

ADVISORY COMMITTEE
Probate Law Revision

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

Dates) 1:30 p.m., Friday, May 20, 1966
and : and
Times) 9:00 a.m., Saturday, May 21, 1966
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of April meeting.
2. Reports on miscellaneous matters.
3. Claims against decedents' estates.
 - a. Unmatured, unliquidated and contingent claims; secured and unsecured claims; encumbered property devised or bequeathed.

Report and draft by subcommittee (Carson, Gooding and Riddlesbarger).
 - b. Claim of personal representative.

Report and draft by subcommittee (Frohnmayr, Gooding and Riddlesbarger).
 - c. Sections 10 to 32, Gooding's rough draft, 4/1/66.
4. Support of surviving spouse and minor children; homestead.

Reports and drafts by three subcommittees (subcommittee #1: Gilley and Krause; subcommittee #2: Husband and Mapp; subcommittee #3: Allison, Braun and Lisbakken).
5. 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.
6. 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.
7. 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-fifth Meeting, May 20 and 21, 1966
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The twenty-fifth 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, May 20, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Gooding, Husband, Jaureguy, Lisbakken, Mapp (arrived 2:45 p.m.) and Riddlesbarger. Carson and Frohnmayer were absent.

The following members of the Bar committee were present: Bettis (arrived 3:35 p.m.), Gilley, Braun (arrived 1:50 p.m.), Krause, Richardson (arrived 3:40 p.m.), Thalsofer and Warden (arrived 2:15 p.m.). Boivin, Copenhaver, Field, Hornecker, Lovett, Luoma, Rhoten and Tassock were absent.

Also present was Robert W. Lundy, Chief Deputy Legislative Counsel.

Minutes of April Meeting

Zollinger moved, and it was seconded, that reading of the minutes of the last meeting (April 15 and 16, 1966) be dispensed with and that they be approved as submitted. Jaureguy asked that he be recorded as being present at the April meeting. Motion carried unanimously.

Miscellaneous Matters

Appraisal of decedents' estates. Lundy reported that, in accordance with instructions given him at the April meeting, he had written to officers of the American Institute of Real Estate Appraisers, Society of Real Estate Appraisers and National Association of Security Dealers, inviting comment on and suggestions for improvement of present Oregon statutes on appraisal of decedents' estates and enclosing copies of the present statutes (ORS

116.420 to 116.435) and the advisory committee's proposal to the 1965 Oregon legislature (Senate Bill 308). Lundy indicated that the replies he had received thus far were not responsive to the questions posed in his letter and that he had concluded it would not be possible to reach a majority of either the security dealers or real estate appraisers through this statewide organization approach. The officers had sent him lists of members of their organizations which totaled approximately 100 individuals. Lundy advised that he had reported this information to Butler, whose reaction was that it would not be worthwhile to make a mass mailing of questionnaires to these individuals at this time. One group, a Portland chapter of the American Institute of Real Estate Appraisers, indicated they would undertake to make some comment in the future, but were unable to do so before this May meeting.

In reply to a question by Husband, Lundy explained that because the appraisal statute (i.e., ORS 116.425) specified top limits on appraisal fees and because these limits were geared to value of the appraised property, the real estate appraisers appeared to believe this amounted to a contingent fee and one of the articles in their Code of Ethics prohibited working on a contingent fee basis. Apparently someone on the state or national level had asked the members of these associations to call this matter to the attention of some group who would attempt a solution. Lundy stated that one of the letters he had received referred to a Washington statute (i.e., section 11.44.070, 1965 Washington Probate Code), but noted that this statute also contained a contingent fee element.

It was the concensus of the committees that it would be very difficult to find a solution which would remove all elements of value of appraised property from the fee schedule and that the committees should await concrete proposals from the interested groups before taking further action.

Determining validity of will in testator's lifetime. Lundy noted that at the April meeting he had raised a question of whether the committees wished to give consideration to authorization of a procedure to determine the validity of a will during the testator's lifetime. [Note: See Minutes, Probate Advisory Committee, 4/15,16/66, page 3.] He stated he had written Professor Hans A. Linde, School of Law, University of Oregon, who had suggested such a procedure, but had received no reply from him. Zollinger stated he felt this suggestion was worthy of committee consideration and other members agreed. Riddlesbarger indicated he would contact Professor Linde personally and attempt to obtain some specific proposals from him on this matter.

Report to Law Improvement Committee. Lundy reported that the Law Improvement Committee had met on April 22, at which time he had indicated the views expressed at the April meeting of the advisory and Bar committees that the proposed Oregon probate code would in all probability not be completed in time for presentation to the 1967 legislature. The Law Improvement Committee's reaction was that it was willing to accept this assessment of the time required to do a good job and would not be disappointed if the revised code were not completed in time for submission to the next legislative session.

Inheritance by Nonresident Aliens. Allison reported he had talked to Peter A. Schwabe, indicating that the proposed new nonresident alien statute was nearly complete, except for one or two small drafting questions. He asked Lundy if a draft had been prepared which could be forwarded to Schwabe, and was told that no drafting had been done, but that a copy of the April meeting minutes had been forwarded to Schwabe.

Claims Against Decedents' Estates

Gooding distributed to members present copies of a draft of sections 6 to 9 on claims against decedents' estates, dated May 20, 1966, prepared by a subcommittee consisting of Carson, Gooding, and Riddlesbarger, which was a revision of comparable sections in Gooding's report dated April 1, 1966, considered at the April meeting. Note: A copy of the revised draft dated May 20, 1966, constitutes Appendix A to these minutes. Gooding pointed out that section 6, as set forth in the revised draft, was approved at the April meeting. Note: See Minutes, Probate Advisory Committee, 4/15, 16/66, pages 25 to 33.

Secured, unmatured claims (section 7). Riddlesbarger noted that the committees had decided that any unmatured claim, whether or not secured, should be entitled to allowance, as determined by the court, at value established as of the date of the decedent's death (see revised section 6). If the creditor was not satisfied with that determination, Riddlesbarger commented, he should have an opportunity to contest the amount allowed by the court.

Zollinger pointed out that the question of whether the creditor should be entitled to proceed against the distributees of the estate to the extent of the property distributed remained to be determined by the committees. Gooding commented that the creditor should have the right to present his claim and have it determined as in a bankruptcy proceeding, and if he was dissatisfied with that determination, he could either appeal or withdraw his claim and rely solely on his security. If the creditor waited until

the debt was matured to present the claim, it was Gooding's opinion that the distributees should be responsible for payment. Butler objected to the bankruptcy approach because the proposed statute did not necessarily involve insolvent estates. He did not agree it was right to require every secured creditor to fall back on his security.

