

ADVISORY COMMITTEE  
Probate Law Revision

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

Dates ) 4:30 p.m., Friday, July 15, 1966  
and : and  
Times ) 9:00 a.m., Saturday, July 16, 1966  
Place : Judge Dickson's courtroom  
244 Multnomah County Courthouse  
Portland

Suggested Agenda

1. Reports on miscellaneous matters.
2. Powers and duties of executors and administrators generally; discovery of assets; inventory and appraisal.
  - a. Possession and control of property (ORS 115.105) (Butler and Richardson).

Consideration of: (1) Who should make repairs and otherwise protect property against loss or damage; (2) who is entitled to income from property during administration; (3) whether personal representative has duty to take possession and produce income; (4) views of banks on subject (Butler).

Compare sections 350 to 354, 1963 Iowa Probate Code.
  - b. Continuation of business by personal representative (ORS 116.170) (Butler).

Consideration of: (1) Continuation under will authorization or court order; (2) bond of personal representative.

Compare ORS 126.255 and section 83, 1963 Iowa Probate Code.
  - c. Report and recommendation for revision of ORS 116.175 to 116.465 (Butler).
3. Claims against decedents' estates.
  - a. Procedure on disallowance of claims.
  - b. Statute of limitations.

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4. Actions and suits affecting decedents' estates and administration (ORS chapter 121) (Gooding and Jauregui).

5. 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).

6. Establishing foreign wills and ancillary administration.

Report by Mapp and Riddlesberger, and consideration of Uniform Probate of Foreign Wills Act and Uniform Ancillary Administration of Estates Act.

7. Approval of minutes of June meeting.

8. Next meeting.

ADVISORY COMMITTEE  
Probate Law Revision

Twenty-seventh Meeting, July 15 and 16, 1966  
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The twenty-seventh 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, July 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, Carson (arrived 2:10 p.m.), Gooding, Husband, Jaureguy, Lisbakken, Mapp and Riddlesbarger. Frohnmayer was absent.

The following members of the Bar committee were present: Bettis (arrived 2:15 p.m.), Gilley, Braun (arrived 2 p.m.), Copenhagen, Field (arrived 2 p.m.), Lovett, Rhoten (arrived 2:10 p.m.) and Richardson. Boivin, Hornecker, Krause, Luoma, Tassock, Thalhofer and Warden were absent.

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

Miscellaneous Matters

Portland "Oregonian" article on "How to Avoid Probate." Dickson called attention to an article in the July 15, 1966, edition of The Oregonian, written by John P. MacKenzie, The Washington Post, entitled "Bar Accused in the 'High Cost of Dying'" and commenting on Norman F. Dacey's book "How to Avoid Probate." After brief discussion, Dickson requested that Lundy communicate with Allan G. Carson, Chairman of the Law Improvement Committee, and ask Carson if he would care to communicate with The Oregonian and suggest that, in view of the publicity given Dacey's book, it might be appropriate also to give some publicity to the Oregon probate law revision project.

"Oregon Voter" article on probate project. Dickson expressed regret that the article on the probate law revision project that appeared in the June 18, 1966, issue of the Oregon Voter did not contain the names of members of the Bar Committee on Probate Law and Procedure, since they had labored

diligently with the advisory committee and deserved to have their efforts recognized in the article. He pointed out that the names of members of both committees had been given to the Oregon Voter for inclusion in the article.

August and September meetings. After brief discussion, the committees decided that a meeting should be held in August at the regularly scheduled times, but that a meeting should not be held in September because of the Oregon State Bar convention scheduled for that month.

Powers and Duties of Executors and Administrators Generally; Discovery of Assets; Inventory and Appraisal

Possession and control of property (ORS 116.105). [Note: See Minutes, Probate Advisory Committee, 6/17, 18/66, pages 16 and 17, and the Appendix to those minutes.] Butler explained that Richardson and an associate were in the process of preparing a memorandum on the laws pertaining to the proper disposition of income received during estate proceedings, and suggested that further consideration of ORS 116.105 be postponed pending completion of the memorandum. Richardson indicated he expected the memorandum to be completed in time for consideration at the October meeting of the committees, and Dickson directed that this matter be placed on the agenda for the October meeting.

Authority of executor or administrator to continue a business (ORS 116.170); debts incurred in operating a business (ORS 116.175); discontinuance of business or modification of authority (ORS 116.180). Butler noted that the committees had discussed continuation of a business by a personal representative pursuant to authority granted by will or court order at the last meeting, and also the advisability of requiring additional bond of the personal representative applicable to the operation of such business. [Note: See Minutes, Probate Advisory Committee, 6/17, 18/66, pages 22 and 23.] Butler commented that at the last meeting the committees had been inclined to adopt the approach of section 83, 1963 Iowa Probate Code. He advocated deletion of the requirement for filing a monthly report with the court as stipulated in ORS 116.175, and Dickson agreed that the requirement should be deleted. Dickson observed that the requirement seldom was complied with, and expressed the belief that often it would be improper to require that such information be made a matter of public record.

Butler pointed out that ORS 116.180 permitted any interested person to petition the court for an order to discontinue a business. He noted that if the committees decided that the owner of a business, by his will, should be able to direct or authorize the continuation of a business, ORS 116.180 perhaps should be modified to recognize such a testamentary

direction or authorization. He questioned whether it would be proper for a beneficiary under the will to challenge the propriety of the continuation of a business by a personal representative who was conducting the business under a testamentary direction. Zollinger pointed out that Butler was distinguishing between a testamentary authority and a testamentary direction and, in effect, was recommending that a testamentary direction was sufficient in itself as an authority and would not require a court order to initiate or continue the business. Butler expressed the view, with which Dickson agreed, that it was unsound to state arbitrarily that a business could be conducted for a specific period of time and no longer. Riddlesbarger contended that any interested person should have a right to inquire into the proper conduct of a business at any time. Zollinger expressed the opposing view commenting that the personal representative should be held responsible for malfeasance or nonfeasance, but that otherwise no one should have the right to inquire into his conduct of the business.

After further discussion, Butler moved, seconded by Zollinger, that ORS 116.170, 116.175 and 116.180 be deleted, and that the general approach of section 83, 1963 Iowa Probate Code, be adopted in lieu thereof. Motion carried.

Butler moved that the proposed statute recognize the propriety of a testator authorizing or directing the continuation of a trade or business. Jaureguy contended that the direction in the will should be subject to disapproval by the court. He pointed out that if the estate were insolvent, or nearly insolvent, the court should have the authority to direct immediate disposition of the business. Zollinger remarked that, in the case of an insolvent estate, it might be justifiable to give such discretion to the court, but not otherwise, and Jaureguy agreed. Gilley suggested a provision requiring the court, before directing disposition of the business, to make a finding that the estate was being substantially damaged or wasted by continuation of the business, and Zollinger indicated he favored imposing a stricter limitation on the court. Zollinger expressed the opinion that the testator, if he so desired, should be able to require his personal representative, while the estate was solvent, to continue the conduct of the business even though such business might be losing money. After further discussion, the committees apparently agreed that the court should have broad discretionary power to determine whether or not a business should be continued, and Butler withdrew his motion on the ground it was unnecessary in view of the approach agreed upon by the committees.

Jaureguy remarked that a direction in a will to continue the testator's business might be proper at the time of execution of the will, but at his death or sometime later the estate could be insolvent, in which case the court should be able to direct discontinuance and liquidation of the business.

Zollinger noted that this question arose when the personal representative acquired his prerogative to conduct a business by testamentary authority or direction, and suggested that a provision be included in the proposed statute to specify, in substance, that "without a court order, the personal representative may conduct a business if the will of the testator so provides and shall conduct a business if the will so directs, and, in either event, the court may, for good cause shown, direct the discontinuance of the business." Butler moved, seconded by Gilley, that Zollinger's suggested wording be approved. Motion carried.

Delivery of personal property and payment of debts to foreign administrators and executors; publication of notice; effect of payment or delivery (ORS 116.186). Butler expressed approval of ORS 116.186 and recommended that no change be made. Zollinger commented that ORS 116.186 was similar to a California statute.

Butler moved, seconded by Zollinger, that ORS 116.186 be continued in its present form. Motion carried.

Recording of copies of records in other counties wherein real property is situated (ORS 116.190); discharge of representative conditioned on compliance with ORS 116.195; final order of discharge (ORS 116.195). Butler referred to his comments on ORS 116.190 as set forth in his report submitted at the last meeting. Note: See Appendix, Minutes, Probate Advisory Committee, 6/17,18/66.

