JOINT MEETING
ADVISORY COMMITTEE PROBATE LAW REVISION
OREGON STATE BAR COMMITTEE ON PROBATE LAW AND PROCEDURE

Friday, January 8, 1965

MINUTES

The tenth meeting was a joint meeting of the Advisory Committee and the Committee on Probate Law and Procedure which convened at 2:00 o'clock p.m. on Friday, January 8, 1965 in Room 319 State Capitol, Salem, Oregon.

Members of the Advisory Committee present were Judge William L. Dickson, Chairman, Clifford E. Zollinger, Vice Chairman, R. Thomas Gooding, Otto J. Frohnmayer, Wallace P. Carson, and Herbert E. Butler.

Members of the Committee on Probate Law and Procedure present were Duncan L. McKay, Chairman, William M. Keller, Secretary, Louis Schnitzer, Wade P. Bettis, Charles M. Lovett, Campbell Richardson, Robert W. Gilley, J. Ray Rhoten, Herbert Swift, and William E. Tassock.

Minutes of Meetings. Mr. Lundy and Judge Dickson discussed reporting, typing, and reproducing the minutes. Mr. Lundy advised that the Legislative Counsel Committee had authorized the payment of $2.00 per hour for reporting and typing rough drafts of the minutes -- this did not include editing or reproducing -- and that $50 would be the maximum allowable per meeting. Mr. Lundy explained that previously minutes had been typed on a Multigraph plate, mats made, and copies run off in Salem. Judge Dickson stated that six meetings were scheduled up to the first of July, and requested the allowance of $50 a meeting.

Report of Law Improvement Committee. Judge Dickson distributed to the members copies of the nine proposed bills and asked for a report from Mr. Butler who had met with the Law Improvement Committee that morning. Mr. Butler stated that the Law Improvement Committee had requested him to report to them before adjournment whether the committees were in agreement on the proposed bills, or whether further study was indicated, and advised that these bills, if introduced, should be introduced immediately so that legislative time would not be lost. Judge Dickson then suggested that the agenda be changed to give first consideration to the proposed measures.

Bill No. 1. Mr. Butler commented on the obvious oversight in amending ORS 111.020; that inadvertently there had not been included a provision for descent and distribution in cases where the intestate is survived by lineal descendants but not a surviving spouse, and that under such circumstance it was intended that the law would remain as it is now. It was agreed that the effective date of this Bill would be January 1, 1966.

Bill No. 2. It was suggested that Bill No. 2, page three, Section 1, subsection (4) be amended so that a surviving spouse having filed the marital declaration would not inherit additional property than that provided for in Bill No. 1.

It was suggested further that Section 3 of Bill No. 2 be amended to read: "A guardian of the estate with prior approval of the Court by order may exercise for and on behalf of the ward the right of the ward to revoke a recorded declaration claiming a marital right of the ward and to cause the revocation to be recorded or to release or subordinate the marital right."

After considerable discussion of these two bills, they were referred to Messrs. Zollinger and Butler with instructions for them to collaborate with Judge Dickson in revising the bills as per committee suggestions.

Bill No. 3. Mr. Keller explained that the only change in the bill as approved by the Committee on Probate Law and Procedure was the elimination of the word "interested" in the following sentence: "At any time within 15 days from the filing of such return any /interested/ person may file his objection to the confirmation of such sale."

Bill No. 3 was approved as amended.

Bill No. 4. Mr. Butler read the suggested changes in terminology made by the Law Improvement Committee in Section 1. A discussion among the members ensued, and it was the concensus that Sections 1 and 2 of Bill No. 4 should be revised as follows:

"Section 1. If, after making any will, the testator shall marry, and the spouse of the testator shall be living at the time of his death, such will shall be deemed revoked, unless provision shall have been made for such survivor by a written antenuptial agreement or marriage settlement or unless the will shall declare the intention of the testator that the will shall not be revoked by the marriage.

"Section 2. If, after making his will, a testator shall be divorced, or his marriage shall be annulled, unless his will shall otherwise provide, such divorce or annulment shall revoke all provisions in the will in favor of the former spouse, including any provision appointing such spouse as the executor of the will and the effect of the will shall be the same as though the former spouse had predeceased the testator.

"Section 3. ORS 114.130 is repealed."

Bill No. 5. The following amendments to Bill No. 5 were suggested:

"Section 2. ORS 116.425 is amended to read:

"116.425. (1) An appraiser designated by order of the court to appraise a property or properties is entitled to receive compensation of not less than $15 nor in excess of the following rates for the property or properties appraised by him:

"(a) For appraising real estate, $1 per $1,000 of appraised value on the first $100,000, and 50 cents for each $1,000 thereafter.

"(b) For appraising listed securities, bonds and notes of the United States, and insurance, 25 cents per $1,000 of appraised value.

"(c) For appraising unlisted over-the-counter securities other than those mentioned in paragraph (d), $1 per $1,000 of appraised value on the first $100,000, and 25 cents for each $1,000 thereafter.

* * * * *

"(3) In addition to compensation provided in this section the appraisers shall be allowed their actual and necessary expenses."

Committee members were in accord with these amendments.

Bill No. 6. After discussion of the bill by Mr. Tassock, it was approved in its present form for submission to the Law Improvement Committee.

Bill No. 7. This bill was discussed in full and revisions suggested by Messrs. Bettis and Frohnmayer. A motion was made, seconded, and adopted to withdraw Bill No. 7 and to refer it back to the Advisory Committee for further consideration since members of the committees were in disagreement as to both the wording and the substance.

Bill No. 8. This bill was discussed and approved, Mr. Tassock dissenting by stating that he felt the bill encompassed too much and effected a very considerable change; that it should be reconsidered by the Oregon State Bar Committee.

Bill No. 9. After general discussion, Bill No. 9 was amended as follows:

"Section 1. (1) Upon the hearing under ORS 116.805 of objections to the sale of real property or in the absence of objections, the court shall make an order confirming the sale and directing the execution of a proper conveyance to the proper person by the executor or administrator, unless the court determines that:" * * * * * * *

This bill was approved as amended.

The bills having been considered thoroughly, Mr. Butler was instructed to report back to the Law Improvement Committee concerning the action taken. After making his report, he stated that the Law Improvement Committee would look forward to the bills being corrected and revised, and referred to Mr. Lundy for appropriate drafting before introduction to the Legislature.

Revision of the Probate Code: The best way to proceed with revision of the Probate Code was discussed. Mr. Frohnmayer indicated he felt that separate sections should be assigned to specific members of the two committees for analyzing and comparison with model codes until a skeleton was set up for general discussion. Mr. Zollinger was of the opinion that it would be more advantageous to avoid dividing up the project, and that the members should work jointly in turning out a revised draft and in criticism of the proposed changes. Messrs. Carson and Lovett concurred in the latter view. Mr. Schnitzer advised that copies of the Uniform Small Estate Code were available and its consideration might be of assistance. Mr. Frohnmayer suggested that the present Code, the Mundorff Code, and a recent model code be cross-indexed as a preliminary to suggested revision. Judge Dickson stated that he would assign sections to committee members for consideration on the basis of their interests at the next meeting.

Next Meeting of Advisory Committee. A special joint meeting with the Bar Committee on Probate Law and Procedure was scheduled for Saturday, January 23, 1965 at 9 a.m. in Room 244 Multnomah County Courthouse, Portland.

Minutes of Joint Meeting. It was agreed that copies of the minutes of joint meetings would be furnished members of the Committee on Probate Law and Procedure as well as the Advisory Committee.

The meeting was adjourned at 5:45 p.m.

ADVISORY COMMITTEE

Probate Law Revision

Eleventh Meeting

Date: Saturday, January 23, 1965
Time: 9 A.M.
Place: Judge Dickson's Courtroom
244 Multnomah County Courthouse
Portland, Oregon

Suggested Agenda

1. Approval of minutes of January 8, 1965 meeting.

2. Guardianship and conservatorship.

   Final consideration of proposed legislation.

3. Small estates.

   Proposed legislation entitled "The Small Estates Act" (dated October 7, 1964).

4. Arranging agenda for next meeting of Advisory Committee.

ADVISORY COMMITTEE
Probate Law Revision

January 23, 1965

Minutes

Meeting convened at 9:10 a.m., Saturday, January 23, 1965, in Judge Dickson's courtroom, 244 Multnomah County Courthouse, Portland. All members, except Gooding, were present. Also present were all members of Committee on Probate Law and Procedure, except Rhoten. Also present were Denny Z. Zikes, William C. Martin and Patricia A. Lisbakken.

Copies of Gooding's letter of January 20, 1965 to Dickson and Schnitzer's letter of January 11, 1965 and Random Thoughts on Bill #7 to Dickson were distributed to all present.

1. PROBATE JURISDICTION IN CIRCUIT COURT. Dickson announced that bill had been introduced by Shirley Field to move all probate jurisdiction into Circuit Courts and asked committee to consider advisability of looking into it.

McKay thought eastern Oregon would be unhappy about such a bill, as circuit judges there must cover two or three counties and exclusive circuit court jurisdiction might turn probate into a mail order business. Dickson and Allison suggested this is value of having a probate commissioner, Allison advising Alaska had solved distance problem with commissioner system.

Dickson stated Campbell Richardson had been asked to study this problem, but the committee had then been looking toward possible legislation in 1967.

After discussion as to how closely committee should monitor progress of bill, a motion was made, seconded, and upon being put to vote carried, to appoint committee to "keep track" of bill introduced by Shirley Field transferring probate jurisdiction to circuit courts. Dickson appointed Richardson, Carson and McKay to do so.

2. GUARDIANSHIP AND CONSERVATORSHIP BILL. (All references are to Rough Draft of July 18, 1964 and to New Revised Draft of September 11, 1964 of subsection (4), Section 2. Dickson suggested bill be drafted in final form for introduction.

Section 2 (4) and (5). Zoller noted changes had been made in subsections (4) and (5) on November 14, 1964, and after members of committee pointed out subsections had been previously discussed, motion was made, seconded and upon being put to vote carried, to approve as amended subsections (4) and (5), Section 2.

Section 2 (6). After motion made and seconded, there being no discussion, upon being put to vote motion carried to approve subsection (6), Section 2.

Section 6 and Section 7. Zoller advised that Section 6 merely provides Section 7 shall be added, that Section 7 provides for termination other than by death of ward. Zoller read comments to Section 7 in Rough Draft of 7/18/64, and after motion was made and seconded, upon being put to vote motion carried to approve Sections 6 and 7.

Section 8. Zoller mentioned this is other half of pair of sections dealing with termination of guardianship, Section 8 providing for termination by death of the ward; that present statute, which provides for 90 day winding up period, is amended to permit such further time as court by order may allow, and includes an extension of guardian's right to possession of all property of the ward, whether in the physical possession of the guardian or another; that there is no further change from present statute until subsection (3), which provides "at any time during the winding up period the court, upon a petition filed by the executor or administrator, may order the guardian to deliver to the executor or administrator any part of the property of the ward in his possession not necessary for such payment, " and stated that Lundy's comments make this applicable only to termination by death of the ward. Zoller then read comments to Section 8, Rough Draft 7/18/64. After motion was made and seconded, there being no discussinn, upon being put to vote motion was carried to approve Section 8.

Section 9. Zoller read comments to Section 9, Rough Draft 7/18/64. During discussion which followed, Frohnmayer asked if committee had considered question of sale of real property without regular formalities of a sale. Allison stated present statute limits small guardian situation to settling debts or choses in action due to person under legal disability, thus covers only personal property; that committee considered it advisable to extend authority to cover right to sell real property where the value does not exceed $1,000; e.g., where there were minor heirs owning undivided interests in real property of small value--that it might be well to bring such interests within scope of statue and allow an informal sale with a right to execute a deed thereto. Allison stated Section 9 as drafted allows such a sale of real property, and that with a limitation of $1,000 there should be no serious problems.

Frohnmayer asked if a deed would be given; Allison replied that it would, subject to court approval. Zoller pointed out subsection (1) provides "with such notice as the court may order or without notice," and this would apply to sale of real or personal property for cash. Frohnmayer noted this is rather new concept. Allison stated present statute provides for "such notice as the court may order or without notice," and notice is thus already provided for.

Jaureguy mentioned possibility of an estate of $10,000 or more, but each particular item not exceeding the $1,000 limit.

Zoller commented that provision in subsection (1) for notice provides for conferring of authority upon person to act and relates to circumstances under which such an order may be entered, but does not determine purpose for which a sale may be made without notice.

In answer to query by McKay, Dickson stated $1,000 limit applies to value of ward's interest.

Allison advised where there is undivided interest in real property a petition could be filed for the appointment of a person to sell a particular piece of real property, and before an order was entered appointing him to sell, the court has authority to order that notice be given, e.g., "in a month Joe Doakes as special guardian is to sell Blocks 3 and 4, Blackacre." The notice would describe the property and give notice of the appointment of the person who is to sell it.

Zoller thought court should, where appropriate, be able to authorize person designated to execute transfer instrument without any formalities at all, and would like paragraph (c) of subsection (1) so to read.

Riddlesbarger noted provision that sale shall be approved by the court.

After general discussion as to whether notice provided in subsection (1) would apply only to appointment of person, or whether it would also apply to notice preliminary to a sale of property, and possible effect of a repetition of language, motion was made, seconded, and upon being put to vote carried, Allison voting against, to amend paragraph (c) of subsection (1) to repeat language appearing therein providing for notice, such language to immediately follow the words "Sell for cash".

Frohnmayer questioned whether wording "with such notice as the court may order or without notice," might be construed as meaning the individual could decide to sell without notice, not that the court might determine no notice was necessary.

After discussion of possible wording to prevent such a construction, motion was made, seconded and upon being put to vote carried, Allison approving wording but disapproving repetition, to amend both subsection (1) and paragraph (c) of subsection (1), Section 9, to provide: "with such notice, or without notice, as the court may order,".

General discussion ensued following query by McKay as to why it is necessary for a sale to be for cash, Riddlesbarger questioning where asset would end up if sold for credit; mentioned by Dickson intent was to allow disposal of property quickly, for cash; by Zoller the difficulty of collecting installment payments and making application of them in a continuing capacity; generally, the lack of authority in an appointee to bring an action if there were a breach, and that intent had been to provide a limited power, a one-shot cash deal in view of fact no formalities are required.

Zoller queried last sentence in paragraph (c), providing: "The sale shall be approved by the court." Zoller wondered whether this meant a time lapse before court order approving sale, stated he would prefer the sale be approved in a petition preliminary, rather than subsequent, to the sale. Frohnmayer suggested

possibility of court order entered and sale thereafter not completed; thus it should be reported to the court. Zoller stated a deed is public notice; Schnitzer that this would negate necessity of having sale approved; Zoller that if sale was upon terms authorized, court approval would not be essential.

Motion made, seconded, and upon being put to vote carried, to delete last sentence in paragraph (c), subsection (1), Section 9: "The sale shall be approved by the court."

Motion made, seconded, and upon being put to vote motion carried, to approve as amended Section 9.

Sections 10, 11 and 12. Zoller stated Section 10 deletes subsection (3) of present ORS 126.660, is preliminary to Section 12, which is all new; that Section 11 merely adds Section 12. Zoller read all three sections. Butler questioned necessity of accounting to guardian of the person as provided in Section 12.

Motion made, seconded, upon being put to vote carried, to delete words "guardian of the person and estate or" appearing in Section 12 (2).

Motion made, seconded, and upon being put to vote carried to approve as amended Sections 10, 11 and 12.

Dickson requested Zollinger and Lisbakken to prepare bill for submission to Lundy.

3. SMALL ESTATES ACT. Dickson read letter of Keith Skelton, dated January 21, 1965, to Zikes, expressing his interest in work and research done regarding handling of small estates. Dickson had invited Skelton to attend this meeting, which he was unable to do. Dickson forwarded a copy of the Small Estates Act to Skelton.

Martin pointed out act is based on net estate, rather than gross; that court would have nothing to do with the administration; but that in no instance would the act have exclusive authority--an estate could still be handled in regular probate court whenever problems arise. Procedure is optional. Estate is administered by a "voluntary administrator," who will go to county clerk, then proceed to administer the estate in summary manner with one publication to give creditors opportunity to make claims. Upon closing of the estate, a final account is rendered to the clerk and estate will thereupon be concluded. Voluntary administrator has authority to sell both real and personal property, applies to testate as well as intestate estates. As there is no attempt made to determine the validity of the will, should there be an objection thereto the estate would be moved into probate court.

Butler asked if consideration had been given to insolvent estates where only interested persons would be creditors; Martin replied creditors would be required to administer the estate in regular probate court, as the act is confined to administration by relatives, and intent is to keep proceeding simple and inexpensive.

McKay queried use of court clerk; Carson advised county clerk is ex-officio clerk of the court.

Zikes stated 14 states now have provision for small estates, that New York act is the most complete, but that it covers only personal property and intestate situations, with a limit of $3,000.

Frohnmayer mentioned discussion at October 8, 1964 meeting as to whether value of estate should be limited to $5,000 net or gross. Shetterly asked whether "liens and encumbrances" included claims; Zikes replied claims are not included.

Zoller pointed out individual must be willing to act as a voluntary administrator; that schedule is used similar to that in bankruptcy; no court order is entered. Zoller suggested advisability of having court intervention for determination of validity of will, that Gooding's suggestion for court review at conclusion of the administration had merit.

Martin stated this would require an attorney to present orders; Zoller suggested intervening orders could still be eliminated.

Zikes and Martin mentioned at present even though will is admitted to probate, it can still be later attacked; and that if validity of will is not questioned, no matter how invalid it may be the estate can still be administered and closed.

Allison suggested possibility of hand-written will, unwitnessed, being filed; that procedure is administrative.

Swift mentioned advisability of requiring a bond, as under act where there is no bond and no court accounting a voluntary administrator might skip the country with the assets. Martin replied bond would defeat purpose of the act, that a prohibitive premium might be set.

Betts felt a comprehensive small estates act was advisable, but by eliminating appraisal, notices, complexity of sale proceedings and time required for administration costs could still be cut down without doing away with bond and attorneys, suggested limiting attorneys' fees in the statute.

Frohnmayer reminded committee at 10/8/64 meeting Mr. Ferder of Inheritance Tax Division, State Treasurer's office, stated by far greatest number of reports in nonprobated estates were filed by laymen, not attorneys.

After discussion as to definition of a small estate as stated in Section 3 (1), motion was made, seconded and upon being put to vote carried to approve subsection (1), Section 3, reserving for further consideration whether it should include testate estates.

Discussion ensued as to whether testate estates should be included, Zoller asking if they could be included but with a provision that amendment be made to provide will must be valid; Jaureguy stated any interested party could still go into court and have a regular administration; Frohnmayer queried whether there is

a lack of notice; Martin mentioned provision is made for notice to be sent by the clerk; Schnitzer that if testate estates were eliminated persons would be placed in position of deciding whether or not to make a will; Gilley that elimination of testate estates might prove temptation to suppress a will; Allison that affidavit could include names of witnesses to the will so as to alert the clerk to requirement therefor.

Motion made, seconded, and upon being put to vote carried, to approve in principle testate as well as intestate estates.

Section 1. (Short title.) Motion made, seconded, and upon being put to vote carried to approve Section 1.

Section 2 (1) and (2). (Rules of construction, purpose and application.) Motion made, seconded, and upon being put to vote carried to approve subsections (1) and (2), Section 2.

Section 2 (3). Betts asked why use of act should be limited to persons who die after effective date of act, and general discussion ensued as to advisability of allowing act to apply to estates of persons who died prior to it, Jaureguy suggesting limitation to persons for whom proceedings of administration had not been commenced.

Motion made, seconded, and upon being put to vote carried to amend subsection (3), Section 2, to read: "The Small Estates Act shall apply to estates of decedents upon which administration has not been commenced in this state at the effective date of this Act.

Section 2 (4). Motion made, seconded, and upon being put to vote carried, to delete subsection (4), Section 2.

Motion made, seconded, and upon being put to vote carried, to approve as amended Section 2.

Section 3 (1). (Definition of a small estate.) Zoller proposed deletion of "real or personal"; Carson pointed out "liens and encumbrances" do not constitute "value"; general discussion as to correct wording to express net value.

Subsequent discussion (see Section 6 (1), Paragraph 10, infra) as to when value should be determined.

Motion made, seconded, and upon being put to vote carried to amend subsection (1), Section 3 to read: "A small estate is the estate of a decedent who dies testate or intestate leaving property in this state of a value as of the date of death not exceeding $5,000 after deducting the amount of liens and encumbrances."

Motion made, seconded, and upon being put to vote carried to approve as amended subsection (1), Section 3.

Section 3 (2). (Definition of a voluntary administrator). Frohnmayer asked if there was reason for sole use of term "administrator," rather than "voluntary administrator or executor."

Martin stated intent was to clearly distinguish capacity from that of an executor under a will in a regular probate proceeding.

Motion made, seconded, and upon being put to vote carried to approve subsection (2), Section 3.

Section 3 (3). (Definition of clerk.) Allison asked if there were reason to restrict proceeding to county in which decedent was a resident at the time of his death; Martin stated that due to simplified procedure this would give better notice, that clerk would send notice to any other county in which real property is situated; Carson advised as to history of use of "resident," "inhabitant," "domicile" in present probate code.

Motion made, seconded, upon being put to vote carried to change "resident" in three places where it appears in subsection (3), Section 3, to "resident and inhabitant."

Motion made, seconded, and upon being put to vote carried to approve as amended subsection (3), Section 3.

Section 6 (1) Paragraph 10. (Form of affidavit.) Riddlesbarger questioned whether voluntary administrator would report to the clerk if property should exceed $5,000. Martin stated purpose of No. 10 is to alert layman if he should discover additional property during course of his administration he must report it. Discussion ensued as to whether value should be determined as of date of death, or as of date of affidavit; unclear from reading No. 10, Section 6 (1) whether voluntary administrator must report to clerk if additional property is found during administration (as Martin stated was intent of drafters), or if it applies to increase in value during administration; whether it should be necessary to dump administration back in clerk's lap if a slight excess should appear.

After general discussion as to date at which property should be valued, whether at date of decedent's death or at date of affidavit, motion was made, seconded and upon being put to vote carried to amend entire act to provide wherever provision is made for value, such value should be as of the date of death. (See Section 3 (1), supra.)

Motion made, seconded, and upon being put to vote carried to delete Paragraph 10, Section 6 (1).

Martin pointed out Paragraph 10 is a part of the affidavit to be signed by the voluntary administrator, that in Section 11 (6) like duties are given him. It was discovered that copies of the Small Estates Act mailed to members of both committees were incomplete. Dickson requested Martin and Keller to provide for the additional pages to be prepared and mailed.

General discussion followed, Riddlesbarger asking if transfer agent would recognize act; Martin replied acts in other states are recognized; Jaureguy questioned necessity of reporting and applying to the court if tax clearance and release cannot be obtained, and

Allison asked why closure could not be simply postponed until clearances obtained; Martin replied estate shouldn't be allowed to sit idle, and further, tax problems might be indication of other problems, such as an excess of the $5,000 limit.

Dickson announced next meeting to be February 13, 1965, at 9:00 o'clock a.m., in his courtroom, 244 Multnomah County Courthouse, Portland. Members of Committee on Probate Law and Procedure invited to attend. Agenda to be continuation of discussion on Small Estates Act, and proposal No. 7.

Respectfully submitted

Patricia A. Lisbakken
Acting Secretary

ADVISORY COMMITTEE

Probate Law Revision

February 13, 1965

Minutes

Meeting convened at 9:05 A.M., Saturday, February 13, 1965, in Judge Dickson's courtroom, 244 Multnomah County Courthouse, Portland. All members present. Also present were McKay, Keller, Shetterly, Swift and Richardson of Committee on Probate Law and Procedure, and Zikes, Martin and Lisbakken.

Carson read memo of telephone message from Lundy to himself, 2/12/65, which memo is attached to these minutes.

Dickson announced assignments as follows:

Bill No.	Committee
1 & 2	Zollinger, Allison
3, 6 & 9	Shetterly, Swift
4	Jaureguy, McKay
5	Dickson, Carson
7	Zollinger, Jaureguy
8	Allison, McKay
Small Estates Act	Riddlesbarger, Butler, Martin, Zikes & Lisbakken

Martin and Dickson announced Keith Skelton intended to introduce a bill for the Small Estates Act on February 15, 1965, in its original form, and that he is aware Committee is engaged in substantial amendments.

SMALL ESTATES ACT

Section 1. Approved 1/23/65.

Section 2 (1). Approved 1/23/65.

Section 2 (2). Approved 1/23/65.

Section 2 (3). During discussion over terminology, Carson stated word "administration" is broad term which can include probate of a testate estate as well as administration of an intestate estate.

After discussion it was generally agreed intent was to apply act to estates of persons upon which no other administration had been commenced in this state, without regard to date of decedent's death, or date act is passed.

Motion made, seconded and carried to amend subsection (3) to read as follows, and thus approved:

"The Small Estates Act shall apply to estates of decedents upon which no other administration has been commenced in this state

at the time of filing of the affidavit of the voluntary administrator pursuant to section 5 (3) of this 1965 act."

Section 2 (4). Deleted 1/23/65.

Section 3 (1). Amended and approved 1/23/65.

Section 3 (2). After noting word "qualifies" is not defined, subsection amended and approved to read as follows:

"(2) A voluntary administrator is a person who undertakes to settle a small estate without the formality of court administration as provided in this act."

Section 3 (3). Note was taken of the fact the minutes of the 1/23/65 meeting were in error in adding words "and inhabitant" in three places without corresponding deletion of "a resident."

After discussion as to advisability of deleting words "real or personal" as applied to property as was done in subsection (1) of this section, it was generally agreed they should remain.

Subsection amended and approved to read as follows:

"(3) The clerk, as used in this act, is the clerk of the court having probate jurisdiction in the county in which the decedent was an inhabitant at the time of his death if he was an inhabitant of this state, or in a county in which the decedent left real or personal property if he was not an inhabitant of this state."

Section 4 (1). Discussion as to whether right to act as voluntary administrator should be limited to one who has reached age of 21 years, rather than "age of majority," to prevent married minor from acting. Allison pointed out regular probate code provides minors are not qualified to act, and Frohnmayer suggested status of "majority" should be here perpetuated.

Discussion as to merits of limitation of right to act to persons named and only in event none named could act, should right to designate nominee arise. Zikes and Martin stated this was intent of drafters. Committee in agreement widow should be able to appoint a nominee to act for her in preference to having, for instance, her brother-in-law act, that such a result would avoid potential family disharmony. Carson suggested time limitation within which persons of lesser preference or their nominees might not apply would aid situation.

Amended and approved to read as follows:

"(1) The right to act as a voluntary administrator shall be limited to one of the following persons or his nominee, in the order set forth, who is a resident of this state, competent, and has reached the age of majority:"

Section 4 (1), (a) and (b). Advisability of including nephews and nieces discussed. Keller asked if language implied a brother would take preference over a sister, and a nephew over a niece. It was agreed that not only was this the intent, but further, (in jest, we trust?) that this is as it should be.

Amended and approved to read as follows:

"(a) If the decedent dies testate, the executor, any devisee or legatee named in the will, the surviving spouse, any child, grandchild, parent, brother, sister, nephew or niece of the decedent.

(b) If the decedent dies intestate, the surviving spouse, any child, grandchild, parent, brother, sister, nephew or niece of the decedent."

Section 4 (1) (c). See discussion Section 4 (1) above. Subsection (c) automatically eliminated to further intent to permit person named or his nominee to act.

Section 4 (2). See discussion Section 4 (1) and Section 4 (3) below. Amended and approved to read:

"(2) Within a period of thirty days after the death of the decedent neither a person of lesser preference nor his nominee shall have the right to act as voluntary administrator unless there is filed with the clerk a written renunciation of such right signed by each person of higher preference. Thereafter any eligible person or his nominee may act as voluntary administrator."

Section 4 (3). Allison suggested eliminating subsection (3). After 30 days limitation on order of preference provided in subsection (2), then anyone who comes in may apply. Zollinger suggested addition of sentence to subsection (2) to cover situation.

Subsection (3) of section 4 deleted.

Section 5 (1). Riddlesbarger asked purpose of this subsection; Frohnmayer asked why provided procedure may be used "immediately" after death of decedent. Zikes stated some states provide for a waiting period after death, intent of drafters was to make clear fact no waiting period is necessary.

Dickson suggested ending sentence after Clerk, omitting "without formal administration by the probate judge." Riddlesbarger noted this subsection empowers Clerk.

Shetterly questioned whether clerk would be liable on his bond if he neglected to do something required under the act. Frohnmayer mentioned matter had been discussed in Salem 10/8/64, and that it was a part of the basic philosophy of the act--that clerks now do much work that is more than clerical in nature, and that training of the clerk would be necessary; Riddlesbarger stated "supervise" requires clerk to act affirmatively.

Amended and approved to read as follows:

"(1) The procedure prescribed by this act shall be supervised by the Clerk."

