estate and rely solely on the security. Braun indicated she was of the opinion a secured claim could be satisfactorily treated in a manner similar to that of a claim not yet due, and that the security might be waived when distributee bond was given. Frohnmayer remarked that he was reluctant to allow a mortgagee so many remedies on the mortgage debt.

Dickson commented that he saw no reason not to leave a secured creditor to recourse on his security, without the necessity of presenting a claim.

Dickson pointed out that the matter of encumbered property devised or bequeathed and responsibility for exoneration thereof was an aspect of the problem of secured creditors and their claims against an estate that should be considered by the committees. It was recalled that a bill on the subject of encumbered property devised or bequeathed had been prepared by the Bar committee in 1964 and submitted to the advisory committee, which had revised the bill somewhat and submitted it to the Law Improvement Committee, as Bill No. 7, in January 1965. Dickson noted that Bill No. 7 had been withdrawn from the Law Improvement Committee because the advisory and Bar committees decided further revision of it was necessary, and that such revision had been undertaken but was completed too late for approval by the Law Improvement Committee and introduction at the 1965 legislative session. Lundy commented that Bill No. 7, as revised, appeared to have been the basis for section 13 of Riddlesbarger's wills draft Note: See Appendix A, Minutes, Probate Advisory Committee, 12/17,18/65/, which had been considered and approved with some change by the committees at the November 1965 meeting Note: See Minutes, Probate Advisory Committee, 11/19,20/65, pages 7 and 8, and rewritten wills draft constituting an appendix to these minutes/.

On the suggestions of Allison and Zollinger, Dickson appointed a subcommittee, consisting of Carson, Gooding and Riddlesbarger, to review the matters of unmatured, unliquidated and contingent claims, secured and unsecured claims and encumbered property devised and bequeathed, and to submit a report and revised draft for consideration by the committees at the joint meeting in May. Frohnmayer commented that there should be some research done on the present law as to remedies against an estate of a creditor with a mortgage not in default, and indicated he would undertake such research and forward his findings to members of the subcommittee.

Claim of personal representative (section 9). Gooding referred to section 9 of the rough draft, relating to claim of personal representative, and indicated that the first three sentences thereof were derived from ORS 116.580 and 116.585, and the last two sentences from sections 317(d) and 324, Texas Probate Code. It was noted that the concluding phrase of the first sentence of section 9 (i.e., "in the proceedings for the final settlement of the estate") differed from the concluding phrase of ORS 116.580 (i.e., "in any action, suit or proceeding between the executor or administrator and such creditor, heir or other person"). Gooding explained that the wording of the phrase in section 9 was that used in section 161, Mundorff code.

Zollinger questioned the purpose of the next to last sentence of section 9. Gooding commented that the purpose of the sentence apparently was to make the procedure for disposition of claims of a personal representative inapplicable if the personal representative was claiming as an heir, devisee or legatee or if the claim constituted an expense of administration. Zollinger moved, seconded by Braun, that the sentence be deleted. Motion carried.

Zollinger indicated he saw no purpose served by the last sentence of section 9. Frohnmayer commented that there might be instances in which it would be appropriate for a personal representative to purchase a claim. Zollinger moved, seconded by Frohnmayer, that the sentence be deleted. Motion carried.

Riddlesbarger pointed out that section 1 of the rough draft, relating to filing of claims, applied to "all persons having claims against an estate of a decedent," which apparently would include a personal representative, and suggested that a personal representative should not be permitted to proceed on his claim under either section 1 or section 9, or both. He referred to a situation in which he had represented an heir in an estate proceeding and in which the personal representative, the surviving spouse, had presented a claim for medical services performed for decedent, and recounted that the claim had been rejected in the district court but allowed in the circuit court. He noted that the heir he represented was denied permission to intervene in the circuit court proceeding, on the ground that the heir would be able to object to the claim on settlement of the final account, but that on the final account the district court took the position that the circuit court determination on the claim was binding. He commented that in this situation the heir had no opportunity to object effectively to payment of the claim. Dickson remarked that the outcome of the situation referred to by Riddlesbarger was not based on the fact that the claimant was the personal representative, but on the existence of the availability of duplicate trial procedures on claims.

Dickson suggested that perhaps personal representatives should be excepted from section 1 of the rough draft. Braun moved, seconded by Zollinger, that section 1 be revised to apply to claimants other than a personal representative. Motion carried.

In response to a question by Gilley, Zollinger commented, and Frohnmayer agreed, that a personal representative should be required to present his claim within four months, like other creditors, in order to be entitled to preferred payment. Zollinger suggested that section 9 might provide that a personal representative's claim be presented within the time allowed for presentment

of claims of other creditors, and not be allowed, retained or recovered if not so presented.

There was discussion at some length of the procedure for disposition of the claim of a personal representative, including the necessity of corroborative proof; the possible role of a corepresentative or a special representative appointed by the court; and whether a personal representative, on rejection of his claim, should proceed in the same manner as other creditors with rejected claims or retain funds for determination of the claim on settlement of his final account.

Allison asked whether, under present law, corroborative proof of claims of personal representatives was required. Dickson pointed out that ORS 116.555 required corroboration of claims rejected by a personal representative, as did section 25 of the rough draft, but that this present requirement did not extend to rejected claims of a personal representative. He suggested that a personal representative with a claim might be required to submit corroborative proof of the claim on presentment. Zollinger indicated he was not in favor of Dickson's suggestion; that he saw no reason to treat personal representative claims before rejection differently than claims of other creditors. Dickson remarked that the court, in determining a personal representative claim, could require such proof as might be necessary for the determination. In response to a question by Husband, Dickson commented that not too many personal representative claims were presented to him for allowance or rejection, and that most of these were supported by corroborative proof.

Riddlesbarger expressed approval of the provision of section 9 permitting a personal representative, where his claim was not presented to the court or was so presented and rejected, to retain funds and have the matter determined on settlement of the final account. Dickson noted that the retention of funds until final account procedure in section 9 involved, in some instances, two determinations by the court on the same claim, and suggested that this procedure might be made the sole procedure on personal representative claims, rather than an alternative or addition to presentment to the court. Gilley commented that a personal representative might desire a determination of his claim before settlement of the final account, for tax purposes for example. Frohnmayer indicated he did not favor postponement of court determination on a personal representative claim until the final accounting.

Gooding noted that other probate codes provided for special representatives to represent the estate when a personal representative claim was filed (see sections 431 and 432, 1963 Iowa Probate Code; section 473.423, Missouri Probate Code; and section 146, Model Probate Code). Frohnmayer suggested

that the procedure for disposition of a personal representative claim should be presentment to the court, court appointment of a special representative to represent the estate in the matter and, if the claim was rejected by the court, appeal by the personal representative in the same manner as other creditors with rejected claims. Lovett questioned whether heirs would be protected under the procedure suggested by Frohnmayer, and expressed the view that heirs should have an opportunity to object to a personal representative claim and to appear and be heard on such objection. Gilley commented that the interests of heirs probably would be represented adequately by the special representative.

Zollinger suggested that if there were joint personal representatives and one of them presented a claim against the estate, the other might be authorized by the court to represent the estate in the matter of the claim, and otherwise the court should appoint a special representative for the purpose. Butler noted that section 431, 1963 Iowa Probate Code, permitted disinterested corepresentatives to act in such cases, and that this section read as follows:

"If the personal representative is a creditor of the decedent, he shall file his claim as other creditors, and the court shall appoint some competent person as temporary administrator to represent the estate in the matter of allowing or disallowing such claim. The same procedure shall be followed in the case of corepresentatives where all such representatives are creditors of the estate; but if one of the corepresentatives is not a creditor of the estate, such disinterested representative shall represent the estate in the matter of allowing or disallowing such claim against the estate by a corepresentative."