Allison reviewed the deliberations of the committee that revised the guardianship statutes in 1960 and 1961 on the subject of recordings in other counties, and recommended that a provision similar to ORS 126.466 be incorporated in the probate code, which would set forth the precise documents to be recorded, in lieu of the general requirements contained in subsection (2) of ORS 116.190. Butler disagreed with Allison's recommendation, on the ground that court authorization to sell property must be obtained in all cases under a guardianship, whereas power of sale in a will created a completely different situation.

After further discussion, Zollinger moved, seconded by Butler, that subsection (2) of ORS 116.190 be revised to read substantially as follows:

"If the sale is made pursuant to an order of court, the order of sale shall be recorded in the county in which the property is situated, and if the sale is confirmed by order of court, a certified copy of the order of confirmation shall be recorded in the county in which the property is recorded." Motion carried.

Butler remarked that the last word in the seventh line of subsection (3) of ORS 116.190, should be "or," rather than "of." Jaureguy suggested that "or" should be changed to "and" or a comma should be inserted in lieu of "or." Zollinger pointed out that the order of the two documents described should be reversed, so as to require, first, a recording of the order decreeing that expenses had been paid, followed by the order approving the final account. Braun observed that recording the order closing the estate should be sufficient inasmuch, as that order was made on the assumption that all requirements for closing the estate had been fulfilled. Dickson indicated this assumption was too broad, and contended that the order of closure did not necessarily presuppose that everything completed up to that time had been executed properly. Allison suggested that subsection (3) be revised to include the order approving the final account and the order closing the estate, because it was not always possible for the court to decree that all expenses, taxes and other claims against the estate had been fully satisfied and discharged.

Butler moved, seconded by Carson, that subsection (3) of ORS 116.190 be revised to refer to the orders approving the final account and directing distribution, in lieu of the orders presently specified. Zollinger moved, seconded by Gooding, that Butler's motion be amended to delete ORS 116.195, and include in subsection (3) of ORS 116.190 a provision for recording the order closing the estate. Motion to amend carried. Main motion carried.

Subsection (1) of ORS 116.190 apparently was approved without change.

Proceedings in case of refusal to disclose property (ORS 116.305).  
Butler moved, seconded by Braun, that ORS 116.305 be approved without change. Motion carried.

Zollinger asked if it would be desirable to amend ORS 116.305 to require any person having information on property of the estate or its value to make disclosure of that information upon the demand of an interested person. Braun suggested an amendment permitting an inquiry when any person had knowledge of any property of an estate and refused to give it. Bettis commented that he would favor expanding the scope of the section even further to compel disclosure of any information connected with the orderly administration of the estate and the discovery of its assets and heirs. Richardson commented that such a procedure could be justified by the fact that the decedent was not present to furnish needed information.

Bettis moved, seconded by Zollinger, that the scope of the discovery proceedings be expanded by providing that the personal representative, when authorized by the court, be permitted to require the disclosure of any

matter bearing upon the assets of the estate, the administration thereof or the identification of parties in interest. Zollinger explained that, by the terms of the motion, the personal representative or the court on its own motion would have the right to initiate the discovery proceedings, in which a person cited could show cause why he should not be obliged to answer questions on the subject. Motion carried.

Zollinger pointed out that if, as proposed by the committees, present law were changed to make the title to a decedent's personal property vest in the heirs or legatees, the personal representative would not be a shareholder of the corporation. This, he indicated, would not give the personal representative, as under present law, a right to require a disclosure by the corporation. He suggested that ORS 116.305 include an express provision that the personal representative would be entitled to the rights of a stockholder to examine the books and records of a corporation. Lundy suggested that such a provision might be made a part of a personal representative's possession and control authority applicable to all personal property. Zollinger indicated that he would not insist that the provision be incorporated in ORS 116.305, but that he did urge that such a provision be placed either in ORS 116.305 or in the possession and control section of the probate code. Carson suggested that the desired effect could be accomplished by amendment of the pertinent provision of the corporation code (i.e., ORS 57.246(2)) by placing "personal representative," before "agent or attorney." Gilley noted that if Carson's suggestion was followed, the question would still remain as to whether or not the personal representative was the stockholder. Husband commented that the appropriate provision should be included in the probate code, even though the suggested amendment were made to the pertinent provision of the corporation code.

Zollinger moved, and it was seconded, that the statutes provide, at an appropriate place, that "the personal representative shall have, with respect to corporations in which the decedent held stock, the rights of a stockholder to examine the books and records of a corporation." Motion carried.

Mode of examination (ORS 116.310). Gooding expressed the view, with which Dickson agreed, that ORS 116.310 performed no useful function, and suggested that the mode of examination could be incorporated by referring to the general statutes on taking evidence (i.e., ORS chapter 45).

Allison moved, seconded by Gooding, that ORS 116.310 be deleted. Motion carried.

Proceedings in case such person refuses to appear or answer (ORS 116.315). Zollinger moved, seconded by Butler, that all wording in ORS 116.315 following "punished for a contempt" be deleted. Dickson indicated he preferred to retain the entire section. Gooding pointed out that punishment for a contempt was set forth in ORS 44.190. Motion carried.

Person intrusted with property of estate compelled to account (ORS 116.320). Dickson commented that ORS 116.320 was unnecessary in view of the wording previously adopted, but Richardson pointed out that the section was useful when necessary to bring a partner in a business into court. Dickson suggested that Lundy revise ORS 116.305 to make it broad enough to include the situation mentioned by Richardson. Butler moved, seconded by Zollinger, that ORS 116.320 be deleted. Motion carried.

Damages for embezzlement, alienation or conversion of property before administration granted (ORS 116.325); executor of his own wrong (ORS 121.060). Zollinger contended that the liability under ORS 116.325 for double damages of any person who converted to his own use any property of a deceased person was too severe. Jaureguy pointed out that the Oregon Supreme Court had construed the section to exclude situations where the conversion was innocent. Gilley commented that he had been able to prod people into doing the right thing by reading the section to them. Gooding noted that the Supreme Court had harmonized ORS 121.060 with ORS 116.325.

Zollinger moved, seconded by Braun, that the substance of ORS 121.060 be substituted for that of ORS 116.325. Motion failed.

Jaureguy noted that both sections (i.e., ORS 116.325 and 121.060) dealt with the same subject, and suggested that they be consolidated. Riddlesbarger so moved, seconded by Braun, and the motion carried. Lundy inquired if it was intended to have a section with two provisions, and was informed by Dickson that the section should contain one provision for wilful interference and one for innocent interference with the decedent's property. In reply to a question by Husband, Zollinger and Dickson noted that both sections should be removed from their present places in the probate code and placed in the administration area of the proposed code.

Riddlesbarger suggested that the probate court be permitted to make an order in a summary proceeding requiring a person withholding property of the estate to deliver that property. Zollinger expressed the opposing view, and commented that the person was entitled to a trial in an ordinary court proceeding and should not be called upon to give up possession to property in a summary proceeding, even though increased expense of litigation would likely result. Dickson pointed out that very little litigation resulted from discovery proceedings.

Avoidance of acts of decedent in fraud of creditors (ORS 116.330); order allowing proceedings therefor (ORS 116.335); disposition of property recovered (ORS 116.340). Zollinger indicated he thought it desirable to obtain an order of court to authorize the commencement of any litigation in a decedent's estate or in a guardianship, and suggested that ORS 116.330, 116.335 and 116.340 be combined in one section. Riddlesbarger asked Dickson if he felt it served a useful purpose to require a court order to commence litigation and received a negative reply. Gooding moved, seconded by Braun, that ORS 166.330, 116.335 and 116.340 be approved with the revision necessary to delete the requirement for a court order prior to commencement of an action. Motion carried.

Lundy asked if the sections as revised should authorize the personal representative to commence the proceeding, and received an affirmative reply from Dickson, who indicated that his understanding of the committees' position at that time was that the statute would be permissive and not mandatory, the proceeding could be commenced without a court order and that the sections were to be transferred to the area of the proposed code dealing with administration.

Zollinger expressed the view, with which Riddlesbarger and Jaureguy agreed, that if the statute were permissive, the rights of the creditor should be expressed by providing that either the personal representative or the creditor could initiate the proceeding. Braun remarked that the category of creditors concerned was limited to those who were defrauded. Zollinger pointed out that section 368, 1963 Iowa Probate Code, brought in creditors against whom fraud was not committed, and suggested inclusion of such a provision in the Oregon code. He proposed that if the personal representative declined to bring an action, a creditor should be allowed to initiate it and prosecute it at his own expense. He noted that the effect of setting aside a fraudulent conveyance should be, as was clearly stated in the 1963 Iowa Probate Code, to set it aside to the extent of debts of all creditors.