Section 5 (2). Butler believed testator should have privilege of specifying whether or not a bond should be required, as he would be acquainted with person he named as his executor. Martin and Zikes thought bond requirement would defeat intent of the act. After discussion, amended and approved to read as follows:

"(2) The voluntary administrator shall not be required to furnish a bond even though required by the terms of the will, or file an oath

of office, or have the estate appraised."

Section 5 (3). After discussion as to advisability of requiring affidavit of at least one subscribing witness to will as opposed to allowing proof to be otherwise made where no witness was available, amended and approved as follows:

"(3) The voluntary administrator shall file with the clerk his affidavit in the form prescribed by section 6 (1) of this 1965 act, a certified copy of the certificate of the death of the decedent, his will, if any, and an affidavit of a subscribing witness to the will in the form prescribed by section 6 (2) of this 1965 act."

Section 6. First paragraph amended and approved to read as follows:

"The following forms shall be used in administering this act and shall be provided by the clerk."

Section 6 (1). Zollinger questioned necessity of:

"STATE OF OREGON)
County of _____) ss."

Carson stated necessary for venue in criminal prosecution.

Approved.

Section 6 (1) ¶1. Pursuant to changes made in Section 2 (3), amended and approved as follows:

"1. The name of the decedent is _____. There has not been commenced in the State of Oregon any proceeding for voluntary or judicial administration upon his estate."

Section 6 (1) ¶2. It was agreed editorial comment should be added at the end of this paragraph to instruct voluntary administrator to file other documents with his affidavit.

Amended by addition of editorial comment as follows, and thus approved:

"(A death certificate and, if the decedent left a will, the will and the affidavit of a subscribing witness must be filed herewith.)"

Recessed for lunch at 12:50 P.M., reconvened at 2:15 P.M. Absent from Committee were Butler and Riddlesbarger. Also present were Keller, of Committee on Probate Law and Procedure, and Martin and Lisbakken.

Section 6 (1) ¶3. Amended and approved to read as follows:

"3. At the time of his death decedent was an inhabitant of the County of _____, State of _____, and his address was _____."

Section 6 (1) ¶4. Discussion as to possibility of good faith omission, particularly with regard to the naming of issue of a deceased child. Zollinger pointed out frequency with which all remotely related kinsmen are named by individuals as being their potential heirs.

Allison suggested a division of the paragraph into two parts, and Frohnmayer suggested a form be furnished by the clerk setting forth laws of descent and distribution.

Amended and approved to read as follows:

"4.A. The heirs at law of decedent are as follows:

Name	Address	Age
Surviving husband or wife, if any:		
Surviving children, if any:		
Surviving children of deceased children, if any:		

If none of the foregoing survives, complete and attach schedule provided by the clerk listing heirs at law. See ORS 111.010 through 111.040.

B. If the decedent left a will, list the devisees and legatees below:

Name	Address	Relationship	Age"

Section 6 (1) ¶5. After discussion, amended and approved to read as follows:

"5. The description and vlaue as of date of death of decedent of all his real and personal property located within the State of Oregon, after deducting the amount of liens and encumbrances, are as follows:

(Include any obligations due or to become due to decedent. Do not include property held jointly with right of survivorship or as tenant by the entirety. Describe each item and state its location and gross value at date of decedent's death. Describe any lien or encumbrance against each item and state its amount at date of decedent's death, showing net value of property in right-hand column. In addition to street address, a legal description must be shown for real property.

Item No.	Description	Net Value
	Total Net Value	

Section 6 (1) ¶6. Amended and approved to read as follows:

"6. The description and value as of date of death of decedent of all real and personal property which decedent owned jointly, with another or others, with right of survivorship, or as a tenant by the

entirety, after deducting the amount of liens and encumbrances, are as follows:

(Include any obligations due or to become due to decedent and another or others with right of survivorship. Describe each item and state the name, address and relationship of survivor, location of the property and its gross value at date of decedent's death. Describe any lien or encumbrance against each item and state its amount at date of decedent's death, showing net value in right-hand column. In addition to street address, a legal description must be shown for real property.

Item No.	Description	Net Value

Total Net Value

Section 6 (1) ¶7. Amended and approved to read as follows:

"7. To the best of my knowledge, all of decedent's debts and liabilities are as follows:

Item No.	Name of Creditor	Address	Description	Amount

Total

Section 6 (1) ¶8. Amended and approved to read as follows:

"8. I undertake to act as voluntary administrator of decedent's estate and to administer it pursuant to the Small Estates Act. In so doing, I agree:

(a) to open an estate bank account in this state in which I will deposit all money received;

(b) to sign all checks drawn on such account in the name of the estate by myself as voluntary administrator;

(c) to reduce all of decedent's assets to possession;

(d) to liquidate such assets to the extent necessary;

(e) to set apart property exempt from execution to the persons entitled thereto and file with the clerk a statement of such property;

(f) after obtaining a receipt or release from the State Treasurer and a clearance from the State Tax Commission, but in no event earlier than forty-five days after filing this affidavit, to pay the expenses of administration, decedent's reasonable funeral expenses and his debts add liabilities in the order provided by law;

(g) to distribute the balance of decedent's assets to the person or persons and in the amount or amounts provided by law or b the terms and provisions of decedent's Will, if any, filed herein; and

(h) to file with the clerk an account of all receipts and disbursements as soon as possible, but in no event later than three months after filing this affidavit unless for good cause an extension is granted by the clerk."

Section 6 (1) ¶9. Amended and approved to read as follows:

"9. I understand this proceeding is not a determination of estate and inheritance tax liability, if any. I will file all tax returns required by law and I will obtain a receipt or release from the State Treasurer and a clearance from the State Tax Commission."

Section 6 (1) ¶10. [Formerly ¶11, original ¶10 deleted 1/23/65.] Amended and approved to read as follows:

"10. If letters testamentary or of administration are granted in the State of Oregon at any time during my administration, I acknowledge that my powers as voluntary administrator shall cease and thereupon I will file a report and account of my administration as provided in subsection (3) of this section and deliver to the executor or administrator all assets of the estate in my possession."

Section 6 (1) ¶11. [Formerly ¶12.] Approved.

Section 6 (1) ending. Wprd "(Affiant)" deleted from beneath signature line. Approved as thus amended.

Section 6 (2). Lisbakken to prepare draft for consideration of Affidavit of Witness to Will.

Section 6 (3). Formerly subsection (2). Amended to delete "FOR SETTLEMENT OF ESTATE" from title of document, and beginning paragraph amended and approved to read as follows:

"The undersigned voluntary administrator of the above entitled Estate reports and accounts as follows:"

Section 6 (3) ¶1. Lisbakken to revise and prepare draft of accounting for consideration.

Section 6 (3) ¶2. Deleted. See following.

Section 6 (3) ¶2. [Formerly ¶3.] Amended and approved to read as follows:

"2. I have paid all claims against the estate which were duly presented to me and approved."

Section 6 (3) ¶3. [Formerly ¶4.] Amended and approved to read as follows:

"3. I have filed all tax returns required by law and I have filed with the clerk the receipt or release of the State Treasurer and the clearance of the State Tax Commission."

Section 6 (3) ¶4. [Formerly ¶5.] Approved.

Section 6 (3) Verification. Note: Page numbered 16-A should be numbered 17-A Word "(Affiant)" deleted from beneath signature line, approved as thus amended.

Section 6 (4). Formerly subsection (3). Title amended to read as follows:

"STATEMENT OF EXEMPT PROPERTY SET APART UNDER SMALL ESTATES ACT"

Statement amended to delete "have" from phrase "that I have set apart property".

List amended to read as follows:

"Date Description Net Value

Name, relationship and age of person to whom property was set apart: "

Word "(Affiant)" deleted from beneath signature line.

Approved as thus amended.

Section 7 (1). After discussion to effect "appropriate record" would allow clerk to keep same type of record he now keeps for probate, without separate docket, subsection (1) was amended and approved to read as follows:

"(1) The clerk shall keep an appropriate record of all proceedings in estates settled under the Small Estates Act."

Section 7 (2). Amended and approved to read as follows:

"(2) Upon the filing of each affidavit made pursuant to section 5 (3) of this 1965 act the clerk shall forthwith:"

Section 7 (2) (a). Amended and approved to read as follows:

"(a) File a copy of the affidavit with the clerk of each other county in the state of Oregon in which real property of the decedent is situated, and"

At Frohnmayer's invitation, two-day meeting scheduled for July, none in August. Friday and Saturday, July 16 and 17, 1965, in Medford, to begin at 9:00 o'clock A.M. Friday morning.

Next meeting of Committee to be February 27, 1965, at 9:00 o'clock A.M., in Judge Dickson's courtroom, 244 Multnomah County Courthose, Portland.

Meeting adjourned at 5:40 P.M.

LAW IMPROVEMENT COMMITTEE

ADVISORY COMMITTEE ON PROBATE LAW REVISION

MESSAGE FROM ROBERT LUNDY TO WPC, BY TELEPHONE, OF FRIDAY, FEBRUARY 12, 1965, P.M.

Mr. Lundy asks WPC to convey this message to Judge Dickson and the members of the Advisory Committee On Probate Law Revision: The Office of the Legislative Counsel is not in a position to employ a secretary to be assigned to this advisory committee. However, on February 11, 1965, the Law Improvement Committee authorized the allocation of $450 to this advisory committee for defraying the costs of secretarial work and supplies for six meetings, with the expectation that that total sum of $450 will allow $75 for each of six meetings of this advisory committee, or not exceeding $50 for secretarial services, and not exceeding $25 for supplies, for each of the six meetings.

Mr. Lundy suggested that, inasmuch as the office of the Legislative Counsel is not in a position to place the secretary for this advisory committee on the payroll of that office, the secretary's single statement for services rendered at all the six meetings may be presented to the office of the Legislative Counsel in a lump sum after such six meetings will have been held. Also, Mr. Lundy stated that the Law Improvement Committee is expected to meet on Friday, February 19, 1965, at 2:00, p.m., in the Senate Judiciary Committee room, which is Room 113 of the Capitol, and to consider, at that meeting, the Bill for an Act amending and supplementing the Guardianship and Conservatorship statutes, and any other proposed bills that this advisory committee may submit to the Law Improvement Committee at or before its meeting of February 19, 1965, including, for example, the "Small Estates Act", possibly. Mr. Lundy commented that this advisory committee perhaps would delegate some member, or members, of this advisory committee to appear before the Law Improvement Committee at its meeting of Friday, February 19, 1965.

AGC reports that, on Friday, February 12, 1965, the Secretary of the Senate Judiciary Committee assured him that the first eight bills for acts submitted by this advisory committee to the Law Improvement Committee were introduced in the Senate in the afternoon of Friday, February 12, 1965, as bills of the Senate Judiciary Committee, introduced at the request of the Law Improvement Committee.

MEETING NOTICE

On Saturday, February 27, 1965, at 9:00 a.m. in Room 244, Multnomah County Courthouse, Portland, Oregon, there will be a special joint meeting of the Oregon Probate Law Revision Advisory Committee and the Oregon State Bar Committee on Probate Law and Procedure, to consider further revisions of the "Small Estates Act" and House Bill 1614.

Enclosed herewith is a copy of the letter sent to Senator Mahoney on February 19, 1965, which is self-explanatory.

WILLIAM L. DICKSON, Chairman
Oregon Probate Law Revision
Advisory Committee

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT-DEPT. NO. 7
COUNTY COURT HOUSE
PORTLAND 4, OREGON

WILLIAM L. DICKSON
JUDGE

February 19, 1965

Honorable Thomas R. Mahoney
Senate Judiciary Committee
State Capitol Building
Salem, Oregon

Dear Senator:

Thank you and the other members of the Senate Judiciary Committee for introducing the bills hereinafter mentioned.

The names, addresses and telephone numbers of members of the interested committees appear on the attached lists.

The committee members who have been selected to appear before the Senate Judiciary Committee and present the sponsers' views are indicated below:

S.B. 302 Sale of real property by administrator or executor, filing of objections, conforms with guardianship law (originated with Bar Committee as Bill No. 3).
Mr. Herbert Swift Mr. Kenneth E. Shetterly

S.B. 303 Reopening of estate (originated with Bar Committee as Bill No. 8).
Mr. Duncan L. McKay Mr. Stanton W. Allison

S.B. 305 Revocation of Will by subsequent marriage (originated with Bar Committee as Bill No. 4).
Mr. Duncan L. McKay Mr. Nicholas Jaureguy

S.B. 306 Power of sale under will, clarification (originated with Bar Committee as Bill No. 6).
Mr. Herbert Swift Mr. Kenneth E. Shetterly

S.B. 307 Confirmation of sale of real property by executor or administrator (originated with Advisory Committee as Bill No. 9).
Mr. Herbert Swift Mr. Kenneth E. Shetterly

S.B. 308 Appraisal of decedent's estate, (originated with Bar Committee as Bill No. 5).
Judge William L. Dickson Mr. Wallace P. Carson

S.B. 315 Abolishes dower and curtesy (originated with Advisory Committee as Bill No. 1)
Mr. Stanton W. Allison Mr. Clifford E. Zollinger

S.B. 328 Declaration of marital right (originated with Advisory Committee as Bill No. 2).
Mr. Herbert Swift Mr. Kenneth E. Shetterly

When appropriate, will you please have Mr. Murray, the Committee Clerk, invite the gentlemen indicated above to appear before the Committee.

With kind personal regards, I am,

Sincerely yours,

WILLIAM L. DICKSON
Probate Judge

WLD:mb
Encl. - Roster of members of the Oregon Probate Law Revision Advisory Committee and Oregon State Bar Committee on Probate Law and Procedure.

ADVISORY COMMITTEE

Probate Law Revision

February 27, 1965

Minutes

Meeting convened at 9:00 a.m., Saturday, February 27, 1965, in Judge Dickson's courtroom, Portland. Butler, Frohnmayer, and Gooding absent. McKay, Bettis, Swift and Richardson, of Committee on Probate Law and Procedure present. Also present were Zikes, Martin and Lisbakken.

Dickson reported Senate Bills 302, 306 and 307 were to be considered by the Senate Judiciary Committee on Wednesday, March 17, 1965, at 1:00 p.m., Room 113, State Capitol Building, Salem.

Dickson advised that pursuant to telephone conversation with Frohnmayer, summer meeting might better be held in August rather than in July, and it is presently scheduled in Medford August 13 and 14, 1965, beginning at 9:00 a.m. Friday morning, August 13. Each member individually shall write Frohnmayer about reservations for rooms and for Shakespeare tickets.

Minutes of February 13, 1965 meeting distributed to all present.

1. GUARDIANSHIP AND CONSERVATORSHIP BILL

Zollinger reported on his appearance before Law Improvement Committee in Salem, February 19, 1965, which committee examined proposed amendments to Code and decided to prepare bill for introduction; but determined that Lundy should rephrase Section 2 (4) (a) (A) to provide request for accountings shall be in writing, and Section 2 (4) (a) (D) to provide a copy of the request shall be filed with the court; and recommended that this Committee reconsider Section 12 with regard to conservatorships and the lack of provision for termination other than by death of the ward in view of fact elaborate provision therefor had been made with regard to guardianships.

Zollinger felt conservatorship should have similar provisions to those of guardianship. Carson questioned necessity where ward is still living. Zollinger asked whether conservator could pay expenses before accounting to ward, his own fees and his attorneys' fee, and if not, why not. Zollinger stated he was unable to give committee reason for this Committee's omission of these provisions except perhaps it had been press of time. Dickson said Lundy had suggested Committee perhaps had been influenced by present Code. Zollinger believed in any event lack should be remedied, suggested incorporation by reference of Section 7.

Allison mentioned lack of time limitation on winding up of conservatorship was probably not good, that a time limit might be more important where there is a competent person waiting to receipt assets. Zollinger pointed out same situation arises in guardianship where incompetent ward becomes competent, as is dealt with in Section 7. Allison noted incorporation by reference had been used in conservatorship section relative to termination by death of ward, and that it seemed just as important to make provision for termination by other than death.

Motion carried to incorporate by reference into conservatorship section provisions of guardianship section for winding up upon termination other than by death of ward, and to delegate to Zollinger the chore of preparing appropriate provisions.

2. SMALL ESTATES ACT

Lisbakken reported on her appearance before Law Improvement Committee in Salem on February 19, 1965, which committee approved in principle H.B. 1614 (the original draft of the Small Estates Act, dated 10/7/64) and approved in principle changes and revisions now being made by this Committee. Reported that revised Act should be in Salem by Tuesday, March 2, 1965, and that discussion was to be entertained with Keith Skelton as to the possibility of jacking up title on H.B. 1614 to incorporate in its entirety the revised Act. Reported questions had been raised with regard to lack of provision for notice to State Public Welfare Commission (which notice was subsequently provided at this meeting), and with regard to constitutionality of non-claim provisions barring rights of creditors and whether Section 7 (4), which provides "The giving of notice hereunder is not jurisdictional," might prove Act vulnerable to charge of lack of due process. Martin advised test is sufficiency of notice, and after subsequent discussion Committee decided to provide for two publications of notice and to extend time limit for presentation of claims to 30 days in order to remove any doubt. Martin advised time schedule would then be as follows:

15 days after filing Affidavit before first publication required,
30 days to file claim,
10 days to reject claim,
30 days for rejected claimant to petition for probate.

Thus, a total of 85 days. Allowing an extra 5 days, a 90 day period would be required after filing Affidavit as minimum before distribution may be made. Act revised accordingly.

Dickson reported Sam Haley had suggested possibility of having a State agency or officer, e.g., the Secretary of State, provide forms for use under the Act, rather than to have them provided by the clerk, and in this manner forms could be conveniently changed from time to time without waiting for legislature to create new forms. Discussion ensued, during which Zollinger stated he would have no objection to Supreme Court drawing forms to be used, but that he did not believe forms should be left to discretion of some state agency, and that he preferred statutory forms until Supreme Court did draw forms. Lisbakken commented State of New York had provided statutory forms, apparently on theory concept is novel and precisely detailed forms are basic to carrying out purpose and intent of Act.

Bettis noted that having forms printed by a state agency would be additional tax burden on the people; whereas, if particular forms are mandatory by statute, then commercial printing firms will promptly print and sell them.

Motion carried to delete provision in Act that forms shall be provided by clerk.

Motion carried to declare forms shall be statutory and obligatory.

Discussion follows with regard to various sections of the Act. The Act as revised will be distributed when printed copies are available. Prepared for review by Allison on March 1, 1965, and subsequent immediate delivery to Lundy. References below are to section numbers as they appear in original 10/7/64 draft, as previously revised.

Section 6. Provision made 2/13/65 minutes that forms "shall be provided by the clerk" is deleted.

Section 6 (1) ¶8 (f). Amended to provide lapse of 90 days before payment of expenses and liabilities.

Section 6 (1) ¶8 (g). New provision is here inserted to require voluntary administrator to send notice to claimant that his claim has been allowed or rejected.

Section 6 (1) ¶8 (h) [formerly (g)]. Approved.

Section 6 (1) ¶8 (i) [formerly (h)]. Amended to provide Report and Account shall be filed no later than six months after filing of Affidavit.

Section 6 (1) ¶10. Amended to limit any letters testamentary which might be issued to those issued "pursuant to the order of any court" in accordance with subsequent decision by Committee to provide in Act for issuance of letters of voluntary administration.

Section 6 (2). Draft of Affidavit of Witness to Will form which was sent to members by mail prior to this meeting substantially revised by Committee, with final review by Zollinger, Allison and Carson.

Section 6 (3) ¶1. Draft of accounting (page 15 of 10/7/64 draft) mailed to members prior to meeting approved after Lisbakken noted word "all" should be deleted from statement of payment of claims, and after deletion of parenthetical statement appearing at bottom of page.

Section 6 (3) ¶2. Inserted statement by voluntary administrator that he has sent notice to each creditor of allowance or rejection of claim.

Section 7 (2) (b). Allison revised form of notice.

Section 7 (2) (c). Amended to include provision notice shall be sent to State Public Welfare Commission.

Section 7 (2) (d). Inserted former subsection (4) of Section 7 after Martin stated purpose of clause stating notice not jurisdiction was to refer to notice to be given to heirs at law, devisees and legatees, and to State Treasurer, Tax Commission and Public Welfare, and intent was not to apply it to notice to creditors.

Section 7 (3). Discussion as to sufficiency of notice, manner in which it should be published, whether publication should be by voluntary administrator or by clerk. Approved two publications by clerk in form set forth.

Section 8 (1). Upon Allison's suggestion, deletion of provision that claims must be made "in the form provided by law for claims presented to duly appointed executors and administrators," and time of presentation amended to refer to first publication of notice pursuant to decision to require two publications. Amended to provide claim shall be thereafter barred, rather than to bar any suit or action thereon.

Section 8 (2). After discussion in which it was generally agreed any claim not allowed should be rejected, not merely deemed denied, this section was deleted.

Section 8 (2) [formerly (3)] . Amended to include direction voluntary administrator shall allow or reject claims and notify claimants thereof in writing within 10 days.

Recessed for lunch at 12:45 p.m. Reconvened at 2:00 p.m. Present were Dickson, Zollinger, Jaureguy, Allison and Carson, also Martin and Lisbakken.

Section 9. Entire section rewritten to provide for issuance of letters of voluntary administration as evidence of authority to act and form therefor set forth similar to statutory forms in Code for letters testamentary and letters of administration.

Section 10 (1) and (1) (a). Approved.

Section 10 (1) (b). Determined this section unnecessary . Lisbakken advised of similar provisions in small estates acts of other states; Allison believed voluntary administrator should not be able to subject others to legal costs without their permission. Deleted.

Section 10 (1) (b) [formerly (c)] . Provision for sufficiency of deed or bill of sale of voluntary administrator set forth separately as a new Section 12. Clarified with respect to sale of assets so as to specifically limit such sale to one for cash.

Section 10 (1) (c) [formerly (d)] . Approved.

Section 10 (1) (d) [formerly (e)] . After language changes, approved.

Section 10 (1) (e) [formerly (f)] . Advisability of allowing discretion unlimited in distribution to minors and incompetents questioned. Determined it would be wise to allow distribution under $1,000 as in guardianship code. Subsequent provision made in Section 11 [new subsection] (7) for duty of voluntary administrator upon distribution to follow guardianship provisions. Subsection deleted.

Section 10 (2). Surplusage. Deleted.

Section 10 (2) [formerly (3)] . Approved.

Section 11 (1). Amended in accordance with previous decision (see 7/13/65 minutes, Section 6 (1) ¶8 (a)), and thus approved.

Section 11 (2). Now subsection (5).

Section 11 (3). Now subsections (2), (6) and (7).

Section 11 (3) [new] . New subsection inserted to require voluntary administrator to notify creditors of allowance or rejection of claims.

Section 11 (4). Decision to require voluntary administrator to report all sales made within 10 days thereafter (see Section 6 (1) ¶8 (d)), and amended accordingly.

Section 11 (5). Now subsection (8).

Section 11 (6). Determined unnecessary and deleted.

Section 11 (7). Now subsection (9).

Section 12. A new Section 12 has been inserted with regard to effect of deed or bill of sale (see Section 10 (1) (b) [formerly (c)] above). Former Section 12 (1) revised. Former Section 12 (2) deleted, after noting penal liability exists without being here set forth. Former Section 12 (3) revised. Section 12 is now Section 13.

Section 13. Amended to provide 90 days rather than 45 days, moved and now appears as subsection (2) of Section 2.

Section 14 (1). Moved and now appears as subsection (1) of Section 2.

Section 14 (2). Determined provisions for comity unnecessary and section deleted.

Section 14 (new). After discussion as to amount at which filing fee should be set, new section inserted to provide for a filing fee of $35.00.

Next meeting of Committee to be March 13, 1965 at 9:00 o'clock a.m., in Judge Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

Meeting adjourned at 6:30 p.m.

ADVISORY COMMITTEE

Probate Law Revision

March 13, 1965

Minutes

Meeting convened at 9:00 A.M., Saturday, March 13, 1965, in Judge Dickson's courtroom, Portland. Allison and Frohnmayer absent. Committee on Probate Law and Procedure present - Schnitzer, Bettis, Lovett, Rhoten and Tassock absent.

1. SMALL ESTATES ACT

Dickson reported Martin had talked to Lundy, his office is reviewing revisions. As soon as completed, Lundy will turn Act over to Chairman of House Judiciary Committee, who will appoint subcommittee to handle bill and thus speed up its consideration. Since Law Improvement Committee has approved Act in principle, it is possible it will be designated as Judiciary Committee Bill, introduced at request of Law Improvement Committee. Martin to keep in contact with Dellenback. Lundy will send copy of Bill in form it leaves his office to all Committee members.

2. GUARDIANSHIP BILL

By letter of March 1, 1965, corrected Bill was transmitted to Lundy.

3. SENATE BILL 308

To be considered Monday, March 15, 1965 by Senate Judiciary Committee, Room 113. Richardson and Bledsoe to appear. Keller mentioned Arthur Goldsmith very interested, Dickson to telephone him.

4. BILL NO. 7

Zollinger read his "Random Thoughts on Bill #7" (copies of which have previously been distributed to Committee) and Schnitzer's responsive letter of January 11, 1965 (also previously distributed).

Zollinger commented it is difficult to feel you are arriving at decision testator wanted when he hasn't said what he wants. Jaureguy stated Nawrocki decision (providing for exoneration from the estate where mortgage has been placed on specifically devised property subsequent to execution of will) does not by any means express universal intention of testators; the need is for a consistent rule whereby the issue may be determined with certainty. Zollinger believed would probably come closer to testator's intention in majority of cases if rule is broken down into categories: (1) devise of real property, (2) legacy of personal property, and (3) bequest of tangible personal property.

Dickson reported on New York law, which provides where real property subject to a mortgage or other lien descends to an heir or passes to a devisee (R.P.L. §250) or personal property subject to a mortgage, pledge or other lien is specifically bequeathed (D.E.L. §20), the heir, devisee or legatee must satisfy the lien out of his own property without resorting to the executor or administrator unless decedent's will directs, expressly or by implication, that the lien be otherwise satisfied. Where real property is devised to two or more persons their interest shall bear its proportionate share of the total lien.

Zollinger noted if the holder of a mortgage presents a claim to the personal representative for a note, secured by the mortgage, it is a good claim and must be discharged from the assets of the estate.

Carson stated a distributee should take subject to a mortgage, and not be forced to pay it. Zollinger agreed, but believed the estate should be held harmless; that an executor or administrator should be subrogated to the rights of the mortgagee, that he should distribute his rights by subrogation among the distributees of the estate.

Dickson noted the matter is an important one, to be covered at the earliest possible opportunity; that he would like something done at this session. Dickson asked whether both real and personal property should be dealt with.

Butler suggested differentiation in personal property between tangible and intangible, as often intangibles are pledged as collateral; Dickson pointed out tangibles, however, are often unpaid for

Richardson stated he would like to approach problem from the standpoint of intent of the average person; that there are two distinctions: (a) encumbrances created before execution and those created after execution, and (b) purchase money encumbrances and other types of encumbrances. He believed before a will is executed the average person intends property to go subject to the encumbrance; and after the will is executed probably has no intention that the property will go subject to the encumbrance; and that there is not much difference between real and personal property.

Keller believed there is a distinction between real and personal property, and a further distinction as to whether it is a purchase money mortgage. The length of the term of the debt varies between real and personal property; normally a real property mortgage is a long term debt, the purchaser considers what he owns is his equity. Whereas, with personal property, e.g., a pledge of accounts receivable or a mortgage of one's furniture, you have a short-term debt. The normal intent on short-term debt is that exoneration would apply. On a long-term debt, as with real property, the probable intent is that exoneration would not apply. It was noted, however, that a manufacturer's security interest given on machinery and equipment in a manufacturing plant might be just as much a long-term debt as a mortgage on real property.

McKay believed personal and real property go hand-in-hand. When a farm is mortgaged, equipment and livestock go with it, and the same instrument includes both. Zollinger disagreed, stating there would be a long-term mortgage on the land, whereas a crop mortgage on crop and livestock would be a one-year mortgage. McKay stated an FHA loan on farm for crops is at least three years, that it will keep on for years, may finance the farmer for life. Gooding agreed that refinancing is a continuing process-for expansion, diversification or operating capital.

Shetterly noted under an intestate situation bills are paid, the distributees take what is left; queried whether there was anything wrong in statute providing where there is a will the devisees and legatees take subject to any encumbrance existing at the date of death. There would then be certainty, and the testator would be required to change his will if he later encumbers the property and desires exoneration from his estate. A testator can now specifically bequeath property, sell it the next day.

Dickson agreed that this is probably the testator's intent when he makes a will, that he intends to give no more than he owns at the time of his death. Carson agreed, suggested concentrating first on real property; believed devisee should take specifically devised real property with any encumbrance--whether created before or after execution of a will; that the probable intent of the testator on a mortgage existing at the time of executing his will is to give the property as is, and where mortgage is made after will executed--then this is testator's latest act and it must be presumed he knows what he is doing.