Allison indicated he favored appointment of a special representative to represent the estate in every case of a personal representative claim, whether or not there was a corepresentative, expressing the view that a corepresentative would seldom be disinterested entirely. Frohnmayer commented that he saw no reason not to give the court some discretion in determining disinterest of a corepresentative. In response to a question by Riddlesbarger, Allison remarked that he favored the procedure for disposition of a personal representative claim previously suggested by Frohnmayer (i.e., presentment to court, appointment of special representative and appeal from rejection as in the case of rejected claims of other creditors), with no provision for retention of funds until settlement of the final account.

Husband commented that he favored the present procedure for disposition of personal representative claims, expressing the view that in most cases such

a claim was allowed by the court on presentation and that this usually ended the matter. He indicated he was opposed to appointment of a special representative in every instance of presentment of a personal representative claim. Dickson remarked that he saw no advantage in appointment of a special representative, that the court might as well make the determination on a personal representative claim in the first instance and that a requirement of corroborative proof would serve to protect the estate.

Frohmayer referred, with approval, to section 146, Model Probate Code, providing: "If the personal representative is a creditor of the decedent, he shall file his claim as other persons and the court may appoint any suitable person, whether interested in the estate or not, to represent the estate on the hearing thereof." Husband expressed the opinion, with which Riddlesbarger agreed, that the court had inherent power to appoint a suitable person to represent the estate on the hearing of a personal representative claim even in the absence of a specific provision like that in the Model section. Riddlesbarger commented that the court might, if it so desired, designate a referee to obtain the necessary facts on a personal representative claim. Gilley remarked that a referee was supposed to be impartial, whereas the suggested special representative would be expected to be an advocate for the estate, and indicated he favored the Iowa provision previously referred to (i.e., section 431, 1963 Iowa Probate Code).

Riddlesbarger expressed the view that a special representative should not be appointed in every case of presentment of a personal representative claim, and suggested that such appointment be limited to instances in which any person interested in the estate so required. Gilley questioned whether interested persons would have knowledge of presentment of a personal representative claim and so be in a position to decide whether or not to require appointment of a special representative.

Butler moved, seconded by Gooding, that section 9 be revised to read as follows, and be approved as so revised:

"If the personal representative is a creditor of the decedent, his claim shall be presented to the court within the time allowed to other creditors; but the allowance of such claim by such court does not conclude a creditor, heir or other person interested in the estate in any action, suit or proceeding between the personal representative and such creditor, heir or other person. If the court rejects the claim of the personal representative, either in whole or in part, the personal representative shall retain the amount thereof until the final settlement of his accounts, when, if the same is controverted or objected to by

any person interested in the estate, the right of the personal representative to have the allowance claimed shall be tried and determined by the court."

Gilley moved, and it was seconded, that Butler's motion be tabled. Gilley's motion carried.

Dickson commented that there appeared to be need for some subcommittee work on section 9. He appointed a subcommittee, consisting of Frohmayer, Gooding and Riddlesbarger, to prepare a report and revised draft on claims of personal representatives for consideration by the committees at the May meeting, with Frohmayer and Riddlesbarger to send their suggestions to Gooding.

Scope and Progress of Probate Revision Project

Riddlesbarger noted that Jaureguy had remarked to him that it was going to be quite difficult to obtain legislative approval of a revised probate code constituting the comprehensive overhaul exemplified by committee action thus far. Jaureguy indicated that his remark did not imply any misgivings as to the excellence of the work being done by the committees, but merely reflected his opinion as to the difficulty of convincing attorneys in the legislature, and otherwise, of the need for revision when many of them had been practicing for years without encountering serious problems with the present probate statutes. Carson commented that he shared, to some extent, Jaureguy's view that the scope of the revision seemed to be too broad, and that he would prefer to adhere more closely to existing law where it was operating satisfactorily and to keep introduction of new matter to a minimum.

Husband indicated he did not believe many of the proposed changes approved by the committees thus far were too controversial in nature, although abolition of dower and curtesy appeared to fall into the controversial category. He remarked that there were a number of past instances in which comprehensive revisions had been adopted by the legislature, citing the example of the guardianship revision enacted in 1961, and expressed the opinion that obtaining legislative approval of a comprehensive probate revision, while not easy, would not be impossible. Gilley commented that securing enactment of a revised probate code in Oregon should be no more difficult than it was in Washington, Iowa or the other states in which revised codes had been enacted in recent years.

Zollinger stated that the committees should propose only what they thought was good legislation, and that it would be harder to justify a

probate revision the committees felt was not the best that could be offered.

Frohnmayr pointed out that the probate revision would be considered by the Law Improvement Committee before submission to the legislature, and that it would be necessary to convince the Law Improvement Committee of the need for and value of the various proposals embodied in the revision. Lundy commented that the Law Improvement Committee had not formulated definite plans for its review of the revision, but had indicated it favored a series of explanations to local Bar groups around the state. Gooding noted that the Iowa probate revision project had taken some five years to complete, and that, before submission to the Iowa legislature in 1963, a tentative final draft had been considered by a committee of the state judges association, copies of the final product had been distributed to all judges and attorneys and the revision had been explained by the Bar revision committee at meetings attended by judges, court clerks and attorneys in various cities in the state.

Lundy indicated that he was encountering difficulty finding sufficient time for all the drafting work necessary. Frohnmayr suggested that, in view of all the time and effort being expended by committee members on the revision project, the state might reasonably be expected to provide some assistance to Lundy in the drafting work. Husband commented that experienced draftsmen were not easy to find, and that the bulk of the drafting would probably have to be done by Lundy.

Mapp reported that he had obtained financial assistance from the University of Oregon for some research and writing in the probate law area during the coming summer, and expressed the belief that such work would contribute to the revision project. Lundy remarked that Mapp's summer project might serve to assist in the committees' task of preparing the written explanation of the revision requested by the Law Improvement Committee and that probably would be expected by the legislature. Dickson commented that the products of Mapp's summer project also would provide desirable and needed publicity of the revision project.

Dickson expressed the view that satisfactory prosecution of the revision project and completion of a desirable end product required the sustained efforts of persons of the high caliber of the committee members for a long period of time, and that reduction in the present pace of committee activity, such as less frequent meetings, might be detrimental, if not fatal, to the revision project. Husband commented that it appeared completion of the revision project would take longer than previously anticipated, but that he would not propose a decrease in committee activity.

Dickson asked if members thought the Law Improvement Committee should be informed that the probate revision would not be completed in time for necessary review, publicity and submission to the 1967 legislature. Zollinger expressed the opinion that such was not necessary at this point, and that the committees should continue their efforts to produce at least a preliminary draft this year, which might be good enough for submission to the 1967 legislature or, if necessary, held back and perfected during the next two years. Lundy suggested the possibility that the preliminary draft referred to by Zollinger, if ready in time and adequate for the purpose, might be submitted to the 1967 legislature for study or educational purposes only, commenting that interest in and reaction to proposed legislation often was not stimulated until a bill had been introduced at a legislative session.

Zollinger indicated he did not favor submitting a number of minor revision bills to the 1967 legislature, and, in response to a question by Lundy, commented that he did not believe the committees favored dividing the revision into a few large segments and concentrating on one such segment for legislative consideration in 1967.

Next Meeting of Committees

The next joint meeting of the committees was scheduled for Friday, May 20, 1966, at 1:30 p.m., and the following Saturday, May 21, in Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

It was agreed that the first item on the agenda for the May meeting should be claims against decedents' estates, with consideration of:

(1) A report and draft by Carson, Gooding and Riddlesbarger on unmaturred, unliquidated and contingent claims, secured and unsecured claims and encumbered property devised or bequeathed.

