ADVISORY COMMITTEE
Probate Law Revision
Twenty-first
~~Twentieth~~ Meeting
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Dates) 1:30 p.m., Friday, January 14, 1966
and: and
Times) 9 a.m., Saturday, January 15, 1966
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

1. Pretermitted children (sections 18 and 19, draft of proposed chapter on wills). See ORS 114.250 and 114.260.

   Redraft of sections 18 and 19 (Zollinger and Braun).

   Research report on remedy and procedure whereby pretermitted children obtain their shares (Frohnmayer and Riddlesbarger).

2. Deposit of wills with county clerk (sections 28 to 31, draft of proposed chapter on wills). See ORS 114.410 to 114.440.

   Reports by members on consulation with county clerks on present use of procedure under ORS 114.410 to 114.440.

3. Advancements and retainer.

   Report by Frohnmayer (dated December 10, 1965). Copies of this report were distributed to members before the December meeting.

4. Initiation of probate or administration (ORS chapter 115).

   Report by Gilley and Krause on revision of ORS chapter 115.

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

ADVISORY COMMITTEE
Probate Law Revision

Twenty-first Meeting, January 14 and 15, 1966
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The twenty-first 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, January 14, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

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

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

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

Pretermitted Heirs

Frohnmayer report (remedies of pretermitted heirs). Frohnmayer referred to and commented upon his report on remedies for enforcement of rights of pretermitted heirs in Oregon, which had been distributed to members of both committees prior to the meeting. [Note: A copy of this report constitutes Appendix A to these minutes.] He pointed out that the pertinent wording of the Oregon pretermitted heir statute (ORS 114.250) was "and the same shall be assigned to them, and all the other heirs, devisees and legatees shall refund their proportional part." He indicated that appropriate remedies of a pretermitted heir did not appear to include a will contest, citing authority for the proposition that a pretermitted heir was a petitioner for distribution and not a proper contestant of a will. He commented that pretermitted heir statutes were generally of the Massachusetts type, under which parol evidence was admissible to show that omission of an heir was intended by a testator, or the Missouri type, under which such parol evidence was not admissible, and noted that the Oregon statute was of the Missouri type. Frohnmayer suggested that the requirement of the Oregon statute as to refunding by heirs, devisees and legatees raised difficult questions involving possible differences in the treatment of real and

personal property and appropriateness of the time at which the remedy of pretermitted heirs should be asserted.

At Zollinger's suggestion, further consideration of Frohnmayer's report and the detailed problems involved in remedies of pretermitted heirs was postponed pending discussion and action on the wording of a proposed pretermitted heir statute.

Zollinger and Braun report (proposed statute). Zollinger referred to and commented upon his report, prepared in collaboration with Braun and distributed to members of both committees at the meeting, on a proposed pretermitted heir statute. [Note: A copy of this report constitutes Appendix B to these minutes.] He noted that the report did not set forth the pertinent provision of the 1963 Iowa Probate Code (section 267), which reads as follows:

> "When a testator fails to provide in his will for any of his children born to or adopted by him after the making of his last will, such child, whether born before or after the testator's death, 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."

Zollinger stated that he and Braun were agreed that the pretermitted heir statute should not include descendants of deceased children of the testator because the effect of such inclusion was likely in most cases to go too far in defeating the expressed purpose of the testator, but he recognized that whether public policy required such inclusion was a question for the committees to decide.

Zollinger suggested the possibility of making no provision at all for pretermitted heirs in the proposed revised Oregon probate code. Allison expressed the view that some provision for pretermitted heirs should be made, suggesting that omission might be difficult to justify when the proposed revised code was before the Oregon legislature for approval. Krause moved, seconded by Thalhofer, that a pretermitted heir statute be included in the proposed revised code. Motion carried.

Riddlesbarger commented that in his opinion the primary aim of the pretermitted heir statute was to carry out the probable intention of a testator, rather than to afford protection to a testator's children. Dickson agreed, indicating that protection of a testator's children should be accomplished in some other fashion.

Riddlesbarger referred to a draft of a proposed pretermitted heir statute submitted for consideration by a committee of the Wisconsin Bar Association in February 1964, commenting that this draft contained a number of rules designed to implement the probable intention of a testator. The Wisconsin draft reads as follows:

"Sec. 7 UNINTENTIONAL FAILURE TO PROVIDE FOR ISSUE OF TESTATOR

"(1) Children born or adopted after making of the will. If a testator fails to provide in his will for any child born or adopted after the making of the will, such child is entitled to receive a share in the estate of the testator equal in value to the share which the child would have received if the testator had died intestate, unless

"(a) it appears from the will or evidence outside the will that such omission was intentional,

"(b) the testator intentionally eliminated all of his children known to be living at the time of execution of the will from any share under the will, or

"(c) the testator provided for the subsequently born or adopted child by a transfer or transfers outside the will, and the intent that such transfer or transfers be in lieu of a testamentary gift is either shown by statements of the testator or inferred from the amount of the transfers and other circumstances.

"If a child entitled to a share under this section dies before the testator, and such child leaves issue who survive the testator, the issue who represent such child are entitled to his share.

"(2) Living issue omitted by mistake. If it is established by clear and convincing evidence that a testator has by mistake or accident failed to provide in his will for any child living at the time of making of the will, or for the issue of a deceased child, such child or issue of a deceased child is entitled to receive a share in the estate of the testator equal in value to the share which he or they would have received if the testator had died intestate.

"(3) Time for presenting demand for relief. A demand for relief under this section must be presented to the

court in writing not later than (a) six months after allowance of the will, or (b) the final judgment, whichever first occurs.

"(4) From what estate share is to be taken. Except as subsection (5) provides otherwise, the court shall in its final judgment assign the share provided by this section:

"(a) from any intestate property first;

"(b) the balance from each of the devisees or legatees under the will in proportion to the value of the estate each would have received under the will as written, unless the obvious intention of the testator in relation to some specific devise or bequest or other provision in the will would thereby be defeated, in which case the court in its discretion may adopt a different apportionment and may exempt a specific devise or bequest or other provision.

"(5) Discretionary power of court to assign different share. If in any case under subsections (1) or (2) the court determines that the intestate share is a larger amount than the testator would have wanted to provide for the omitted child or issue of a deceased child, because it exceeds the value of a provision for another child or for issue of a deceased child under the will, or that assignment of the intestate share would unduly disrupt the testamentary scheme, the court may in its final judgment make such provision for the omitted child or issue out of the estate as it deems would best accord with the probable intent of the testator, such as assignment, outright or in trust, of any amount less than the intestate share but approximating the value of the interest of other issue, or modification of the provisions of a testamentary trust for other issue to include the omitted child or issue."

Zollinger suggested that the application of the pretermitted heir statute should be limited to children born or adopted after execution of the will. He expressed the view that a person competent to make a will was competent to know the natural objects of his bounty, and commented that as to children born or adopted before execution of the will the testator's intention probably had been expressed therein, even if only by omission. Riddlesbarger expressed opposition to Zollinger's suggestion, remarking that the testator's intention was the crucial factor and that in many cases it might be established that the omission of children born or

adopted before execution of the will was unintentional. Zollinger moved, seconded by Allison, that application of the statute be limited to children born or adopted after execution of the will. Motion failed both committees by a separate vote of each.

The committees discussed briefly the inclusion of descendants of deceased children of a testator as pretermitted heirs. Zollinger and Braun expressed opposition to such inclusion. Frohnmayer, Thalhofer and Riddlesbarger indicated they favored such inclusion. Thalhofer suggested that a testator might be inclined to forget descendants of deceased children more often than living children. Riddlesbarger commented that descendants of deceased children should be included if it could be shown that their omission or the omission of the children by the testator was the result of mistake.

Zollinger revised proposed statute. Riddlesbarger suggested that the pretermitted heir statute contain one provision for children born or adopted after execution of the will on an automatic basis and another provision for all living children and descendants of all deceased children on the basis of proof of unintentional, mistaken or accidental omission. Zollinger proposed the following to carry out Riddlesbarger's suggestion:

> "If any person makes his last will and dies, survived by a child born or adopted after the execution of his will, not provided for by his will and not a member of a class referred to therein, such child shall inherit and receive such share of the estate of the testator as would have been inherited by or distributed to him if the testator had died intestate.
>
> "If the testator shall be survived by a child not named or provided for by his will and not a member of a class referred to therein or by a descendant of a deceased child when neither the deceased child nor his surviving descendant has been named or provided for by his will or is a member of a class referred to therein, such child or descendant of a deceased child shall inherit and receive such a share of the estate of the testator as would have been inherited by and distributed to him if the testator had died intestate if it shall appear and be found in a proceeding brought pursuant to ORS_____that the omission of such child or descendant was inadvertent."

Zollinger pointed out that the second paragraph of the revised proposed statute was applicable to children born or

adopted before execution of the will and to descendants of any children who predeceased the testator either before or after execution of the will.

Butler commented that the proposed revised statute appeared to favor children born or adopted after execution of the will, and questioned the desirability of such favoritism. Rhoten suggested that if Riddlesbarger's idea of proof of unintentional omission were adopted, such proof should be required in the case of children born or adopted after execution of the will, as well as in the case of other children and their descendants.

Allison expressed the view that if there was to be an establishment of intention or lack of intention by a testator it would have to be as to persons about whom the testator could have had an intention at the time of execution of the will, and questioned whether the testator could have an intention as to persons not then in existence. Zollinger remarked, and Gilley agreed, that a testator could make express provision for children born or adopted after execution of the will.

Riddlesbarger referred to the words "not provided for" in the first paragraph of the proposed revised statute, and questioned whether an express disinheritance of a child was a provision for such child. Allison suggested, and Zollinger agreed, that the wording "not mentioned or provided for" should be used.

In response to a question by Dickson, Zollinger expressed the view that the proceeding for establishment of unintentional omission should be brought in a court of general jurisdiction. He proposed that the heirs and beneficiaries of the testator, so far as known or disclosed in the probate proceeding, should be made defendants in the proceeding for establishment of unintentional omission. He commented that the proceeding was essentially one in equity for determination of the fact of error or inadvertence, and suggested that a declaratory judgment proceeding be used. In response to a question by Rhoten, Zollinger indicated that by "heirs and beneficiaries" he intended to include all persons who would be entitled to a share of the testator's estate under the laws of descent and distribution and under the will. Zollinger also expressed his opinion that the claimant under the pretermitted heir statute should have the burden of proving unintentional omission.

Allison stated that he foresaw considerable difficulty in establishing the state of mind of a testator in a proceeding for determination of unintentional omission. He suggested that the committees endeavor to cover all pretermitted heirs

on an automatic basis and abandon the idea of a proceeding for establishment of unintentional omission.

Riddlesbarger expressed objection to the word "inadvertent" in the second paragraph of the proposed revised statute. Richardson suggested substitution of "unintentional" for "inadvertent." Butler questioned whether "unintentional" had a meaning adequately expressing the nature of the omission as contemplated by the committees. Lundy remarked that omission of a child whom the testator believe dead might not constitute an unintentional omission, but rather a mistake. Riddlesbarger suggested use of "result of mistake" or "result of accident." Butler proposed use of the phrase "that it was the testator's intention to name or provide for or include as a member of the class and that the omission was the result of mistake."

Gilley remarked that whatever the nature of the pretermitted heir statute or the scope of the rules as to omission therein, there probably would be instances in which testators' wishes would not be anticipated or satisfied, and that the aim of the statute was to reduce the number of such instances to a practical minimum. In response to a question by Riddlesbarger, Dickson commented that he seldom encountered pretermitted heir problems; that in most cases in his experience testators' intentions were clear and the matters settled with little difficulty.

Present Oregon statute (ORS 114.250). Richardson referred to the present Oregon pretermitted heir statute (ORS 114.250), and suggested, and Jaureguy agreed, that perhaps it would be advisable for the committees to retain the basic approach of this statute, on which a body of case law had been developed, with some improvement of wording and addition of a better provision on the remedy of pretermitted heirs.

Riddlesbarger moved, seconded by Rhoten, that the approach of the present Oregon statute be adopted as a basic concept for a pretermitted heir provision, with improvements to be made therein. Motion carried. In response to questions by Zollinger, Butler expressed his opinion that adoption of the motion meant approval by the committees of the Missouri rule excluding extrinsic evidence on intention of testators as to omission, and of the proposition that the fact of omission established the right of pretermitted heirs.

Dickson assigned to Allison and Richardson the task of preparing a revised proposed pretermitted heir statute for consideration by the committees at the meeting the following day.

Remedy of pretermitted heirs. For the guidance of Allison and Richardson in preparing a revised proposed pretermitted heir statute, the committees discussed several aspects of the remedy to be afforded pretermitted heirs.

Zollinger noted that his and Braun's report proposed that the share of a pretermitted heir be a portion of the net estate, including both real and personal property, and that, if not distributed to him in the probate proceeding, it be recovered ratably from other distributees. Krause suggested that the pretermitted heir's share come first from any intestate property, then from the residuary estate and then from specific bequests, in order to give maximum effect to the expressed intention of the testator.

Gilley pointed out that the pertinent provision of the 1963 Iowa Probate Code (section 267) gave to a pretermitted child "a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate." Zollinger expressed the view that the quoted portion of the Iowa provision was less than satisfactory, and that, for example, it was not clear under the Iowa provision whether a pretermitted child would receive a share of the real property.

Rhoten expressed agreement with Zollinger's position that a pretermitted heir should receive a portion of all the net estate, whether intestate property, residuary estate or specific bequests. Riddlesbarger moved, seconded by Butler, that the committees adopt Zollinger's position. Motion carried.

Braun referred to that part of her and Zollinger's report dealing with the period in which a pretermitted heir should be required to make his claim, and suggested that the claim be made during the probate period. Zollinger agreed that the claim should be made during probate, commenting that in most instances the existence of the pretermitted heir would be known during this period and the executor could make distribution accordingly. He suggested that the period for making a claim be limited to three years, or perhaps six years, after the death of the testator.

Riddlesbarger suggested that the period for pretermitted heir claims begin at the time of allowance of the will. Zollinger expressed approval of Riddlesbarger's suggestion. Dickson indicated that he preferred the death of the testator as the starting point for the period.

Thalhofer commented that if the pretermitted heir claim period were limited to the probate period, an executor might know of the existence of a pretermitted heir, but fail to

disclose that knowledge and thus foreclose the pretermitted heir's claim.

Krause moved, seconded by Thalhofer, that the pretermitted heir claim period be limited to three years from the death of the testator. Motion failed.

Butler suggested that if the period for pretermitted heir claims were to be stated in terms of a specific number of years, the period in any event should extend to the end of the probate period. Gilley proposed that the period be limited to the period of administration of the estate, ending with the order of final distribution, and Rhoten and Allison expressed agreement with this proposal. Dickson and Gilley suggested that the filing or hearing on the final account might be used as the termination point of the period. Rhoten commented that in some instances settlements are made after the filing of the final account. Gilley moved, seconded by Rhoten, that the period for pretermitted heir claims be limited to six months after the date of the order admitting the will to probate, as in the case of will contests (see ORS 115.180). Motion carried.

In response to a question by Richardson, Zollinger suggested that the claim of a pretermitted heir be determined in a court of general jurisdiction. Allison suggested that such claims be submitted by petition in the probate court and then, if objections to the claims were made, recourse be had to a court of general jurisdiction. He remarked that in many cases the fact of pretermission would be admitted and the matter settled satisfactorily without recourse to a court proceeding for determination of the validity of the claim.

Probate Jurisdiction

Frohnmayer referred to that part of his report on remedies of pretermitted heirs which commented on deficiencies of the present limited jurisdiction of the probate court in Oregon, and suggested that the committees should consider broadening this jurisdiction. In response to a question by Riddlesbarger, Dickson indicated that the subject of probate jurisdiction had not been assigned to anyone for study and report. Frohnmayer suggested appointment of a subcommittee to work on the matter. It was pointed out that the matter of probate jurisdiction was the subject of studies in progress or to be undertaken by the Bar Committee on Judicial Council.

After further brief discussion, Dickson appointed a subcommittee, consisting of Thalhofer (chairman), Copenhaver, Field, Gooding and Warden, to study and report on probate jurisdiction.

Deposit of Wills with County Clerk

Thalhofer, indicating that he would be unable to attend the meeting the following day, reported on the practice on depositing wills with the county clerk under ORS 114.410 to 114.440 in Deschutes County. He stated that 98 wills had been deposited since 1947, 48 wills were on deposit at the present time and the most recent deposit was on December 8, 1965. He commented that an index to deposited wills was maintained, and that when a deposited will was delivered, the person receiving it signed the envelope in which the deposited will was kept and the signed envelope retained by the clerk as evidence of the delivery. He indicated that the usual practice was for persons to inquire about wills on deposit; that lists of deposited wills were not published but that information on such wills was given on request. He remarked that he had been informed that little difficulty was encountered in the procedure. In response to a question by Krause, Thalhofer stated that a $1 charge was made for deposit of a will.

Small Estates

Bettis indicated that Representative Keith D. Skelton had contacted John H. Holloway, Secretary of the Oregon State Bar, inquiring about the status of proposed legislation on summary proceedings for administration of small estates of decedents, and that Holloway, in turn, had asked Bettis about this matter. Dickson noted that the small estates bill introduced at the 1965 session of the Oregon legislature (i.e., House Bill 1614) had died in the House Judiciary Committee. He reported that Lisbakken, William C. Martin and Duncan L. McKay were working on proposed small estates legislation for the American Bar Association in connection with the current Model Probate Code project. He expressed his belief that the committees probably would not reach the point of considering small estates legislation until the end of their work on the Oregon probate revision project. Zollinger commented that a bill on the subject probably would not be ready in time for introduction at the 1967 session of the Oregon legislature. Bettis stated he would report these matters to Holloway.

The meeting was recessed at 5:15 p.m.

The meeting was reconvened at 9 a.m., Saturday, January 15, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were

present: Dickson, Zollinger, Allison, Butler, Carson, Frohnmayer, Jaureguy, Lisbakken, Mapp and Riddlesbarger.

The following members of the Bar committee were present: Bettis, Gilley, Braun, Copenhaver, Hornecker, Krause, Rhoten, Richardson and Warden.

Also present was Lundy.

Deposit of Wills with County Clerk (continued)

Dickson reported on the deposit of wills with the county clerk under ORS 114.410 to 114.440 in Multnomah County, noting that 1,339 wills had been deposited since June 19, 1945, 430 of these had been withdrawn and 909 were on deposit as of January 14, 1966, the most recent deposit being on January 14. He indicated that the county clerk complied with the statute by enclosing a deposited will in a sealed envelope, giving a receipt to the testator and retaining a copy of the receipt as a record. He pointed out that deposited wills were filed numerically according to deposit, and that an alphabetical index thereto was maintained. He commented that lists of wills on deposit were never supplied to anyone; that a deposited will was released only upon proper identification and proof of the testator's death, but that a will was released to the testator if he wished to withdraw it. Krause remarked that concern had been expressed to him as to the workload imposed on the county clerk's office in Multnomah County by the will deposit procedure, to the number of wills of deceased testators still on deposit and to the small charge made for the service (i.e., $1, as provided in ORS 114.410). In response to a question by Jaureguy, Dickson indicated that no attempt was made to check deposited wills when intestate estate proceedings were initiated.

Dickson read aloud a letter from Gooding reporting on the deposit of wills with the county clerk in Union County. The pertinent portion of this letter is as follows:

> "Regarding ORS 114.410 to 114.440, apparently enacted in 1945, the Clerk of Union County states that 18 wills have been filed, 15 are presently on file, with the oldest being February 15, 1950, and the newest being September 24, 1964, and our County having a population of approximately 18,000.
>
> "Our Clerk conforms to ORS 114.410 and 114.420. The depositor usually names the executor and an attorney on the endorsement, and the endorsement is issued accordingly. The Clerk also conforms to ORS 114.430.
>
> "Respecting ORS 114.440, she has never had an

occasion to have a public opening. Her notice requirement would be a death certificate, and she would deliver the will and death certificate to the Probate Judge. She doesn't feel that she has authority to go any further in the matter.

"She also advised me that she had the will of a person, now deceased, and I am the executor of the latter's estate. Prior to death and the drafting of a new will, decedent had told me that the will was filed with the Clerk, decedent having worked at the Clerk's office for a long period of time, but I have ignored it. The next time I go to the Courthouse, I shall make this a 'living law' by receiving the will.

"I believe all of this matter should be repealed. The Clerk states that it is a nuisance, the Courthouse is full and her office is understaffed and quite busy with other matters. Moreover, the State should not perform this rather non-important service. It isn't used and a will being ambulatory, it is likely that many of them will have been revoked."

Riddlesbarger reported on the deposit of wills with the county clerk in Lane County as follows:

"No record is kept which would enable one to determine the number of wills currently in effect filed by living persons. To date, 276 such wills have been filed. No record is kept, however, of the number of withdrawals. The Clerk did say that the number of filings has increased markedly during the last few years.

"There has never been a public opening of such a will to date.

"The list of wills will not be supplied to anyone. The office will tell an inquirer whether or not a particular will is on file. The Clerk is of the opinion that no authority exists to give anyone such a list of wills.

"No action would be taken merely upon newspaper or other informal notice of the death of the testator. Proof of the identity of the person requesting delivery of the will is required before delivery of the will to the person named on the envelope as being entitled to receive it. The Clerk agreed that to protect the will it might be desirable to duplicate it before sending it to any person or to any court,

but no occasion to consider the matter has ever arisen because, as indicated above, there has been no public opening of any will.

"Enclosed is the only form in use in Lane County. It is the envelope in which the will is sealed upon receipt of it.

"The Clerk had no other suggestions to make but was emphatic in the opinion that the system is a good one."

Hornecker, reporting on the deposit of wills with the county clerk in Jackson County, stated that 234 wills were on deposit at the present time, of which approximately 100 had been deposited within the last four years, and that the first one had been deposited in 1945. He indicated that an index, setting forth the name of the testator, the date of deposit, the deposit number, from whom received and to whom delivered, was maintained. He noted that before a deposited will was delivered, the recipient was required to sign the envelope in which the will was kept, and that the clerk retained the envelope. He remarked that one law office in Medford had adopted the practice of suggesting to its clients that wills be deposited with the clerk, and suggested that this might account for some of the recent increase in the number of deposits.

Braun reported on the deposit of wills with the county clerk in Clackamas County, noting that 109 wills had been so deposited and 12 withdrawn. She indicated that anyone was permitted to withdraw a will on signing a receipt therefor, and commented that this procedure appeared to provide little protection.

Frohnmayer expressed concern that wills might be kept on deposit for long periods of time, and suggested that county clerks should not be required to act as custodians of them indefinitely. Allison commented that as to will deposits county clerks were somewhat in competition with those who render a safe deposit box service. He expressed the view that wills were more likely to be found if placed in safe deposit boxes than if deposited with county clerks. Butler noted that a large number of wills were on file in the trust department of his bank, remarked that any custodian of wills is faced with the problem of follow-up and explained the follow-up procedures employed by his bank.

Dickson expressed the view that ORS 114.410 to 114.440 should be repealed. Carson stated he would not argue strongly against such repeal, but indicated that, despite its deficiencies, the procedure of depositing wills with county clerks had some merit. Butler commented, and

Dickson agreed, that notwithstanding abandonment of the procedure for deposit of wills with county clerks the authority to accept wills not for probate (i.e., under ORS 115.110) should be retained, and that the county clerk's office was the logical place for deposit of such wills not for probate.

Riddlesbarger moved, seconded by Gilley, that ORS 114.410 to 114.440 be repealed. Motion carried unanimously.

Riddlesbarger remarked that, with the repeal of ORS 114.410 to 114.440, there would be need for some provision on the disposition of wills deposited with county clerks at the time of such repeal. Allison suggested that county clerks might be directed to continue the handling of wills on deposit with them in the same manner as under the statutes before repeal thereof. Dickson suggested than an affirmative duty be imposed on county clerks to return wills to depositors still living. Zollinger expressed the view that deposited wills need not be kept forever, and that county clerks should be permitted to destroy wills after a period of perhaps 40 years had elapsed and the clerks had been unable during this period to return wills to testators or other designated persons. In response to a question by Riddlesbarger, Dickson indicated he saw no need for return of the deposit fee since service had already been performed. Krause suggested that the period of time should begin on the effective date of the repeal of the statutes, rather than on the date of deposit of each will.

Frohnmayer proposed, and it was agreed, that Lundy should draft a provision on the disposition of wills deposited with county clerks at the time of repeal of ORS 114.410 to 114.440, including the requirement that clerks employ all reasonable effort to return such wills to the testators or persons designated to receive them and the authority of clerks to destroy wills after 40 years from the effective date of the repeal of the statutes if proper receipients were not found within that period. In response to a question by Bettis, Dickson stated that this provision did not apply to wills not for probate in the custody of county clerks.

Pretermitted Heirs (continued)

Allison noted that at the meeting the previous day he and Richardson had been assigned the task of preparing a revised proposed pretermitted heir statute for consideration by the committees. He summarized the various proposals that had been discussed the previous day and the reaction of the committees thereto. He pointed out the matters on which the committees had appeared to be in agreement, and stated that

he and Richardson had prepared and were submitting a revised proposed statute incorporating these matters, as follows:

> "If a testator dies survived by a child or by a descendant of a deceased child and neither the child nor the deceased child or his surviving descendant has been named or provided for by the testator's will and is not a member of a class named or provided for therein, such testator, so far as regards such surviving child or descendant, shall be deemed to die intestate, and such surviving child or descendant of the deceased child upon compliance with this section shall inherit and receive such a share of the estate as would have been inherited by and distributed to him if the testator had died intestate. If the pretermitted heir is not named in the petition for probate of the will, notice of claim of the pretermitted heir must be given by a petition for allowance of such claim filed in the probate proceeding not later than six months after the date of entry of the order admitting the will to probate, with citation to the executor and all persons named in the petition for probate of the will. Any such party aggrieved by an order allowing or disallowing the claim entered pursuant to such petition may have the matter tried in the circuit court as provided in ORS chapter 28 by commencing a proceeding therein within 30 days of the entry of the order in the probate proceedings."

Richardson suggested that the first part of the first sentence of his and Allison's revised proposed statute would be improved by rewording it to read "if a testator dies survived by a child or by a descendant of a deceased child and the child or the deceased child and his surviving descendant have not been named or provided for etc." Carson commented that it should be made clear when a descendant of a deceased child was to be considered a pretermitted heir. In response to a question by Carson, Allison stated that it was his understanding that if, for example, a testator's will specified that he left nothing to his sons and one son predeceased the testator, the descendants of the deceased son would not take as pretermitted heirs because their ancestor was named. Lundy suggested that one way to make the meaning more clear might be to describe pretermission of a child and descendants of a deceased child in separate sentences. Zollinger commented that Lundy's suggestion contemplated an approach similar to that employed in Zollinger's revised proposed statute considered the previous day.

Zollinger questioned the meaning of "with citation to

the executor and all persons named in the petition for probate of the will" in the second sentence of the Allison and Richardson revised proposed statute. Allison commented that the purpose of the citation was to give notice of the claim of a pretermitted heir. In response to a question by Allison, Zollinger expressed the view that it was necessary to spell out the citation procedure, as well as the procedure for objections to a pretermitted heir claim and the action to be taken by the claimant in the event of such objections.

Braun remarked that the provision for pretermitted heir claims in the Allison and Richardson revised proposed statute appeared to contemplate only the situation in which a pretermitted heir was not named in the petition for probate of the will, and expressed the view that devisees and legatees should be permitted to object to claims of pretermitted heirs who were named in such petition. Zollinger indicated his belief that devisees and legatees would be permitted to object, in the declaratory judgment proceeding, if pretermitted heirs were so named. He commented that the notice to devisees and legatees (see ORS 115.220) should include designation of any pretermitted heirs.

In response to a question by Lundy, Allison stated that if a pretermitted heir was named in the petition for probate, he would not have to file a separate claim. Allison called attention to the present requirement that a petition for probate contain identification of all heirs (see ORS 115.020).

Braun asked whether some provision should be made as how the portion of the estate to be received by a pretermitted heir was to be obtained, as, for example, ratably from other distributions. Zollinger and Allison commented that they understood that the share of a pretermitted heir was to come ratably first from intestate property and then from devises and bequests.

Frohnmayer expressed the view that the determination as to claims of pretermitted heirs should be made in the probate court, and not in a separate declaratory judgment proceeding. He suggested that the matter of such determination be postponed pending the study and report on probate jurisdiction by the subcommittee appointed the previous day.

Zollinger noted that the matter of determining pretermitted heir claims was similar to the general matter of determining heirship (see ORS 117.510 to 117.560). He commented that the present statutes on determination of heirship were poor ones for accomplishment of their intended purpose and in many respects unnecessary, and suggested that

the committees should consider repeal of these statutes. Dickson remarked that further consideration of determining pretermitted heir claims might be postponed pending consideration of both probate jurisdiction and general heirship determination proceedings.

Zollinger proposed that Lundy proceed to draft a proposed pretermitted heir statute, endeavoring to include therein those matters on which the committees appeared to be in agreement and to pinpoint those matters on which there still appeared to be uncertainty. Lundy indicated his willingness to undertake such an assignment. He also stated that the procedure suggested as to drafting a proposed pretermitted heir statute was in line with the procedure he contemplated following generally in regard to drafting the proposed new probate code. He commented that, first, he planned to develop and submit for consideration by the committees a proposed outline or arrangement of provisions to constitute the new code, and then, following tentative approval thereof by the committees, commence drafting those parts of the new code on which the committees had made decisions. He stated that such drafts would be submitted to the committees for consideration, and that thus the committees would have a second chance to review wording on matters previously considered and tentatively acted upon. He pointed out that in the process of preparing such drafts and reviewing them, questions not previously considered would probably arise.

Heirship Determination

Dickson suggested, and it was agreed, that a subcommittee be appointed to study and report at the March meeting of the committees on the matter of proceedings for the determination of heirship, both generally and as to pretermitted heirs. Dickson proceeded to appoint such a subcommittee, consisting of Riddlesbarger (chairman), Braun, Gilley, Mapp and Zollinger. Dickson suggested that Riddlesbarger maintain contact with Thalhofer, chairman of the probate jurisdiction subcommittee, on matters of mutual concern of the two subcommittees. Riddlesbarger asked Lundy to draft a proposed pretermitted heir statute for consideration by the heirship determination subcommittee.

Initiation of Probate or Administration

The committees began consideration of a draft of proposed legislation relating to initiation of probate or administration and primarily encompassing the matters covered by ORS 115.010 to 115.350, which had been prepared by Gilley, with assistance by Krause and Hornecker, and

distributed in the form of a report to all members of both committees before the meeting. In response to a question by Frohnmayer, Gilley indicated that in preparing the draft he had consulted the pertinent provisions of probate codes of other states, as well as those of the Oregon probate code.

Pleadings and mode of procedure (section 1). Gilley noted that section 1 of the draft was derived form ORS 115.110, with certain minor changes that he pointed out and explained.

Riddlesbarger referred to that part of section 1 specifying that the mode of procedure was "in the nature of a suit in equity except as otherwise provided by statute," and questioned whether there should be any exception to this mode of procedure. In response to a question by Riddlesbarger, Dickson commented that contested claims against estates of decedents often were tried as actions at law.

Zollinger suggested, and Frohnmayer and Gilley agreed, that the requirement in section 1 that petitions, reports and accounts "be verified by at least one of the persons making the same" might be deleted. Zollinger commented that there appeared to be tendency to eliminate requirement of oaths and acknowledgements, as illustrated by the almost complete absence thereof in the Uniform Commercial Code. Rhoten and Bettis indicated they favored retention of the verification requirement.

Rhoten suggested, and Frohnmayer agreed, that it might be specified that the verification be in the same manner as pleadings are verified. Gilley commented that such a specification would permit an agent or attorney to make the verification in some instances, and that this would be desirable. Dickson cited instances in which he believed it would be wise and appropriate for an attorney to make the verification. Jaureguy suggested that the authority of an agent or attorney to verify should be specified in section 1, rather than rely on the general reference to the law on verification of pleadings to accomplish this authority. [Note: See ORS 16.070.]

Gilley moved, seconded by Allison, that the committees approve section 1 with two modifications as follows: (1) Revision of the third sentence to read "all petitions, reports and accounts shall be verified as pleadings are verified"; and (2) deletion of "verified" in paragraph b, since the third sentence makes this word redundant. Dickson offered an amendment to the motion, which was accepted, that the third sentence of section 1 be revised to read "all petitions, reports and accounts shall be verified by at least one of the persons making the same or his agent or

attorney." Gilley pointed out that under the wording proposed by the amendment to the motion there would be a different rule on verification by an agent or attorney than in the case of pleadings. Amended motion carried.

Contents of petition (section 2). Gilley indicated that section 2 of the draft, which specified the contents of a petition for probate of a will or appointment of an administrator, was derived from pertinent provisions of the Oregon (see ORS 115.020), Iowa and Washington probate codes and from proposals by him and Krause.

Allison suggested that the petition should state the ages of the deceased and his heirs. Gilley commented that the statement that the deceased had testamentary capacity at the time of execution of the will, required by paragraph f of section 2, was an indication that the deceased was of proper age. Frohnmayer suggested inclusion of the deceased's Social Security number, and Dickson remarked that this number would be needed sooner or later in the probate proceeding. Gilley remarked that "wage earner Social Security account number" appeared to be the proper terminology, and referred to this wording used in ORS 107.450, relating to complaints in domestic relations suits. Dickson pointed out that all persons do not have Social Security numbers and that some have a different kind of identification number required by the federal government. He commented that the petition should state the Social Security number or other federally required identification number of the deceased. Rhoten expressed the view that in some instances it would be difficult to obtain Social Security numbers and some of the other items of information that section 2 would require to be stated in the petition. Gilley suggested that certain items of information be required to be stated "so far as known to the petitioner."

Butler noted that the present Oregon statute (i.e., ORS 115.020) required that the petition state the ages of heirs. Dickson suggested that the relationship of heirs to the deceased should be stated.

It was apparently agreed that paragraphs b and c of section 2 should be revised to read as follows:

> "b. The name, age, domicile and date of death of the decedent and, if known, his wage earner Social Security number or Treasurer's identification number.
>
> "c. So far as known, the names, relationships to the decedent, ages and last known addresses of his heirs."

Butler and Riddlesbarger suggested, and Allison and Gilley agreed, that the statement as to the qualification to act of a nominated executor or administrator required by paragraph e of section 2 be affirmative; i.e., "that he is qualified to act." It was apparently agreed that paragraph e should be revised to read as follows:

> "e. The name and address of the person nominated as executor by the will or nominated as administrator by the petition and that he is qualified to act."

In response to a question by Zollinger, Dickson expressed the view, with which Gilley agreed, that paragraph f of section 2 should be deleted. Dickson remarked that the age factor of a deceased's testamentary capacity was covered by the age statement required by the revised wording of paragraph b. Gilley commented that testamentary capacity was established in the process of proving the will and that allegation of such capacity was not necessary in the petition. Rhoten suggested that the phrase "and facts necessary to admit the will, if any, to probate" might be added to paragraph d. Carson, indicating that he opposed allegation of testamentary capacity in the petition, commented that a petitioner with the will in his possession was obligated to offer it for probate, that the petitioner might not know whether the deceased had testamentary capacity or might not be willing to admit such capacity and that such capacity was determined from other evidence. It was apparently agreed that paragraph f should be deleted.

Allsion suggested that paragraph g of section 2 be revised by inserting "personal" before "property" and deleting "which might be readily convertible into money," and, in response to a question by Butler, noted that "personal property" was the basis for the bond of a personal representative (see ORS 115.430). Zollinger proposed fuller use of the personal representative's bond statute, including "the probable value of the annual rents and profits of and from the real property of the estate." Hornecker commented that his and Krause's draft of a revised personal representative's bond statute would propose looking to the income of all property, rather than only real property. Carson suggested revision of paragraph g to read: "The estimated value of the property belonging to the decedent." Rhoten suggested addition of "and sufficient information concerning the value of the property to enable the court to fix the bond, if any" to the revision suggested by Carson. It was apparently agreed that paragraph g should be revised to read as follows:

> "g. The estimated value of the property belong to the decedent and sufficient information concerning the value of the property to enable the court to fix the bond, if any."

Carson expressed his belief that paragraph h of section 2 was unnecessary, and suggested that it be deleted. After further brief discussion, it was apparently agreed that paragraph h should be deleted.

Gilley moved, seconded by Butler, that section 2, with revision as apparently agreed upon, be approved by the committees. Motion carried. Jaureguy indicated that he had voted in opposition to the motion on the grounds that too much new wording was used in revised section 2, that present wording had been in existence for many years and had acquired a well-understood meaning and that use of new wording implied new meaning. Carson stated that he was in agreement with Jaureguy in principle, but expressed the view that this principle was not violated by revised section 2. Frohnmayer commented that he did not share Jaureguy's view, and that he believed it to be the duty of the advisory committee to up-date old wording in order to make the meaning of the probate statutes clearer.