Dickson noted the modern trend on long-term mortgages is to carry mortgage insurance with a named beneficiary so mortgage will be paid off.

Unanimous agreement with Shetterley's rule as to real property--that devisee and legatees under a will take subject to any encumbrance existing at date of death.

With regard to personal property, Zollinger stated in the case of a pledge of securities, the borrower commonly incurs a short-term debt--e.g., a 90 day note with securities pledged as collateral. In most cases it would not be a testator's intent that the effect of his will should be modified, regardless of whether the will was executed previously or subsequent to the exectuion of his note. There should be a right of exoneration in favor of specific legatees of securities.

Butler believed there is a distinction between tangibles and intangibles. Frequently one will pledge a block of securities to the bank and leave it there year after year, e.g., to finance a fleet of logging trucks. Should the stock be bequeathed to someone, testator would intend distributee would take subject to the indebtedness. Shetterly stated there would be nothing difficult about writing into a will direction to exonerate. Dickson believed burden of requiring exoneration should be on the testator.

Richardson distinguished between tangible and intangibles--where one pledges either real or tangible personal property as security, it is usually in connection with the purchase or with the operation of the property; whereas, with intangibles the loan is usually not connected with the property secured. There would thus be a difference in intent. Agreed with Butler that when pledging intangibles the testator probably has no intent with regard to the operation of his will. In many cases there would be a violation of the testator's intent if a gift of intangible property was subjected to exoneration.

Gilley noted the more exceptions and distinctions there are, the more uncertainty there will be. Suggested simple rule that a devise or bequest is subject to encumbrances.

Zollinger did not agree intent of testator could be accomplished by applying same rule to personal property as to real property.

Motion carried on being put to vote to apply same rule to personal property as to real property.

Dickson queried whether Committee wanted to consider intestate as well as testate situation. Swift believed should stay with testate for this statute.

Zollinger suggested two sections to statute, one to cover real and personal property, other to make provision for subrogation of an estate to the rights of the holder of the encumbrance if the holder presents a claim which is paid from

the other assets of the estate. There should be acquisition of a note by subrogation so the note and mortgage could be distributed. Riddlesbarger suggested two statutes. Zollinger believed if providing a statute which says specific legatte or devisee should not be entitled to exoneration of the encumbrance from the estate, then there must be a provision that the holder of the encumbrance has a claim against the estate and is paid from the estate. The two cannot be separated. Cannot say the holder of the encumbrance has no claim. If mortgagee insists on payment, there is no reason why he should not be paid. There must be recourse against someone.

Keller stated he preferred Bill No. 7 to New York's statute, which apparently imposes personal liability on the devisee.

Zollinger suggested insertion of a new section 2 to the effect that if the holder of any encumbrance presented a claim on the debt thereby secured the executor or administrator would be subrogated to the debt and encumbrance to the extent of any payments made from the assets of the estate other than rents and profits of property specifically devised.

Dickson appointed Riddlesbarger to revise Bill No. 7.

Keller noted his notes indicate the January 8, 1965 draft refers to a mortgage, trust deed or security agreement. At one time it was suggested, "or other lien or encumbrance except a judgment against the decedent." Mechanic's line- presumed intent that there be no exoneration. On other hand there is judgment lien.

Gilley pointed out placing a mortgage on property is a conscious, voluntary act; whereas, neglect could cause a mechanic's lien to be imposed. From standpoint of testator's intention there is a distinction.

General discussion followed as to whether distinction should be made between voluntary and involuntary liens. Gilley suggested there are three categories: a mortgage, which is a voluntary, conscious act, a general lien which is an involuntary judgment, and a mechanic's lien which is involuntary, but still applies to specific property.

On being put to vote it was determined liens should be separated.

Keller suggested adding pledge to mortgage, trust deed and security agreement, that these together with mechanic's and materialmen's lienc ould be treated alike, everything else should be exonerated.

After discussion as to possibility of referring to Code section by number it was noted scope of chapter is too broad, including even attorney's lien.

Carson suggested providing for encumbrance created by reason of labor and materials furnished to or upon, or in respect of, the property bequeathed.

Riddlesbarger stated intent to include pledge, some statutory liens, and a separate section for subrogation and dealing with ORS 116.165, giving executor or administrator right to redeem real property subject to a mortgage which he might pay in cash and then be subrogated.

On being put to vote, there was no contrary view.

Gilley queried whether language in Bill No. 7 "When any property subject to a mortgage . . . is specifically bequeathed or devised" was sufficient to cover an encumbrance originating after the date of the will, assuming will speaks from the date of death.

Riddlesbarger to finalize, forward to Carson, Chairman of Law Improvement Committee. Legislative follow-up assigned to Riddlesbarger and Carson.

5. REVISION OF PROBATE CODE

After discussion as to best method of approach, determined Dickson to assign various sections to members, McKay to assign members of his Committee to assist. Suggestions for revision of all sections to be in writing, considered at next meeting.

Next meeting - April 10, 1965, 9:00 A.M., Judge Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

Meeting adjourned at 10:55 A.M.

Next Meeting

OREGON PROBATE LAW REVISION

ADVISORY COMMITTEE

Time: 9 A.M. Saturday, April 10, 1965

Place: Judge Dickson's Courtroom
244 Multnomah County Courthouse
Portland, Oregon

Code Sections assigned for study to:

William P. Riddlesbarger and Otto J. Frohnmayer	ORS 111.010 to ORS 115.990 inclusive.
Stanton W. Allison, Clifford E. Zollinger and Herbert E. Butler	ORS 116.005 to ORS 116.990 inclusive (except ORS 116.505 to 116.595 inclusive) and ORS 120.310 to ORS 120.400 inclusive.
T. Thomas Gooding and Nicholas Jaureguy	ORS 116.505 to ORS 116.595 inclusive; ORS 117.010 to ORS 117.180 inclusive and ORS 121.010 to 121.370 inclusive.
Wallace P. Carson	ORS 118.005 to ORS 119.990 inclusive, and ORS 120.010 to ORS 120.230 inclusive.

ADVISORY COMMITTEE

Probate Law Revision

April 10, 1965

Minutes

Meeting convened at 9:00 A.M., Saturday, April 10, 1965, in Judge Dickson's courtroom, Portland. All members present. Committee on Probate Law & Procedure present, with Schnitzer, Shetterly, Bettis, Lovett, Rhoten, Tassock and Richardson absent.

1. CURRENT LEGISLATION

Reports made by various members of Committee on current status of its bills in legislature.

SB 302 (Objection to sale of real property)
Swift reported word "interested" inserted by amendment, to read ". . . any interested person may file with the clerk his objection to the confirmation of the sale." Motion made, carried, that Committee recommend to all members of House and Senate Judiciary Committees that word "interested" be removed, original wording reinstated. [Subsequently passed by both House and Senate, with word "interested" inserted.]

SB 303 (Reopening decedents' estates)
McKay reported insertion by Senate of words "or adjudicated" in last line, to read ". . . but a claim that already is barred or adjudicated may not be asserted in the reopened administration." [Subsequently passed as amended. Signed by Governor 5/10/65. Chapter 345, Oregon Laws 1965.]

SB 305 (Revocation of will by marriage, divorce or annulment)
[Subsequently amended by House, Senate concurred and repassed.]

SB 307 (Sale of real property, confirmation)
[Subsequently passed without amendment. Signed by Governor 5/13/65. Chapter 399, Oregon Laws 1965.]

SB 400 (Guardianship and conservatorship)
[Subsequently passed without amendment. Signed by Governor 5/13/65. Chapter 402, Oregon Laws 1965.]

SB 306 (Sale or lease of property under power granted in will)
[Tabled in Senate Judiciary.]

SB 308 (Appraisal of estates)
Carson and Zollinger reviewed Senate amendments, which provide for appraisal of all property except cash, appointment of at least one appraiser, delete fee schedule, provide reasonable compensation to be determined by court. Discussion as to whether each probate court should set its own fee schedule, Riddlesbarger believing it neither duty nor perogative of Committee to provide schedule. [Subsequently Senate refused to concur in House amendments, conference committees failed to reach agreement prior to legislature adjournment.]

SB 315 & SB 328 (Dower and curtesy; recorded declaration)
Frohnmayer stated none opposed to giving surviving spouse an undivided interest in fee in real property, but giving the right to convey out during lifetime without protecting the interest of the surviving spouse is questionable. Allison advised in California, Washington and Idaho one can dispose of such property, that title insurance had been issued on such deeds. [Both bills tabled in Senate Judiciary.]

HB 1614 (Small Estates Act)
Reported that Dellenbach believes Act should be held over and made a part of the revision of the probate code. Primary objections are to greater responsibility of clerks, no seal of approval by a court, lack of bond, lack of adequate time for State Welfare Commission and State Board of Control to file claims-60 days wanted.
Allison reported House Judiciary Committee hearing addressed by Riddlesbarger, Carson, Butler, Lisbakken, and himself, and thereafter Dickson, Butler, Allison and Lisbakken met to consider objections. Allison then met with Skelton and Dellenbach with following suggestions: (1) lower limit to $2,000, (2) give creditors right to petition for probate, (3) notice to be given also to State Board of Control and Auditor of County in which summary procedure initiated, and (4)extend time for presentation of claims to 60 days and provide in Sec. 19 that claims not presented are barred "unless formal proceedings are commenced within the period provided by section 5." Refused to give State Land Board right to petition as voluntary administrator. Also objection to request releases be obtained from State Welfare Commission and State Land Board.
Judiciary also questionedvalidity of real property sale. Allison to meet coming week with representative counsel of four title insurance companies. Suggested actual cash value of real property be stated in Affidavit as that shown by assessment roll of county wherein property situated, that bond be required in all cases where real property is sold. Doubt expressed as to procedure for setting apart homestead.
[Tabled in House Jidiciary.]

Bill No. 7 (Specifically devised real property subject to encumbrance)
Bill revised by Riddlesbarger and Carson. Title: "Relating to encumbered property of decedents; creating new provisions; and repealing ORS 116.140, 116.145, 116.150, 116.155 and 116.160." Motion carried to report to Law Improvement Committee this Committee favors passage of bill.

2. REVISION OF PROBATE CODE

Discussion of time required to complete revision of probate code. Consensus that revision could be completed in time for next session of Legislature. Dickson pointed out two areas that would require extensive consideration: creditors' rights, and administration of estates.

Frequency of meetings considered, agreed half a day is too short for accomplishment, that subcommittee work important. Therefore, no meeting in May to give subcommittees opportunity to prepare for day-long meeting in June. No meeting in July. Two-day meeting in August in Medford, members to arrive night of August 12, work on 13th and 14th.

Dickson suggested subcommittees after research make definite recommendations to Committee, rather than merely bringing results of research into Committee for its consideration.

Dickson noted area not assigned: whether Uniform Principal and Income Act might apply to probate.

McKay to discuss with Board of Governors possibility of reassignment of his committee members whose appointments lapse to provide continuity. McKay to assign to Bar Committee same assignments given Advisory Committee.

Discussion as to whether to pattern code revision after Model Code, after Iowa code, or merely to amend present code. Allison stated attempt by Alaska to adapt Model Code was frustrating; Carson noted where departure from present law is too great, opposition arises. Dickson reminded Committee of good reception to guardianship code, which was revised section-by-section.

NOTE: Zollinger new address: Pendergrass, Spackman, Bullivant & Wright, Pacific Building, Portland, Oregon; telephone 228-6351.

Next meeting - Saturday, June 19, 1965, 9:00 A.M., Judge Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

Meeting adjourned at 11:30 A.M.

Oregon State Bar

808 S. W. 15TH AVENUE
PORTLAND, OREGON 97205
227-0495

June 9, 1965

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

From: William M. Keller, Secretary
Committee on Probate Law & Procedure
215 American Bank Building
Portland, Oregon 97205

MEETING NOTICE

Date: Saturday, June 19, 1965

Time: 9 A. M.

Place: Judge Dickson's Courtroom
244 Multnomah County Courthouse
Portland, Oregon

AGENDA:

1. Report on success of legislation proposed.
2. Progress reports on legislation being considered.

Please indicate, by signing and returning the extra colored copy of this notice in the enclosed return envelope, whether or not you will be able to attend the meeing.

WMK:sb

enclosures

ADVISORY COMMITTEE

Probate Law Revision

June 19, 1965

Minutes

Meeting convened at 9:00 A.M., Saturday, June 19, 1965, in Judge Dickson's courtroom, Portland. All members present except Zollinger and Butler. Committee on Probate Law & Procedure present, except McKay, Schnitzer, Gilley and Tassock. Dickson noted although Schnitzer is unable to attend meetings at present, he continues to be hard-working committee member. Also present were William E. Love, of Law Improvement Committee, and David Frohnmayer.

1. GENERAL

Dickson advised 50% of bills presented by Committee to legislature passed.

Dickson reported on luncheon meeting on June 17, 1965 attended by himself and Zollinger, with Messrs. Love and Stoll, representing parent committee, which requested revision of probate code ready by August, 1966 for presentation to it. Law Improvement Committee would then review it early in September, present it to the Bar. This Committee could make corrections early in November, still have time to meet with legislature in November and have bills ready to introduce when session opens. Suggested separate bills for controversial subjects, e.g., small estates act, dower and curtesy. Other work should probably be in one bill. Dickson advised work schedule would require Lundy, or one of similar capability, and stenographic help. Dickson noted new Washington code was recently made available to Lundy. It was determined rather than ask for special allowance for research materials, Committee will try to obtain materials through Lundy's office. Further advised that Committee intends to meet the third Saturday in each month, and has agreed to work for more than half a day. Laison between Committee and parent was discussed; Love suggested occasionally a member of his committee might sit in on meetings. Expense of attending meetings was discussed. Dickson suggested sufficient funds might be made available to pay travel expense of out-of-town members. Love and Stoll

suggested: approach to legislature could be improved, that bills might better be referred to Legislative Counsel Committee rather than to a law committee; presentation to local bar associations of work product, inviting their help and cooperation; and a public relations program. Discussion with regard to mass production and distribution prior to presentation to legislature determined unnecessary and useless expense.

Love reported the Law Improvement Committee had met June 18, 1965; that it is an offshoot of the Legislative Counsel Committee and thus has a certain amount of that committee's budget at its disposal. Decided that probate law revision is most important project it now has. Resources will be available, including staff time, to run from September, 1965 to September, 1966. Sam Haley is now working on revision of code to incorporate this session's laws. Lundy is interested in working with Advisory Committee, but he is at direction of Legislative Counsel Committee, which might assign another to the project. Budgeted 13 man-months--about 6% of budget available. Will provide stenographic minutes, publication costs--whatever appears necessary. Further reported Advisory Committee increased to ten, Lisbakken appointed a member. May expand it further to make member of Law Improvement Committee also a member. Suggested one or two members of Law Improvement Committee should be members of legislature.

Dickson reported he had contacted Bar to request continuance of members of Probate Law & Procedure Committee, that decision would not be made until September.

2. FROHNMAYER-RIDDLESGARGER SUBCOMMITTEE

Frohnmayer pointed out basic problem--whether to cut and patch present code, or to perform an overall revision. Noted American Bar Association iw working on a new Uniform Probate Code. Reported April, 1965 issue of Trusts and Estates contains article on ABA movement for a new code, that it is important both for procedure and substantive law. Public is becoming aware of cumbersome provisions of present probate law. One of reasons for inter vivos trusts is to get away from probate. Elements article suggested necessary to consider in revision: (1) Unduly restrictive authority of personal representative. Too much supervision of court. Reason for restrictions--to protect from dishonest fiduciary; but assumption should be that he will be honest. Powers of the fiduciary should be substantially the same as of owner of property. (2) Appraisers--no longer any particular reason for having them. Present system is a matter of political patronage, and a waste of money. Taxing authorities do not rely on these appraisals. (3) Abolition

of distinction between real and personal property, and question of where title would vest. Recognition that problem will be treated differently in different states, but forward-looking people are thinking of abolution of distinction. (4) Notice--requirement for publication. Many notices unnecessary--e.g., for sale of real property. (5) Less public disclosure of what property is in probate. Should not be open to public as to size of estate and the assets included. (6) Small estates--necessity for summary proceedings. (7) Independant administration--non-intervention wills, such as they now have in Idaho and Washington. (8) Guardians, court-appointed--should have more authority. (9) Probate court should be a court of general jurisdiction.

Paul E. Bayse is head of ABA committee on revision of Model Probate Code. Work has been in progress for over a year, draft of legislation not expected for at least another year. Presentation to the Committee on Uniform State Laws is anticipated one year from this summer.

Mention made of provisions of Iowa 1963 probate code, and Washington code which was passed in 1965--eliminates expense of administration, provides for small estates, but probably not as helpful to this Committee as Iowa code because Washington is community property state.

Frohnmayer suggested if a mere patching is done of present code it will be pretty far behind the times; that it should instead be a forward-looking code. Committee should decide now whether to abolish dower and curtesy; otherwise two codes would be required--one with and one without.

Riddlesbarger concerned with definitions of terms, and best method of dealing with legislature. Judiciary Committee said time too short to adequately consider Small Estates Act, so the legislation was tabled.

Consideration given to Riddlesbarger suggestion that Committee follow pattern established by educational group--two phases: (1) Housekeeping bill--e.g., clean up references to "his and her", "executor, executrix, administrator, administratrix," make existing code a more readable document and eliminate contradictions, without substantial substantive change. Then, (2) in separate bill, as a separate project, prepare legislation to effect the modern trend of thought.

Discussion followed as to whether better to have sweeping revision of present code, or to present two bills. Allison pointed out one cannot determine in advance what is controversial and what is not. Recommended complete revision, based on present code rather than complete new code. Jaureguy

pointed out present code has been construed for many years; if a brand new code is adopted benefit of these years of construction is lost. However, if new code were adopted it should be a uniform code. Carson believed uniform code is too far in the future to provide any real help; that it would be better to try to improve existing code.

Love stated his Committee hoped for something more than a mere topographical revision and elimination of ambiguities, etc., that it would prefer substantive changes in the law, but within the framework of the existing code.

Riddlesbarger requested definition of terms--whether "new code" means merely a rearrangement. Dickson stated a new coee would embrace a number of new concepts, including radical changes in the necessity for probate, abolition of the distinction between real and personal property. Frohnmayer included power of probate court--stated there is no reason why probate court should not have power to determine title to real property. Dickson mentioned case where trustee is also executor--that there is no reason why assets should not be distributed to him without the intervention of an equity court.

Frohnmayer moved Committee undertake to make an extensive revision and reorganization of the existing code, to incorporate desirable provisions of the Iowa, Washington, perhaps South Carolina, codes, possibly Uniform Code, including a revision of the format of the code, to provide a modern, up-to-date code. Keller noted motion would not preclude building on the present foundation. Motion seconded by Jaureguy, upon being put to vote carried unanimously.

Frohnmayer distributed copies of "Proposed New Draft of S.B. 315 (ORS 111.020)" and of "Proposed Re-Draft for ORS 111.030." Introduced his son, David, who has completed his first year of law school at University of California--Boalt Hall, and who helped research.

Riddlesbarger requested assignment of definitions. Carson and Lundy appointed to provide definitions.

Frohnmayer noted ORS 111.010 contains definitions and rules of construction--that similar definitions appear throughout the entire probate code. Suggested one section early in Code give definitions and use of terms. Suggested elimination of terms "executor, administrator," that "personal representative" be used throughout.

ORS 111.020--used S.B. 315, which was revision of this section, thus code should do away with dower and curtesy. Proposed New Draft read. Questioned use of "seised" ("When any person dies seised"); "not having lawfully devised the same," (What about intestate?); situation where there is a will valid as to some things, but invalid as to the disposition of real property--perhaps could include in definitions "intestate" to include partial intestacy; "shall descend"--whether or not to stay with Oregon law that upon death of intestate title immediately descends to the heirs, subject to being divested for payment of debts--modern approach is to vest title in personal representative so he may deal with it the same as with personal property; "subject to his debts"--does this mean those only which are unsatisfied out of the personal property?

Carson noted under present sections real property may be sold before personal property.

Frohnmayer stated if distinction is retained between real and personal property, then widow receives 1/4 real property and 1/2 personal property, and issue becomes important. This would give validity to theory of abolishing distinction. Frohnmayer suggested possibility of giving 1/3 of both real and personal property to widow, net after debts and claims are paid; otherwise, if one type of property is sold rather than the other, one might thereby deprive the widow of just share.

Riddlesbarger questioned who would bear expenses--believed in the final settlement everyone should bear a proportionate share of the expenses.

Dickson suggested adoption of the doctrine of apportionment.

Swift suggested rather than doing away with distinction between real and personal property, merely to provide widow's share of each is the same. Keller noted present trend would indicate one-half would be reasonable share, as in community property states. Richardson noted intent when will is made is usually that widow will get bulk of the property. Favors one-half, but would prefer widow share proportionately burden of debts and taxes.

On poll of Committee members, determined surviving spouse to receive one-half real and personal property.

Discussion followed as to rights of surviving spouse and minor children. Allison noted confusion which results from "homestead"--when it is discussed in probate code it becomes confused with property exempt from execution on sale after judgment; thus, in considering the rights of the widow, word "homestead" should be eliminated. Also suggested setting aside of property to spouse should be by court hearing. Allison Committee to consider rights of spouse and minor children in Chapter 113.

ORS 111.040. David Frohnmayer noted present ORS 111.040 defines degree of kindred, stated Oregon uses civil law. Suggested this present section be incorporated in a definition section, and there define kinship. Would add "by counting upward from the intestate to the nearest common ancestor" as was done in the Model Probate Code of 1946. If this suggestion followed, there would be very escheat. Model Probate Code decided to limit, however, to maternal grandmother, theory being one might prefer that property should go to State of Oregon rather than to an extremely distant relative.

Frohmayer noted many escheats result merely from lack of diligence; therefore, consideration should be given to whether it is better to give property to a distant relative in Timbuktu rather than to have the estate remain in Oregon.

Riddlesbarger questioned whether in-laws should ever appear in the chain--noting that often daughters- and sons-in-law took care of elderly parents, that many older people refuse to make a will.

Riddlesbarger and Frohnmayer Subcommittee to consider this matter of in-laws and make recommendation to Committee.

Proposed New Draft SB 315 - (4) "Shall descend to the father and mother . . . as tenants by the entirety," In reply to query as to whether this is in keeping with the concept, it was noted this had previously been adopted as the policy of this Committee. (5) Whether to spell out specifically whether to take by right of representation if one or the other of the brothers and sisters is still alive. Dickson suggested it would be better to follow Supreme Court cases and opinions of Attorney General on this matter, spelling it out in statute.

(6) Oregon has collateral kindred rule, should list general rule, list exceptions. (b) Oregon version of ancestral property doctrine. Allison suggested (b) should be an exception to (4), not to (6); that this is very useful to title insurance people, obviates necessity of administration of the deceased minor child's estate. Upon death of the child his share lapses, not subject to claims.

Discussion as to whether there is relation back to original inheritance. Allison pointed out in answer to query as to whether a sale by a guardian during infancy would be invalid, that it is property owned at death, thus infant at death would not own property previously sold.

Upon vote, motion carried to eliminate (6)(b).

(6) "in equal degree"--Carson suggested insertion of words "per capita."

(7) Merely adds "surviving spouse," attempting to make provisions consistent as to real and personal property. Presently, even though there is surviving spouse, there could be an escheat to the state.

Discussion of terms "lineal desdendant" and"issue." Carson noted terms not identical, that "lineal descendant" is a more precise term and should be used in preference to "issue." Richardson mentioned Oregon Supreme Court case on terms, noted Oregon defines differently from some other states where "issue" means children.

Jaureguy noted if one leaves two children, one of them survives him and has one child, the other has six, his one child will take equally with the other six, but if both children die, all grandchildren will take equally. Jaureguy would prefer right of representation regardless of whether one child is living or not. Carson noted right of representation applies in (5) to brothers and sisters, but in (6) next of kin take per capita.

Upon vote, determined right of representation to apply in (1), (5) and (6).

Next meeting - August 13 and 14, 1965, to commence at 9:00 A.M. at the Rogue Valley Country Club, Medford. To continue report of Frohnmayer-Riddlesbarger subcommittee.

Meeting adjourned at 12:45 P.M.

Oregon State Bar

808 S. W. 15TH AVENUE
PORTLAND, OREGON 97205
227-0495

June 24, 1965

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

From: William M. Keller, Secretary
Committee on Probate Law and Procedure
215 American Bank Building
Portland, Oregon 97205

MEETING NOTICE

DATE: Friday, August 13, 1965
Saturday, August 14, 1965

TIME: 9:00 A. M. to 2:00 P. M.

PLACE: Rogue Valley Country Club, Medford, Oregon

AGENDA: Continuation of discussion of ORS Chapters 111, 112, 113, 114, 115

NOTE: If you have not already made reservations please write or telephone Mr. Otto J. Frohnmayer immediately.

Please indicate by signing and returning the enclosed colored copy to William B. Keller, Secretary, 215 American Bank Building, Portland, Oregon, whether or not you will be able to attend the meeting on August 13 and 14.

PROBATE LAW REVISION
ADVISORY COMMITTEE

MINUTES

August 14, 1965

MR. FROHNMAYER: In the meeting on Friday, August 13th, the committee, after some discussion of ORS 111.020, determined that it had better spend its time in discussing a proposed new draft of the sections 111.020 and 111.030, which deal with the descent and distribution of real and personal property. At its meeting on Friday, the Committee approved the definition section with the exception that Mr. Zollinger raised a question as to whether or not in the definition of claims there should be included encumbrances against property which had not been assumed by the decedent. That is in subsection (1). In subsection (2), which is the degree of kinship, we determined that this section should probably be taken out of the definition and rules of construction section and be placed into a separate section, since it is substantive law. We made a change in the definition 5, which defines now net estate as being real and personal property of the decedent, other than the property set apart to the surviving spouse or minor children, family allowances and claims against the estate. On section 6, which defines personal property, it was agreed that we probably should use the definition that is contained in the model probate code. Section 10, which discusses right of representation -- no decision was reached on that. The definition under the uniform code -- that is the one under consideration -- should be considered in connection with 10. Section 12 of the definition section we agreed should be taken out of the definition section and moved down in Article 6, which deals with the share

of other than surviving spouse, and should be made part of the subsection (3) of that section. The Committee approved Article 2 of the proposed new draft and we left our discussion of the question of title and possession of property, which is Article 3.

(Discussion of Article 3, Title and Possession of Property by Messrs. Frohnmayer and Zollinger.)

. . .

MR. ALLISON: What you have just read, I think, changes the law in this respect: It does in a sense, although perhaps not as clearly as I might think, state that the property becomes the property of the heirs at law, as far as the real property is concerned, but as I understand the law at the present time, the title to the personal property in the estate does not vest at the moment of death in the same sense that the real property does. In other words -- and I am subject to correction on this -- but as I understand the situation, the personal property of the estate is in the control of the administrator and in a sense rather different from that of the real property. At least, I think that should be discussed as to whether this is bringing in any changes in our present law --

MR. FROHNMAYER: I think this is well taken. I think the decisions are as you say. But I think it's also true that that was an anomaly in our law and is an anomaly, because really, you can have the same problems with personal property as you can with real property. Where is the title going to be to personal property if no administrator or executor is appointed? So really, I think it opens up a vacuum in the law.

MR. ALLISON: I have no quarrel with that, but I think it should be an understanding, if that is the law -- and I think it is at the present time in a certain way -- that this is a change in our rule and I don't think there is anything

wrong with it.

MR. FROHNMAYER: As we have said in this memo, we think the uniform code will come out this way.

THE CHAIRMAN: Is there any objection on the part of anyone to this particular change, if it be a change? Hearing none, then, let's approve the language as read. For the record, do you want to read that paragraph as corrected?

MR. FROHNMAYER: Yes.

> "Article3, Title and Possession of Property. When any person dies intestate, his estate shall be subject to the rights of the surviving spouse and minor children and any claims for which the estate is liable. Subject to the foregoing, the real and personal property shall pass to the persons who succeed to his estate as his heirs as provided in this chapter. Such property shall be subject to the possession of the personal representative, who shall have the power to sell the same as provided in this title."

MR. ZOLLINGER: Should we strike "the" before "power"?

MR. FROHNMAYER: I think that's agreeable.

MR. ALLISON: Mr. Chairman, this may not be too important, but I think the language, if it can, should stress the fact that the transfer of the title is instantaneous at the time of death, and for that reason, I would prefer that it would read, "Subject to the foregoing, the real and personal property pass --". I don't like "shall pass". That sounds as though it's something that happens in the future. Can't we say, "the real and personal property pass to the persons who succeed --"?

(Discussion of Mr. Allison's suggestion by Chairman Judge Dickson, Mr. Frohnmayer, Mr. Allison and Mr. Zollinger.)

. . .

THE CHAIRMAN: All right. Now, Allison, will you read that for the record?

MR. ALLISON:

> "When any person dies intestate, the title to his real and personal property passes to the persons who succeedto his estate as his heirs, as provided in this chapter, subject to the rights of the surviving spouse and

minor children and any claims for which the estate is liable. The personal representative -- "

--Will you dictate your part of it?