Dickson pointed out that ORS 95.070 gave anybody a right to bring an action for fraudulent conveyances, and commented that he did not consider it necessary to include a provision concerning creditors' rights in this regard in the probate code. In reply to a question by Lundy, Zollinger indicated that the personal representative should not attempt to recover the amount of the deficiency if the cost of the proceeding would be more than the recovery was worth.

After further discussion, Riddlesbarger moved, seconded by Braun, that this subject be referred to a subcommittee for further study and

recommendation. Motion carried. Dickson appointed Gooding, Riddlesbarger and Zollinger to conduct the study and report thereon to the committees the following morning.

The meeting was recessed at 5:05 p.m.

The meeting was reconvened at 9:30 a.m., Saturday, July 16, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

All members of the advisory committee were present, except Butler and Frohnmayer. The following members of the Bar committee were present: Bettis, Gilley, Braun (arrived 10:05 a.m.), Copenhaver, Field (arrived 10:30 a.m.), Hornecker, Lovett, Rhoten and Richardson. Also present was Lundy.

Discovery of Assets (continued)

Avoidance of acts of decedent in fraud of creditors (ORS 116.330); order allowing proceedings therefor (ORS 116.335); disposition of property recovered (ORS 116.340) (continued). Riddlesbarger reported that the recommendation of the subcommittee appointed the previous day was that ORS 116.330, 116.335 and 116.340 should be retained, with the following revision of ORS 116.335:

"If upon the application it appears to such court or judge that the assets are insufficient for the purposes specified in ORS 116.330, and that it is probable that the conveyance, transfer, judgment or decree was made, suffered, consented to or procured with the intent or in the manner specified in such section, and that it is prudent to bring such proceedings, it shall make the order . . . (no further change)."

Riddlesbarger explained that the reason for adding "and that it is prudent to bring such proceedings" to ORS 116.335 was to require a court finding on this matter and thus preclude court consent to commencement of the proceedings where, for example, the expense of the proceedings would exceed the recovery. He noted that the subcommittee recommendation retained the present requirement of court consent to commencement of the proceedings and left the law in its present form so far as proceedings by creditors were concerned; i.e., if a creditor had a right to initiate a proceeding to avoid acts of a decedent in fraud of creditors under present law, such right remained unaffected. He commented that the problem of

requiring a personal representative to obtain consent of the court to commence legal proceedings in other instances should be considered separately.

Riddlesbarger moved, seconded by Zollinger, that all action taken previously by the committees with respect to ORS 116.330, 116.335 and 116.340 be rescinded, that ORS 116.330 and 116.340 be approved without change and that ORS 116.335 be revised as recommended by the subcommittee. Motion carried.

Rhoten indicated that he would like to have the right to set aside a decedent's conveyance in fraud of creditors extended to heirs, as well as to creditors. He suggested provision be made giving heirs the right to set aside fraudulent transfers and bring the assets into the estate for distribution. Dickson asked Rhoten if he would be satisfied to allow the heirs to participate in any surplus recovered in the proceedings commenced by the personal representative, and received an affirmative reply.

Rhoten moved, seconded by Bettis, that ORS 116.340 be amended by deleting "; but the right to or interest in the surplus, if any, remains as if such proceeding had not been allowed or commenced." There followed a lengthy discussion of the motion, during which Riddlesbarger expressed the view that such an amendment would depart from the committees' basic concept of trying to give effect to the wishes of the deceased. Motion failed. Riddlesbarger moved, seconded by Gooding, that ORS 116.340 be approved without change. Motion carried.

Riddlesbarger pointed out that he did not contemplate that a personal representative should be required to seek approval of the court to commence an action, except in the particular instance set forth in ORS 116.330 and 116.335. Other members concurred, and Carson suggested incorporation in the proposed probate code of a provision which would state that no such court approval was required unless otherwise expressly provided by statute. There being no objection, Dickson referred the matter to Carson for study and report thereon to the committees when the subject of actions and suits involving decedents' estates came under discussion. Richardson commented that he was inclined not to favor removal of any necessity for a personal representative to obtain a court order before commencing litigation, because this would put the personal representative in a position where he would have to sue at his peril. He suggested that reasonable standards might be prescribed for issuance of the court order in such instances. Dickson appointed Richardson to research the question he had raised and present the opposing view at the time Carson made his recommendations on the subject.

Carson remarked that the committees might wish to consider broadening the scope of ORS 116.330 to allow an application to the court not only by the personal representative but by a creditor, which would ease the burden on the reluctant personal representative who hesitated to bring an action to set aside a fraudulent transaction because he found it embarrassing or disagreeable to do so. Zollinger pointed out that a defrauded creditor could bring a proceeding for the purpose on his own behalf without further amendment of the statute.

### Claims Against Decedents' Estates

Lundy distributed to members present copies of his report, dated July 14, 1966, entitled "Revised Rough Draft on Disallowance and Bar of Claims Against Decedents' Estates." He explained that the report reflected his interpretation of committee action at the June meeting on Gooding's June 13 revised rough draft on denial and contest of claims, and on related matters.

Claims considered allowed if not disallowed (section 1). Gooding read section 1 of Lundy's draft, and the committees made no comment thereon.

Disallowance of claims by personal representative (section 2). Allison proposed that subsection (1) of section 2 of Lundy's draft should state "or his attorney, if any," rather than "or, if any, his attorney." Lundy noted that this phrase would appear in numerous places in the proposed probate code and should be consistent in form throughout. It was agreed that "if any" served no purpose in section 2 and should be deleted.

Procedure by claimant on disallowance of claim (section 3). Lovett suggested that "to the claimant" be deleted from the beginning clause in subsection (1) of section 3 of Lundy's draft, and the committees concurred.

Zollinger pointed out that the claim had been disallowed under section 2, and that repetition of the "disallowed" wording in subsection (2) of section 3 was unnecessary. He suggested that "is considered disallowed and" be deleted from subsection (2) of section 3, and the committees concurred.

Separate action or suit required by personal representative (section 4). Jaureguy referred to section 4 of Lundy's draft, and questioned the time periods for the personal representative to require a claimant to commence a separate action or suit and for the claimant to commence that action or suit. Gooding pointed out that it was necessary to have some definite and limited periods, and Jaureguy agreed that this probably was so. Jaureguy suggested that the personal representative's notice of requirement to the

claimant should advise the claimant that unless he brought an action or suit on his claim in 60 days, the claim would be barred. Zollinger proposed that, instead of providing that the personal representative should serve a notice of requirement, section 4 should require that the personal representative serve a notice on the claimant or his attorney that unless action or suit was brought on the claim within 60 days, the claim would be barred. The committees approved Zollinger's proposal.

It was agreed that "if any" in the phrase "claimant or, if any, his attorney" should be deleted, and that the phrase "is considered disallowed and" should be deleted.

Summary determination procedure (section 5). Zollinger referred to section 5 of Lundy's draft, and posed the question of whether a partially disallowed claim should be considered on summary determination only to the extent of the part disallowed or whether the entire claim should be considered, including the part allowed. Lundy commented that he would construe the wording of section 5 to contemplate summary determination on the whole claim, and that there was nothing in section 5 which would prevent anyone from raising a question on that part of the claim that had been allowed. He remarked that if the committees intended that only that part of the claim which had been disallowed was to be considered by the court, the wording of section 5 would need to be clarified to reflect that intent. Zollinger expressed the view that the personal representative should not allow any part of a claim if he was not convinced that it was just and, having allowed any part, the allowance should stand. Gilley expressed disapproval of this policy because of the possibility that additional evidence might appear after allowance and in the summary determination proceeding, and indicated he was of the opinion, with which Dickson and Jaureguy agreed, that the entire claim should be open to examination on summary determination. Zollinger restated his position that when a personal representative had approved a claim, to the extent it was approved, it should no longer be the subject of litigation. A show of hands indicated that the majority of the members disagreed with Zollinger's position.

Allison pointed out that the present statute (i.e., ORS 116.520) did not contain provision for partial disallowance, and recommended that a claim be either approved or disapproved, with no provision for partial disallowance. After a brief discussion, Allison moved that the wording on partial disallowance of a claim be deleted from section 5. Motion failed for lack of a second.

Riddlesbarger proposed that section 5 be revised to make it clear that the summary determination proceeding would be upon the entire claim.

Zollinger remarked that under such a statute he would suggest that a creditor present portions of his claim separately so as to insure against a partially allowed claim subsequently being totally disallowed in a court proceeding. Gilley expressed concern that such a procedure on the part of creditors could lead to harassment of the personal representative by each claimant presenting a series of claims, and suggested that a claimant be required to assert all his causes of action in one claim or at least present them all at the same time. Jaureguy contended that a claimant should be entitled to file his claims either separately or in one document, and a majority of committee members apparently concurred with this contention.