(2) A report and draft by Frohnmayer, Gooding and Riddlesbarger on claims of a personal representative.

(3) Sections 10 to 32, Gooding's rough draft (Report, April 1, 1966).

It was agreed that the second item on the agenda for the May meeting should be support of surviving spouse and minor children and homestead, with consideration of reports and drafts by the three subcommittees on this subject appointed previously at this April meeting, to be followed by consideration of the Mapp and Riddlesbarger report on establishing foreign

wills and ancillary administration, and then Butler's report on powers and duties of executors and administrators generally, discovery of assets and inventory and appraisal.

In response to a question by Richardson, Dickson indicated that the subcommittee proposals on outlines of the proposed revised probate code need not be ready for consideration at the May meeting.

The meeting was adjourned at 5 p.m.

APPENDIX

(Minutes, Probate Advisory Committee Meeting, April 15 & 16, 1966)

(The following proposed draft on support of surviving spouse and minor children and homestead, and notes on the proposed draft, were prepared by Mr. Allison and distributed to members of the advisory and Bar committees at the April meeting.)

PROPOSED DRAFT

SUPPORT OF SURVIVING SPOUSE AND MINOR CHILDREN; HOMESTEAD

1. For the purposes of this chapter "the homestead" must be at the date of death of the decedent the actual abode of and occupied by the decedent, his spouse, parent, or child, and be exempt from execution according to the exemption laws then in effect.
2. Until administration of the estate is granted and the inventory filed, the surviving spouse and minor children of the deceased are entitled to remain in the possession of the homestead, all the wearing apparel of the family and household furniture of the deceased. The widow and minor children shall also have a reasonable provision for their support during such period, to be allowed by the court.
3. When the owner of a homestead dies intestate the homestead descends free of judgments and claims against the deceased owner or his homestead estate, except mortgages, executed thereon and laborers' and mechanics' liens, to the persons in the manner provided by law. Such exemption shall not extend to any person other than a child or grandchild, widow or widower, and father or mother of the deceased owner. Such homestead shall be subject to and charged with the expenses of his last sickness and for his funeral, the costs and charges of administration and the claim of the State Public Welfare Commission for the net amount of public assistance, as defined in ORS 411.010, which was paid to or on behalf of the deceased and the recovery of which from the estate of the deceased recipient is authorized by statute other than this section. Nothing in this section shall prevent or limit the court or judge from setting apart for the widow, widower or minor children of the deceased the homestead.
4. When a homestead is devised the devisee takes it free of judgments and claims against the testator or his homestead estate, except mortgages executed thereon and laborers' and mechanics' liens. Such exemption shall not extend to any devisee other than a child or grandchild, widow or widower, and father or mother of the testator. Such homestead shall be

subject to and charged with the expenses of his last sickness and of his funeral, the costs and charges of probate and the claim of the State Public Welfare Commission for the net amount of public assistance, as defined in ORS 411.010, which was paid to or on behalf of the deceased and the recovery of which from the estate of the deceased recipient is authorized by statute other than this section. Nothing in this section shall prevent or limit the court or judge from setting apart for the widow, widower or minor children of the deceased the homestead.

5. Upon petition filed by the surviving spouse, or if no surviving spouse, by the guardian of the minor children within sixty days after the filing of the inventory, the court shall set aside to the surviving spouse, or if no surviving spouse, to the minor children of the decedent the homestead and the personal property exempt from execution according to exemption laws in effect as of the date of death of the decedent. The homestead and the personal property shall become the property of the person to whom it is set aside.

6. The court may by order provide an allowance to the surviving spouse for the support of such spouse and any minor children, or to the minor children alone if there be no surviving spouse, in an amount adequate for support during the administration of the estate. In making or denying such order the court shall take into consideration all assets and income available for the support of the spouse and children outside of the probate estate. The allowance hereunder shall have priority over debts, funeral expenses, expenses of last illness and administration expenses; but if the estate is insolvent, the allowance may not be granted for more than one year after date of death.

7. If upon filing the inventory of the estate of an intestate decedent who died leaving a spouse or minor children, it appears from the inventory that the value of the estate does not exceed \$2,500 over and above property exempt from execution, the court or judge thereof shall make a decree providing that the whole of the estate, after the payment of funeral expenses and expenses of administration, be set apart for such spouse or minor children in like manner and with like effect as in case of property exempt from execution. There shall be no further proceeding in the administration of such estate unless further property is discovered.

8. If an intestate leaves neither surviving spouse nor minor children, all the property of the estate is assets in the hands of the administrator for the payment of funeral expenses, expenses of administration, the debts of the deceased or distribution according to law.

N O T E S

(On proposed draft of support of surviving spouse
and minor children and homestead.)

I was to report and recommend for revision ORS 113.070, 116.005 to 116.025, 116.590, and 116.595.

Mr. Lundy noted that Staff Report No. 2 dated June, 1964 furnished material in this area including provisions from the Alaska and Missouri statutes, a Wisconsin preliminary draft, and the Model Probate Code. I also refer to pertinent sections of the Iowa Code, Sections 374 to 377 inclusive, and the Washington Code, Sections 11.52.010 to 11.52.050 inclusive. See also Jaureguy and Love, Sections 161 through 168.

The ORS sections above must be reconsidered in the light of the fact that (1) we have provided for inheritance by the surviving spouse of one-half of the real and personal property; (2) under election against a will the spouse may take an undivided one-fourth of the real and personal property; and (3) dower and curtesy are abolished.

After reviewing the material set out above, I have concluded that it would be better to redraft on the basis of our present statutes. The law is fairly well established on interpretation of our present statutory framework. There seems little correlation between the various new codes outlined above. It is felt that adopting the entire language of any one of these codes would involve more problems.

I will refer to the proposed draft as follows: Please note that ORS 113.070, which was passed in 1854, should be repealed since the material is included in the proposed redraft.

Section 1: It seems advisable that since the word "homestead" is used throughout our present and proposed draft, and indeed in all of the other codes referred to, that a definition should be made part of the draft. The language is identical with the language of ORS 23.240.

Section 2 is identical to ORS 116.005 with minor revisions in the language.

Section 3 is the same as ORS 116.590 with minor revisions in the language.

Section 4 is a redraft of 116.595.

Section 5 would replace ORS 116.010. As is pointed out in Jaureguy and Love, the court must be apprised of the circumstances of the property to be set aside by petition and in practice the court does not set aside this property unless a petition is filed. It seems proper that this be included specifically in the section. I do not find any time provided in which the petition should be filed but in view of the fact that the status of real property depends upon whether the homestead is set aside or not, it seems proper that some period for filing should be prescribed. The proposed draft omits the present language "to be used or expended by her or him in the maintenance of herself or himself and minor children if any." This language has caused many uncertainties, and in view of the general understanding that the duty to use these funds for this purpose is moral and not obligatory, it seems desirable to omit this language.

Section 6: This is a copy of Section 11 of the Wisconsin first preliminary draft. It follows very closely the Model Code and to me is the best that I found in any of the codes referred to. It seems an improvement over 116.015.

Section 7: This is the same as ORS 116.020 except that the amount is increased from \$1,000 to \$2,500. Since the new codes all seem to set aside up to \$10,000, this would, with our present \$7,500 homestead exemption, bring our code in conformity with the others.

Section 8 is the same as ORS 116.025.

STANTON W. ALLISON

REPORT
April 12, 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: Revised Probate Codes Recently Enacted in Other
States.