Zollinger inquired if it would be agreeable to all members to say that the creditor who presented a claim upon an unmatured obligation, secured or unsecured, was limited to the amount of the present worth of that unmatured obligation. Butler replied that the committees had decided upon that limitation, but it was his opinion that the creditor should have the right to hold the claim until maturity and receive full payment at that time. Riddlesbarger agreed and, in response to a question by Husband, stated that the distributees of the estate should be obligated to pay the claim even though they did not receive the full amount from the estate. Husband expressed disapproval of the proposition that a personal liability be imposed on the distributees beyond the amount distributed to them. He pointed out, and Braun agreed, that this was not possible under present law, and indicated he would be opposed to a change in this present policy.

Gooding asked why a creditor should not be forced to rely on his security if he refused to accept payment at present worth. Riddlesbarger replied that this was unfair because it was not in accordance with the terms of the original bargain between the creditor and the decedent.

Riddlesbarger then posed the following question: Ignoring the present law, should a secured creditor be permitted to retain his unmatured obligation until maturity and recover upon the full obligation at maturity? A majority of the committees answered no.

Riddlesbarger next posed this question: Should the creditor be entitled to receive payment on his claim to the full value of the security? A majority of the committees answered yes.

Claims not due (sections 6 and 7). Riddlesbarger again referred to the fact that the committees had agreed that an unmatured claim should be allowed at its value as of the date of the decedent's death. He then asked this question: If a creditor were to go into court having a secured, unmatured claim worth \$10,000 at maturity, the court were to determine the present value to be \$9,000 and the creditor were to contend the present value to be \$9,500, should that creditor have the right to contest this determination? A majority of the committees answered yes.

Riddlesbarger next asked: If the creditor were still unsatisfied, following the result of this contest, should he then be permitted to withdraw his claim and rely on his security? A majority of the committees answered yes.

Zollinger suggested the following revised section:

"Section 6. Claims not due. 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 as of the date of the decedent's death, and thereafter until paid shall bear interest at the rate of six percent per annum. When a creditor holds security, he may present or withhold a claim based on the secured debt. If he presents a claim upon an unmatured debt which is allowed pursuant to this section, he may either:

"(1) Withdraw his claim, or

"(2) Accept payment in the amount allowed in satisfaction of the claim."

Zollinger explained that under his revised section 6 interest would accrue from the date of death to the date of payment. Riddlesbarger read ORS 82.010, the general statute pertaining to interest rates, and expressed the view that this statute could be relied upon for interest requirements, rather than including a provision thereon in revised section 6. Butler commented that such an interest provision in the revised section would make the administration process more difficult, and expressed disapproval of putting a "red flag" in the statute calling attention to the six percent interest rate. Butler expressed the opinion that, on an interest bearing note, interest should run according to the terms of the note; on an open account, if the creditor demanded interest, he could collect it under the general statute referred to by Riddlesbarger. Butler contended that revised section 6 should remain silent so far as interest was concerned. Husband remarked that the doubt should be removed and a provision dealing with interest should be included in the revised probate code.

Allison commented, and Butler agreed, that the determination of value of an unmatured claim as of the date of the decedent's death was compounding the problem, and suggested that the date of allowance would be a more realistic point at which to determine such value.

Butler moved, and it was seconded, that the second sentence of revised section 6, as proposed by Zollinger, read as follows: "They shall be allowed in such sum as shall be equal to the value of the obligation as of the date of the allowance." Motion carried.

Thalhofer suggested that the fourth sentence of revised section 6 read: "If he presents a claim upon an unmatured debt which is finally allowed pursuant to this section . . ."

Gooding proposed that the third sentence of revised section 6 read: "When a creditor holds security, he may at his option present a claim based on the secured debt." He and Butler disapproved of the inclusion of "withhold" in this sentence. Zollinger agreed and other members concurred in Gooding's proposal.

Jaureguay called attention to the fact that the committees had not yet agreed on wording regarding the creditor's rights concerning his security. He proposed that the creditor be allowed to "withdraw his claim without prejudice to other remedies." Allison suggested that it would be better construction in the last sentence of revised section 6 to reverse the order of subsections (1) and (2).

Gilley suggested the following wording for the unapproved portion of revised section 6:

"When a creditor holds security, he may at his option present a claim based on the secured debt. If he presents a claim upon an unmatured debt which is finally allowed pursuant to this section, he may either:

"(1) Accept payment in the amount allowed in satisfaction of the claim, or

"(2) Withdraw his claim without prejudice to other remedies."

Allison proposed that "shall" be changed to "may" in the first sentence of revised section 6, and the committees concurred. He then moved that the wording proposed by Gilley be approved with one change; i.e., addition of "secured" following "unmatured" in the last sentence. Gilley commented that he had intentionally omitted "secured", believing it to be unnecessary, but if that doubt existed, he favored insertion of the word "secured." Zollinger indicated that the sentence should not be limited to secured debts and that he would oppose the motion. He further stated that if Allison's motion failed, he would move to delete the last sentence and substitute the following: "Payment of the amount finally allowed discharges the debt and exonerates the security, if any, but the claimant may, after allowance, withdraw his claim without prejudice to

other remedies." Krause seconded Allison's motion. Motion failed.

Gilley indicated that the property which constituted security would usually be owned by the estate and proposed that Zollinger's wording be revised to read: "Payment of the amount finally allowed discharges the obligation of the estate and exonerates the security . . ." Zollinger inquired if the creditor could pursue his claim against other security not owned by the estate under Gilley's proposed wording. Gilley replied that he believed a more sensible result would be achieved if all security were exonerated upon full payment and that co-obligors should probably be released also. Allison concurred that the security belonging to the estate should be exonerated upon payment.

Zollinger asked if it was the concensus of the committees to say that the holder of an unmatured claim against the estate might have the value determined in the first instance by the personal representative and, if appealed, determined by the court. He elaborated that when the allowed claim was paid, such payment would discharge the claim against the estate and against security to which the personal representative or the heirs of the decedent were entitled, but without prejudice to the recourse of the claimant against other obligors or other collateral of the estate. Riddlesbarger commented that this proposition would change present law. Richardson remarked that it would be unfair in cases where the creditor did not receive full value. Husband indicated that in such cases a new agreement would usually be made between the creditor and the co-obligors, but in the absence of such an agreement, the creditor's acceptance of that value should release the obligation. Zollinger expressed the view that if the creditor received 100 percent of the present value, he had been paid and should have recourse against no one, but that if the estate was insolvent and he was paid 50 percent, the debt was not discharged and the security not exonerated.