Persons entitled to petition for proof of a will or for administrator (section 3). Gilley referred to section 3 of the draft, relating to persons entitled to petition for proof of a will or for administrator, and commented briefly thereon.

Dickson, Frohnmayer, Mapp and Zollinger expressed the view that "personal representative" should be substituted for "administrator" in the section heading of section 3. It was also suggested that "probate" and "probated" should be substituted for "proof" and "proved" in the section heading and in paragraph a.

Dickson, referring to paragraph b of section 3, expressed the view that the court should have more discretion as to whom administration was granted. Riddlesbarger suggested that the phrase "be granted to a creditor of the estate" in paragraph b (2) be revised to read "be granted to any suitable person, including a creditor," and that paragraph b (3) be deleted. Zollinger commented, and Dickson agreed, that the persons listed in paragraph b should not have a right to appointment, but rather that the list should constitute an order of preference, with authority in the court to appoint a suitable person subject to such preferences. Gilley noted that appointment as a matter of right had existed for many years, and expressed the view that there was merit in this approach. Frohnmayer suggested that a vote be taken on whether appointment of designated persons should be a matter of right unless a person was unsuitable. By a separate vote of each committee, the advisory committee opposed the proposition and the Bar committee favored it.

Zollinger suggested that the order of preference among persons desiring to act as administrator should be, first, the surviving spouse, then the surviving child or children andd then the next of kin, with authority in the court to consider the ability of any of those persons to discharge the duties of administrator. Allison suggested that nominees of persons listed in the order of preference be included therein.

Butler expressed the view that it was not clear that paragraph b of section 3 applied only to appointment of administrators. He remarked that paragraph a appeared to relate only to petitions for probate of a will and not to appointment of executors, and that paragraph b appeared to relate to administration of an estate, whether by an executor or administrator. Zollinger commented that he agreed with Butler, and that the order of preference in paragraph b should apply to persons desiring to act as personal representative. Allison stated that the distinction between persons entitled to petition and persons to be preferred in the appointment of personal representative should be clearer.

Riddlesbarger commented that a court should follow the order of preference unless it found a person unsuitable either on the court's own initiative or on other objection to the appointment. In response to a question by Krause, Dickson expressed the view that the wording "any qualified person whom the court finds suitable may serve as an executor or administrator" was satisfactory, but remarked that the court should not have to make a negative finding as to suitability. Dickson further stated that, while the court should be allowed some discretion in appointment of personal representatives to screen out unsuitable candidates, some protection should be provided against a judge appointing his relatives or friends.

Dickson suggested, and it was agreed, that Gilley and Krause should prepare a redraft of paragraphs a and b of section 3, endeavoring to incorporate therein the views apparently approved by the committees, and submit it to the committees for consideration.

The meeting was recessed at 12:30 p.m.

The meeting was reconvened at 1:30 p.m. All members of the advisory committee, except Gooding and Husband, were present. The following members of the Bar committee were present: Bettis, Gilley, Braun, Copenhaver, Hornecker, Krause, Rhoten, Richardson and Warden. Also present was Lundy.

Persons entitled to petition for proof of a will or for administrator (section 3). Gilley announced that, during the recess, he and Krause had prepared a redraft of paragraphs a and b of section 3 of the draft, as follows:

> "a. Any executor, devisee or legatee named in any will, or any other person interested in the estate, including any creditor, may petition the court to have the will probated or an administrator appointed.
>
> "b. The court shall appoint as personal representative a qualified person or persons whom the court considers suitable, giving preference to:
>
> "(1) The executor named in the will;
>
> "(2) The surviving spouse of the decedent;
>
> "(3) The nearest of kin of the decedent.
>
> "(4) A person who renounces his priority of appointment as personal representative or who is not qualified to act, may nominate in writing a qualified person as personal representative and such nominee shall have the same priority of appointment as the person making the nomination, but no person under the age of 18 years or of unsound mind shall have such right of nomination."

Gilley noted that the redraft did not specifically refer to children of the decedent in the order of preference because "nearest of kin" included such children. Butler and Allison suggested that the fact that an order of preference was being prescribed would be clearer if the phrase "giving preference in the following order" was used. Gilley indicated that, under the redraft, the court would not be required to make a finding of unsuitability in its order of appointment of a personal representative. Zollinger suggested that "whom the court finds to be suitable" be substituted for "whom the court considers suitable." In response to a question by Mapp on the need for both "qualified" and "suitable," Gilley and Lundy pointed out that "qualified" referred to the statutory qualifications of personal representatives, while "suitable" was a broader term intended to give the court a wider range of discretion in the appointment of personal representatives.

The committees discussed at some length the matter of nominees of persons in the order of preference for appointment as personal representative. Zollinger suggested, and Dickson agreed, that the prohibition against nomination by persons under 18 years of age or of unsound mind should

be deleted. Dickson commented that the age of the person making a nomination was a factor that the court would consider in any event. Krause expressed the view, in which Butler concurred, that there was no need to make provision for nominees, since in appropriate cases the court would not have to adhere to the order of preference in appointing a personal representative. Gilley and Dickson indicated that they favored a provision for nominees. Zollinger noted that if no provision were made for nominees and if, for example, a surviving spouse did not wish to act as personal representative but did wish to nominate a bank to so act, the court probably would have to give preference to children of the decedent over the bank. Dickson suggested that provision for nominees might be made by revising the phrase preceding the listed order of preference to read "giving preference to the following persons in the following order or their respective nominees."

Riddlesbarger asked about protection against the practice of a probate judge appointing one of his relatives as a personal representative on a finding that the relative was suitable. Braun suggested that the court might be required to make a finding that no preferred persons or their nominees were suitable before proceeding to appoint someone else. Dickson commented that if provision were made for nominees, a probate judge would find it extremely difficult to ignore all preferences and appoint one of his relatives.

Gilley moved, seconded by Butler, that the committees approve the following separate section on appointment of personal representatives:

> "The court shall appoint as personal representative a qualified person or persons whom the court finds to be suitable, giving preference to the following persons in the following order or their respective nominees:
>
> "(1) The executor named in the will;
>
> "(2) The surviving spouse of the decedent;
>
> "(3) The nearest of kin of the decedent or the respective nominees of any of them." Motion carried unanimously.

Gilley referred to paragraph c of section 3, relating to service of a copy of a petition for appointment of an administrator upon the State Land Board if the petition does not set forth the name of an heir of the decedent, and commented that this paragraph should be a separate section. Zollinger questioned the interest of the Land Board in the matter

of appointment of an administrator. Butler commented that because of the possibility of escheat in the case of an intestate estate and no heirs, the Land Board would have an interest and probably should have a voice in the appointment of an administrator, although it should not be placed in a position to control such appointment. Gilley pointed out that paragrph c essentially was a notice provision, with no specific mention of authority of the Land Board to propose appointment of an administrator or object to any appointment otherwise proposed. Gilley suggested, and Frohnmayer and Zollinger agreed, that notice to the Land Board should be given at the same time and in the same manner as notice to heirs, legatees and devisees under section 10 of the draft (see ORS 115.220). Riddlesbarger expressed the view that the Land Board should receive notice before appointment of an administrator. Rhoten remarked that the Land Board should not receive notice until after such appointment.

Krause moved, seconded by Bettis, that consideration of paragraph c of section 3 be postponed until section 10 was before the committees for consideration. Motion carried.

Venue (section 4). Gilley referred to section 4 of the draft, relating to venue for proof of a will and intestate administration, noting that it was derived from ORS 115.140, but was drafted with the aim of simplifying this present statute on venue and with its most significant innovation being to eliminate reference to real property.

Dickson suggested deletion of the phrase "at or immediately before his death" in paragraph a of section 4, commenting that the phrase, being expressed in the form of alternatives, was likely to engender confusion.

Riddlesbarger referred to the pertinent provision of the 1965 Washington Probate Code (section 11.16.050), and remarked that the wording of this provision (i.e., "deceased was a resident or had his place of abode") might be preferable to the wording of paragraph a of section 4 (i.e., decedent was domiciled"). He suggested that residence or place of abode might be easier to determine than domicile. Gilley noted that the venue provision of the 1963 Iowa Probate Code (section 12) used "residents."

Zollinger questioned the meaning and effect of the word "situs" in paragraph b of section 4, and in response to a question by Gilley, commented that substitution of "is located" for "has its situs" might be an improvement.

Zollinger asked whether there should be any order of preference of venue as to nonresident decedents based on kinds of property -- for example, where a decedent owned tangible assets in one county and was owed debts by persons in another county. He also suggested that situs or location be determined either at the death of the decedent or immediately before, but not in the alternative.

Butler suggested that the place where a nonresident decedent owed debts might be a proper consideration in determining venue. He remarked that, for example, if a nonresident decedent had creditors in one county and substantial assets located in another county, and if proper venue were in the county in which the assets were located, the creditors might not learn of the probate proceeding.

Allison proposed consideration of the place where a nonresident decedent died in this state or the place therein where the greater part of his assets were located as factors for determination of proper venue. He commented that nonresidents often have businesses or relatives in Oregon, and that their death in the state would probably often occur where those businesses or relatives were located.

Frohnmayer suggested that section 4 be revised to read as follows:

> "Probate of a will shall be had and the administration of the estate of an intestate shall be granted in the county where:
>
> > "a. If the decedent was domiciled in this state, then in the county of the decedent's domicle or other place of abode at his death.
> >
> > "b. If the decedent was not domiciled in this state at his death, then in the county where the decedent died or where any of his assets are situated."

Rhoten expressed the view that "resident or" should be inserted after "place" in paragraph a of Frohnmayer's suggested revision of section 4. Carson commented that including "resident" invited problems and that use only of "abode" was preferable. Gilley expressed his opinion that only domicile should be used. Lundy pointed out that many statutes use residence and not domicle -- for example, provisions of the guardianship statutes (see ORS 126.106 and 126.111). Jaureguy commented that revised paragraph a implied a distinction between domicile and place of abode, and it was pointed out that there was such a distinction.

Examples of persons having domiciles in one county and places of abode in another were given. Frohnmayer explained that revised paragraph a provided for venue in the county of domicile or of place of abode in the alternative.

Frohnmayer moved, seconded by Riddlesbarger, that paragraph a of his suggested revision of section 4 be approved. Motion carried.

At this point (3 p.m.) Riddlesbarger left the meeting.

Frohnmayer moved, and the motion apparently was seconded, that paragraph b of his suggested revision of section 4 be approved. Motion carried.

Zollinger suggested, and Dickson agreed, that there should be added to section 4 a provision to the effect that if a court in a county of proper venue assumed jurisdiction of a decedent's estate, no court in another county should assume such jurisdiction. Gilley referred to a pertinent provision of the 1963 Iowa Probate Code (section 14), which reads: "When a case is originally within the jurisdiction of the courts of two or more counties, the one which first takes cognizance thereof by the commencement of the proceedings shall retain the same throughout." Zollinger remarked that the Iowa provision did not specify that jurisdiction of the first court was exclusive. Allison referred to a pertinent provision of the 1965 Washington Probate Code (section 11.16.060).

At this point (3:20 p.m.) Frohnmayer and Warden left the meeting.

Gilley called attention to ORS 126.116, relating to proceedings for the appointment of a guardian commenced in more than one county, and commented that a portion of this statute might serve as an appropriate model for a provision to be added to section 4, as follows:

> "If proceedings are commenced in more than one county, they shall be stayed except in the county where first commenced until final determination of venue in the county where first commenced. If proper venue is finally determined to be in another county, the court shall cause a transcript of the proceedings and all original papers filed therein, all certified by the clerk of the court, to be sent to the clerk of the court of the proper county."

Gilley moved, seconded by Zollinger, that his suggested provision be approved and added to section 4. Motion carried unanimously.

Establishing foreign wills (section 5). Gilley referred to section 5 of the draft, relating to establishing foreign wills, noting that it was based upon ORS 115.160.

Gilley suggested, and Zollinger agreed, that the double certification (i.e., certificates by the court clerk and the chief judge or presiding magistrate) specified in paragraph a of section 5 was unnecessary, and that a single certification would be sufficient.

Dickson questioned the meaning of the reference to copies of the "probate" of wills probated in other states or foreign countries in paragraph a of section 5. He expressed the view that the nature of the materials constituting such "probate" should be spelled out. Allison remarked that it would be desirable to obtain copies of the foreign petition, order admitting the will to probate and, possibly, testimony of subscribing witnesses to the will. In response to a question by Gilley, Dickson and Allison commented that the foreign petition often contained information not disclosed by the foreign order or otherwise. Gilley pointed out that submission of the foreign materials did not dispense with the Oregon petition, and that the Oregon petition would contain much of the information disclosed by the foreign materials.

That part of paragraph a of section 5 specifying that the foreign probated wills be "recorded" and "admitted in evidence" in the same manner as wills executed and proved in this state was discussed. Gilley suggested that such foreign probated wills be filed and admitted "upon petition." Dickson commented that paragraph a should contain some provision recognizing the possibility of Oregon contest of the foreign probated will. Butler suggested that the matter of contest of foreign probate wills might be provided for in section 7 of the draft, relating to contests of wills. Allison expressed the view that the foreign probated will should be "presented for probate," rather than "admitted." Zollinger and Dickson remarked that, in their opinion, "admitted" was the proper term as to foreign probated wills. Dickson indicated that the admission of such wills was in common form, but with the right to contest preserved.

Zollinger suggested that paragraph a of section 5 be revised to read as follows:

> "a. Upon petition, if a will so executed as to qualify it for probate in this state is probated in any other state or territory of the United States or in any foreign country, copies of such will and of the order of probate thereof, certified by the clerk of the court in which such will was probated, with the seal of the

court affixed thereto, if it has a seal, shall be filed and the will admitted to probate with the same effect as though it were executed and proved in this state."

Carson asked whether that part of Zollinger's suggested revision of paragraph a of section 5 referring to "a will so executed as to qualify it for probate in this state" did not open up the matter of proving the will as if it were a local will, and commented that if such were the case there would be no giving of credence to the foregin order and thus no need for such order being submitted. Allison pointed out that admission of wills that do not meet Oregon requirements, such as holographic wills or wills with only one witness, upon the order of admission of a foreign court would constitute a change in present Oregon law, and referred to the requirement of ORS 114.060 that wills of nonresidents devising real property in Oregon be executed according to the laws of this state. Gilley suggested that the matter might be resolved by approving paragraph a as set forth in his draft and some revision of ORS 114.060.

Gilley moved, seconded by Zollinger, that paragraph a as set forth in his draft be approved. Motion carried.

Dickson referred to the previous discussion and action by the committees on ORS 114.060. [Note: See Minutes, Probate Advisory Committee, 11/19,20/65, page 5, and Riddlesbarger wills draft, Appendix A, Minutes, Probate Advisory Committee, 12/17,18/65, page 1, section 2.] Dickson noted that repeal of ORS 114.060 had been approved, with a savings provision for wills executed prior to the repeal. Zollinger suggested that the committees reconsider their action on ORS 114.060, and approve retention of this statute revised so as to make a foreign will executed according to the laws of the country, state or territory of which the testator was a resident effective as to both real and personal property in Oregon. Allison proposed the following revision of ORS 114.060: "Any person not an inhabitant of, but owning property in this state may devise or bequeath such property by will executed according to the laws of this state or of the country, state or territory in which the will is executed." Carson commented that "domiciled" should be substituted for "an inhabitant" in Allison's proposed revision. Butler indicated that limiting the application of the revised version of ORS 114.060 to nonresidents constituted a discrimination against Oregon residents who make wills outside the state. Dickson suggested that Butler's objection would be resolved if provision were made that any will executed in accordance with the place where it was executed was valid in Oregon in all cases.

Mapp referred to section 50 of the Model Probate Code, and suggested, and Butler, Dickson and Zollinger agreed, that it might be appropriate to substitute that section for ORS 114.060. Section 50 reads: "A will executed outside this state in a manner prescribed by this [Code], or a written will executed outside this state in a manner prescribed by the law of the place of its execution or by the law of the testator's domicile at the time of its execution, shall have the same force and effect in this state as if executed in this state in compliance with the provisions this [Code]." In response to a question by Dickson, Lisbakken indicated that section 50 of the Model Probate Code was substantially similar to the pertinent part of section 2 of Riddlesbarger's wills draft.

Dickson stated that it appeared to be the sense of the meeting that the committees reverse their previous action repealing ORS 114.060, and approve revision of that statute along the lines of section 50 of the Model Probate Code. He requested that Mapp and Riddlesbarger prepare such a revision of ORS 114.060 and submit it for consideration at a future meeting.

Zollinger referred to paragraph b of section 5, and suggested that the application of the paragraph be extended to the situation in which the will is foreign probated but a record of such probate is not available. Gilley suggested, and Zollinger agreed, that the first sentence of paragraph b might be revised to read: "If any will is filed or recorded in any other state or territory of the United States or in any foreign country, a copy of the will, certified as provided in subsection a of this section may be filed in any court of this state which has jurisdiction of the estate of the testator." Butler questioned the wording "certified as provided in subsection 'a'", and suggested that "certified by the clerk of the court" or "certified by the official custodian" be substituted therefor. Mapp commented that the wording used should be sufficiently broad and flexible to encompass various kinds of foreign procedure.

Zollinger suggested, and Dickson agreed, that Mapp and Riddlesbarger be requested to prepare a revision of section 5 along the lines apparently agreed upon by the committees and submit it for consideration at a future meeting.

Next Meeting of Committees

The next joint meeting of the committees was scheduled for Friday, February 18, 1966, at 1:30 p.m., and the following Saturday, February 19, in Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

Dickson indicated that the principal items on the agenda for the February meeting would be inheritance by non-resident aliens (report by subcommittee), advancements and retainer (Frohnmayer's report) and continuation of consideration of Gilley's draft of proposed legislation relating to initiation of probate or administration, starting with section 6 thereof.

The meeting was adjourned at 5:00 p. m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting,
January 14 & 15, 1966)

The following report on remedies for enforcement of rights of pretermitted heirs in Oregon was prepared by Mr. Frohnmayer and distributed to members of the advisory and Bar committees prior to the January 14 meeting:

January 3, 1966

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

From: Otto J. Frohnmayer

Gentlemen:

Pursuant to the directions of our chairman, I have prepared and enclosed for each of you a memorandum dealing with the remedies of a pretermitted child in Oregon. I have enlarged on my assignment by suggesting some revisions and actions which should be taken by our committees.

I hope you will find the enclosed memorandum clear and helpful.

Sincerely yours,

/s/ Otto J. Frohnmayer
OTTO J. FROHNMAYER

OJF:gh

Enclosure

MEMORANDUM FOR PROBATE REVISION COMMITTEE

REMEDIES FOR ENFORCEMENT OF RIGHTS OF
A PRETERMITTED HEIR IN OREGON

No Oregon case has been found which rules on the precise methods by which a pretermitted heir may enforce his rights. However, by reference to the Missouri cases arising under a statute which provided the model for the Oregon statute, conclusions may be reached as to how these rights may be established and enforced. It seems desirable to draft code provisions making more explicit what these remedies should be.

The present statutory provisions are as follows:

(1) ORS 114.250 Pretermitted Heirs to Have Portion of Estate. If any person makes his will and dies, leaving a child or children, or, in case of their death, 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, so far as regards such child or children or their descendants, not provided for, shall be deemed to die intestate; and such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate; and the same shall be assigned to them, and all the other heirs, devisees and legatees shall refund their proportional part.

(2) ORS 117.510 - 117.560. These provisions deal with the determination of heirship, including petition, hearing, trial of issues, conclusiveness of the decree and reopening of proceedings. Presumably these sections are available to a pretermitted heir.

Whatever the appropriate remedies may be, they do not seem to include a will contest. See e.g. Torregano's Estate, 54 Cal 2d 234, 352 P 2d 505, 88 ALR 2d 597, at 612:

> In holding that the appellant was not included in the class of those who were to be given one dollar should they contest the will, the court held as follows:
>
> "This is so for the obvious reason that the appellant is not a contestant. She is a petitioner for distribution, claiming to be a pretermitted heir, and such a person has never been held to be a contestant."

Pretermission statutes are generally of the Massachusetts type or the Missouri type. I Jaureguy and Love, Oregon Probate Law and Practice, section 391 at page 375. Oregon's statute is of the Missouri type. The difference between the statutes is that in the Massachusetts type parol evidence is admissible to show that the omission of an heir was intentional

while in the Missouri type parol evidence is not admissible.

The Oregon Supreme Court has explicitly stated that since our statute of wills is an exact copy of the Missouri statute, the court will look principally to the decisions of that state to ascertain its judicial construction. Gerrish v. Gerrish, 8 Or 351, 353 (1880).

In Missouri it has been held that the pretermitted heir has no remedy by way of objecting to or attacking the probate of the will or the will itself. In Cox v. Cox, 101 Mo. 168, 13 SW 1055 (1890), the court observed as follows:

> "The probate of the will does not render its provision effective, or render one or any of its provisions valid. If any such provisions are in violation of law, the law will not carry them into effect. Nevertheless, the testator made them. They are his will, and on probate whether they are or not, is the only question to be decided. And in this case the establishment of the instrument as the will of the testator in no way impairs the rights of the plaintiff as heir at law. If he has been pretermitted therein, as he claims, he can enter, defend his possession, or bring his action of ejectment, as the case may be, whenever he chooses. The probate of the will does not stand in his way on that issue. But, in the very nature of things, that issue cannot be tried in a proceeding designed by the law to ascertain the single fact whether a certain paper is or is not in the will of the deceased." (italics added)

In Story v. Story, 188 Mo. 110, 86 SW 225 (1905) the Missouri court made specific mention of the proper means by which the pretermitted heir should assert his rights:

> "...our statutes make full provision for protecting the rights of a pretermitted heir. As to such heir the testator dies intestate. ...His rights may be given him by partition, ejectment, distribution, or other appropriate remedy, without striking the will down, except pro tanto. We do not hold that the omission from a will of the names of those heirs who are the natural objects of a testator's bounty may not be shown on an issue of a testamentary incapacity, or lack of disposing memory, or undue influence, or fraud. All we hold is that such fact, standing alone, is not ground for setting a will aside, and is not a material, traversable issue in this case."

The holding of these cases namely, that the pretermitted child takes independently of the will and has no remedy by way of attacking the will itself or its probate was followed in Goff v. Goff, 352 Mo. 809, 179 SW 2d 707, 152 ALR 717 (1944). In Jaureguy & Love, op. cit. supra at 377 the authors remark 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."

In the Oregon cases in which the rights of pretermitted heirs have been asserted, the most common procedure has been a suit to quiet title. See, e.g. Gerrish v. Gerrish, 8 Or 351 (1880), Roots v. Knox, 107 Or 96, 213 P. 1013 (1923), and Towne v. Cottrell, 236 Or 151, 387 P 2d 576 (1963). In Barnstable v. U. S. National Bank, 232 Or 36, 374 P 2d 386 (1962) the remedy sought was a declaratory judgment that plaintiff was a pretermitted child of the testator, or in the alternative for specific performance of an alleged oral contract not to disinherit the plaintiff.

In the Missouri cases cited, the courts suggested that among the appropriate remedies were the following: partition, ejectment, distributing, and, in Hill v. Martin, 28 Mo. 78 (1859) a bill for contribution rather than a proceeding for partition.

The annotation to be found in 123 ALR 1073, 1084 to 1093 contains a detailed discussion as to the remedies resorted to by various courts, including contribution, independent proceedings in equity, writs of entry or ejectment and partition proceedings. This annotation should be consulted for further reference.

The Oregon pretermission statute, ORS 114.250, specifically refers to the duty of all the other heirs, devisees and legatees to refund their proportional part. This raises difficult questions, not only as to possible differences in the treatment of real and personal property, but also as to the appropriateness of the time at which the remedy should be asserted. If the various remedies are not exclusive, there remains the possibility that title to property might be subject to collateral attack even after the final order of the probate court has been entered. This is especially true because of the limited jurisdiction of the probate court in Oregon, particularly with regard to the title of real property.

ORS 117.560 (2) provides that any claimant, upon showing good cause, who has not had actual notice of the proceedings for determination of heirship, may be allowed to answer and set up his rights within three years after the entry of the decree. This provision applies both to real property and to personal property which have already been distributed. Thus restitution may be compelled from other claimants or defendants even after the decree of distribution. Some cases from other jurisdictions have held that if a pretermitted child claims a part of the personal property, as distinguished from real property, he is bound to apply to the the probate court in which the account of administration would have to be settled, since he could only claim by virtue of a decree of that court. See, Gage v. Gage, 29 N H 533 (1854) and State ex rel Citizens Bank v. Allen, 296 Mo. 636, 247 SW 411 (1922).

If the above reasoning were held to apply in Oregon, real and personal property would perhaps unnecessarily be treated differently. The issue is further complicated by the present provision that the pretermitted heir is to be treated as an intestate. Under Oregon law real property is held to vest in the intestate takers at the death of the intestate, so that perhaps only adverse possession would constitute a defense against a pretermitted heir who might be claiming many years later.

One of the anomalous problems in Oregon with regard to the remedies available to a pretermitted heir is the differing treatment accorded to real and personal property. Jaureguy and Love, supra, volume 1 at page 377 comments as follows:

> "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 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." Citing Northrop v. Marquam, 16 Or 173, 187-188, 18p 449, 457; and Worley v. Taylor, 21 Or 589, 595-596, 28 P 903, 905.

This difference in treatment seems to be directly related to the limited jurisdiction of the probate court which precludes it from determining who succeeds to the

decedent's interest in real property. See the treatment of this problem in Jaureguy and Love, Supra, section 512 at 527-531.

Insofar as the committee wishes to treat real and personal property identically, it should address itself to the problem of probate court jurisdiction as it relates to a pretermitted heir. There would seem to be no reason for holding that on the one hand the decree of distribution of personal property is final after three years (ORS 117.560 (2)) while on the other hand permitting a pretermitted heir to come in much later with a suit to quiet title or ejectment action regarding the real property of the decedent.

OTTO J. FROHNMAYER

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, January 14 & 15, 1966)

The following report on a proposed pretermitted heir statute was prepared by Mr. Zollinger, with the concurrence of Mrs. Braun, and distributed to members of the advisory and Bar committees at the January 14 meeting:

PRETERMITTED CHILDREN

ORS 114.250:

"Pretermitted heirs to have portion of estate. If any person makes his will and dies, leaving a child or children, or in case of their death, 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, so far as regards such child or children or their descendants, not provided for, shall be deemed to die intestate; and such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate; and the same shall be assigned to them, and all the other heirs, devisees and legatees shall refund their proportional part."

ORS 114.260:

"Effect of advancement to pretermitted heir. If the child or children, or their descendants, referred to in ORS 114.250, has had an equal proportion of the testator's estate bestowed on them in the testator's lifetime by way of advancement, they shall take nothing by virtue of the provisions of ORS 114.250."

RCW 11.12.090:

"Intestacy as to pretermitted children. If any person make his last will and die 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 shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them, and all the other heirs, devisees and legatees shall refund their proportional part."

PROPOSED FOR CONSIDERATION:

If any person makes his last will and dies, survived by a child, not named or provided for by his will, and not a member of a class referred to therein, including a child born or adopted after the making of the will, such child shall inherit and receive such share of the estate of the testator as would have been inherited by and distributed to him if the testator had died intestate. The share of the pretermitted child in property available for distribution by the executor shall be distributed to him by the executor if his existence is known to the executor and, if not distributed to him, may be recovered from the person to whom such share was distributed or, if there is more than one such person, ratably from the persons to whom distribution was made, including specific, demonstrative, pecuniary and residuary legatees. The interest by descent in real property of which the testator died seized, if not disclosed in the probate proceedings or otherwise established of record, may be established by suit against the devisee or devisees of such real property or his or their successor in interest, without distinction between specific and residuary devisees.

COMMENTS:

1. It is by no means clear that failure to name or provide for a child should be attributed to forgetfulness or oversight. On the contrary, a person competent to make a will is competent to identify the natural objects of his bounty. It may be more sensible to provide for pretermitted children only if born after the execution of the will and if no provision is made in the will indicating a purpose not to provide for such children, thus:

> If any person makes his last will and dies, survived by a child born or adopted after the execution of his will, not provided for by his will and not a member of a class referred to therein, such child shall inherit, etc.

2. Mrs. Braun has reconsidered her suggestion that the statute should include a provision for the descendants of a deceased child, when neither the deceased child nor his surviving descendants is named or provided for or a member of a class to which reference is made in the will. Others may desire to include such a provision, although the subcommittee (Braun and Zollinger) reject it. We have some abandoned language available for this purpose.

3. We propose no provision concerning advancements to pretermitted heirs. ORS 114.260 should be repealed and Sec. 19 of the Riddlesbarger draft should be deleted. The provision that the pretermitted child shall inherit and receive such share of the estate of the testator as would have been inherited by and distributed to him if the testator died intestate would necessarily take into account advancements made to him. Advancements to legatees and devisees, if conforming to the requirements of ORS 111.120 would also be taken into account.

4. When the fact that the testator is survived by a child for whom no provision is made is known to the petitioner for the admission of the will to probate or to the executor, the interest of the pretermitted child will appear of record and need not be established by any other proceeding. He may receive distribution with distribution to legatees and his interest in real property will be established by the probate record. In the situation which may arise when the pretermitted child is not known to exist, he should be entitled to recover what should have been distributed to him from those to whom it was distributed and he should be able to establish his interest in the real estate.

5. The question will arise concerning the effect of the taking upon specific, demonstrative, pecuniary and residuary legatees and specific and residuary devisees. We have resolved this issue by concluding that each beneficiary of the will should take his proportionate share of the contribution to make the pretermitted child whole. The committee may conclude that all of the share of the pretermitted child should be taken from the residuary beneficiary. We suggest that the real and personal property of the estate should be treated alike.

6. It is the feeling of the subcommittee that a reasonably short period of limitations should be established, but we have omitted this from our draft of statute. If the committee shares this feeling, we suggest that there be added substantially the following sentence:

> "No action to recover real or personal property pursuant to this section shall be brought more than _____ years after the death of the testator."

Mrs. Braun suggests that perhaps the pretermitted child should be required to establish his interest during probate. If this view is accepted, the last two sentences of the foregoing proposal should be deleted and there should be

substituted a provision to the effect that if the pretermitted child shall not appear and establish his interest in the proceedings for administration upon his estate, no action thereafter be brought for the recovery of any share to which he might otherwise have been entitled.

CLIFFORD E. ZOLLINGER

REPORT
January 10, 1966

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

From: Robert W. Gilley

Subject: Rough Draft on Initiation of Probate or Administration.

One of the matters scheduled for consideration by the Advisory and Bar Committees at the meeting to be held January 14 and 15, 1966, is revision of ORS chapter 115, relating to initiation of probate or administration and executors and administrators generally.

This report contains a rough draft of a suggested revision of the first part of ORS chapter 115 (i.e., ORS 115.010 to 115.350), relating to initiation of probate or administration.

INITIATION OF PROBATE OR ADMINISTRATION

Section 1. Pleadings and Mode of Procedure

No particular pleadings or forms thereof are required in the exercise of jurisdiction of probate courts, and the mode of procedure in the exercise of such jurisdiction is in the nature of a suit in equity except as otherwise provided by statute. The proceedings must be in writing and upon the petition of a party in interest or the order of the court. All petitions, reports and accounts shall be verified by at least one of the persons making the same. The court exercises its powers by means of:

a. A citation to a party.

b. A verified petition of a party in interest.

c. A subpena to a witness.

d. Orders and decrees.

e. An execution or warrant to enforce its orders and decrees.

NOTE: This is ORS 115.010 with two minor deletions.

Section 2. Contents of Petition

A petition for probate of a will or for the appointment of an administrator shall state:

a. The facts relied upon to give the petitioner the right to petition.

b. The name, domicile and date of death of the deceased.

c. The names and last known addresses of his heirs, so far as known.

d. The facts relied upon to give the court jurisdiction and to establish venue.

e. That the person nominated as executor by the will or nominated as administrator by the petition is not disqualified to act as such, and the name and address of the nominee.

f. That the deceased had testamentary capacity at the time of the execution of the will.

g. Unless bond is waived by the will, the estimated value of the property belonging to the deceased, which might be readily convertible into money.

h. That no other petition for the probate of the will or for the appointment of administrator is believed to have been filed in this state.

Section 3. Persons Entitled to Petition for Proof of a Will or for Administrator

a. Any executor, devisee or legatee named in any will, or any other person interested in the estate, including any creditor, may petition the court to have the will proved.

b. Administration shall be granted upon the petition of any person interested in the estate as follows:

(1) To the surviving spouse, or next of kin in the order of their degree of relationship, or if of equal degree, then in the discretion of the court.

(2) If the surviving spouse, next of kin or the person nominated by them shall be unsuitable or disqualified, or shall neglect for 20 days after the death of the intestate to petition for administration (or to request that administration be granted to some other person) the same may in the court's discretion, be granted to a creditor of the estate.

(3) If the persons named in the paragraph (2) above do not make such application within 30 days from the death, administration may be granted to such person as the court may deem proper.

(4) A person who renounces his right to appointment as administrator or who is not qualified to act, may nominate in writing a qualified person as administrator and such nominee shall have the same priority of right to appointment as the person making the nomination, but no person under the age of 18 years or of unsound mind shall have such right of nomination.

c. If the petition for appointment of administrator does not set forth the name of an heir of the decedent, the petitioner shall immediately serve upon the State Land Board a copy of the petition, and no order appointing an administrator shall be granted until after proof of service has been filed with the clerk of the court.

NOTE: This is ORS 115.120 with the addition of the reference to creditors and the deletion of some language considered redundant, combined with ORS 115.310, as modified.

Section 4. Venue

Proof of a will shall be taken and administration of the estate of an intestate shall be granted in the county where:

a. The decedent was domiciled at or immediately before his death.

b. Any part of his estate has its situs at the time of his death or at the time of the filing of the petition, if the decedent was not domiciled in the state at or immediately before his death.

NOTE: This is intended to simplify ORS 115.140. Its most significant innovation is to eliminate reference to real property and restricts venue of an inhabitant to the county of domicile. The thought is that there is less chance of confusion if an inhabitant's estate can have only one proper venue, also that his creditors have a better chance of being notified of the death.

Section 5. Establishing Foreign Wills

a. If a will is probated in any other state or territory of the United States or in any foreign country, copies of such will and of the probate thereof, certified by the clerk of the court in which such will was probated, with the seal of the court affixed thereto, if there is a seal, together with a certificate of the chief judge or presiding magistrate that the certificate is in due form and made by the clerk or other person having the legal custody of the record, shall be recorded in the same manner as wills executed and proved in this state, and shall be admitted in evidence in the same manner and with like effect.

b. If any will is filed or recorded in any other state or territory of the United States or in any foreign country without probate thereof and probate of the will is not required by the law of the place where it is filed or recorded, a copy of the will, certified as provided in subsection "a" of this section may be filed in any court of this state which has jurisdiction of the estate of the testator. The will may be proved by affidavit, deposition or testimony in open court as wills filed for probate in this state.

NOTE: This modifies ORS 115.160 principally by not requiring a deposition to prove a will which has not been admitted to probate elsewhere.

Section 6. Testimony of Attesting Witnesses

a. Upon the hearing of a petition for the probate of a will ex parte and before contest is filed, an affidavit of an attesting witness may be used in lieu of the personal presence of the witness testifying in open court. Such witness may give evidence of the execution of the will by attaching to his affidavit a photographic or photostatic copy of the will, and may identify the signature of the testator and witnesses to the will by the use of the photographic or photostatic copy. The affidavit so made shall be received in court and have the same force and effect as to the matters contained therein as if such testimony were given in open court.

b. However, upon motion of any person interested in the estate, filed within 30 days after the order admitting the will to probate is made, or in the discretion of the court within that time, the court may require that the witness making the affidavit be produced before the

court for further examination, or if the witness is outside the reach of a subpena, the court may prescribe that the deposition of such witness may be taken, and after the order is obtained the deposition may then be taken, after notice to the proponent or his attorney, in the manner provided in this state for the taking of depositions.

c. However, in case of contest of a will or the probate thereof in solemn form, the proof of any or all material or relevant facts shall not be made by affidavit, but in the same manner as such questions of fact are proved in a suit in equity.

d. If the evidence of none of the attesting witnesses, by affidavit, by deposition, or in open court, is available, the court may accept in lieu thereof evidence that the signatures of the testator and at least one of the attesting witnesses on the will are genuine.

NOTE: This is based on ORS 115.170 but eliminates the requirement that attesting witness be outside the reach of a subpena before his affidavit may be used and also adds, as subsection "d", an explicit authorization for proof of genuiness of signatures.