At your joint meeting on February 18, 1966, Mr. Zollinger pointed out that members of both committees were familiar with, and some had copies of, the 1965 Washington Probate Code and 1963 Iowa Probate Code, but that members might not be aware of revised probate codes recently enacted in other states. Mr. Zollinger suggested that I 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 such codes themselves were not available for distribution to members. This report represents my effort to comply with that suggestion.

The list of revised probate codes in this report is based upon a survey of the statutes of all states and the District of Columbia available at the Oregon Supreme Court Library. Most of the codes listed were referred to in my initial staff report to the Advisory Committee (i.e., "Probate Law Revision in Oregon," Staff Report No. 1, April 1964).

In preparing the following list, I have interpreted liberally the phrase "recently enacted," and have used the year 1930 as a starting point. The list is arranged chronologically, with the latest enactment first and the earliest enactment last, and is divided into two parts -- those codes enacted since publication of the Model Probate Code in 1946, and those enacted before that publication and after 1930.

CODES ENACTED AFTER MODEL PROBATE CODE

1965 District of Columbia

District of Columbia Code Annotated, titles 18-21,
Supplement V, 1966. [Note: This appears to
be, for the most part, a formal revision.]

1965 Washington

Washington Revised Code Annotated, title 11.
[Note: This revision, enacted as Laws 1965,
chapter 145, is effective July 1, 1967, and
is not yet compiled in Washington Revised Code.]

1963 Iowa

Iowa Code Annotated, chapter 633.

1960 Louisiana

Louisiana Code of Civil Procedure Annotated,
articles 2811-3500. [Note: Other Louisiana
statutory law relating to probate, but not
revised in 1960, will be found in Louisiana
Revised Statutes Annotated, title 9 (R.S.
9:1421-9:1615), and Louisiana Civil Code
Annotated, articles 870-1775.]

1959,
1953 North Carolina

North Carolina General Statutes, chapters 28-37.
[Note: The 1959 revision was limited to
intestate succession (chapter 29). The 1953
revision was limited to wills (chapter 31).]

1955 Missouri

Missouri Annotated Statutes, chapters 472-475.

1955 Texas

Texas Probate Code Annotated.

1953 Indiana

Indiana Annotated Statutes, titles 6-8.

1951 New Jersey

New Jersey Statutes Annotated, title 3A. [Note:
This appears to be, for the most part, a
formal revision, occasioned by adoption of
the new state Constitution in 1947.]

1949 Arkansas

Arkansas Statutes Annotated, titles 57, 60-63.

1947,
1949,
1951 Pennsylvania

Pennsylvania Statutes Annotated, title 20. [Note:
The 1947 revision consisted of an Intestate Act,

a Wills Act, an Estates Act and a Principal and Income Act. The 1949 revision consisted of a Fiduciaries Act. The 1951 revision consisted of a Register of Wills Act.]

CODES ENACTED BEFORE MODEL PROBATE CODE

- 1941 Nevada
Nevada Revised Statutes, titles 12 (chapters 133-156) and 13 (chapters 159-167).
- 1939 Illinois
Illinois Annotated Statutes, chapter 3.
- 1939 Kansas
Kansas Statutes Annotated, chapter 59.
- 1939 Michigan
Michigan Statutes Annotated, section 27.3178.
- 1935 Minnesota
Minnesota Statutes Annotated, chapters 525 and 526.
- 1933,
1945 Florida
Florida Statutes Annotated, chapters 731-737 and 744-746. [Note: The 1933 revision related to estates of decedents (chapters 731-737). The 1945 revision related to guardianship (chapters 744-746).]
- 1931 California
California Probate Code.
- 1931 Ohio
Ohio Revised Code, title 21.

To: Mr. Charles M. Lovett, Miss Patricia A. Lisbakken,
Mr. Peter A. Schwabe, Mr. Walter L. Barrie, and
Judge William L. Dickson:

A PROPOSED ACT

RELATING TO SUCCESSION OR TESTAMENTARY DISPOSITION TO ALIENS

Pursuant to Mr. Landy's memorandum summarizing the questions raised at the March meeting of the Advisory Committee, I discussed the questions with Mr. Schwabe.

It seems to us that the questions raised at the meeting were triggered by the third sentence of Section 2 of the redraft which reads as follows: "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."

I am satisfied that the court should determine the rights of the petitioner as of the time when the court order is handed down. It seems entirely proper that the rights of the parties must be subject to any change in the status of the alien which might occur subsequent to the filing of the petition and prior to determination by the court of his rights.

I suggest therefore that this question can be resolved as indicated if the entire sentence quoted above is deleted from the proposed act. If this is done, the act would provide that a petition for an order authorizing withdrawal shall be filed, that the court shall fix a time and date certain for the hearing, and that if at such hearing the court determines that the petitioner would receive the benefit, use, or control of the money, the court shall order the money paid to the petitioner.

Mr. Zollinger suggested that the second paragraph of paragraph 1 be amended to read: "The money to be deposited shall be the proceeds of sales remaining after payment therefrom of the expenses of such sales," et cetera. Mr. Schwabe suggested that in the large majority of these cases the subject matter is money and not property which needs to be sold. He suggests, and I agree, that the original language of the redraft is preferable.

Stanton W. Allison

REPORT
April 1, 1966

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

From: Tom Gooding
P. O. Box 944
LaGrande, Oregon 97850

Subject: Rough Draft on Claims Against Decedents' Estates

One of the matters scheduled for consideration by the Advisory and Bar Committees at the meeting to be held April 15 and 16, 1966, is revision of those sections of the present Oregon probate code (principally, ORS 116.510 to 116.595, 117.030 and 117.110 to 117.180) relating to claims against decedents' estates.

This report contains a rough draft of a suggested revision of the statutes pertaining to claims against decedents' estates, under three general headings: "Time and Manner of Filing Claims," "Classification, Allowance and Payment of Debts and Charges" and "Denial and Contest of Claims."

TIME AND MANNER OF FILING CLAIMS

Section 1. Filing of claims. All persons having claims against an estate of a decedent, including the claims of the State of Oregon, must serve a statement thereof upon the personal representative and file the same with the clerk of the court with proof of such service within six months of the date of the first publication of notice of the appointment of the personal representative, except an action pending prior to decedent's death may be revived as provided by law without filing of a claim as herein provided.

Section 2. Contents of a claim. A claim shall be verified by an affidavit of the claimant, or someone on his behalf who has personal knowledge of the fact, to the

effect that the amount claimed is justly due, that no payments have been made thereon, except as stated, and that there is no just counterclaim to the same to the knowledge of the affiant. The claim shall contain claimant's name and address and the name and address of claimant's attorney, if any. When it appears or is alleged that there is any written evidence of such claim, the personal representative may demand that such evidence be produced or its nonproduction accounted for.

Section 3. Defects of form. Any defect of form, or claim of insufficiency of exhibits or vouchers presented, shall be deemed waived by the personal representative unless written objection thereto has been filed with the clerk of the court within 60 days after presentment of the claim, and a copy mailed by certified mail to the claimant.

Section 4. Limitation on filing. All claims not filed within six months after the date of the first publication of notice of the appointment of the personal representative shall be barred from payment; provided, however, the personal representative may waive such limitation on filing; and this provision shall not bar claimants entitled to equitable relief due to peculiar circumstances.

Section 5. Funeral charges. The personal representative named in the will, the surviving spouse or next of kin are authorized to incur funeral charges on account of the estate in the burial of the decedent before the administration of the estate is granted. The burial of the decedent may be

in a manner and at a cost according to his circumstances and condition in life; but no funeral charges, except those necessary to give the decedent a plain and decent burial, shall be allowed out of the estate where the assets are not sufficient to satisfy all other claims against it, including legacies and devises, if there are any.