MR. ZOLLINGER:

"The personal representative shall be entitled to possession of the property during administration and shall have power to sell the same as provided in this title."

(Further discussion of language changes followed.)

. . .

THE CHAIRMAN: All right. In order to pass this and get along, I'll delegate the redrafting of this section to Dave and to Mr. Allison and Mr. Zollinger and you can revamp it at our first opportunity. Would that be satisfactory?

(Further discussion of language changes.)

. . .

THE CHAIRMAN: Well, let's let it stand, with the understanding that if there is any cleanup in the language to be accomplished, why Cliff and Stanton will take care of it.

. . .

(Discussion of the language of Article 4, Share of Surviving Spouse If Decedent Has Left Issue by Messrs. Frohnmayer, Allison, Zollinger, Jaureguy and Shetterly.)

. . .

MR. FROHNMAYER: This is paragraph 4, Share of Surviving Spouse If Decedent Left Issue.

"If decedent dies intestate, leaving surviving spouse and issue, the surviving spouse shall have an undivided one-half interest in the net estate of the decedent in addition to the portion of the estate set apart to him for family allowances, homestead rights and exempt properties."

(Further discussion resulted in noting change in the title of Article 4 by deleting the words "has left" and inserting the word "leaves", so that the

title of Article 4 reads, "Share of Surviving Spouse If Decedent Leaves Issue.")

. . .

(Discussion of language of Article 5, Share of Surviving Spouse If Decedent Leaves No Issue by Messrs. Frohnmayer, Zolliner, Jaureguy, resulted in no conlcusion about language changes.)

. . .

THE CHAIRMAN: Let's pass that for the moment and go to number 6 and come back to it if need be, because there seems to be some diversity of opinion on the merits.

(Discussion of the language of Article 6, Share of Other Than Surviving Spouse by Messrs. Frohnmayer, Jaureguy, Zollinger and Gilley.)

. . .

MR. ZOLLINGER: Well, I think my motion would be that we preserve the substance of Section 6 as it is now offered in this memorandum.

THE CHAIRMAN: Is there a second to that motion?

MR. FROHNMAYER: I second the motion.

(A vote is taken on the motion by a show of hands of the Advisory Committee and the same by the Bar Committee.)

THE CHAIRMAN: The motion is carried by both the Bar Committee and the Advisory Committee, so we then have, by our action today, I take it, reversed our position, and we will approve Section 6, unless there are some other --

MR. FROHNMAYER: We have some other provisions here.

(Further discussion of Section 6 by Messrs. Allison and Gooding.)

THE CHAIRMAN: Now, Tom, you restate your motion, His motion will be directed to Roman numeral six, Share of Others Than Surviving Spouse.

MR. GOODING: And Iit will be as follows:

"The part of the net estate not taken by the surviving spouse shall pass (a) to the issue of the intestate equally if they are in the same degree of kinship, or if in unequal degree, those of more remote degrees take by representation."

THE CHAIRMAN: Is there a second to that motion?

MR. ALLISON: I'll second it.

THE CHAIRMAN: It has been moved and seconded that the language of Sections 1 and 2 and the introductory phrase of Roman numeral six be changed to read as follows:

"The part of the net estate not taken by the surviving spouse shall pass (a) to the issue of the intestate equally if they are in the same degree of kinship, or if in unequal degree, those of more remote degrees takelby representation."

Now, is ther any discussion on the motion?

(Further discussion on the motion.)

. . .

THE CHAIRMAN: Mr. Tom Gooding moves and Mr. Stanton Allison seconds that we adopt the following language for paragraph number Roman numeral six in lieu of the introductory statement and subsections number (1) and (2):

"The part of the net estate not taken by the surviving spouse shall pass (1) to the issue of the intestate equally if they are in the same degree of kinship, or if they are in unequal degree, those of more remote degree take by representation."

Now, is there any further discussion on the motion?

(There was no further discussion. A vote was taken on the motion first by a show of hands of the Advisory Committee and then the same by the Bar Committee, the motion being carried on behalf of both committees.)

. . .

THE CHAIRMAN: Let me make this correction in the language here, which I think would be satisfactory to all concerned, in the introductroy part of Roman

numeral six:

"The part of the net estate not passing to a surviving spouse shall pass (1) to the issue of the intestate equally if they are in the same degree of kinship, or if in unequal degree, those of more remote degree take by representation;"

MR. ZOLLINGER: This is acceptable only if we define representation substantially conforming to the model code.

THE CHAIRMAN: Yes, that's right.

(Discussion of Article 6, (3), as augmented by Article 1, definition 12, dealing with the right of survivorship in personal property descending to surviving parents of the intestate.)

. . .

THE CHAIRMAN: Mr. Butler has moved that we consider the estate of inheritance in personal property vesting in the surviving parents as a seperate estate rather than a joint one with right of survivorship as far as personal property is concerned, and the motion is seconded by Mr. Duncan McKay. Now, is there any further discussion on this?

(Further discussion by Messrs. McKay, Shetterly, Zollinger and Bettis.)

. . .

MR. BUTLER: Well, my motion was that where real property of an intestate is descending to parents, that they take as tenants in common, not as tenants by the entirety.

THE CHAIRMAN: Do you wish to second that motion, Mr. McKay?

MR. McKAY: Yes.

(The motion was voted upon by a show of hands by the Advisory Committee and the same by the Bar Committee and was lost in both instances.)

MR. BUTLER: I make the same motion with respect to personal property, except instead of being tenants by the entirety, it's joint ownership with right of survivorship.

THE CHAIRMAN: And you want it to descend to them separately?

MR. BUTLER: As tenants in common.

(The motion was voted upon by a show of hands by the Advisory Committee and was lost, and then was carried by a vote of the Bar Committee. There was then further discussion of the motion by Messrs. Bettis, Shetterly, Riddlesbarger, McKay and Frohnmayer.)

. . .

THE CHAIRMAN: I concur with what Otto has just said, and it seems to me, in summarizing the situation, the Advisory Committee, which is the one that has the primary burden of doing the work, has agreed by a preponderance that we should leave it in as suggested and we meet opposition from the Bar Committee evenly divided if we excluded Mr. Butler, who is also on the Advisory Committee. The Bar Committee is not here in force today, and probably, for our discussion this morning, we should take it as accepted by the Advisory Committee and later on, when we have the full Bar Committee, we could go back to the matter and discuss it, because as Otto has suggested, it is a point of variance and we are certainly going to have some repercussions from the Bar on all points of variance. So we could take it up at a later time, and if there is no objection, we'll pass it now for the time being as being acceptable to the Advisory Committee and review it later. Would that be satisfactory?

(Discussion of subparagraph 3.)

. . .

THE CHAIRMAN: Tom Gooding makes the motion and Mr. Allison seconds the motion that the language of the uniform act be adopted for our subparagraph 3, that language being as follows:

"If no issue or parent survive the intestate to the issue of either parent by representation."

Now, is there any further discussion on the motion?

(There was no further discussion. The motion was voted upon and was accepted unanimously by both the Advisory Committee and the Bar Committee.)

. . .

(Discussion of subsections (4) and (5) by Messrs. Frohnmayer, Zollinger and Gooding.)

. . .

THE CHAIRMAN: It has been moved by Mr. Zollinger and seconded by Mr. Frohnmayer that we adopt the language of subparagraphs D, E and F of the model code with the word "Oregon" inserted in the parentheses. Now, these subsections D, E and F will be renumbered to be subsections (4), (5) and (6), and the language of (4) will read as follows:

"If no issue, parent or issue of either parent survives the intestate to the surviving grandparents of the intestate."

Subsection E, which will be renumbered (5), will read as follows:

"If no issue, parent, issue of either parent or grandparent survives the intestate to the issue of deceased grandparents in the nearest degree of kinship to the intestate within the fifth degree, computed according to rules of the civil law per capita without representation."

Subparagraph F will be renumbered to be (6) and will read as follows:

"If no person takes under the preceding paragraphs, to the state of Oregon."

Now, is there any discussion on the motion? If no, are you ready for the question?

(The motion was voted upon and carried by both committees.)

. . .

THE CHAIRMAN: Mr. Zollinger moves that we adopt the language of the uniform act, and it's seconded by Mr. Allison. Is there any discussion on the motion?

MR. JUAREGUY: I think the motion ought to specify the section, which is section 302.

MR. ZOLLINGER: I would like to include, as long as it is my motion, a provision that this shall be separately stated and not among the definitions.

MR. FROHNMAYER: We would agree with that.

(The motion was voted upon and carried by both committees.)

. . .

THE CHAIRMAN: Mr. Otto Frohnmayer moves that we adopt the language of section 303 of the uniform code and Mr. Zollinger seconds the motion. Are you ready for the question?

(The motion was voted upon and carried by both committees.)

. . .

THE CHAIRMAN: Mr. Frohnmayer moves that we adopt the language of section 304 and the motion is seconded by Mr. Zollinger and section 304 will then read as follows:

"(Partial intestacy) If a will validly disposes of only part of the net estate of the decedent, the part not disposed of by the will shall pass according to the law governing intestate succession."

Is there any discussion on the motion?

(There was no discussion on the motion. The motion was voted upon and carried by both committees.)

. . .

THE CHAIRMAN: Mr. Otto Frohnmayer moves and the motion is seconded by Mr. Zollinger that we adopt the language of section 305, which reads as follows:

"(Time of determining relationship: After born heirs.) The relationships existing at the time of the death of the intestate govern the inheritance of the net estate of the intestate, but persons conceived before his death and born alive thereafter inherit as though they were alive at the time of the death of the intestate."

Is there any discussion?

(There was no discussion on the motion. The motion was voted upon and carried by both committees.)

. . .

THE CHAIRMAN: Mr. Frohnmayer moves we adopt the language of section 306 and the motion is seconded by Mr. Clifford Zollinger and that section reads as follows:

"Section 306 (Persons of the half blood) Persons of the half blood inherit the same share that they would inherit if they were of the whole blood."

(The motion was voted upon and carried by both committees.)

. . .

THE CHAIRMAN: Mr. Otto Frohnmayer moves the adoption of the language of section 307 and Mr. Zollinger seconds the motion. The language will read as follows:

"(Persons related through two lines.) A person related to the intestate through more than one line is entitled only to the share which is largest."

(The motion was voted upon and carried by both committees.)

. . .

THE CHAIRMAN: Mr. Otto Frohnmayer moves the adoption of section 308 and the motion is seconded by Mr. Clifford Zollinger. The language reads as follows:

"(Adopted children.). For the purpose of inheritance to, through, and from a legally adopted child, the child shall be treated as the natural child of the adopting parents and he shall not be treated as the child of his natural parents for the purpose of intestate succession."

Is there any discussion?

(Discussion of the motion followed and Mr. Zollinger suggested deletion of the word "Legally". There was no objection to Mr. Zollinger's amendment.)

THE CHAIRMAN: Now I'll put the question this way: It has been moved by Mr. Otto Frohnmayer and seconded by Mr. Zollinger that we adopt the language of section 308, reading as follows:

"(Adopted children.) For the purposes of inheritance to, through, and from an adopted child, the child shall be treated as the natural child of the adopting parents and he shall not be treated as the child of his natural parents for the purpose of intestate succession."

(Further discussion.)

. . .

THE CHAIRMAN: Now the language will read:

"(Adopted children.) For the purposes of inheritance to, through, and from an adopted child, the child shall be regarded as the natural child of the adopting parent, and he shall not be regarded as the child of his natural parent for the purpose of intestate succession."

(The motion was voted upon and carried by both committees.)

. . .

THE CHAIRMAN: Mr. Otto Frohnmayer moves the adoption of this language, seconded by Mr. Zollinger:

"(Illegitimate children.) For the purposes of inheritance to, through, and from an illegitimate child (subparagraph 1) the child shall be treated as the legitimate child of his mother; and (subparagraph 2) the child shall also be treated as the legitimate child of the father if (subparagraph A) the father marries the mother; (subparagraph B) the father acknowledges in writing that the child is his own; (subparagraph C) a court establishes the paternity of the child during the father's lifetime."

Is there any discussion ?

(There was further discussion but no conclusion reached. The meeting was adjourned for the lunch hour.)

. . .

(The meeting was reconvened after the lunch hour.)

THE CHAIRMAN: Now, dealing with intestate succession, we are back to the point of whether or not we want to deal any further with adopted children and illegitimate children at this meeting. I take it from what has been said before lunchtime that in the absence of some report from Mr. Shetterly, we prefer to continue that until our next meeting. Is that correct? Hearing no voice to the contrary, I assume it is. So do you want to go now to section 310 on advancements, Otto?

MR. FROHNMAYER: No, Mr. Shetterly has that one assigned to him, too. I would suggest that we try to clarify our thinking on 111.060, which is one of our sections having to do with felonious death.

(Then followed discussion of section 111.060, corruption of the blood, discussion of whether or not felonious death of the decedent should preclude lineal descendants of the killer from inheritance, and discussion of whether conviction for the felonious death of the decedent should conclusively prevent the killer from inheritance so that the necessity of a subsequent civil trial would be eliminated, contributions to the discussion being made by Messrs. Frohnmayer, Zollinger, Chairman Dickson and Allison.)

MR. FROHNMAYER: To get this thing to a head, Mr. Chairman, I move that we approach this problem on the basis that -- to defeat the inheritance the killing must be with a felonious intent. And these might not be the precise

words, but it would mean that the murderer would have to be convicted of either first or second degree murder.

(Further discussion.)

. . .

MR. ZOLLINGER: Mr. Chairman, just as a matter of interest, I would like to read what I have just been jotting down here. I don't think it is anything we want to adopt, but I think it raises some of the ideas we have been talking about: One who with felonious intent takes or procures the taking of the life of another shall not inherit from such person or receive any part of his estate by will or otherwise or receive any part of the proceeds of insurance upon the life of such person. Upon intestate death of such decedent, his estate shall pass as though he were not survived by such person. Conviction of the crime of murder in the first or second degree shall establish conclusively that the life of the decedent was taken with felonious intent. In the absence of such conviction, the fact may be determined in civil litigation.

THE CHAIRMAN: That does cover the sense of our meeting here today.

. . .

(Mr. Shetterly returns to the meeting.)

THE CHAIRMAN: Ken, while you were out, we found we were stymied in connection with considering the inheritance rights of adopted children and illegitimate children and Otto indicated that you had or would be willing to do some work on that. I wonder if you could tell us what --

(Discussion of the subject by Mr. Shetterly, Frohnmayer, Allison, Zollinger and Riddlesbarger.)

. . .

THE CHAIRMAN: Well, at least we are at this stage: We haven't anything concrete that we are ready to act upon today. Now, the question arises, Ken -- do you want to develop it further and present it at our next meeting?

MR. SHETTERLY: I would be glad to do that.

THE CHAIRMAN: And there will be these three sections, then, dealing with adopted children, illegitimate children and advancements. I think the effect of adoption and illegitimacy is treated in 111.210 and the following section and advancements in 111.110.

. . .

THE CHAIRMAN: Mr. Zollinger moves that we adopt section 311 of the uniform code and that was seconded by Mr. Allison.

(Discussion of the motion.)

THE CHAIRMAN: In lieu of section 311, Mr. Zollinger moves that we incorporate a provision to abolish dower and curtesy and that we use the language that is used in the bill presented to the Legislature.

MR. ZOLLINGER: No, not necessarily. Let's leave that open -- that we add language which preserves existing rights.

THE CHAIRMAN: Yes, all right.

. . .

THE CHAIRMAN: In summary, the matters on the agenda for the next meeting will be, number 1, the revision of these proposed code provisions by Otto and Dave Frohnmayer; secondly, the report from Ken Shetterly on the appropriate provisions to be used for adopted and illegitimate children; next, the provisions relating to advancements by Ken Shetterly; next, the provisions relating to the so-called laws concerning corruption of the blood by the

Frohnmayers; and last, the abolition of dower and curtesy by Mr. Allison. And it will be hoped that at that September meeting we can conclude our discussions on those.

. . .

MEETING ADJOURNED

PROBATE LAW REVISION
ADVISORY COMMITTEE

MINUTES

September 18, 1965

Meeting convened at 9 a.m. Saturday, September 18, 1965, in Judge Dickson's courtroom, Portland. The following members of the Advisory Committee were present:

Judge Wm L. Dickson
Otto J. Frohnmayer
W. P. Riddlesbarger
Stanton W. Allison
R. Thomas Gooding
H. E. Butler
C. E. Zollinger

The following members of the Probate Law and Procedure Committee were present:

Duncan L. McKay
H. E. Butler
J. Ray Rhoten
Robert W. Gilley
Charles M. Lovett
William M. Keller

Mr. David Frohnmayer was also present as a guest.

Frohnmayer presented a draft on descent and distribution of real and personal property, prepared as per the discussions at the Medford meeting in August. Copies were distributed to all members.

At Allison's suggestion, sub-paragraph V (5) was amended to read as follows:

> "(5) If no issue, parent, grandparent, or issue of either parent survives the intestate, to the issue of deceased grandparents in the nearest degree of kinship to the intestate within the fifth degree computed according to rules of the civil law, per capita without representation."

Gilley raised the question as to whether or not the last sentence of paragraph VI reading, "all distributees except those in the nearest degree take by representation." is in conflict with the language of paragraph V (5) which requires a per capita distribution. Zollinger explained that paragraph VI is limited to the definition of "representation". That definition is obviously not necessary to an interpretation of paragraph V (5) but only to paragraph V (3).

Allison raised a question concerning the word "lawful" in paragraph I (3). It was pointed out that paragraph XIII will specifically define the status of illegitimate children and therefore the word lawful will not be construed as affecting their status but only relates to adopted children who are likewise specifically covered in paragraph XII.

Under item two of the material distributed to all members by Frohnmayer (proposals discussed but not finally adopted by the committee) there was a discussion concerning Zollinger's redraft of the article on "title and possession of property". The purpose of Zollinger's redraft was to make it clear that the article would apply to a situation where the decedent died intestate. The following redraft was approved by the committee:

"Article_____

"Title and Possession of Property

"When a person dies intestate, title to his real and personal property passes at his death to his heirs; if a decedent dies testate, title to his real and personal property passes at his death to those to whom it is given by his Will. The title of the heirs or beneficiaries to the real or personal property of the deceased owner is subject to the rights of his surviving spouse and minor children and any claims for which the estate is liable. During administration the personal representative shall be entitled to possession of the real or personal property and shall have power to sell, mortgage, lease or otherwise dispose of the same as provided in this title."

Allison raised a question regarding the use of the terms "heirs","beneficiaries", etc. It was decided that the matter of defining terms at this point and throughout the draft is referred to Messrs. Wallace Carson and Bob Lundy.

Upon motion by Dickson, seconded by Riddlesbarger, it was decided to tentatively place the article "Title and Possession of Property" at the beginning of the appropriate chapter. However, it was pointed out that arrangement and sequence is an over-allproblem to be handled accordingly.

Riddlesbarger asked if, as per the Iowa Code, we substitute the word "estate" for "real and personal property". It was decided that this should not be done, as there are Supreme Court decisions on this question which should be clarified.

The motion to approve the article on "Title and Possession of Property", as set forth above, was made by Zollinger, seconded by Frohnmayer and unanimously passed.

Frohnmayer presented the chapter distributed to the members as item three, relating to inheritance from victims of murder.

A 1936 Harvard Law Review article by Wade (49 Harv. LR 715) was discussed. It was noted that Washington, in its new Probate Code, had adopted

Wade's suggestions almost verbatim.

It was pointed out that this problem was not limited exclusively to probate; that other matters such as trusts, joint and entirety property, guardianships and insurance were involved.

Frohnmayer's statement that the words "felonious intent" were superior to the word "feloniously" as used in the present statute went unchallenged (presumably because he is correct but the temporary secretary suspects considerable ignorance on the committee with respect to criminal law).

The title of the chapter was discussed. It was pointed out that the two primary words in the title, "inheritance" and "murder" were both somewhat inappropriate. The following proposals were made:

1. Allison - "Rights of persons causing death of others."

2. Gilley - "Person causing death not be benefit therefrom." (This is taken from the present heading ORS 111.060.)

Nothing was concluded with respect to the title of this chapter, it being agreed that this was essentially Mr. Lundy's problem.

There was a discussion concerning the elimination of the words "dower" and "curtesy" from section (3) of this chapter. No final decision was reached but the consensus was that the words should probably not be eliminated, even if dower and curtesy were eliminated prospectively.

Section IV of this chapter was discussed. Dickson suggested the possibility of providing that, as to all property rights covered, the slayer is deemed to have predeceased the decedent. It was pointed out that there are exceptions, i. e. joint property, tenants by the entirety, etc. Section IV was tentatively changed to read as follows:

"Section IV: Property passing by will or trust:

> "The slayer shall be deemed to have predeceased decedent as to property which would have passed to or for the benefit of the slayer by will of the decedent, or by trust instrument."

There ensued a long discussion with respect to Section V, relating to tenancy by the entirety. Hargrove v. Taylor, 236 Or. 451 and other cases were discussed. It was finally agreed that Allison and Zollinger should collaberate with Frohnmayer to redraft this section, probably providing for the passage of title to the heirs of the decedent with the slayer having a life interest in one-half of the profits.

Section VI, relating to jointly owned property, was then discussed. Zollinger feels that the solution as to joint property should be the same as tenants by the entirety. There was general agreement upon this thought.

Allison suggested using such language as "survivorship" etc., rather than "joint tenancy". This is because joint tenancy is supposed to have been abolished in Oregon.

Gilley and Keller started a discussion with respect to the difference between jointly owned bank accounts and other property. It was pointed out that a bank account is a more temporary fluid transaction than a permanent manner of holding title. There was a lengthy discussion with respect to the rights of creditors. It was suggested, with considerable support, that the line should be drawn on the basis of whether both (or all) signatures are required to effect a withdrawal or transfer.

Dave Frohnmayer, reading Wade's article in Harvard Law Review, suggested that Section VI (3) covers this problem by giving the courts the power to settle the matter equitably. The committee was polled and it was agreed that the statute should specifically do something with respect to bank accounts.

Zollinger suggested the following language:

> "If property is subject to withdrawal or transfer by instrument executed by less than all of the owners, it shall be deemed owned by the party who deposited or otherwise invested it. In the absence of proof of source, it shall be deemed owned equally by the parties in whose names it is held."

The entire matter of joint property, including the exception to be made with respect to bank accounts, was referred to Zollinger and Allison for the working out of appropriate language.

Section VII was discussed. It was decided to adopt the language of the Washington Code reading as follows:

> "Section VIII - Reversions, Vested Remainders, Contingent Remainders, and Future Interests. Property in which the slayer holds a reversion or vested remainder and would have obtained the right of present possession upon the death of the decedent shall pass to the estate of the decedent during the period of the life expectancy of decedent; if he held the particular estate or if the particular estate is held by a third person it shall remain in his hands for such period.
>
> As to any contingent remainder or executory or other future interest held by the slayer subject to become vested in him or increased in any way for him upon the condition of the death of the decedent:
>
> (a) If the interest would not have become vested or increased if he had predeceased the decedent, he shall be deemed to have so predeceased the decedent;

(b) In any case, the interest shall not be vested or increased during the period of the life expectancy of the decedent."

Section VIII was approved as submitted by Frohnmayer.

Section IX was tentatively approved.

Section X relating to insurance proceeds was next discussed.

The question was raised as to whether subsection (2) relating to disability insurance is properly within the scope of this chapter. It was felt that the adding of the word "disability" to the title of the chapter might eliminate the problem.

The question of the inclusion of rights under pension plans, profit sharing plans, annuity contracts, etc., was likewise discussed.

The entire section was referred to Allison and Zollinger to rewrite in accordance with the thoughts expressed.

Section XI was next discussed. It was pointed out that Washington Code did not require a written notice. Dickson indicated he definitely preferred the requirement of a written notice. The following language was suggested and received general approval:

"Section XI: Payment by insurance company, bank, etc., no additional liability.

"Any insurance company making payment according to the terms of its policy or any bank or other person performing an obligation for the slayer as one of several joint obligations shall not be subjected to additional liability by the terms of this chapter if such payment or performance is made without written notice of a claim arising pursuant to this chapter."

This section was likewise assigned to Allison and Zollinger for redrafting.

Section XII was discussed. Upon it being pointed out that this section only related to bonafide purchasers, no furtherproblems seem to be in evidence.

Section XIII was discussed at length. The question arose as to whether or not an acquittal should control so asto relieve an alleged slayer from any liability or disability under this chapter and it was decided that it should not.

Contrary to the original consensus that a conviction should be conclusive, it was finally decided, largely because of the long and tortuous course of practically all criminal convictions, that a conviction itself would not be conclusive but that the record of the conviction should be admissible in evidence in every case. The language of the Washington Code (11.84.130) was generally approved. The matter was referred to Allison and Zollinger for the preparation of a further draft.

Inheritance by, through and from an adopted child.

Shetterly presented the results of his study of this problem. He reviewed the present statutory law in Oregon and the treatment of the matter elsewhere, including the Iowa Code. After considerable discussion, the following language was approved and ordered submitted to Mr. Lundy:

> "For the purpose of inheritance, by, through and from an adopted child, whether adopted in Oregon or elsewhere, the child shall be regarded as the child of the adopting parent, and he shall not be regarded as the child of his natural parent; except that if the spouse of a natural parent adopts the child, the child shall be regarded as the child of the natural parent and the adopting parent."

There was a brief discussion of ORS 111.070 relating to reciprocity between foreign countries and the right of non-resident aliens to take property. Dickson suggested that he contact Peter Schwabe and Catherine Zorn, who have had the most experience in such matters. If they are willing to do so, they will be asked to prepare a draft of proposed legislation relating to this subject. It is expected that such drafts would be submitted to the committee for study without written or oral argument.

Uniform Simultaneous Death Act.

It was agreed that since Chap. 112 ORS contains the Uniform Act only, no changes are necessary.

Dower and Curtesy

Allison commenced the discussion of this subject by reviewing the relationship of the various changes contemplated to be made in the law of descent and distribution. He suggested that if the widow's intestate inheritance of real property is changed to 50% of the fee interest, the reason for dower has largely disappeared.

Allison also mentioned that he felt the reception of the Judiciary Committee was favorable with respect to substituting a fee interest in a widow, but that it was not favorable with respect to the declaration of marital rights.

Upon motion duly made and seconded the following Resolutions received the approval of both committees:

> 1. The bill to be submitted to the legislature should eliminate dower and curtesy, and not be a part of any companion bill relating to marital right or otherwise.
>
> 2. The rights given to a surviving spouse under ORS 113.050 (right to take as against a will) should be extended to real property as well as personal property.

It was further decided to refer to Allison the task of preparing appropriate draft of proposed legislation to be submitted by Dickson to Lundy.

Inheritance by, through and from an illegitimate child.

Shetterly presented the results of his study of this matter. The statutory history in Oregon was reviewed. It was moved, seconded and passed that ORS 111.231 be recommended for repeal and that the following revision of the language of Section 309 of the Uniform Act be recommended:

"For the purpose of inheritance to, through, and from an illegitimate child

(1) The child shall be treated as the legitimate child of his mother; and

(2) The child shall also be treated as the legitimate child of the father if, during the lifetime of the child

(a) The father marries the mother;

(b) The father acknowledges in writing that the child is his own; or

(c) A Court determines the paternity of the child during the father's lifetime in a proceeding brought for that purpose."

Advancements

Shetterly presented his study of this subject. The present law was reviewed.

The first problem presented was whether the rule as to advancements should apply to a child and other lineal descendants only, or should it apply to any heir. The feeling of both committees was that the doctrine should logically extend to all parties.

A resolution was then made, seconded and adopted that the subject of advancements be continued on the agenda for the next meeting and that the secretary be instructed to include as an appendix to these minutes section 310 of the Uniform Code and the new Washington Code section (11.04.041) dealing with advancements.

AGENDA NEXT MEETING

It was decided to omit the October meeting and to have a 2-day meeting in the courtroom of Judge Dickson beginning Friday, November 19, 1965 at 1:15 p.m., to continue that afternoon and all day Saturday, November 20th.

The agenda for the 2-day November meeting was determined to be as follows:

1. Continuation of discussion concerning advancements and retainer.

2. Consideration of Bills redrafted pursuant to decisions made at this September meeting, including primarily the section on inheritance from victims of murder.

3. Consideration of the chapter on wills --- presentation by Mr. Riddlesbarger.

4. Consideration of the reciprocal rights of inheritance - non-resident aliens.

Meeting adjourned.