Section 7. Contest of Will

When a will has been admitted to probate, any person interested may, at any time within six months after the date of the entry in the court journal of the order of court admitting such will to probate, contest probate or the validity of such will.

NOTE: This is the same as ORS 115.180 with the deletion of extension of time for contest to six months beyond the removal of disability of a person entitled to contest and of the provision preserving the right to contest a will made in accordance with the laws of the jurisdiction where executed. The former omission is subject to some difference of opinion,

but it is suggested that more disruption and therefore more injustice, could result from extending the period of contest for perhaps many years, than from cutting off the rights of one under disability. It is recognized also that there could be a constitutional question involved here. The latter deletion appears to the writer to be of matter which is completely unnecessary.

Section 8. Letters Testamentary

a. When a will is proved, letters testamentary shall be issued to the persons therein named as executors, or coexecutors or to such of them as give notice of their acceptance of the trust and are qualified. If all the persons therein named decline to accept, or are disqualified, letters of administration with the will annexed shall be issued to the person to whom the administration would have been granted if there had been no will.

b. When a bank or trust company is named in a will as executor or coexecutor, and such company is converted as provided by law, or is consolidated with another bank or trust company or sells its trust and fiduciary business or its trust department to another bank of trust company, pursuant to any law permitting such conversion, consolidation or sale, letters of administration with the will annexed shall be issued to such converted, consolidated or purchasing company if it is otherwise qualified.

NOTE: This is ORS 115.190 without any change.

Section 9. Issuance of Letters of Administration Where Will Declared Inoperative

If after a will has been proved and letters testamentary or of administration with the will annexed have been issued thereon, such will

is set aside, declared void or inoperative, such letters shall be revoked, and letters of administration issued.

NOTE: This is ORS 115.200 without any change.

Form of Letters Testamentary

Letters testamentary may be in the following form:

STATE OF OREGON)
) ss.
County of_____)

TO ALL PERSONS TO WHOM THESE PRESENTS SHALL COME, GREETING:

KNOW YE, That the Will of _____, Deceased, has been duly proved in the probate court for the county aforesaid, and that _____, who _____ named Execut____ therein, ha__ been duly appointed such Execut____ by the court aforesaid; this, therefore, authorizes said _____ to administer the estate of said decedent, according to law.

IN TESTIMONY WHEREOF, I, _____, Clerk of the court, have hereunto subscribed my name and affixed the seal of said court, this _____ day of _____, A.D. 19____.

(Seal)

A.B. Clerk of the Court

NOTE: This is ORS 115.210 without any change.

Form of Letters of Administration

a. Letters of administration may be in the following form:

STATE OF OREGON)
) ss.
County of_____)

TO ALL PERSONS TO WHOM THESE PRESENTS SHALL COME, GREETING:

KNOW YE, That is appearing to the court that _____ has died intestate, leaving at the time of h__ death, property in this state, and that the probate court for the county aforesaid has duly appointed _____ administrat___ of the estate of said decedent; this, therefore, authorizes said _____ to administer the estate of said decedent, according to law.

IN TESTIMONY WHEREOF, etc., (the same as in letters testamentary).

b. Letters to an administrator of the partnership with the will annexed, or to a special administrator, may be issued according to the foregoing forms, with such variations as may be proper in the particular case.

NOTE: This is ORS 115.350 without any change.

Section 10. Copy of Will and of Order to Heirs, Legatees and Devisees

Upon the entry of an order admitting any will to probate, the appointed representative shall forthwith cause a copy of the decedent's will and a copy of the order to be mailed to each heir, legatee and devisee named therein at his last-known address. Proof of such mailing shall be made by affidavit and filed at or before the hearing of the final account.

NOTE: This is ORS 115.220 with the addition of a requirement that a copy of the order admitting be sent with the will and that the copies be sent to heirs as well as legatees and devisees. These insertions were made at the suggestion of another committee member so that they may be discussed.

GENERAL NOTE: ORS 115.110 and 115.130, having reference to the custody and production of wills have been omitted from this draft, they having been covered in another draft. All reference to nuncupative wills has also been deleted to be consistent with prior recommendations.

Section 11. Appointment of Special Administrator

When for any reason there is a delay in issuing letters testamentary or of administration, and the property of the deceased is in danger of being lost, injured or depreciated, the court may appoint a special administrator to take charge of the estate. He shall qualify in like manner, and have the powers and perform the duties of an administrator generally, except that he is not authorized to pay the debts of, or otherwise discharge any obligation against, the deceased. Upon the issuing of letters testamentary or of administration, the powers of such special administrator shall cease.

NOTE: This is ORS 115.330 without change.

Section 12. Proceedings When Will Found after Administration Granted

If, after administration has been granted upon an estate, a will of the deceased is found and proven, the letters of administration shall be revoked and letters testamentary or of administration with the will annexed shall be issued.

NOTE: This is ORS 115.340 without change.

Section 13. Publication of Notice by Executor or Administrator

Every executor and administrator shall, immediately after his appointment, publish a notice thereof, in a newspaper published in the county, if there is one, otherwise in such paper as is designated by the court, in two issues of the newspaper published not more than a week apart. The notice shall require all claimants against the estate to present their claims with proper vouchers within six months of the date of the notice to the executor or administrator at a place within the state specified in the notice. A copy of the notice as published with proof of publication as required herein, shall be filed with the clerk not later than the time of filing the final account.

NOTE: This is substantially ORS 116.505, principal change being the length of time of publication and the elimination of the requirement that the designated place of presenting claims be within the county.

ADVISORY COMMITTEE
Probate Law Revision

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

Dates) 1:30 p.m., Friday, February 18, 1966
and : and
Times) 9:00 a.m., Saturday, February 19, 1966
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of December and January meetings.

2. Report on miscellaneous matters (Lundy).

3. Inheritance by nonresident aliens.

   Report by subcommittee (Allison, Lisbakken, Lovett, Barrie and Schwabe).

   Memorandum containing Schwabe's draft and comment. Copies of this memorandum have been distributed to members.

4. Advancements and retainer.

   Report by Frohnmayer (dated December 10, 1965). Copies of this report were distributed to members before the December meeting.

5. Initiation of probate or administration (ORS chapter 115).

   Draft of suggested revision of first part of ORS chapter 115 (i.e., ORS 115.010 to 115.350), relating to initiation of probate or administration. Copies of a report by Gilley (dated January 10, 1966) containing this draft were distributed to members before the January meeting. Note: Consideration of this draft will begin with section 6 thereof.

   Draft of suggested revision of last part of ORS chapter 115 (i.e., ORS 115.410 to 115.520), relating to executors and administrators generally. Copies of this draft were distributed to members present at the January meeting.

6. Next meeting.

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

ADVISORY COMMITTEE
Probate Law Revision

Twenty-second Meeting, February 18 and 19, 1966
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The twenty-second 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, February 18, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

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

The following members of the Bar committee were present: Bettis, Braun (arrived 3:10 p.m.), Hornecker, Krause, Lovett, Richardson, Thalhofer and Warden (arrived 2:30 p.m.). Gilley, Boivin, Copenhaver, Field, Luoma, Rhoten and Tassock were absent.

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

Miscellaneous Matters

Dickson reported that Representative Keith D. Skelton, in correspondence to Bettis, continued to express interest in proposed legislation on summary proceedings for administration of small estates of decedents and in having such legislation prepared in time for consideration by the 1967 Oregon legislature. Dickson asked Bettis to advise Representative Skelton that Duncan L. McKay, Patricia A. Lisbakken and William C. Martin, as a committee, were working on proposed small estates legislation for the American Bar Association in connection with the current Model Probate Code project, and to suggest that Representative Skelton communicate with this small estates committee. Bettis also was requested to send to members of the small estates committee copies of his correspondence to Representative Skelton.

Dickson stated that he had been invited to appear at a meeting of title company representatives at Salishan in June and speak on the probate law revision project and the work of the advisory committee in respect thereto. He indicated he would appreciate suggestions by members of the committees on the content of his remarks to the title company

representatives.

Dickson indicated that he and Lundy had corresponded on the subject of ways and means to accelerate the work of the committees, and had agreed that one method to accomplish this purpose would be for members, at the meetings, to devote less time to discussion on the exact wording of revision proposals, and instead to concentrate on identification of problems and determination of policy in the solution thereof. He pointed out that matters discussed and determinations tentatively made thus far and in the near future would be embodied in drafts prepared by Lundy, and that discussion of exact wording could be postponed until those drafts were before the committees for consideration. Lundy remarked that specific wording initially agreed upon might have to be altered in the course of his preparation of drafts constituting segments of the proposed revised probate code, and that such specific wording also might be altered on consideration of those drafts by the committees.

Lundy expressed the suspicion that all members did not receive copies of the minutes of the December meeting, and noted that he had extra copies thereof available for distribution on request. He commented that he had distributed copies of the 1963 edition of the Oregon probate code, with annotations, to members of the Bar committee present at the meeting, and that he would distribute copies of the 1965 statute chapters to members of both committees as soon as they were available. He noted that in December he had distributed copies of current rosters of both committees, and asked members to notify him of any additions, corrections or changes that should be made therein.

Lundy indicated that the Law Improvement Committee had met on Friday, February 11, and that he had reported at that meeting on the progress of the probate law revision project. He stated that members probably were aware of the probate revision project in progress in New York, and remarked that he would endeavor to obtain for members copies of two bills revising most of the New York probate statutes introduced at the 1966 session of the New York legislature.

Zollinger noted that members were familiar with, and some had copies of, the 1965 Washington Probate Code and 1963 Iowa Probate Code, but that there might be recently enacted revised probate codes in other states of which members were not aware. He suggested that Lundy prepare and distribute to members a list of revised probate codes recently enacted in other states, expressing the view that such a list would be helpful as a research aid even though copies of the codes themselves were not available for distribution to members.

Inheritance by Nonresident Aliens

Allison noted that at the December meeting Barrie and Schwabe had expressed 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 pointed out that at the December meeting the committees had approved in principle a "benefit" statute on inheritance by nonresident aliens, with no reciprocity requirement, and that the chairman had appointed a subcommittee, consisting of himself, Lisbakken, Lovett, Barrie and Schwabe, to prepare such a statute and submit it to the committees at this meeting. Allison stated that Schwabe had prepared a proposed statute, copies of which had been distributed to members of both committees before the meeting. [Note: See Memorandum, February 7, 1966, from Lundy to members of both committees, on "rights on nonresident aliens to take property by succession or testamentary disposition ORS 111.070."]

Allison commented that the subcommittee had revised Schwabe's proposed statute to some extent. He distributed to members present copies of the revised proposed statute, which read as follows:

> "1. Where, at the time of distribution of an estate, the probate court finds that an heir, legatee, devisee, or distributee is an alien not residing within the United States or its territories, who would not receive the benefit, use, or control of the money or other property due him, the probate court shall order that the administrator or executor of said estate sell and convert said property into cash and that the money due said alien be deposited to his credit at interest in a savings account in a bank or banks in the State of Oregon. The passbook or other evidence of such deposit shall be delivered to the clerk of the court. Such sales of property shall be made pursuant to the procedure prescribed by the statutes for the sale of real and personal property by decedents' estates.
>
> "The money to be deposited shall be subject to the expenses of such sales and such sums as the court may fix and allow for the services of the administrator or executor, and his attorney, and of the attorney or attorney in fact, if any, representing the alien in said proceeding.
>
> "2. Any money so deposited shall be withdrawn and distributed only upon the order of the court which

ordered the deposit. A petition for an order authorizing withdrawal shall be filed by the alien heir, legatee, devisee, or distributee, or, if deceased, by a personal representative appointed by said court. The petition shall allege that at the time of filing the alien heir, legatee, devisee, or distributee, or, if deceased, his heirs or beneficiaries, would receive the benefit, use, or control of the money. The court shall fix a time and date certain for the hearing of said petition and shall order that written notice thereof be given not less than thirty days prior thereto to the State Land Board of Oregon, to the bank in which said funds are deposited, and to the consular representative of the country of which the alien is, or if deceased was, a citizen.

"If at such hearing the court determines that the petitioner or, if deceased, his heirs or beneficiaries, would receive the benefit, use, or control of said money, the court shall make an order that the money, including the interest accrued thereon, be paid to the petitioner or to his attorney in fact, subject to the costs and expenses of the recovery proceeding as allowed and approved by the court.

"3. If no order for withdrawal of any money so on deposit is made within twenty years from the date of the entry of the order directing the deposit, such money, including the interest accrued thereon, shall be disposed of as escheated property.

"4. Section 111.070 ORS is hereby repealed."

Allison pointed out that Barrie had suggested, and he agreed, that some provision should be made for notice to the State Land Board of the initiation of an estate proceeding in which there was a possibility of escheat under the nonresident alien inheritance statute, and for making the Land Board a party in such an instance. Allison commented that such a provision should not be incorporated in the nonresident alien inheritance statute itself, but instead should be set forth in conjunction with subsection (2) of ORS 115.310, relating to service of copies of petitions for appointment of administrators upon the Land Board. He proposed the following wording for such a provision:

"Where the petition for appointment of a personal representative discloses that there are nonresident alien heirs or beneficiaries, the petitioner shall immediately serve upon the clerk of the State Land Board, as provided by ORS 16.770 to 16.810, 16.850 and

16.860, a copy of the petition, and no order appointing the personal representative shall be granted by the court or entered until after due proof of service has been filed with the clerk of the court having jurisdiction in such proceedings."

Barried indicated his objection to the revised proposed statute in several particulars. He objected, first, to interest on deposits going to nonresident aliens, and suggested that such interest be used to defray some of the considerable expense incurred by the state, especially expert witness fees, in participating in the one or more proceedings that would be instituted by each nonresident alien to withdraw a deposit. In answer to a question by Allison, Barrie expressed the view that court allowed and approved "costs and expenses of the recovery proceeding" provided for in paragraph number 2 of the revised proposed statute would not adequately reimburse the state for expense incurred, and pointed out that he was advocating the proposition that the Land Board should receive all interest earned by deposits. In response to a question by Bettis, Barrie commented that there was no assurance that ultimate escheat of deposit principal and interest in some cases would result in reimbursement of the state, and that even if such reimbursement finally resulted, the state would be compelled to wait a considerable period of time therefor. Zollinger indicated that he favored leaving interest on deposit and subject to the same disposition as principal.

Barrie suggested that the time period for recovery of the deposit be reduced from 20 to 10 years, and referred to the 10-year period for recovery of escheated property provided for in ORS 120.130. In response to a question by Thalhofer, Schwabe expressed his opinion that the 20-year period for recovery of a deposit was too long, especially if other eligible heirs of the decedent were to be allowed to claim the deposit after expiration of the nonresident alien heir recovery period. There appeared to be general agreement that the nonresident alien heir recovery period should be reduced to 10 years.

Zollinger noted that, under the Uniform Disposition of Unclaimed Property Act, certain bank deposits were presumed abandoned if activity of a certain nature did not occur in respect to such deposits within a seven-year period [Note: See ORS 98.306], and thereupon were to be paid to the State Land Board [Note: See ORS 98.362]. He also indicated that the owner of property presumed abandoned and paid or delivered to the Land Board was not entitled to income accruing thereafter[Note:SeeORS 98.372]. He expressed

the view that a deposit awaiting recovery by a nonresident alien heir would be subject to the abandoned property statutes, and suggested, and Barrie agreed, that a specific exemption of such a deposit would be necessary if the committees did not desire application of the abandoned property statutes thereto. Schwabe noted that paragraph number 2 of the revised proposed statute specified that money deposited was to be "withdrawn and distributed only upon the order of the court which ordered the deposit," and expressed the view that this specification precluded application of the abandoned property statutes. Zollinger disagreed with the view expressed by Schwabe, and, in response to questions by Allison, pointed out that it was the owner of a bank deposit, in this case the nonresident alien heir and not the court or clerk thereof, whose activity prevented presumed abandonment and who received notice of abandonment proceedings, with opportunity to claim, under the abandoned property statutes.

Bettis commented that if a deposit made to the credit of a nonresident alien heir was subject to the abandoned property statutes, the court apparently would lose control over it after seven years. Barrie remarked that abandoned property paid or delivered to the State Land Board was held subject to claim at any time [Note: See ORS 98.392]. Zollinger suggested that the provision for escheat of nonresident alien heir deposits was not entirely appropriate if the abandoned property statutes applied to such deposits. After further discussion, Dickson stated that it appeared there was general agreement that the abandoned property statutes should not apply to nonresident alien heir deposits.

Barrie suggested, and Richardson agreed, that the revised proposed statute should include a requirement that a nonresident alien heir allege new evidence as to his receiving benefit, use or control in his second and each subsequent petition for withdrawal of a deposit. Schwabe commented that, as a practical matter even in the absence of a statutory requirement, such allegation of new evidence would always be made. In response to a question by Gooding, Schwabe indicated that, to his knowledge, in other states having "benefit" statutes the incidence of repeated claims by nonresident alien heirs was very small. In response to a question by Allison, Barrie pointed out that a determination by a court as to benefit, use or control by one citizen of a particular country was not necessarily controlling as to subsequent claims by that citizen or other citizens of the same country. Barrie indicated that proof of foreign law was a question of fact in this state and that there might be a change in the law of a particular country or in the government thereof

within a relatively short period of time. Dickson expressed agreement with the suggestion that allegation of new evidence be required by the revised proposed statute.

Zollinger noted that the estate might be closed when a proceeding for withdrawal of a nonresident alien heir deposit is brought, and asked whether the proceeding should be a separate one or the estate reopened for the purpose. In response to a question by Barrie, Schwabe indicated his guess that under the New York "benefit" statute the withdrawal proceeding was handled as a part of the estate proceeding, but without reopening the estate. Schwabe commented he saw no objection to institution of a withdrawal proceeding under the name or file number of the estate proceeding, even though the estate had been closed, and pointed out that the personal representative would not be a party to the withdrawal proceeding. Zollinger remarked that he was inclined to favor making the withdrawal proceeding a separate one, complete in itself, on the ground that certain records in the estate proceeding might not be proper for consideration in the withdrawal proceeding. Allison noted that the revised proposed statute did not specify the nature of the withdrawal proceeding, except to the extent of indicating that the court that ordered the deposit also was to order withdrawal and distribution, and expressed the view that the statute need not so specify, but pointed out that one advantage of handling the withdrawal proceeding as a part of the estate proceeding lay in the court order of deposit being made in the estate proceeding. There appeared to be general agreement that the withdrawal proceeding should be brought under the name or file number of the estate proceeding, but with no necessity of reopening the estate or making the personal representative a party.

Lundy noted that paragraph number 3 of the revised proposed statute provided for disposal of deposited money as escheated property if not withdrawn upon court order within a certain period of time, and asked whether other eligible heirs would be entitled to claim the money on expiration of the nonresident alien heir claim period. Barrie responded that under the present reciprocity statute (i.e., subsection (3) of ORS 111.070) other eligible heirs were entitled to property that would have gone to the nonresident alien heir if he had been eligible, but that under the revised proposed statute this would not occur, and that ORS 120.130 would not be applicable for the purpose of allowing other eligible heirs to take after expiration of the nonresident alien heir claim period.

Jaureguy posed the situation of several specific

bequests under a will, one of which was to a nonresident alien, and a residuary bequest, and asked whether, under the revised proposed statute, the specific bequest to the nonresident alien would escheat to the state, rather than go to the residuary legatee, if the nonresident alien did not prove his eligibility within the claim period. Barrie responded, and Dickson agreed, that escheat would result in the situation posed. Jaureguy indicated that he did not favor this result. Allison commented that the subcommittee had proceeded on the understanding that the nonresident alien heir deposit and withdrawal procedure constituted a post-distribution matter, after all other eligible heirs and beneficiaries had received their shares, and that the state would receive the deposit if not withdrawn within the claim period on petition of the nonresident alien heir or his personal representative.

After further discussion, Allison moved, seconded by Krause, that the revised proposed statute be rereferred to the subcommittee (i.e., Allison, Lisbakken, Lovett, Barrie and Schwabe) for the purpose of reducing the nonresident alien heir claim period to 10 years, with other eligible heirs being entitled to claim a deposit on expiration of the period without withdrawal and distribution to the nonresident alien heir. Motion carried. Zollinger suggested, and Dickson agreed, that the subcommittee should consider a provision that if, within the 10-year period, a nonresident alien heir was unable to establish his eligibility to receive a deposit, the deposit would be distributed upon petition to those who would take upon death intestate of the nonresident alien, and otherwise to those who would take by succession from the decedent. It was also agreed that the subcommittee should take into consideration the matters of exemption of nonresident alien heir deposits from application of the abandoned property statutes, requirement of allegation of new evidence in second and subsequent petitions for withdrawal by nonresident alien heirs and initiation of withdrawal proceedings as a part of the original estate proceedings. Dickson stated that consideration of the report of the subcommittee would be scheduled for the Friday afternoon session of the March meeting of the committees.

Lundy noted that the California Law Revision Commission had studied the matter of inheritance by nonresident aliens and in 1959 had recommended a "benefit" statute in lieu of the existing California reciprocity statute, but that the California legislature apparently had not approved this recommendation. He asked if the subcommittee would be interested in considering the California study and proposal. Schwabe indicated that he had information on the California

study and proposal which the subcommittee might consider if interested.

Barrie stated he would like to be recorded as opposed in principle to the proposed "benefit" statute, and that he would express such opposition when the matter came before the Oregon legislature for consideration. Dickson commented that it would be helpful if Barrie, notwithstanding his opposition, would continue to work with the subcommittee.

At this point (3 p.m.) Barrie and Schwabe left the meeting.

Jaureguy stated he would like to be recorded as opposing prevention of inheritance by nonresident aliens who are citizens of countries that do not permit inheritance by aliens.

Initiation of Probate or Administration

The committees resumed consideration, begun at the January meeting, of a draft of proposed legislation relating to initiation of probate or administration and primarily encompassing the matters covered by ORS 115.010 to 115.350, which had been prepared by Gilley, with assistance by Krause and Hornecker, and distributed in the form of a report to all members of both committees before the meeting.

Testimony of attesting witnesses (section 6). Krause referred to section 6 of the draft, relating to testimony of attesting witnesses, and moved, seconded by Bettis, that it be approved. Motion carried.

Allison suggested that Lundy, in drafting section 6 for insertion in the proposed revised probate code, should delete, in paragraph c, the word "however" and should substitute "be made" for "not be made by affidavit, but." He also suggested deletion of "by affidavit, by deposition, or in open court" in paragraph d of section 6.

Contest of will (section 7). Krause noted that section 7 of the draft, relating to contest of will, was derived from ORS 115.180, but with elimination of provision for extension of the time for contest by persons under legal disability and provision for contest of foreign wills.

Dickson and Jaureguy questioned termination of the right of a minor to contest a will before he attained majority. Bettis commented that a minor's interest in contesting a will would in most cases probably be represented

by relatives or friends. Hornecker remarked, and Dickson agreed, that a person who stood to benefit from a minor's failure to contest and who was in a position to inform the minor of his rights, might be inclined to neglect to inform the minor. Bettis noted that there were both advantages and disadvantages in such a situation, but expressed the view, with which Allison agreed, that the advantage of not holding open the right to contest for a long period of time probably was paramount.

Thalhofer pointed out that the Iowa statute on will contests allowed one year for the purpose and did not extend the time for persons under legal disability (see section 308, 1963 Iowa Probate Code). Allison noted that the comparable Washington statute contained no provision for persons under legal disability (see section 11.24.010, 1965 Washington Probate Code).

In response to a question by Jaureguy, Zollinger suggested that a minor who failed to contest a will within the six-month period would later have recourse in an independent action for fraud if such had occurred to preclude him from asserting his right to contest.

Zollinger moved, seconded by Allison, that section 7 be approved. Motion carried.

Letters testamentary (section 8). Krause pointed out that section 8 of the draft, relating to issuance of letters testamentary, was the same as ORS 115.190. Lundy asked if the terminology used in paragraph b of section 8 was consistent with that used in the banking statutes. Zollinger responded that there was consistency of terminology. He suggested, and Dickson agreed, that if paragraph b was duplicated in the banking statutes, paragraph b might be deleted.

Zollinger moved, and it was seconded, that section 8 be approved. Motion carried.

Issuance of letters of administration where will declared inoperative; form of letters testamentary and of administration (section 9). Krause noted that section 9 of the draft, relating to issuance of letters of administration where wills are declared inoperative and containing forms for letters testamentary and of administration, was a combination of ORS 115.200, 115.210 and 115.350.

Allison referred to the first paragraph of section 9 and asked whether there was a distinction between declaring a will inoperative and setting it aside. Butler suggested

that a will might be valid, but at the same time inoperative because property purporting to pass thereunder was subject to a contract or trust. Allison asked whether, in the situation mentioned by Butler, letters testamentary would be revoked and letters of administration issued. Dickson responded that in the situation posed the estate would be closed. Butler remarked that the will might be inoperative as concerned the disposition of the property, but that proceedings begun with issuance of letters testamentary might continue to completion for other purposes.

Zollinger expressed objection to the terminology of the first paragraph of section 9 as to a will being set aside, on the ground that it was the order admitting the will to probate, rather than the will itself, that was set aside.

Richardson suggested, and Zollinger agreed, that the wording of the forms for letters should be modernized. Zollinger noted that the forms set forth in section 9 included the words "this, therefore, authorizes," and commented, and Dickson agreed, that letters do not authorize a personal representative to act, but are merely evidence thereof. Zollinger also suggested, and Dickson agreed, that the letters indicate the date on which the authority of the personal representative to act begins.

Gooding expressed the view, with which Dickson agreed, that there should be a single form for letters designated as letters of personal representative or letters of representation. Bettis asked if Gooding's suggestion contemplated blanks in the single form for insertion of "executor," "administrator" or some other proper designation. Gooding responded that, under his suggestion, only the designation "personal representative" would be used. Zollinger commented, and Bettis and Allison agreed, that there were instances in which it was important to know whether a personal representative was an executor or administrator.

Gooding moved, seconded by Hornecker, that there be a single form for letters and that this form should refer to a "personal representative" only, and not to an "executor," "administrator" or some other proper designation. Motion failed.

Zollinger moved, seconded by Bettis, that there should be separate forms for letters testamentary and of administration, and that, in accordance with a suggestion by Dickson, Richardson be assigned the task of improving the wording of section 9, including that of the forms set forth

therein. Motion carried.

Thalhofer questioned the meaning of the phrase "letters to an administrator of the partnership with the will annexed" in the last paragraph of section 9. Lundy commented that apparently the phrase referred to a procedure under statutes repealed in 1943 (see chapter 426, Oregon Laws 1943) and replaced with a procedure presently described in ORS 116.450 to 116.465.

Copy of will and of order to heirs, legatees and devisees (section 10). Krause referred to section 10 of the draft, relating to personal representatives mailing copies of wills and orders admitting them to probate to heirs, legatees and devisees, and noted that the section was based upon ORS 115.220, but with the requirements that orders admitting wills to probate, as well as the wills themselves, be mailed and that the mailing be to heirs, as well as legatees and devisees.

Richardson noted that section 10 required mailing of copies of the will and order to heirs, legatees and devisees "named therein," and asked whether "therein" referred to the will or the order, pointing out that the will would not name heirs who also were not legatees or devisees in the usual situation and that the committees had previously decided that the petition for probate should include identification of all heirs, including but not limited to legatees and devisees. [Note: See Minutes, Probate Advisory Committee, 1/14,15/66, page 19.] Krause suggested, and Dickson agreed, that the problem raised by Richardson would be resolved by deletion of "named therein" in section 10.

Several members commented on the burden imposed upon a personal representative by the requirement of mailing copies of a will to all heirs, legatees and devisees, and especially to heirs other than legatees and devisees. Dickson commented that this matter had been the subject of much debate by Bar probate committees for many years. Zollinger remarked that the burden was justified only to the extent of the hazard to heirs in not being notified of the initiation of the probate proceeding. Husband indicated that he was aware that there probably were instances of estates being probated without the knowledge of some heir, but questioned whether any abuses had occurred in such instances.

Allison stated that he did not object strongly to mailing copies of a will to legatees, devisees and heirs otherwise named in the will, since those persons were necessarily involved in the estate proceeding, but that in most instances

mailing copies to heirs not named in the will was not only burdensome but an invitation to fruitless inquiry and in the end, in most cases, purposeless. Bettis commented, and Butler agreed, that such mailing appeared to constitute an invitation to contest the will, which would be unwarranted and unsuccessful in most cases. Allison pointed out, and Bettis agreed, that another problem was ascertaining the names and addresses of all heirs. Butler indicated that he favored reversion to the situation existing before enactment of ORS 115.220 in 1963, when only published notice to creditors was required, and commented that a requirement of notice to heirs was not likely to make a personal representative any more honest.

Gooding suggested, and Zollinger agreed, that the six-month period for contesting a will was an argument in favor of prompt notice to all heirs. Mapp commented that notice should be sent to all heirs whose identity and location could reasonably be determined. Butler noted that section 10 did not specify a particular time within which copies of a will were required to be mailed, and provided for proof of mailing at or before the hearing of the final account. He remarked that the will contest period in some instances might have expired by the time such a copy was received by an heir.

A number of substitutes for mailing copies of a will and order of admission to probate to heirs were proposed. Husband suggested a copy of the petition instead of the order. Zollinger suggested a notice stating that the will was admitted to probate and that a copy of the will might be obtained on request. Krause suggested a copy of the letters testamentary. Jaureguy commented that an heir would not be able to ascertain from the letters whether or not he was named in the will. Bettis suggested a published notice to heirs. Thalhofer pointed out that published notice would not likely come to the attention of heirs who did not reside in the publication area. Zollinger suggested that mailing a copy of the will and order to legatees and devisees be retained, but that notice mailed to other heirs consist of a statement that the decedent died leaving a will that made no provision for the heir to whom the statement was addressed.

Dickson proceeded to ascertain the desires of the committees on several issues. It appeared that a majority of the members present (1) favored some kind of notice of the initiation of probate, whether or not there was a will, (2) opposed notifying only those persons named in a will,

and (3) favored notifying heirs as well as those persons named in a will. A discussion of the nature of the notice followed. Zollinger commented that persons named in a will should receive a copy thereof. Braun expressed the view, with which Krause agreed, that a notice stating that the will had been admitted to probate and a named personal representative appointed was sufficient without a copy of the will itself. Warden asked whether it would not be desirable to mail a copy of the will to all heirs.

Bettis moved, seconded by Krause, that a combined notice of initiation of administration of a decedent's estate and to creditors should be published as presently required in the case of notice to creditors, and that a copy of this notice and of the will, if any, be mailed to all persons named in the will and heirs of the decedent, so far as they and their addresses were known, to their last known addresses. Motion carried.

Zollinger remarked that he supposed the published notice would be directed to heirs and creditors, instructing heirs as to the period within which to contest the will, if any, and creditors as to the period within which to file claims. In response to a question by Dickson, Bettis indicated that the mailing should be done "forthwith," "immediately" or promptly" upon the entry of the order admitting the will to probate or appointing the administrator where there was no will, but expressed the view that a specific time limitation did not appear to be necessary. Braun suggested that proof of mailing should be filed within six months. Husband commented that such proof should be filed within a much shorter period of time than six months. Zollinger remarked that a 30-day time limit should be adequate. Dickson expressed the view that reasonable specific time periods for mailing and filing proof thereof should be provided.

Warden pointed out that ORS 115.220, upon which section 10 was based, had been amended by legislation enacted in 1965 to exempt the personal representative from mailing a copy of a will to himself if he was also a legatee or devisee. [Note: See chapter 514, Oregon Laws 1965.]

Dickson assigned to Bettis and Krause the task of preparing a revision of section 10, taking into consideration the adopted motion made by Bettis and subsequent discussion thereof, and of submitting it to the committees for consideration.

In response to a question by Hornecker, Lundy noted that

the matter of notice to the State Land Board of initiation of an estate proceeding had been discussed at the January meeting in connection with paragraph c of section 3 of the draft. [Note: See Minutes, Probate Advisory Committee, 1/14,15/66, pages 24 and 25.] It was pointed out that paragraph c of section 3 provided that if the petition for appointment of an administrator did not set forth the name of any heir, the petitioner should serve upon the Land Board a copy of the petition, with no order appointing the administrator granted until after proof of such service.

Dickson suggested that provision for notice to the State Land Board might be included in section 10 of the draft, as revised by Bettis and Krause. Zollinger commented that he saw no reason to mail a copy of a will to the Land Board, even though the testator left no heirs, and suggested that the notice to the Land Board of a proceeding to appoint an administrator when there were no heirs, as specified in paragraph c of section 3, was sufficient.

Braun pointed out that in the discussion of paragraph c of section 3 at the January meeting doubt was expressed as to the necessity of notifying the State Land Board before appointment of an administrator, and indicated that she favored notice to the Land Board at the same time as notice under section 10. In response to a question by Allison, Zollinger expressed the view that the Land Board probably could contest a will as an interested person under section 7 of the draft. Butler stated that he was not in favor of providing for notice to the Land Board; that such a requirement was a further complication of probate proceedings and an extra detail for a personal representative to remember.

Gooding moved, seconded by Thalhofer, that paragraph c of section 3 be approved as the only notice to the State Land Board. On a vote by the advisory committee only, motion failed.

Zollinger moved, seconded by Butler, that paragraph c of section 3 be deleted. Motion carried.

Gooding moved that the substance of paragraph c of section 3 be incorporated in section 10 and taken into consideration in the revision thereof by Bettis and Krause. Butler moved to amend Gooding's motion by adding the limitation that notice to the State Land Board be given only in intestate situations. Gooding accepted Butler's amendment, and Thalhofer seconded the amended motion. In response to a question by Allison, Bettis interpreted the effect of the amended motion to be that the Land Board should be notified

after appointment of an administrator if there were no heirs, legatees or devisees. Allison commented that it would be desirable to obtain the reaction of the Land Board to a change in the time and kind of notice to it. He suggested that the Land Board probably desired notice before appointment of an administrator in the case of probable escheat in order to be able to take action necessary to protect property that might escheat, and that the Land Board's interest in this regard probably was proper. Dickson, Thalhofer and Warden indicated that in their experience the Land Board had not participated in proceedings for appointment of administrators.

Zollinger requested a division of the question on Gooding's motion as amended, and Dickson submitted the motion in two parts. On the first part (i.e., incorporation of the substance of paragraph c of section 3 in section 10, with reference to Bettis and Krause for revision), motion carried. On the second part (i.e., limiting notice to the State Land Board to intestate situations), motion carried.

Lundy commented that he sometimes had occasion to converse on an informal and unofficial basis with the Clerk of the State Land Board, and asked whether, in the course of such a conversation, he should attempt to ascertain the reaction of the Clerk to the proposal on notice to the Land Board just approved by the committees. It was agreed that Lundy should do this.

Appointment of special administrator (section 11). Dickson referred to section 11 of the draft, relating to appointment of special administrators, and commented that there was frequent need for a special administrator to handle the matter of burial and certain minor details involved when the coroner had the unclaimed body of a decedent. Krause remarked that section 11 did not appear to be applicable in the situation described by Dickson, since there probably was no property of the decedent in danger of being lost, injured or depreciated.

Zollinger expressed the view that the function of a special administrator should be to preserve a decedent's estate likely to suffer loss or injury by reason of lapse of time before appointment of a regular personal representative, and that the authority of the special administrator should be limited to that necessary to perform this function. He suggested, and Jaureguy agreed, that section 11 should specify that the special administrator take charge of the property in danger of being lost, injured or depreciated, rather than all of the estate.

Lundy referred to the present statute on appointment of temporary guardians (i.e., ORS 126.141), and asked if there was any similarity between the function of a temporary guardian and a special administrator. He pointed out that, under ORS 126.141, a temporary guardian was subject to terms and conditions prescribed by the court in the order of appointment.

Dickson suggested, and Allison agreed, that section 11 needed some revision and that the matter of proper provision for special administrators should be referred to a member for redrafting and submission to the committees for consideration at the Saturday session of the meeting. Zollinger commented that the revision of section 11 should encompass provision limiting the function of a special administrator to property in danger of being lost or injured and some provision for disposal of the body of the decedent. Dickson assigned to Zollinger the task of revising section 11.

Proceedings when will found after administration granted (section 12). Krause moved, seconded by Bettis, that section 12 of the draft, relating to proceedings when a will was found and proven after administration had been granted, be approved. Motion carried.

Richardson pointed out that his revision of section 9 of the draft, pursuant to the assignment previously made to him, might necessitate some change in the wording of section 12. Dickson added the matter of necessary revision of section 12 to Richardson's assignment as to section 9.