Section 6. Unsecured claims not yet due. Upon proof of an unsecured claim which will become due at some future time, the same may be satisfied by payment of such sum as the court may prescribe to be equal to its present value, or the court may direct the investment of an amount which will provide for the payment of the claim when it becomes due.

Section 7. Secured claims and procedure. When a creditor holds any security for a claim not yet due, he may file his claim as a claim not yet due with the right of withdrawing the claim if the personal representative's compromise offer is not satisfactory, and, after such withdrawal, rely entirely on his security, or he may elect to rely entirely on his security without the necessity of filing a claim. When a creditor holds any security for his claim, which is then due, the security shall be described in the claim. If such claim is secured by a mortgage, pledge or other lien which has been recorded, it shall be sufficient to describe the lien by date, and refer to the volume, page and place of recording; the claim shall be allowed in the amount remaining unpaid at the time of its

allowance, and the judgment allowing it shall describe the security; payment of the claim shall be upon the basis of the full amount thereof if the creditor shall surrender his security; otherwise payment shall be upon the basis of one of the following:

(1) If the creditor shall exhaust his security before receiving payment, then upon the full amount of the claim allowed, less the amount realized upon exhausting the security; or

(2) If the creditor shall not have exhausted, or shall not have the right to exhaust his security, then upon the full amount of the claim allowed, less the value of the security determined by agreement, or as the court may direct.

Section 8. Contingent claims. Contingent claims which cannot be allowed as absolute debts shall, nevertheless, be filed in the court and proved. If allowed as a contingent claim, the order of allowance shall state the nature of the contingency. If such claim shall become absolute before distribution of the estate, it shall be paid in the same manner as absolute claims of the same class. In all other cases, the court may provide for the payment of contingent claims in any one of the following methods:

(1) The creditor and personal representative may determine, by agreement, arbitration or compromise, the value thereof, according to its probable present worth,

and upon approval thereof by the court, it may be allowed and paid in the same manner as an absolute claim; or

(2) The court may order the personal representative to make distribution of the estate but to retain in his hands sufficient funds to pay the claim if and when the same becomes absolute; but, for this purpose, the estate shall not be kept open longer than two years after distribution of the remainder of the estate; and if such claim has not become absolute within that time, distribution shall be made to the distributees of the funds so retained, after paying any costs and expenses accruing during such period, and such distributees to give bond for the satisfaction of their liability to the contingent creditor; or

(3) The court may order distribution of the estate as though such contingent claim did not exist, but the distributees shall be liable to the creditor to the extent of the estate received by them, if the contingent claim thereafter becomes absolute; and the court may require such distributees to give bond for the performance of their liability to the contingent creditor; or

(4) Such other method as the court may order.

Section 9. Claim of personal representative. If the personal representative is himself a creditor of the testator or intestate, his claim, duly verified, may be presented to the court for allowance or rejection; but the allowance of such claim by such court does not conclude a creditor, heir, or other person interested in the estate in the pro-

ceedings for the final settlement of the estate. If the court rejects the claim of the executor or administrator, either in whole or in part, or if the same is not presented for allowance, the personal representative may retain the amount thereof until the final settlement of his accounts, when, if the same is controverted or objected to by any person interested in the estate, the right of the personal representative to have the allowance claimed shall be tried and determined by the court. If the claim is not presented to the court or judge before it is barred by the statute of limitations, such claim cannot be allowed, retained or recovered. This provision does not apply to the claim of any heir, devisee or legatee who claims in such capacity, or to any claim that accrues to the estate after the granting of letters for which the representative of the estate has contracted. The personal representative shall not purchase for any purpose any claim against the estate he represents.

Section 10. Claims against personal representative.

The naming of a personal representative in a will shall not operate to extinguish any just claim which the deceased had against him; and, in all cases where a personal representative is indebted to his testator or intestate, he shall account for the debt in the same manner as if it were cash in his hands; provided, however, that if such debt was not due at the time of receiving letters, he shall be required to account for it only from the date when it

becomes due.

CLASSIFICATION, ALLOWANCE AND PAYMENT
OF DEBTS AND CHARGES

Section 11. Classification of debts and charges. In any estate in which the assets are, or appear to be, insufficient to pay in full all debts and charges of the estate, the personal representative shall classify such debts and charges as follows:

- (1) Court costs.
- (2) Other costs of administration.
- (3) Reasonable funeral and burial expenses.
- (4) All debts and taxes having preference under the laws of the United States.
- (5) Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him at his last illness.
- (6) All taxes having preferences under the laws of this state.
- (7) All debts owing to employes for labor performed during the 90 days next preceding the death of the decedent.
- (8) The claim of the State Public Welfare Commission for the net amount of public assistance, as defined in ORS 411.010, paid to or for the decedent and the claim of the Oregon State Board of Control for care and maintenance of any decedent who was at a state institution to the extent provided in ORS 179.610 to 179.770.

(9) All other claims filed within six months after the publication of the notice of the appointment of the personal representative and allowed during the course of administration. As to claims of this class, they shall have the priorities among each other in accordance with subsections (1) to (7) of this section.

Section 12. Order for payment. As soon as practicable after the filing of the first semiannual account and each semiannual account thereafter, the court shall ascertain and determine if the estate is sufficient to satisfy the claims presented and allowed by the personal representative, within the first six months or any succeeding period of six months thereafter, after the date of the notice of his appointment, after paying the funeral charges and expenses of administration; and if so, it shall so order and direct; but if the estate is insufficient for that purpose, it shall ascertain what percent of such claims it is sufficient to satisfy, and order and direct accordingly. If the estate is insufficient to pay all the claims and charges of any one class, payable within any period of six months, as provided in section 11, each creditor of such class shall be paid in proportion to the amount of his claim, and not otherwise, without preference between claims then due and those of the same class not due.

Section 13. Payment of contingent claims by distributees. If a contingent claim shall have been filed and allowed against an estate

and all the assets of the estate shall have been distributed, and the claim shall thereafter become absolute, the creditor shall have the right to recover thereon against those distributees whose distributive shares have been increased by reason of the fact that the amount of said claim as finally determined was not paid prior to final distribution, provided an action therefor shall be commenced within six months after the claim becomes absolute. Such distributees shall be jointly and severally liable, but no distributee shall be liable for an amount exceeding the amount of the estate or fund so distributed to him. If more than one distributee is liable to the creditor, the creditor shall make parties to the action all such distributees who can be reached by process. By its judgment, the court shall determine the amount of the liability of each of the distributees as between themselves, but if any be insolvent or unable to pay his proportion, or beyond the reach of process, the others, to the extent of their respective liabilities, shall nevertheless be liable to the creditors for the whole amount of his debt. If any person liable for the debt fails to pay his just proportion to the creditor, he shall be liable to indemnify all who, by reason of such failure on his part, have paid more than their just proportion of the debt, the indemnity to be recovered in the same action or in separate actions.

Section 14. Personal representative's liability.

Upon the filing of a semiannual account, and an order is made as provided in section 12, thereafter the personal representative is personally liable to each creditor included in such order for such amount.

Section 15. Owner may obtain order for payment. Any creditor of an estate of a decedent whose claim, or part thereof, has been approved by the court or established by suit, may, at any time after 12 months from the granting of letters testamentary or of administration, upon written application and proof showing that the estate has on hand sufficient available funds, obtain an order directing that payment be made; or, if there are no available funds, and if to await the receipt of funds from other sources would unreasonably delay payment, the court shall then order sale of property of the estate sufficient to pay the claim; provided, the representative of the estate shall have first been cited on such written complaint to appear and show cause why such order should not be made.