Mapp called attention to the comment under section 138, Model Probate Code, which stated that it would be unconstitutional to apply the terms of the Model section (i.e., on claims not due) to contracts entered into before the effective date of that section. Zollinger indicated that a claim not presented might constitutionally be barred whether or not it was due. Mapp contended that it would depend on whether the debt was incurred before the effective date of the new statute, and Zollinger replied that section 138 did not so state and had nothing to do with claims not presented. With respect to claims in existence on the effective date of the Model section, the creditor would have the option of refusing to accept present value, and Zollinger stated he would be inclined to accept the

Model provision in this respect by modifying his proposal to say that if a claimant upon a debt incurred prior to the effective date of revised section 6 requested the court to make provision for the payment of his debt at maturity, the court should do so by order. Gooding indicated such a provision would be in accordance with the provisions of revised section 8 (i.e., on contingent and unliquidated claims) and Zollinger concurred. Zollinger also agreed that the proposed revised probate code should contain the customary general savings clause.

Gooding moved, seconded by Zollinger, that revised section 6 be approved to read as follows:

"Section 6. Claims not due. Claims upon debts not due may 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 as of the date of the allowance. When a creditor holds security, he may at his option present a claim based on the secured debt. Payment of the amount finally allowed discharges the debt and exonerates the security, if any, but the claimant may, after allowance, withdraw his claim without prejudice to other remedies." Motion carried.

Secured, matured claims (section 7a). Zollinger expressed the view that revised section 7a was unnecessary; that a person who held a secured, matured claim should present his claim as any other claimant, and if he did not do so, he could fall back on his security. Allison, referring to insolvent estates, asked whether the claimant should be allowed to collect 50 percent of his claim and still hold his security. Zollinger commented that it would be advisable to retain revised section 7a if it were made to apply only to insolvent estates.

In reply to a question by Riddlesbarger, Zollinger indicated that revised section 7a appeared to state that the creditor would be obliged to turn in his security before he would be entitled to payment.

Thalhofer noted that revised section 7a appeared to make a distinction between "allowance" and "payment" of a claim, and that the committees had agreed such a distinction should be retained.

Jaureguy noted, and Zollinger agreed, that the section did not make clear that the security was property owned by the estate, and they indicated they favored the inclusion of such a provision. Jaureguy moved that the section be revised to indicate that the security contemplated was "property of the estate." Riddlesbarger commented that all property would pass immediately on decedent's death to the heirs and beneficiaries under a proposal previously approved by the committees, and Jaureguy

changed his motion to indicate the security was "property given by the decedent," rather than "property of the estate." Zollinger moved, and it was seconded, to amend the motion by adding to Jaureguy's wording "and owned by him at his death." Motion to amend failed.

Riddlesbarger moved, seconded by Gooding, that revised section 7a be approved with the housekeeping changes discussed, such changes to be made by Lundy. Motion carried.

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

The meeting was reconvened at 9 a.m., Saturday, May 21, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Carson, Gooding, Husband, Jaureguy, Lisbakken (arrived 10 a.m.), Mapp and Riddlesbarger.

The following members of the Bar committee were present: Bettis (arrived 9:50 a.m.), Gilley, Braun (arrived 9:45 a.m.), Krause and Warden.

Also present was Lundy.

Claims Against Decedents' Estates (continued)

Contingent and unliquidated claims (section 8). Gooding commented that the only difference between revised section 8 and section 8 in his report of April 1, 1966, was application of the revised section to "unliquidated" claims, as well as "contingent" claims.

Riddlesbarger suggested that "for this purpose" be inserted in the second clause of the first sentence of subsection (2) of revised section 8 which would then read: ". . . but for this purpose the estate shall not be kept open . . ." It might be necessary, he said, to keep the estate open longer for other purposes.

Allison suggested that the claim should be presented and proved. Lundy commented that the comparable Iowa statute, (i.e., section 424, 1963 Iowa Probate Code) required that the claim be "filed in the court and proved." Zollinger commented that this change would not be appropriate unless other substantial revisions in claim procedure were made.

Gooding suggested that the first sentence of revised section 8 read: "Contingent or unliquidated claims which cannot be allowed as absolute debts shall, nevertheless, be presented to the personal representative." Gilley proposed that the wording be "presented and allowed," but Dickson remarked that "presented" was sufficient. Zollinger commented that in the section relating to unmaturred claims (i.e., revised section 6), "presented to the personal representative as other claims" was the phrase used and other members agreed it would be appropriate to use the same wording in revised section 8.

Following a discussion on the provisions set forth in revised section 8, Gooding moved, seconded by Gilley, that the section be approved with the following changes:

"Section 8. Contingent and unliquidated claims. Contingent or unliquidated claims which cannot be allowed as absolute debts shall, nevertheless, be presented to the personal representative as other claims. If such claim shall become absolute before distribution of the estate . . .

"(1) (No change)

"(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 . . .

"(3) . . .and the court may require such distributees to give corporate surety bond for the performance of their liability to the contingent creditor; or

"(4) (No change) " Motion carried.

Compromise of claims (section 8a). Riddlesbarger suggested that new section 8a be made section 3a in Gooding's report dated April 1, 1966, in order that it immediately follow section 3 relating to defects of form. Lundy inquired if section 8a should be located in the earlier or later portion of the claims sections, and commented that a comparable section of the Model Probate Code (i.e., section 147) preceded a section concerning payment at the end of the Model sections on claims. He was told to exercise his own discretion in locating section 8a.

Zollinger pointed out that the meaning of the last sentence of new section 8a was not clear, and suggested the following wording in lieu of the section:

"Section 8a. Compromise of claims. With the prior authorization or subsequent approval of the court, the creditor and personal representative may compromise a claim, whether due or not due, absolute or contingent, liquidated or unliquidated."

Gooding moved, seconded by Krause, that Zollinger's wording be approved to replace new section 8a. Motion carried.

Claim of personal representative (section 9). Gooding explained that revised section 9 was adapted from ORS 116.580 and 116.585. Gooding and Frohnmayer had concluded they would not recommend appointment of a corepresentative or a representative ad litem to report and investigate on the validity of a personal representative's own claim. (Note: See Minutes, Probate Advisory Committee, 4/15, 16/66, pages 35 to 37.)

Riddlesbarger indicated he had an alternative proposal on claims of personal representatives, and explained that in section 1 (i.e., on filing of claims) in Gooding's report dated April 1, 1966, he wished to begin by saying: "All persons, except a personal representative, having claims against an estate . . ." Lundy pointed out that the committees had voted in favor of this revision of section 1 at the April meeting.