Publication of notice by executor or administrator (section 13). Husband asked whether some clarification of the matter of notice to creditors was needed in the situation in which a will had been admitted to probate, the executor had published the notice and then a later will was found and proven. Zollinger remarked that a similar problem would arise in situations under section 12 of the draft or otherwise when one personal representative replaced another. He suggested that perhaps the new personal representative should publish a new notice to creditors, but with some time limitation thereon taking into consideration the notice published by the previous personal representative. He called attention to section 11.40.150, 1965 Washington Probate Code, which reads as follows:

"In case of resignation, death or removal for any cause of any personal representative, and the appointment of another or others, after notice has been given by publication as required by RCW 11.40.010, by such personal representative first appointed, to persons to file their claims against the

> decedent, it shall be the duty of the successor or personal representative to cause notice of such resignation, death or removal and such new appointment to be published two successive weeks in a legal newspaper published in the county in which the estate is being administered, but the time between the resignation, death or removal and such publication shall be added to the time within which claims shall be filed as fixed by the published notice to creditors unless such time shall have expired before such resignation or removal or death: PROVIDED, HOWEVER, That no such notice shall be required if the period for filing claims was fully expired during the time that the former personal representative was qualified."

Allison noted that the committees had previously approved a combined published notice to heirs and creditors, and asked whether in the substituted personal representative situation new notice to heirs as well as creditors would be necessary. Dickson commented, and Allison agreed, that the situations referred to were of frequent occurrence, and that the notice aspects thereof should be clarified. Dickson assigned the task of proposing such clarification and necessary revision of section 13 of the draft to Bettis and Krause, who had previously been assigned the matter of notice and the revision of section 10 of the draft.

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

The meeting was reconvened at 9:10 a.m., Saturday, February 19, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

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

The following members of the Bar committee were present: Bettis, Braun, Hornecker, Krause, Lovett, Richardson, Thalhofer (arrived 11 a.m.) and Warden.

Also present was Lundy.

Initiation of Probate or Administration (continued)

Copy of will and of order to heirs, legatees and devisees (section 10). Dickson noted that there had been a considerable amount of discussion on section 10 of the draft and generally on the matter of notice of initiation of administration of

decedents' estates at the meeting the previous day, and some disagreement among members as to whether such notice should be required and, if so, the nature thereof. He commented that this matter of notice had been a controversial one with Bar committees over the years. He pointed out that Bettis and Krause had been requested to prepare a proposal on the subject for consideration at the joint meeting of the committees in March, and suggested that certain other members might be asked to act as dissenters to that proposal. Dickson appointed Allison, Carson and Zollinger as a subcommittee of dissenters to offer criticism of the Bettis and Krause proposal and to prepare and submit an alternative proposal. Zollinger requested that copies of the Bettis and Krause proposal be sent to members of the subcommittee of dissenters within the next three weeks.

Dickson remarked, on behalf of the members who were judges, that the probate courts should not be involved in the matter of notice of initiation of probate or administration, for example as recipients of requests from heirs for copies of wills. He expressed the view that such notice should be the responsibility of personal representatives or their attorneys.

Appointment of special administrator (section 11). Zollinger noted that at the meeting the previous day he had been assigned the task of preparing a revision of section 11 of the draft, relating to appointment of special administrators, and proceeded to distribute to members present copies of his revision, which read as follows:

"Section 11. Appointment of Special Administrator

"If any property of a decedent is in danger of being lost, injured or depreciated pending the appointment and qualification of a personal representative of the estate of the decedent, the court may appoint a special administrator to take charge of such property. The petition for his appointment shall specify the property subject to such danger and the danger to which it is subject. He shall qualify by giving bond approved by the court in such amount as the court shall require, conditioned upon the faithful performance of his duties. He may incur expenses for the funeral and burial or other disposition of the remains of the decedent in a manner suitable to the condition in life of the decedent and for the protection of any property of the estate of the decedent against danger of loss or injury. He may sell perishable property of the

estate of the decedent to prevent loss from deterioration. A special administrator shall not approve or reject creditor's claims or pay claims or expenses of administration or take possession of assets of the decedent's estate other than those which are in danger of being lost, injured or impaired pending the appointment and qualification of a personal representative. Upon the appointment and qualification of a personal representative of the decedent the powers of the special administrator shall cease and he shall make and file his final account and deliver to the personal representative assets of the estate in his possession. If the personal representative shall object to the final account of the special administrator, the court shall hear such objections and, whether or not objections be interposed, shall examine such final account. To the extent approved by the court, the reasonable fees of the special administrator and all expenses properly incurred by him, including the reasonable fees of his attorneys, shall be paid by the personal representative as expenses of administration."

Zollinger commented that revised section 11 reflected his idea of the role of a special administrator, which should be to function only in those circumstances where certain matters could not be delayed until appointment of a regular personal representative. In response to a question by Dickson, Zollinger indicated that the principal difference between the revised section and provisions on the same subject found in the probate codes of other states was that the latter usually authorized a special administrator to take possession of all assets of the estate. Dickson expressed the view that the revised section would satisfactorily resolve the problem he had raised the previous day as to unclaimed bodies of decedents in the custody of the coroner.

Allison suggested, and Dickson agreed, that the account of a special administrator should not be referred to as a "final" account. Zollinger indicated he had no objection to deletion of "final" before "account" in revised section 11.

Allison noted that the first reference to property of a decedent in revised section 11 employed the phrase "lost, injured or depreciated," while subsequent references used "loss or injury" and "lost, injured or impaired," and suggested that the terminology on the danger to property should be the same throughout the section. He also suggested, and Zollinger agreed, that "deteriorated" should be substituted for "depreciated." Carson suggested that the authority of a

special administrator to sell perishable property be conditioned on prevention of "loss, injury or deterioration," rather than "loss from deterioration," and Zollinger remarked that he did not object to this broadening of the condition.

Jaureguy commented that revised section 11 gave him the impression that a special administrator could sell perishable property and exercise other powers without court orders of approval, and expressed the view that a special administrator should be subject to court supervision to the same extent as a regular personal representative. Frohnmayer suggested that sale of perishable property should be subject to court approval, but, in response to a question by Zollinger, expressed the view, with which there appeared to be general agreement, that the exercise of other powers, such as funeral arrangements and incurring expense to protect property against loss, need not be conditioned on court orders.

In response to a question by Husband, Zollinger indicated that the matter of who was qualified to be appointed as special administrator should be left to the discretion of the court.

Richardson noted that revised section 11 required that the petition for appointment of a special administrator specify the property subject to danger, and asked whether a special administrator would be able to protect property not mentioned in the petition but later discovered to be in danger. Zollinger responded that he had this matter in mind when he prepared the revised section, and pointed out that the authority of the special administrator described in the section was not limited to that property described in the petition. He expressed his opinion, with which Frohnmayer agreed, that the section was sufficiently clear on this point, but indicated that he was willing to leave any necessary clarification to Lundy, such as insertion of "so far as known" after "property" in the sentence on the petition, or insertion of "any" before "perishable" or "whether or not listed in the petition" after "decedent" in the sentence on the authority to sell.

Allison moved, seconded by Jaureguy, that revised section 11, with the suggested changes, be approved. Motion carried.

Dickson commented that revised section 11 perhaps should precede the sections on appointment of regular personal

representatives in the arrangement of the proposed revised probate code.

Advancements

Frohnmayer referred to and commented upon his report on advancements, which had been distributed to members of both committees prior to the December meeting. [Note: A copy of this report is contained in the Appendix to these minutes.]

Frohnmayer pointed out that section 1 of the draft set forth in his report on advancements, unlike comparable provisions of the Iowa, Washington and Model Probate Codes, did not limit the doctrine of advancements to persons entitled to inherit at the time advancement was made, but specified that the doctrine was applicable to any person entitled to inherit, which would include persons not heirs at the time of advancement but subsequently becoming heirs before the death of the intestate.

Frohnmayer commented that a surviving spouse presumably would be a "person entitled to inherit" referred to in section 1 of the draft, and referred to ORS 111.130, whereby an advancement to issue of an intestate is excluded in computing the part to be given to the surviving spouse. He noted that the committees previously had agreed to retain ORS 111.130 in the proposed revised probate code, with amendment substituting "surviving spouse" for "widow" and "share to which the surviving spouse is entitled" for "part to be given to the widow, but the widow shall only be entitled to receive the one-half of the residue, after deducting the value of the advancement." [Note: See section 10, Committee Proposal #6.] He expressed the view that amended ORS 111.130 would cause undue complication of the scheme of computation under the proposed advancement statutes, and suggested that amended ORS 111.130 be deleted. He posed the situation of an intestate with a $50,000 estate survived by one son, who had received a $25,000 advancement, and a widow, and explained that, in this situation, if amended ORS 111.130 were retained, the widow would receive $25,000, whereas if amended ORS 111.130 were deleted, the widow would receive $37,500 pursuant to section 1 of the draft. Allison moved, seconded by Zollinger, that the previous action retaining amended ORS 111.130 be rescinded and that the amended section be deleted. Motion carried.

Frohnmayer posed two other situations and explained the application of section 1 of the draft thereto. In the situation of an intestate with a $50,000 estate survived only by four sons, one of whom had received a $10,000

advancement, he pointed out that the son who received the advancement would receive $5,000 of the intestate estate and the other three sons would receive $15,000 each. Frohnmayer noted that if, in the same situation, the advancement to the one son had been $25,000, that one son would receive nothing from the intestate estate and each of the other three sons would receive one-third of $50,000.

Frohnmayer stated that section 1 of the draft limited the doctrine of advancements to intestacy as to the entire estate, and, in response to a question by Jaureguy, commented that one reason for such a limitation probably was complication in attempting to apply the doctrine in cases of partial intestacy. Mapp expressed the view that advancements should be considered in partial intestacy situations. He suggested that, in view of the requirement of ORS 111.120 and section 2 of the draft that an advancement be evidenced in writing, the theory need not be employed that a decedent who had disposed of any of his property will was presumed to have made all such disposition he desired. He remarked that a testator might deliberately make an advancement to apply against an intestate share. Allison and Zollinger indicated that they favored application of the advancements doctrine in partial intestacy, and Carson and Frohnmayer, on the theory that existence of a will should rule out the statutory presumption of intent which formed the basis for the doctrine, expressed opposition. Allison moved, seconded by Zollinger, that section 1 of the draft be amended to make it applicable to partial as well as entire intestacy, and that the section be approved as so amended. On a vote by the advisory committee only, motion failed.

Frohnmayer moved, seconded by Carson, that section 1 of the draft be approved without change. Motion carried.

Frohnmayer pointed out that section 2 of the draft was comparable to ORS 111.120 in requiring written evidence of advancement, and asked if the requirement of written evidence should be perpetuated. Allison expressed the view that written evidence of advancement should be required, noting that the doctrine of advancements was based on presumed intention of a decedent and suggesting that intention of absolute gift was more common than intention of advancement and that if a decedent desired that a gift be an advancement, he should so specify in writing. Zollinger commented that the question was whether it was more desirable to have the certainty of the written evidence rule than to allow other proof of the actual fact situation. He indicated that he favored the approach of the pertinent provision of the 1963 Iowa Probate Code (section 224) that a

gratuitous inter vivos gift was presumed an absolute gift and not an advancement, but that this presumption was rebuttable. In response to a question by Frohnmayer, Lundy stated that section 11.04.041, 1965 Washington Probate Code, included a provision substantially the same as the Iowa provision. Richardson indicated his agreement with Zollinger's position as to consideration of evidence other than written in determining whether an advancement had been intended. Zollinger moved, seconded by Richardson, that the Iowa provision be substituted for section 2 of the draft. On a vote by the advisory committee only, motion failed.

Frohnmayer moved, seconded by Zollinger, that section 2 be amended by substituting "advancee" for "donee," and approved as so amended. Motion carried.

Frohnmayer moved, seconded by Zollinger, that section 3 of the draft be approved without change. Motion carried.

Zollinger referred to section 4 of the draft, providing that an advancement was to be valued as of the time made, and asked whether it was not more reasonable to value an advancement as of the time of the decedent's death. Allison, Dickson and Frohnmayer expressed their opinions that valuation as of the time an advancement was made was more reasonable, and that consideration of increases or decreases in value subsequent to the time of making an advancement would result in inequities and create problems outweighing any advantages of such consideration. Frohnmayer noted that the Iowa provision (section 225, 1963 Iowa Probate Code) specified valuation of an advancement as of the time when the advancee came into possession or enjoyment or as of the date of death of the intestate, whichever occurred first. Frohnmayer moved, seconded by Allison, that section 4 of the draft be approved without change. Motion carried.

Frohnmayer moved, seconded by Zollinger, that a section repealing ORS 111.110 to 111.170, inclusive, be added to the draft. Motion carried.

Retainer

Frohnmayer referred to and commented upon his report on retainer, which had been distributed to members of both committees prior to the December meeting. [Note: A copy of this report is contained in the Appendix to these minutes.] He called attention to the differences between the Iowa (section 471, 1963 Iowa Probate Code) and Model Probate Code (section 187) provisions on retainer set forth in his report.

He noted that the Iowa provision applied to indebted distributees and distributees taking as heirs of deceased indebted legatees or devisees, whereas the Model provision applied only to indebted distributees. He pointed out that the Iowa provision made retainer prior and superior to other rights against distributees and not barred by statutes of limitations or discharge in bankruptcy, while the Model provision made distributees entitled to any defense that would be available in direct proceedings against them for recovery of the debts.

Richardson commented that neither the Iowa nor Model provision appeared to cover the situation involving a beneficiary of a testamentary trust who was indebted to the estate, since the beneficiary would not be a distributee. He expressed the view that the factual situations involving persons benefiting from an estate who were indebted thereto were so varied that it would be almost impossible to codify the rules of retainer to be applied in each case, and suggested that the proposed statute on retainer specify that it was not complete in its coverage of retainer situations. Allison remarked, and Richardson agreed, that not in every instance of a testamentary trust would a beneficiary thereunder in fact receive anything, as, for example, in the case where a beneficiary dies before receiving anything under a trust or in the case of a discretionary trust. Zollinger suggested that retainer be limited to distributees and not apply to the trust situation.

Zollinger moved, seconded by Frohnmayer, that the doctrine of retainer be limited to those cases in which a distributee was indebted to the decedent's estate. Motion carried.

Zollinger remarked that the next question was whether an indebted distributee should be allowed to assert statute of limitations, discharge in bankruptcy and usual defenses available in an action to recover debt under the retainer doctrine, and indicated he was inclined to favor the approach of the Model provision making such defenses so available to the distributee. Allison expressed agreement with Zollinger's view, on the ground that a personal representative should have no better right to recover a debt than the decedent himself. Carson commented that he did not approve the idea of a distributee employing bankruptcy to avoid paying a debt to a decedent who left him an inheritance. In response to a question by Frohnmayer, Zollinger expressed his opinion that the specification in the Iowa provision that retainer was prior and superior to rights of judgment creditors, heirs and assigns of a distributee was an accurate statement of the applicable law whether or not there was retainer.

Frohnmayer noted that the Iowa provision referred to a distributee who took as an heir of a deceased legatee or devisee indebted to the estate, and commented that the meaning of this reference was somewhat obscure. Carson suggested that the reference might contemplate a situation in which a distributee took by represenation. Richardson remarked that the reference might contemplate a situation involving a testamentary disposition to one person, but if he did not survive the testator, to another person; that is, a substitution or alternative bequest or devise.

Allison moved, seconded by Zollinger, that the Iowa provision on retainer be approved. Motion carried. Zollinger suggested, and it apparently agreed, that the matter of retainer against a distributee who claimed through an heir indebted to the estate should be clarified.

Executors and Administrators Generally

The committees began consideration of a draft of proposed legislation relating to executors and administrators generally and primarily encompassing the matters covered by ORS 115.410 to 115.520, which had been prepared by Hornecker and Krause, with assistance by Gilley, and distributed in the form of a report to members of both committees present at the meeting.

Qualifications of executors and administrators (first section). Hornecker referred to the first section of the draft, relating to qualifications of executors and administrators, and commented that "personal representative" should be substituted for "executor or administrator" in this and other sections of the draft. He noted that the comparable Washington provision on qualifications of personal representatives was section 11.36.010, 1965 Washington Probate Code.

Husband referred to subsection (5) of the first section, under which a nonresident could be a personal representative if he appointed a resident agent to accept service, and commented that he had approved such a provision as to guardians (ORS 126.161(5)), but questioned whether it was desirable as to personal representatives. It was pointed out that such a provision on nonresident personal representatives appeared in section 96, Model Probate Code, and Richardson indicated that nonresidents were allowed to serve as personal representatives in California and Washington. Zollinger expressed the view, with which Dickson agreed, that nonresidents should be allowed to act as personal representatives;

that this was as appropriate in the case of personal representatives as in the case of guardians.

Frohnmayer suggested that a nonresident personal representative should be required to file a bond in all cases, and Zollinger indicated he would not object to such a requirement. The location of such a requirement was discussed, and insertion of the requirement in the first section, in the second section or in both was suggested. Frohnmayer proposed insertion of "who has failed to file a bond or" after "state" in subsection (5) of the first section, and insertion of "or in any event upon the appointment of a nonresident of this state who has failed to file a bond" after "estate" in subsection (4) of the second section.

Dickson noted that the first section did not continue the disqualification of judicial officers to be personal representatives as provided in ORS 115.410, and asked whether judicial officers should not be so disqualified. Zollinger expressed the view, with which Frohnmayer agreed, that there were some circumstances in which a judge should be allowed to serve as personal representative and that this matter should be determined on an individual basis. Dickson indicated he favored an across-the-board disqualification, but, in answer to a question by Hornecker, remarked that pro tem judges need not be so disqualified. Husband commented that he recognized the possibility of conflict of interest in a judge serving as personal representative, but expressed the opinion that in most instances judges would decline such service. In response to a question by Braun, Dickson argued that the matter of qualification of judges to serve as personal representatives was a basic one and not of ethics in particular cases. Warden suggested disqualification of probate court judges, and Dickson commented that it was not always clear who was a probate judge, noting that when he was absent any Multnomah County circuit judge could sit as probate judge. Husband suggested, and it apparently was agreed, that a disqualification of Supreme Court, circuit court, district court and county court judges be added to the first section. In response to a question by Lundy, Dickson indicated that the disqualification would apply only to judges of this state.

Allison suggested substitution of "attorney" for "person" in subsection (4) of the first section. Lundy commented that a suspended or disbarred attorney technically was not an "attorney."

Dickson asked whether "finds suitable" in the first

sentence of the first section would adequately cover the situation of an attorney whose activities were being investigated by a Bar grievance committee. Allison asked whether the Bar office maintained a record of resignations by attorneys who were being so investigated. Carson suggested, and Zollinger agreed, that an attorney be disqualified to act as personal representative if he submitted a special resignation when charges of professional misconduct against him were under investigation or disciplinary proceedings were pending, under the rule of admission recently adopted by the Supreme Court (Rule N, adopted September 28, 1965, and published in 82 Advance Sheets No. 1, January 26, 1966). Zollinger commented, and Frohnmayer agreed, that this disqualification provision might specifically refer to this rule on special resignations. Lundy noted that such a reference probably would have to be to the rule as it existed on a particular date. Carson suggested that the disqualification provision contain the wording of the rule rather than refer to the rule as such. There appeared to be general agreement that such a disqualification provision should be added to the first section as a separate subsection, and that the wording thereof should be left to Lundy.

The meeting was recessed at 12:30 p.m.

The meeting was reconvened at 1:45 p.m. All members of the advisory committee, except Butler, Lisbakken and Riddlesbarger, were present. The following members of the Bar committee were present: Bettis, Braun, Field (arrived 2:10 p.m.), Hornecker, Krause, Lovett, Richardson and Thalhofer. Also present was Lundy.

Qualifications of executors and administrators (first section). The committees continued discussion of the first section of the draft, relating to qualifications of executors and administrators. Hornecker noted that one of the grounds for disqualification was conviction of a felony (subsection (3)), but that the first section did not include conviction of a misdemeanor involving moral turpitude, which was a ground for disqualification under ORS 115.410. Zollinger suggested that the court finding of suitability might be sufficient to cover this matter. Richardson commented that the court in most cases probably would not be aware of convictions of misdemeanors involving moral turpitude. He expressed the views that the finding of suitability would not adequately cover this matter and that the disqualification for conviction of such a misdemeanor should be specified if it was intended to have it apply. Lundy pointed out that the meaning of "moral turpitude" was

not clear. Frohnmayer moved, seconded by Zollinger, that specific provision on disqualification for conviction of a misdemeanor involving moral turpitude should not be included in the first section. Motion carried.

Dickson referred to subsection (1) of the first section, and commented that he assumed "incompetent" had the meaning ascribed to it in the guardianship statutes (ORS 126.006(3)). Zollinger expressed the view that the definition of "incompetent" in ORS 126.006(3) was not the meaning that should be given to "incompetent" in describing persons disqualified to be personal representatives. Lundy noted that the definition in ORS 126.006(3) had not been designed particularly for the provision on qualifications of guardians (ORS 126.161), but for description of prospective wards. Jaureguy commented that the court finding of suitability covered "an incompetent." Zollinger responded that suitability and competence were not the same thing. In answer to a question by Lundy, Dickson indicated that the disqualification should include more than mentally ill persons; that spendthrifts, for example, should be included. Lundy suggested the possibility of substituting "a person under legal disability" for "an incompetent" in subsection (1) of the first section.

Hornecker moved, seconded by Richardson, that the first section, with addition of subsections disqualifying attorneys who had submitted special resignations under the rule on admissions previously discussed and judges of the Supreme Court, circuit court, district court and county court of this state, and with insertion of "failed to file a bond" in subsection (5), be approved. Motion carried.

Necessity and amount of bond; bond notwithstanding will (second section). Hornecker referred to the second section of the draft, relating to necessity and amount of bond of a personal representative, and called attention to provisions on bond contained in the 1963 Iowa Probate Code (sections 169 to 187), 1965 Washington Probate Code (sections 11.28.180 to 11.28.235) and Model Probate Code (sections 106 to 119). He suggested that "annual income from the real and personal property" be substituted for "annual rents and profits of and from the property" in paragraphs (a) and (b) of subsection (1) of the section.

Discussion on the second section centered primarily on three issues: (1) Whether bond should be required in all cases, except in certain instances when a will declared otherwise; (2) whether the amount of bond should be more in

the discretion of the court or determined in accordance with the statutory standards as presently provided in ORS 115.430; and (3) whether personal sureties, as well as corporate, should be authorized.

Hornecker noted that, under subsection (5) of the second section, the court was empowered to exercise discretion in decreasing or increasing the amount of a bond. Zollinger expressed the view that the court should have more discretion initially in fixing the amount of a bond. Frohnmayer commented, and Zollinger agreed, that the minimum prescribed in subsection (1) of the second section would be too high in some cases. Bettis expressed his opinion that there were instances in which no bond should be required.

Dickson stated that in his opinion the amount of a bond should be in the discretion of the court and that personal surety bonds should not be authorized. He noted that in many cases the need for protection of the estate was minimal, and that if the court had more discretion in fixing the amount of bond, it could require a minimum bond of $1,000 in such cases, for which the premium was $10. Hornecker indicated he opposed allowing the court more discretion in fixing the amount of bond, suggesting that the court in such case would have to rely upon representations by attorneys for estates and in some instances this would result in too little protection for such estates. Dickson remarked that a number of instances in which estates had suffered loss by reason of defalcating personal representative were those in which a will had specified that no bond be required, and expressed the view that protection against dishonesty could not always be assured.

Hornecker also objected to prohibition of personal surety bonds. Husband commented that the use of personal surety bonds had the advantage of reducing expense to the estate. Krause suggested that personal sureties might be permitted in small estates, such as those having a value of less than $1,000. Allison commented that in some cases personal surety bond afforded no more protection than in cases where a will dispensed with the requirement of bond, and that if a court determined that protection really was needed, it should specify a surety company bond, but otherwise be empowered to allow a personal representative to act without bond.

Zollinger noted that a guardian was required to have a bond "with sufficient surety or sureties, in such amount as the court determines necessary for the protection of

the ward and the estate of the ward, and conditioned upon the faithful discharge by the guardian of his authority and duties according to law," with the bond to be approved by the court (ORS 126.171). He suggested that it might be appropriate to adapt the guardian bond requirement for the personal representative bond requirement. Richardson pointed out that all guardians were required to be bonded, and objected to such a requirement in the case of personal representatives.

In response to a question by Carson, Dickson indicated that he did not favor authorizing the court to dispense with bond altogether, on the ground that this would impose an undue burden on the court, which of necessity had to rely to a considerable extent on information supplied by estate attorneys. Dickson commented, and Jaureguy agreed, that there should be some bond, however small, to protect every estate.

Frohnmayer moved, seconded by Gooding, that the court should require bond in such amount as the court determined necessary, but not less than $1,000. Motion carried.

Allison asked if anyone had any information as to recoveries or attempted recoveries on personal surety bonds, indicating that he had no knowledge on this matter. He commented that personal sureties usually were friends of the personal representative or perhaps the surviving spouse, and undertook to act as surety as a personal favor. Frohnmayer remarked that in some instances personal sureties became unavailable, and that an advantage of corporate surety bond was that the surety company was likely to maintain close observation of the administration of the estate. Carson expressed the view that use of corporate surety bonds only might lead to increased premiums and more expense to estates. Field noted that surety companies were becoming more concerned about their risk in fiduciary bond matters. Dickson expressed the opinion that corporate surety bond premiums were not likely to increase, especially if satisfactory personal representatives were appointed.

Bettis moved, seconded by Frohnmayer, that the bond required by the court be a corporate surety bond. Motion carried. Zollinger indicated he voted in favor of the motion somewhat reluctantly. Dickson and Zollinger pointed out that the adopted motions on court requirement of bond and on corporate surety bond did not apply when a will declared no bond was required and the court did not override the will on this matter (subsection (4) of the second section).

Carson suggested that the second section should contain some specific criteria for the court to consider, but not be bound by, in fixing the amount of bond of a personal representative. Dickson indicated he would not object to inclusion of such criteria, although he did not believe it necessary. Zollinger suggested that subsection (3) of the section might be used as one such criterion. Frohnmayer commented that such criteria should include the proper performance by the personal representative of his duties, the protection of creditors and beneficiaries of the estate, the size and liquidity of the estate and the income it produced and the probable amount of indebtedness and taxes.

Dickson expressed the view that the petition for probate or appointment of an administrator should contain information to aid the court in fixing the amount of bond. In response to a question by Thalhofer, Lundy pointed out that the committees had agreed previously that the petition should contain "the estimated value of the property belonging to the decedent and sufficient information concerning the value of the property to enable the court to fix the bond, if any." [Note: See Minutes, Probate Advisory Committee, 1/14,15/66, page 20.] Field suggested, and Jaureguy and Dickson agreed, that the petition should include information on the nature of the property of the decedent, as well as the estimated value thereof. Dickson proposed, and it apparently was generally agreed, that the petition should contain, in lieu of the wording quoted above, "the nature and estimated value of the property belonging to the decedent." Richardson commented, and Dickson agreed, that the nature and estimated value of the property should be set forth "so far as known." In response to a question by Braun, Dickson agreed that the court would be relying on information supplied by an estate attorney as to nature and estimated value of property until the inventory was filed.

At this point (3:10 p.m.) Bettis and Krause left the meeting.

Dickson commented that, in view of action previously taken by the committees, subsections (2) and (3) of the second section could be deleted, although they might form the basis for criteria to be considered by the court in fixing the amount of bond. Zollinger noted that subsection (4) should be retained, and recalled that the committees previously had revised the subsection in connection with bond of nonresident personal representatives in all cases. He commented that subsections (5) and (6) still were appropriate and should be retained.

Frohnmayer stated that he and Hornecker would undertake to redraft the second section in accordance with action taken thereon by the committees, and submit the redraft for consideration at the March meeting. Dickson requested that Frohnmayer and Hornecker include the third, fourth and fifth sections of the draft in their redraft, and Frohnmayer agreed to do so.

For the benefit of Frohnmayer and Hornecker, Allison suggested the following revision of subsection (1) of the second section:

> "(1) No executor or administrator shall, except as stated in this section, act as such until he files with the clerk of the court a bond executed by a surety company qualified to transact surety business in this state, in favor of all interested parties conditioned upon the executor or administrator faithfully performing the duties of his trust according to law, in an amount within the discretion of the court but not less than $1,000, having in mind the probable value of the personal property of the estate, the probable value of the annual income from the real and personal property of the estate, and the probable financial liabilities of the estate."

Other bond provisions (third, fourth and fifth sections). Zollinger suggested that the third section of the draft, relating to when sureties may become severally liable for portions of bond, was not appropriate in view of action taken on the second section and that it could be deleted. He commented that the fourth section, relating to when new and sufficient bond may be required, should be retained.

Zollinger referred to the fifth section of the draft, relating to effect of new bond or failure to give it, and indicated dislike of the provision therein for automatic termination of a personal representative's authority, his removal and revocation of his letters when he failed to give a new bond. Dickson suggested that the second sentence of the fifth section be deleted. He also remarked that the first sentence of the section was not appropriate when an additional bond, rather than a new replacement bond, was required; that is, in the case of additional bond the sureties on the original bond should not be discharged. Frohnmayer suggested, and Dickson and Zollinger agreed, that the first sentence might be unnecessary and could be deleted.

Removal of executor or administrator; grounds and procedure (sixth section). Dickson referred to the sixth

section of the draft, relating to removal of an executor or administrator, and stated that often it was not possible to obtain personal service of citation on a personal representative and that some provision should be made for supplemental or substituted service, perhaps on the personal representative and the surety on his bond in the first instance, and if the personal representative could not be found, on the estate attorney. Allison suggested that if personal service on the personal representative could not be made, notice might be given as ordered by the court.

Husband commented that substituted service when a personal representative could not be found might not satisfy standards of due process for removal of the personal representative. Zollinger expressed the opinion that there was no right to act as personal representative that was protected by due process, and that the court, after reasonable effort was made to notify the personal representative, should be able to remove him. Dickson commented that if a personal representative were to be surcharged, due process would require adequate notice and opportunity to be heard, and that it would be desirable to remove and surcharge in the same proceeding. Zollinger remarked that substituted service on a personal representative's attorney might not satisfy due process for surcharge. Dickson proposed that the court first remove the personal representative and then direct that he account within a certain number of days.

Gooding suggested, and Jaureguy agreed, that "to the probable loss of the applicant or the estate" in the sixth section should be deleted.

Frohnmayer and Hornecker were assigned to redraft the sixth section in accordance with the apparent intent of the committees, and to submit the redraft for consideration at the March meeting. It was also agreed that this assignment should include consideration and any necessary revision of the seventh section (duty of court as to executors and administrators), eighth section (continuation of administration after death, resignation, removal or change of status of executor or administrator), ninth section (rights and powers of remaining or new administrator) and tenth section (resignation of executor or administrator).

Zollinger referred to subsection (2) of the eighth section of the draft, and suggested that the substance thereof might be covered in the banking statutes (ORS chapter 711). Frohnmayer indicated he would check on this matter.

Allison and Dickson commented that, in connection with the tenth section of the draft, the court should approve the resignation of a personal representative and perhaps the personal representative should publish notice of his intention to resign.

Minutes of December and January Meetings

No objection being raised, Dickson ordered that reading of the minutes of the last two meetings (December 17 and 18, 1965, and January 14 and 15, 1966) be dispensed with and that they be approved as submitted.

Next Meeting of Committees

The next joint meeting of the committees was scheduled for Friday, March 18, 1966, at 1:30 p.m., and the following Saturday, March 19, in Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

Matters to be considered at the March meeting were discussed. Dickson recalled that a report and revised draft on inheritance by nonresident aliens by the subcommittee on that subject (Allison, Lisbakken, Lovett, Barrie and Schwabe) previously had been scheduled for consideration at the Friday afternoon session of the March meeting.

Other matters tentatively placed on the agenda for the March meeting were: (1) Revised drafts on bonds and removal, death and resignation of personal representatives by Frohnmayer and Hornecker; (2) a revised draft on issuance and form of letters testamentary and of administration by Richardson; (3) revised drafts on notice of initiation of estate administration by Bettis and Krause and by a subcommittee of dissenters (Allison, Carson and Zollinger); (4) a report on heirship determination, both generally and as to pretermitted heirs, by the subcommittee on the subject (Riddlesbarger, Braun, Gilley, Mapp and Zollinger); (5) a report by Riddlesbarger on the phrase "the validity of whch is determinable by the law of this state" in the testamentary additions to trusts draft otherwise approved at the December meeting; (6) consideration of ORS 115.110, 115.130 and 115.990, relating to delivery of wills by custodians or possessors; (7) drafts of revisions of ORS 114.060 and 115.160, relating to foreign wills, by Mapp and Riddlesbarger, and consideration of the Uniform Probate of Foreign Wills Act; and (8) a progress report on probate courts and jurisdiction by the

subcommittee on the subject (Thalhofer, Copenhaver, Field, Gooding and Warden).

Lundy was requested, and he agreed, to send to all members of both committees as soon as possible a list of all matters tentatively scheduled for consideration at the March meeting.

It was decided to postpone consideration of ORS chapter 116, relating to administration of estates, until the April meeting. Zollinger pointed out that preliminary review of ORS chapter 116, except that part relating to claims against estates, had been assigned to Allison, Butler and himself, and that the work had been subdivided as follows: Allison, ORS 116.005 to 116.025, 116.590 and 116.595, plus ORS 113.070 and 120.310 to 120.400; Butler, ORS 116.105 to 116.465; and Zollinger, ORS 116.705 to 116.990.

The meeting was adjourned at 3:45 p. m.

APPENDIX

(Minutes, Probate Advisory Committee Meeting, February 18 & 19, 1966

The following report on advancements and retainer was prepared by Mr. Frohnmayer and distributed to members of the advisory and Bar committees prior to the December meeting:

December 10, 1965

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

From: Otto J. Frohnmayer

Gentlemen:

Please find enclosed copies of the following:

1. Proposal covering Advancements.

2. Proposal covering Retainer.

These are being sent to you pursuant to the suggestion of Judge Dickson in the event that these subjects will be gotten to at the meeting on December 17 and 18.

Yours very truly

Otto J. Frohnmayer

OJF:lm

encls.

ADVANCEMENTS

A preliminary study and draft of revisions for the Oregon law on advancements was prepared by Mr. Ken Shetterly for the September 18, 1965, meeting of the Advisory Committee. At that meeting it was concluded that the doctrine should logically extend not only to issue of the intestate but also to any heir. The following draft relies mainly on section 310 of the Uniform Probate Code. Mr. Shetterly's draft appears to have followed the Iowa Code. The Iowa code and the new Washington code both follow the Model Probate Code quite

closely. Since the Uniform Code appears to represent the latest thinking on the subject, this draft follows the Uniform Code where it varies from the Model Code.

I suggest that the existing statute provisions: ORS 111.110 to 111.170, inclusive, be repealed and the following language substituted.

Section 1

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's 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.

Comments

1. This changes present Oregon law by expanding the doctrine to any person taking by intestate succession, as opposed to the present limitation to the issue of the intestate.

2. Since the intestate's share of real and personal property will be the same for all takers under the descent and distribution provisions, there is no need to distinguish as between the real and personal property as is done in present ORS 111.150.

3. This draft, unlike the Iowa, Washington and Model Probate codes, does not specify that the person to whom the advancement was made would have been entitled to inherit a part of the estate had the intestate died at the time of making the advancement. The present draft merely specifies that the doctrine applies to any person entitled to inherit a part of the estate. Hence this draft would expand the doctrine of advancements to apply to persons who would not have been heirs had the intestate died at the time of the advancement but who subsequently become heirs prior to the death of the intestate.

4. Presumably the definition section will specify that a surviving spouse is an "heir." This changes present Oregon law as found in ORS 111.130. The proposed amendment to

ORS 111.130 contained in section 10 of Proposal No. 6 of this committee's proposals to the legislature would seem unduly to complicate the scheme of computation and its omission is suggested.

5. This section specifies that the doctrine of advancements applies only to intestacy and only to a person who dies intestate as to his entire estate. This limitation would not, however, seem to affect the holding of the case of Clark v. Clark, 125 Or 333, 342, 267 P 534, 537, which held that a will might direct that a previous gift be considered an advancement in the determination of the shares into which an estate is to be divided.

Section 2

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

Comments

1. This draft, which follows the Uniform Code, differs from the Iowa, Washington and Model Probate codes (which provide that such presumption is rebuttable) by providing that the presumption of a gift may be accomplished only by writing of the donor or the donee. The Uniform Code is actually in accord with the more limited application of the statute of frauds already extant in Oregon law--ORS 111.120. Since the Uniform Code is later and since it does not change existing Oregon law, it is to be preferred over the Model Code. The early case of Seed v. Jennings, 47 Or 464, 83 P 872 (1905) is in conflict with both the old Oregon statute and this new draft. That case suggested the common law presumption that a voluntary conveyance of property by a parent to a child is presumed to be an advancement, unless it is proved to be a gift. This dictum was contrary to the statutory law in force at the time and would, in any event, seem to be repealed by the suggested version, reversing the presumption and making it rebuttable only by evidence in writing.