Section 16. Liability for nonpayment of claims. (1)
If any representative of an estate shall fail to pay on demand any money ordered by the court to be paid to any person, except to the State Treasury, when there are funds of the estate available, the person or claimant entitled to such payment, upon affidavit of the demand and failure to pay, shall be authorized to have execution issued against the property of the estate for the amount due, with interest and costs; or

(2) Upon return of the execution not satisfied, or merely upon the affidavit of demand and failure to pay, the court may cite the representative and the sureties on his bond to show cause why they should not be held liable for such debt, interest, costs and damages. Upon return of citation duly served, if good cause to the contrary be not shown, the court shall render judgment against the representative and sureties so cited, in favor of the holder of such claim, for the amount theretofore ordered to be paid or established by suit, and remaining unpaid, together with interest and costs, and also for damages upon the amount neglected to be paid, at the rate of five percent per month for each month, or fraction thereof, that the payment was neglected to be paid after demand made therefor, which damages may be collected in any court of competent jurisdiction.

Section 17. Source of payment. All debts and charges owing by the estate of a decedent shall be paid from the property of the estate, and, in testate matters, from the residue of the estate, unless the will of the decedent, or other trust instrument, provides expressly to the contrary.

DENIAL AND CONTEST OF CLAIMS

Section 18. Presumption of allowance. All claims filed shall be deemed allowed unless the personal representative shall within 60 days of the date of filing such claim disallow the same.

Section 19. Disallowance by personal representative.
Within 60 days of the date of the filing of any claim, the personal representative or his attorney shall file with the clerk, with proof of service by affidavit, a notice of disallowance of the claim and shall mail a copy of the notice to the claimant or claimant's attorney, if any, by certified mail at the claimant's address or the attorney's address stated in the claim.

Section 20. Contents of notice of disallowance.
Such a notice of disallowance shall advise the claimant that the claim has been disallowed and will be forever barred unless the claimant shall within 20 days after the date of mailing the notice, file a request for hearing on the claim with the clerk, and mail a copy of such request for hearing to the personal representative by certified mail.

Section 21. Claims barred after 20 days. Unless the claimant shall within 20 days after the date of mailing said notice of disallowance, file a request for hearing with the clerk, and mail a copy thereof to the personal representative, the claim shall be deemed disallowed, and shall be forever barred.

Section 22. Request for hearing by claimant. At the time of the filing of a claim against an estate, or at any time thereafter prior to the time that the claim may be barred by the provisions of section 21, or the approval of the final report of the personal representative

after notice to the claimant, the claimant may file a written request for hearing on his claim with the clerk of the court and shall mail a copy of such request for hearing by certified mail to the personal representative or to his attorney.

Section 23. Applicability of rules of procedure.

Within 20 days from the filing of the request for hearing on a claim, the personal representative shall move or plead to such claim in the same manner as though the claim were a complaint filed in an ordinary action or suit; and thereafter, all provisions of law and rules of procedure applicable to motions, pleadings and the trial of ordinary actions and suits, to and including appeal, shall apply as in ordinary actions and suits.

Section 24. Contest by others. Any person interested in an estate at any time prior to the approval of any claim may appear and object in writing to the approval of the same, or any part thereof. The objections shall be filed with the clerk and the objector shall mail a copy of the objection by certified mail to the personal representative or his attorney and to the claimant or his attorney. The personal representative and the claimant shall move or plead to the objection in the manner provided in section 23, and it shall be determined by the court in the manner provided in section 23.

Section 25. Quantum of proof. No claim which is rejected by the personal representative shall be allowed

by any court except upon some competent, satisfactory evidence other than the testimony of the claimant.

Section 26. Pleading statute of limitations. It shall be within the discretion of the personal representative to determine whether or not the applicable statute of limitations shall be pleaded to bar a claim which he believes to be just, provided, however, that this section shall not apply where the personal representative was appointed upon the application of a creditor.

Section 27. When claim not affected by statute of limitation. No claim shall be barred by the statute of limitation which was not barred at the time of the decedent's death, if the claim shall have been filed against the decedent's estate within six months from the date of the publication of notice of the appointment of the personal representative.

Section 28. Claims barred when no administration commenced. All claims barrable under the provisions of this 1967 Act shall, in any event, be barred if administration of the estate, whether testate or intestate, original or ancillary, is not commenced within five years after the death of the decedent.

Section 29. Liens not affected by failure to file claims. Nothing in this 1967 Act shall affect or prevent any action or proceeding to enforce any mortgage, pledge or other lien upon property of the estate.

Section 30. Proof of judgment. (See ORS 116.570)

Section 31. Reference of claims. (See ORS 116.575)

Section 32. Exemption of homestead devised or not
devised. (See ORS 116.590 and 116.595, which seemingly
could be consolidated)

TO: The Advisory Committee - Probate Law Revision

From: Tom Gooding, P. O. Box 944, La Grande, Oregon

RE: Creditor's Rights

PUBLICATION OF NOTICE: All codes indicate this provision belongs in the Chapter 115 on the initiation of probate. Rather than stating what the notice should contain, the costs of publication might be in the following statutory notice form prescribed:

_____ is the _____
(Name) (Executor-Administrator)
of the estate of _____, deceased, pending in the _____
(Name) (Circuit -
County) Court of the State of Oregon for _____ County.
Creditors must deliver their claims within three months after _____
(date of first publication of this notice) to the _____
(Executor-Administrator)
at the following address:

TIME FOR PRESENTATION: ORS 116.510 consideration may be given to reducing the time. Probably should include liquidated and unliquidated claims. Late filing permitted in Mundorff #154, upon grounds, assets available and tax-liability offset. Some definitions of "claims" might be in order such as found in Mundorff, #154 and Missouri #473.360. For instance the latter statute provides:

"Except as provided in #473.367 (Action in Circuit Court) and 473.370 (Claim based on judgment), all claims against the estate of a deceased person, other than costs and expenses of administration and claims of the United States and tax claims of the State of Missouri and subdivisions thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise which are not filed in the Probate Court within 9 months after the first published notice of Letters Testamentary or of administration, are forever barred against the estate, the executor or administrator, the heirs, devisees and legatees of the decedent. No contingent claim based on any warranty made in connection with the conveyance of real estate is barred under this section. (Excepts enforcement of mortgage, pledge or lien)";

VERIFICATION OF CLAIMS: 116.515, some consideration has been given to the elimination of verification. All codes seem to require, even bankruptcy where penalties for a false oath are provided.

FILING OF CLAIM: The Oregon practice is to file a claim with the Executor. Most Courts require:

1. File with Clerk, with proof of service upon representative or attorney. Mundorff #153.
2. Others provide for the claim to be filed in duplicate with the Clerk to mail copy to the representative or attorney. Iowa #418; Texas #308.

The failure of the Clerk to give notice does not affect the validity of the presentment or the presumption of rejection. Texas #308.

3. An action pending against the decedent prior to death is revived as provided by law without the filing of a claim. Mundorff, Missouri #473.367.

CONTENTS OF CLAIM: Aside from verification, in the present statutory language, the codes require it to state the place of residence and post office address of the claimant and of the attorney for the claimant. Mundorff #153; Iowa #418.

APPROVAL OR REJECTION: ORS 116.520 requires affirmative rejection akin to most codes. Mundorff #156 deems inaction to be allowance.

1. The claim is rejected by inaction and is thereafter established, the costs are taxed individually against the representative, or he may be removed for cause on the written complaint of any interested person after citation, hearing and proof. Missouri #310.