Interested persons heard in summary determination or separate action or suit (section 6). Lundy noted that the substance of section 6 of his draft had not been approved by the committees at the June meeting. Approval had been expressed, he said, in favor of the proposition that interested persons should be allowed to join in a proceeding initiated by either the personal representative or the claimant, and he commented that section 6 was a possible way of accomplishing this purpose.

Lundy pointed out that, in referring to the summary determination, he had used "probate court," and in referring to the action or suit, he had used "any court of competent jurisdiction," and asked if the committees intended that the separate action or suit could be brought in the probate court. The committees agreed that the wording used in Lundy's draft was correct in regard to this matter.

Zollinger moved, seconded by Braun, that section 6 be approved without change. Motion carried.

Proof of claim for court allowance (section 7); waiver of statute of limitations (section 8). Gooding read sections 7 and 8 of Lundy's draft, and the committees made no comment thereon or change therein.

Effect of death on limitations (ORS 12.190) (section 9). Jaureguy referred to section 9 of Lundy's draft, amending ORS 12.190, and suggested that "and the cause of action survives," be deleted from subsections (1) and (2), because all causes of action survived under present law. The committees agreed that the quoted phrase should be deleted.

Extension of statute of limitations (section 10); claim barred when personal representative not appointed (section 11). Gooding read sections 9 and 10 of Lundy's draft, and there followed a discussion concerning

the phrase "if a personal representative is not appointed and does not qualify" in section 11. Lundy commented that he would construe the phrase to mean that the personal representative had to be both appointed and qualified, and that the term "qualify" might be used in two senses; i. e., first, be qualified by meeting the statutory requirements for appointment as a personal representative and, second, be qualified by filing a bond. Carson commented that the personal representative was appointed on condition that he did qualify, and expressed approval of the wording. Lundy suggested that "unless" might be substituted for "if" in the phrase, and the committees agreed that the following wording would be satisfactory for the concluding clause of section 11: ". . . after the date of the decedent unless a personal representative is appointed and qualifies within the six-year period."

Nonabatement of action or suit by death, disability or transfer; continuing proceedings (ORS 13.080) (section 12). Dickson asked Lundy if he intended to remove section 12 of his draft, amending ORS 13.080, from ORS chapter 13 and place it in the proposed probate code, and was told that section 12 could remain in ORS chapter 13 because section 13 of Lundy's draft, which would go in the area of claims in the proposed probate code, adopted ORS 13.080 by reference, so that the substance was, in effect, in both places.

Zollinger pointed out that one of the reasons it was necessary to extend the period of probate was because of pending litigation, and suggested that the period might be shortened somewhat by distinguishing between pending cases in which the decedent was the plaintiff and those in which he was the defendant. He commented that it should not be necessary to require that both the personal representative and the distributee be joined in actions brought by the decedent prior to death. He also suggested clarification of the term "successors in interest" in section 12. Lundy commented that if the meaning of "successors in interest" were clarified when applied to death, it should also be clarified when applied to a legal disability under section 12.

Allison asked if the present wording of subsection (1) of ORS 13.080, as amended by section 12, had reference to other statute sections or to the following provisions of ORS 13.080. Lundy responded that it was difficult to determine this matter, and pointed out that the 1965 amendment of ORS 121.020 provided that all actions survived in the case of death. He suggested that so far as ORS 13.080 was concerned, with the 1965 amendment of ORS 121.020, the wording might be surplusage.

After further discussion, the committees decided to consider ORS 121.020 prior to making a final decision on section 12. Note: Section 12

was considered again at the Saturday afternoon session of the meeting, and a summary of this consideration will be found on pages 19 to 21 of these minutes./

Actions and Suits Affecting Decedents' Estates and Administration

The committees then began a consideration of ORS chapter 121, relating to actions and suits affecting decedents' estates and administration, and Gooding's report thereon.

∟Note: Copies of Gooding's report, dated July 8, 1966, and entitled "Actions and Suits Affecting Decedents' Estates and Administration (ORS chapter 121)," were distributed to all members of both committees prior to the meeting./

What causes of action survive; parties (ORS 121.020). Lundy asked whether ORS 121.020 covered the situation of a pending action, and Jaureguy expressed the views that the section covered both actions pending and not pending and was principally intended to cover personal injury cases.

Allison moved, seconded by Gooding, that ORS 121.020 be retained, with an amendment adding suits in equity to the application of the section. Motion carried.

Several representatives regarded as one person (ORS 121.030). Allison asked if a provision existed which would make ORS 121.030 applicable to suits in equity, and was told by Lundy that subsection (1) of ORS 121.210 specified that the provisions of ORS 121.030 to 121.100 applied to suits by and against personal representatives.

Allison moved, seconded by Gooding, that ORS 121.030 be approved, with the addition of "suit" wherever appropriate in order to include suits in equity. Motion carried.

Judgment against representative on failure to answer not evidence of assets in his hands (ORS 121.040); effect of judgment or decree against executor or administrator (ORS 116.565). Gooding expressed the view, with which Zollinger agreed, that ORS 121.040 was superfluous if ORS 116.565 was retained in either the claims area or the suits and actions area of the proposed probate code. Gooding moved, seconded by Zollinger, that ORS 121.040 be deleted. Motion carried.

Dickson inquired whether the application of ORS 116.565 should be

extended to include default judgments, and Zollinger expressed the opinion that the section was sufficient as is. In reply to a question by Riddlebarger, Zollinger commented that he believed the section should be restricted to judgments upon claims against estates. Zollinger moved, seconded by Gooding, that ORS 116.565 be approved and the question of its proper placement in the proposed probate code be reserved until a later time. Motion carried.

Costs and disbursements; decrees for payment of money, how enforced (ORS 116.560). Gooding suggested that ORS 116.560 be deleted. Zollinger agreed that the subject of award of costs in an action was not appropriate for a specific provision to be included in the proposed probate code, but should be covered by a general provision that the procedures in probate are governed by general law on the subject. Gooding moved, seconded by Zollinger, that ORS 116.560 be deleted from the proposed probate code. Motion carried.

Contradiction or avoidance of inventory as evidence (ORS 121.050). Based upon the hypothesis that an inventory was an admission against interest and that was all it should be, Zollinger moved, seconded by Bettis, that ORS 121.050 be deleted. Motion carried.

Executor of his own wrong (ORS 121.060). Zollinger noted that the committees had discussed ORS 121.060 at the meeting the previous day and had approved consolidation of the section with ORS 116.325, with some revision of substance. /Note: See page 7 of these minutes./

Authority of executor of executor (ORS 121.070). After a brief discussion, Gooding moved, seconded by Zollinger, that ORS 121.070 be revised to apply to all personal representatives, and that the section be transferred to the area of the proposed probate code dealing with powers and duties of personal representatives. Motion carried.

Time within which actions against representative may be commenced (ORS 121.080); action against representative not to be commenced until claim is presented and rejected; liability on claim presented after six months from appointment of representative (ORS 121.090); provisional remedies against executors or administrators (ORS 121.100). Gooding pointed out that ORS 121.080, 121.090 and 121.100 had been repealed by previous committee action. /Note: See Minutes, Probate Advisory Committee, 6/17,18/66, page 13./ Zollinger remarked that ORS 121.090 should be retained unless a similar provision was contained in the proposed new claims provisions. If it was not contained therein, he suggested that the claims provisions should provide in substance that no action or

suit might be brought against a personal representative on a claim without the presentment of a claim and its rejection in whole or in part. If the claims provisions so provided, he stated he would have no objection to the removal of all but the first sentence of ORS 121.090. Lundy pointed out that subsection (1) of section 1 of his draft dated June 16, 1966, provided that all claims, except the claim of the personal representative, had to be presented to the personal representative unless there was some specific provision to the contrary.

Riddlesbarger moved, and the motion was seconded, that Lundy check previous action by the committees to make certain that the substance of the first sentence of ORS 121.090 was perpetuated in an appropriate place in the claims area of the proposed probate code. 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 were present except Butler, Frohnmayer and Husband. The following members of the Bar committee were present: Bettis, Gilley, Braun, Hornecker, Lovett, Rhoten and Richardson. Also present was Lundy.

Actions and Suits Affecting Decedents' Estates and Administration (continued)

Application of ORS 121.030 to 121.100 to suits; "debt" defined (ORS 121.210). Gooding read the comment on ORS 121.210 in his report dated July 8, 1966, and suggested that "claim" be used in place of "debt" in subsequent sections of ORS chapter 121. Gooding moved, seconded by Braun, that ORS 121.210 be deleted. Motion carried.