APPENDIX

Washington - "Sec. 11.04.041 ADVANCEMENTS. If a person dies intestate as to all his estate, property which he gave in his lifetime as an advancement to any person who, if the intestate had died at the time of making the advancement, would be entitled to inherit a part of his estate, shall be counted toward the advancee's intestate share, and to the extent that it does not exceed such intestate share shall be taken into account in computing the estate to be distributed. Every gratuitous inter vivos transfer is deemed to be an absolute gift and not an advancement unless shown to be an advancement. The advancement shall be considered as of its value at the time when the advancee came into possession or enjoyment or at the time of the death of the intestate, whichever first occurs. If the advancee dies before the intestate, leaving a lineal heir who takes from the intestate, the advancement shall be taken into account in the same manner as if it had been made directly to such heir. If such heir is entitled to a lesser share in the estate than the advancee would have been entitled had he survived the intestate, then the heir shall only be charged with such proportion of the advancement as the amount he would have inherited, had there been no advancement, bears to the amount which the advancee would have inherited, had there been no advancement.

Section 310 Uniform Probate Code (advancements.)

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

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

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

(d) An advancement is to be valued as of the time of the advancement.

Oregon State Bar

808 S. W. 15TH AVENUE
PORTLAND, OREGON 97205
227-0495

October 11, 1965

To: All Members of the 1965-66 Oregon State Bar committee on Probate Law and Procedure

Term Expiring 1966:	Term Expiring 1967:	Term Expiring 1968:
Wade P. Bettis, Chairman	John M. Copenhaver	Shirley Field
Harry D. Boivin	Robert W. Gilley, Secretary	Gregory T. Hornecker
Patricia Braun	George Luoma	Charles M. Lovett
Campbell Richardson	J. Ray Rhoten	Donald G. Krause
John C. Warden	William E. Tassock	Joseph J. Thalhofer

NOTICE OF NEXT MEETING

Please note October meeting is cancelled

DATE AND TIME: Meeting begins 1:15 p.m. on Friday, November 19, 1965 and continues on Saturday November 20.

PLACE: Judge Dickson's Courtroom, 244 Multnomah County Courthouse, Portland, Oregon.

AGENDA:
1. Continuation of discussion concerning advancements and retainer.
2. Consideration of Bills redrafted pursuant to decisions made at this September meeting, including primarily the section on inheritance from victims of murder.
3. Consideration of the chapter on wills --- presentation by Mr. Riddlesbarger.
4. Consideration of the reciprocal rights of inheritance - non-resident aliens.

Minutes of the September 18, 1965 meeting and proposals 1, 2, 3, 4, 5 and 6 will be mimeographed and mailed to all members of the 1964-65 and 1965-66 committees, as well as members of the Oregon Probate Law Revision Advisory Committee.

cc: All Members, 1965-66 and 1965-64 committee.
All Members, Oregon Probate Law Revision Advisory Committee.

To: Members, 1965-66 OSB Committee on Probate Law and Procedure
Please indicate by signing and returning the colored copy in enclosed envelope, whether or not you will be able to attend the November 19-20 meeting.

( ) I will attend ( ) I will be unable to attend

Signature

PROBATE LAW REVISION

ADVISORY COMMITTEE

Minutes

November 17, 1965
November 18, 1965

Meeting convened at 1:30 P.M. Friday, November 17, 1965, in Judge Dickson's Courtroom, Portland, Oregon. The following members of the Advisory Committee were present:

Judge William L. Dickson
Clifford E. Zollinger
Stanton W. Allison
Herbert E. Butler
Wallace P. Carson
Otto J. Frohnmayer
R. Thomas Gooding
Nicholas Jaureguy
William P. Riddlesbarger
Patricia A. Lisbakken

The following members of the Probate Law and Procedure Committee were present:

Wade P. Bettis
Robert W. Gilley
Patricia Braun
Campbell Richardson
John C. Warden
John M. Copenhaver
J. Ray Rhoten
Charles M. Lovett
Donald G. Krause
Joseph J. Thalhofer

Dickson reported he and Zollinger attended meeting with parent committee in Mr. Love's office, and that parent Committee is anxious to have the Probate Code revision completed by August, 1966.

1. RIGHTS OF PERSON RELONIOUSLY CAUSING DEATH OF ANOTHER - Proposal #7.

Frohnmayer reported that Allison and Zollinger had reviewed the effect of felonious death upon inheritance. Distributed to all members present was a drafted rewrite of the material that had been gone over at the last meeting.

Jaureguy questioned the title, as it did not appear one feloniously causing death has any "rights." Zollinger noted a slayer does have a right to a one-half interest for life in property owned by the entirety, and Allison advised all titles would be reviewed and revised where necessary by Lundy.

Sections 1 and 2 were discussed at the last meeting.

Section 3 has been revised in accordance with prior discussions to eliminate the words "dower" and "curtesy."

Section 4 has been revised in accordance with prior discussions to eliminate the words "by devise or legacy from the decedent" and to substitute therefor "by will of the decedent or by trust."

Sections 5 and 6 were discussed at the last meeting and have been revised in accordance with general agreement that making a slayer a constructive trustee for the benefit of other people is probably not realistic, and that it would be better if such property were to immediately pass to the heirs of decedent. As to entirety property, the slayer would be entitled only to a life estate of the one-half interest. Hargrove v. Taylor, 236 Or. 451, was discussed. Reference to joint tenancy has been eliminated. Riddlesbarger noted the section originally provided for "one-half of the rents and profits during his lifetime," but a life tenancy involves obligations, such as payment of taxes, etc., so language has been revised to provide a one-half interest for life.

Butler questioned whether "heirs" was broad enough to include devisees and legatees. It is noted that when a code section of definitions is prepared, it shall include definition of "heirs" as including devisees and legatees.

In answer to inquiry as to whether or not such property would pass free of probate, Dickson pointed out that Proposal #1 has provided title to a decedent's real and personal property is subject to the rights of the surviving spouse, minor children, and claims for which the estate is liable. In answer to question as to why there is differentiation between property held as a tenant by the entirety and that held with others with a right of survivorship, Hargrove v. Taylor, supra, held one has a constitutional right to retain property and cannot be deprived of it without due process of law. Thus, all Committee can do is legislate as to rights of inheritance. Forfeiture of the slayer's interest would violate constitutional rights. Zollinger mentioned that Committee had decided not to taint blood, thus property could still pass under appropriate circumstances to heirs of a slayer.

Section 5 (1) of the redraft was amended in accordance with Zollinger proposal to read as shown in Proposal #7, attached hereto, and upon motion carried was approved as amended.

Section 5 (2). Allison read redraft and noted it provides the slayer shall take nothing of his victim. The intent is that upon the death of one co-owner, the decedent's interest would vest in the survivors other than the slayer, and upon the death of a second co-owner, his title would vest in the then remaining persons. The slayer would still retain his same right to receive his share of the profits, b ut no greater right than he had before his crime. Braun questioned what would happen with a joint bank account, if the slayer could withdraw all proceeds from that account and spend them. Zollinger agreed that he could, but the slayer would be accountable to the other survivors and would have to return the proceeds of the account. Frohnmayer suggested problem of slayer being final survivor among three or more persons might be left for consideration under the law of restitution, that the slayer should not be deprived of property he already has, but should be prevented from enrichment by his slaying.

Rhoten expressed concern as to what would happen if theslayer outlived a blameless survivor. Allison stated the primary purpose of the section is to deprive the slayer of the fruits of his crime, not to reward the estate of the decedent. Where there are a number of joint tenants, as long as the estate continues until the death of the final survivor one of these tenants will be entitled to possession and to a share of the rents, profits, etc. There is no intent to deprive the slayer of these. The only intent is to deprive the slayer of the fruits of his crime. Krause pointed out that even though the slayer may have changed the rights of other survivors he does not himself benefit. Zollinger and Carson believed this problem should be left for the Courts to decide, that the slayer should take nothing as a survivor of his victim but his rights in relation to other tenants should be determined by the Court.

Riddlesbarger questioned whether or not this subsection actually passes title as stated in Section 2, and Zollinger and Dickson replied that by providing the slayer shall take nothing as a survivor among the owners, he has been cut off completely as a survivor, and when he is cut off provision is made for the passage of title.

The remote possibility of a slayer killing seventeen co-owners by the use of dynamite was discussed, and it was agreed the simultaneous death act would in such case be applicable.

Section 5(2) upon motion carried was approved as shown in Proposal No. 7, attached hereto.

Section 5(3). Allison pointed out the language had been slightly changed from the original draft and now more clearly expresses the same thought. In answer to query by Gooding, Zollinger explained the intent is the provision shall apply to any trust arising because a greater proportion of the property has been contributed by one party than by another, that it is applicable to an implied as well as express contract, to a constructive as well as resulting trust. Whether the ownership is legal or equitable, an agreement between the parties should control. Jaureguy questioned whether (3) is necessary and believed it might be misleading, e.g., in the event of an agreement between the parties and one kills another. Zollinger advised the source of this provision is the Washington code and Wade, 49 Harvard Law Review 715, and that his first reaction was it might not be necessary, but because the source is reliable the language has been slightly revised so it is more understandable.

Frohnmayer cited the original language from the Washington statute: "or any trust arising because a greater proportion of the property has been contributed by one party than the other," and Wade, Harvard Law Review, supra, to the effect this is intended to cover the situation where there are three or more joint tenants or obligees. When the slayer then kills, it will be impossible to say that any particular portion of the property vests in the estate of the decedent. An attempt is here made to indicate when a resulting trust or agreement between the parties should be enforced. Frohnmayer felt it would confuse the purpose of this statute to leave (3) in,

as purpose is to keep the wrongdoer from profiting in spite of his agreement.

Section 5 (3), upon motion carried, is deleted.

Section 6. Discussion as to precise language to convey intent that the life estate of the decedent should be measured by the decedent's life expectancy according to mortality tables. Carson, Jauregui and Bettis submitted a language version which provided for normal life expectancy rather than the use of "standard tables" after Zollinger pointed out life expectancy tables sometimes categorize people by living conditions, e.g., in retirement homes, various communities, etc., and intent here is to tie the expectancy to an average person rather than to decedent himself.

Section 6, as rewritten and set forth in Proposal #7 attached hereto, upon motion made and carried, was approved in its entirety.

Section 7. Allison stated this is the former Section IX, which was tentatively approved at the last meeting. Upon motion carried, Section 7 was approved.

Section 8. Allison stated this is original Section X, that question had arisen at the last meeting as to the desirability of including reference to disability insurance; that Mr. Zollinger had questioned insurance people and had been told none had ever heard of disability insurance being payable to a beneficiary other than the disabled; therefore, reference to such insurance is omitted. Zollinger pointed out reference had been inserted to profit sharing, pension plans and employee benefit provisions.

Section 8 (1) and (2). After slight language revision as set forth in Proposal #7 attached hereto, was, upon motion carried, approved.

Section 9. Allison advised this is former Section XI, the language of which was at the last meeting tentatively approved, and that this Section 9 approximates the former section. It was determined that written notice should be given only by a claimant, that language should be added to provide disposition of property could be withheld upon receipt of such notice. Riddlesbarger pointed out that if proper notice of a claim is made one nevertheless makes a payment, he is not necessarily relieved from liability. The protection lies in the withholding of payment until determination, not in the making of payment.

Section 9 as amended, upon motion carried, was approved as set forth in Proposal #7 attached hereto.

Section 10. Allison stated this is former Section XII. In answer to inquiry as to whether a discharge in bankruptcy is a defense to a suit for breach of trust, Gooding advised that such breach is not dischargeable. Thus, by having the slayer hold the property in trust, there is an advantage over a mere liability. [illegible] noted that once a matter is adjudicated the purchaser has [illegible] a matter of record, and prior to adjudication, there is no problem.

Section 10 as amended to read "provisions" rather than "terms" /of this chapter/, as set forth in Proposal #7 attached hereto, was, upon motion carried, approved.

Section 11. Upon motion carried, approved without change.

Section 12. Upon motion carried, approved without change.

Rights of Persons Feloniously causing Death of Another, as set forth in Appendix hereto, approved for submission to Lundy as Proposal #7.

2. WILLS.

Riddlesbarger distributed copies of a redraft of his chapter on Wills, and noted that originally he had included a section of definitions. Since the matter of definitions has been postponed by the Committee, such will eventually either appear at the beginning of this chapter or at the beginning of this chapter or at the beginning of the Probate Code, to be used throughout.

Section 1. Discussion as to the proper age at which one may be permitted to make a will. Riddlesbarger noted a great majority of other states use the age 18, as does the Mundorff Code. Upon motion carried, both Committees approved the age of 18.

It was noted it had been the aim of the Committees to forego the use of excessive terminology, and the section was accordingly reworded. As now written, the section provides one who has lawfully married does not subsequently lose his capacity to make a will by reason of divorce, even though he may yet be under the age of 18.

Section 1 now reads as set forth in the rewritten draft attached hereto, and as thus amended, approved upon motion carried.

Section 2. It is noted the section on definitions shall include definition of "will" as including a codicil, thus term "codicil" omitted. Riddlesbarger recommended ORS 114.050 be eliminated, since having reduced the age to 18 years, nuncupative wills do not appear necessary. Allison advised in Alaska experience proved deathbed wills were full of traps and should be eliminated.

ORS 114.050 upon motion carried shall be repealed. Motion carried to incorporate provision in repeal to protect wills executed prior to this act.

Discussion as to desirability of admitting to probate in Oregon holographic wills which are valid where made, but invalid here. Dickson noted this is wide open field for fraud, and of those he had seen most wills written by decedent defy construction. Possibility discussed of having provision elsewhere in probate code for ancillary proceedings. Motion carried to delete second proviso in Section 2.

ORS 114.060, upon motion carried, shall be repealed and savings clause shall appear in repealing act to provide for wills executed prior to the act.

Section 2, upon motion carried, approved to read as set forth in rewritten draft.

Section 3. Riddlesbarger reported identical with present statutory provision. Upon motion carried, approved to read as set forth in rewritten draft.

Section 4 discussed, determined age of witness should be raised from 16 to 18 years. As thus amended, upon motion carried, approved. [Note, however, on November 18 entire section is deleted.]

Meeting temporarily adjourned at 6:05 P.M.

Meeting reconvened at 8:30 A.M., Saturday, November 18, 1965 in Judge Dickson's Courtroom. All members of Advisory Committee present except Thomas W. Mapp and Robert W. Lundy. Following members of Probate Law and Procedure Committee were present:

Wade P. Bettis
Robert W. Gilley
Patricia Braun
Campbell Richardson
John C. Warden
John M. Copenhaver
J. Ray Rhoten
Shirley Field
Charles M. Lovett
Donald G. Krause
Joseph J. Thalhofer

Section 4. Carson requested reconsideration of matter of minimum age requirement for a witness. He believed perhaps hundreds of wills now in existence would be rendered void by this change in the law, that frequently law firms employ secretaries just out of high school who act as witnesses. Oregon Code presently provides as to competency of witnesses generally, and he saw no reason to change requirements for probate code. ORS 44.020 and ORS 44.030 were discussed and the competent witness as therein defined being one who can perceive and can relate his perceptions to others, and the application as to a witness to a will. Richardson believed there is no reason competency should be defined differently for attesting a will than for witnessing any other act. He stated it is question of weight of evidence, rather than admissibility. Allison pointed out by requiring minimum age you are placing further condition on validity of will submitted for probate.

Section 4 upon motion carried was deleted.

Section 5 read by Riddlesbarger. Jaureguy noted if a will is executed under undue influence and codicil is later executed which refers to that will, the codicil (if valid) validates the will. Upon motion carried, Section 5 deleted.

Sections 6, 7 and 8 are referred to Richardson and Riddlesbarger for review and discussion at next meeting.

Section 9. Dickson noted Oregon law has repudiated dependent relative revocation. Reported Iowa Code defines will to include instrument which merely revokes a will. Frohnmayer suggested definition of "will" should include a revocation. Section 9 with housekeeping amended approved upon motion carried to read as set forth in rewritten draft.

Section 10 Riddlesbarger stated is present law. Zollinger noted execution of subsequent will is not necessarily revocation of prior will, except to extent wills conflict. Allison reminded Committees intended definition will describe will as including codicils and revocation.

Warden reported that 129 Or. 77 provides word "republish" does not mean to re-execute. Publication signifies an act of declaration or making known to witnesses that testator understands instrument is to be his last will and testament. Frohnmayer reported in Washington destruction or cancellation of subsequent will shall not revive prior will. Zollinger reminded Committees under definition of will as including codicil, if codicil is destroyed, will is then ineffective. Riddlesbarger advised Ohio Code provides no will which shall be revoked or become invalid shall be revived other than by execution of another will or codicil in which it is incorporated by reference. Jaureguy believed if revocation is in writing, a testamentary instrument, and it evidences intention to revive earlier will, it should so do.

Section 10 upon motion carried amended to read as set forth in rewritten draft.

Section 11. Riddlesbarger read, advised it is original act as drafted by members of Advisory Committee and submitted to last legislature--passed in Senate, House Committee first tabled, then wrote present compromise. Committee determined no reason to diverge from original position. Upon motion carried, approved as amended to read as set forth in rewritten draft.

Section 12 reserved for later consideration.

Section 13. Bill No. 7 approved by Law Improvement Committee, too late to be submitted to last legislature. Did not receive consideration by full Advisory Committee. Zollinger restated his opinion that specific disposition of property by will should not be changed by a pledge of that property, that pledging should not have effect of a testamentary act. Lively discussion as to whether such act is in fact making a will for testator, and whether section would carry out testator's intent, or would defeat it; whether intent would be different as to encumbrance existing prior to will and one placed against property subsequent thereto, and as to purchase money mortgage and another. Frohnmayer reported Washington, 11.12.070 provides any specifically devised real or personal property which is subject to a mortgage shall be taken subject thereto unless will provides otherwise. It does not include a pledge, etc., and Gilley advised Iowa Code is similar. Field asked result if assets were insufficient to discharge all obligations. Zollinger replied abatement would apply. Frohnmayer pointed out one frequently must warn testators to consider amount of cash which will be available for payment of legacies at time will is probated and counsel percentages rather than dollars.

Motion made to favor partial exoneration. Vote counted, motion lost. Committees polled, lost in Advisory Committee 3 to 6.

Section 13 (1). Motion carried to approve as amended to read as set forth in written draft.

Section 13 (2). Question arose as to whether this subsection should appear in definitions; determined Lundy would later decide. Motion carried to approve as amended as set forth in rewritten draft.

Section 13 (3). Motion carried to approve as amended as set forth in rewritten draft.

Meeting temporarily adjourned at 12:30 P.M.

Meeting reconvened at 1:40 P.M. Present were all members of Advisory Committee except Riddlesbarger, Lundy, Mapp. Members of Probate Law and Procedure Committee present were Gilley, Braun, Warden, Krause and Lovett.

Section 13 (4). Carson read, explained subsection would apply, for instance, to a claim based upon a note secured by a mortgage. Personal representative is subrogated to rights of creditor against devisee or legatee, with right of reimbursement out of specifically devised property to extent devisee does not have right to have debt exonerated. Discussion as to whether there should be lien or subrogation.

Section 13 (4) upon motion carried revised as shown in rewritten draft.

Section 13 (5) upon motion carried revised as shown in rewritten draft.

Agenda for next meeting discussed. Meeting adjourned at 3:25 P.M.

Proposal #7

RIGHTS OF PERSON FELONIOUSLY CAUSING DEATH OF ANOTHER

Sec. 1. Definitions. As used in this Chapter.

1. Slayer shall mean one who with felonious intent takes or procures the taking of the life of another.

2. Decedent shall mean any person whose life is so taken.

Sec. 2. Slayer not to benefit from death.

No slayer shall in any way acquire any property or receive any benefit as the result of the death of the decedent, but such property shall pass as provided in the sections following.

Sec. 3. Slayer deemed to predecease decedent.

The slayer shall be deemed to have predeceased the decedent as to property which would have passed from the decedent or his estate to the slayer under the statutes of descent and distribution or would have been acquired by statutory right as the surviving spouse of the decedent.

Sec. 4. Property passing by will or trust.

The slayer shall be deemed to have predeceased decedent as to property which would have passed to or for the benefit of the slayer by will of the decedent or by trust.

Sec. 5. Rights of survivorship.

1. Upon the death of the decedent title to property held by the slayer and decedent as tenants by the entirety or with a right of survivorship shall remain in the slayer to the extent only of an undivided one-half

interest for his lifetime and, subject thereto, shall pass to the heirs, devisees or legatees of the decedent other than the slayer subject to the provisions of Proposal #1.

2. Upon the death of a decedent who, with the slayer and another or others, was the owner of property with a right of survivorship, the slayer shall take nothing as survivor among the owners.

Sec. 6. Reversions, vested remainders, contingent remainders, and future interests.

1. Property in which the slayer holds a reversion or vested remainder subject to an estate in the decedent for his lifetime shall pass to the heirs, devisees or legatees of the decedent for a period of time equal to the normal life expectancy of a person of the decedent's sex and of his age at the time of his death; if the particular estate is held by a third person for the lifetime of the decedent it shall continue in such person for a period of time equal to the normal life expectancy of a person of the decedent's sex and of his age at the time of his death.

2. As to any contingent remainder or executory or other future interest held by the slayer, subject to become vested in him or increased in any way for him upon condition of the death of the decedent:

a. If the interest would not have become vested or increased if he had predeceased the decedent, he shall be deemed to have so predeceased the decedent;

b. In any case, the interest shall not be vested or increased during a period of time equal to the normal life expectancy of a person of the decedent's sex and of his age at the time of his death.

Sec. 7. Property appointed--powers of revocation or appointment.

1. Property appointed by the will of the decedent to or for the benefit of the slayer shall be distributed as if the slayer had predeceased the decedent.

2. Property held either presently or in remainder by the slayer, subject to be divested by the exercise by the decedent of a power of revocation or a general power of appointment, shall pass to the heirs of the decedent and property so held by the slayer, subject to be divested by the exercise by the decedent of a power of appointment to a particular person or persons or to a class of persons, shall pass to such person or persons or in equal shares to the members of such class of persons exclusive of the slayer.

Sec. 8. Insurance proceeds.

1. Proceeds payable to or for the benefit of the slayer as the beneficiary or assignee of any policy or certificate of insurance or certificate of membership issued by any

benevolent association or organization on the life of the decedent, or as the survivor of a joint life policy, or proceeds under any pension, profit sharing or other plan, shall be paid instead to the personal representative of the decedent, unless the policy, certificate or plan designates some person other than the slayer of his estate as secondary beneficiary to him in which case such proceeds shall be paid to such secondary beneficiary in accordance with the applicable terms thereof.

2. If the decedent is beneficiary or assignee of any policy or certificate of insurance on the life of the slayer, the proceeds shall be paid to the personal representative of the decedent on the death of the slayer, unless the policy or certificate names some other person other than the slayer or his personal representative as secondary beneficiary, or unless the slayer by naming a new beneficiary or assigning the policy or certificate performs an act which would have deprived the decedent of his interest therein if he had been living.

Sec. 9. Payment by insurance company, bank, etc., no additional liability.

Any insurance company making payment according to the terms of its policy or any bank, trustee, or other person performing an obligation to the slayer shall not be subjected to addi-

tional liability by the terms of this chapter if such payment or performance is made without written notice by a claimant of a claim arising pursuant to this chapter. Upon receipt of such notice the person to whom it is directed may withhold any disposition of the property pending determination of his duties.

Sec. 10. Rights of persons without notice dealing with slayer. The provisions of this chapter shall not affect the rights of any person, who for value and without notice purchases or agrees to purchase from the slayer property which the slayer would have acquired except for the provisions of this chapter, but all proceeds received by the slayer from such sale shall be held by him in trust for the persons entitled to the property under the provisions of this chapter, and the slayer shall also be liable both for any portion of the proceeds which he may have dissipated and for any difference between the actual value of the property and the amount of its proceeds.

Sec. 11. Record of conviction as evidence against claimant of property. The record of his conviction of having participated in the killing of the decedent with felonious intent shall be admissible in evidence against a claimant of property in any civil action arising under this chapter.

Sec. 12. Severability.

If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application and to this end the provisions of this act are declared to be severable.

Rewritten Draft
11/19-20/65

WILLS

FORMALITIES

Sec. 1. Who may make wills. Any person 18 years of age or older or who has lawfully married, and who is of sound mind, may dispose of his property by will.

Sec. 2. Will to be in writing; execution; attestation. Every will shall be in writing, signed by the testator, or by some person under his direction and in his presence, and shall be attested by two or more competent witnesses, each subscribing his name thereto in the presence of the testator.

Sec. 3. Person signing testator's name to sign his own name as witness. Any person who signs the testator's name to any will by his direction shall subscribe his own name as a witness to such will, and state thereon that he signed the testator's name at his request.

Sec. 4. (Deleted.)

Sec. 5. (Deleted.)

Sec. 6, 7 and 8. (Reserved for later consideration.)

REVOCATION

Sec. 9. Express revocation or alteration. A will cannot be revoked or altered otherwise than by another will, or unless the will is burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence and by his direction; and when so done by another person, the direction of the testator and the fact of such injury or destruction must be proved by two or more witnesses.

Sec. 10. When cancellation of the will revives prior will. If, after making a will, the testator shall make a subsequent will, the destruction, cancellation or revocation of such subsequent will shall not revive the earlier will.

Sec. 11. Subsequent marriage or divorce of testator as a revocation. (1) If after making his will the testator marries and the spouse of the testator is living at the time of his death, the will is revoked unless provision has been made for the surviving spouse by a written antenuptial agreement, or marriage settlement, or unless the will evidences the intent of the testator that the will shall not be revoked by the marriage.

(2) If after making his will the testator is divorced or his marriage is annulled, unless the will evidences a different intention, the divorce or annulment revokes all provisions in the will in favor of the former spouse and any provision naming the former spouse as executor, and the effect of the will is the same as though the former spouse had predeceased the testator.

Sec. 12. (Reserved for later consideration.)

Sec. 13. Encumbrance as a revocation of previous will. (1) If property upon which an encumbrance exists at the death of the testator is specifically given by will executed by the testator on or after the effective date of this 1967 Act, the beneficiary thereof shall take the property subject to the encumbrance, and the personal representative shall not be required to make any payment on account of the obligation secured by the encumbrance, except when the will provides otherwise or in the circumstances set forth in subsection (3) or subsection (4) of this 1967 Act.

(2) For the purposes of this 1967 Act, a voluntary encumbrance is a mortgage, trust deed, security agreement or pledge, or a lien arising from labor or services performed or materials supplied or furnished, or any combination thereof, upon or in respect of the real or personal property, and an involuntary encumbrance is any other encumbrance upon the real or personal property, all irrespective of whether the testator was personally liable upon the obligation secured by the encumbrance.

(3) The devisee or legatee of real or personal property specifically devised or bequeathed, unless the will provides otherwise, may require that an encumbrance thereon be fully or partially discharged out of other assets of the testator's estate not specifically devised or bequeathed if:

(a) The encumbrance is an involuntary encumbrance; or

(b) The encumbrance is a voluntary encumbrance and

(i) The will specifically directs full or partial discharge of the encumbrance out of other assets, but a provision in the will for payment of the debts of the testator shall not, of itself, constitute such direction; or

(ii) The personal representative receives rents or profits, or both, from the property and the devisee or legatee requests that he apply all or part of the rents or profits, or both, in full or partial discharge of the obligation secured by the encumbrance, in which event the personal representative shall apply the rents or profits, or both, upon principal or interest, or both, owing upon the obligation, as requested; or

(iii) Any beneficiary under the testator's will requests, in a writing subscribed by the beneficiary and delivered to the personal representative, that the obligation secured by the encumbrance be fully or partially discharged out of property, or the proceeds of sale thereof, which otherwise would pass to the beneficiary.

(4) If a claim based upon an obligation secured by a voluntary encumbrance on specifically devised property is presented and paid or if specifically devised real property that is subject to a voluntary encumbrance is redeemed and if the beneficiary is not entitled to exoneration, the personal representative shall have a lien upon such property in the amount so paid, which lien shall be administered upon as an asset of the estate.

(5) If property upon which an encumbrance exists at the death of the testator is specifically devised by a will executed before the effective date of this 1967 Act, the rights of the beneficiary of such property in respect of exoneration thereof out of other assets of the estate shall be determined in accordance with the law in effect at the time of the execution of the will.

December 1, 1965

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

MEETING NOTICE

Date and Time: Friday, December 17, 1965, at 1:30 P.M., continuing Saturday, December 18, 1965.

Place: Judge Dickson's Courtroom
244 Multnomah County Courthouse
Portland, Oregon

Agenda:

1. Consideration of Reciprocal Rights of Inheritance - Non-Resident Aliens. (Peter Schwabe and Walter L. Barrie.)

2. Continuation of November discussion on Wills, as presented by Mr. Riddlesbarger, his paragraph No.6, No.12, and Nos.14 et seq.

3. Continuation of September discussion concerning Advancements and Retainer. (Mr. Frohnmayer.)

4. Consideration of Chapter 115, including Proof of Wills, Priority of Right to Administer and Administratior's Bond. (Messrs. Riddlesbarger and Frohnmayer.)

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

PAL:jf

ADVISORY COMMITTEE
Probate Law Revision

Twentieth Meeting, December 17 and 18, 1965
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The twentieth 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, December 17, 1965, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger (arrived 4 p.m.), Allison, Butler, Frohnmayer, Gooding, Jaureguy, Lisbakken and Riddlesbarger. Carson and Husband were absent.