Section 3

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 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.

Comments

1. This section is a substitute for ORS 111.170. It is virtually identical to the Model Probate Code (section 29(c)), Iowa code (section 226), Washington code (section 11.04.041) and Uniform Probate Code (section 310) provisions. In this way the person to whom an advancement is made is charged for it whether he takes per capita or by representation. See generally, Model Probate Code comment at page 67.

Section 4

An advancement is to be valued as of the time of the advancement.

Comments

1. This adopts subsection (d) of section 310 of the Uniform Probate Code. It represents a change from the Washington, Iowa and Model Probate codes which value the advancement at the time when the advancee came into possession or enjoyment, or at the time of the death of the intestate, whichever first occurs. It also changes present Oregon law (ORS 111.160) which provides for valuation by the donor or donee in any one of three different writings or its estimated value when granted. The former method presents a difficulty in that the writings in which the

valuation may be expressed could conceivably be inconsistent with one another. In 1 Jaureguy & Love, Oregon Probate Law and Practice in sections 41-46, this problem is noted. The authors suggest that the valuation expressed in a deed would control over a differing valuation acknowledged by the donee. The new Uniform Probate Code section here obviates this problem and provides only for an objective determination of the value of the advancement at only one point in time.

RETAINER

It would seem desirable to codify the old common law of "right of retainer," although it has been suggested that this equitable right need not depend on statutory authorization. See Security Inv. Co. v. Miller, 189 Or 246, 218 P 2d 966 (1950). It is suggested that the new provision be fitted into chapter 116 or 117 (dealing with claims against the estate or with the settlement and distribution).

The following are two codifications of the right of retainer:

A. Iowa Probate Code, section 471 reads as follows:

When a distributee of an estate is indebted to the estate, or if a distributee takes as an heir of a deceased devisee indebted to the estate, the amount of such indebtedness, if due, or the present worth of the indebtedness, if not due, shall be treated as an off-set and retained by the personal representative out of any testate or intestate property, real or personal, of the estate to which such distributee is entitled. The right of set-off and retainer shall be prior and superior to the rights of judgment creditors, heirs or assigns of such distributee and shall

not be barred by the statute of limitations nor by a discharge in bankruptcy.

Comment

1. This provision specifically enlarges the provisions of the Model Probate Code (section 187) to include distributees. It specifically make the right of retainer superior to the rights of creditors, heirs or assigns of the distributee and does not permit the right to be barred by lapse of time or discharge in bankruptcy. It codifies present Iowa law.

B. Section 187 of the Model Probate Code reads as follows:

When a distributee of an estate is indebted to the estate, the amount of the indebtedness, if due, or the present worth of the indebtedness, if not due, may be treated as an off-set by the personal representative against any testate or intestate property, real or personal, of the estate to which such distributee is entitled; but such distributee shall be entitled to the benefit of any defense which would be available to him in a direct proceeding for the recovery of such debt.

Comment

1. This substantially follows Ohio law, except for the last clause which follows the Alabama code and marks a departure from the common law rule according to which the right of retainer was permitted with respect to debts barred by the statute of limitations or a discharge in bankruptcy. This prevents litigation which has arisen in connection with these matters. The meaning of "off-set" is very broad (see Model Probate Code, section 144 and comment thereto) and includes unliquidated as well as liquidated claims.

The two sections as presented should give the committee a choice of approaches. The Iowa code gives a broader meaning

to the right. The main differences are with respect to the rights of other claims to the estate property, and with respect to other debts and claims barred by the statute of limitations. For further reference see the following cases dealing with this right:

1. Stanley v. U. S. National Bank, 110 Or 648, 224 P 835 (1924). In this case the legacy to a legatee who was the defaulting administrator of the estate, was deemed automatically set-off by the claims of the other heirs for misappropriated property and was good even as against a bona fide purchaser.

2. Boise Payette Lumber Company v National Surety Corporation, 167 Or 553, 118 P 2d 1066 (1941).

3. Security Inv. Co. v Miller, 189 Or 246, 218 P 2d 966 (1950).

4. See also as to the right of retainer the following: 1 ALR 991; 30 ALR 775; 75 ALR 878; 110 ALR 1384; 26A CJS Descent and Distribution, section 711; 53 Calif. L. Rev. 224 (March 1965).

MEMORANDUM
February 7, 1966

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

From: Robert W. Lundy
Chief Deputy Legislative Counsel

Subject: Rights of nonresident aliens to take property by succession or testamentary disposition (ORS 111.070).

At the joint meeting of the Advisory and Bar Committees on December 17, 1965, a subcommittee was appointed to prepare and submit to the committees at their joint meeting in February 1966 proposed legislation on inheritance by nonresident aliens. See Minutes, Probate Advisory Committee, 12/17,18/65, page 4. Members of the subcommittee are Mr. Stanton W. Allison, Miss Patricia A. Lisbakken, Mr. Charles M. Lovett, Mr. Walter L. Barrie and Mr. Peter A. Schwabe.

In letters addressed to Judge William L. Dickson and dated January 21 and 22, 1966, Mr. Schwabe set forth a draft of a proposed statute on inheritance by nonresident aliens and commented thereon. This memorandum contains the substance of that draft, with certain changes in form and style, and comment, for consideration at the meeting to be held Friday, February 18, 1966. It was my thought that this memorandum would present the contents of those letters in a form more convenient for such consideration than copies of the letters themselves.

Mr. Schwabe's Draft

Section 1. (1) Where it shall appear to the probate court at the time of distribution of an estate that an alien heir, legatee, devisee or distributee not residing within the United States or its territories would not have the benefit or use or control of the money or other property due him, the probate court may order that the administrator or executor

of said estate sell and convert said property into cash and that the money due said alien be deposited to his credit at interest in a savings account in a bank or banks in the State of Oregon. The passbook or other evidence of such deposit shall be delivered to the clerk of the court. Such sales of property other than cash shall be made pursuant to the procedure prescribed by the statutes for the sales of real and personal property by the guardian of the estate of a nonresident spendthrift. The money to be desposited shall be subject to the expenses of such sales and such sums as the court may fix and allow for the services of the administrator or executor, his attorney and an attorney or attorney in fact, if any, representing the alien in said proceeding.

(2) (a) Any money so deposited shall be withdrawn and disposed over only upon the order of the court which ordered the deposit. A petition for an order authorizing withdrawal shall be filed by the heir, legatee, devisee or distributee and shall allege that at the time of filing said petition he would have the benefit or use or control of the money. The court shall fix a time and date certain for the hearing of said petition and shall order that notice thereof be given in the manner as provided by law for the giving of notice of the hearing on the final account of an executor or administrator and notice of said hearing shall further be given not less than twenty days prior thereto to the State Land Board of Oregon and to the bank or banks in which said

funds are deposited.

(b) If at such hearing the court determines that the petitioner would have the benefit or use or control of said money, the court shall make an order that the money, including the interest accrued thereon, be withdrawn and paid over to the petitioner or to his attorney in fact, subject to the costs and expenses of the recovery proceeding as allowed and approved by the court.

(3) In the event the alien heir, legatee, devisee or distributee shall die prior to receiving the money on deposit to his credit, a withdrawal petition as provided in subsection (2) of this section may be filed by the personal representative of his estate appointed by the probate court in which the original decedent's estate from which the money was derived was administered. Such petition shall allege that the person in whose name the money is on deposit would, if then living, have the benefit or use or control of said money. In all other respects the procedure shall be the same as if the petition were filed by the heir, legatee, devisee or distributee himself.

(4) If no petition for withdrawal of any money so on deposit is filed either by the heir, legatee, devisee or distributee himself, or, if he has died, by the personal representative of his estate as provided in subsection (3) of this section, within twenty years from the date of the entry of the order directing the deposit, such money,

including the interest accrued thereon, shall be disposed of as escheated property.

Section 2. ORS 111.070 is repealed.

Mr. Schwabe's Comment

In his letter of January 21, Mr. Schwabe stated:

"Pursuant to Mr. Allison's letter to me of December 20, 1965, I have now prepared and respectfully submit herewith draft of a proposed statute to replace ORS 111.070. In this I have, basically, adopted the custodial, withholding principle of the New York, Pennsylvania and Massachusetts statutes, and have endeavored to incorporate the view and desires of the joint committees as reflected on pages one to four of the Minutes of the Joint Meeting held on December 17, 1965. I did deem it advisable to include specific procedural provisions for lack of which the statutes of the other states have been much criticized."

"I trust that the above [i.e., his draft] is in fact along the lines of the committees' thinking and desires and shall of course be pleased to furnish any information or explanation that may be called for. Also I shall be pleased to make any changes or revisions that may be requested and to appear again before the committees if that might aid in the committees' work."

"I should perhaps explain that the references to attorneys in fact were included in the proposed statute for the reason that it may be presumed that in most instances the alien heirs would appear and act through the consular officials of their country as their attorney in fact."

The third sentence of subsection (1) of section 1 of Mr. Schwabe's draft as set forth in his letter of January 21 read as follows:

"Such sales of property other than cash shall be made pursuant to the procedure prescribed by the statutes for the sales of real and personal property by executors or administrators of decedents' estates."

In his letter of January 22, Mr. Schwabe referred to the above sentence and stated:

> "Since my letter of yesterday it has occurred to me that the provision in the next to the last line on page one that such sales are to be made pursuant to the procedure for the sales of real and personal property by executors or administrators of decedents' estates' might not only raise some problems but be unnecessarily cumbersome and costly. It seems to me that the procedure for the sale of property by a guardian would be much more practical, particularly ORS 126.471 pertaining to a spendthrift ward, as much trouble, time and expense could be saved by having the non-resident alien heir execute a consent to the sale."

REPORT
January 14, 1966

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

From: Gregory T. Hornecker and Donald G. Krause

Subject: Rough Draft on Executors and Administrators Generally

One of the matters currently under consideration by the Advisory and Bar Committees is revision of ORS chapter 115, relating to initiation of probate or administration and executors and administrators generally.

This report contains a rough draft of a suggested revision of the last part of ORS chapter 115 (i.e., ORS 115.410 to 115.520), relating to executors and administrators generally.

EXECUTORS AND ADMINISTRATORS GENERALLY

Qualifications of executors or administrators. Any qualified person whom the court finds suitable may serve as an executor or administrator. A person is not qualified to serve as an executor or administrator who is:

(1) An incompetent.

(2) A minor.

(3) A person who has been convicted of a felony.

(4) A person suspended for misconduct or disbarred from the practice of law, during the period of suspension or disbarment.

(5) A nonresident of this state who has not appointed a resident agent to accept service of summons and process in all actions, suits and proceedings with respect to his

trust and has caused the appointment to be filed in the probate proceedings.

NOTE: This section contains the substance of ORS 126.161 pertaining to the qualifications of guardians and deletes the reference in ORS 115.410 to nonresidents of this state, judicial officers, other than justices of the peace, persons of unsound mind and persons who have been convicted of a misdemeanor involving moral turpitude.

Necessity and amount of bond; bond notwithstanding will. (1) No executor or administrator shall, except as stated in this section, act as such until he files with the clerk of the court a bond in favor of all interested parties conditioned upon the executor or administrator faithfully performing the duties of his trust according to law, in an amount and with sureties as follows:

(a) With one or more sufficient personal sureties approved by the court, in a sum not less than double the probable value of the personal property of the estate, plus double the probable value of the annual rents and profits of and from the (real) property of the estate; or

(b) If the bond is executed by a surety company qualified to transact surety business in this state, then in a sum not less than the probable value of the personal property of the estate plus the probable value of the annual rents and profits of and from the property of the estate.

(2) When there are securities registered in the decedent's name, which may not be sold or transferred of

record by the executor or administrator without an order of court authorizing such sale or transfer, the required bond shall be based only upon the estimated income to be derived from such securities during the period of administration, unless such securities are ordered by the court to be sold, at which time a further bond shall be required by the court for the full value thereof.

(3) When money of the estate is deposited in a bank or saving and loan association under an arrangement whereby it cannot be withdrawn by the executor or administrator without an order of court authorizing such withdrawal, the required bond shall be based upon only the estimated interest on such deposit unless all or part of such money be ordered withdrawn by the court at which time a further bond shall be required by the court for the money so ordered withdrawn.

(4) When a will declares that no bond shall be required of the executor, he may act upon taking an oath faithfully to perform his trust, without filing a bond. Notwithstanding such provisions in a will, the court may, at any time in its discretion, on its own motion upon the petition of any person interested in the estate, require such executor to give the bond required by this section.

(5) If, upon filing the inventory, or at any time thereafter, it appears to the satisfaction of the court that the bond of the executor or administrator is different

in amount than required by this section, the court may, by order, reduce or increase the bond accordingly.

(6) Nothing in this section shall affect the provisions of ORS 709.230 and 709.240, relating to a trust company acting as executor or administrator.

NOTE: This is ORS 115.430, substituting, however, the word "bond" for the word "undertaking." See, however, Mr. Gilley's suggested addition to ORS 115.430 (i.e., subsection (3).

When sureties may become severally liable for portions of bond. When the bond prescribed by ORS 115.430 exceeds $2,000, three or more sureties may become severally liable for portions of that sum, if the aggregate sum for which such sureties become liable equals the amount provided in the bond.

NOTE: This section contains the substance of ORS 115.440.

When new and sufficient bond may be required. When the amount of an executor's or administrator's bond is insufficient, or the sureties therein or either of them have become nonresidents of this state, or are likely to or have become insolvent, the executor or administrator shall be required to give a new and sufficient bond. The application for such new bond may be made by the court on its own motion or by any heir, legatee, devisee, creditor or other person interested in the estate, and in the manner prescribed in ORS 115.470 for the removal of executors and administrators.

NOTE: This section contains the substance of ORS

115.450 with the addition of the provision that the court may upon its own motion require the executor or administrator to post a new bond.

Effect of new bond or failure to give it. The new bond required under ORS 115.450, when filed and approved, discharges the sureties in the former bond from any liability on account of their principal arising from subsequent acts or omission. When a new bond is required, if the executor or administrator fails to comply with the court's order within five days from the entry or within such further time as the order may prescribe, the authority of such executor or administrator ceases and he is deemed removed and his letters revoked.

NOTE: This provision contains the substance of ORS 115.460 with some wording changes and the continued deletion of the word "undertaking" and substitution of the word "bond."

Removal of executor or administrator; grounds and procedure. Any person interested in the estate may apply for the removal of an executor or administrator who has become disqualified for appointment or who, in any way, has been unfaithful to or neglectful of his trust to the probable loss of the applicant or the estate. Such application shall be by petition and upon citation to the executor or administrator. If the court finds the charge to be true, it shall by order remove such executor or administrator and revoke his letters.

NOTE: This provision contains the substance of ORS 115.470 deleting, however, the reference to

an executor or administrator who becomes a nonresident of this state.

Duty of court as to executors and administrators. When it appears probable to the court that any of the causes for removal of an executor or administrator exists, the court shall cite the executor or administrator to appear and show cause why he should not be removed, and if he fails to appear or show cause, an order shall be made removing him and revoking his letters. It is the duty of the court to exercise supervisory control over an executor or administrator, to the end that he faithfully and diligently performs the duties of his trust according to law.

NOTE: This is ORS 115.490.

Continuation of administration after death, resignation, removal or change of status of executor or administrator. (1) When an executor or administrator dies, resigns or is removed, if there is a coexecutor or administrator he shall exercise the powers and perform the duties of the trust. If all the executors or administrators die, resign or are removed, administration of the estate remaining unadministered shall be granted to those next entitled, if they qualify.

(2) When a bank or trust company has been appointed as an executor or administrator, and thereafter is converted as provided by law, or is consolidated with another bank or trust company or sells its trust and fiduciary business or its trust department to another bank or trust company, pursuant to any law permitting such conversion, consolidation or sale, the converted, consolidated or purchasing

bank or trust company shall continue and complete the administration of the estate as though it had been originally appointed as the executor or administrator with all the rights, obligations and responsibilities incident thereto.

NOTE: This is ORS 115.500 with one minor deletion.

Rights and powers of remaining or new administrator. The surviving or remaining executor or administrator, or the new administrator, is entitled to the exclusive administration of the estate, and may maintain any necessary and proper action, suit or proceeding on account thereof, against the executor or administrator ceasing to act, or against his sureties or representatives.

NOTE: This is ORS 115.510.

Resignation of executor or administrator. The court, in its discretion, may allow an executor or administrator to resign, upon his filing an account of his administration.

ADVISORY COMMITTEE
Probate Law Revision

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

Dates) and : Times) 1:30 p.m., Friday, March 18, 1966 and 9:00 a.m., Saturday, March 19, 1966
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of February meeting.

2. Reports on miscellaneous matters.

3. Inheritance by nonresident aliens.

   Revised draft by subcommittee (Allison, Lisbakken, Lovett, Barrie and Schwabe).

4. Testamentary additions to trusts.

   Report by Riddlesbarger on phrase "the validity of which is determinable by the law of this state.

5. Probate courts and jurisdiction thereof.

   Progress report by subcommittee (Thalhofer, Copenhaver, Field, Gooding and Warden).

6. Heirship determination (generally and pretermitted heirs).

   Report by subcommittee (Riddlesbarger, Braun, Gilley, Mapp and Zollinger).

7. Delivery of wills by custodians or possessors.

   Consideration of ORS 115.110, 115.130 and 115.990.

8. Foreign Wills.

   Drafts by Mapp and Riddlesbarger of revisions of ORS 114.060 and 115.160.

9. Letters testamentary and of administration.

   Revised draft by Richardson and Lundy.

10. Notice of estate administration.

    Revised draft by Bettis, Krause and Lundy. Criticism and alternative draft by subcommittee of dissenters (Allison, Carson and Zollinger).

11. Bond of personal representative.

Revised draft by Frohnmayer and Hornecker.

12. Removal, death or resignation of personal representative.

Revised draft by Frohnmayer and Hornecker.

13. Next meeting.

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

ADVISORY COMMITTEE
Probate Law Revision

Twenty-third Meeting, March 18 and 19, 1966
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The twenty-third meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:30 p.m., Friday, March 18, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson (arrived 2:35 p.m.), Zollinger, Allison, Butler, Husband, Jaureguy (arrived 2:40 p.m.), Lisbakken, Mapp and Riddlesbarger. Carson, Frohnmayer and Gooding were absent.

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

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

Vice Chairman Zollinger noted that Dickson would be delayed in attending the meeting by reason of a hearing. Zollinger presided pending Dickson's arrival.

Testimony of Attesting Witnesses

Zollinger referred to section 6 of the draft of proposed legislation relating to initiation of probate or administration, which had been prepared by Gilley, with assistance by Krause and Hornecker, and distributed in the form of a report to all members of both committees before the January meeting. Zollinger pointed out that section 6, relating to testimony of attesting witnesses, had been considered and approved at the February meeting. [Note: See Minutes, Probate Advisory Committee, 2/18,19/66, page 9.] Zollinger asked whether a witness attesting a will might make his affidavit, to be used subsequently in lieu of his testimony or personal presence, at the time of attestation. He suggested, and Warden agreed, that an affidavit made by a witness at the time of attestation would be more significant than an affidavit made at a later time. Gilley commented that some attorneys routinely followed the practice of having witnesses make their affidavits at the time of attestation.

Zollinger pointed out that under section 6 of the draft it was not clear whether the practice of witnesses making their affidavits at the time of attestation was authorized and suggested that section 6 be revised to make such authorization clear. Gilley commented that if the affidavit was attached to the original copy of the will, rather than to a photographic or photostatic copy thereof, the affidavit might be detached in the course of preparing and maintaining the file of estate records. Zollinger proposed that the affidavit might be set forth in the will document itself, following the attestation clause, instead of attached thereto, and, in response to a question by Riddlesbarger, commented that authorization for this practice should be permissive in nature and not mandatory or exclusive.

Allison commented that the statute section relating to execution of wills might be revised to include the authorization on attesting witness affidavits proposed by Zollinger, rather than the section relating to testimony of attesting witnesses. Zollinger expressed the view that section 6 of the draft was the appropriate place to recognize expressly the validity of an affidavit set forth following the attestation clause in a will.

Warden and Gilley remarked that, in their experience, the testimony of witnesses personally present to prove a will was seldom if ever employed, and that proof by affidavit was the common practice.

There was general agreement that section 6 of the draft should be revised to provide expressly that the affidavits of attesting witnesses may be made at the time of attestation and may be set forth following the attestation clause in the will. Gilley suggested, and it apparently was agreed, that the provision need not specify that the affidavits may be set forth in the will itself, but merely that the affidavits may be made at the time of attestation or any time thereafter, thus permitting inclusion of the affidavits in the will or attachment to the original will or a copy thereof.

Miscellaneous Matters

Lundy reported that he had obtained and brought to the meeting copies of two bills revising most of the New York probate statutes prepared by the New York Temporary State Commission on Estates and introduced at the 1966 session of the New York legislature. He indicated he had requested sufficient copies of the bills to distribute to all members of both committees, but had received only five of each bill. He invited members present to help themselves to the copies available.

Lundy noted that the 1965 ORS chapters on probate were not yet available for distribution to members and insertion in their copies of the Oregon probate code. He indicated he had not yet completed the list of revised probate codes recently enacted in other states that he had been requested at the February meeting to prepare and distribute to members. He reported that he had begun work on a proposed outline or arrangement of provisions to be included in the proposed revised Oregon probate code, noted that he was encountering some difficulty in the prosecution of this task and that the probate codes of other states were not particularly helpful as guides, and invited suggestions from members on this matter.

Gilley indicated that Miss Lydia Strnad, chairman of the Protective Services Subcommittee, Committee on Aging, Community Council, had suggested to him that the probate committees consider recommending the establishment of public administrators and guardians in Oregon, to function in situations where regular administrators and guardians willing and able to act could not be found. Lisbakken remarked that Gladys M. Everett, a Portland attorney, had been working on the guardianship aspect of this problem, and suggested that she might be consulted on this matter. Zollinger expressed the view, with which there appeared to be general agreement, that the matter of public administrators and guardians was deserving of consideration by the committees, but that such consideration should be postponed until after work on the principal proposed probate revision legislation was completed.

Inheritance by Nonresident Aliens

Allison noted that at the February meeting the subcommittee on inheritance by nonresident aliens, consisting of himself, Lisbakken, Lovett, Barrie and Schwabe, had submitted a draft on the subject, which had been considered and approved in principle by the committees. He pointed out that a number of suggestions for revision of the draft had been made at the February meeting, and that the draft had been rereferred to the subcommittee for appropriate revision. He commented that a revised draft had been prepared, and proceeded to distribute copies thereof to members present. The revised draft read as follows:

> "1. Where, at the time of distribution of an estate, the probate court finds that an heir, legatee, devisee, or distributee is an alien not residing within the United States or its territories, who would not receive the benefit, use, or control of the money or other property due him, the probate court shall order that the

administrator or executor of said estate sell and convert said property into cash and that the money due said alien be deposited to his credit at interest in a savings account in a bank or banks in the State of Oregon. The passbook or other evidence of such deposit shall be delivered to the clerk of the court. Such sales of property shall be made pursuant to the procedure prescribed by the statutes for the sale of real and personal property by decedents' estates.

"The money to be deposited shall be subject to the expenses of such sales and such sums as the court may fix and allow for the services of the administrator or executor, and his attorney, and of the attorney in fact, if any, representing the alien in said proceeding. It shall not be subject to the provisions of the Uniform Disposition of Unclaimed Property Act (ORS 98.306).

"2. Any money so deposited shall be withdrawn and distributed only upon the order of the court which ordered the deposit. A petition for an order authorizing withdrawal shall be filed by the alien heir, legatee, devisee, or distributee, or, if deceased, by a personal representative appointed by said court. The petition shall allege that at the time of filing the alien heir, legatee, devisee, or distributee, or, if deceased, his heirs or beneficiaries, would receive the benefit, use, or control of the money. The court shall fix a time and date certain for the hearing of said petition and shall order that written notice thereof be given not less than thirty days prior thereto to the State Land Board of Oregon, to the bank in which said funds are deposited, and to the consular representative of the country of which the alien is, or if deceased was, a citizen.

"If at such hearing the court determines that the petitioner or, if deceased, his heirs or beneficiaries, would receive the benefit, use, or control of said money, the court shall make an order that the money, including the interest accrued thereon, be paid to the petitioner or to his attorney in fact, subject to the costs and expenses of the recovery proceeding as allowed and approved by the court.

"A subsequent petition filed after denial of a petition for an order authorizing withdrawal shall allege the particulars of new and changed conditions since the filing of the last previous petition.

"The recovery proceeding shall be filed under the

register number of the estate in which the order for deposit of the money due the alien was entered, and no order shall be required to reopen the estate for the recovery proceeding.

"3. If no petition for withdrawal of any money so on deposit is filed and pending within ten years from the date of the order directing the deposit, such money, including the interest accrued thereon, shall be distributed to an heir, devisee, or legatee, other than such alien, who has filed his petition within one year from the expiration of the ten year period and has been found eligible to take such property. If no such petition is filed and allowed by the court, the money shall be disposed of as escheated property.

"4. Section 111.070 is hereby repealed."

Allison explained the new features of the revised draft, which were: (1) Reduction from 20 years to 10 years of the period within which a nonresident alien heir would be permitted to establish eligibility to withdraw a deposit; (2) exemption of deposits from the seven-year presumption of abandonment under the Uniform Disposition of Unclaimed Property Act, particularly ORS 98.306; (3) requirement of new evidence for a second and each subsequent claim by a nonresident alien during the 10-year period; (4) provision that a claim by a nonresident alien be handled as a part of the original estate proceeding, but with no necessity to reopen the estate for this purpose; (5) provision for disposition of a deposit after 10 years by distribution to eligible heirs who had filed claims therefor within one year after expiration of the 10-year period, and if no such claims were filed, by escheat; and (6) provision, not previously discussed by the committees, that a petition for withdrawal of a deposit must have been filed and pending within the 10-year period, instead of the requirement of the previous draft that the court order for withdrawal be made within that period.

Barrie commented that the requirement of the revised draft that a petition for withdrawal of a deposit be filed and pending within the 10-year period prompted a question as to the time to which evidence of eligibility of a nonresident alien heir to withdraw should be directed. He noted that under the present reciprocity statute (i.e., ORS 111.070) evidence of eligibility was directed to the situation at the time of the death of the decedent. He posed a situation in which a petition for withdrawal was filed shortly before expiration of the 10-year period alleging new evidence that was determined to be insufficient to establish eligibility of the nonresident

alien heir by the court after that expiration, and in which different and sufficient new evidence came to light after that expiration but before the court hearing on the petition. He asked whether evidence of a situation arising after expiration of the 10-year period should be allowed in a withdrawal proceeding pending on the date of that expiration.

Suggestions that evidence of eligibility of a nonresident alien heir in a withdrawal proceeding be limited to the situation existing at the time of filing the petition and, instead, that such evidence extend to the situation existing at the time of the court hearing on the petition were made and discussed. Allison proposed, and it was agreed, that action on this matter should be postponed until the next meeting in order to obtain the views of Schwabe thereon. It also was agreed that consideration of this matter should be scheduled for the Friday afternoon session of the April meeting of the committees.

Husband expressed the view that the second paragraph of section 1 of the revised draft did not make it clear that expenses of sale and compensation of personal representative and attorneys were to be paid out of sale proceeds, and suggested that the paragraph be revised to read: "The money to be deposited shall be the proceeds of sale remaining after payment therefrom of the expenses of such sale and such sums * * *."

At this point (2:40 p.m.) Barrie left the meeting.

Testamentary Additions to Trusts

Riddlesbarger pointed out that the committees previously had approved substitution of the Uniform Testamentary Additions to Trusts Act for ORS 114.070 [Note: See Minutes, Probate Advisory Committee, 12/17,18/66, page 6], but had postponed action on the phrase "the validity of which is determinable by the law of this state" in section 1 of the Act, pending a report by him on the meaning of this phrase. He indicated that he had encountered considerable difficulty in determining the meaning of the phrase, and was still unsure on this matter. He noted that one commentator had stated that the phrase was included in the Uniform Act 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. Riddlesbarger remarked that he was inclined to favor retention of the phrase because it was contained in the Uniform Act and because its deletion might raise questions as to the reason therefor.

Mapp commented that of the states in which the Uniform Act

had been adopted, in only one (i.e., New Jersey) was the Act adopted without the phrase in question. In response to a question by Zollinger, Mapp expressed the view that the phrase meant that the Act was applicable only to testamentary provisions which were valid under Oregon law. Mapp also remarked that the wording of the phrase did not turn on whether the testamentary provision was valid or invalid, but only on whether the validity thereof was determinable by the law of Oregon. Zollinger indicated his uncertainty as to the meaning of the phrase, and suggested that whatever its meaning, the wording used did not clearly express that meaning.

Allison moved, seconded by Braun, that the phrase in question be deleted from the Uniform Act as approved by the committees. Motion carried.

Probate Courts and Jurisdiction

Members of the subcommittee on probate courts and jurisdiction, appointed at the January meeting, reported on activities and progress of the subcommittee. Copenhaver noted that of the 36 counties in Oregon, county courts had probate jurisdiction in 14, district courts in 11 and circuit courts in 11; and that of the 14 county courts with probate jurisdiction, 12 were in eastern Oregon. He indicated that he did not believe the matter of transfer of probate jurisdiction from all county courts to circuit courts had been considered formally by the county judges' association, but that he was aware that many county judges were not opposed to such a transfer and some would favor it. He commented that much of the opposition to such a transfer was found among attorneys in multi-county judicial districts without a resident circuit court judge in each county, and that periodic unavailability of a circuit court judge to handle probate matters in each county of such judicial distrists was a problem, particularly, for example, in the 9th Judicial District (i.e., Harney and Malheur Counties).

Warden reported that he had sent a questionnaire to all district court judges asking whether they favored transfer of all probate jurisdiction to the circuit court; that of 24 replies, 18 (including seven from judges with probate jurisdiction) were in favor of such transfer; and that of the six replies expressing opposition, four were from judges with probate jurisdiction. He noted that the Bar Committee on Judicial Administration also was studying the matter of centralizing probate jurisdiction in the circuit courts, and that District Judge Henry Kaye of Umatilla County, a member of that Bar committee, had sent a questionnaire to all district court judges with probate jurisdiction asking if they would be willing to handle probate matters on a pro tem circuit

court judge basis if the jurisdiction was transferred to the circuit court. Warden indicated that Judge Kaye's survey disclosed that eight of the 11 district court judges were willing to handle probate matters on such a pro tem basis.

Dickson commented that the probate caseload in some of the eastern Oregon counties in multi-county judicial districts did not appear to be heavy. He called attention to statistics as of the end of 1965 indicating that, for example, there were 150 estates pending in Malheur County, of which 69 were over three years old; 55 pending in Harney County, with 15 over three years old; 25 pending in Sherman County, with 8 over three years old; 57 pending in Grant County, with 27 over three years old; 16 pending in Wheeler County, with 7 over three years old; and 40 pending in Gilliam County, with 26 over three years old.

Dickson remarked that a large majority of the county and district court judges with probate jurisdiction appeared to be in favor of transfer thereof to the circuit court. He suggested that district court judges could handle some probate matters on a pro tem circuit court judge basis in order to relieve some of the extra burden on regular circuit court judges. In response to a question by Allison, Warden agreed that assignment to other judicial districts was a significant factor in the periodic unavailability of circuit court judges in multi-county judicial districts in eastern Oregon. Allison expressed the view that such assignment might be less frequent if probate jurisdiction was transferred to those circuit courts.

Warden suggested that utilization of attorneys as pro tem probate judges in county seats with no resident circuit court judge and no district court judge might afford a solution to the problem in multi-county judicial districts without resident circuit court judges in each county. Zollinger commented that such utilization of attorneys presupposed the availability and willingness of attorneys to undertake such service when most such attorneys had a probate practice, and suggested authorization for appointment of attorneys as probate commissioners to sign orders and handle other ex parte matters.

Zollinger asked whether the committees favored a proposal to transfer all probate jurisdiction to the circuit courts, and if so, whether this proposal should be included in the principal proposed probate revision bill or in a separate bill. Dickson expressed the view that the proposal need not be in a separate bill, since the jurisdiction transfer matter appeared to be noncontroversial in a large majority of the counties that would be affected by the proposal. Riddlesbarger moved, and it was seconded, that the committees approve in principle the inclusion in the principal proposed probate

revision bill of provision for transfer of all probate jurisdiction to the circuit courts, for district court judges to handle ex parte probate matters when circuit court judges were unavailable and for probate commissioners, who should be attorneys, to handle ex parte probate matters in counties having no district court. Motion carried unanimously.

Husband asked whether appointment of probate commissioners should be made by the Supreme Court or the appropriate circuit court. There was general agreement that probate commissioners should be appointed by the circuit court judges.

Dickson requested that the subcommittee on probate courts and jurisdiction establish and maintain contact with the Bar Committee on Judicial Administration for the purpose of exchanging information on proposals relating to probate courts and jurisdiction thereof. He also asked the subcommittee to keep in touch with Lundy in regard to the drafting of the proposal approved by the probate committees. In response to a question by Lundy, Warden indicated that the Judicial Council was not considering the matter of probate jurisdiction at the present time.

Delivery of Wills by Custodians or Possessors

Lundy referred to his report, dated March 16, 1966, on the subject of delivery of wills by custodians thereof, and to the rough draft of a suggested statute contained in the report. [Note: Copies of this report were distributed before the meeting to some members and at the meeting to other members.] He pointed out that section 1 of the rough draft was derived from ORS 115.110 and 115.130, but differed therefrom in certain respects, and that section 2 repealed ORS 115.110, 115.130 and 115.990.

In response to a question by Husband, Zollinger and Lundy indicated that section 1 of the rough draft did not require a custodian of a will to deliver it to the court unless the court so ordered; that, in the absence of such a court order, the custodian might deliver the will to an executor named therein. Riddlesbarger expressed the view that wills should be delivered to the court in all cases, in order that such wills might be more readily available to interested persons than if they were delivered to executors. In response to questions by Husband, Riddlesbarger agreed that the general practice in Lane County was not to deliver nonprobated wills to the court, and Dickson commented that the general practice in Multnomah County was the same, but that the Multnomah County Clerk maintained a good record of all wills delivered to him. Bruan noted that her office followed the practice of

delivering wills to the court. Husband remarked that delivering wills to the court might result in some instances in discovery of property, the existence of which otherwise would be undisclosed. Zollinger and Dickson expressed the view that alternative delivery of wills to the court or an executor should be retained.

Zollinger moved, seconded by Gilley, that the rough draft be approved without change. Motion carried.

Execution of Wills

Riddlesbarger pointed out that, at the January meeting, he and Mapp had been assigned the task of preparing and submitting for consideration by the committees (1) a revision of ORS 114.060, relating to execution of nonresidents' wills affecting property in Oregon, along the lines of section 50 of the Model Probate Code; and (2) a revision of section 5, relating to establishing foreign wills, of Gilley's draft on initiation of probate or administration along the lines apparently agreed upon by the committees. [Note: See Minutes, Probate Advisory Committee, 1/14,15/66, page 30.]

Mapp stated that in fulfillment of the first part of his and Riddlesbarger's assignment (i.e., revision of ORS 114.060) he had prepared a report embodying a rough draft of proposed legislation consisting of four sections -- section 1 on who may make wills, section 2 on execution of will, section 3 on person signing testator's name to sign his own name as witness and section 4 on validity of will. He distributed copies of his report, dated March 16, 1966, to the members present.

Mapp explained that sections 1 and 3 of his rough draft were the same as sections 1 and 3 of Riddlesbarger's wills draft as approved by the committees at the November 1965 meeting [Note: See Rewritten Draft, 11/19-20/65, attached as an appendix to Minutes, Probate Advisory Committee, 11/19,20/65], that section 2 of his draft was a revised version of section 2 of Riddlesbarger's wills draft as approved and that section 4 of his draft was a proposed revision of ORS 114.060.

Execution of will (section 2). Mapp referred to section 2 of the rough draft, relating to execution of will, noting that the section preserved the substantive requirements of the present Oregon statute (i.e., ORS 114.030) and section 2 of Riddlesbarger's wills draft as approved, but incorporated certain judicial interpretations so that all actual requirements were clearly stated. He pointed out that section 2 of the rough draft generally followed the form used in section 47

of the Model Probate Code.