Riddlesbarger reviewed the discussion at the April meeting concerning one of his clients who had been denied his day in court on a claim of a personal representative. (Note: See Minutes, Probate Advisory Committee, 4/15, 16/66, page 34.) Riddlesbarger distributed to members present copies of his proposed alternative section 9. (Note: A copy of Riddlesbarger's proposed alternative section 9 constitutes Appendix B to these minutes.) Riddlesbarger noted that the committees had also discussed at the April meeting the possibility that the personal representative might wish to have his claim paid at some time prior to the filing of the final account. He indicated he considered this to be a reasonable desire on the part of the personal representative, and that under alternative section 9 a time would be fixed for objections to be made to such payment. If no objections were forthcoming, he commented, the claim could be paid forthwith, or the personal representative would have the option of waiting until the final account was filed, at which

time objections could also be made.

Gooding expressed the view that if the claim were not asserted until the filing of the final account, at which time objections were made, delay could be occasioned in closing the estate. He indicated his preference was to require the personal representative to file the claim as other creditors and have the validity of the claim determined early in the course of administration.

Jaureguy commented that the personal representative should file his claim within the four-month period for preferred payment of claims. Gilley asked how a personal representative could give notice to other creditors of filing his claim if he filed such claim before other creditors filed their claims. Zollinger remarked, and other members agreed, that he did not consider it sensible to require the personal representative to give notice to other creditors of the fact that he had presented a claim; that only the heirs, devisees and legatees need receive such notice. Riddlesbarger urged that a personal representative be precluded from presenting his own claim to himself for approval. He proposed that all claims of personal representatives be presented to the court for approval.

The committees then turned to a discussion of revised section 9 as set forth in Gooding's draft dated May 20, 1966. Dickson explained that the first sentence of the section indicated that if the court allowed the claim, it was not necessarily a final decision but was subject to review, and that the second sentence stated that if the court rejected the claim, it was an ex parte rejection and might be reviewed again on the final accounting. Allison suggested the following change in wording of the first sentence: "(No change in first clause) . . . but the allowance of such claim by the court may be objected to by any person interested in the estate on final account in any action, suit, or proceeding."

Mapp inquired if the wording should be retained which would permit the heirs to sue the personal representative at some time subsequent to final settlement. Zollinger replied that under present law (i.e., ORS 117.630) the final settlement did not protect the personal representative with respect to his liabilities. Jaureguy suggested that ORS 117.630 be clarified to provide that the personal representative could not be held liable if he had exercised due diligence and honesty in his actions. Zollinger pointed out that the committees previously had taken the position that action against the personal representative was not barred by allowance and settlement of the final account. His personal feeling,

with which Husband, Dickson and Jaureguy expressed agreement, was that settlement of the final account should conclude the matter. Allison pointed out that many personal representatives operated a business in connection with administration of an estate, that after the final account was settled it might be determined there had been a defalcation by the personal representative and that this would be an occasion for a separate suit between the heirs and the personal representative for embezzlement or fraud. Mapp inquired if the wording should apply specifically to the personal representative in this respect, as opposed to application to all creditors, and Jaureguy responded that there was a clear distinction between general creditors and a personal representative because of the latter's fiduciary relationship.

Allison moved, seconded by Riddlesbarger, that the first sentence of revised section 9 be changed to read: "(No change in first clause) . . . but the allowance of such claim by the court may be objected to by any person interested in the estate on final account and does not conclude a creditor, heir, or other person in any action, suit, or proceeding between the personal representative and such creditor, heir, or other person." Carson moved that the main motion be amended to state "final accounting," rather than "final account." Allison and Riddlesbarger accepted the amendment to the main motion. Main motion, as amended, carried.

Zollinger moved, seconded by Braun, that the first sentence of revised section 9 be changed to read: ". . .but the allowance of such claim by the court may be objected to by any person interested in the estate on final accounting and does not conclude any person in any action, suit, or proceeding." (Note: No vote was taken on this motion.)

Lundy commented that he would interpret "within the time allowed," in the first sentence of revised section 9, to include both the four-month and twelve-month periods for claim presentment. Zollinger expressed the view that the claim of a personal representative should be filed within four months. Under present law the personal representative need only file his claim with his final account, but if the law was to be changed to say that he must present his claim to the court for approval, Zollinger's opinion was that, in view of such a substantial change in policy, the claim should be presented within the first four months of administration. Butler disagreed, stating that this would establish a different standard for the personal representative than for other claimants against the estate. Allison concurred with Butler, adding that in cases where the personal representative was a member of the decedent's family, he might wish to withhold his

claim until it was determined that the estate was solvent.

Zollinger moved, seconded by Braun, that the personal representative's claim should be presented to the court within four months after the first publication of notice to creditors. Motion failed.

Zollinger questioned the precise meaning of "presentment" of a personal representative's claim to the court. He outlined a hypothetical situation wherein the claim was taken to the court and the judge was not available, and inquired if a filing with the clerk under these circumstances would constitute presentment. Butler contended that the present wording of the law was quite clear and needed no change, and Husband supported this contention by noting that ORS 116.580 and 116.585 have been in existence for over 100 years, during which time no Supreme Court cases had involved difficulty in determining the meaning of "presented."

Carson suggested the following wording for the first sentence of revised section 9: ". . . shall be filed with the clerk of the court (thus, he said, fixing a record of the time of filing) within the time allowed by law for presentation of claims and thereafter presented to the court; . . ." Allison suggested virtually the same wording, excluding only "thereafter." After further discussion, Allison moved, seconded by Braun, that the following wording be approved: "If the personal representative is a creditor of the decedent, his claim shall be filed with the clerk of the court within the time allowed by law for presentment of claims and shall be presented to the court for allowance; . . ." Riddlesbarger moved, seconded by Braun, to amend the main motion to include "thereafter" as suggested by Carson. Motion to amend failed. Main motion carried.

Mapp moved, seconded by Zollinger, that the following wording be deleted from the first sentence of revised section 9: "And 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." Mapp explained that this deletion would permit the law to apply equally to personal representatives and other creditors. Motion carried.

Dickson explained that the second sentence of revised section 9 conferred on the personal representative the right of a rehearing. Allison pointed out that the present statute (i.e., ORS 116.585) allowed the personal representative to retain money for his claim when he had not presented the claim before final accounting. He failed to understand, he said, why this provision should be incorporated to embrace the

situation where the claim had been presented and disallowed. Zollinger suggested that the sentence be divided into two parts by placing a period after "final settlement of his accounts." He proposed that the second part of the second sentence should then read: "If any person interested in the estate shall object thereto or if the court shall so require, the claim of the personal representative shall be tried and determined by the court." Lundy asked if this wording on objection by interested persons pertained to objection to a final account, and received an affirmative reply from Zollinger.