Causes of suit surviving; parties; extent of liability of heirs, legatees, devisees and next of kin (ORS 121.220). Dickson suggested that ORS 121.220 be deleted and that the substance of committee action on the balance of ORS chapter 121, relating to liability of distributees for debts of a decedent, be compiled in one comprehensive section. Gooding moved, seconded by Jaureguy, that ORS 121.220 be deleted. Motion carried.

Suits against distributees by estate creditors (ORS 121.230 to 121.370); nonintervention will statute. Gooding pointed out that the balance of ORS chapter 121 concerned the liability of various types of distributees to creditors of an estate; and that each section provided separate rules for each particular class of distributee. He recommended that ORS 121.230 to 121.370 be deleted and in their place one statute be drafted to provide that distributees were liable to creditors "in the following manner," with the liabilities listed thereafter in the order set forth in the present ORS sections. If further rules were needed, he suggested that they be placed

in an additional section. Gooding also noted that the Mundorff code did not contain the existing sections under consideration, and Lundy explained that at the time the Murdorff code was written, the sentence of ORS chapter was not included in the probate code, but was located elsewhere in the compiled statutes.

Zollinger questioned the virtue of retaining ORS 121.230 to 121.370 in the proposed probate code and observed that if creditors were to be barred by a time limitation, the bar should be complete as to the distributees. Lundy pointed out that creditors would be barred unless entitled to equitable relief due to peculiar circumstances, according to previous action by the committees, and Dickson remarked that a court of equity could reach these situations without the provisions contained in ORS 121.230 to 121.370. Lundy read the statute of nonclaim previously approved by the committees (i.e., subsection (3) of section 1, Lundy's draft dated June 16, 1966). Zollinger expressed the view that this statute of nonclaim was all that was needed in the probate code. He suggested a possible clarification by inserting "from the bar" after "equitable relief" in the nonclaim statute.

After further discussion, Zollinger proposed retention of a provision, to be limited expressly to those cases in which a claim was not barred, which would authorize the holder of such a claim to pursue it against the persons to whom the assets of the estate were distributed and also give these distributees equitable recourse against other distributees. Dickson remarked that this could be accomplished through revision of the statute of nonclaim.

Allison moved, seconded by Riddlesbarger, that ORS 121.230 to 121.370 be deleted, and that such revision of the nonclaim statute be made as was necessary to preserve the rights of claimants entitled to equitable relief against the distributees to the extent of their respective distributions. Motion carried.

Mapp outlined the historical background of the English probate system and explained that in 17th century England real property was not subject to probate in any form and personal property was distributed immediately while still subject to claims of creditors. Modern probate law in Oregon and most other states, Mapp continued, had completely rejected the concept of distributing property subject to claims of creditors, but ORS 121.230 to 121.370 appeared to be in direct opposition to the present philosophy of holding property for a prescribed period of time to be distributed free of claims of creditors. Mapp proposed that Oregon develop two parallel systems of property distribution: One like the present system, and the other a new system which would shortcut the arbitrary time periods and allow immediate distribution of property to those persons who agreed to take such property

subject to the claims of creditors, with each person who received a part of the estate to be held liable to each creditor up to the entire amount of the estate inventory. Dickson expressed objection to such a new system on the ground that there was no justification for prejudicing the position of creditors by making collection more difficult than during the lifetime of the decedent. Dickson said he would not recommend that Mapp spend hours of research on such a project, which almost certainly would be strongly opposed by collection agencies, county clerks, title companies and newspaper publishers. Mapp indicated he would do a minimum amount of work on such a new system to determine its feasibility.

Allison suggested the committees consider a nonintervention will statute similar to those in effect in Washington, Idaho and Alaska, and Zollinger concurred that such a statute should be studied by the committees with a view to adopting at least a part of it. After further discussion, Dickson appointed Zollinger, Allison and Mapp to study chapter 11.68, 1965 Washington Probate Code, and to present their recommendations at the August 1966, meeting.

Riddlesbarger commented that many of the technicalities involved in probate must be observed although the need for them has long since passed and suggested that the procedures be examined with a view to terminating probate proceedings earlier than presently contemplated by the statutes. Zollinger proposed adoption of a statute that would provide for termination of an estate proceeding prior to the four-month claim presentment period upon a showing that all creditors' claims had been paid and that nothing remained to be done in the administration of the estate other than its distribution. Gilley inquired how it would be possible to determine that all claims had been paid and Zollinger replied that it might be possible to make a showing to the court which would justify earlier closure of the estate. Dickson pointed out that it would be unfair to creditors to make the period shorter than four months, and Allison pointed out that in actual practice estates were often summarily closed when a recital had been made to the court that there was nothing further to be done in administration.

#### Claims Against Decedents' Estates (continued)

Nonabatement of action or suit by death, disability or transfer; continuing proceedings (ORS 13.080) (section 12, Lundy's draft dated July 14, 1966 (continued)). Lundy pointed out that the new material discussed at the June meeting was contained in subsection (3) of ORS 13.080, as amended by section 12 of his draft dated July 14, 1966. [Note: See Minutes, Probate Advisory Committee, 6/17,18/66, page 11.] Braun suggested that "shall"

be substituted for "may" in subsection (3), and the committees concurred. Zollinger recommended the same change in subsection (2), and the committees agreed this was a desirable substitution.

Zollinger raised the question of the precise time when a disability occurred under subsection (2), with particular reference to a mental disability, and suggested that the time could begin at the time of an adjudication of incompetency or, if there were no such adjudication, at the time of substitution of the parties. He proposed the following wording for subsection (2): "In the case of the disability of a party, the court shall, at any time within one year after the adjudication of such disability, on motion, allow the action or suit to be continued . . . ." Gilley remarked that it would be better to limit the statute to cases where there had been an adjudication of the disability.

Dickson noted that the 1965 legislature had enacted a statute (i.e., ORS 426.295) providing that admission of a person to the state hospital did not amount to a determination that the person was incompetent and that he was presumed to be competent notwithstanding such admission. He indicated that the Judicial Conference, the Oregon Medical Association and others were proposing a statute for introduction at the 1967 legislative session that would alter the 1965 statute by providing that a mentally ill person committed to the state hospital was presumed to be incompetent and would establish a procedure to determine competency at a future time.

Lovett suggested the following wording for subsection (2): "When a guardian shall be appointed for an incompetent person, he may be substituted within one year in any action then pending by or against the incompetent." Zollinger pointed out that the suggested wording would apply only to cases in which a guardian was appointed. Jaureguy objected to the suggested wording and contended that it was unnecessary to include "disability" in the wording of the section.

Dickson suggested deletion of subsection (1), but Zollinger expressed the opinion that subsection (1) was a good introduction to subsections (2) and (3). Zollinger suggested that subsection (1) be revised to read as follows: "An action or suit shall abate by the death or disability of a party except as follows:". He then asked if the period pending the appointment of a personal representative or a successor in interest should be part of the one-year and four-month periods in subsection (3), and expressed the opinion that the periods should begin to run at the time of the appointment of the personal representative. Zollinger then proposed substitution of the following for section 12:

"Section 12. ORS 13.080 is repealed and the following enacted in lieu thereof:

"An action or suit shall abate by the death or disability of a party except as follows:

"(1) In the case of the disability of a party, the action or suit shall continue upon motion for the substitution of his guardian or conservator within one year after his appointment and qualification.

"(2) In the case of the death of a party, the action or suit shall continue upon the substitution of the personal representative of the decedent, upon motion, within one year after his death, unless the personal representative sooner filed his final account, but not later than the date of filing the final account of the personal representative."

Zollinger further explained that if the person became insane in fact, the action would abate, but when the guardian was appointed, the action would no longer be in abatement. Zollinger asked that Lundy revise section 12 along the lines outlined above for submission to the committees at the August meeting.

Continuance of action or suit without claim presentment (section 13); enforcement of encumbrances (section 14). Zollinger moved, seconded by Jaureguy, that sections 13 and 14 of Lundy's draft dated July 14, 1966, be approved, subject to Lundy making such revision thereof as might be necessary to conform with his revision of section 12. Motion carried.

#### Actions and Suits By and Against Personal Representatives

Jaureguy indicated he had been requested by Dickson to assemble ORS sections dealing with actions and suits by and against personal representatives. He distributed to members present copies of such sections, some of which had been considered earlier at the meeting.

Commencement of new action within one year after dismissal or reversal (ORS 12.220). Dickson suggested that, where applicable, references to suits in equity be added to ORS 12.220 and other pertinent ORS sections. The committees agreed to leave to Lundy the task of making certain that suits in equity, as well as actions, were covered in the appropriate sections.