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

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

1. Inheritance by Nonresident Aliens. Dickson noted that Barrie and Schwabe had been invited to submit their views and recommendations on the matter of inheritance by nonresident aliens and the present Oregon reciprocity statute (i.e., ORS 111.070) governing this matter. He indicated that both Barrie and Schwabe had sent him letters on the subject [Note: Copies of a memorandum, dated December 14, 1965, containing reproductions of these letters were distributed to all members of both committees before the meeting], and that they were present at the meeting to comment orally.

Schwabe recommended repeal of ORS 111.070, expressing the view that it was unfair to Oregon residents who have relatives in foreign countries to deny by Oregon law the right of those residents to leave, by will or intestacy, all or part of their estates to those relatives. He commented that ORS 111.070 had been more strictly applied by the Oregon Supreme Court than a similar California statute by the Supreme Court of that state. He suggested that, if the committees were inclined to favor retention in Oregon law of a principle of not benefiting hostile foreign governments, a statute similar to that of New York (i.e., N.Y. Surr.Ct. Act §269-a), which embodies the so-called "benefit" rule whereby inheritances to nonresident aliens are conditioned

upon their receipt thereof free from confication by their governments, might be adopted in lieu of ORS 111.070.

Barrie recommended retention of ORS 111.070, but suggested that the section might be amended to require notice to the State Land Board of circumstances that might result in escheat under the section, to clarify an ambiguity in the wording of the section and, possibly, to provide for recovery of escheated estates by nonresident aliens if the conditions of the statute should be satisfied in the future. He commented that there was at present no federal control on the administration and distribution of estates, and that this circumstance supplied one answer to the absence of federal control on the passing of estates to nonresident aliens. He stated that the basic question was whether Oregon should extend benefits through the distribution of estates to heirs in Communist countries without reciprocal benefits being extended by those countries. He noted that, by the manipulation of rates of exchange for foreign currency, some countries (Czechoslovakia, for instance) are making substantial profit on moneys from the United States going to heirs in those countries. He explained and commented upon the "benefit" rule.

Allison asked whether the Oregon reciprocity statute had been effective in inducing foreign countries to liberalize their laws or practice on inheritance by United States citizens. Schwabe responded that he did not know of a single European country that prohibited inheritance by United States citizens from its own citizens and that in recent year hundreds of American heirs actually had received their inheritances from foreign citizens, but that it was a question whether this policy was in fact a result of state reciprocity statutes in this country or of the recent increase in assets of citizens of foreign countries. In response to questions by Frohnmayer, Schwabe stated that so far as he knew neither Russians nor Poles were prohibited by their governments from accepting inheritances from United States citizens, nor did those governments confiscate any of such inheritances.

In response to a question by Butler, Barrie estimated that perhaps $100,000 escheated each year under ORS 111.070.

Butler suggested that if Oregon law allowed a bequest to a Russian citizen, it might be next to impossible to obtain guaranteed delivery of the funds to the legatee, and asked whether a custodial arrangment would have to be employed in this circumstance. Schwabe commented that distributions were being made to Russian citizens because of proof of actual delivery. Butler noted that the New York statute applied not only to money but to other property, and that responsibility for custody under the statute was in the probate court. He

suggested that, if the approach of the New York statute were adopted in Oregon, it might be preferable to place custodial responsibility in the State Land Board, which presently handles escheated estates, instead of in the probate court. Schwabe indicated that in New York the liquidation of personal property was usually required, although the sale of securities was not insisted upon, and that money was actually deposited in a bank and the deposit record given to the probate court. He stated that if the committees were disposed to favor a statute similar to that of New York, he would be willing to draft such a statute. He expressed the view that he could improve upon the New York statute, but commented that the committees might prefer a statute almost exactly like that of New York in order to obtain the benefit of the New York court decisions and practices. Barrie noted that the "benefit" rule was a part of the Oregon statute (i.e., ORS 111.070(1)(c)), and to that extent Oregon already had the benefit of the New York decisions.

Dickson stated that he understood that Barrie and Schwabe were willing to furnish additional information on the matter and to assist in drafting a proposed new Oregon statute if the committees decided that the present Oregon law should be changed.

At this point (2:30 p.m.) Barrie and Schwabe let the meeting.

Allison expressed the view, with which Jaureguy agreed, that the effect of ORS 111.070 was unjust to individuals who happened to live in certain European countries; that the apparent aim of the statute was to put pressure on foreign governments, but that in many instances the individual citizens were unable to influence the policies of their governments. He suggested that foreign heirs would be protected if their inheritances were preserved for them until there was some guarantee that they would receive the inheritances.

Lovett and Dickson indicated that they favored the reciprocity approach of the present Oregon statute. Dickson suggested that moneys constituting inheritances of foreign heirs should be held until such time, without limit, as the reciprocal conditions would be satisfied, and that the moneys so held should draw interest to go to the holder rather than the heirs; that this situation would provide an incentive on the part of foreign heirs to press for reciprocity on the part of their governments.

Riddlesbarger expressed the view that the Oregon reciprocity statute did not constitute an invasion of the federal prerogative of handling foreign relations, and that while the

statue might have some such side effect, its primary aim reflected state responsibility to Oregon residents to enable them to inherit from foreign citizens. Frohnmayer commented that the approach of the Oregon statue supported the proposition that all states might adopt any manner of legislation with regard to the matter of inheritance by foreign heirs, but that apparently few states had in fact done so. He stated his opinion that this was a matter that should be left to the federal government and that the Congress might do something about this matter in the near future.

Frohnmayer moved, seconded by Braun, that ORS 111.070 be repealed. Motion failed both committees by a separate vote of each.

Allison moved, seconded by Jaureguy, that the committees approve a "benefit" statute, either one based upon the New York statute or one prepared by a subcommittee, with provision that a custodian should determine whether inheritances should go to foreign heirs immediately or be held until some guarantee was obtained that those heirs would actually receive the inheritances, but with no reciprocity requirement. Braun noted that the motion contemplated removal of the present escheat factor, and suggested a separate vote on this matter. Dickson expressed the view that the purpose of the motion was to obtain the general opinion of the committees, and that specifics could be worked out by a subcommittees and then submitted to the committees for consideration and final approval. Motion carried both committees by a separate vote of each.

Dickson appointed a subcommittee, consisting of Allison, Lisbakken, Lovett, Barrie and Schwabe, to prepare and submit to the committees at their joint meeting in February proposed legislation in accordance with the adopted motion.

Frohnmayer remarked that there had been mention of accumulating indefinitely the income of inheritances held in custody for foreign heirs and noted that such accumulation would be contrary to trust principles. He suggested, and Dickson agreed, that provision should be made for termination of the custody at some point.

2. Wills. The committees returned to consideration of a draft of a proposed chapter on wills, which had been distributed by Riddlesbarger at the meeting on November 19, 1965, and portions of which had been discussed and acted upon by the committees at the meeting on November 19 and 20. [Note: A copy of this draft, as it existed before revision of portions thereof at the November 19 and 20 meeting, constitutes Appendix A to these minutes.]

a. Testamentary additions to trusts (sections 6, 7 and 8). Riddlesbarger referred to sections 6, 7 and 8 of the wills draft, noting that these sections were derived

from sections 275, 276 and 277, 1963 Iowa Probate Code, which in turn had been adapted from the Uniform Testamentary Additions to Trusts Act (approved in 1960 by the National Conference of Commissioners on Uniform State Laws). He remarked that these sections were intended to replace ORS 114.070.

Riddlesbarger commented that at the last meeting Richardson had called his attention to an article on the Uniform Act in the August 1965 issue of "Trusts and Estates," and that action by the committees had been postponed pending his study of the article. [Note: A copy of this article constitutes Appendix B to these minutes.] He stated that the article had convinced him that a provision similar to that of New Jersey (i.e., New Jersey Statutes Anno. (1962) § 3A:3-16.4) should be added to the draft, as follows: "This Act shall not be construed as providing an exclusive method for making devises or bequests to trustees of trusts created otherwise than by the will of the testator making such devise or bequest."

The committees discussed at some length the phrase "the validity of which is determinable by the law of this state" in section 6. Riddlesbarger called attention to the explanation for this phrase set forth in the "Trusts and Estates" article. There was a difference of opinion among the members of the committees as to the meaning of the phrase, as well as to the necessity or desirability thereof. Some members took the view that the phrase meant that if the validity of a devise or bequest was not determinable by the law of Oregon, but rather by the law of some other state, then the pour-over would not be valid in Oregon. Others were of the opinion that if such validity was determinable by the law of some other state, then the section would merely be inapplicable, and the law of the other state would be applied in Oregon to determine the validity of the pour-over. To the suggestion that the phrase might be deleted, Dickson and Tassock pointed out that the phrase was a part of the Uniform Act and that there were advantages, such as the decisions in other states that had adopted the Uniform Act, in adhering to the wording of the Uniform Act. Dickson suggested, and the committees agreed, that action on the phrase should be postponed until more information on its meaning had been obtained. Riddlesbarger was requested to study this matter further and report thereon to the committees at their joint meeting in February.

Butler referred to the phrase "may be made by a will to the trustee of a trust established, or to be established" in section 6, and suggested that "by a will" was superfluous.

Riddlesbarger called attention to the wording of

ORS 114.070 requiring that the devise or bequest be to a trust "established by written instrument executed prior to the execution of such will," and indicated his preference for the provision of section 6 specifying that the devise or bequest would not be invalid "because the trust was amended after the execution of the will or after the death of the testator," pointing out that the latter wording was the same as that of the Uniform Act, the 1963 Iowa Probate Code (section 275) and the 1965 Washington Probate Code (section 11.12.250).

Allison remarked that the wording "not be invalid because the trust was amended after the execution of the will or after the death of the testator" in section 6 appeared inconsistent with the subsequent wording "shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator***." He suggested that, to eliminate what appeared to him to be a contradiction, there be inserted a provision that the devise or bequest would not be invalid because the trust was amendable or revocable, or both. Frohnmayer and Butler expressed their opinions that there was no inconsistency between the two phrases referred to by Allison because these phrases dealt with different aspects of the matter. Butler commented that the first phrase concerned the validity of the devise or bequest, while the second concerned administration of the property devised or bequeathed. Frohnmayer noted, however, that the Uniform Act contained the provision suggested by Allison.

Butler moved, seconded by Riddlesbarger, that the committee approve the Uniform Act, with the addition of the New Jersey provision suggested by Riddlesbarger. Motion carried. [Note: The adopted motion is subject to the report by Riddlesbarger on the phrase "the validity of which is determinable by the law of this state," and action thereon by the committees at their joint meeting in February.]

b. Bond or agreement to convey property devised as a revocation (section 12). Riddlesbarger referred to section 12 of the wills draft, pointing out that it was the same as ORS 114.140. He suggested deletion of "the" in the phrase "for the specific performance or otherwise," and "by law" in the phrase "as might be had by law against the heirs of the testator or his next of kin." Allison suggested that "executory contract of sale" be substituted for "bond, covenant or agreement" in section 12.

Allison moved, seconded by Riddlesbarger, that Lundy redraft section 12, with the aim of simplifying and improving the wording thereof to the extent possible, but retaining the present meaning. Motion carried unanimously.

c. Testator's intent (section 14). Riddlesbarger noted that section 14 of the wills draft was the same as ORS 114.210. He also pointed out that Jaureguy and Love (see 1 Jaureguy & Love, Oregon Probate Law and Practic § 436 (1958)) had questioned the necessity, as well as the literal accuracy, of ORS 114.210.

Field moved, seconded by Braun, that section 14 be deleted. Motion carried unanimously.

Dickson questioned the accuracy of the division heading "Rules of Construction" preceding section 14. Lundy commented that the heading did not have the status of law, but rather was merely an editorial aid.

d. Construction of devise for life with remainder in fee to children (section 15). It was pointed out that section 15 of the wills draft was the same as ORS 114.220. The committees agreed that "effect" should be substituted for "construction" in the leadline of the section.

Zollinger called attention to the provision of the 1965 Washington Probate Code (section 11.12.180) similar to section 15. The Washington statute reads as follows: "If any person, by last will, devise any real estate to any person for the term of such person's life, such devise vests in the devisee an estate for life, and unless the remainder is specially devised, it shall revert to the heirs at law of the testator."

After further brief discussion, it was decided to postpone consideration of section 15 until the following day.

The meeting was recessed at 5:10 p.m.

The meeting was reconvened at 9 a.m., Saturday, December 18, 1965, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

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

The following members of the Bar committee were present: Bettis, Gilley, Braun, Field, Hornecker, Krause, Lovett, Rhoten, Tassock and Thalhofer.

Also present was Lundy.

d. Construction of devise for life with remainder in fee to children (section 15). The committees continued

consideration of section 15 of the wills draft, which had been begun the preceding day.

Allison, noting that the application of section 15 and ORS 114.220 was limited to real property, raise the question of extending this application to personal property. He referred to a passage on this matter in Jaureguy & Love (see 1 Jaureguy & Love, Oregon Probate Law and Practice § 414, at p. 403 (1958)), which reads as follows:

> "The Oregon statute applies only to devises of real estate. Personal property is not mentioned. It seems rather clear, however, that the rule in Shelley's case applies to personalty, at least by analogy, as well as to real property. The statue here does not change the law."

Allison suggested and Frohnmayer agreed, that the application of section 15 should be extended to personal property by substitution of "property" for "real estate" in the section.

Zollinger suggested that the words "in fee" and "in fee simple" be deleted from section 15, commenting that these words of limitation were not necessary for accomplishment of the purpose of the section and that the application of the section should not be so limited. Gilley commented that the quoted words would be inappropriate if the application of the section was extended to personal property.

Riddlesbarger raised the question of the meaning of the words "right heirs" in section 15. Gilley expressed his opinion, with which Dickson agreed, that right heirs were heirs of the blood. Dickson elaborated that an adopted child, for example, would not be a right heir. Frohnmayer suggested that "right heirs" be deleted from section 15, so that the remaining pertinent wording of the section would be "children or heirs." Allison noted that Jaureguy & Love (see 1 Jaureguy & Love, Oregon Probate Law and Practice § 414, at p. 403 (1958)) referred to and commented upon an Oregon Supreme Court decision (see Jerman v. Nelson, (1931) 135 Or. 126) which drew a distinction between remainders to children (vested estates, subject to later divestment) and remainders to heirs (contingent estates), and questioned whether a distinction between children and heirs should be preserved in section 15 by specification of both, or whether only heirs should be referred to in the section.

Braun moved, seconded by Zollinger, that section 15 be revised to read as follows: "A devise of property to any person for the term of the person's life, and after his death, to his children or heirs, shall vest an estate for life

only in the devisee, and remainder in the children or heirs." Jaureguy commented that with the wording "devise of property" there would be a tendency to consider the meaning of "property" as limited to real property. He suggested, and Allison agreed, that the words "any real or personal property" should be used. Frohnmayer and Zollinger objected to this specification of the two categories of property in this instance, on the ground of the previous decision by the committees to avoid this specification and rely instead upon a general definition of property as including both real and personal. Gilley suggested, and Carson agreed, that "bequest" should be used in addition to "devise"; that this would make unnecessary the specification of "real or personal" property; that a general definition of devise as including bequest would not be a satisfactory solution in every instance. Gilley moved, seconded by Jaureguy, that the main motion be amended by inserting "or bequest" after "devise" in the revision of section 15 proposed by the main motion. Amendment to main motion accepted. Main motion, as amended, carried. Jaureguy moved, seconded by Allison, that "or legatee" be inserted after "devisee" in revised section 15, in order to conform with "devise or bequest." Motion carried.

e. Presumption of devise of fee; passing of interest acquired after making of will; effect of conveyance by testator after will made (section 16). Riddlesbarger noted that section 16 of the wills draft was the same as ORS 114.230, and commented that he recommended no substantive changes in the ORS section.

Zollinger suggested that section 16 should be made applicable to personal property as well as real property; that the rules set forth in the three subsections of section 16 were as appropriate with respect to personal as to real property; that limiting the application of the section to real property implied that some other rules were applicable to personal property. He expressed the view that affirmative statement that the rules set forth in section 16 were applicable to personal property was appropriate in the light of what he considered to be the objectives of the probate law revision project. He commented that he approved a statement he had seen that the objectives of the revision program that had produced the 1965 Washington Probate Code were "to present a comprehensive Probate Code which reflects current business practice, provides adequately for realities of administration of decedents' estates, simplifies and states more clearly rules of procedure, and eliminates that which is archaic, unrealistic, outmoded or unnecessarily expensive," and would like to see similar statement of objectives adopted for the Oregon revision program. Frohnmayer expressed agreement with Zollinger's

suggestion on extending the application of section 16 to personal property, and proposed substitution of "property" for "real property" in the section.

In response to a question by Riddlesbarger, Carson expressed his opinion that the phrase "subject to his disposal" in subsection (1) of section 16 meant subject to the testator's right of testamentary disposition.

Zollinger proposed that subsection (1) of section 16 be revised to read as follows: " A testamentary disposition of property disposes of all the interest of the testator therein at his death unless the will discloses a purpose to dispose of a lesser estate or interest."

Braun suggested that subsection (1) be revised to read as follows: "A devise of property shall pass of the interest of the testator therein at his death unless the will discloses an intention to dispose of a lesser estate or interest." Zollinger moved, seconded by Frohnmayer, that the revision of subsection (1) suggested by Braun be approved. Motion carried.

Braun expressed her opinion that revised subsection (1) made subsections (2) and (3) unnecessary. Gilley agreed, and moved, seconded by Butler, that subsections (2) and (3) of section 16 be deleted. Allison, Zollinger and Riddlesbarger spoke in opposition to the motion. Allison remarked that revised subsection (1) dealt with the disposition of property owned by a testator at the time of making his will, while the emphasis of subsection (2) was on property acquired by a testator after making his will. Gilley commented that a testamentary disposition of "all my property" would include property acquired after the making of the will, and that revised subsection (1) would presumably apply to such a disposition. Allison suggested that subsection (2) was designed more to cover the situation of testamentary dispositions of specifically described property than the situation referred to by Gilley. Motion to delete subsections (2) and (3) failed the advisory committee, but carried the Bar committee, by a separate vote of each. Dickson announced the ruling of the chair that the vote of the advisory committee prevailed in this instance and that the motion had failed.

Frohnmayer moved, seconded by Thalhofer, that subsection (2) of section 16 be revised to read as follows: "An estate or interest in property acquired by a testator after he makes his will shall pass thereby unless it appears therefrom that he did not so intend." Motion carried.

Frohnmayer proposed that subsection (3) of section 16 be

revised to read as follows: "No disposition of property by a testator after he makes his will shall prevent or affect the operation of the will upon the estate or interest therein subject to the disposal of the testator." Gilley commented that the revised wording proposed by Frohnmayer appeared to convey the impression that a testamentary disposition of particular property would prevail over a subsequent conveyance of the property by the testator, although such a result was not the aim of subsection (3).

Zollinger moved, seconded by Krause, that subsection (3) be revised to read as follows: "No encumbrance or disposition of property by a testator after he makes his will shall affect the operation of the will upon a remaining estate or interest therein which is subject to the disposal of the testator at his death." Motion carried unanimously.

Carson asked whether "estate or" should be deleted from the phrase "estate or interest" in revised subsections (2) and (3). Zollinger indicated he favored deletion of "estate or" in subsections (2) and (3), but retention thereof in subsection (1). After further brief discussion, Zollinger expressed approval of deletion of "estate or" in subsection (1), as well as in subsections (2) and (3). Carson moved, seconded by Thalhofer, that "estate or" in revised subsections (1), (2) and (3) of section 16 be deleted. Motion carried.

f. When issue of deceased devisee or legatee takes estate (section 17). Riddlesbarger noted that, while similar to ORS 114.240, section 17 of the wills draft was based upon the wording of a provision of the 1965 Washington Probate Code (section 11.12.110). As a possible alternative to section 17, he referred to two sections (sections 273 and 274) of the 1963 Iowa Probate Code, which read as follows:

> "§ 273. If a devisee die before the testator, his heirs shall inherit the property devised to him, unless from the terms of the will, the intent is clear and explicit to the contrary.
>
> § 274. The devise to a spouse of the testator, where the spouse does not survive the testator, shall lapse notwithstanding the provisions of section two hundred seventy-three (273), unless from the terms of the will, the intent is clear and explicit to the contrary."

Riddlesbarger pointed out that the Oregon and Washington statutes were applicable with respect to "lineal descendants" of "any child, grandchild or other relative of the testator," while the application of the Iowa statute was broader (i.e.,

with respect to "heirs" of "a devisee"). He moved, seconded by Carson, that the present application of the Oregon statute, embodied in section 17, be retained. Zollinger suggested, and it was agreed, that a vote should first be taken on whether to approve the concept of the Iowa statutes. The proposition to approve the Iowa concept failed unanimously.

Zollinger suggested that the operation of the anti-lapse statute should be limited to devises or bequests to a testator's lineal descendants, brothers, sisters, nephews or nieces. He commented that the aim of the statute was to approximate as closely as possible the wishes of a testator. Butler indicated he saw no reason to change the present application of the Oregon statute. Carson expressed concern about the effect of a change in the present application of the Oregon statute on the many existing wills prepared in reliance upon existing statutes. Riddlesbarger suggested that a savings clause as to existing wills would resolve Carson's concern.

Butler moved, seconded by Jaureguy, that the present application of the Oregon statute, embodied in section 17, be retained. Motion carried the advisory committee, but failed the Bar committee. On the basis of his previous ruling, Dickson ruled that the motion had carried.

Zollinger moved, seconded by Allison, that the last sentence of section 17 be deleted and that the first sentence be revised to read as follows: "When property is devised to any person related by blood or adoption to the testator who dies before the testator leaving lineal descendants, the descendants shall take the property which the devisee would have taken if he had survived the testator's (with the understanding that "devised" included "bequeathed" and "devisee" included "legatee"). Motion carried.

Thalhofer moved, seconded by Butler, that the second sentence of section 17 be revised to read as follows: "If the descendants are all in the same degree of kinship to the predeceased devisee, they shall take equally, or, if of unequal degree, they shall take by representation" (with the understanding that "devisee" included "legatee"). Motion carried.

Braun suggested the inclusion in revised section 17 of a specific exception for the circumstance in which a will provided otherwise. Allison expressed the view that such a specific exception was not necessary.

g. Pretermitted heirs to have portion of estate (section 18). Riddlesbarger pointed out that section 18

of the wills draft was similar to ORS 114.250, but was based upon the wording of a provision of the 1965 Washington Probate Code (section 11.12.090). Butler noted, and Riddlesbarger agreed, that the wording of section 18 followed that of section 11.12.090 of the 1965 Washington Probate Code in the bill as introduced, but that the section had been amended by the Washington legislature before enactment.

Dickson asked whether section 18 applied to illegitimate children that were pretermitted.

Riddlesbarger raised the question of the application of section 18 to adopted children that were pretermitted. Field moved, seconded by Thalhofer, that the application of section 18 be extended to children adopted after the making of a will. Allison suggested that a definition of "children" generally applicable throughout the probate code might include legally adopted children who under the laws would otherwise be entitled to inherit with natural children. Riddlesbarger commented that, whether or not such a general definition was approved, the application of section 18 to adopted children should be stated specifically in the section. Motion carried.

Tassock commented that the phrase "named or provided for in such will" in section 18, and also in ORS 114.250, had an uncertain meaning as applied to some situations. Rhoten suggested, and Zollinger agreed, that the meaning of the phrase might be clarified by the addition of "mentioned as a class." Carson remarked that the Oregon Supreme Court had decided that a provision in a testator's will giving $5 to any person claiming to be a legal heir who should legally establish such claim did not name or provide for a child of the testator who contested the will (see Wadsworth v. Brigham, (1928) 125 Or. 428). He suggested that "named or designated" might be preferable to "named or provided for."

Braun raised the question of whether section 18 should apply to grandchildren of a testator. Zollinger and Dickson expressed the view that the application of section 18 should be limited to children.

Braun moved, seconded by Gooding, that the clause "unless it appears from the will that such omission was intential" in section 18 be deleted. Braun commented, and Allison agreed, that the description of a pretermitted child in the section should be broad enough to cover the purpose of the quoted clause. Riddlesbarger indicated that he favored deletion of the quoted clause, and that, if retained, it might generate a considerable amount of litigation. Motion carried.

Allison questioned the desirability of the clause "unless when the will was ececuted the testator had one or more children known to him to be living and devised substantially all his estate to his surviving spouse" in section 18. Frohnmayer commented that the quoted clause required knowledge on the part of a testator of a particular child and that this requirement would give rise to difficult problems of proof of such knowledge. He noted that the enacted version of section 11.12.090, 1965 Washington Probate Code, did not contain the quoted clause, and suggested that it be deleted from section 18. Allison remarked that the description of a pretermitted child in the section, particularly if this description included "as mentioned as a class," would sufficiently cover the purpose of the quoted clause. He moved, seconded by Zollinger, that the quoted clause in section 18 be deleted. Motion carried.

Zollinger suggested that the last "unless" clause in section 18 be revised to read as follows: "but if it appears from the will that the purpose of the testator was to treat his children equally, all of his children shall receive equally." He expressed the view that section 18 should state the effect of pretermission, and noted that the last "unless" clause qualified the preceding statement to the effect that a pretermitted child would take as if no will had been made. Tassock moved, seconded by Gilley, that the last "unless" clause in section 18 be deleted. Motion carried.

Frohnmayer moved, seconded by Field, that Zollinger prepare a redraft of section 18 and submit it to the committees for consideration. Motion carried.

The meeting was recessed at 12:45 p.m.

The meeting was reconvened at 2 p.m. All members of the advisory committee, except Husband, were present. The following members of the Bar committee were present: Gilley, Braun, Field, Hornecker, Lovett and Thalhofer. Also present was Lundy.

g. Pretermitted heirs to have portion of estate (section 18). Zollinger announced that, during the recess, he had prepared and was submitting to the committees for consideration a redraft of section 18 of the wills draft, which reads as follows:

> "A pretermitted child is a child of the testator, whether or not his lawful issue, who is not named, referred to as a member of a class or provided for in the will of the testator, including a child born or adopted after the execution of the will and a

child born after the death of the testator. A pretermitted child or his issue shall take a share of the testator's estate equal to that which he or they would have taken upon the testator's intestate death and only the remainder of the testator's estate shall be subject to his testamentary disposition."

Allison referred to the phrase "whether or not his lawful issue" in redrafted section 18, and asked whether there was not an existing Oregon statute providing for inheritance by illegitimate children. [Note: See ORS 111.231.] Zollinger expressed the view, and Dickson agreed, that the description of a pretermitted child should specify whether an illegitimate child was included.

Allison questioned inclusion of the phrase "and a child born after the death of the testator" in redrafted section 18. Gilley suggested that the phrase "including a child born or adopted after the execution of the will and a child born after the death of the testator" in the section be deleted.

In response to a question by Thalhofer, Zollinger stated that redrafted section 18 did not apply to pretermitted grandchildren and expressed the view that the section should not so apply. Braun commented that grandchildren should be included in the description of a pretermitted child, and moved, seconded by Butler, that "or a child of the predeceased child of the testator" be inserted after "a pretermitted child is a child of the testator" in the redrafted section. Allison pointed out that ORS 114.250 applied to "descendants" of children of testators, and suggested that the following sentence be added to the redrafted section: "A pretermitted child shall include the descendants of a child who shall have died prior to the death of the testator." Butler moved, seconded by Gooding, that the application of the present Oregon statute (i.e., ORS 114.250) to descendants of children of testators be embodied in the description of a pretermitted child in redrafted section 18. Motion carried. Frohnmayer suggested, and Zollinger agreed, that if descendants of children were to be included, the provision to accomplish this aim should be a separate sentence. Zollinger proposed the following sentence to cover the situation: "The term includes descendants of the testator when the will of the testator does not name or provide for the ancestor or identify the ancestor as a member of a class named or provided for in the will."

Riddlesbarger remarked that some mention had been

made as to the conclusion of a probate proceeding foreclosing later disposition under the pretermitted heir statute, but that such did not appear to be the case. He called attention to a passage in Jaureguy & Love (1 Jaureguy & Love, Oregon Probate Law and Practice § 391, at p. 377 (1958)) on the subject, which reads as follows: "It will be noticed from the wording of the statute that the failure to comply with its requirements does not affect the admissibility of the will to probate, and the claims of the pretermitted children are not asserted in will contest proceedings. While the order of distribution in the probate court would doubtless normally preclude later assertion of rights with respect to personalty, it seems clear that it has no effect upon the rights of such children or other descendants with respect to real property. In fact, it has even been held that a sale of real property by an executor, pursuant to powers granted in the will, is void as to such pretermitted children."