Gilley commented that he found no provision giving the court authority to reconsider a disallowed claim of the personal representative if there was no objection to it at the time of the final accounting; that the authority of the court to reconsider appeared to be conditioned upon the matter being objected to or controverted. He agreed that Zollinger's proposed wording would be an improvement and suggested consideration of the following: "The allowance or rejection of the claim may be reconsidered on the hearing on final account."

Allison proposed that the same right of appeal on claims be accorded the personal representative as any other creditor by providing that if the appeal to the circuit court was by a personal representative, the court should appoint a special administrator to represent the estate in the proceeding. This provision would abolish the absurd situation, he said, of having the court rehear the same evidence on which it disallowed the claim on a summary hearing. Zollinger expressed the view that this would be a wasteful and unnecessary procedure. Unless there was an objection to approval of the claim, he was of the opinion that the claim should be allowed.

Gilley moved, seconded by Husband, that the following be substituted for the second sentence of revised section 9: "The allowance or rejection of the claim may be reconsidered by the court on hearing on the final account." He explained that this wording would empower the court to set up whatever arrangements seemed appropriate. Butler remarked that Gilley's proposed wording might contain an implication that reconsideration on hearing on final account was an exclusive remedy in the event of rejection, and that he would favor the proposal made by Allison.

Butler moved, seconded by Bettis, to amend Gilley's motion to provide that in addition to the right of rehearing at the time of the hearing on the final account, the personal representative might appeal to the circuit court in the manner specified in ORS 116.540, with the understanding that

there would be a special administrator appointed to represent the estate in such hearing. He added that the motion to amend would also include a requirement for service of notice upon all interested parties. Motion to amend carried.

Lundy inquired if the heirs would be interested parties in this type of appeal, and Butler responded that this would be his understanding and that the appeal would be held before the circuit court not acting as a probate court.

Riddlesbarger moved, and it was seconded, that the main motion be further amended by prefacing Gilley's proposed wording with "upon application of the personal representative or any person interested in the estate."

At this point Dickson, who had been summoned from the meeting by a telephone call, returned and Zollinger explained the action just taken by the committee. Dickson called for another vote on Butler's motion to amend and the motion failed.

Vote was then taken on Gilley's motion, as amended by Riddlesbarger's motion. Motion carried.

Allison moved, seconded by Braun, to delete from revised section 9 the sentence just approved. Motion failed.

Riddlesbarger asked that Lundy prepare a draft of sections 1 to 10 in Gooding's report dated April 1, 1966, incorporating in the draft the revisions thus far approved by the committees. Dickson so ordered and directed that Lundy's draft be placed on the agenda as the first order of business for the June meeting.

Claims against personal representative (section 10, Gooding's report dated April 1, 1966). Braun pointed out that section 10 in Gooding's report dated April 1, 1966, was comparable to ORS 116.440. Allison moved, seconded by Gooding, that ORS 116.440 be substituted for section 10. Motion carried.

Zollinger commented that ORS 116.440 should be positioned in the same place as section 10 in Gooding's report. Dickson commented that it might be appropriate to insert ORS 116.445 as section 11. Lundy pointed out that these sections pertained to claims by the estate, rather than claims against the estate.

After a brief discussion, Gooding moved, seconded by Braun, that the action just taken by the committees be rescinded, section 10 be deleted and ORS 116.440 remain in its present place in the probate code. Motion carried.

Classification of debts and charges (section 11). Carson expressed disapproval of substitution of section 11 for ORS 117.110. Butler noted that the present statute referred to "expenses of last sickness," whereas section 11 referred to "medical and hospital expenses of the last illness," which altered the meaning. Zollinger suggested that the committees should adhere as closely as possible to the present statute. He indicated he favored incorporation in section 11 of priority of the expenses of administration, as presently provided in ORS 117.160, to be followed by substantially the same provisions as contained in ORS 117.110.

The committees discussed the meaning of "court costs" as set forth in subsection (1) of section 11, and decided to combine subsections (1) and (2) by using the phrase "costs of administration" to cover both categories.

Husband asked why subsection (5) had been inserted in that position, and was told by Gooding that the federal statute now prescribes this order. Dickson expressed approval of the insertion.

Gooding suggested that subsection (5) be revised to read "expenses of last illness." Zollinger expressed approval of the "reasonable and necessary" requirement, but Butler felt this was nebulous terminology. Gooding moved, seconded by Butler, that subsection (5) be revised to read "expenses of last sickness." Motion carried.

Gooding moved, seconded by Butler, that subsection (8) of ORS 117.110 be substituted for subsection (9) of section 11. It would then read: "(9) All other claims against the estate." Motion carried.

The meeting was recessed at 12:15 p.m.

The meeting was reconvened at 1:30 p.m. All members of the advisory committee, except Frohnmayer and Riddlesbarger, were present. The following members of the Bar committee were present: Bettis, Gilley, Braun, Krause, Richardson and Warden (departed 3 p.m.). Also present was Lundy.

Claims Against Decedents' Estates (continued)

Classification of debts and charges (section 11) (continued).

Gooding pointed out that subsection (5) of ORS 117.110 was intentionally omitted from section 11. ORS 117.110(5) states:

"(5) Debts which, at the death of the deceased, were a lien upon his property, or any right or interest therein, according to the priority of their several liens."

Gooding asked if it was the committee's desire to retain such liens as a priority item and the committee agreed to exclude the subsection.

Butler moved, seconded by Gooding, that section 11 be approved as revised in subsections (1), (2), (5) and (9). Motion carried.

Order for payment (section 12). Gooding noted that section 12 was derived from ORS 117.030 and 117.140.

Bettis suggested that section 12 might conflict with the existing provisions of ORS 116.520, which indicated that a personal representative might allow a claim and pay it in due course of administration. Lundy commented that "due course of administration" might contemplate the provisions on order for payment. Gooding remarked that court approval was required only in the case of an insolvent estate. Bettis, however, expressed concern that the wording of the two sections might indicate otherwise.