Allison noted that section 2 would permit a testator to acknowledge, in the presence of the attesting witnesses, his signature previously made by someone else, and questioned the desirability of this practice. Mapp pointed out that section 47 of the Model Probate Code required that the signing of the testator's name by someone else be done in the presence of the attesting witnesses. He commented that two clauses (i.e., "himself sign" and "at his direction and in his presence have someone else sign his name for him") in section 47 of the Model Probate Code had been combined in section 2 of the rough draft, and that it was contemplated that the "acknowledge" clause apply only to the testator's signature made by himself.

In response to a question by Zollinger, Mapp affirmed that section 2 did not require that attesting witnesses sign at the request of the testator, and commented that such was not required by the present Oregon statute. Zollinger suggested that it be required that the testator acknowledge that the document is his will and that the attesting witnesses sign at the request of the testator. He pointed out that the former requirement was set forth in section 279, 1963 Iowa Probate Code, and the latter requirement in section 279, 1963 Iowa Probate Code and section 11.12.020, 1965 Washington Probate Code. Jaureguy expressed approval of a requirement that attesting witnesses sign at the request of the testator, but Mapp and Dickson expressed the view that this was a formality not contributing to the validity of the will and should not be required.

The appropriateness of the word "acknowledge" in the requirement that a testator "acknowledge his signature already made" in the presence of the attesting witnesses was discussed. Allison suggested that the word might seem to imply an acknowledgment made before a notary public, although in fact this was not contemplated. Dickson expressed the opinion that the word was capable of different meanings in different contexts, but that its use in the context of section 2 was appropriate and preferable to such words as "verify" and "declare."

Mapp pointed out that the requirement of section 2 that a testator sign or acknowledge his signature in the presence of the attesting witnesses was based upon interpretation of "attested" in the present Oregon statute by the Oregon Supreme Court. Allison noted that the pertinent sections of the Iowa and Washington probate codes previously referred to did not specifically contain such a requirement, and questioned inclusion of the requirement in section 2.

Dickson suggested that section 2 be revised to read as follows:

> "Sec. 2. Execution of will. A will shall be in writing and shall be executed by the signature of the testator and of at least two attesting witnesses on the instrument as follows:
>
> "a. The testator, in the presence of each of the attesting witnesses, shall himself sign or at his direction and in his presence have someone else sign his name for him or acknowledge his signature previously made.
>
> "b. The attesting witnesses shall each sign in the presence of the testator."

In response to a question by Braun, Dickson expressed the view that, under the revision of section 2 suggested by him, a testator's acknowledgement of his signature included his name signed for him by someone else.

Zollinger suggested that the requirement that attesting witnesses sign in in the presence of the testator need not be perpetuated, pointing out that "presence of the testator" was being interpreted quite broadly. Warden commented that there was some danger in permitting attesting witnesses to sign out of the testator's presence, such as the possibility of substitution of pages of the will.

Warden moved, seconded by Gilley, that the revision of section 2 suggested by Dickson be approved. Zollinger moved, seconded by Braun, that the main motion be amended so as to delete the requirement that attesting witnesses sign in the presence of the testator. Motion to amend the main motion failed. Main motion carried.

Person signing testator's name to sign his own name as witness (section 3). It was suggested that the substance of section 3 of the rough draft, relating to person signing testator's name to sign his own name as witness, should be incorporated in section 2.

Allison moved, and it was seconded, that section 3 be revised to include the requirement that a person signing the testator's name do so in the testator's presence, and that the substance of section 3 so revised be approved and incorporated in section 2. Motion carried.

Validity of will (section 4). Mapp noted that there were two versions of section 4 of the rough draft, relating to validity of will -- one on page 2 of his report and the other

on page 4. He pointed out that the version on page 4 differed from the one on page 2 in requiring that the will be written and attested.

Mapp commented that the version of section 4 on page 2 of the report would permit probate in Oregon of a holographic will made in California by either a resident of California or a resident of Oregon, and of a holographic will made in Oregon by a California resident. Riddlesbarger indicated that the authorization under section 4 on page 2 of probate in Oregon of a will executed in this state by a nonresident according to the law of the testator's domicile was a feature not contained in section 50 of the Model Probate Code. Braun and Husband expressed the view that probate of holographic wills should be allowed in Oregon; Jaureguy and Allison expressed the contrary view. Zollinger noted that probate of holographic wills was permitted under the present Oregon statute (i.e., ORS 114.060) as to bequests of personal property, although not as to devises of real property, located in this state. Husband expressed the opinion that extending the recognition of the validity of holographic wills in Oregon would create more problems than would be solved thereby. Dickson remarked that it was interpretation of wills, rather than the manner of their execution, that gave rise to most of the problems.

Allison suggested that there should be a minimum requirement under section 4 that a will be in writing and signed by the testator. He moved, seconded by Warden, that the version of section 4 on page 4 of the report, with the word "attested" therein deleted, be approved. Motion carried.

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

The meeting was reconvened at 9:05 a.m., Saturday, March 19, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

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

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

Probate Courts and Jurisdiction

Dickson asked Copenhaver and Warden to repeat their reports on probate courts and jurisdiction thereof, previously made at the Friday afternoon session of the meeting, for the

benefit of members not present at that time, and they proceeded to do so. In response to a question by Husband, Warden indicated that the three district court judges with probate jurisdiction who had expressed reluctance to handle probate matters on a pro tem circuit court judge basis if the jurisdiction was transferred to the circuit court were Judge Hall of Curry County, Judge Hall of Lincoln County and Judge Jenkins of Washington County.

Referring to the previous discussion on appointment of probate commissioners, Dickson suggested that there should be a commissioner in each county of the large eastern Oregon multi-county judicial districts.

In response to a question by Lundy, Dickson and Thalhofer expressed the view that the transfer of all probate jurisdiction to circuit courts should include jurisdiction as to guardianship, adoption, change of name and commitment of the mentally ill and deficient.

Establishing Foreign Wills

Riddlesbarger noted that the first part (i.e., revision of ORS 114.060) of his and Mapp's assignment on wills had been disposed of at the meeting the previous day, and that the second part of that assignment (i.e., revision of section 5, relating to establishing foreign wills, of Gilley's draft on initiation of probate or administration) remained for report and consideration. Mapp commented that the first part of the assignment was concerned with original probate in Oregon of foreign executed wills, while the second part involved ancillary probate in Oregon of wills probated in another jurisdiction.

Mapp referred to the Uniform Probate of Foreign Wills Act, and suggested that this Act should be considered by the committees. He explained that the Act, in general, provided that if a will already had been probated in another jurisdiction, normally the jurisdiction of the testator's domicile, then the jurisdiction having adopted the Act would accept that ancillary probate and admit the will to probate. He proposed that Lundy be asked to send copies of the Act to all members of the committees, and that action on the matter of establishing foreign wills be postponed pending this distribution and consideration of the Act by members.

Allison and Jaureguy recollected that at one time the Bar committee had recommended adoption of the Uniform Act. [Note: See Oregon State Bar, 1954 Committee Reports 25 (1954).] Lundy noted that the Act had been submitted to the Oregon legislature in 1951, as Senate Bill 135, at the request of the

Commission on Uniform Laws.

Zollinger commented that in connection with the establishing of foreign wills the committees might also wish to consider the matter of ancillary administration and distribution. Mapp remarked that the matter mentioned by Zollinger was covered in another Uniform Act (i.e., the Uniform Ancillary Administration of Estates Act), and suggested that copies of this Act also should be distributed to members.

Dickson suggested, and it was agreed, that Lundy should send copies of both Uniform Acts to members, and that consideration of these Acts should be scheduled for the Friday afternoon session of the April meeting of the committees. Dickson asked Mapp and Riddlesbarger to be prepared to lead the discussion of these matters at the April meeting.

Heirship Determination

Riddlesbarger noted that at the January meeting a subcommittee, consisting of himself, Braun, Gilley, Mapp and Zollinger, had been appointed to study and report on the matter of proceedings for the determination of heirship, both generally and as to pretermitted heirs. [Note: See Minutes, Probate Advisory Committee, 1/14,15/66, page 17.] He stated that he had asked Lundy to draft a proposed pretermitted heir statute for consideration by the subcommittee, and that Lundy had prepared and submitted such a draft. He commented that Lundy's draft included those matters on which the committees apparently were in agreement at the January meeting, and was embodied in a report which also contained comment on the draft and related matters and which was accompanied by a copy of statute sections on pretermitted children included in a bill revising New York's substantive law of estates prepared by the New York Temporary State Commission on Estates and introduced at the 1966 session of the New York legislature. Riddlesbarger indicated that the subcommittee had met the previous day after the meeting of the full committees had been recessed, and had discussed its recommendations to be made to the full committees.

Pretermitted heirs. Riddlesbarger stated that the subcommittee was of the opinion that all aspects of the matter of pretermitted heirs should be reexamined, rather than consideration being limited to the procedure for determination of pretermitted heir claims and distribution of shares, and that to aid in this reexamination the committees should have copies of the draft Lundy submitted to the subcommittee and of the proposed New York statutes on pretermitted heirs. Copies of Lundy's draft and the proposed New York statutes were distributed to the members present.

Riddlesbarger noted that all members of the subcommittee

but himself were inclined to favor no provision at all on pretermitted heirs, although the subcommittee did not strongly recommend adoption of this course of action.

Riddlesbarger reported that the subcommittee had decided not to proceed further on the basis of Lundy's draft, although it appeared to reflect accurately the ideas generally approved at the January meeting, because, as Zollinger had pointed out in a letter to the subcommittee members, the restatement of those ideas in the draft disclosed an inconsistency and certain questionable matters of policy. Riddlesbarger indicated that the subcommittee recommended that the proposed New York statute on pretermitted heirs be considered as the basis for a substitute for Lundy's draft and the provisions thereof previously agreed upon by the committees. He pointed out that under the proposed New York statute only children born after execution of a testator's will were considered pretermitted heirs, and that descendants of deceased children were not so considered.

Riddlesbarger noted that the subcommittee also recommended that there be no special provision on the remedy of pretermitted heirs, but that determination of pretermission should be made and distribution of pretermitted heir shares accomplished in the probate proceeding as a part of the general procedure on settlement and distribution, and that the subject of all remedies involved in probate should be treated broadly. He commented that centralization of probate jurisdiction in the circuit courts, in accordance with the proposal approved by the committees at the meeting the previous day, would facilitate implementation of this recommendation. He referred with approval to the broad statement of the jurisdiction of the probate court in section 10, 1963 Iowa Probate Code. He stated that the subcommittee's recommendation included repeal of the present specific Oregon statutes on determining heirship (i.e., ORS 117.510 to 117.560).

Zollinger remarked that the subcommittee did not recommend the particular wording of the proposed New York statute, contemplating that such wording could be clarified and improved in some respects, but did recommend the substance of that proposed statute with one change, which was to extend application thereof to children adopted after execution of a testator's will. He explained the provisions of the proposed New York statute on determination of the share a pretermitted child was entitled to receive, in general gearing such share to the shares given children living when the testator executed his will. He posed a situation in which a testator willed $500 to each of two living children and another child was born after execution of the will, and pointed out that under the proposed New York statute in this situation each child would receive one-third share of $1,000. He also pointed out that if the bequests to

the two living children were unequal, such as $600 and $400, the after-born child would receive one-third of $1,000 and the other children would share the balance of the $1,000 on a 60/40 basis.

In response to a question by Jaureguy, Zollinger indicated that, under the proposed New York statute, if there were no children living at the time of execution of a will, an after-born child would receive an intestate share of the testator's estate.

Allison referred to the situation posed by Zollinger involving bequests of $500 to each of two living children, and asked why the after-born child in that situation should not receive $500 from some other portion of the estate, instead of one-third of the total willed to the two living children. Zollinger commented that the disposition suggested by Allison's question had merit if the bequests to living children were equal, but would create difficulties if such bequests were unequal. Gilley remarked that such disposition also would invade other testamentary provisions and in some instances would unduly disrupt the testamentary plan.

Zollinger expressed the opinion that the subcommittee was in agreement that the reason for a statutory provision for pretermitted children was that a testator would have provided for them if he had known they existed. He commented that the subcommittee also felt that if a testator did not provide for living children, more often than not it was because the testator intended such omission, and that to require an intestate share to such omitted children more often than not defeated the purpose of the testator. He indicated the subcommittee's view that in the case of after-born children, however, there was substantial reason to require some pretermitted share, but that if a testator left nothing to living children, then it was likely he would not have desired to leave anything to after-born children either. He expressed the opinion that the proposed New York statute embodied a fairly carefully and well thought out plan on pretermission and pretermitted shares, and indicated that the subcommittee recommended this plan as probably the best that could be made. Riddlesbarger pointed out that instances in which any given provision for pretermitted heirs would apply inequitably could be raised, and agreed that the proposed New York statute, tending to give considerable effect to the wishes of a testator, offered about the best possible plan.

Riddlesbarger moved, seconded by Zollinger, that the committees reconsider their previous action on a proposed pretermitted heir statute and consider the plan embodied in the proposed New York statute. Motion carried. After further

discussion, Zollinger moved, seconded by Warden, that the substance of the proposed New York statute, extending its application to after-adopted children and excluding the provision on remedy of pretermitted children, be approved. Motion carried unanimously.

Heirship determination generally. Riddlesbarger moved, seconded by Mapp, that the present specific Oregon statutes on determining heirship (i.e., ORS 117.510 to 117.560) be repealed, and that general provisions on remedies involved in probate, following the approach of the 1963 Iowa Probate Code (particularly sections 10 and 11 thereof), be approved. Motion carried. Dickson referred the matter of drafting implementation of the approved motion to the subcommittee on probate courts and jurisdiction. Riddlesbarger commented that in drafting such implementation consideration should be given to the role of the probate commissioners, authorization for whom the committees had approved at the meeting the previous day, in the matter of general remedies.

Other provision for children of decedents. Riddlesbarger stated that the subcommittee also recommended that consideration be given to authorizing the probate court to make some provision out of a decedent's estate for dependent minor children of the decedent. Allison noted that discussion in the subcommittee reflected a strong feeling that it was unjust to have laws making it the duty of a parent, while living, to support his minor children, but to permit the parent to make no provision on his death for subsequent support of such children. He commented that the subcommittee proposed a statute that would empower the probate court, upon application by the surviving parent, guardian or a friend of a minor child of the decedent, to allocate income of the estate to the support of the child if not otherwise adequately provided for. Allison indicated that one objection to the proposal was that it contained no clear guidelines for the court to follow in exercising its power, and suggested that the proposal be contingent upon transfer of all probate jurisdiction to the circuit court. He also suggested that the matter be considered by the committees in connection with its review of the present Oregon statutes on support of surviving spouse and minor children (e.g., ORS 116.005 to 116.015). Dickson commented that the proposal involved many problems, one being that many estates were inadequate to supply funds for support of dependent minor children. He expressed the view that the proposal would be too controversial for inclusion in the proposed principal probate revision bill.

Letters Testamentary and of Administration

Lundy noted that at the February meeting Richardson was assigned the task of preparing and submitting for consideration

by the committees a revision of sections 9 and 12 of Gilley's draft on initiation of probate or administration. [Note: See Minutes, Probate Advisory Committee, 2/18,19/66, pages 11 and 12.] Lundy indicated that Richardson had prepared such a revision and sent it to him. Lundy stated he had made some changes in Richardson's revision and set it forth as a rough draft in a report, dated March 14, 1966, mailed to all members before the meeting.

Lundy explained that the substance of section 9, relating to issuance of letters of representation were admission of will revoked, and section 9a, relating to form of letters of representation, of the rough draft had been combined in section 9 of Gilley's draft. He noted that sections 9 and 12 of the rough draft were related in that they both dealt with revocation of one kind of letters and issuance of another kind in substitution, and suggested, and Allison agreed, that the two sections might be located together in the proposed revised probate code.

Zollinger referred to the form for testate letters in subsection (1) of section 9a of the rough draft, and suggested that "of the estate of the decedent" be added after the blank for insertion of the proper designation of the personal representative. He also suggested that the forms for both testate and intestate letters include a more direct statement of the authority of the named personal representative to act as such as of the date of the letters, such as "and is (are) as of the date hereof the appointed, qualified and acting personal representative(s) of the estate."

Allison commented that there were situations involving the use of letters to evidence the authority of the personal representative in which the date of death of the decedent was significant, and suggested that the forms for letters include a blank for insertion of that date. He noted that the form for letters of administration in section 11.28.140, 1965 Washington Probate Code, called for entry of the date of the decedent's death. In response to a question by Zollinger, Jaureguy indicated that the clerk who prepared and delivered the letters could discover the date of a decedent's death from the petition for probate or administration. Zollinger questioned the need for including date of death in the letters.

Lundy pointed out that the forms in section 9a, like those in the present Oregon statutes (i.e., ORS 115.210 and 115.350), were not mandatory. He also noted that the 1963 Iowa Probate Code, the proposed revised New York probate code and the Model Probate Code did not contain statutory forms for letters. In answer to a question by Butler, Allison and Dickson commented that the statutory forms, even though merely permissive, were useful in promoting uniformity throughout the state and helpful

to the county clerks, who had the forms printed.

Lundy noted that the forms set forth in section 9a were drafted in contemplation that in some instances there might be more than one executor, administrator with the will annexed or administrator, and asked if this was appropriate. Carson commented that he had never hear of joint administrators with the will annexed. Zollinger remarked that he saw no reason not to recognize the possibility of more than one administrator, although this was not as common as co-executors.

Lundy referred to subsection (3) of section 9a, relating to the form for letters issued to special administrators, and asked whether the subsection was really helpful in indicating such form and whether an actual permissive form for special administrators should be set forth as for other personal representatives. Dickson noted that the authority of special administrators was so limited they might not require letters, and suggested that subsection (3) might be deleted.

Zollinger indicated he was inclined not to favor reference to all letters as "letters of representation," with the distinction as to testate and intestate letters appearing only in the section containing the permissive forms. He suggested that the present terminology "letters testamentary" and "letters of administration" be continued. Allison suggested that there be more complete headings on the forms, such as designation of whether they were letters testamentary or of administration and perhaps a blank for insertion of the estate file number.

Dickson assigned Zollinger to work with Richardson and Lundy in preparing a revision of section 9a of the rough draft, incorporating any desirable suggestions made in the preceding discussion, for consideration by the committees at the next meeting.

Notice of Estate Administration

Lundy noted that at the February meeting Bettis and Krause had been assigned the task of preparing revisions of section 10, relating to copy of will and of order to heirs, legatees and devisees, and section 13, relating to publication of notice by executor or administrator, of Gilley's draft on initiation of probate or administration, with the revisions to take into consideration motions adopted and views expressed on the subject of notice of estate administration at that meeting. [Note: See Minutes, Probate Advisory Committee, 2/18,19/66, pages 14 to 16 and 18.] Bettis commented that he had prepared a revision of section 13, Krause a revision of section 10, and that both drafts had been sent to Lundy.

Lundy stated that, upon receiving the drafts from Bettis and Krause, he had combined them, with certain changes and additions, in a rough draft on notice of estate administration, which, together with the original drafts by Bettis and Krause, was embodied in a report directed to the committees. Lundy noted that copies of this report, dated March 14, 1966, had been mailed to all members before the meeting.

Lundy proceeded to explain, briefly, the contents of the rough draft. He indicated that section 10(1) was based upon a motion adopted at the February meeting and provided for mailing of copies of published notices and of wills admitted to probate to all known heirs and to all legatees and devisees. He pointed out that subsections (2) and (3) of section 10 prescribed mailed notice to the State Land Board where a decedent died intestate and there were no known heirs and where any known heir or any legatee or devisee was a nonresident alien. Allison pointed out that some such provision as section 10(3) previously had been suggested by Barrie and also by the subcommittee on inheritance by nonresident aliens at the February meeting. [Note: See Minutes, Probate Advisory Committee, 2/18,19/66, pages 4 and 5.] Lundy commented that section 10(4) dealt with filing proof of the mailings required by the preceding three subsections of the section.

Lundy indicated that section 13 of the rough draft constituted a revised provision on publication of notice by personal representatives, and embodied the concept that the notice was addressed to heirs, legatees and devisees as well as to creditors. He referred to paragraph (c) of subsection (1), and expressed the view that the notice should indicate whether a will had been admitted to probate, but suggested that the committees might not wish to go so far as to have the notice indicate specifically the right of interested persons to contest. He pointed out that section 13 would require only two publishings of the notice, unlike the present requirement of at least four by ORS 116.505, and noted that Bettis and Gilley probably would wish to comment on this change since it was a feature of their drafts.

Lundy explained that section 13a of the rough draft, relating to notice by successor personal representatives, was based upon section 11.40.150, 1965 Washington Probate Code, and had been suggested at the February meeting. [Note: See Minutes, Probate Advisory Committee, 2/18, 19/66, pages 17 and 18.]

Mailed notice to heirs, legatees and devisees. Allison pointed out that at the February meeting there had been some disagreement among members as to whether notice to heirs, legatees and devisees should be required and, if so, the nature

thereof, and that after the assignment to Bettis and Krause had been made a subcommittee, consisting of himself, Carson and Zollinger, had been appointed to offer criticism of the Bettis and Krause proposal and to prepare and submit an alternative proposal. He distributed copies of the subcommittee's report to the members present, commenting that there had not been an opportunity to involve Carson in its preparation. The subcommittee report read as follows:

"ALTERNATIVE REVISED DRAFT OF SECTION 10 (1)
OF ROUGH DRAFT ON NOTICE OF ESTATE ADMINISTRATION

"Your subcommittee's dissent is directed solely to the provision in the Lundy draft that where a will is probated the personal representative must mail a copy of the will, not only to the legatees and devisees named therein as now provided (ORS 115.220), but also to each known heir of the testator.

"Unless the heir is a pretermitted child (in which case his interest would be apparent from the petition for probate as is now the case) the heir at law has no interest in the property and assets of the estate which should entitle him to notice. The only reason we can conceive for the proposed change is to give notice to every collateral heir who is not provided for by the will so that he may contest the will. We do not believe such a result is socially desirable. The practical result would be, in our opinion, that the attorney for the estate would have not only the burden of sending notices and copies of the will to all the heirs, but would in the course of probate have to explain to these heirs why they were mailed the notice and a copy of the will.

"What should the personal representative's attorney tell these people when they ask for information; that they should consult their own attorneys for advice whether to contest the will? Any attorney in probate practice would agree that this would be only the beginning of the problem in each case, yet the attorney for the estate ethically could not advise these adverse parties.

"We have also excused the mailing where the address of the party cannot with diligence be ascertained in the 30-day period.

"The suggested draft of (1) is as follows:

"(1) Immediately after his appointment a personal representative shall cause a copy of the published notice provided for in section 13 to be mailed to each known heir of the decedent at his last known address, if the decedent died intestate. If the decedent died testate, upon the entry of the order admitting the will to probate the

personal representative shall cause a copy of the published notice provided for in section 13 and a copy of the decedent's will to be mailed to each legatee or devisee named therein at the last known address of the legatee or devisee. If the personal representative is an heir, legatee, or devisee, no mailing to him is required. If the personal representative is not able, with diligence, to ascertain the address of any heir, devisee, or legatee within 30 days after his appointment, mailing of notice of his appointment, or of the will, to such heir, devisee, or legatee is excused."

Carson noted that both section 10 of Lundy's draft and the alternative revised draft required mailing of copies of published notices "immediately," and that the alternative revised draft required such mailing, in the testate situation, "upon the entry of the order admitting the will to probate." He suggested that delays in first publication of notice might make literal compliance with these requirements difficult in some instances. Allison commented that the mailing might be required "immediately (or promptly) following the first publication of the notice." Zollinger remarked that "immediately" and "upon the entry of the order" might be deleted, since proof of the mailing was required to be filed within 30 days after appointment of the personal representative.

Warden referred to the alternative revised draft, and suggested that there might be sufficient reason to require mailing of notice to some heirs, such as the surviving spouse and lineal descendants of the decedent, in the testate situation. Allison, Zollinger and Dickson expressed agreement with Warden's suggestion. Carson noted that beneficiaries under testamentary trusts might be considered as entitled to receive notice as legatees and devisees, although in the trust situation the actual legatee or devisee was the trustee and not a beneficiary. He suggested, however, that mailed notice to trust beneficiaries should not be required, and Zollinger agreed, commenting that notice to surviving spouse and lineal descendants who were not legatees or devisees might reach some trust beneficiaries.

Riddlesbarger asked whether any member was aware of problems arising from failure of heirs to receive notice of estate administration. Dickson responded that his court occasionally received letters from persons claiming to be heirs and that they were unaware of admission of a will to probate, and that these letters often requested copies of the will. Husband asked whether those who contested wills were not collateral heirs in most cases. Allison commented that a requirement of notice to collateral heirs in the testate situation amounted to an invitation to contest the will, and that he did not think this was desirable. He also expressed the view that this

requirement would involve the mailing of an unduly large number of copies of the notice and will.

Riddlesbarger suggested, and Dickson, Braun and Carson agreed, that copies of the wills need not be sent to anyone. Carson commented that the mailing of will copies imposed a considerable burden on estate attorneys and created other problems for them.

Zollinger moved, seconded by Thalhofer, that subsection (1) of section 10 of Lundy's draft be revised to read as follows:

> "(1) A personal representative shall cause a copy of the published notice provided for in section 13 to be mailed to each known heir of the decedent at his last known address, if the decedent died intestate. If the decedent died testate, the personal representative shall cause a copy of the published notice provided for in section 13 and a copy of the decedent's will to be mailed to the spouse and lineal heirs of the testator who are not provided for by the will and to each legatee or devisee named therein at the last known address of the party. If the personal representative is an heir, legatee or devisee, no mailing to him is required. If the personal representative is not able to ascertain the address of any of the parties to whom notice is to be given, the mailing of the notice to such parties is excused."

Riddlesbarger moved, seconded by Carson, that Zollinger's motion be amended by deletion of "and a copy of the decedent's will" in the proposed revision of subsection (1) of section 10 of Lundy's draft. Riddlesbarger's motion to amend carried. Zollinger's motion, as amended, carried.

Mailed notice to State Land Board. Lundy noted that subsection (2) of section 10 of his draft, relating to mailed notice to the State Land Board where a decedent died intestate and there were no known heirs, represented a departure from the present requirement (i.e., subsection (2) of ORS 113.310) that such notice be given before appointment of an administrator. He commented that it was agreed at the February meeting that he should discuss this matter with the Clerk of the Land Board, but that he had not had an opportunity to do so after preparation of the draft. He indicated that his previous discussions with the Clerk had disclosed that the Land Board's interest was in protecting property that might escheat and that notice in advance of appointment of an administrator was thought to further this interest.

Zollinger moved, seconded by Warden, that subsection (2) of section 10 of Lundy's draft, with deletion of "immediately after his appointment," be approved. Motion carried.

Zollinger referred to subsection (3) of section 10 of Lundy's draft, relating to mailed notice to the State Land Board where any known heir or any legatee or devisee was a nonresident alien, and pointed out that the subsection would require mailed notice in many instances in which there was no reason to suppose a nonresident alien would not be eligible to receive his inheritance and in which, therefore, the Land Board would have no interest. He indicated that he favored deletion of the subsection unless its application could be limited to situations in which escheat would more likely result, such as requiring the notice only as to nonresident aliens who were citizens of countries listed by the Land Board as those whose citizens would not have the benefit, use or control of inheritances from United States decedents. Rhoten suggested that personal representatives and estate attorneys would not likely be aware of such a list in many cases.

In response to a question by Lundy, Lovett pointed out that the State Land Board would receive notice of a proceeding to withdraw a nonresident alien heir's deposit under the draft on the subject of inheritance by nonresident alien heirs previously considered and apparently tentatively approved by the committees, but would not receive notice of the proceeding culminating in the order that the deposit be made.

On a suggestion by Riddlesbarger, Dickson ruled that the matter of the disposition of subsection (3) of section 10 be tabled, that Lundy should discuss the matter with Barrie and report thereon at the next meeting of the committees and that the matter be scheduled for consideration at the next meeting.

Published notice. Dickson referred to the word "immediately" in subsection (1) of section 13 of Lundy's draft, relating to publication of notice by personal representatives, and suggested, and it was agreed, that "promptly" should be substituted therefor.

Husband questioned the desirability of reducing the number of publishings of the notice to two. Gilley pointed out that this reduction was a feature of section 13 of his draft on initiation of probate or administration, and commented that it was his impression that the first publication was the significant one in most instances and that interested

persons would be as likely to learn of the initiation of estate proceedings through one publication as they would through five publications. Mapp agreed that one publication would be sufficient for interested persons who systematically checked such notices.

Dickson commented that the expense of publishing notices was one of the smallest expenses charged to the estate, and expressed the view that in deciding upon the number of publishings it would be preferable to err on the side of too many rather than too few. Bettis pointed out that the initial cost of published notice, such as the cost of setting the type, represented the largest share of publication expenses, and that the expense of publication after the first one was relatively small. Gilley recognized that newspapers might oppose reduction of the number of publishings on the ground of possible loss of revenue, but suggested that newspapers might be justified in charging the same amount for two publishings as presently charged for at least four. Warden commented that if the charge were to remain the same, there would be less reason to reduce the number of publications presently required.

At Bettis' suggestion the members were polled on the question of reducing the number of publishings of notice to two, and a majority were in favor of such reduction.

The wording of the publication requirement in subsection (1) of section 13 was discussed. Lundy pointed out that the terminology was similar to that used in the present statute on sales by guardians (i.e., ORS 126.441), and suggested that the committees decide upon the terminology to be used uniformly throughout the proposed revised probate code wherever publication of notice was called for. Carson suggested that the wording should be "once in each of two successive weeks, or two publishings in all." Jaureguy proposed that "or" in Carson's suggested wording be deleted. Rhoten moved, seconded by Gilley, that the wording "once in each of two successive weeks, two publishingsin all" be approved. Motion carried.

Husband referred to paragraph (a) of subsection (1) of section 13, and questioned the necessity of the requirement therein that the published notice contain a positive statement of the death of the decedent. Riddlesbarger moved, seconded by Husband, that "and the fact of his death" in paragraph (a) be deleted. Motion carried. Allison suggested that "and the date of his death" be added to paragraph (a). Zollinger remarked that he did not understand why the notice should specify the date of the decedent's death.

Gilley moved, and it was seconded, that paragraph (b) of subsection (1) of section 13 be revised to read: "The names and addresses of the personal representative and of his attorney, if any." Motion carried. Zollinger suggested that paragraph (b) also require the name and address of a nonresident personal representative's resident agent to accept service. Butler indicated his intention to move, at the appropriate time, to reconsider the previous action by the committees in approving authorization for nonresident personal representatives.

Carson commented that there should not be too many statutory requirements as to the content of published notice; that additional requirements increased the chances of faulty notices. Braun suggested that if the purpose of additional requirements was to make the published notice more suitable to mail to heirs, legatees and devisees, it might be better to prescribe separately a notice to be so mailed and keep the published notice simple. Dickson expressed the view, with which Zollinger agreed, that the published notice had the purpose of attempting to inform all interested persons of the estate proceeding and of satisfying some aspects of due process by publicizing the opportunity for such persons to come forward and submit claims, make objections or whatever. Bettis commented that, while he believed the mailing of copies of the published notice to heirs, legatees and devisees would best accomplish the purpose of informing them of the estate proceeding, the publication itself would contribute to this accomplishment. Braun asked whether unknown heirs would be considered precluded from asserting any rights they might have as a result of the published notice. Lundy noted that the right of unknown heirs to contest a will, for example, would, in the absence of fraud, be precluded six months after admission of the will to probate.

Gilley moved, seconded by Thalhofer, that paragraph (c) of subsection (1) of section 13 be revised by deletion of the wording as to contesting the probate or validity of the will (i.e., all wording after "a statement of that fact"). Motion carried.

Lovett asked whether the published notice should include the dates of the will and of its admission to probate, noting that section 303, 1963 Iowa Probate Code, specified that the notice should contain these dates. Zollinger called attention to the fact that the Iowa section set forth the form of the published notice. Braun suggested that the notice should indicate specifically whether the decedent died testate or intestate. Dickson remarked that he favored inclusion of a statement that a will had been admitted to probate if

such was the case, but not a statement of intestacy in the event a will had not been so admitted. Jaureguy moved, seconded by Thalhofer, that paragraph (c) of subsection (1) of section 13 be revised by substituting "the date of the will and the date of its admission to probate" for "a statement of that fact." Motion failed.

Allison referred to paragraph (d) of subsection (1) of section 13, and moved, seconded by Bettis, that the period within which creditors should be required to present their claims be reduced from six to four months after the date of first publication of the notice. Motion carried. Riddlesbarger moved, seconded by Zollinger, that "the address stated in the notice" be substituted for "a specified place in this state" in paragraph (d). Motion carried.

Allison suggested that the published notice contain the date of first publication in order that creditors know when the four-month period within which they must present their claims begins. He moved, seconded by Riddlesbarger, that a new paragraph be added to subsection (1) of section 13 as follows: "(e) The date of the first publication of the notice." Motion carried.

Allison and Carson questioned the appropriateness of "in the probate proceeding" in subsection (2) of section 13. Husband expressed the view that the wording was appropriate. Carson asked whether an intestate proceeding was a "probate" proceeding, and suggested that the wording be "with the clerk of the court." Dickson commented that perhaps the personal representative should file his proof of publication of notice "with," instead of "before he files," his final account. Allison suggested that filing of such proof might be required at the same time as filing proof of mailed notice. In response to a question by Gilley, Dickson remarked that so long as the proof of publication was filed the time of filing was immaterial. Riddlesbarger moved, and it was seconded, that subsection (2) be revised by deletion of "before he files his final account" and approved as so revised. Motion carried.

At this point (12 noon) Warden left the meeting.

Notice by successor personal representatives. Allison suggested several changes in the wording of section 13a of Lundy's draft, relating to notice by successor personal representatives. He pointed out that "and will" appearing twice in the first sentence of the section should be deleted in view of the previous action by the committees eliminating the requirement of mailing copies of will from section 10 of the draft. He proposed that the second sentence and subsections

(1) and (2) of section 13a be revised to read:

"However, if the death, removal or resignation occurred within four months after the date of the first publication of notice:

"(1) The successor personal representative shall cause a notice of his appointment and of the death, removal or resignation of his predecessor personal representative to be published in a newspaper published in the county in which the probate proceeding is pending, or if no newspaper is published in that county, then in a newspaper designated by the court, once in each of two successive weeks, two publishings in all.

"(2) The period of time between the death, removal or resignation and the date of first publication of the notice by the successor personal representative shall be added to the original four months within which claims are required to be presented, and a statement of the additional time for presentation of claims shall be included in the published notice by the successor personal representative."

Lundy posed a situation with coexecutors, one of whom died and was replaced by another before expiration of the four-month period for presentation of creditors' claims, and asked whether the new coexecutor in this situation would be a "successor personal representative" subject to the notice provisions of section 13a. Allison, Carson and Zollinger responded that if one of two coexecutors died, the survivor would continue to serve as sole executor, and rarely, if ever, would the deceased coexecutor be replaced.

Zollinger noted that section 13a would not require publication of notice by a successor personal representative if he was appointed after the four-month period for presentation of claims, and expressed the view that the successor should publish notice regardless of when he was appointed. He pointed out that, if the present concept of the Oregon statutes was retained, claims would not be barred by expiration of the four-month period, and that creditors desiring to present claims after such expiration should be informed by published notice as to whom and where such presentment was to be made. Gilley suggested that creditors, by a reasonable amount of inquiry, could obtain the necessary information in the successor personal representative situation. Bettis remarked that the estate records on file with the court would disclose whatever information creditors might need in such a situation.

Riddlesbarger suggested, and Dickson agreed, that creditors would adequately be notified in the successor personal representative situation if the original publication of notice under section 13 specified, pursuant to a requirement in paragraph (d) of subsection (1) of that section, that creditors present their claims to the "personal representative or his successor." In response to a question by Rhoten, Dickson commented that he was not inclined to favor extending the fourt-month claim presentment period in the successor personal representative situation. Gilley noted that Riddlesbarger's suggestion would impose upon creditors the responsibility of ascertaining the identity and whereabouts of a successor personal representative, but indicated he did not object to such imposition. Husband commented that he would prefer a notice provision for creditors to present their claims at a place, rather than to a particular named personal representative. Zollinger remarked that the notice should specify presentment of claims to a named person, and that such presentment at a place would not be sufficient.

Allison expressed approval of Zollinger's proposal that successor personal representatives publish notice whenever they might be appointed. Zollinger commented that if such appointment occurred before expiration of the four-month claim presentment period, the period should be extended to some extent, but otherwise no provision for additional time for such presentment should be made. Allison moved, seconded by Rhoten, that there be a provision that a successor personal representative publish notice of his appointment in every case in the manner set forth in subsection (1) of section 13a. Motion carried. Rhoten suggested, and it was agreed, that if appointment of the successor personal representative occurred before expiration of the four-month claim presentment period, the court should be authorized to extend the period for not more than four months after appointment of the successor and that the notice published by the successor should state the period of extension.