Real party in interest; except fiduciary (ORS 13.030). Zollinger questioned the purpose served by ORS 13.030, commenting that assignments of causes of action in tort were not authorized. Gilley indicated that he

would be reluctant to repeal ORS 13.030 in view of the fact that such repeal might be construed to authorize assignment of tort causes of action, which could not be assigned under present law. Gooding moved that ORS 13.030 be approved, but no vote was taken on the motion.

Declaratory judgments on trusts or estates (ORS 28.040). Gooding suggested the committees might wish to broaden the scope of ORS 28.040. After brief discussion, Gooding moved, seconded by Zollinger, that ORS 28.040 be approved without change. Motion carried.

Actions for injury or death (ORS 30.010 to 30.100). Zollinger pointed out that ORS 30.010 to 30.100 were not probate law, and commented that he was opposed to changing these sections in any way. Jaureguy read the sections and moved, seconded by Zollinger, that they be approved. Motion carried.

Lundy commented that it might be advisable to clarify some of the sections in the general statutes to conform to the wording of the proposed probate code.

Evidence generally (ORS 41.840, 41.850, 41.860 and 41.900). Jaureguy read ORS 41.840, 41.850, 41.860 and 41.900, and moved, seconded by Zollinger, that they be approved. Motion carried.

#### Minutes of June Meeting

Zollinger moved, seconded by Allison, that reading of the minutes of the last meeting (June 17 and 18, 1966) be dispensed with and that they be approved as submitted. Motion carried.

#### Next Meeting of Committees

The next joint meeting of the committees was scheduled for Friday, August 19, 1966, at 1:30 p.m., and the following Saturday, August 20, in Dickson's courtroom, 244 Multnomah County Courthouse, Portland. It was agreed that the agenda items for the August meeting should be as follows:

- (1) Inventory and appraisal. Consideration of ORS 116.405 to 116.465, and Butler's report thereon.
- (2) Nonintervention will statute (chapter 11.68, 1965 Washington Probate Code). Discussion to be led by Zollinger, Allison and Mapp.

- (3) Nonabatement of action or suit by death, disability or transfer; continuing proceedings. Revised statute to be prepared by Lundy.
- (4) Support of surviving spouse and minor children; homestead.
- (5) Establishing foreign wills and ancillary administration.

October Meeting of Committees

The following item was scheduled for consideration at the October meeting: Possession and control of property (ORS 116.105). Report by Richardson on income disposition.

The meeting was adjourned at 4:15 p.m.

REPORT  
July 14, 1966

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

From: Robert W. Lundy

Subject: Revised Rough Draft on Disallowance and Bar of  
Claims Against Decedents' Estates

One of the matters scheduled for consideration by the Advisory and Bar Committees at the meeting to be held July 15 and 16, 1966, is consideration of the procedure on disallowance of claims against decedents' estates and the application of the statute of limitations to claims and actions and suits thereon. These subjects were discussed, and some committee action taken thereon, at the June meeting in connection with sections 21 to 24, 27 and 28 of Mr. Gooding's revised rough draft, dated June 13, 1966, on denial and contest of claims against decedents' estates.

This report contains a revised rough draft reflecting my interpretation of committee action at the June meeting on all of Mr. Gooding's June 13 revised rough draft and related matters. Also, in preparing the revised draft I have made certain additions, deletions and other changes not previously acted upon by the committees.

The following sections of Mr. Gooding's June 13 revised rough draft are not included in the revised draft contained in this report:

Section 30. Proof of judgment. (See ORS 116.570)  
This section was omitted by committee action at the June meeting.

Section 31. Reference of claims. (See ORS 116.575)  
This section was omitted by committee action at the June meeting.

Section 32. Exemption of homestead devised or not devised. (See ORS 116.590 and 116.595) Consideration of this section was postponed by committee action at the June meeting pending future consideration and action on the matter of support of surviving spouse and minor children.

Repeal of the following ORS sections was recommended by committee action at the June meeting:

ORS 121.080 (time within which actions against representative may be commenced).

ORS 121.090 (action against representative not to be commenced until claim is presented and rejected; liability on claim presented after six months from appointment of representative).

ORS 121.100 (provisional remedies against executors or administrators).

REVISED ROUGH DRAFT

Section 1. Claims considered allowed if not disallowed. A claim presented to the personal representative is considered allowed as presented unless the personal representative disallows the claim in whole or in part as provided in section 2.

Section 2. Disallowance of claims by personal representative. (1) If the personal representative disallows a claim in whole or in part, he shall do so within 60 days after the date of presentment of the claim, and, within that 60-day period, shall cause a notice of disallowance to be mailed or delivered to the claimant or, if any, his attorney. The personal representative shall file in the estate proceeding the claim as presented and a copy of the notice of disallowance thereof.

(2) A notice of disallowance of a claim shall inform the claimant that the claim has been disallowed in whole or in part and, to the extent disallowed, will be barred unless the claimant proceeds as provided in section 3.

Section 3. Procedure by claimant on disallowance of claim. (1) If the personal representative disallows a claim in whole or in part, the claimant, within 60 days after the date of mailing or delivery of the notice of disallowance to the claimant, may either:

(a) File in the estate proceeding a request for summary determination of the claim by the probate court, with proof of service of a copy of the request upon the personal representative or his attorney; or

(b) Commence a separate action or suit against the personal representative on the claim in any court of competent jurisdiction. The action or suit shall proceed and be tried as any other action or suit.

(2) If the claimant fails to request a summary determination or commence a separate action or suit as provided in subsection (1) of this section, the claim, to the extent disallowed by the personal representative, is considered disallowed and is barred.

Section 4. Separate action or suit required by personal representative. If the claimant files a request for summary determination of the claim as provided in section 3, the personal representative, within 30 days after the date of service of a copy of the request upon the personal representative or his attorney, may require that the claimant commence a separate action or suit against the personal representative on the claim, which action or suit shall proceed and be tried as any other action or suit. The

personal representative shall serve a notice of that requirement upon the claimant or, if any, his attorney. If the claimant fails to commence a separate action or suit within 60 days after the date of service of the notice, the claim, to the extent disallowed by the personal representative, is considered disallowed and is barred.

Section 5. Summary determination procedure. In a proceeding for summary determination by the probate court of a claim disallowed in whole or in part by the personal representative:

(1) The personal representative shall move or plead to the claim in the same manner as though the claim were a complaint filed in an action or suit.

(2) The court shall hear the matter after notice to the claimant and personal representative. Upon the hearing the court shall determine the claim in a summary manner without a jury, and shall make an order allowing or disallowing the claim in whole or in part.

(3) No appeal may be taken from the order of the court made upon the summary determination.

Section 6. Interested persons heard in summary determination or separate action or suit. In a proceeding for summary determination by the probate court of a claim disallowed in whole or in part by the personal representative or in a separate action or suit against the personal representative on the claim, any person interested in the estate may be heard on the matter of allowance or disallowance of the claim.

Section 7. Proof of claim for court allowance. A claim disallowed in whole or in part by the personal representative may not be allowed by any court except upon some competent and satisfactory evidence other than the testimony of the claimant.

Section 8. Waiver of statute of limitations. A claim barred by the statute of limitations may not be allowed by the personal representative or any court except upon the written direction of distributees and creditors who would be adversely affected by allowance of the claim.

Section 9. ORS 12.190 is amended to read:

12.190. Effect of death on limitations. (1) If a person entitled to bring an action dies before the expiration of the time limited for its commencement, and the cause of action survives, an action may be commenced by his personal representative [s] after the expiration of [the] that time, and within one year [from] after his death.

(2) If a person against whom an action may be brought dies before the expiration of the time limited for its commencement, and the cause of action survives, an action may be commenced against his personal representative [s] after the expiration of that time, and within one year after his death. [the issuing of letters testamentary or of administration; but no suit or action for collection of any claim against the estate of a decedent may be maintained, when no letters testamentary or of administration shall have been issued before the expiration of six years after

the death of the decedent.]

Section 10. Extension of statute of limitations. If a claim is not barred by the statute of limitations on the date of death of the decedent, the claim is not barred by the statute of limitations thereafter until at least one year after the date of death.

Section 11. Claim barred when personal representative not appointed. A claim against the estate of a decedent is barred, and an action or suit on the claim may not be commenced, after the expiration of six years after the date of death of the decedent if a personal representative is not appointed and does not qualify within the six-year period.

Section 12. ORS 13.080 is amended to read:

13.080. Nonabatement of action or suit by death, disability or transfer; continuing proceedings. (1) No action or suit shall abate by the death or disability of a party, or by the transfer of any interest therein, if the cause of action survives or continues.