Allison stated that previous Bar Committees on Probate Law and Procedure had discussed abolition of the semiannual account because the statutory requirement therefor (i.e., ORS 117.010) was seldom observed and, although the matter had never been officially determined, those Bar committees were of the opinion that requirement of an annual accounting would be more realistic. Gooding expressed approval of the semiannual accounting, and remarked that it was a good method for maintaining a check on certain personal representatives. Gilley suggested that section 12 specify "first periodic account," rather than "first semiannual account." Gooding suggested that the section begin with "as soon as practicable, the court shall ascertain . . ." Braun suggested "as soon as practicable, the personal representative may request the court to ascertain . . ." Bettis made a further suggestion: "If there is any question as to the sufficiency of the estate, the personal representative shall as soon as practicable request the court to ascertain . . ."

Gooding expressed the view that if a personal representative believed an estate to be solvent and paid some of the claims, after which time a large claim was received and he discovered he did not have enough money for everyone, he should be held responsible for payment. Zollinger agreed that the personal representative had this responsibility under present law and that this policy should be continued. Allison pointed out that it had been suggested that the court should ascertain the status of the estate at the expiration of the four-month claim presentment period for preferred payment, and indicated he considered this to be the proper time to perform this function. Zollinger stated, and Braun agreed, that at the end of four months the personal representative should be permitted to pay claims without a court order if there were sufficient funds for him to do so. Zollinger expressed disapproval of a provision which would require the personal representative to obtain a court order authorizing payment of claims in a solvent estate.

Zollinger pointed out that section 12 did not contain a statement to the effect that claims presented during the first four months had priority over claims submitted after that period. However, he was of the opinion that certain claims should have priority whether filed before or after the four-month period. Zollinger suggested the following wording:

"All claims classified under subsections (7) to (9) of section 11 presented within four months after notice of the appointment of the personal representative shall be prior to claims so specified and presented thereafter."

Zollinger explained that his suggested wording would leave the priority of subsections (1) to (6) of section 11, whether incurred before or after the expiration of the four-month period. There was a discussion of this wording, after which Gilley proposed the following:

"If at the expiration of four months after the first publication of notice of the appointment of the personal representative, it appears to the personal representative that the estate is sufficient to satisfy the claims presented and allowed after payment of expenses of administration and funeral charges, the personal representative may then pay such claims. If it appears that the estate is not sufficient to satisfy such claims or if it appears doubtful that the estate is sufficient to satisfy such claims, the personal representative shall file a report of the financial situation of the estate, and the court shall ascertain what percentage of such claims it is sufficient to satisfy, and order and direct accordingly."

Gilley commented that the last sentence of section 12 could appropriately remain as it appeared in the draft under consideration. He explained that his proposed wording would contemplate payment of all claims and eliminate the problem of priorities because a late filed claim would lose its priority.

Allison suggested that the sentence in Gilley's proposed wording beginning "if it appears that the estate is sufficient" be stated in the affirmative, rather than the negative, by saying "unless it appears that the estate is sufficient to pay all the claims and charges, the personal representative shall file . . ."

Gooding suggested that he redraft section 12 for submission to the committees at the June meeting, and Dickson so ordered.

Following discussion of sections 13 and 14, Mapp requested that the committees reconsider the provisions of section 12. He outlined a hypothetical situation wherein a personal representative approved all the claims filed with him, including one filed by his brother-in-law, and when the four-month period had elapsed, he paid the claims, after which a bill for funeral expenses arrived and there was no money remaining. He asked if it were the committees intention to provide that the personal representative was not then liable for having paid those claims. Braun remarked that the personal representative could be surcharged at the time of final accounting. Mapp replied that if that were the case, there was no reason to retain section 12, since it would accomplish nothing. Gooding explained that the purpose of the section was to express approval of the practice of paying the claims prior to court approval, a procedure which was ordinarily followed in solvent estates. Gilley commented that if there was doubt concerning the solvency of the estate, the personal representative should not pay the claims without a court order. Mapp's objection to the wording was that if the personal representative paid a general claim ahead of a priority claim, and it developed that there was not sufficient money to pay all the claims, the personal representative was liable, yet he had been invited to do so by the wording of section 12.

After further discussion, Mapp moved, seconded by Gilley, that the reference to "if it appears that" in the wording proposed by Gilley be deleted. Motion carried.

Payment of contingent and unliquidated claims by distributees (section 13). Gooding noted that section 13 was derived from section 141,

Model Probate Code, and section 427, 1963 Iowa Probate Code. Zollinger remarked that the section was appropriate for contingent claims, but, unless revised in some respects, was not appropriate for unliquidated claims. The committees discussed the advisability of combining section 13 with revised section 8, and decided to insert a cross reference to revised section 8 in the first sentence of section 13. It was also decided that "unliquidated" should be inserted in the appropriate places in section 13.

Richardson observed that an estate should not be closed until all claims were liquidated. Zollinger commented that six months was too short a time to require the creditor to commence an action, and the committees decided that one year would be a more reasonable length of time. Other members proposed minor changes in wording, which were incorporated in Zollinger's subsequent motion for approval of section 13.

Gooding pointed out that the requirements of section 13 with respect to the liability of distributees stated the federal rule whereby all claims were determined in one lawsuit. Zollinger remarked that these claims were not determined, however, until the judgment was collected.

Allison suggested placing a period after "themselves" in the fourth sentence of section 13, and beginning a new sentence with "If". Gooding pointed out that "but if" indicated an exception and objected to its removal.

Zollinger moved to delete all of that part of section 13 which began "By its judgment, the court shall determine the amount of the liability of each of the distributees . . ." He commented that the judgment should be against distributees jointly and severally and should stop at that point. The motion died for lack of a second.

There was a lengthy discussion concerning recovery against distributees beyond the reach of process, the liability of distributees among themselves if one or more was insolvent and the liability of distributees in proportion to the respective amounts distributed from the estate.

Husband pointed out that distributees who were beyond the reach of process could not have a valid judgment rendered against them. Zollinger commented that the court could and should determine the value of the distributive shares received by each of the parties. In reply to a question by Warden, Zollinger commented that section 13 concerned a

quarrel between a claimant and a distributee or a group of distributees who could be reached by process and that the personal representative was not involved.

Warden moved, seconded by Richardson, that the last portion of section 13 be deleted, the deletion to begin with "By its judgment, the court shall determine . . ." Motion failed.

Zollinger moved, and it was seconded, that section 13 be approved to read as follows:

"Section 13. If a contingent or unliquidated claim shall have been presented and allowed against an estate pursuant to section 8 and all the assets of the estate shall have been distributed, and the claim shall thereafter become absolute or certain, 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 such claim as finally determined was not paid prior to final distribution, provided an action therefor shall be commenced within one year after the claim becomes absolute or certain. 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 among 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 creditor for the whole amount of the claim. If any person liable for the claim 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." Motion carried.