Riddlesbarger suggested that there should be some provision specifying the remedy and procedure whereby pretermitted children or their descendants obtain their shares. He called attention to the provision of ORS 114.250 that the shares to pretermitted children or their descendants "shall be assigned to them, and all the other heirs, devisees and legatees shall refund their proportional part." Frohnmayer expressed the view that assignment and refund was not the remedy usually pursued; that the proper remedy was one in the nature of an heirship proceeding.

Allison commented that the proper wording of the pretermitted child statute to be considered and approved by the committees was a matter of some difficulty, and moved, seconded by Butler, that further consideration and final approval be postponed until the joint meeting of the committees in January. It was agreed that the matter should be so postponed. Dickson appointed Zollinger and Braun to prepare and submit to the committees at their joint meeting in January a redraft of sections 18 and 19, the latter section relating to the effect of advancements to pretermitted heirs. He appointed Frohnmayer and Riddlesbarger to research the matter of the remedy and procedure whereby pretermitted children obtain their shares and report on this research at the January meeting.

h. Payment and ownership of proceeds of United States bonds (section 20). Riddlesbarger pointed out that subsection (a) of section 20 of the wills draft was the same as ORS 114.270, and that subsection (b) was a new provision designed to answer the question as to whether persons receiving the proceeds of United States bonds payable on death should bear any part of the expenses and charges of probate.

Butler asked whether the principle embodied in subsection (b) of section 20 should be extended to all jointly owned securities. He also questioned the meaning and purpose of the phrase "and such bond is not transferable" in subsection (a), commenting that he was under the impression that most United States bonds were transferable in certain circumstances.

Field moved, seconded by Butler, that section 20 be deleted. Motion carried. Riddlesbarger commented that he had voted against the motion and wished to preserve his right to propose reconsideration of the matter of section 20 at a future time.

i. Presumption attending devise or bequest to spouse (section 21). Riddlesbarger indicated that section 21 of the wills draft was derived from section 268, 1963 Iowa Probate Code. Allison commented that the committees had previously approved provisions that the intestate share of a surviving spouse was in addition to family allowances, homestead rights and exempt property, and that the share of a surviving spouse taken by election against will was in addition to any other statutory right. He suggested that section 21 was covered by these previously approved provisions.

Allison moved, seconded by Field, that section 21 be deleted. Motion carried.

j. Contribution among devisees and legatees (section 22). Riddlesbarger explained that section 22 of the wills draft was derived from sections 11.12.200 and 11.12.210, 1965 Washington Probate Code, but pointed out that subsection (a) of section 22 was similar to ORS 117.340.

At this point (3 p.m.) Field left the meeting.

Frohnmayer suggested that consideration of section 22 be postponed until the committees were ready to discuss the general subject of distribution to legatees, devisees and heirs, and ORS 117.340 in particular. Dickson commented that ORS 117.340 was included in the assignment to Gooding and Jaureguy for research and recommendation.

Braun moved, seconded by Thalhofer, that section 22 be deleted from the draft and consideration thereof undertaken at an appropriate future time. Motion carried unanimously.

k. No interest on devise or bequest unless will so provides (section 23). Riddlesbarger noted that section 23 of the wills draft was derived from section 11.12.220,

1965 Washington Probate Code.

Dickson questioned the desirability of prohibiting interest on devises and bequests unless expressly provided for in the wills containing them, pointing out that a reason for allowing interest was to discourage undue delay in distribution by personal representatives. Frohnmayer commented that interest would come from the residue of the estate, rather than be chargeable to the personal representative, if the personal representative was performing properly and the delay was due to no fault on his part. He suggested, and Zollinger agreed, that interest should be allowed after a certain period of time had passed without distribution. Dickson remarked that a year would be too short a period of time, considering the amount of time necessary to calculate federal estate tax.

Butler expressed the view that interest should be allowed only if the probate court was satisfied that there had been delay or neglect on the part of the personal representative. Allison suggested, and Jaureguy agreed, that consideration be given to the requirement that interest be allowed by order of the probate court, so that the court would have some discretion in particular instances whether or not to allow the interest.

Frohnmayer moved, seconded by Butler, that section 23 be deleted from the draft, referred to Gooding and Jaureguy for research and recommendation in connection with the general subject of distribution and considered by the committees at an appropriate future time. Motion carried unanimously.

L. Witnesses as beneficiaries (sections 24, 25, 26 and 27). Riddlesbarger pointed out that sections 24 to 27 of the wills draft were the same as ORS 114.310 to 114.340. He referred to the provisions of the Iowa and Washington probate codes on the same subject, which read as follows:

> "No will is invalidated because attested by an interested witness; but any interested witness shall, unless the will is also attested by two competent and disinterested witnesses, forfeit so much of the provisions therein made for him as in the aggregate exceeds in value, as of the date of the decedent's death, that which he would have received had the testator died intestate. No attesting witness is interested unless he is devised or bequeathed some portion of the testator's estate." Section 281, Section 281, 1963 Iowa Probate Code.
>
> "All beneficial devises, legacies, and gifts whatever, made or given in any will to a subscribing

> witness thereto, shall be void unless there are two other competent witnesses to the same; but a mere charge on the estate of the testator for the payment of debts shall not prevent his creditors from being competent witnesses to his will. If such witness, to whom any beneficial devise, legacy or gift may have been made or given, would have been entitled to any share in the testator's estate in case the will is not established, then so much of the estate as would have descended or would have been distributed to such witness shall be saved to him as will not exceed the value of the devise or bequest made to him in the will; and he may recover the same from the devisees or legatees named in the will in proportion to and out of the parts devised and bequeathed to him."
> Section 11.12.160, 1965 Washington Probate Code.

Riddlesbarger and Dickson indicated they preferred the Iowa provision to sections 24 to 27 and the existing Oregon law. Zollinger stated that he favored the Iowa provision, but expressed an objection, in which Jaureguy joined, to the word "forfeit" therein because the word connoted a penalty on a witness who had done nothing wrong.

Gilley suggested the substitution of section 46(c), Model Probate Code (i.e., "No attesting witness is interested unless the will gives to him some personal and beneficial interest") for the last sentence of the Iowa provision. Zollinger commented that, if the committees so desired, a specific provision that "the appointment of a person as executor does not create a personal and beneficial interest" might be added.

Zollinger suggested that the following revision of the Iowa provision be adopted in lieu of sections 24 to 27: "No will is invalidated because attested by an interested witness; but any interested witness shall, unless the will is also attested by two competent and disinterested witnesses, take only so much of the provisions therein made for him as in the aggregate exceeds in value, as of the date of the decedent's death, that which he would have received had the testator died intestate. No attesting witness is interested unless a personal and beneficial interest in some portion of the testator's estate is bequeathed or devised to him."

Zollinger moved, seconded by Butler, that Zollinger's suggested revision of the Iowa provision be adopted in lieu of sections 24 to 27 and the existing Oregon law. Motion carried.

m. Deposit of wills with county clerk (sections 28, 29, 30 and 31). Riddlesbarger noted that sections 28 to 31 of the wills draft were the same as ORS 114.410 to 114.440, and referred to provisions of the 1963 Iowa Probate Code (sections 286 to 289) concerning the same subject.

Frohnmayer expressed the view that section 289, 1963 Iowa Probate Code, was preferable to section 31 of the draft and ORS 114.440. The Iowa provision reads as follows:

> "After being informed of the death of a testator, the clerk shall notify the person, if any, named in the endorsement on the wrapper of said will. If no petition for the probate thereof has been filed within thirty days after the death of the testator, it shall be publicly opened, and the court shall make such orders as it deems appropriate for the disposition of said will. The clerk shall notify the executor named therein and such other persons as the court shall designate of such action. If the proper venue is in another court, the clerk, upon request, shall transmit such will to such court, but before such transmission, he shall make a true copty thereof and retain the same in his files."

Allison remarked that the procedure to be followed under section 31 was not clear; that, for example, the nature of the "notice of the testator's death," after which the will was to be publicly opened in court, should be clarified.

Zollinger questioned the extent of use of the present procedure under ORS 114.410 to 114.440, and expressed doubt that many attorneys, in their seach for wills of decedents, made inquiry to the county clerks. Riddlesbarger commented that the procedure had merit regardless of the extent of its use. Frohnmayer asked whether the county clerks in the state should be contacted and consulted regarding the procedure.

Dickson suggested, and it was agreed, that members of the committees should consult the county clerks in their counties on the procedure under ORS 114.410 to 114.440 and submit their findings to the committees at the joint meeting in January. In response to a question by Frohnmayer, Dickson indicated that information to be sought by members should include the number of wills deposited with county clerks, the systems maintained by county clerks for quick identification of wills deposited, the practices, records and forms used by county clerks, any problems encountered by county clerks and any suggestions

they might wish to offer on the procedure.

n. Custodian of will must deliver to proper court; liability (section 32). Riddlesbarger, responding to a question by Zollinger, indicated that section 32 of the wills draft was the same as ORS 115.110. Riddlesbarger noted that a section of the 1963 Iowa Probate Code (section 285) relating to the same subject provided that "every person who willfully refuses or fails to deliver a will after being ordered by the court to do so shall be guilty of contempt of court." It was agreed that the Iowa provision was unnecessary. Dickson pointed out that ORS 115.990 provided a penalty for failure or neglect to produce and deliver a will.

It was apparently agreed that section 32 should be considered when the committees undertook a review of ORS chapter 115.

3. Future Activity by Committees. In response to a question by Riddlesbarger, Dickson affirmed that preliminary work on ORS chapter 115 (Initiation of Probate or Administration) previously had been assigned to Riddlesbarger and Frohnmayer, but indicated that Gilley and Krause of the present Bar committee had replaced two former members of the Bar committee on the assignment. Frohnmayer suggested, and it was agreed, that Gilley and Krause should undertake review and recommended revision of ORS chapter 115, enlisting assistance from other members of the Bar committee for the purpose, and submit their recommended revision to the committees at the joint meeting in January. Gilley commented that the current Oregon statutes on the subject and a copy of the 1965 Washington Probate Code would be of assistance in accomplishment of the assignment to him and Krause. Lundy indicated he would send Gilley a copy of the 1965 Washington Probate Code, and that the 1965 edition of the Oregon statutes, although not yet available, would be provided to all members of both committees as soon as possible.

Frohnmayer noted that there were eight months, and therefore eight meetings, remaining before the committees completed their planned review and recommended revision of most of the Oregon probate law in August 1966, and suggested that this work might be expedited by subcommittee meetings on the various aspects of the probate law remaining to be considered. Zollinger commented that the projected August 1966 deadline would not be a difficult one to meet considering what remained to be done by the committees (i.e., primarily a review and recommended revision of ORS chapters 115, 116 and 117). Dickson noted that ORS chapters 120 and 121 also should be covered. He called attention to the

present assignments with respect to ORS chapters 115 through 121 among members of both committees, and indicated that he would review these assignments and announce his confirmation thereof or changes therein at the joint meeting in January.

Frohnmayer asked whether members of the committees should, as part of their assignments, suggest forms to be used in connection with recommended revision of the statutes, such as the form for a petition for admission of a will to probate. He also suggested that it would be helpful to the committees if reports submitted to them by subcommittees contained the text of Oregon statutes and provisions of the 1963 Iowa Probate Code, 1965 Washington Probate Code, Model Probate Code or other research materials referred to or used in the preparation of those reports.

It was agreed that Lundy should prepare and send to members of the committees lists containing the names and addresses of current members of the committees.

Dickson stated that he would contact John Holloway for the purpose of expressing appreciation for past assistance by the Bar staff in reproducing and distributing minutes of meetings of the committees and indicating that this task would be undertaken henceforth by the Legislative Counsel's office. He commented, in response to a question to a question by Lundy, that the Bar office probably would wish to receive copies of minutes of meetings of the committees prepared by the Legislative Counsel's office.

4. Next Meeting of Committees. The next joint meeting of the committees was scheduled for Friday, January 14, 1966, at 1:30 p.m., and the following Saturday, January 15, in Dickson's courtroom, 244 Multnomah County Courthouse, Portland. The agenda for the next meeting was discussed briefly.

The meeting was adjourned at 4:30 p.m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, December 17&18, 1965)

The following draft of a proposed statute chapter on wills was distributed by Mr. Riddlesbarger at the meeting of the advisory committee on November 19, 1965. The substance of the draft is set forth as it existed before revision of portions thereof at the meeting of the advisory committee on November 19 and 20, 1965 (see minutes of that meeting for revisions of the draft).

WILLS

Formalities

1. Who may make wills. Every person of 18 years of age and upward, or who has attained the age of majority provided in ORS 109.520, of sound mind may, by will, devise and bequeath all his estate, real and personal, except sufficient to pay the debts and charges against his estate, and subject to the rights of the surviving spouse to elect to take against the will as provided in ORS 113.050.

2. Will to be in writing; execution; attestation. Every will and codicil shall be in writing, signed by the testator, or by some person under his direction, in his presence, and shall be attested by two or more competent witnesses, each subscribing his name thereto, in the presence of the testator; provided, that the validity of the execution of any will or instrument which was executed prior to the effective date of this Code shall be determined by the law in effect immediately prior to the effective date of this Code; and provided that a will or codicil executed without the state in the mode prescribed by law, either of the place where executed or the testator's domicile, shall be deemed to be legally executed and shall be of the same force and effect as if executed in the

in the mode prescribed by the laws of this state, provided said will is in writing and subscribed by the testator.

3. Person signing testator's name to sign his own name as witness. Any person who signs the testator's name to any will by his direction shall subscribe his own name as a witness to such will, and state that he subscribed the testator's name at his request, provided that such signing and statement shall not be required if the testator evidences approval of the signature so made at his request by making his mark on the will.

4. Competency of witnesses. Any person who is 16 years of age or older, and who is otherwise competent to be a witness generally in this state, may act as an attesting witness to a will.

5. Defect cured by codicil. If a codicil to a defectively executed will is duly executed, and such will is clearly identified in said codicil, the will and the codicil shall be considered as one instrument and the execution of both shall be deemed sufficient.

6. Testamentary additions to trusts. A devise or bequest, the validity of which is determinable by the law of this state, may be made by a will to the trustee of a trust established, or to be established, by the testator, or by the testator and some other person or persons, or by some other person or persons (including a funded or unfunded life insurance trust, although the trustor has reserved some or all rights of ownership of the insurance contracts), if the trust is identified in the testator's will, and

if its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will, or in the valid last will of a person who has predeceased the testator (regardless of the existence, size, or character of the corpus of the trust). The devise or bequest shall not be invalid because the trust was amended after the execution of the will or after the death of the testator. Unless the testator's will provides otherwise, the property so devised or bequeathed: (1) shall not be deemed to be held under a testamentary trust of the testator, but shall become a part of the trust to which it is given; and, (2) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator (regardless of whether any such amendment was made before or after the execution of the testator's will), and, if the testator's will so provides, including any amendments to the trust made after the death of the testator. An entire revocation or termination of the trust before the death of the testator shall cause the devise or bequest to lapse.

7. Section 6 shall not invalidate any devise or bequest made by a will executed prior to the effective date of this Act.

8. Section 6 shall be so construed as to effectuate its general purpose to make uniform the law of those states which have adopted a similar provision.

Revocation

9. Express revocation or alteration. A written will cannot be revoked or altered otherwise than by another written will, or another writing of the testator, declaring such revocation or alteration and executed with the same formalities required by law for the will itself; or unless the will is burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses.

10. When cancellation of the will revives prior will. If, after making any will, the testator shall duly make and execute a second will, the destruction, canceling or revocation of such second will shall not revive the first will , unless it appears by the terms of such revocation that it was his intention to revive and give effect to the first will, or unless he shall duly republish his first will.

11. Subsequent marriage or divorce of testator as a revocation.

(a) If after making his will the testator marries and the spouse of the testator is living at the time of his death, the will is revoked unless provision has been made for the surviving spouse by a written antenuptial agreement, or marriage settlement, or unless the will declares the intent of the testator that the will shall not

be revoked by the marriage.

(b) If after making his will the testator is divorced or his marriage is annulled, unless the will provides otherwise, the divorce or annulment revokes all provisions in the will in favor of the former spouse and any provision naming the former spouse as executor, and the effect of the will is the same as though the former spouse had predeceased the testator.

12. Bond or agreement to convey property devised as a revocation. A bond, covenant or agreement made for a valuable consideration by a testator to convey any property devised or bequeathed in any will previously made, is not deemed a revocation of such previous devise or bequest, either in law or equity; but such property shall pass by the devise or bequest, subject to the same remedies on such bond, covenant or agreement, for the specific performance or otherwise, against devisees or legatees as might be had by law against the heirs of the testator or his next of kin, if the same had descended to them.

13. Encumbrance as a revocation of previous will.

Section 1. If real or personal property upon which an encumbrance exists at the death of the testator is specifically devised or bequeathed in a will executed by the testator on or after the effective date of this 1967 Act, the devisee or legatee thereof shall take the property subject to the encumbrance, and the executor or the administrator with the will annexed shall not be required to make any payment on account of the obligation secured by the encumbrance, except in the circumstances set forth in section

3 or section 4, No. 13, of this 1967 Act.

Section 2. For the purposes of this 1967 Act, a voluntary encumbrance is a mortgage, trust deed, security agreement or pledge, or a lien arising from labor or services performed or materials supplied or furnished, or any combination thereof, upon or in respect of the real or personal property, and an involuntary encumbrance is any other encumbrance upon the real or personal property, all irrespective of whether or not the testator was personally liable upon the obligation secured by the encumbrance.

Section 3. The devisee or legatee of real or personal property specifically devised or bequeathed may require that an encumbrance thereon be fully or partially discharged out of other assets of the testator's estate not specifically devised or bequeathed if:

(1) The encumbrance is a voluntary encumbrance; and

(a) The will specifically directs full or partial discharge of the encumbrance out of other assets not specifically devised or bequeathed, but a provision in the will for payment of the debts of the testator shall not, of itself, constitute such direction; or

(b) The executor or the administrator with the will annexed receives rents or profits, or both, from the property and the devisee or legatee requests that he apply all or part of the rents or profits, or both, in full or partial discharge of the obligation secured by the encumbrance, in which event

the executor or the administrator with the will annexed shall apply the rents or profits, or both, upon principal or interest, or both, owing upon the obligation, as requested; or

(c) Any beneficiary under the testator's will requests, in a writing subscribed by the beneficiary and delivered to the executor or the administrator with the will annexed, that the obligation secured by the encumbrance be fully or partially discharged out of personal property, or the proceeds of sale thereof, which otherwise would pass to the beneficiary and which is of a value not less than the amount requested by the beneficiary to be applied in full or partial discharge of the obligation; or

(2) The encumbrance is an involuntary encumbrance.

Section 4. If a claim based upon an obligation secured by a voluntary encumbrance on specifically devised real or personal property is presented and paid pursuant to ORS 116.505 to 116.595, or if specifically devised real property that is subject to a voluntary encumbrance is redeemed pursuant to ORS 116.165, the executor or the administrator with the will annexed shall be subrogated to the rights of the owner and the holder, respectively, of the obligation secured by the voluntary encumbrance against the specifically devised or bequeathed property upon which the encumbrance exists and against the devisee or legatee of the specifically devised or bequeathed property, if, or to the extent, that the devisee or legatee of the specifically devised or bequeathed property may not require that the encumbrance

be fully or partially discharged out of other assets of the testator's estate pursuant to section 3, No. 13, of this 1967 Act.

Section 5. If real or personal property upon which an encumbrance exists at the death of the testator is specifically devised or bequeathed in a will executed by the testator before the effective date of this 1967 Act, the rights of the legatee or devisee of the specifically devised or bequeathed real or personal property in respect of exoneration thereof out of other assets of the testator's estate not specifically devised or bequeathed shall be determined in accordance with the laws of this state in force and effect at the time of the execution of the testator's will.

Rules of Construction

14. Testator's intent. All courts and others concerned in the execution of wills shall have due regard to the directions of will and the true intent and meaning of the testator as revealed in his will in all matters brought before them.

15. Construction of devise for life with remainder in fee to children. If any person by will devises any real estate to any person for the term of such person's life, and after his death, to his children, or heirs, or right heirs in fee, such devise shall vest an estate for life only in such devisee, and remainder in fee simple in such children or in such heirs.

16. Presumption of devise of fee; passing of interest acquired after making of will; effect of conveyance by testator after will made.

(1) A devise of real property is deemed a devise of all the estate or interest of the testator therein subject to his disposal, unless it clearly appears from the will that he intended to devise a less estate or interest.

(2) Any estate or interest in real property acquired by anyone after the making of his will shall pass thereby, unless it clearly appears therefrom that such was not the intention of the testator.

(3) No conveyance or disposition of real property by anyone after the making of his will shall prevent or affect the operation of such will upon any estate or interest therein subject to the disposal of the testator at his death.

17. When issue of deceased devisee or legatee takes estate. When any property is devised or bequeathed to any child, grandchild or other relative of the testator, and such devisee or legatee dies before the testator, leaving lineal descendants, such descendants shall take the estate, real and personal, as such devisee or legatee would have done if he had survived the testator. If such descendants are all in the same degree of kinship to the predeceased devisee or legatee, they shall take equally, or, if of unequal degree, then those of more remote degree shall take by representation with respect to such predeceased devisee or legatee. A spouse is not a relative within the meaning of this section.

18. Pretermitted heirs to have portion of estate. If any person makes his will and dies leaving a child or children or descendants

of such child or children not named or provided for in such will, although born after the making of such will or the death of the testator, every such testator, as to such child or children not named or provided for, shall be deemed to die intestate, and such child or children or their descendants not named or provided for shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will that such omission was intentional, or unless when the will was executed the testator had one or more children known to him to be living and devised substantially all his estate to his surviving spouse; or unless it appears from the will that the intention of the testator was to devise to his children equally, in which latter case any child not named in the will shall receive a share in the estate equal in value to that of the other children.

19. Effect of advancement to pretermitted heir. If the child or children, or their descendants, referred to in Section 18 has had an equal proportion of the testator's estate bestowed on him in the testator's lifetime by way of advancement, he shall take nothing by virtue of the provisions of Section 18.

20. Payment and ownership of proceeds of United States bonds.

(a) Where any United States savings bond or United States war savings bond, heretofore or hereafter issued, is payable to a designated person, whether as owner, co-owner or beneficiary, and such bond is not transferable, the right of such person to receive payment of such bond according to its terms, and the ownership of the money

so received, shall not be defeated or impaired by any statute or rule of law governing transfer of property by will or gift or an intestacy. However, nothing in this section shall limit ORS 41.560 or ORS Chapter 95, relating to fraudulent conveyances and transfers.

(b) The person or persons receiving the proceeds of any such bonds shall bear a portion of the expenses and charges of and against the estate of the decedent, making such bond or bonds so payable determined by the proportion which the net funds so received bears to the total estate of the decedent, including such bonds payable to another person or to other persons, unless otherwise provided in the will of the decedent.

21. Presumption attending devise or bequest to spouse. Where the testator's spouse is named as a devisee or legatee in a will, it shall be preseumed, unless the intent is clear and explicit to the contrary, that such devise or bequest is in lieu of the intestate share and homestead rights of the surviving spouse.

22. Contribution among devisees and legatees.

(a) When any testator in his last will shall give any chattel or real estate to any person, and the same shall be taken in execution for the payment of the testator's debts, then all the other legatees, devisees and heirs shall refund their proportional part of such loss to such person from whom the bequest shall be taken.

(b) When any devisees, legatees or heirs shall be required to refund any part of the estate received by them, for the purpose of making up the share, devise or legacy of any other devisee,

legatee or heir, the court, upon the petition of the person entitled ot contribution or distribution of such estate, may order the same to be made and enforce such order.

23. No interest on devise or bequest unless will so provides. No interest shall be allowed or calculated on any devise or bequest contained in any will unless the will expressly provides for such interest.

Witnesses as Beneficiaries

24. Invalidity of devise or legacy to person attesting will. Any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate, except charges in lands, tenements or hereditaments for the payment of any debt, given or made by will to any person who attested the execution of the will is, so far only as concerns such person or any person claiming under him, void; and such person shall be admitted as a witness to the execution of the will.

25. Attesting legatee may take intestate share. If any attesting witness described in Section 24 would be entitled to any share in the testator's estate in case the will should not be established, then so much of the estate as would have descended or been distributed to such witness shall be saved to him as will not exceed the value of the devise or bequest made to him in the will; and he may recover the same from the devisees or legatees named in the will in proportion to and out of the parts devised and bequeathed to him.

26. Result if there are sufficient other witnesses. If the execution of the will described in Section 24 is attested by a sufficient number of other competent witnesses, as required by Section 2 and by Section 4, then such devise, legacy, interest, estate, gift or appointment is valid.

27. Creditor as witness. If by any will any real estate is charged with any debt, and any creditor whose debt is so charged has attested the execution of such will, such creditor shall be admitted as a witness to the execution of such will.

Deposit of Wills with County Clerk

28. Deposit of will with county clerk. A testator may deposit his will for safekeeping in the office of the county clerk for the county in which he resides, upon paying the clerk a fee of $1. The clerk shall give to the testator a certificate of such deposit and shall safely keep every will so deposited. He shall keep an index of all such wills.

29. Inclosure in sealed wrapper; inscription. Every will deposited pursuant to Section 28 shall be inclosed in a sealed wrapper, having inscribed upon it the name and residence of the testator, the day when and the person by whom it was deposited. The wrapper may also have indorsed upon it the name of a person to whom the will is to be delivered after the death of the testator. The wrapper shall not be opened until it is delivered to a person entitled to receive it, or until it is otherwise disposed of in accordance with Section 30 and Section 31.

30. Delivery to testator during his lifetime; delivery after death. During the lifetime of the testator the will shall be delivered only to him, or in accordance with his order in writing, signed by him and duly acknowledged or with his signature satisfactorily proved to the country clerk. After the death of the testator, it shall be delivered to the person named in the indorsement, if he demands it.

31. Public opening in court; procedure when jurisdiction is in another court. If the will is not called for by the person, if any, named in the indorsement, it shall be publicly opened in court after notice of the testator's death. If the jurisdiction of the case belongs to another court, it shall be delivered to the executors named in the will, or shall be filed in the office of the county clerk of such other court.

Surrender of Will by Custodian

32. Custodian of will must deliver to proper court; liability. Every custodian of a will, within 30 days after receipt of information that the maker thereof is dead, must deliver the same to the court having jurisdiction of the estate or to the executor named therein. Any such custodian who fails or neglects to do so is responsible for any damages sustained by any person injured thereby.

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, December 17 & 18, 1965)

The following article appeared in the August 1965 issue of the periodical "Trusts and Estates":

POUR OVER WILL

Appraisal of Uniform Testamentary Additions to Trusts Act

by H. Davison Osgood Jr.

There is a compelling need for the universal enactment of the Uniform Testamentary Additions to Trusts Act by all of the several states. This is predicted on the belief that the so-called pour-over by will to a pre-existing trust, whether or not amendable or amended, whether or not substantial or significant, and whether inter vivos or testamentary, has become a sound, practical and popular estate planning device in widespread use. A review of the judicial and statutory developments of the last three or four decades, and especially within the last decade when numerous states have enacted their own pour-over statutes, reveals that even today, the use of the pour-over is fraught with confusion and uncertainty about its legal validity and efficacy in many jurisdictions.

Indiana and Connecticut enacted the first pour-over statutes in 1953. Others followed rapidly so that today, there are over twenty states which have enacted their own version of a pour-over statute other than the Uniform Act. While there is notable similarity in the scope and purpose of these statutes, there is by no means the uniformity which is desirable. Some are far more liberal than others. Some retain limitations reminiscent of the traditional doctrines utilized to uphold pour-overs. The result has been that a pour-over valid in one state might not be valid in another. It was this state of affairs, presumably, that led the Commissioners on Uniform State Laws to formulate and adopt the Uniform Testamentary Additions to Trusts Act[1] which was completed in 1960 and approved by the American Bar Association in the same year. To date, at least nineteen states have adopted it.

Analysis of the Act

For anyone who has had the opportunity to analyze the difficult problems which have confronted and confounded the courts in pour-over cases through the years and the various approaches several legislatures have taken in recent years in their efforts to solve them, the significance and meaning of every clause of section I of the Uniform Act, which contains most of the substantive law of

the Act, should be readily apparent. In this spirit, there follows an analysis of the text of Section I.[2]

"A devise of bequest,

One Commissioner suggested that the Act be broadened to include specifically the exercise of a power of appointment as some states have done. This suggestion was rejected on the ground that the above language includes the exercise of a power of appointment by will and that any attempt to include other powers of appointment would create additional problems the Act was not intended to solve.

"the validity of which is determinable by the law of this state,

This phrase was included at the suggestion of Professor Bogert to avoid any question in the conflicts of law area as to whether or not a particular state was attempting to reach out into the laws of other states. The phrase as originally suggested used the word "determined" which the Committee replaced with "determinable" so that it was clear that the Act applies not only to accomplished, but also to prospective testamentary dispositions.