(2) In case of the [death or] disability of a party, the court may, at any time within one year thereafter, on motion, allow the action or suit to be continued by or against his [personal] legal representative [s] or successors in interest.

(3) In case of the death of a party, the court may, on motion, allow the action or suit to be continued:

(a) By his personal representative or successors in interest at any time within one year after his death.

(b) Against his personal representative or successors in interest at any time within four months after the date of the first publication of notice of the appointment of the personal representative, but not more than one year after his death.

Section 13. Continuance of action or suit without claim presentment. An action or suit against a decedent commenced before and pending on the date of his death may be continued as provided in paragraph (b) of subsection (3) of ORS 13.080 without presentation of a claim against the estate of the decedent.

Section 14. Enforcement of encumbrances. Sections (insert references to appropriate sections) do not affect or prevent any action, suit or proceeding to enforce any encumbrance upon property of the estate.

REPORT

July 8, 1956

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

From: Tom Gooding

Subject: Actions and Suits Affecting Decedents' Estates and  
Administration (ORS chapter 121)

One of the matters scheduled for consideration by the Advisory and Bar Committees at the meeting to be held July 15 and 16, 1956, is review of ORS chapter 121 (Actions and Suits Affecting Decedents' Estates and Administration).

This report contains my summary of the statute sections that constitute ORS chapter 121, and some commentary and recommendation thereon.

\* \* \* \* \*

ORS 121.020 provides that all causes of action survive death. The section was recently enacted (section 2, chapter 520, Oregon Laws 1955), and retention thereof is suggested.

ORS 121.030 provides that several representatives are regarded as one person. The section was enacted in 1862, has not been amended since that enactment and has not been cited in an Oregon Supreme Court opinion.

ORS 121.040 provides that default judgments are not evidence of assets in the estate unless the complaint alleges the same and summons is served upon the defendant. The section has existed since 1862 without amendment. It is cited in Jauregui & Love, Oregon Probate Law and Practice, section 735. Seemingly, the section is superfluous if we retain ORS 116.565.

ORS 121.050 has existed since 1862, without amendment and without judicial comment. The section provides for the legal effect of an inventory as evidence.

ORS 121.060 has existed since 1862 without amendment, and concerns the "executor of his own wrong." The section restricts the action against such an executor to the rightful personal representative, not allowing action by other interested persons, such as creditors or distributees, as could be done at common law. Rutherford v. Thompson, (1886) 14 Or. 236, 239-240. The section applies to a good faith administrator acting under a void order of appointment. Slate v. Henkle, (1904) 45 Or. 430. If the intermeddler applies property in a manner beneficial to the estate, he can offer this in mitigation. Rutherford v. Thompson, supra. Since it is closely akin to ORS 116.325 (relating to conversion of property and double damages), it is suggested that ORS 121.060 be put in ORS 116.325 and removed from chapter 121.

ORS 121.070 provides that the deceased executor's personal representative has no authority respecting the first estate. If the section is retained, it should be placed in the chapter on administration of estates.

ORS 121.080, 121.090 and 121.100 have been repealed by committee action.

ORS 121.210 applies the above provisions to suits by and against personal representatives, and defines the word "debt." This section could be eliminated by inserting the word "suit" in the above provisions that are retained, and by not using the word "debt" but using the word "claim." "Claim" has received extensive treatment in another area.

ORS 121.220 provides that all causes of suit survive, and this could be eliminated by inserting the word "suit" in ORS 121.020 pertaining to actions. Subsection (2) of this section, having to do with subsequent sections concerning liability of distributees, is not clear.

ORS 121.230, 121.240 and 121.250 state that distributees of personal property are liable to pay creditors to the extent of their shares and so much thereof as may be necessary to satisfy the debts. Joinder is provided for, as well as apportionment between the distributees and a suit for contribution among them.

ORS 121.260 provides for similar liability of the legatee of specific personal property if there is no intestate personal property available. Also, there is apportionment between legatees.

ORS 121.270 provides for the apportionment of costs in the foregoing suits against distributees of intestate personal property or legatees.

ORS 121.280 provides for the satisfaction of a decree against distributees or legatees.

ORS 121.290 provides for the liability of an heir or devisee. ORS 121.300 states that this liability arises only after exhaustion of personal property, excepting (ORS 121.310) where the will charged the claim to the real property.

ORS 121.320, 121.330 and 121.340 state that the liability of a devisee arises only after exhaustion of the personal property and the intestate real property, limited to the extent of the devise received. The above order of exhaustion does not apply if the will provides otherwise, such as making the debt a charge on the devise.

ORS 121.350 provides for the enforcement of the decree against the heir or devisee to the real property and as having preference over any judgment lien pertaining separately to any devisee or heir. ORS 121.360 renders the property responsible unless conveyed to a bona fide purchaser, in which event the devisee is personally liable.

ORS 121.370 provides for the apportionment of recovery against heirs and devisees.

The Mundorff code and 1963 Iowa Probate Code do not have comparable provisions on recovery against distributees. If it is desirable to retain the existing provisions, it would appear that no distinction should be made between personal and real property, and the abatement provisions of the Iowa Code (i.e., sections 436 and 437) could be borrowed in the following form:

Section \_\_\_\_\_. (i) Distributees shall be responsible for the payment of debts and charges, federal and state estate taxes, legacies, the shares of children or the share of the surviving spouse electing to take against the will, without any preference or priority as between real and personal property, in the following order:

- (a) Distributees of property not disposed of by will.
- (b) Residuary distributees, except a surviving spouse who takes under the will.

(c) Distributees of property disposed of by will, but not specifically devised and not devised to the residuary distributee, except property devised to a surviving spouse who takes under the will.

(d) Distributees of property specifically devised, except property devised to a surviving spouse who takes under the will.

(e) The surviving spouse who takes under the will.

(2) A general devise charged on any specific property or fund shall be deemed property specifically devised to the extent of the value of the property on which it is charged. Upon the failure or insufficiency of the property upon which it is charged, it shall be deemed property not specifically devised to the extent of such failure or insufficiency.

(3) If the provisions of the will, the testamentary plan, or the express or the implied purpose of the devise would be defeated by the order of liability stated in this section, the respective distributees shall be responsible in such other manner as may be found necessary to give effect to the intention of the testator.

The above section should be placed with provisions for payment of claims, and then we can prescribe further procedural rules presently in effect for the following matters:

1. Joinder (ORS 121.230).
2. Apportionment among defendants (ORS 121.240).
3. Contributions among distributees (ORS 121.250).

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4. Apportionment of costs among distributees (ORS 121.270).
5. Satisfaction of decree (ORS 121.280).
6. Enforcement of decree and lien thereof (ORS 121.350).
7. Personal liability where property is conveyed to a BFP (ORS 121.360).

The following ORS sections were submitted to the advisory and Bar committees and commented upon by Mr. Jaureguy at the Saturday afternoon session of the July 1966 meeting of the committees.

Ch. 12

Limitations of Actions  
and Suits

12.190 Suspension by death; revival; maximum limitation on claim against decedent's estate. If a person entitled to bring an action dies before the expiration of the time limited for its commencement, and the cause of action survives, an action may be commenced by his personal representatives after the expiration of the time, and within one year from his death. If a person against whom an action may be brought dies before the expiration of the time limited for its commencement, and the cause of action survives, an action may be commenced against his personal representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration; but no suit or action for collection of any claim against the estate of a decedent may be maintained, when no letters testamentary or of administration shall have been issued before the expiration of six years after the death of the decedent.

12.220 Commencement of new action within one year after dismissal or reversal. Except as otherwise provided in ORS 72.7250, if an action is commenced within the time prescribed therefor and the action is dismissed upon the trial thereof, or upon appeal, after the time limited for bringing a new action, the plaintiff, or if he dies and any cause of action in his favor survives, his heirs or personal representatives, may commence a new action upon such cause of action within one year after the dismissal or reversal on appeal; however, all defenses that would have been available against the action, if brought within the time limited for the bringing of the action, shall be available against the new action when brought under this section.

[Amended by 1961 c.728 §397]

Ch. 13

Parties

13.030 Real party in interest; except fiduciary. Every action or suit shall be prosecuted in the name of the real party in interest, except that an executor or an administrator, a trustee of an express trust, or a person expressly authorized to sue by statute, may sue without joining with him the person for whose benefit the action or suit is prosecuted. A person with whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section. This section does not authorize the assignment of a thing in action not arising out of contract.

13.080 Nonabatement of action or suit by death, disability or transfer; continuing proceedings. No action or suit shall abate by the death or disability of a party, or by the transfer of any interest therein, if the cause of action survives or continues. In case of the death or disability of a party, the court may, at any time within one year thereafter, on motion, allow the action or suit to be continued by or against his personal representatives or successors in interest.