A discussion of section 14 followed, after which Mapp asked that the committees return to a consideration of section 13. He pointed out that section 13 was copied almost verbatim from section 141, Model Probate Code, which provided, in part: "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, he shall make all distributees who can be reached by process parties to the action." Mapp noted that the Model section at this point substituted "defendants" for "distributees," because use of the term "distributees" would purport to bind persons beyond the reach of process.

Zollinger suggested that section 13 be revised to read: ". . . the court shall determine the amount of the liability of each of the defendants as among themselves, but if any distributee be insolvent or unable to pay . . ." Mapp objected to the insertion of "distributee" after "any." Lundy commented that "any," if not further described, would probably apply to both distributees and defendants. Butler expressed the view, and Zollinger agreed, that "any" should refer to "distributee," rather than "defendant." Allison moved, seconded by Butler, that the wording suggested by Zollinger be approved. Motion carried.

Personal representative's liability (section 14). Gooding noted that section 14 was derived from ORS 117.180. Zollinger observed, and Dickson agreed, that he would favor deletion of the entire section because it imposed personal liability upon the personal representative for payment of claims even though funds from the estate might not be available to pay such claims until a later date. Zollinger moved, seconded by Braun, that section 14 be deleted. Motion carried.

Owner may obtain order for payment (section 15). Gooding commented that section 15 was taken verbatim from section 326, Texas Probate Code.

Bettis asked why application of section 15 was restricted to creditors whose claims had been approved by the court and did not include claims allowed by the personal representative. Gooding agreed that the first sentence of the section should read: "Any creditor of an estate of a decedent whose claim, or part thereof, has been allowed or established . . ."

Braun questioned the 12-month waiting period provided by section 15 in view of the payment priority for claims filed within the four-month period. Butler observed, and Zollinger agreed, that forcing a sale of property in a four-month period could result in a serious sacrifice. Braun remarked that she saw no reason to wait 12 months if funds were available. Zollinger suggested that the section provide that the creditor might seek an order for payment on the expiration of four months after the

first publication of notice if funds were available, and if funds were not available, a creditor might come in after 12 months had elapsed and seek an order for payment.

Allison remarked that he would favor elimination of that portion of section 15 following the first semicolon. Zollinger stated that he shared Allison's view, inasmuch as a remedy was available against the personal representative if he failed to perform his duties.

Gilley commented that the order directing sale of property did not appear to be discretionary with the court, and suggested that "may" be substituted for "shall." Jaureguy noted that there was a great deal of discretion in determining whether delay was unreasonable, but Gilley maintained, and Dickson agreed, that he would prefer the substitution of "may" for "shall."

Bettis remarked that there were many instances where a personal representative might delay performance of his duties other than by delay in payment of claims, and suggested a general provision granting a right to any person interested in the estate to apply to the probate court for an order to compel a personal representative to meet all of his responsibilities. Zollinger expressed agreement and suggested the following wording for such a general provision:

"Any person interested in an estate may apply for the entry of any order he deems appropriate to require the personal representative to perform the duties of his office. Failure to comply will constitute a ground for contempt as well as removal."

Dickson requested Bettis to draft a proposed section encompassing his suggestions for removal of a personal representative who was derelict in his duties, such draft to be presented to the committees at the time they consider the appropriate sections of the probate code, and Bettis agreed to do so.

Allison moved approval of the following wording for section 15: "Any creditor of an estate of a decedent whose claim, or part thereof, has been allowed or established by suit, may, thereafter and not less than four months after the granting of letters testamentary . . ."

Zollinger stated two objections to Allison's proposed wording: (1) The appropriate time was not the time of granting of letters testamentary or of administration, but rather the first publication of notice of the personal representative's appointment; and (2) four months was not a

sufficient period of time, and he suggested six or eight months. Dickson agreed that six months would be more reasonable.

Allison accepted Zollinger's and Dickson's suggestions and moved, seconded by Gilley, that the following wording for section 15 be approved: "Any creditor of an estate of a decedent whose claim, or part thereof, has been allowed or established by suit, may, thereafter and not less than six months from the first publication of the notice to creditors, upon written application"

Butler objected to an order for sale in a six-month period, and indicated he favored a one-year period. Dickson commented that the time period was discretionary with the court.

Carson moved, and it was seconded, to amend Allison's motion by inserting "action or" preceding "suit," and by substituting "of the appointment of the personal representative" for "to creditors." Motion to amend carried.

Butler moved, and it was seconded, to amend Allison's motion by substituting "at any time after 12 months" for "thereafter and not less than six months." Zollinger expressed disapproval of the amendment, and Allison agreed, inasmuch as the six months might be extended at the discretion of the court. Motion to amend failed. Main motion carried.

Liability for nonpayment of claims (section 16). Dickson commented, and Zollinger agreed, that the provisions of section 16 were unduly harsh. Allison commented that the proposed section Bettis had agreed to draft on removal of a personal representative for nonperformance of his duties would be preferable to section 16. Allison moved, seconded by Braun, that section 16 be deleted. Motion carried.

Source of payment (section 17). After a brief discussion concerning the meaning of and need for the provisions set forth in section 17, Gooding indicated that this section was derived from section 449, 1963 Iowa Probate Code, and that the preceding section of the Iowa Probate Code contained a special provision on payment of federal and state taxes. The committees concurred that section 17, as presently drafted, was inadequate and would be detrimental to some wills and trusts now in existence. Dickson requested that Carson study the problem in connection with the ORS chapter on inheritance tax (i.e., ORS chapter 118).

The meeting was adjourned at 4:10 p. m.

without the necessity of presenting a claim. If the claim is presented, and 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 order of the court 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 and unliquidated claims. Contingent or unliquidated claims which cannot be allowed as absolute debts shall, nevertheless, be filed in the court and proved. If allowed as a contingent or unliquidated claim, the order of allowance shall state its contingent or unliquidated nature. 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 or unliquidated claims in any one of the following methods:

(1) The creditor and personal representative may determine, by agreement, arbitration or compromise, the value thereof, 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 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 distributee shall be liable to the creditor to the extent of the estate received by them, if such contingent claim thereafter becomes absolute. When distribution is made to the distributees, the distributees shall give a corporate surety bond approved by the court 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 8a. Compromise of claims. When a claim against the estate has been filed or suit is pending, the creditor and personal representative may, if it appears for the best interest 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.

Section 9. Claim of personal representative. If the personal representative is a creditor of the decedent, his claim shall be presented to the court within the time allowed by law for presentment of claims; 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.