"may be made by a will in the trustee or trustees of a trust established or to be established

The phrase "or to be established" would seem to contemplate trusts created after the execution of the will, an apparent inconsistency with language which appears later in the Act. Actually, it has a different meaning and was deliberately included for a different reason. It recognizes any distinction which may exist between trusts established by a written instrument and trusts established when the corpus is added sometime after the trust instrument is written, and is intended to cover both situations.

"by the testator or by the testator and some other person or persons or by some other person or persons

The original draft of the Act contained the phrase "by the testator and/or some other person or persons", which the Committee expanded to its final form, first of all to eliminate the objectionable use of the couplet "and/or" and secondly, to remove any doubt that the receptacle trust can be one established not only by the testator or by the testator and another or others, but also by a person or persons other than the testator.

"(including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts)

At common law, under the doctrine of independent significance, the retention and control of some or all of the ownership rights in the insurance contracts, leaving the trustee with the mere expectancy of receiving the insurance proceeds on the death of the insured, may have been enough to deprive the insurance trust of the significance it needed to support a pour-over. This provision in the act wisely removes any question of the validity of a pour-over to such a trust.

"if the trust is identified in the testator's will and its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will.

Thus the Act requires that the trust instrument, in the case of a pour-over to an inter vivos trust, actually have been executed either before or contemporaneously with the will. It should be noted that where a trust and a pour-over will are executed at the same time as integral parts of an estate plan, testators and their counsel are relieved of the necessity of making certain that the trust has been executed before the pour-over will. The pour-over is valid as long as the signing of both instruments takes place as part of the same transaction.

"or in the valid last will of a person who has predeceased the testator

This provision validates pour-overs to the testamentary trusts of others, but limits them to trusts contained in the will of a second testator who has predeceased the testator whose will contains the pour-over, thereby eliminating the possibility of a pour-over to a trust contained in an ambulatory will. While it is not clear whether the second testator must have predeceased the testator whose will pours over at the time of the execution of the latter's will or at the time of his death, the sense of the Act would seem to require the first result.

First of all, even though a will has been properly executed by a competent testator, it could be argued that its validity does not become certain until it is admitted to probate without contest. Secondly, if the intent of the Act is to eliminate the possibility of a pour-over to an ambulatory will, the only way this can be achieved is to validate pour-overs only to wills which can never be changed or revoked because the death of the

testator has intervened. Unfortunately, the proceedings of the Commissioners shed no light on this question and it may some day come before a court for interpretation and adjudication.

> "(regardless of the existence, size, or character of the corpus of the trust.)

A potentially troublesome problem in the application of the doctrine of independent significance was just how large, relatively speaking, the corpus of a pour-over trust had to be before it was significant enough to support the pour-over. The Act removes any requirement of testing the independent significance of the corpus of the receptacle trust. In fact, it goes much further. It eliminates the necessity that there be a trust corpus. Professor Hawley has been quite critical of this provision. In his words,

> "...a trust without a corpus is nothing at all....By definition a trust is a method of holding property, so that a trust with no assets does not exist. It has no legal significance, much less any independent significance."[3]

He goes on to ask if the Uniform Act and any other statutes which contain similar language, "create a new kind of institution, a trust without a corpus."[4] This appears to be exactly what the Act does, but it is submitted to those who might be troubled by this result, that it is better to have resolved the problem in this way than to perpetuate the doubts and uncertainties about exactly what is required to support a pour-over.

> "The devise or bequest shall not be invalid because the trust is amendable or revocable, or both, or because the trust was amended after the execution of the will or after the death of the testator.

This is significant. It codifies a position which many courts and even a few legislatures have been unwilling to take. However, this provision is qualified by or at least must be read together with provisions of the Act that follow. All that this provision says is that a pour-over to a revocable, amendable trust is not invalid because the testator amends it during his lifetime or another does so either before or after the testator's death. It does not determine the effect of the amendment on the pour-over.

> "Unless the testator's will provides otherwise,

By the inclusion of this clause, the Act reserves to the testator the power to provide by his will for results other than

those contemplated by the provisions which follow it. Without this language, there might have been some doubt as to whether or not the testator was precluded from making other provisions in his will.

> "the property so devised or bequeathed (a) shall not be deemed to be held under a testamentary trust of the testator but shall become a part of the trust to which it is given

In brief, there is an actual pour-over and a single, non-testamentary trust results.

> "and (b) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator (regardless of whether made before or after the execution of the testator's will),

This language is consistent with the intent of the Act to codify an exception to the Statue of Wills by validating pour-overs to trusts amended after the execution of the pour-over will.

> "and, if the testator's will so provides, including any amendments to the trust made after the death of the testator.

This provision proved to be by far the most troublesome and controversial in the Act. Several commissioners argued forcefully that the pour-over should be complete, not partial, that the burden should be on the testator to provide specifically for a limitation on the pour-over if that was his intention, that this provision might create more confusion than now exists in the law, and that it would certainly create administrative problems in cases where the will was silent and the trust was amended after the death of the testator. For instance, asked one of the commissioners, what happens to the pour-over property when, after the testator's death, another who has the power to amend the trust exercises it for the purpose of replacing the incumbent trustee with another?

The position as adopted is sound. Despite administrative problems which might arise if there were an amendment subsequent to the testator's death, the language of the Act affords him better protection against his failure to give proper consideration to the possibility of subsequent amendments. The testator is presumed to be content with the pour-over trust as it stood at the time of his death, whereas amendments made after

his death might have been displeasing to him. The Act does not close the door on such a testator. It gives him the opportunity to bestow upon another the power to make amendments after his death which may affect the use and disposition of his property. If this is what he wishes, he need only to provide for it in his will.

> "A revocation or termination of the trust before the death of the testator shall cause the devise or bequest to lapse."

If nothing more, this provision should operate as a caveat to a testator to make proper provisions in the will for alternative disposition of the pour-over property unless he is content to have the property pass either by intestacy if the residuary clause of the will contains the pour-over, or by the residuary clause if it does not.

The Commissioners had considerable difficulty in arriving at the language in section 2 of this Act, but finally adopted the following:

> "This Act shall have no effect upon any devise or bequest made by a will executed prior to the effective date of this Act."

Not only did they not want the Act to have any retroactive effect, but they also did not want to infer that it was declaratory of the existing law in a jurisdiction where it was not the law prior to its enactment or that it changed the law in a jurisdiction where it already was the law. Actually, their difficulty in drafting section 2 stemmed from the fact that in many jurisdictions, no one knew what the law was, so that the Commissioners could not tell what effect any declaration might have. By a vote of 28 to 25, they decided to say nothing more than what appears in the section as finally adopted.

Sections 3, 4, 5, and 6 of the Act are the standard formal sections which were adopted by the Committee without comment or question.

Reception of the Act

Considering the fact that there are many uniform or model acts promulgated by the Commissioners on Uniform State Laws which appear not to have been adopted by any jurisdiction, the Uniform Testamentary Additions to Trusts Act has met with a generally encouraging reception. Since 1961, the first legislative year in which the Uniform Act was available, nineteen states have

enacted it. It has been adopted by Arizona, Arkansas, Connecticut, Idaho, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Mexico, New Jersey, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Vermont, and West Virginia.[5] It is also significant to note that 1961 was the last year in which any state enacted its own version of a pour-over statute.

A Lingering Doubt

One fundamental question is left unanswered by the Uniform Testamentary Additions to Trusts Act. Does the Uniform Act validate pour-overs under certain conditions and by implication, invalidate all others? The State of New Jersey answered this question by adding a section to its version of the Act which reads:

> "This Act shall not be construed as providing an exclusive method for making devises or bequests to trustees of trusts created otherwise than by the will of the testator making such devise or bequest.[6]

In a state without the benefit of such a provision, there could very easily be a problem. For example, a testator might write a will which provides that, "If at the time of my death, I have created a revocable, amendable inter vivos trust with the Local Trust Company for the benefit of myself and my wife, then I give, devise and bequeath the rest, residue and remainder of my estate to the Local Trust Company, as trustee, to be added to the said trust and to be governed and disposed of in accordance with its terms and provisions, as they exist at the time of my death; otherwise, I give, devise and bequeath the rest, residue and remainder of my estate to my wife."

Similarly, the wife might provide that her property is to be added to the same trust if it has been created by her husband prior to her death, even though it might not have been in existence at the time of the execution of her will, making alternative provisions for the disposition of her property in the event that no such trust exists. It is difficult to find any basic objections to plans such as these. The pour-overs to the trust, if it exists, should be upheld. However, in a jurisdiction which has the Uniform Act, there might be considerable doubt about their validity. This would be resolved one way or the other by answering the initial question. The courts may have to provide the answer.

This by no means intended to be a criticism of what the Uniform Act actually accomplishes. It is only to suggest that at this junction, the relationship between the Uniform Act, which codifies much of the law of the pour-over, and whatever remains of

the pour-over law at common law has not yet been clearly defined. For this reason, it behooves testators and their attorneys to proceed with caution into areas where they do not have the shelter of the Uniform Act.

The Uniform Testamentary Additions to Trusts Act is fundamentally good, sound legislation which resolves almost all of the doubts and uncertainties about the validity of pour-overs. It fills a critical need by making available to testators and their advisors a useful, practical modern estate planning device which can be used with certainty and safety. For the sake of uniformity, the 31 states which either have their own pour-over statute or no statute at all, should adopt the Uniform Act.[7]

Notes

This article was adapted by the author from his thesis "The Law of Pour-Overs and the Uniform Testamentary Additions to Trusts Act," accepted for library use by Stonier Graduate School of Banking.

[1]Uniform Testamentary Additions to Trusts Act, Uniform Laws annotated, 9C, Cumulative Annual Pocket Part, Edward Thompson Company, Brooklyn, New York, 1963, pp. 115, 116.

[2]For much of the information herein, the author has drawn upon Proceedings in Committee of the Whole, August 20, 1959, and August 25, 1960, The National Conference of Commissioners on Uniform State Laws, 1155 East 60th Street, Chicago, Illinois.

[3]Joseph W. Hawley, "The 'Statutory Blessing' and Pour-Over Problems," TRUSTS AND ESTATES, Vol. 102, October, 1963, pp. 898,899.

[4]Hawley, supra, n. 3 at p. 899.

[5]Arizona Revised Statutes, Anno. (1961) Title 14, Art. 4, Chap. 1, §§ 14-141-143; Arkansas Statutes (1963) Title 60, Chap. 6, §§ 60-601-604; Connecticut General Statutes Anno. (1961) § 45-173a; Idaho Code (1963) Title 68, Chap. 11, §§ 68-1101-1104; Laws of Iowa (1963) Title 32, Chap. 633, §§ 275-277; Maine, Revised Statutes, Anno. (1964) Title 18, § 7; Massachusetts General Laws Anno. (1963) Chap. 203, § 3B; Michigan, Compiled Laws (1962) §§ 26.78(1)-(4); Minnesota Statutes Anno. (1963) § 525.223; New Hampshire Revised Statutes Anno. (1961) §§ 563-A:1-563-A:4; New Jersey Statutes Anno. (1962) §§ 3A:3-16.1-3A:3-16.5; New Mexico, Ch. 26, Laws of 1965; North Dakota Century Code, Anno. (1961) Title 56-07-01 - 56-07-04; Oklahoma Statutes Anno. (1961) Title 84, §§ 301-304; Laws of South Carolina (1961) Title 19, Chap. 5, §§ 19-295 . 19-298; South Dakota, Session Laws (1963) Chap. 440; Tennessee Code Anno. (1961) Title 32, Chap. 3, Sec. 32-307; Vermont Laws (1961) Title 14, Chap. 105, § 2329; Code of West Virginia (1961) Chap. 41, Art. 3, Secs. 8-11.

[6]New Jersey Statutes Anno. (1962) § 3A:3-16-4.

[7]Several of the states which have enacted the Uniform Act have made relatively insignificant modifications in the original language of the Act. Attorneys and others are therefore advised to compare the version enacted in those states with the text presented in this article. Two states have made significant changes. Connecticut has made it clear that a testator can pour over to the testamentary trust of another, even though the receptable trust is contained in a will that is executed after the testator executes his pour-over will. Massachusetts has changed the language of the statute to codify the position of the minority of Commissioners who felt that a pour-over should be valid even though the receptable trust might be amended after the death of the testator whose will pours over to the trust, without any provision in the will expressly providing for this. It may be that a Massachusetts testator could, in his will, limit the pour-over to the receptacle trust as it existed at the time of his death.

MEMORANDUM
December 14, 1965

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

From: Robert W. Lundy
Chief Deputy Legislative Counsel

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

One of the matters scheduled for consideration by the Advisory and Bar Committees at the meeting to be held Friday, December 17, 1965, pertains to the rights of nonresident aliens to take property by succession or testamentary disposition. See ORS 111.070.

In this memorandum are reproduced letters on this subject from Mr. Walter L. Barrie, Assistant Attorney General, Oregon Department of Justice, and Mr. Peter A. Schwabe, Portland attorney.

C O P Y

STATE OF OREGON
Department of Justice
Salem 97310

December 8, 1965

Honorable William L. Dickson
Chairman, Oregon Probate Law Revision
Advisory Committee
244 Multnomah County Courthouse
Portland, Oregon 97204

Dear Judge Dickson:

This letter contains my views and recommendations concerning the need for revising or amending ORS 111.070. As I understand from talks with Peter Schwabe there will also be an opportunity to present these views in person at 1:30 p.m. on Friday, December 17, 1965, in your courtroom. My further understanding is that the scope of the review of ORS 111.070 is centered around whether ORS 111.070 should be repealed or amended in order to do away with the escheat factor.

I am sure that Mr. Schwabe feels that this law should be completely repealed or, at least, amended in such a way that it would conform to what is

generally termed a custodial statute, such as is found in New York. Most of my comments will thus be concerned with the reciprocity rule in Oregon vs. the New York Custodial Law, the distinctions and merits of each. However I have also included two other items which I believe warrant the attention of the committee in amending ORS 111.070, and are underscored for the committee's attention. I apologize for the length of this letter but I believe the material included herein is important and, hopefully, of assistance to the committee in its consideration of this law.

Oregon's Alien Reciprocity Statute (ORS 111.070) vs.

The Benefit and Use Rule of Other Jurisdictions.

Oregon's original alien reciprocity statute was enacted in 1937 as a reflection of legislative hostility towards confiscations by the Nazi government. O.C.L.A., § 61-107. The legislative aims then, as now, were to prevent the flow of U.S. money into the lands of our enemies or potential enemies, to insure a U.S. legatee's receipt of a bequest and to retaliate against confiscatory seizure by certain foreign governments. Today this Act is directed against the iron curtain countries. Among other states which have adopted a comprehensive reciprocity statute are California, Cal. Prob. Code, § 259, and Montana, Rev. Codes Ann., § 91-520.

There is another approach to a foreign alien's right to receive his inheritance which is generally referred to as the "benefit" rule. This type of legislation is in effect, for instance, in New York, N.Y. Surr. Ct. Act, § 269; Mass., Mass. Gen. Laws, chapter 206, § 27B; Pennsylvania, Title 20, Decedents and Trust Estates, § 1155 et seq.

Under the benefit rule there is no attempt to insure, by reciprocal guarantees, an American's right to inherit from a particular foreign country. The only consideration under such a law is to see to it that the foreign alien will receive his inheritance free from confiscation by his government. Under the latter rule if an alien heir establishes that his government will allow him to receive his inheritance in full that is enough to satisfy the statute. Thus, under the benefit and use rule thousands of dollars may be paid to beneficiaries in iron curtain countries although that particular country prohibited, by law or practice, the flow of funds out of the country to alien beneficiaries. For instance in Bulgaria there existed a law, although I believe it has recently been repealed, which prohibited its citizens or residents from disposing by will their property in Bulgaria to a foreign citizen or resident. Section 27 of the Bulgarian Foreign Exchange Regulation of 1952. In August I had the opportunity to confer with Dr. Ivan Sipkov in Washington, D.C. Dr. Sipkov is an expert in Bulgarian law. It was his opinion that the reciprocal laws in effect in several of our states were instrumental in forcing the communist countries to amend their legislation on more favorable terms in regard to an alien's right to inherit.

There have been several law review articles which praise the benefit rule and condemn the reciprocity rule, because of the latter's confiscatory approach. The reciprocity law, however, has withstood a barrage of challenges alleging

that it conflicts with the federal treaty-making powers, violates the due process clause of the Fourteenth Amendment and invades the field of foreign affairs exclusively reserved to the Federal Government. As a matter of fact a case is now pending before the Oregon Supreme Court which raises each of these objections and this case may well reach the United States Supreme Court.

Under the benefit and use statute an alien is not disinherited through escheat. The law is merely custodial in nature. Instead of permanent disinheritance the foreign beneficiary faces what may be only the delayed enjoyment of his property. Only procedural rights are adjudicated under the benefit rule leaving substantive rights unaffected. Therefore a decision by the court to hold a legacy in trust for the beneficiary does not become res judicata. If at a subsequent date the alien heir's representative can prove that the heir will obtain enjoyment and control of the funds, the inheritance is then transmitted to the heir.

It is the opinion of this writer that the benefit and use rule does not go far enough because it does not protect an American's right to inherit from foreign estates--it falls short because it is not reciprocal.

Under Oregon law an alien's right to inherit is forfeited absolutely by a finding of no reciprocity. This is perhaps a harsh rule but, on the other hand, all that is required is a showing of reciprocity. Presumptively if the court finds against reciprocity it is because there is evidence that the country of which the alien is a citizen or resident discriminates against our citizens and residents.

It is recommended that the present reciprocity law be retained. However an amendment to the present law to allow an alien to have the court consider the reciprocity question again at a subsequent date on the grounds that conditions have changed in the particular country may be feasible. For instance a special statute allowing aliens to recover property escheated under ORS 111.070 providing the conditions of that provision could now be established would be a possibility. A time limit should be attached however. Perhaps 10 years, as under the general recovery statute in ORS 120.130. The difficulty, however, with a subsequent proceeding like this is that it would require a retrial of all the questions before the court in the original trial on reciprocity. These cases can be very expensive and difficult to try, entailing securing an expert witness in foreign law, securing documents and translating foreign law and examining all of the foreign countries inheritance and foreign exchange laws. Therefore it is suggested that any provision which allows an alien to petition for another trial on the question of reciprocity should also provide that the alien pay the state its expenses in defending the case, whether the alien is successful or not in recovering the property. For example, ORS 120.130 (4) provides that the state may deduct its costs and expenses in defending a petition for the recovery of escheated property where the claimant prevails. It is true that as far as most aliens are concerned, they could not afford to pay all the expenses of litigation. That is unfortunate but the alternative of requiring the Land Board to expend money from the Common School Fund to defend these cases would be wholly unsatisfactory.

Notice to State When Estate Contains Alien Beneficiaries

Under the present law there is no requirement that the State Land Board be notified that there is a possibility of escheat under ORS 111.070. It is believed that this is a real gap in the law. It is difficult to know how many estates have slipped out of our hands because the Land Board was not given notice but there are good examples. For instance last year an estate in Grant County involving an heir residing in Communist China was discovered. This estate has been in probate since 1940 and has never been closed.

In order to provide for a more expeditious processing of estates involving aliens and in order to protect the interests of the state under ORS 111.070 it is highly recommended that language similar to the following be added to this statute:

> "In any estate where money or property would have vested in any alien person but for the provisions of this statute (ORS 111.070), it shall be the duty of the executor or administrator thereof as soon as he shall have completed and filed the inventory and appraisement in said estate to furnish the Land Board with the following information and file a copy thereof, in the probate proceedings in said estate:
>
> "(1) The names and addresses of the alien heirs, devisees and/or legatees in said estate;
>
> "(2) The appraised value of the estate;
>
> "(3) The names of any citizens or residents of this country, if any, who claim as an heir, legatee or devisee in said estate."

Ambiguity in ORS 111.070 (1)(a)

ORS 111.070 (1)(a) provides that the right of an alien to take property by succession or testementary devise is dependent in each case:

> "Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as <u>inhabitants and citizens</u> of the country of which such alien is an <u>inhabitant or citizen</u>."

The ambiguity is inherent in the disjunctive and conjunctive use of the words "inhabitants" and "citizens" in the above provision. In the case of the disjunctive reference at the end of the provision, is this to be interpreted as giving an option to the alien heir to prove reciprocity exists either in the country of which he is a citizen or the country of which he is an inhabitant--whichever is more favorable to his case? For instance a citizen of Austria who is an inhabitant of Czechoslovakia would of course rely on his citizenship

since there is no reciprocity with Czechoslovakia and since his inheritance rights are at least partially guaranteed under a treaty between this country and Austria. It would appear that the language in this provision should be clarified.

The opportunity to present our views in regard to the alien reciprocity statute is, of course, very much appreciated.

By /s/ Walter L. Barrie
Walter L. Barrie
Assistant

* * * * * * * * * * * *

C O P Y

Peter A. Schwabe
Attorney and Counselor at Law
Suite 721 Pacific Building
Portland, Oregon 97204

December 9, 1965

Honorable William L. Dickson
Chairman
Oregon Probate Law Revision
Advisory Committee
Multnomah County Courthouse
Portland, Oregon 97204

Re: Revision of ORS 111.070
/The reciprocal inheritance rights statute/

Dear Judge Dickson:

Pursuant to your kind invitation I am pleased to take this opportunity to submit my views and suggestions for possible legislative action in respect to ORS 111.070. I believe it is now generally recognized that the statute has outlived such purpose as it may have had when originally enacted as Chapter 377, O.L. 1937, and amended by Chapter 519, O.L. 1951, and that its provisions for confiscation by the State through escheat are offensive to present-day sensitivities. It is my understanding that the Attorney General, whose duty it has been to enforce the statute in the name of the State Land Board of Oregon /as the recipient of escheats/ will also submit a memorandum setting forth the views and recommendations of the responsible officials of the State of Oregon.

In my opinion, ORS 111.070 is legally and morally indefensible and should be repealed so that rights of inheritance in the State of Oregon may be restored to what they were prior to 1937. Our state, in fact our entire country, was built up and developed to a great extent by the millions of immigrants who came here at our beckoning and to seek a better life during the twenty-five years or so between 1890 and the outbreak of the First World War in August 1914.

These men--and not a few women--were mostly in their twenties when they came and are now in their sunset years. Many came from those regions of the Austro-Hungarian Empire which, upon its dismemberment in 1918, were made parts of Czechoslovakia, Hungary, Poland, Yugoslavia, etc., and from the still existing Eastern European countries such as Bulgaria and Roumania. It is a recognized fact that ORS 111.070 and similar statutes enacted in California, Montana and a few other states have been invoked and enforced primarily against the so-called "Iron Curtain" countries pursuant to what has become commonly known as the "Iron Curtain Rule". As a result the immigrants from the countries included in the "Rule" may not leave their estates, or even a legacy or devise, to their loved ones back home. Most of them have brothers, sisters, nieces and nephews, some have parents, spouses, children and grandchildren over there. Unless there are other blood relatives, so-called "eligible heirs", outside the homeland in territory with which reciprocity is recognized, the State steps in and seizes the estate as an escheat. At best the heirs or beneficiaries in the affected countries are faced with long and costly litigation to prove their rights of inheritance.

Rights of inheritance are as ancient as civilization itself. The denial of such rights by only a few of the fifty American states, Oregon by its ORS 111.070, has given rise to much bitterness and hostility against the United States in the countries whose people have seen their hoped-for inheritances taken away. Certainly the image of the United States has been tarnished in those countries, and there can be no doubt that the relations between the United States and those countries have been adversely affected. This very point is involved in the case of Zschernig v. State Land Board (Estate of Pauline Schrader, deceased, Multnomah County probate No. 91805) presently pending on appeal before our Supreme Court, wherein rights of inheritance were denied to the decedent's heirs in the Russian Zone of occupation of Germany on the ground that reciprocal rights of inheritance do not exist between the United States and that region, which is also commonly called East Germany or the German Democratic Republic, the name given it by the Russian occupiers who set up a puppet regime there. The contention is being made that ORS 111.070 is unconstitutional in that it attempts to invade the exclusive power of the federal government to regulate the foreign relations of the United States. It may be expected that the case will be decided within the next two to three months but the Supreme Court may find it unnecessary to rule on this point as it could be decided on any one of several other points. Also, one side or the other may well decide to take the case to the United States Supreme Court, in which event a final determination of the question may be many months away. And of course it may not be adjudicated at all for one reason or another in this particular case.

Actually, when most of the world was prostrate at the end of World War II there was only one nation (other than the United States of course) with a freely convertible currency, namely Switzerland. Sweden's kroner was almost free, but practically all other currencies of the world were in grave danger. It was in recognition of this that the United States summoned the Bretton Woods Conference in 1944, out of which came the International Monetary Agreement. Thereunder the signatory powers obligated themselves to adopt far-flung and complex systems of foreign funds control for the protection and safeguarding of their currencies. Most countries, not excepting our closest allies such as Great Britain and France, simply did not have dollars which could be applied to sending American citizens

their inheritances out of estates in those countries, yet the courts in the so-called reciprocity states, including Oregon, held that there was no reciprocity of inheritance rights if an American citizen could not on demand receive payment of his foreign inheritance in dollars within the United States. While during the last twenty years the world's finances have improved greatly, the war-born foreign funds controls still exist and even today there are only very few freely convertible currencies. Under the decisions of the Oregon Supreme Court /Christoff's Estate, 219 Or. 233, 347 P.2d 57, Stoich's Estate, 220 Or. 448, 349 P.2d 255, Kasendorf's Estate, 222 Or. 463, 353 P.2d 531, Pekarek's Estate, 234 Or. 74, 378 P.2d 734, etc./ there can be no reciprocity under ORS 111.070 with any country that exercises foreign exchange controls, unless, of course, reciprocal inheritance rights are guaranteed by treaty. But there are very few such countries in eastern or southern Europe, in fact Yugoslavia is probably the only one. /Vide Kolovrat v. Oregon, 366 U.S. 187, 81 S. Ct. 922/.

The time has long since come when this State should cease to penalize and discriminate against those of its people who came from those regions of the world and their relatives back home whom they may not accord rights of inheritance, by will or intestacy, much as they might yearn to do so. Forfeitures and escheats are not favored by the law and the State of Oregon need not enrich itself in this manner. I trust therefore that your committee will see fit to recommend the repeal of ORS 111.070.

/s/ Peter A. Schwabe
(Peter A. Schwabe)

P.S. I shall be most pleased and am planning to appear personally before your Committee at 1:30 P.M. on Friday, December 17, 1965.

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C O P Y

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December 10, 1965

Honorable William L. Dickson
Chairman
Oregon Probate Law Revision
Advisory Committee
Multnomah County Courthouse
Portland, Oregon 97204

Re: Revision of ORS 111.070
/The reciprocal inheritance rights statute/

Dear Judge Dickson:

I am in receipt of a copy of the Attorney General's letter of December 8th in which he sets forth his views and recommendations for revising or amending

ORS 111.070. These are very much different than I had anticipated and while I understand that it is not desired that this correspondence develop into a debate, I would like to submit an alternative recommendation for consideration, only however if the Committee should not be disposed to favor a recommendation for outright repeal of ORS 111.070.

Three of the most populous eastern states, New York, Pennsylvania and Massachusetts, each with large first and second generation "foreign" populations, have so-called withholding statutes. Thereunder the court may withhold and defer actual distribution and payment of inheritances due non-resident alien heirs or beneficiaries unless and until satisfied that they would receive and have the free use, benefit and control of the money--a requirement which is also in ORS 111.070 as subparagraph 3. A study of these statutes motivates me to recommend the New York statute, Section 269a of the New York Surrogate's Court Act for your Committee's consideration. It provides as follows:

> "DEPOSIT IN COURT FOR BENEFIT OF LEGATEE, DISTRIBUTEE OR BENEFICIARY.
>
> 1. Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payment should be withheld, the decree may direct that such money or other property be paid into the surrogate's court for the benefit of such legatee, distributee, beneficiary of a trust, or such person or persons who may thereafter appear to be entitled thereto. Such money or other property so paid into court shall be paid out only by the special order of the surrogate or pursuant to the judgment of a court of competent jurisdiction.
>
> "2. In any such proceeding, where it is uncertain that an alien legatee, distributee or beneficiary of a trust, not residing within the United States or its territories, would have the benefit or use or control of the money or other property due him, the burden of proving that such alien legatee, distributee or beneficiary of a trust will receive the benefit or use or control of the money or other property due him shall be upon him or on the person or persons claiming from, through or under him."

It is of course in no sense confiscatory but does protect the foreign heir if his government should in any way seek to infringe upon his receiving the full and free use and benefit of the inheritance. The adoption of the New York statute, or one similar thereto, would yield the further significant advantage that the Oregon courts would have the benefit of the great volume of decisions in respect to the statute handed down by the Surrogate Courts, particularly those in the metropolitan area of New York City where there are large concentrations of practically every foreign nationality. Thus the interpretation and application of the statute by courts having the benefit of close contacts with the foreign countries involved could serve as excellent guidelines for the interpretation and application of a corresponding Oregon statute by our courts.

/s/ Peter A. Schwabe
(Peter A. Schwabe)