DEFECTS OF FORM: Defect of form or sufficiency of exhibit or vouchers is waived unless personal representative files a written objection with the Clerk, Texas #302.

ATTORNEYS FEES: If the instrument supporting the claim provides for attorneys fees, claimant may include a portion of the fee paid or contracted to be paid to an attorney to prepare, present and collect a claim. Texas #307.

UNSECURED CLAIMS NOT YET DUE: May be paid if claimant consents to Courts discount, otherwise the Court shall direct the investment of an amount which will provide for payment of the claim when it is due. Iowa #421.

SECURED CLAIMS NOT YET DUE: Creditor may file a claim with the right of withdrawing if compromise offer is unsatisfactory, and then he relies entirely on his security, or he may elect to rely entirely on security without the necessity of filing a claim. Iowa #422.

SECURED CLAIMS THAT ARE DUE: Claim must describe the security and is allowed in the amount remaining unpaid upon the surrender of the security. Otherwise payment is as follows:

1. Creditor exhausts security and is paid deficiency, or
2. If security not exhausted, or creditor not having a right to exhaust, then full amount of claim is allowed less the value of the security determined by agreement or Court order. Also see Missouri #473.387.

CONTINGENT CLAIMS: The claim and the order of allowance states the nature of the contingency. If it becomes absolute before distribution, it is paid in the same manner as absolute claims of the same class. Otherwise the Court provides for its determination in any one of the following methods:

1. Agreement, arbitration or compromise of probable present worth approved by Court.
2. Court orders representative to distribute estate but retain sufficient funds to pay claim when it becomes absolute but for no longer than two years. If not then absolute, distribution is made and distributees liable

to creditor to the extent of property received if contingent claim thereafter becomes absolute; Court may require distributees to give bond, or

3. Court order distribution as though contingent claim did not exist but distributees liable to the extent of estate received if contingent claim becomes absolute and Court may require distributees to give bond, or
4. Such other method as Court may order. Iowa #424, Missouri #473,390. Note: See ORS 117.170.

CLAIM OF EXECUTOR OR ADMINISTRATOR IN DETERMINATION: ORS 116.580 and .585 provides for summary allowance with the right to object preserved until the time of the settlement of the account.

1. Same as Mundorff #161 and 162.
2. Except in the case of disinterested co-representatives, Court appoints administrator ad litem to represent estate, file a report and recommendation. If disallowed then handled as contested claim. Iowa #431-432; Missouri #473.423; Texas #317.
3. Foregoing provision does not apply to a claim of an heir, devisee or legatee claiming in such capacity or to any claim that accrues against the estate after the granting of Letters for which a representative of the estate has contracted. Texas #317.
4. Representative shall not purchase claims; if so, Court can cancel claim and remove representative. Texas #324.

CLAIMS AGAINST EXECUTORS: The naming or appointment of a representative does not operate to extinguish a claim which the deceased had against him; he accounts for the debt in the same manner as if it were cash. Texas #316.

JOINT OBLIGATION: Estate is charged in the same manner if obligors had been bound severally as well as jointly. Texas #3123.

CONTEST, DETERMINATION, AND APPEAL OF REJECTED CLAIMS: ORS 116.525 to ORS 116.550. Oregon provides two routes, one directly to the Circuit Court, and the other through the County Court and trial de novo to the Circuit Court.

1. Mundorff, #156 provides a Bill of Particulars, and other motions and proceedings had at law or equity, the demand of a jury trial, independent corroborative evidence etc. with the Court having exclusive jurisdiction.
2. Iowa, #415 provides for the continuance of a pending action in lieu of a claim, or the filing of a separate action in lieu of a claim and sets forth the elaborate procedures for notice, venue etc. Also see #417. The other procedure is in #438-449 as follows:
 - a. If not admitted, deemed denied and personal representative gives written notice of disallowance by certified mail advising that it is disallowed and forever barred unless within 20 days a hearing request is filed with the Clerk with a copy to the representative and proofs of service.

- b. #422, 433 and 444 -- if hearing not duly requested it is disallowed and barred. After request, representative moves or pleads to the same "as though the claim were a petition filed in an ordinary action, and thereafter all provisions of law and rules of civil procedure are applicable to motions, pleadings and the trial of ordinary actions shall apply.
 - c. Claimant does not have to prove claim is unpaid but is subjected to examination on the question of payment or consideration and the estate is not concluded or bound by his examination.
 - d. Trial and hearing without a jury unless requested and governed by the rules of the procedure in ordinary action and judgment is rendered as in ordinary cases.
3. Missouri, #473.407-420 provides for ordinary defenses, assertion of offsets or counterclaims within 10 days after service of a claim and a hearing by the Court governed by individual Court rules, depositions, jury trial for a claim over \$100. If the Court believes there is a probability that any judgment rendered will be appealed, it may on its own motion transfer the same to the Circuit Court. Claimant pays Circuit Court costs upon a claim based upon an expressed or implied contract but not where the suit is cognizable in the probate court. #473.377. Texas procedures are in #312-314.
- a. Any interested person may appear and object before approval, "as in ordinary suits." All allowed claims shall be acted on by the Court and approved by the Court may disallow an approved claim if he is not satisfied that it is just; after examination of the claimant and personal representative or other evidence, if then not convinced the claim is just, he shall disapprove it.
 - b. Appeal is to the next Court.
 - c. Due presentment of a claim is a prerequisite to judgment.

QUANTUM OF PROOF: ORS 116.555 requires independent, competent and satisfactory evidence.

- 1. Mundorff #156 is to the same effect.
- 2. Iowa #445 does not require claimant to prove that claim is unpaid.
- 3. Texas #312 does not require independent testimony.
- 4. Missouri # does not require independent testimony. But provides that affidavit is not received as evidence of claim. #473.380.

STATUTE OF LIMITATIONS: ORS 116.555 provides for an absolute bar whether pled or not. To the same effect is Mundorff's #156.

- 1. Iowa #411-431, allow the "personal representative" the discretion where he believes the claim to be just, and
 - a. Except where he was appointed upon application of the creditor,
 - b. Limitation not a bar if claim not barred at the date of death and

- b. Then Iowa provides for the order of the payment of the debts similar to the Oregon statute, ORS 117.110 and ORS 117.140. This would eliminate the need of 117.140 and 117.160 having to do with the priority of the administrator's compensation and expenses.

PAYMENT OF CONTINGENT CLAIMS BY DISTRIBUTEES: Iowa #427 and Missouri #473.393 provides that creditor recovers against distributees if distributive shares have been increased by reason of the fact the claim wasn't paid. Action must be commenced within six months after claim is absolute; distributees jointly and severally liable, to the extent of the amount of their increased distribution; creditor makes all parties to the action who can be reached by process, and Court determines liability of each distributee as between themselves and others have contribution against insolvent distributees.

PAYMENT OF SECURED CLAIMS: Texas #306 provides that personal representative may pay the maturities on a secured claim or the claim prior to maturity if it is in the best interest of the estate. Also secured claims not presented within the time provided by law can be immediately approved, fixed as preferred and a lien, and paid. Representative can also sell the property free of the lien and apply the proceeds to the payment of the whole debt.

PAYMENT OF DEBT AND CHARGES BEFORE EXPIRATION OF SIX MONTHS PERIOD: Iowa Provides that family allowance, funeral, burial, and last illness may be paid and others may be paid as the Court shall order and the Court may require bond or security to be given by creditor to refund such part of such payment as may be necessary to make payment in accordance with the provisions of the code. Other payments without order are at his own peril and he may unfilled debts and charges at his own peril.

ALLOWANCE OF CLAIMS: Missouri #473.403 gives the order of allowance the effect of a judgment bearing interest at the legal rate unless the claim provides for a different rate.