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, May 20 & 21, 1966)

(The following draft on claim of personal representative was prepared by Mr. Riddlesbarger and distributed to members of the advisory and Bar committees at the May meeting.)

CLAIM OF PERSONAL REPRESENTATIVE

Section 9. If the personal representative is himself a creditor of the decedent, his claim duly verified shall be filed with the court within the time limited for the filing of claims of others. After so doing, the personal representative may either:

(1) Give notice in writing of the filing of the claim and the contents thereof to the heirs and creditors of the estate and any other person interested in the estate and known to be such by the personal representative. Any creditor, heir or other person interested in the estate may object to the allowance and payment of the claim, provided such objection is filed with the court within 30 days after the delivery of such notice to him. The allowance or rejection of the claim shall be determined by the court after a hearing thereon. If the claim is allowed by the court, the same may be paid forthwith after the expiration of 30 days from the date of the order allowing the claim, provided no appeal is taken from the order within that time. If an appeal is taken, payment of the claim shall be stayed pending the outcome of the appeal. If no objection to the allowance and payment of the claim is filed in the court within 30 days

after the delivery of the notice of the filing of the claim by the personal representative, the court shall determine whether or not the claim is to be allowed or rejected.

(2) Retain the amount of the claim until final settlement of his accounts when, if the same is 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 no objection is made to the allowance and payment of the claim, it may be paid forthwith upon settlement of the final account.

MEMORANDUM
April 25, 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 May meeting.

This memorandum lists matters tentatively scheduled for consideration by the committees at their joint meeting on May 20 and 21, 1966. Also contained are references to certain matters discussed at the April meeting and to assignments made at that meeting.

As customary, a notice of and suggested agenda for the May meeting will be sent to you early in the week of the May meeting.

LIST OF MATTERS FOR MAY MEETING

1. Claims against decedents' estates.
 - a. Unmatured, unliquidated and contingent claims; secured and unsecured claims; encumbered property devised or bequeathed.

Report and draft by subcommittee (Carson, Gooding and Riddlesbarger). Research on law as to remedies of creditor with mortgage not in default and report thereon to subcommittee by Frohnmayer.

See: Gooding's Rough Draft on Claims Against Decedents' Estates (Report, April 1, 1966), sections 6, 7, 8 and 13.

Provision on encumbered property devised or bequeathed previously approved by committees.

Rewritten wills draft, 11/19,20/65, section 13, set forth as appendix to Minutes, 11/19,20/65.

Also, section 13 of original wills draft set forth as Appendix A, Minutes, 12/17,18/65; and action on section 13 of original wills draft reported on pages 7 and 8, Minutes, 11/19,20/65.

b. Claim of personal representative.

Report and draft by subcommittee (Frohn-mayer, Gooding and Riddlesbarger). Frohnmayer and Riddlesbarger to send their suggestions to Gooding.

See: Gooding's Rough Draft on Claims Against Decedents' Estates (Report, April 1, 1966), section 9.

c. Sections 10 to 32, Gooding's Rough Draft.

General Comment: At the April meeting the committees began consideration of Gooding's Rough Draft on Claims Against Decedents' Estates (Report, April 1, 1966), copies of which were mailed to all members before the meeting. Sections 1 to 9 were considered at the meeting. Sections 1 to 5, with some revision, were approved tentatively. Revision of sections 6 to 9 was assigned to subcommittees as indicated above. Sections 10 to 32 remain to be considered.

Section 1. Motion carried that claims not be filed with the clerk of the court unless rejected. Change six months to four months. Change "serve" to "present."

Section 2. Approved.

Section 3. Approved, as revised to read: "Any defect of form or insufficiency of the claim presented may be waived by the personal representative."

Section 4. Apparently approved, as revised. Revision to take into consideration: (1) Claims barred if not presented within 12 months or before filing final account, whichever occurs first; (2) no waiver of limitation by personal representative; (3) claims presented within four months have preference; (4) final account not to be filed before expiration of four months; and (5) consolidation of sections 1 and 4.

Section 5. Apparently approved, as revised. Revisions to take into consideration: (1) Deletion of the first sentence, and (2) clarification of "burial" to encompass all kinds of interment and incidents thereto, such as funeral and monument.

Sections 6 and 8. Motion carried 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." Question raised whether there should be specific provision that payment satisfied debt.

Discussion of whether various methods for payment of contingent claims under section 8 would be appropriate also for payment of unmatured claims under section 6 and unliquidated claims. Motion carried that there be separate provisions for unmatured, unliquidated and contingent claims, with alternative payment methods similar to those set forth in section 8.

After discussion of methods for payment of contingent claims under section 8, motion carried that court provide for one or more of following, with authority to change any method previously provided: (1) Agreement by creditor and personal representative; (2) withholding of funds by personal representative; (3) requiring distributees to give corporate surety bond to insure payment of claim; and (4) such other method as the court may order.

General provision on compromise of claims suggested, such as section 147, Model Probate Code, which provides: "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."

Section 7. Among questions raised were whether procedure should be same for unmatured and matured secured claims and whether early payment of unmatured secured claims should be mandatory or permissive.

Section 9. Apparently decided that: (1) Last two sentences should be deleted; (2) personal representative as creditor should be excepted from

section 1, so personal representative not have alternative of presenting claim under section 1 or section 9; and (3) personal representative should present his claim within time allowed other creditors.

Discussion of whether there should be corroborative proof of personal representative claims and whether personal representative should present claim to court, to a co-representative or to a special representative appointed by the court for the purpose. Questions raised as to procedure on rejection of personal representative claim-- whether personal representative should proceed as other creditors with rejected claims or decision be postponed until settlement of final account.

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

Reports and drafts by three subcommittees (subcommittee #1: Gilley and Krause; subcommittee #2: Husband and Mapp; subcommittee #3: Allison, Braun and Lisbakken).

See: Allison's proposed draft and notes thereon, copies of which were distributed to members present at the meeting.

3. 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.

4. 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.

OUTLINE OF PROPOSED REVISED PROBATE CODE

At the Saturday session of the April meeting Lundy submitted for consideration a tentative outline, or general table of contents, of the proposed revised Oregon probate code. This tentative outline was discussed and various objections thereto advanced. Three subcommittees were

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appointed to prepare tentative outlines and send them to Lundy. The three subcommittees are: Subcommittee #1: Frohnmayer, Mapp and Warden; subcommittee #2: Copenhaver, Gooding and Thalhofer; subcommittee #3: Dickson, Lisbakken and Richardson.

This matter will be on the agenda for consideration at a future meeting, but not at the May meeting.