The meeting was recessed at 1:15 p. m.

The meeting was reconvened at 2:30 p.m. All members of the advisory committee, except Frohnmayer and Gooding were present. The following members of the Bar committee were present: Bettis, Gilley, Braun, Hornecker, Lovett and Thalhofer (arrived 3 p.m.).

Executors and Administrators Generally

Hornecker noted that at the February meeting he and Frohnmayer were assigned the task of preparing a revision of those parts of the draft on executors and administrators generally, which was considered at that meeting, relating to

bond of personal representative and removal, death or resignation of personal representative. [Note: See Minutes, Probate Advisory Committee, 2/18,19/66, pages 33 and 34.] Hornecker distributed to members present copies of a revised draft prepared by himself and Frohnmayer. [Note: A copy of this revised draft constitutes the Appendix to these minutes.]

Qualification of personal representative (section 1). Carson referred to subsection (5) of section 1 of the revised draft, relating to disqualification to act as personal representative of a member of the Oregon State Bar who had resigned when charges of professional misconduct against him were under investigation or disciplinary proceedings against him were pending, and commented that it was his impression it had been decided at the February meeting not to refer specifically to Rule N. Lundy and Gilley remarked that the specific reference probably would be construed to mean the rule as it existed on the effective date of the revised probate code, and that subsequent changes in the rule could be anticipated. In response to a question by Hornecker, Zollinger pointed out that an attorney submitting a special resignation under Rule N must know about and specifically recognize the pending investigation of charges or disciplinary proceedings.

Braun moved, and it was seconded, that subsection (5) be revised to read: "(5) A person who has resigned from the Oregon State Bar when charges of professional misconduct are under investigation or when disciplinary proceedings are pending against him." Motion carried. Riddlesbarger asked whether subsection (5) should be worded in terms of "a person who has tendered his resignation." Zollinger responded that the person should not be disqualified to act as personal representative until his resignation became effective. In response to a question by Jaureguy, Zollinger expressed the view that the person would not be considered to have resigned until his resignation was accepted by the Supreme Court. Jaureguy moved, and it was seconded, that "or tendered his resignation" be inserted after "Oregon State Bar" in subsection (5) as previously approved by the committees. Motion failed.

Husband moved, seconded by Lovett, that "until he is reinstated" be inserted at the end of subsection (5) as previously approved by the committees. Motion carried.

Allison suggested that subsections (4) and (5) be combined in a single subsection. Lundy pointed out that subsection (5) was limited to Oregon resignations, while subsection (4) extended to suspension or disbarment from the practice of law

anywhere. It was agreed that subsections (4) and (5) should be separate subsections.

Butler expressed his strong objection to that part of subsection (6) permitting a nonresident to act as personal representative under certain conditions. He commented that his experience as personal representative of the estate of a Washington resident revealed the difficulties involved in authorizing nonresident personal representatives. He suggested that the interests of estates and beneficiaries would be better served if nonresident personal representatives were prohibited. Jaureguy remarked that a nonresident would be less familiar with the local procedures than a resident personal representative. In response to a question by Riddlesbarger, Butler expressed the view that a testator who was considering naming a nonresident executor in most cases did not realize the problems involved. Husband commented that if there was a nonresident personal representative additional burdens would be placed upon the estate attorney.

Riddlesbarger expressed the view that a testator should be able to name a nonresident as executor if he so desired. Gilley indicated he was in favor of permitting nonresident personal representatives, that he had served as executor of estates of Washington and Idaho decedents and had encountered no insurmountable problems and that he had heard no complaints arising out of the authorization for nonresident personal representatives in California and Washington. He remarked that he did not believe there would be additional burden on the estate attorney by reason of a nonresident personal representative, but that any such burden should not be the crucial factor in determining whether or not to allow nonresident personal representatives.

Butler moved, and it was seconded, that subsection (6) be revised to read: "(6) A nonresident of this state." On a vote by the advisory committee only, motion carried. On a separate vote by the Bar committee, motion failed.

Zollinger suggested that it would be desirable for the committees to know whether or not probate codes recently enacted in other states authorized nonresident personal representatives, and asked Lundy to obtain such information. Butler noted that Richardson recently had received a questionnaire from a group conducting a survey of probate practice in the several states and that a question as to nonresident personal representatives had been included therein. He suggested that Richardson might know of the results of the survey as to that particular question.

Lundy noted that subsection (7) disqualified judges of

all county courts, and pointed out that some such judges had no judicial functions. In response to a question by Zollinger, Lundy indicated that at the February meeting the committees had decided against using "a judicial officer" because this wording would include municipal judges. The wording "judicial officers other than municipal judges" and "a judicial officer of any county or state court" were suggested. Gilley asked whether federal judges should be disqualified. Braun asked whether the probate commissioners, appointment of whom the committees previously had approved, should be disqualified. Dickson commented that disqualification of probate commissioners probably would make it extremely difficult to find attorneys to serve as such commissioners. Lundy remarked that probate commissioners probably would be prohibited from acting as such in respect to estates for which they were personal representatives or attorneys.

Hornecker moved, seconded by Butler, that subsection (7) be approved without change. Motion carried.

Necessity and amount of bond; bond notwithstanding will (section 2). Husband referred to that part of subsection (1) of section 2 of the revised draft requiring that the bond of a personal representative be one executed by a surety company, and expressed the view that this requirement would increase the difficulties involved in probate practice, particularly in the case of small estates. Zollinger moved, seconded by Braun, that subsection (1) be approved. Motion carried.

Jaureguy referred to subsection (2), and expressed some concern that the general guidelines for the court to follow in fixing the amount of bond of a personal representative set forth in that subsection would not result in an adequate bond in all cases. Butler commented that the present arbitrary guidelines based on the value of the estate resulted in inequities in some cases. Zollinger moved, seconded by Carson, that subsection (2) be approved. Motion carried.

Husband referred to subsection (3), relating to the bond of a personal representative when the will declared that no bond was required, and moved, seconded by Zollinger, that the oath requirement be deleted. Motion carried unanimously.

Allison referred to that part of subsection (3) authorizing the court to require a bond notwithstanding a contrary declaration in a will, and asked whether the bond required by the court was to be a surety company bond. Jaureguy suggested that the court should be authorized to require a personal surety bond as well as a surety company bond. Zollinger suggested that the court might be authorized to

require "such bond as in the discretion of the court should be required." Husband commented that if the court determined a bond was necessary, there was sufficient reason for it to be a surety company bond. Zollinger proposed, and it was agreed, that the bond required by the court be the same as that described in subsection (1).

Hornecker noted that the reference to a nonresident personal representative in subsection (3) should be deleted pursuant to the previous action by the advisory committee in eliminating authority for nonresident personal representatives.

Dickson suggested, and Allison agreed, that subsection (4) might be expanded to authorize the court to require a bond if one was not previously required, a new bond, an additional bond or a bond in respect to sales of property by a personal representative, as well as to increase or decrease the amount of an existing bond, and thus eliminate the necessity for at least the second sentence of subsection (3). Thalhofer and Husband indicated they did not favor this suggested expansion of subsection (4).

Braun suggested that it might be wise to authorize the court to increase or decrease the amount of a bond before the filing of the inventory. She moved, seconded by Gilley, that subsection (4) be revised to read: "(4) If at any time it appears to the court that the bond of the personal representative is inadequate or excessive, the court may, by order, increase or reduce the amount of the bond." Motion carried.

Butler moved, and it was seconded, that subsection (5) be approved. Motion carried.

When new bond may be required (section 3). Zollinger referred to subsection (2) of section 3 of the revised draft, relating to discharge of the surety on a former bond when a new bond was filed, expressed the view that it was an appropriate provision and withdrew his suggestion, made at the February meeting, that it be deleted. Dickson suggested that the discharge of the surety on the former bond be by court order. In response to questions by Allison and Jaureguy, Zollinger commented that the surety on a new bond would assume responsibility only for subsequent acts or omissions of the personal representative and not for prior acts or omissions, and that section 3 applied only to new bonds and not to additional bonds.

Riddlesbarger questioned the meaning of "financially involved" in subsection (1).

Riddlesbarger suggested, and Butler and Lovett agreed, that the substance of subsection (1) of section 3 might be incorporated in subsection (4) of section 2 by inserting "or require a new bond" at the end of subsection (4) of section 2, thus eliminating the necessity for subsection (1) of section 3. Zollinger commented that subsection (4) of section 2 also should authorize the court to require an additional bond. He expressed the view that the discharge of sureties on any bond should be by court order, rather than, in the case of a new bond, automatically upon the filing of the new bond, and that the court order should be conditioned upon a finding that another or other bonds were sufficient. Hornecker questioned the need for a court order discharging a surety from liability for subsequent acts or omissions of a personal representative. Riddlesbarger commented that a surety company probably would wish to have some official evidence of its discharge and that a court order would satisfy that wish. In response to questions by Allison, Zollinger expressed the opinion that the exoneration of the surety on a personal representative's bond when an estate was closed did not discharge the surety from liability for previous acts or omissions of the personal representative, and indicated that he was not proposing to deal with the matter of exoneration of such surety on closure of the estate at this point.

Riddlesbarger moved, seconded by Gilley, that "or require a new or additional bond" be inserted at the end of subsection (4) of section 2. Motion carried.

Allison moved, seconded by Gilley, that a second sentence be added to subsection (4) of section 2, to read substantially as follows: "When a new bond has been approved and filed, the court may order that the surety on the former bond be discharged from any liability on account of its principal arising from subsequent acts or omissions of the personal representative." Motion carried.

Removal of personal representative; grounds and procedure (section 4). The procedure for removal of a personal representative set forth in subsections (1) to (3) of section 4 of the revised draft was discussed. Riddlesbarger and Zollinger commented that the citation described in subsection (1) appeared to be directed to the personal representative's attorney if the personal representative could not be found in the state and to the surety on the personal representative's bond, and indicated that they did not favor citation requiring the appearance of such attorney and surety. Allison noted that the present Oregon statute on removal of personal representatives (i.e., ORS 115.470) provided for notice to the personal representative "served in the manner provided for

the service of summons."

Hornecker indicated that citation to the personal representative's attorney was a suggestion by Frohnmayer and was designed to give the court jurisdiction to act on the removal of the personal representative when the latter could not be found in the state and service of the citation therefore could not be made on him. Riddlesbarger commented that obtaining jurisdiction over the personal representative's attorney by citation would not effectively obtain jurisdiction over the personal representative. Carson remarked that obtaining jurisdiction over the attorney would be fruitless in most cases, since the attorney would not be in a position to do anything to resolve the problems giving rise to the proposed removal of the personal representative.

Zollinger stated he would not object to the citation being directed to the personal representative and served on him if he could be found in the state, but if he could not be so found, then on his attorney and the surety on his bond as a substituted service on the personal representative rather than as a citation directed to the attorney and surety. He commented that the court had sufficient jurisdiction to remove a personal representative without the necessity of citation, and that the primary purpose of citation was to notify the personal representative of his opportunity to appear and be heard on the issue of his removal. Carson expressed approval of Zollinger's proposal, remarking that the attorney and surety should not be punished by contempt, for example, in a proceeding to remove the personal representative for some act or failure to act of the personal representative. He suggested that it should be emphasized that service of citation on the attorney or surety constituted nothing more than substituted service on the personal representative. Lovett expressed the view that a copy of the citation directed to the personal representative should be served on the surety whether or not service thereof on the personal representative was made.

It was agreed that service of the citation in a proceeding to remove a personal representative should be directed to the personal representative only and served on him if found within the state, but if not so found, service should be made on his attorney and surety on his bond for the purpose of constituting service on the personal representative.

Allison suggested, and Jaureguy agreed, that "on the ground that he has become disqualified" should be substituted for "who has become disqualified" in the first sentence of subsection (1). Allison also suggested that the words "in any way" in the first sentence of subsection (1) be deleted as unnecessary.

Allison expressed objection to the wording of the last sentence of subsection (1), commenting that the court need not

find "the charge to be true." He proposed that the sentence be revised to read: "Upon the hearing the court may, by order, remove such personal representative and revoke his letters."

Allison referred to subsection (3), and expressed the view that the personal representative should be informed of his opportunity in every case to appear and show cause why he should not be removed. He suggested that "may or on its own motion" in subsection (3) should be deleted.

Riddlesbarger questioned the appropriateness of including subsections (4) and (5) in a section otherwise pertaining to removal of personal representatives, and suggested that these subsections be separate sections located elsewhere in the proposed revised probate code. Lundy and Carson pointed out that subsection (5) was substantially the same as the last sentence of ORS 115.490. It apparently was agreed that subsections (4) and (5) should be separate sections located elsewhere.

Jaureguy commented, and Riddlesbarger agreed, that the separate section containing the substance of subsection (5) should include the following: "If the court is of the opinion that the personal representative has not faithfully and diligently performed such duties, it may (or shall) on its own motion order the personal representative to appear and show cause why he should not be removed." Braun remarked that the substance of the sentence suggested by Jaureguy appeared to be contemplated by "or on its own motion shall" in subsection (3).

Powers of successor and surviving personal representatives (sections 5 and 6). The limitation of the powers exercisable by a successor personal representative under subsection (2) of section 5 of the revised draft and by a surviving personal representative under section 6 to those not personal to another personal representative designated in a will was discussed. Hornecker noted that subsection (2) of section 5 was derived from section 100, Model Probate Code, and section 6 from section 101, Model Probate Code. Gilley suggested that "will" be substituted for "instrument creating the powers" in subsection (2) of section 5.

Allison expressed concern, in which Dickson joined, that subsection (2) of section 5 might be construed to override, in some instances, the authority of an administrator with the will annexed to sell property pursuant to a power of sale given by the will to the executor, as presently recognized in ORS 116.825, and stated that he opposed any such effect of subsection (2) of section 5. Zollinger

commented that a testator should be able to give a power that was personal to a designated executor, if he chose to do so, with some assurance the power would be exercised only by that executor. He noted that subsection (2) applied only to "successor" personal representatives, and suggested that the subsection should apply also when an executor named in a will failed to qualify and another personal representative was appointed. Gilley remarked that Zollinger's suggestion might be accomplished by substituting "the other personal representative" for "a successor personal representative" in subsection (2).

Riddlesbarger expressed the view that some provision should be made for determining whether a power given to a personal representative in a will was personal to that particular personal representative or not, and that perhaps the court should have discretion to make such determination by order. Allison indicated he would favor a provision that a personal representative appointed by the court in place of another have all the powers of the replaced personal representative unless the court, by order, found that powers given by a will were personal to the replaced personal representative designated in the will. In response to a question by Zollinger, Allison suggested that the court make its finding at the time it appointed the new personal representative and that this finding be included in the order of appointment.

Husband suggested that subsection (2) of section 5 be revised to read: "The other personal representative shall have all the powers of his predecessor except those specifically provided in the will to be personal to the personal representative therein designated." Zollinger commented that Husband's suggestion made the wording of the will the test of whether a particular power was personal to a designated personal representative, and indicated that he favored the suggestion. After further discussion, the following revision of subsection (2) was approved tentatively: "When the other personal representative is appointed, he shall have all the rights, powers and duties given in the instrument creating the powers, except those which the court finds are personal to the personal representative therein designated."

Allison expressed the opinion that often it would be extremely difficult to determine from a will whether a power given therein was personal to a designated personal representative, and that in view of this difficulty, all powers so given in a will should be considered not personal and should be exercisable by any personal representative.

Zollinger commented that he still adhered to the proposition that a testator should be able to give a power personal to a designated personal representative if he wished to do so, but indicated that he would not object to such power being evident by express terms of the will, thus requiring the testator to make the giving of a personal power perfectly clear. Husband indicated he agreed with Zollinger.

Butler suggested, and it apparently was agreed, that the powers, referred to in subsection (2) of section 5 and in section 6, given by a will should be considered not personal to a particular personal representative unless the will expressly provided that such powers were personal, and that drafting of appropriate wording to reflect this should be left to Lundy. Butler noted that a distinction between powers of appointment and powers of administration should be recognized in drafting the appropriate provision. Allison commented, and Zollinger agreed, that the provision on personal powers should not prevent a personal representative from performing those administrative functions necessary to the proper administration of the estate.

Zollinger remarked that section 6 prompted the question of what powers less than all of two or more personal representatives were authorized to exercise, and suggested that this was a matter the committees should consider. Lundy noted that this matter was dealt with in section 102, Model Probate Code, which listed certain powers that were to be exercised only by all of two or more personal representatives and allowed the exercise of other powers by any one of them.

Effect of substitution of personal representative (section 7). Hornecker noted that section 7 of the revised draft, relating to effect of substitution of personal representative, was derived from section 69, 1963 Iowa Probate Code. Zollinger suggested that section 7 was unnecessary. Butler moved, seconded by Gilley, that section 7 be deleted. Motion carried.

Property; failure to deliver; penalty (section 8). Hornecker noted that section 8 of the revised draft, requiring a resigned or removed personal representative to promptly deliver all estate property to his successor, was derived from section 70, 1963 Iowa Probate Code. Gilley moved, seconded by Butler, that section 8 be deleted. Motion carried.

Bank or trust company; change in status (section 9). Hornecker pointed out that section 9 of the revised draft, relating to the effect of change of status of a bank or trust company acting as personal representative, was the

same as subsection (2) of ORS 115.500. Zollinger expressed the opinion that the substance of section 9 was covered in the banking statutes. Hornecker and Lundy indicated they had been unable to find a comparable provision in the banking statutes, but that their search had not been a completely thorough one.

Riddlesbarger moved, and it was seconded, that section 9 be approved, with the proviso that it might be deleted if subsequently found to be duplicated in the banking statutes. Motion carried.

Next Meeting of Committees

The next joint meeting of the committees was scheduled for Friday, April 15, 1966, at 1:30 p.m., and the following Saturday, April 16, in Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

Dickson suggested, and it was agreed, that Lundy should determine the items to be included in the agenda for the April meeting. Lundy indicated that such agenda would include approval of the minutes of the February meeting. In response to a question by Lundy, Dickson commented that review of ORS chapter 116 was a matter available for inclusion in the April meeting agenda.

The meeting was adjourned at 5:15 p.m.

APPENDIX

(Minutes, Probate Advisory Committee Meeting, March 18 & 19, 1966)

(At the February meeting of the advisory and Bar committees, Mr. Frohnmayer and Mr. Hornecker were assigned to prepare and submit at the March meeting a revision of those parts of the draft on executors and administrators generally, which was prepared by Mr. Hornecker and Mr. Krause and considered at the February meeting, relating to bond of personal representative and removal, death or resignation of personal represenative. The following draft, prepared by Mr. Frohnmayer and Mr. Hornecker and constituting a revision of most of the previous draft on executors and administrators generally, in accordance with motions adopted and views expressed at the February meeting, was submitted at the March meeting.)

PERSONAL REPRESENTATIVE

At the February meeting of the Advisory Committee and State Bar Committee, Gregory T. Hornecker and Otto J. Frohnmayer were commissioned to revise and submit to the members of both committees their revision. The revision with notes and comments is as follows:

Section 1

Qualification of Personal Representative. Any qualified person whom the court finds suitable may serve as a personal representative. A person is not qualified to serve as a personal representative who is:

(1) Incompetent to act in that capacity.

(2) A minor.

(3) A person who has been convicted of a felony.

(4) A person suspended for misconduct or disbarred from the practice of law, during the period of suspension or disbarment.

(5) A member of the Oregon State Bar who has resigned pursuant to rule N of the rules of admission of the Supreme

Court of the State of Oregon, when charges of professional misconduct are under investigation, or when disciplinary proceedings are pending against the member.

(6) A nonresident of this state who has failed to file a bond or who has not appointed a resident agent to accept service of summons and process in all actions, suits and proceedings with respect to the estate and has caused such appointment to be filed in the probate proceedings.

(7) A judge of a county court, district court, circuit court or Supreme Court of the State of Oregon.

Comparable provisions:

Model Code § 96

Iowa Code § 295

Washington Code § 11.36.010

ORS 115.410

Section 2

Necessity and amount of bond; bond notwithstanding will.

(1) No personal representative shall, except as stated in this section, act as such until he files with the clerk of the court a bond executed by a surety company qualified to transact surety business in the State of Oregon in favor of all interested parties conditioned upon the personal representative performing the duties of his trust, in an amount, within the discretion of the court, but not less than $1,000.

Comparable provisions:

Model Code § 106

Iowa Code § 169 et seq.

Washington Code § 11.28.180 et seq.

ORS 115.430

(2) In fixing the amount of the bond the court shall take into account the size of the estate, the character and liquidity of its assets, the anticipated income during probate, the probable amount of indebtedness and taxes and other pertinent facts with the view of affording adequate protection to the interested parties.

(3) When a will declares that no bond shall be required of the personal representative, he may act upon taking an oath faithfully to perform his trust, without filing a bond. (Query: Should personal representative be required to file an oath?) Notwithstanding such provision in a will, the court may, at any time in its discretion, on its own motion or upon the petition of any interested party or in any event upon the appointment of a nonresident personal representative, require such personal representative to give a bond.

Comparable provisions:

Model Code § 107

Iowa Code § 172 and § 173

Washington Code § 11.28.200

ORS 115.430

(4) If, upon filing the inventory, or at any time thereafter, it appears to the court that the bond of the personal representative is inadequate or excessive, the court may, by order, increase or reduce the amount of the bond.

Comparable provisions:

Model Code § 115

Iowa Code § 180

Washington Code § 11.28.210

ORS 115.450

(5) Nothing in this section shall alter the provisions of ORS 709.230 and 709.240 relating to a trust company acting as a personal representative.

Section 3

When new bond may be required. (1) If a surety on a bond becomes financially involved or is no longer qualified to transact business in the State of Oregon or if it desires to be released as the surety on a bond, the court may require the personal representative to file a new or additional bond in such amount as the court deems adequate.

(2) The new bond required under this section when approved and filed shall discharge the surety on the former bond from any liability on account of its principal arising from subsequent acts or omissions of the personal representative.

Comparable provisions:

Model Code § 116

Iowa Code § 185

ORS 126.176 (guardianship code)

Comment: Judge Dickson and Mr. Zollinger suggested that this provision be deleted along with the remainder of the section as shown on page 5 of the report of 1/14/66. Hornecker and Frohnmayer are inclined to agree.

Section 4

Removal of personal representative; grounds and procedure. (1) Any person interested in the estate may apply for the removal of a personal representative who has become disqualified for appointment or who, in any way, has been unfaithful to or neglectful of his trust. Such application shall be by petition and upon citation to the personal representative, or upon citation to his attorney if the personal representative cannot be served by the use of due diligence in the State of Oregon. In case the personal representative has filed a bond with the court, citation shall also be served upon the surety. If the court finds the charge to be true, it shall by order remove such personal representative and revoke his letters.

(2) The petition shall specify the grounds for the removal of the personal representative.

(3) The court on such petition may or on its own motion shall order the personal representative to appear and show cause why he should not be removed.

(4) The designation of the attorney or attorneys employed by the personal representative, if any, to assist him in the administration of the estate shall be filed in the probate proceedings. § 82, Iowa. Such designation shall state the attorney's name and address.

(5) It is the duty of the court to exercise supervisory control over a personal representative, to the end that he shall faithfully and diligently perform the duties of his trust.

Comparable provisions:

Model Code § 98

Iowa Code § 65 and § 82

Washington Code § 11.28.250 et seq.

ORS 115.470

Section 5

Appointment of successor personal representative. (1) When a personal representative fails to qualify, dies, is removed by the court, or resigns, and such resignation is accepted by the court, the court shall appoint another personal representative.

(2) When a successor personal representative is appointed he shall have all the rights, powers and duties of his predecessor except that he shall not exercise powers given in the instrument creating the powers that by its express terms are personal to the personal representative

therein designated.

Comparable provisions:

Model Code § 100

Iowa Code § 66 and § 68

Washington Code § 11.28.290

ORS 115.500, 115.510

Section 6

Powers of surviving personal representative. Every power exercisable by joint personal representatives may be exercised by the survivor of them when one is dead or by the other when one appointment is terminated by order of the court or by the remaining personal representative or representatives when one or more of them has resigned unless the power given in the will appears by its terms to be personal to the personal representative therein designated who has died, resigned, or has been removed by the court.

Comparable provisions:

Model Code § 101

Iowa Code § 67

Washington Code § 11.28.270

ORS 115.500

Section 7

Effect of substitution of personal representative. The substitution of a personal representative shall occasion no delay in the administration of an estate. The periods herein

specified within which acts are to be performed after the appointment of a personal representative shall, unless otherwise ordered by the court, be computed from the issuing of the letters to the first personal representative.

Comparable provisions:

Iowa Code § 69

Section 8

Property; failure to deliver; penalty. A personal representative who has resigned or has been removed shall promptly deliver to the successor personal representative all the property in his hands or under his control belonging to the estate. If he fails or refuses to do so upon proper order of the court he shall be guilty of contempt.

Comparable provisions:

Iowa Code § 70

Section 9

Bank or trust company; change in status. Whenever a bank or trust company is appointed and qualified as a personal representative, and thereafter such company is converted as provided by law, or is consolidated with another bank or trust company or sells its trust and fiduciary business or its trust department to another bank or trust company, pursuant to any law permitting such conversion, consolidation or sale, the converted, consolidated or purchasing company shall continue and complete the adminis-

tration of the estate as though it had been originally appointed as the personal representative with all the rights, obligations and responsibility incident thereto.

Comparable provisions:

ORS 115.500, subsection (2)

Comment: Frohnmayer and Hornecker have made a rather hurried search of the provisions of the Oregon Code relating to banks and trust companies and have found no comparable provision or provisions. We do not find any comparable code section in the Model, Iowa or Washington Code. Query: Should an interested party have the right to be heard upon the appointment of a successor bank or trust company? Mr. Frohnmayer questions the absolute right of a successor bank or trust company to take over the powers of the original personal representative.

REPORT
March 16, 1966

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

From: Robert W. Lundy

Subject: Delivery of Wills by Custodians

One of the matters scheduled for consideration by the Advisory and Bar Committees at the meeting to be held March 18 and 19, 1966, is consideration of ORS 115.110, 115.130 and 115.990, relating to delivery of wills by custodians or possessors.

ORS 115.110 was the basis for section 32 of Mr. Riddlesbarger's draft on wills. See Minutes, Probate Advisory Committee, 12/17,18/65, Appendix A, page 14. At the December meeting it apparently was agreed that consideration of section 32 be postponed until the committees were engaged in review of ORS chapter 115. See Minutes, Probate Advisory Committee, 12/17,18/65, page 21.

Mr. Gilley, in his draft on initiation of probate or administration contained in his report dated January 10, 1966, noted, on page 10 of that report, that ORS 115.110 and 115.130 were omitted from his draft, on the ground that they were covered in another report.

The purpose of this report is to give you something in addition to the bare bones of ORS 115.110, 115.130 and 115.990 for consideration at the March meeting. The rough draft (i.e., a suggested statute section to replace ORS 115.110, 115.130 and 115.990) and the materials set forth following that draft are intended to generate discussion.

ROUGH DRAFT

Section 1. Delivery of will by custodian; liability. (1) A person having custody of a will, other than an executor named therein, shall deliver the will, within 30 days after the date of receiving information that the testator is dead, to a court having jurisdiction of the estate of the testator or to an executor named in the will.

(2) If it appears to a court having jurisdiction of

the estate of a decedent that a person has custody of a will made by the decedent, the court may issue an order requiring that person to deliver the will to the court.

(3) A person having custody of a will who fails to deliver the will as provided in this section is liable to any person injured by that failure for damages sustained thereby.

Section 2. ORS 115.110, 115.130 and 115.990 are repealed.

PRESENT OREGON STATUTES

"115.110 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."

"115.130 Order for production of will. If it is alleged in any petition that any will is in possession of a third person and the court is satisfied that the allegation is correct, an order must be issued and served upon the person having possession of the will, requiring him to produce it at a time and place named in the order."

"115.990 Penalties. Any person who wilfully sequesters or secretes any last will of a person then

deceased, or who, having the custody of any such will, wilfully fails or neglects to produce and deliver the same to the judge of the court having jurisdiction of its probate, or to any executor named therein, within a reasonable time after the death of the testator thereof, with intention to injure or defraud any person interested therein, is punishable, upon conviction, by imprisonment in the county jail not more than one year or by a fine not exceeding $500."

WASHINGTON STATUTE
(1965 Probate Code)

"Sec. 11.20.010 DUTY OF CUSTODIAN OF WILL--LIABILITY. Any person having the custody or control of any will shall, within thirty days after he shall have received knowledge of the death of the testator, deliver said will to the court having jurisdiction or to the person named in the will as executor, and any executor having in his custody or control any will shall within forty days after he receives knowledge of the death of the testator deliver the same to the court having jurisdiction. Any person who shall wilfully violate any of the provisions of this section shall be liable to any party aggrieved for the damages which may be sustained by such violation."

IOWA STATUTE
(1963 Probate Code)

"§ 285. Custodian--filing--penalty

"After being informed of the death of the testator,

the person having custody of his will shall deliver it to the court having jurisdiction of his estate. 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. He shall also be liable to any person aggrieved for the damages which may be sustained by such refusal or failure."

MODEL PROBATE CODE

"§ 63. Duty of custodian of will; liability. After the death of a testator the person having custody of his will shall deliver it to the court which has jurisdiction of the estate. Every person who wilfully refuses or fails to deliver a will after being duly ordered by the court to do so shall be guilty of contempt of court. He shall also be liable to any party aggrieved for the damages which may be sustained by such refusal or failure.

"Comment. Statutes in practically every state provide that the custodian of a will may be compelled to produce it. Some stop with a general statement, while others go into more or less detail. In some jurisdictions criminal penalties are provided for the refusal to produce a will. The statute here presented is almost identical with Kan. Gen. Stat. (Supp. 1943) § 59-621."

The following is from a statutory note on section 63, Model Probate Code:

"Most legislative provisions today treat the refusal to produce the will as a contempt, giving the court power to imprison the custodian until he produces the will. Six jurisdictions, however, provide only a criminal sentence, in the form of a fine or imprisonment for a definite period, or both. These six are Connecticut, District of Columbia, Maryland, South Carolina, Tennessee and Washington. A few states provide for enforcement both by criminal sentence and imprisonment for contempt. No criminal penalties have

been set up in the Model Probate Code, since it is felt that such provisions rightfully belong in the penal code rather than in the probate code."

"It is common to provide for restitution to persons damaged by withholding of the will, either by making the custodian liable in damages to all persons injured, or by a penalty of a stated sum per day or per month, to be recovered for the benefit of the estate. * * * This type of statute, embodying a blanket penalty, has the merit that the damages may be recovered in a single suit, but this advantage is outweighed by two other considerations. The sum recoverable bears no relation to the actual damages sustained; it may be larger or smaller than the actual damages. Moreover, the benefits presumably enure to the various distributees in proportion to their shares in the estate, although possibly they have not been damaged in this proportion. * * * For these reasons the Model Probate Code does not contain this type of provision, but provides instead for liability to all persons damaged." Similar statutes of 23 states are cited (i.e., Alabama, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maine, Massachusetts, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, West Virginia, Wisconsin and Wyoming).

"A further penalty, in addition to liability for damages, is imposed in Kansas, where a person who knowingly withholds a will for more than a year from the date of testator's death is barred from all rights under the will. * * * In Ohio the custodian is barred of all rights both testate and intestate if he withholds the will for three years."

"One more feature of these statutes should be mentioned. It is frequently provided that the custodian must surrender the will within a specified time, usually thirty days after being informed of the testator's death * * *. No time limit has been written into the Model Probate Code; in the absence of any rule, a reasonable time is implied, and it is felt that this is sufficiently definite."

In considering the comment and statutory note under section 63, Model Probate Code, above, keep in mind that the Model Probate Code was published in 1946.

REPORT
March 16, 1966

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

From: Mr. Mapp and Mr. Riddlesbarger

Subject: Rough Draft on Execution of Wills

ROUGH DRAFT

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. Execution of Will. A will shall be writing and shall be executed by the signature of the testator and of at least two attesting witnesses on the instrument as follows:

a. The testator shall:

(1) Himself sign, or, at his direction and in his presence have someone else sign his name for him, or,

(2) Acknowledge his signature already made in accordance with subsection (1) above, and

(3) Perform one of the acts described in subsections (1) and (2) above in the presence of each of the attesting witnesses.

b. The attesting witnesses shall each sign in the presence of the testator.

COMMENT Regarding Section 2. Section 2 preserves the substantive requirements of the present Oregon law regarding the execution of wills, but incorporates certain judicial interpretations

in the section so that the actual requirements are clearly stated in the statute. For example, the present statute states that the will should be attested by two or more competent witnesses. As the Oregon courts have interpreted this as meaning that the testator must either sign or acknowledge in the presence of the witnesses, it is felt desirable to specifically state this requirement in the statute.

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. Validity of Will. A will is legally executed if the manner of its execution complies with the law in force of

(1) this state at the time of execution or at the time of the testator's death, or

(2) the domicile of the testator at the time of execution or at the time of his death, or

(3) the place of execution at the time of execution.

COMMENT Regarding Section 4. While much has been written regarding the purposes of formalities in connection with the execution of wills, it would seem that their principal functions are (1) evidentiary and (2) protective.

If the will is written, we have evidence of its content. If it is signed by the testator we have evidence that it was the instrument he intended as his will.

The presence of witnesses tends to create an environment calculated to caution a testator as to the gravity of his acts, hopefully protecting him from his own precipitous conduct. Moreover, they protect an earlier true will from a subsequent instrument executed under duress, or by an incompetent person.

Unfortunately, we often articulate these formalities as requirements which the State imposes on a would-be testator, as though they reflected some minimal behavioral standard dictated by public policy. But the foregoing summary of formalities should disclose that they are designed solely to protect the testator. In truth, the State should be understood to assure its domiciliary that, as a governmental service to him, no will executed by him in this state will be probated unless it satisfies the statutory formalities.

But if this be so, why can't we assume that a will executed by a non-domiciliary, or executed outside this state, in accordance with formalities less protective than ours in force in the domicile or at the place of execution, reflected the choice of the testator? We offer him more protection, but should we impose more protection on him?

The subcommittee recognizes that this section would thus permit the original probate in Oregon of a holographic will in certain circumstances. The holographic will is felt to satisfy the evidentiary requirements of the usual formalities as it is a written instrument and is signed by the testator. It affords the testator somewhat less protection because it does not provide for witnesses who can assure the court that the will was not executed under duress or by a testator of dubious competence.

Perhaps the greatest practical objection to the holographic will is that it is customarily made by the testator without the assistance of counsel. Thus, it is often extremely difficult to interpret. However, this difficulty is not caused by the absence of witnesses, and is therefore also present where an attested will was prepared by the testator himself. It would seem that unless we are willing to refuse probate to "home-made" attested wills, we ought not to reject "home-made" holographic wills.

Moreover, even if there are reasons for continuing Oregon's disapproval of holographic wills, it would seem that the advantages of this position are out-weighed by the difficulty of attempting to maintain the position in the face of the increasing mobility of elderly persons who tend to make their wills in one jurisdiction according to the laws in force there, and then move to other jurisdictions. Rejecting these wills can create extreme hardships.

The Section 4 recommended by the subcommittee departs from the language originally recommended in the Riddlesbarger draft, which in turn was substantially based on Section 50 of the Model Probate Code and Section 283 of the Iowa Code, because

neither of those provisions would admit the will of a non-resident which happened to be executed in Oregon in accordance with the law of the domicile of the non-resident.

Should the committee decide that no will should be admitted to original probate in Oregon unless it is written, signed by the testator, and attested, irrespective of the laws in force at the place of execution or the domicile of the testator, the following language would be suggested:

> Sec. 4. Validity of Will. A will is legally executed if it is written, signed by the testator, attested, and is otherwise executed in accordance with the law in force of
>
> (1) this state at the time of execution or at the time of the testator's death, or
>
> (2) the domicile of the testator at the time of execution or at the time of his death, or
>
> (3) the place of execution at the time of execution.

March 18, 1966

PRETERMITTED HEIRS

ROUGH DRAFT

Section 1. (1) If a testator dies survived by a child not named or provided for in the will of the testator and not a member of a class named or provided for in the will, the child shall have that share of the estate of the testator he would have had if the testator had died intestate.

(2) If a testator dies survived by a descendant of a deceased child and the deceased child and descendant are not named or provided for in the will of the testator and not members of a class named or provided for in the will, the descendant shall have that share of the estate of the testator he would have had if the testator had died intestate.

(3) The share of the estate that a child or a deceased child's descendant is entitled to have as provided in this section shall be taken proportionately from the shares of others entitled thereto in the following order:

(a) Property not disposed of by the will.

(b) Property disposed of by the will.

(4) A child or deceased child's descendant is not entitled to have a share of the estate as provided in this section unless he files in the probate proceeding, not later than six months after the date of the entry of the order admitting the will to probate, a claim therefor.