COMPELLING PAYMENT: Texas #326-328 provide that after 12 months, upon petition and proof showing available funds, or if no available funds and if to await receipt of funds would unreasonably delay payment, Court orders sale of property.

1. Even a creditor who has filed a late claim can obtain this relief.
2. If representative fails to pay when ordered, execution issues and representative and sureties can be cited to show cause why they should not be personally held for such debt, interest, costs and damages.

PROTECTION OF CREDITORS:

1. Shouldn't there be a provision requiring Court approval before payment of claims? This may help to prevent preferring creditors.
2. Shouldn't creditors be given notice of an application to pay creditors so that they might object to any claims they might deem spurious?

VOIDABLE PREFERENCE: Shouldn't the representative be given powers to set aside voidable preferences akin to the Bankruptcy Act?

MEMORANDUM
March 28, 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: Matters for consideration at April meeting

At the March meeting I was requested to prepare a proposed agenda for the meeting to be held April 15 and 16, 1966. This memorandum lists matters I plan to include in that agenda. The agenda itself will be sent to you early in the week of the April meeting.

If any of you would like changes made in this list, please let me know as soon as possible, preferably before April 8.

LIST OF MATTERS FOR APRIL MEETING

1. Inheritance by nonresident aliens.

- a. Time of determination of benefit, use or control in proceeding to withdraw deposit.

At the March meeting there was discussion of whether the proposed statute on inheritance by nonresident alien heirs should include a specific provision on the time to which evidence of benefit, use or control should be directed in a proceeding to withdraw a deposit. For example, should such evidence be limited to the situation existing at the time of filing the petition for withdrawal, or should the court consider any evidence coming to its attention up to and including the time of hearing and court order?

It was pointed out that the situation as to benefit, use or control might change between the time of filing a petition and the time of hearing thereon. It also was pointed out that if a petition was filed shortly before expiration of the 10-year limitation period, if the evidence as to benefit, use or control at the time of filing the petition was insufficient and if sufficient evidence or evidence of changed situation came to light after expiration of the limitation period but before the court hearing, the question would arise as to whether this evidence brought to the court's attention after that expiration should be considered by the court.

At the March meeting it was decided that action on this matter of time of evidence and determination of benefit, use or control should be postponed until the April meeting, and that Mr. Schwabe's views on this matter should be sought and considered at the April meeting.

b. Notice to State Land Board.

A rough draft on notice of estate administration, embodied in a report by Bettis, Krause and Lundy, dated March 14, 1966, was considered at the March meeting. Subsection (3) of section 10 of this rough draft read as follows:

"(3) If any known heir or any legatee or devisee of a decedent is an alien not residing within the United States or its territories, immediately after his appointment a personal representative shall cause a copy of the published notice provided for in section 13 and a statement containing the name and, if known, address of the heir, legatee or devisee to be mailed to the clerk of the State Land Board."

It was pointed out that Mr. Barrie previously had suggested some provision for notice to the State Land Board of the existence of nonresident alien heirs, and that Mr. Allison had proposed such a provision at the February meeting (see Minutes, 2/18, 19/66, page 4).

At the March meeting objection to subsection (3) set forth above was expressed, on the ground that the subsection would require notice in many instances in which deposit and ultimate escheat would not occur and in which the State Land Board would have no interest. The matter was tabled, and Lundy was requested to solicit Mr. Barrie's views on the subject and report thereon at the April meeting.

2. Establishing foreign wills and ancillary administration.

Prior to the March meeting Professor Mapp and Mr. Riddlesbarger were assigned the task of preparing and submitting a proposed revision of ORS 115.160, relating to establishment of foreign wills. At the March meeting Mapp and Riddlesbarger suggested that consideration of their report be postponed until the April meeting, and that in the meantime members of the committees give consideration to the Uniform Probate of Foreign Wills Act and Uniform Ancillary Administration of Estates Act. Lundy was requested to send copies of these two Uniform Acts to all members.

Mapp and Riddlesbarger were asked to lead the discussion on this matter at the April meeting.

3. Form of letters testamentary and of administration.

A rough draft on issuance and form of letters of representation, embodied in a report by Richardson and Lundy, dated March 14, 1966, was considered at the March meeting. Section 9a of this rough draft dealt with the form of letters of representation.

In the course of discussion of section 9a at the March meeting several suggestions for revision thereof were made, as follows:

- (1) The present Oregon designation of letters (i.e., letters testamentary and letters of administration) should be retained, instead of the designation "letters of representation."
- (2) The headings of the forms should be revised to include designations (e.g., "LETTERS TESTAMENTARY" and "LETTERS OF ADMINISTRATION"), and perhaps a blank for insertion of the estate file number.
- (3) The testate form should be revised by insertion of "of the estate of the decedent" after the blank for insertion of the name of the personal representative.
- (4) The testate and intestate forms should be revised to include more direct statements of the authority of the named personal representatives to act as such as of the date of the letters (e.g., "and is (are) as of the date hereof the appointed, qualified and acting personal representative of the estate).
- (5) The forms should include a blank for insertion for the date of death of the decedent. See section 11.28.140, 1965 Washington Probate Code.
- (6) The provision on form of letters issued to special administrators in subsection (3) of section 9a might be eliminated.

4. Support of surviving spouse and minor children; homestead.

Report and recommendation for revision of ORS 113.070, 116.005 to 116.025, 116.590 and 116.595 by Allison.

Note to Advisory Committee members: See Staff Report No. 2, "Materials on Family Rights in Decedents' Estates," dated June 1964. This report includes provisions on the subject in question extracted from the Alaska statutes, a Wisconsin preliminary draft, the Missouri statutes and the Model Probate Code.

5. Claims against decedents' estates.

Report and recommendation for revision of ORS 116.510 to 116.595, 117.030 and 117.110 to 117.180 by Gooding.

6. Sale or lease of estate property.

Report and recommendation for revision of ORS 116.705 to 116.900 by Zollinger.

Note: My records indicate that ORS 116.990 is included in Zollinger's assignment. This section, however, provides a criminal penalty for unauthorized administration of the personal estate of a decedent, and is not closely related to the subject of sale or

lease of estate property. As a matter of fact, the section probably is related to matters discussed by the committees in connection with ORS chapter 115. Nevertheless, I am sure Zollinger has a recommendation on ORS 116.990, and this is as good a point as any other to consider it.

I believe the matters listed above will constitute a sufficiently full agenda for the April meeting. In fact, they may constitute more than can be covered at the April meeting.

MATTERS REMAINING TO BE CONSIDERED

My records indicate that the following matters will remain to be considered by the committees in their preliminary review of ORS chapters 111 to 121 after matters on the agenda for the April meeting are disposed of:

1. Powers and duties of executors and administrators generally; discovery of assets; inventory and appraisal.

Report and recommendation for revision of ORS 116.105 to 116.465 by Butler.

2. Periodic accounting; distribution to legatees, devisees and heirs; final account.

Revision of ORS 117.010, 117.020, 117.310 to 117.390 and 117.610 to 117.690.

3. Inheritance and gift tax (ORS chapters 118 and 119).

While you may not wish to delve into the revenue aspects of inheritance tax or consider any aspects of gift tax, I assume you will deem it appropriate to review the procedural aspects of the inheritance tax statutes in so far as they relate to administration of decedents' estates.

4. Escheats.

Report and recommendation for revision of ORS 120.010 to 120.230 by Carson.

5. Estates of persons presumed to be dead.

Report and recommendation for revision of ORS 120.310 to 120.400 by Allison.

6. Actions and suits affecting decedents' estates and administration (ORS chapter 121).