Ch. 28

Declaratory Judgments

28.040 Declaratory judgments on trusts or estates. Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, ward or insolvent, may have a declaration of rights or legal relations in respect thereto:

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or other;  
or

(b) To direct the executors, administrators, trustees, guardians or conservators to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

[Amended by 1961 c.344 §101]

Ch. 30  
Actions and Suits in  
Particular cases.

**ACTIONS FOR INJURY OR DEATH**

**30.020 Action for injury or death of child.** A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child. [Amended by 1931 c.344 §102]

**30.025 Action by personal representative for wrongful death.** When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the decedent, for the benefit of the surviving spouse and dependents and in case there is no surviving spouse or dependents, then for the benefit of the estate of the decedent, may maintain an action against the wrongdoer, if the decedent might have maintained an action, had he lived, against the wrongdoer for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$25,000, which may include a recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital or nursing services for the deceased. [Amended by 1953 c.600 §3; 1961 c.437 §1]

**30.030 Distribution of damages.** Upon settlement of a claim, or recovery of judgment in an action, for damages for wrongful death, by the personal representative of a decedent, for the benefit of the surviving spouse or dependents, or both, the amount of damages so accepted or recovered shall be distributed as follows:

(1) One-half to the surviving spouse and one-half to the dependents.

(2) If there is no surviving spouse, all to the dependents.

(3) If there is no dependent, all to the surviving spouse.

**30.040 Apportionment among dependents upon settlement.** If settlement, with or without action, is effected and there is more than one dependent, the amount to be distributed to the dependents shall be apportioned among them in accordance with their respective expectancies of dependency as determined by the probate court of appointment by order entered in the matter of the estate.

**30.050 Apportionment among dependents after judgment.** If the action described in ORS 30.030 is brought, and a judgment for the plaintiff is given, and there is more than one dependent, the amount to be distributed

to the dependents shall be apportioned among them in accordance with their respective expectancies of dependency as determined by the trial court by order entered in such action.

**30.060 Appeal from order of apportionment.** In the case of an order of apportionment made under either ORS 30.040 or 30.050, any dependent may appeal therefrom, or from any part thereof, to the Supreme Court, within the time, in the manner and with like effect as though such order was a judgment of the circuit court.

**30.070 Settlement; discharge of claim.** The personal representative of the decedent, with the approval of the court of appointment, shall have full power to compromise and settle any claim of the class described in ORS 30.030, whether the claim is reduced to judgment or not, and to execute such releases and other instruments as may be necessary to satisfy and discharge the claim. The party paying any such claim or judgment, whether in full or in part, or in an amount agreed upon in compromise, shall not be required to see that the amount paid is applied or apportioned as provided in ORS 30.030 to 30.060, but shall be fully discharged from all liability on payment to the personal representative.

**30.075 Death of injured person.** (1) Causes of action arising out of injuries to a person, caused by the wrongful act or omission of another, shall not abate upon the death of the injured person, and the personal representatives of the decedent may maintain an action against the wrongdoer, if the decedent might have maintained an action, had he lived, against the wrongdoer for an injury done by the same act or omission. The action shall be commenced within two years by the injured person himself, as provided in ORS 12.110, and continued by his personal representatives under ORS 121.020 and this section, or within three years by his personal representatives, if not commenced prior to death. Damages recoverable under ORS 121.020 and this section shall not exceed \$25,000, and shall be limited to reasonable expenses paid or incurred for doctor, hospital or nursing services for the deceased and for his loss of earnings.

(2) In any such action if the plaintiff prevails, there shall be taxed and allowed to the plaintiff, as a part of the costs of the action, a reasonable amount to be fixed by the court as attorney fees for the prosecution of the action, if the court finds that

written demand for the payment of such claim was made on the defendant either in the form of an action filed or a letter 10 days before commencement of the action; provided, that no attorney fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, at least 20 days before trial in an action that was pending at the death of the injured party, or otherwise prior to the commencement of the action, an amount not less than the damages awarded to the plaintiff.

[1965 c.320 §4]

**30.080 Death of wrongdoer.** Causes of action arising out of injury to or death of a person, caused by the wrongful act or negligence of another, shall not abate upon the death of the wrongdoer, and the injured person or the personal representatives of one meeting death, as above stated, shall have a cause of action against the personal representatives of the wrongdoer; however, the injured person shall not recover judgment except upon some competent satisfactory evidence other than the testimony of the injured person, and the damages recoverable under this section shall not exceed \$25,000, which may include a recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital or nursing services for the deceased.

[Amended by 1953 c.600 §3; 1961 c.437 §2]

**30.090 Appointment of administrator of estate of wrongdoer.** If no probate of the estate of the wrongdoer has been instituted within 60 days from the death of the wrongdoer, the court, upon motion of the injured person, or of the personal representatives of one meeting death, as stated in ORS 30.080, shall appoint an administrator of the estate of the wrongdoer.

**30.100 Substitution of personal representative as party defendant.** In the event of the death of a wrongdoer, as designated in ORS 30.080, while an action is pending, the court, upon motion of the plaintiff, shall cause to be substituted as defendant the personal representative of the wrongdoer, and the action shall continue against such personal representative.

Evidence Generally

41.840 Declaration, act or omission of a member of a family on questions of pedigree. The declaration, act or omission of a member of a family, who is deceased or out of the state, is admissible as evidence of common reputation in cases where, on questions of pedigree, such reputation is admissible.

41.850 Declaration, act or omission of decedent. The declaration, act or omission of a deceased person, having sufficient knowledge of the subject, against his pecuniary interest, is admissible as evidence to that extent against his successor in interest. When a party to an action, suit or proceeding by or against an executor or administrator appears as a witness in his own behalf, or offers evidence of statements made by deceased against the interest of the deceased, statements of the deceased concerning the same matter in his own favor may also be proven.

41.860 Entries of deceased persons or persons without the state. Entries or other writings of like character of a person deceased or without the state, made at or near the time of the transaction and in a position to know the facts stated therein, may be read as primary evidence of those facts when it was made:

- (1) Against the interest of the person making it;
- (2) In a professional capacity, and in the ordinary course of professional conduct; or
- (3) In the performance of a duty specially enjoined by law.

41.900 Facts which may be proved, generally. Evidence may be given of the following facts:

- (1) The precise facts in dispute.
- (2) The declaration, act, or omission of a party as evidence against such party.
- (3) A declaration or act of another, in the presence and within the observation of a party, and his conduct in relation thereto.
- (4) The declaration or act, verbal or written, of a deceased person, in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person; the declaration or act of a deceased person, made or done against his interest in respect to his real property; and also the declaration or act of a dying person, made or done under a sense of impending death, respecting the cause of his death.

Ch. 116

Administration of Estates

116.550 Appeal to Supreme Court. An appeal shall lie to the Supreme Court from the judgment, decree or other determinative order of the circuit court made in such matter, as in the ordinary case.

116.565 Effect of judgment or decree against executor or administrator. The effect of a judgment or decree against an executor or administrator, on account of a claim against the estate of his testator or intestate, is only to establish the claim, as if it had been allowed by him, so as to require it to be satisfied in due course of administration, unless it appears that the complainant alleged assets in his hands applicable to the satisfaction of such claim, and that such allegation was admitted or found to be true, in which case the judgment or decree may be enforced against such executor or administrator personally.

Ch. 121

Actions and Suits  
Affecting Decents'  
Estates and Administra-  
tion.

**121.020** What causes of action survive; parties. All causes of action, by one person against another, whether arising on contract or otherwise, survive to the personal representatives of the former and against the personal representatives of the latter. The executors or administrators may maintain an action thereon against the party against whom the cause of action accrued, or after his death against his personal representatives.

[Amended by 1965 c.620 §2]

**121.040** Judgment against representative on failure to answer not evidence of assets in his hands. When a judgment is given against an executor or administrator for want of answer, such judgment is not to be deemed evidence of assets in his hands, unless it appears that the complaint alleged assets, and that the summons was served upon him.

**121.090** Action against representative not to be commenced until claim is presented and rejected; liability on claim presented after six months from appointment of representative. An action against an executor or administrator shall not be commenced until the claim of the plaintiff has been duly presented to the executor or administrator, and by him rejected. If the claim is presented after the expiration of the period of six months from and after the date of the published notice of his appointment, the executor or administrator, in an action therefor, is liable only to the extent of the assets in his hands at the time the summons is served upon him and allocable to the payment of such claim under and pursuant to the provisions of ORS 116.510.