Section 2. ORS 114.250 and 114.260 are repealed.

NEW YORK PROPOSED PRETERMITTED HEIR STATUTES

The following two statute sections relating to pretermitted heirs are contained in a bill introduced at the 1966 session of the New York legislature. This bill (Senate Intro. No. 816, Assembly Intro. No. 1549) is designated the "Estates, Powers and Trusts Law," and constitutes a revision of New York's substantive law of estates prepared by the New York Temporary State Commission on Estates, whose comments on the statute sections are set forth thereunder.

§5-3.2 Revocatory effect of birth of child after execution of will

(a) Whenever a testator, during his lifetime or after his death, has a child born after the execution of a last will, and dies leaving the after-born child unprovided for by any settlement, and neither provided for nor in any way mentioned in the will, every such child shall succeed to a portion of the testator's estate as herein provided:

(1) If the testator has one or more children living when he executes his last will, and:

(A) No provision is made therein for any such child, an after-born child is not entitled to share in the testator's estate.

(B) Provision is made therein for one or more of such children, an after-born child is entitled to share in the testator's estate, as follows:

(i) The portion of the testator's estate in which the after-born child may share is limited to the portion passing to the living children under the will.

(ii) The after-born child shall receive such share of the testator's estate, as limited in subparagraph (i), as he would have received had the testator included all after-born children with the living children upon whom benefits were conferred under the will, and given an equal share of the estate to each such child.

(iii) To the extent that it is feasible, the interest of the after-born child in the testator's estate shall be of the same character, whether an equitable or legal life estate or in fee, as the interest which the testator conferred upon his living children.

(2) If the testator has no child living when he executes his last will, the after-born child succeeds to the portion of such testator's estate as would have passed to such child had the testator died intestate.

(b) The after-born child may recover the share of the testator's estate to which he is entitled, either from the other children under subparagraph (a) (1) (B) or the testamentary beneficiaries under subparagraph (a) (2), ratably, out of the portions of such estate passing to such persons under the will. In abating the interests of such beneficiaries, the character of the testamentary plan adopted by the testator shall be preserved to the maximum extent possible.

Source: DEL § 26.
Changes: Substantially revised.
Comments: This section substantially revises DEL § 26 to eliminate a serious defect in the policy underpinning of that statute by which an after-born child who qualifies for an elective share of his parent's estate will receive a substantial portion of such estate although the parent has made no provision for other children living at the time the will was executed. The new section undertakes to correct this distortion of the reasonably presumable intention of the normal parent.

No change has been effected in the principle underlying DEL § 26, embodied in paragraph (a) of the new section, which disqualifies an after-born child from taking an elective share where the testator has given some concrete evidence that the after-born child was not inadvertently or unintentionally disinherited (see, McLean v. McLean, 207 N.Y. 365)

§5-3.3 Action in supreme court by child born after execution of will, by surviving spouse upon revocation of will by marriage or by subscribing witness with interest under will

In the event that the administration of a decedent's estate in the

surrogate's court has been completed and the estate distributed, an action may be maintained in the supreme court by an after-born child under 5-3.2, a surviving spouse under 5-1.3 or a subscribing witness under 3-3.1 to enforce rights under such sections against testamentary beneficiaries or distributees, as the case may be.

Source: DEL § 28.
Changes: Slightly revised.
Comments: This section re-enacts DEL § 28, slightly revised to make an action in the supreme court to enforce the specified rights contingent on the unavailability of a suitable remedy in the surrogate's court.

REPORT
March 7, 1966

To: Members of the Subcommittee on Heirship Determination

From: Robert W. Lundy
Chief Deputy Legislative Counsel

Subject: Rough Draft on Pretermitted Heirs.

At the joint meeting in January of the Advisory Committee on Probate Law Revision and Bar Committee on Probate Law and Procedure, a subcommittee was appointed to study and report at the joint meeting in March on the matter of proceedings for the determination of heirship, both generally and as to pretermitted heirs. The subcommittee consists of Mr. Riddlesbarger (chairman), Mrs. Braun, Mr. Gilley, Professor Mapp and Mr. Zollinger.

At the January meeting Mr. Riddlesbarger asked me to prepare a draft of a proposed pretermitted heir statute for consideration by the subcommittee. In preparing this draft I was to take into consideration those matters on which the advisory and Bar committees appeared to be in agreement and to pinpoint those matters on which there appeared to be uncertainty.

This report contains my draft of a proposed pretermitted heir statute and some comment thereon. I respectfully request that you keep in mind that it was prepared by one relatively uninformed on probate matters.

ROUGH DRAFT

Section 1. (1) If a testator dies survived by a child not named or provided for in the will of the testator and not a member of a class named or provided for in the will, the child shall have that share of the estate of the testator he would have had if the testator had died intestate.

(2) If a testator dies survived by a descendant of a deceased child and the deceased child and descendant are not named or provided for in the will of the testator and not members of a class named or provided

for in the will, the descendant shall have that share of the estate of the testator he would have had if the testator had died intestate.

(3) The share of the estate that a child or a deceased child's descendant is entitled to have as provided in this section shall be taken proportionately from the shares of others entitled thereto in the following order:

(a) Property not disposed of by the will.

(b) Property disposed of by the will.

(4) A child or deceased child's descendant is not entitled to have a share of the estate as provided in this section unless he files in the probate proceeding, not later than six months after the date of the entry of the order admitting the will to probate, a claim therefor.

COMMENT

Generally. At the January meeting a motion carried by which the approach of the present Oregon pretermitted heir statute (i. e., ORS 114.250) was adopted as the approach to be embodied in the proposed statute, with certain clarifications in the description of pretermission and in the remedy of pretermitted heirs. See Minutes, 1/14,15/66, page 7. It was agreed, apparently, that ORS 114.260, relating to the effect of advancements to pretermitted heirs, should not be perpetuated, on the ground that the general statutes on advancements would apply. For convenience in reference, ORS 114.250 is set forth below.

114.250 Pretermitted heirs to have portion of estate. If any person makes his will and dies, leaving a child or children, or, in case of their death, 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, so

far as regards such child or children or their descendants, not provided for, shall be deemed to die intestate; and such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate; and the same shall be assigned to them, and all the other heirs, devisees and legatees shall refund their proportional part.

Mr. Allison and Mr. Richardson were assigned the task of preparing a proposed statute in conformity with the motion referred to above and the discussion following adoption of that motion. Their draft was submitted and considered later at the January meeting. See Minutes, 1/14,15/66, pages 15 to 17. For convenience in reference, that draft is set forth below.

If a testator dies survived by a child or by a descendant of a deceased child and neither the child nor the deceased child or his surviving descendant has been named or provided for by the testator's will and is not a member of a class named or provided for therein, such testator, so far as regards such surviving child or descendant, shall be deemed to die intestate, and such surviving child or descendant of the deceased child upon compliance with this section shall inherit and receive such a share of the estate as would have been inherited by and distributed to him if the testator had died intestate. If the pretermitted heir is not named in the petition for probate of the will, notice of claim of the pretermitted heir must be given by a petition for allowance of such claim filed in the probate proceeding not later than six months after the date of entry of the order

admitting the will to probate, with citation to the executor and all persons named in the petition for probate of the will. Any such party aggrieved by an order allowing or disallowing the claim entered pursuant to such petition may have the matter tried in the circuit court at provided in ORS chapter 28 by commencing a proceeding therein within 30 days of the entry of the order in the probate proceedings.

You may wish to refer to the complete record of discussion by the committees on the matter of pretermitted heirs. If so, see:

1. Minutes, 12/17,18/65, pages 12 to 16; Appendix A, pages 9 and 10 (sections 18 and 19).

2. Minutes, 1/14,15/66, pages 1 to 9, 14 to 17; Appendices A and B.

In the course of discussion by the committees on the matter of pretermitted heirs, attention was called to pertinent provisions of the 1963 Iowa Probate Code (section 267), the 1965 Washington Probate Code (section 11.12.090) and a draft submitted for consideration by a committee of the Wisconsin Bar Association in February 1964 (see Minutes, 1/14,15/66, pages 3 and 4).

For your information, this report is accompanied by a copy of statute sections relating to pretermitted heirs contained in a bill introduced at the 1966 session of the New York legislature. This bill is designated the "Estates, Powers and Trusts Law," and constitutes a revision of New York's substantive law of estates prepared by the New York Temporary State Commission on Estates, whose comments on the statute sections are set forth thereunder. Also accompanying this report is a copy of an extract of a study on the matter or pretermitted heirs published in 1957 by the New York Law Revision Commission. This extract purports to summarize the pretermitted heir statutes of the several states at that time.

Subsections (1) and (2). Subsections (1) and (2) of my draft describe pretermission as to children of a testator and descendants of deceased children. These subsections are based upon pertinent portions of ORS 114.250 and the Allison and Richardson draft, and I am fairly confident that they reflect, in substance, the views of a

majority of the members of the committees as recorded in the minutes.

In form, my draft sets forth the provisions for pretermitted children and pretermitted descendants of deceased children in separate subsections. I am inclined to believe that this formal device, although necessitating some duplication of wording, facilitates clarity in describing the two classes of pretermitted heirs.

You may question the absence of the word "last" before the word "will" in subsections (1) and (2). I suggest that "last" is unnecessary, and that "the will" means "last will." Note that ORS 114.250 does not use "last" in describing the will. It may be of interest that the wording of ORS 114.250 remained unchanged by the legislature from 1853 to 1953, and included "last," which was eliminated in the revision of 1953.

The wording of subsections (1) and (2) is that the pretermitted heirs shall "have" a share of the testator's estate. The wording of ORS 114.250 is that the pretermitted heirs shall "be entitled," and that of the Allison and Richardson draft is "inherit and receive." "Have" is used in sections 3 and 4 of Committee Proposal #2, relating to descent and distribution of real and personal property.

Subsections (1) and (2) do not contain the phrase to the effect that a testator, so far as regards a pretermitted heir, is deemed to die intestate. I do not believe this phrase is necessary, in view of the fact that a pretermitted heir's share is described as an intestate share.

It appears that the portion of ORS 114.250 describing pretermission of descendants of deceased children does not strictly mean what it seems to mean. This is illustrated by the Oregon Supreme Court's decision in Towne v. Cottrell, (1963) 236 Or. 151, and the comment on this decision in the most recent issue of the Oregon Law Review (Volume 44, Number 3, April 1965, at page 250). Towne involved a will in which a testatrix, with two living children and four children of a deceased child, acknowledged the death of the one child, made a specific devise to one of the deceased child's children and left the remainder to the two living children. The court held that the omitted grandchildren were not entitled to claim under the pretermitted heir statute on the ground that they were constructively "named" in the will; that naming the deceased parent and providing for one of his children sufficiently "named" his other children. I have not attempted to codify the effect of Towne in subsection (2), and suggest that there is no necessity to do so. Since Towne appears to be based upon court interpretation of "named," and "named" is perpetuated in subsection (2), I believe the decision would

be applicable in construing subsection (2), and that it is probably a good idea to leave such matters of interpretation to the court.

The Law Review comment referred to above, by the way, states that a deceased child's descendant is named in a will, for purposes of ORS 114.250, when reference is made to him by class, citing Neal v. Davis, (1909) 53 Or. 423.

Am I correct in assuming that adopted and illegitimate children of a testator and adopted and illegitimate descendants of deceased children of a testator are eligible to be pretermitted heirs under present Oregon law? As to adopted children and descendants, this would appear to be the case under ORS 109.041, 109.050, 111.210 and 111.212. As to illegitimate children and descendants, this would appear to be the case under ORS 109.060 and 111.231. Committee Proposals #3 and #4 contemplate repeal of ORS 111.210, 111.212 and 111.231, and substitution of new sections in lieu thereof. I presume the "inheritance" referred to in these new sections is not limited to that of a child from his parent, but also applies to that, for example, of a grandchild from his grandparent.

Subsection (3). Subsection (3) of my draft describes, generally, the manner in which shares of pretermitted heirs are to be taken from portions of a testator's estate otherwise to be distributed. This subsection is based upon an exchange between Mrs. Braun, Mr. Allison and Mr. Zollinger reported on page 16 of the minutes of the January meeting. See also Minutes, 1/14,15/66, page 8; and Appendix B. I must admit, however, that in subsection (3) I have moved into an area of uncertainty as to the intent of the committees.

Subsection (3), I believe, falls into the category of abatement provisions. You may wish to consider a general abatement provision, which includes abatement for payment of pretermitted heir shares, and thus obviate an abatement provision applicable only to pretermitted heir shares. For general abatement provisions, see section 134, Model Probate Code, and sections 436 and 437, 1963 Iowa Probate Code. I cannot find any Oregon statutes relating generally to abatement that are comparable to the Model Code and 1963 Iowa Probate Code provisions, but ORS 116.720, 116.730, 116.735 and 117.310 to 117.330 seem to embody certain aspects of abatement.

Subsection (4). Subsection (4) of my draft precludes assertion of pretermitted heir claims if not filed in the probate proceeding within the same time period allowed for contest of the will. This subsection is based upon a motion adopted at the January meeting and reported on page 9 of the minutes thereof. See also Minutes, 1/14,15/66, pages 8, 9, 15, 16; and Appendix B.

The Allison and Richardson draft goes beyond the filing of pretermitted heir claims to provide for citation upon such filing and appeal to the circuit court in a declaratory judgment proceeding in the case of objection to allowance or disallowance of such claims by the probate court. Subsection (4) stops with the claim filing requirement and, for several reasons, makes no further provision on procedure for recovery of pretermitted heir shares. First, I am too uncertain at this point as to the intent of the committees on this procedure. Second, this procedure is dependent to some extent on what you plan to propose on determination of heirship generally. Third, this procedure also is dependent on proposals made by the subcommittee chaired by Judge Thalhofer, which may result in upgrading the jurisdiction of the probate court and importing more finality and exclusiveness into the court's disposition of probate proceedings. Fourth, it may not be desirable to prescribe a special procedure for disposition of pretermitted heir claims if there is some possibility of handling shares of pretermitted heirs generally in the same manner as shares of legatees, devisees, and other heirs.

There are two principal differences between subsection (4) and that portion of the Allison and Richardson draft dealing with the filing of pretermitted heir claims. Subsection (4) requires filing by all those who would avail themselves, in the probate proceeding or in another proceeding, of the pretermitted heir statute. The Allison and Richardson draft requires such filing only by those not named in the petition for probate of the will, on the theory explained at the January meeting that claims, if any, of persons named in the petition would be apparent from the petition and will. However, perhaps the theory of the filing of claims should be as much to require promptness on the part of all allegedly pretermitted heirs in giving notice of their intention to claim as such, even though they may be known, as it is to discover the existence of hitherto unknown persons who may be pretermitted heirs.

Subsection (4), unlike that portion of the Allison and Richardson draft dealing with claim filing, omits provision for citation to the executor and all persons named in the petition for probate of the will. Is citation necessary? Might it be assumed that the personal representative, for example, would be aware of pretermitted heir claims filed in the probate proceeding and that he would communicate this knowledge to legatees and devisees? If a special hearing by the probate court on pretermitted heir claims is contemplated, citation may be called for. On the other hand, if the probate court can dispose of pretermitted heir claims at the hearing on the personal representative's final account or in an order of final distribution, it would seem

that notice given of these proceedings could include mention of pretermitted heir claim determination. I must confess that my question as to the necessity of citation on filing pretermitted heir claims may be based to some extent on the fact that, pursuant to a view expressed at the January meeting, I undertook to spell out the details on citation in my draft, but abandoned this when the draft began to assume considerable length and some complexity, and problems arose that could not be resolved satisfactorily in the absence of some expression of intent of the committees.

Determination of claims and distribution of shares. My draft contains no provision as to procedure for determination of pretermitted heir claims or distribution of pretermitted heir shares in the probate proceeding or otherwise. As mentioned in the comment for subsection (4), several factors are responsible for this omission.

At the January meeting at least one member expresed the view that, if possible, determination of pretermission should be made and distribution of pretermitted heir shares accomplished in the probate proceeding. May I suggest that the statutory provisions on settlement and distribution might encompass this determination and distribution as to pretermitted heirs without special provision therefor in the pretermitted heir statute itself, and that, if possible, objections to such determination and distribution and appeal therefrom, if any, be handled as are objections to and appeal from other aspects of probate court decrees on final accounts of personal representatives or orders of final distribution. Jaureguy and Love (see 2 Jaureguy & Love, Oregon Probate Law and Practice §829, at page 290) point out that there is no express Oregon statutory provision requiring an order of distribution.

For your information, this report is accompanied by a copy of sections 182 to 195, Model Probate Code, relating to distribution and discharge. See also sections 469 to 481, 1963 Iowa Probate Code, and sections 11.72.002, 11.72.006 and 11.76.010 to 11.76.250, 1965 Washington Probate Code.

Incidentally, for a provision on determination of heirship generally, see section 195, Model Probate Code.

REPORT
March 14, 1966

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

From: Campbell Richardson and Robert W. Lundy

Subject: Rough Draft on Issuance and Form of Letters of Representation.

One of the matters scheduled for consideration by the Advisory and Bar Committees at the meeting to be held March 18 and 19, 1966, is revision of sections 9 and 12 of Mr. Gilley's draft on initiation of probate or administration, contained in his report dated January 10, 1966. These sections deal with issuance of letters of administration where a will is set aside, declared void or inoperative, with the form of letters testamentary and of administration and with proceedings when a will is found and proven after administration is granted, and are derived from ORS 115.200, 115.210, 115.340 and 115.350.

At the February meeting, Mr. Richardson was assigned the task of revising sections 9 and 12. His revision, with certain changes therein made by Mr. Lundy and for which Mr. Richardson should not be held responsible, is embodied in the following rough draft.

ROUGH DRAFT

Section 9. Issuance of letters of representation where admission of will revoked. If, after a will has been proved and letters of representation issued thereon, an order or decree is entered revoking the admission of the will to probate, those letters shall be revoked and new letters of representation issued.

Section 9a. Form of letters of representation. (1) Letters of representation issued to executors or to administrators with the will annexed may be in the following form:

State of Oregon)
) ss.
County of _____)

TO WHOM IT MAY CONCERN:

The will of _____, deceased, has been proved in the probate court for the above county. _____ has (have) been appointed _____ (executor(s) or administrator(s) with the will annexed) by that court.

In testimony thereof, and to evidence the authority of the above personal representative(s) as of the date hereof to administer the estate of the above decedent according to law, I, as clerk of the court, have hereunto subscribed my name and affixed the seal of the court on _____ (month) _____ (day), 19__.

(Seal) _____, Clerk of the Court

By _____, Deputy

---

(2) Letters of representation issued to administrators may be in the following form:

State of Oregon,)
) ss.
County of _____)

TO WHOM IT MAY CONCERN:

It appearing to the probate court for the above county that _____ has died intestate, the court has appointed

_____administrator(s) of the estate of the decedent.

In testimony thereof, and to evidence the authority of the above personal representative(s) as of the date hereof to administer the estate of the above decedent according to law, I, as clerk of the court, have hereunto subscribed my name and affixed the seal of the court on _____, 19__.
(month) (day)

(Seal)

_____, Clerk of the Court

By _____, Deputy

---

(3) Letters of representation issued to special administrators may be in a form similar to the applicable form set forth in subsection (1) or (2) of this section, with such variations as are proper in the particular case.

Section 12. Proceedings when will proved after administration granted. If, after administration of an intestate estate has been granted and letters of representation issued thereon, a will of the decedent is offered and proved, those letters shall be revoked and new letters of representation issued.

REPORT
March 14, 1966

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

From: Wade P. Bettis, Donald G. Krause and Robert W. Lundy

Subject: Rough Draft on Notice of Estate Administration.

One of the matters scheduled for consideration by the Advisory and Bar Committees at the meeting to be held March 18 and 19, 1966, is revision of sections 10 and 13 of Mr. Gilley's draft on initiation of probate or administration, contained in his report dated January 10, 1966. These sections deal with personal representatives mailing copies of wills and orders admitting those wills to probate to named heirs, legatees and devisees and with personal representatives publishing notice to creditors, and are derived from ORS 115.220 and 116.505.

At the February meeting, Mr. Bettis and Mr. Krause were assigned the task of revising sections 10 and 13. Their revision, with certain changes therein and additions thereto made by Mr. Lundy and for which Mr. Bettis and Mr. Krause should not be held responsible, is embodied in the following rough draft. Because the changes and additions made by Mr. Lundy are substantial in some respects, the original revisions by Mr. Bettis and Mr. Krause are set forth in this report. following the rough draft.

ROUGH DRAFT

Section 10. Copy of notice and will to heirs, legatees and devisees; notice to Land Board. (1) Immediately after his appointment a personal representative shall cause a copy of the published notice provided for in section 13 and a copy of the will of the decedent admitted to probate, if any, to be mailed to each known heir of the decedent and to each legatee or devisee, if any, of the decedent, at the last-known address of the heir, legatee or devisee. If the personal representative is also an heir, legatee or devisee of the decedent, copies of the published notice and will need not be

mailed to the personal representative.

(2) If the decedent died intestate and there are no known heirs of the decedent, immediately after his appointment a personal representative shall cause a copy of the published notice provided for in section 13 and a statement that there are no known heirs of the decedent to be mailed to the clerk of the State Land Board.

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

(4) A personal representative shall file in the probate proceeding, within 30 days after the date of his appointment, proof by affidavit of the mailing required by this section.

Section 13. Publication of notice by personal representative. (1) Immediately after his appointment a personal representative shall cause a notice of his appointment to be published in a newspaper published in the county in which the probate proceeding is pending, or if no newspaper is published in that county, then in a newspaper designated by the court, once a week for two consecutive weeks, or two publishings in all. The notice shall include:

(a) The name of the decedent and the fact of his death.

(b) The name and address of the personal representative.

(c) If a will of the decedent has been admitted to probate, a statement of that fact and that any interested person may contest the probate or validity of the will at any time within six months after the date of the entry of the order admitting the will to probate.

(d) A statement requiring all persons having claims against the estate of the decedent to present their verified claims to the personal representative at a specified place in this state within six months after the date of the first publication of the notice.

(2) A personal representative shall file in the probate proceeding, before he files his final account, proof by affidavit of the publication of notice required by this section. The affidavit shall include a copy of the published notice.

Section 13a. Notice by successor personal representatives. If a personal representative dies, is removed by order of the court or his resignation is accepted by the court and a successor personal representative is appointed after the mailing of copies of notice and will required by section 10 and after the publication of notice required by section 13, the successor personal representative need not cause copies of notice and will to be mailed as provided in section 10 or cause notice to be published as provided in section 13. However, if the time within which persons having claims against the estate of the decedent were required by the notice caused to be published as provided in section 13 by a former personal representative did not expire before the death, removal

or resignation of the predecessor personal representative:

(1) Immediately after his appointment the successor personal representative shall cause a notice of his appointment and of the death, removal or resignation of his predecessor personal representative to be published in a newspaper published in the county in which the probate proceeding is pending, or if no newspaper is published in that county, then in a newspaper designated by the court, once a week for two consecutive weeks, or two publishings in all.

(2) The time after the date of that death, removal or resignation and before the date of first publication of the notice by the successor personal representative shall be added to the time within which those claims are required to be presented, and a statement of the time so added shall be included in the published notice by the successor personal representative.

(3) The successor personal representative shall file proof of his published notice as provided in subsection (2) of section 13.

SECTION 10 (MR. KRAUSE)

Section 10 Copy of Notice and Will to Heirs, Legatees and Devisees. Upon the entry of an order admitting any will to probate, or appointing a personal representative, said personal representative shall forthwith cause a copy of the published notice to heirs and creditors to be mailed to each heir, legatee and devisee, and a copy of the decedent's will

to each legatee and devisee at his last-known address. Proof of such mailing shall be made by affidavit and filed within thirty days after the entry of such order.

NOTE: This is ORS 115.220 with the additional requirement that a copy of the published notice to creditors and heirs be sent to all of the heirs, legatees and devisees. Copies of the will are also sent to each legatee and devisee as in the former statute. This new section also in effect gives the personal representative thirty days within which to send out the will and copies of notice.

SECTION 13 (MR BETTIS)

Section 13. Publication and Mailing of Notice by Personal Representative

Every personal representative of a decedent's estate shall:

(a) Publish a notice once a week for two consecutive weeks in a newspaper published in the county, if there is one, otherwise in such newspaper as designated by the court. The notice shall apprise all interested persons of the death of the decedent and the name and address of the personal representative of his estate. The notice shall also require all claimants against the estate to present their verified claims to the personal representative at a specified place in the state and within six months from the date of the first publication of such notice.

(b) Immediately mail a copy of the notice as published to the last-known address of all the decedent's heirs at law, so far as known, and to each of the devisees and legatees who are named in his will. If there are no known heirs at law or devisees or legatees, such notice shall be mailed to the State Land Board.

(c) File with the clerk of the probate court prior to the filing of the final account an affidavit of publication containing a copy of the notice as published, and an affidavit of mailing.

NOTE: This section revises ORS 116.505 in the following particulars:

1. Reference is made to a "personal representative" instead of to "executor or administrator," assuming that the former term is to be used primarily in the code revision.

2. Requires two publications instead of four.

3. Permits the court rather than "court or judge" to designate a paper if none is published in the county.

4. The notice is not only to creditors but to all persons interested in the estate and informs of the death, the name and address of the personal representative and a place in the state (rather than in the county) where claims are to be presented.

5. The notice requires claims to be verified (as now required by ORS 116.515) and omits reference to present requirements of "proper vouchers" which seems to me to be superfluous.

6. Specifies that six months for filing claims commences on date of first published notice. A creditor reading a last publication might be misled in thinking that he has six months from that date.

7. Provides a new provision for immediate mailing of copy of notice as published to all heirs and devisees and legatees so far as known, and to their last-known address; and if there aren't any of these classes, then to the State Land Board.

8. The filing with the clerk is to be done prior to filing of the final account, rather than within the six months of the notice; and is to include proof of both the publication and of the mailing.

MEMORANDUM
February 28, 1966

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

From: Robert W. Lundy
Chief Deputy Legislative Counsel

Subject: Matters for consideration at March meeting.

This memorandum lists matters tentatively scheduled for consideration by the committees at their joint meeting on March 18 and 19, 1966. The matters listed are those that were mentioned at the February meeting.

As requested at the February meeting, I am sending this list to you considerably in advance of the March meeting. A notice of and suggested agenda for the March meeting will be sent to you early in the week of the March meeting.

If any of you would like changes made in this list (for example, rearrangement of the order of the matters listed, addition of matters not listed or deletion of listed matters on which assignments will not be completed by the March meeting), please let me know as soon as possible, preferably before March 11.

I must report, with regret, that the final version of the minutes of the February meeting will not be edited, reproduced and distributed for another two weeks. If any of you require information on the discussion at the February meeting in order to complete assignments on matters for consideration at the March meeting, please let me know; I may be able to extract from the rough minutes the information you need.

LIST OF MATTERS FOR MARCH MEETING

1. Inheritance by nonresident aliens.

Revised draft by subcommittee (Allison, Lisbakken, Lovett, Barrie and Schwabe).

At the February meeting, Allison, on behalf of the subcommittee, submitted a draft of a proposed statute. This draft was re-referred to the subcommittee for revision, which apparently was to include: (1) Reduction form 20 years to 10 years of the period

within which a nonresident alien would be permitted to establish eligibility and withdraw a deposit; (2) exemption of deposits from the seven-year presumption of abandonment under the Uniform Disposition of Unclaimed Property Act (see ORS 98.306); (3) requirement of new evidence for a second and each subsequent claim by a nonresident alien during the 10-year period; (4) provision that a claim by a nonresident alien be handled as a part of the original estate proceeding, but with no necessity to reppen the estate for this purpose; and (5) provision for disposition of a deposit after 10 years by distribution to eligible heirs, or if none, by escheat.

2. Probate courts and jurisdiction thereof.

Progress report by subcommittee (Thalhofer (chairman), Copenhaver, Field, Gooding and Warden).

3. Testamentary additions to trusts.

Report on phrase "the validity of which is determinable by the law of this state" (Riddlesbarger).

See Minutes, 12/17,18/65, pp. 5, 6; Appendix A, p.2, §6; Appendix B, p. 2.

4. Heirship determination (generally and pretermitted heirs).

Report by subcommittee (Riddlesbarger (chairman), Braun, Gilley, Mapp and Zollinger).

See, specifically, Minutes, 1/14,15/66, p. 17.

See, generally as to pretermitted heirs, Minutes, 12/17,18/65, pp. 12 to 16; Minutes, 1/14,15/66, pp. 1 to 9, 14 to 17, and Appendices A and B.

5. Delivery of wills by custodians or possessors.

See ORS 115.110, 115.130 and 115.990.

See Minutes, 12/17,18/65, p. 21; Appendix A, p. 14, §32.

6. Foreign wills.

Drafts of revisions of ORS 114.060 and 115.160 (Mapp and Riddlesbarger).

See, as to ORS 114.060, Minutes, 11/19,20/65, p. 5; Minutes, 12/17,18/65, Appendix A, p. 1, §2; Minutes, 1/14,15/66, pp. 29, 30.

See, as to ORS 115.160, Minutes, 1/14,15/66, pp.28 to 30.

See, generally, Uniform Probate of Foreign Wills Act.

7. Letters testamentary and of administration.

Revised draft on issuance of letters of administration where will set aside, declared void or inoperative, on form of letters testamentary and of administration and on proceedings when will found and proven after administration granted (Richardson).

See Report by Gilley, dated 1/10/66, containing rough draft on initiation of probate or administration, pp. 7 to 9, §9, and p. 10, §12.

In the course of the discussion of section 9 of Gilley's draft at the February meeting, the following matters were raised: (1) An objection to the wording as to a will being "set aside, declared void or inoperative"; (2) an objection to the forms of letters stating that the executor or administrator is authorized by the letters to administer the estate; and (3) a suggestion that the forms of letters state the date of issuance.

8. Notice of probate proceeding.

Revised draft on notice and copy of will to beneficiaries under will and heirs, published notice to creditors and, in the case of intestacy, notice to the State Land Board (Bettis and Krause).

Alternative revised draft by subcommittee of dissenters (Allison, Carson and Zollinger). The revised draft by Bettis and Krause should be sent to the subcommittee of dissenters by March 11.

See Report by Gilley, dated 1/10/66, containing rough draft on initiation of probate or administration, p. 9, §10, and p. 11, §13.

Based on discussion at the February meeting, the revised draft by Bettis and Krause apparently should include provision for the following matters:

(1) Notice to beneficiaries under will and heirs should be published in combination with published notice to creditors.

(2) Copy of published notice and will should be mailed to beneficiaries under will and heirs, so far as they and their addresses are known, to their last know addresses.

(3) Mailing of notice and will copies to beneficiaries and heirs, and filing proof thereof, should be done within short period after order admitting will to probate or appointing personal representative.

(4) Mailing of notice and will copies to personal representative who is beneficiary or heir should be specified unnecessary.

(5) Notice should be mailed to State Land Board in intestate situation after appointment of personal representative.

(6) Consideration should be given to notice in situations involving replacement of personal representatives, as where a will is found after an administrator is appointed or a personal representative dies, resigns, or is removed. See sec. 11.40.150, 1965 Washington Probate Code.

9. Bond of personal representative.

Reivsed draft on bonds of personal representatives (Frohnmayer and Hornecker).

See Report by Hornecker and Krause, dated 1/14/66, containing rough draft on executors and administrators generally, pp. 2 to 5.

Based on discussion at the February meeting, in preparing the revised draft the following matters apparently should be considered:

(1) A bond should be required in all cases. See ORS 126.171.

(2) The amount of the bond should be in the discretion of the court, but not less than $1,000.

(3) The bond should be a corporate surety bond; personal surety bonds should not be permitted.

(4) Factors for the court to consider in fixing the amount of the bond should be set forth, such as protection of creditors and estate beneficiaries, size of estate, liquidity of estate, income produced by estate, probable amount of indebtedness and probable taxes.

(5) Whether additional bond, as well as new bond, should be provided for. See ORS 126.176.

(6) Whether failure to give new bond should automatically remove the personal representative.

(7) Whether a new bond should discharge sureties on the old bond. See ORS 126.176.

10. Removal, death or resignation of personal representative.

Revised draft on removal, death or resignation of personal representative (Frohnmayer and Hornecker).

See Report by Hornecker and Krause, dated 1/14/66, containing rough draft on executors and administors generally, pp. 5 to 7.

Based on discussion at the February meeting, in preparing the revised draft the following matters apparently should be considered:

(1) As to removal, if citation cannot be served personally on the personal representative, then service should be made on his attorney. Should service also be made on the personal representative's surety?

(2) Provision should be made for procedure for accounting by personal representative after removal. Compare ORS 126.506 and subsection (1) of ORS 126.336.

(3) As to removal, the words "the probable loss" were objected to as unnecessary.

(4) Whether subsection (2) of ORS 115.500 is duplicated by provision in the banking statute should be determined. See ORS chapter 711, for example.

(5) Whether there should be published notice of intention to resign by a personal representative and whether there should be approval of resignation by the court.

See item 8 (6) above, on notice in situations involving replacement of personal representatives.

ADVISORY COMMITTEE
Probate Law Revision

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

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

Suggested Agenda

1. Approval of minutes of February and March meetings.

2. Reports on miscellaneous matters.

3. Inheritance by nonresident aliens.

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

   b. Notice to State Land Board.

4. Establishing foreign wills and ancillary administration.

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

5. Form of letters testamentary and of administration.

   Revised draft on form of letters by Richardson and Zollinger.

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

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

7. Claims against decedents' estates.

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

   See: Report from Gooding, dated April 1, 1966, containing "Rough Draft on Claims Against Decedents' Estates."

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

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

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

9. Next meeting.

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

ADVISORY COMMITTEE
Probate Law Revision

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

Minutes

The twenty-fourth meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:30 p.m., Friday, April 15, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

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

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

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

Minutes of February and March Meetings

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

Miscellaneous Matters

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

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

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

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

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

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

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

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

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

Inheritance by Nonresident Aliens

Time of determination of benefit, use or control in proceeding to withdraw deposit. Allison noted that at the March meeting a revised draft on inheritance by nonresident aliens had been considered (Note: See Minutes, Probate Advisory Committee, 3/18,19/66, pages 3 to 5), and that in the course of discussion of the draft a question had arisen as to the time to which evidence of benefit, use or control should be directed in a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Form of Letters Testamentary and of Administration

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

"LETTERS TESTAMENTARY

No. _____

"THIS CERTIFIES that the will of_____, deceased, has been proved and _____ has (have) been appointed and is (are) at the date hereof the duly appointed, qualified and acting

_____ of the will and
(executor(s) or administrator(s) with the will annexed)

estate of said decedent.

"IN WITNESS WHEREOF, I, as Clerk of the _____Court of

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

_____Clerk of the Court

By _____
Deputy

"LETTERS OF ADMINISTRATION

No. _____

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

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

_____Clerk of the Court

By _____
Deputy"

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

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

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

Support of Surviving Spouse and Minor Children; Homstead

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

All members of the advisory committee were present.

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

Also present was Lundy.

Arrangement of Proposed Revised Probate Code

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

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

Chapter 118	Inheritance Tax	Chapter 118	Inheritance Tax
Chapter 119	Gift Tax	Chapter 119	Gift Tax
Chapter 120	Escheat; Estates of Persons Presumed to be Dead	Chapter 120	Escheat
Chapter 121	Actions and Suits Affecting Decedents' Estates and Administration	Chapter 121	Actions and Suits Affecting Estates
Chapters 122 to 125	/ Reserved for expansion/	Chapters 122 to 125	/ Reserved for expansion/

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

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

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

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

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

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

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

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

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

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

Nonresident Personal Representatives

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

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

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

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

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

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

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

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

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

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

Claims Against Decedents' Estates

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The meeting was recessed at 12 noon.

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

Claims Against Decedents' Estates (continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Scope and Progress of Probate Revision Project

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

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

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

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

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

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

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

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

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

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

Next Meeting of Committees

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

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

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

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

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

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

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

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

The meeting was adjourned at 5 p.m.

APPENDIX

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

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

PROPOSED DRAFT
SUPPORT OF SURVIVING SPOUSE AND MINOR CHILDREN; HOMESTEAD

1. For the purposes of this chapter "the homestead" must be at the date of death of the decedent the actual abode of and occupied by the decedent, his spouse, parent, or child, and be exempt from execution according to the exemption laws then in effect.

2. Until administration of the estate is granted and the inventory filed, the surviving spouse and minor children of the deceased are entitled to remain in the possession of the homestead, all the wearing apparel of the family and household furniture of the deceased. The widow and minor children shall also have a reasonable provision for their support during such period, to be allowed by the court.

3. When the owner of a homestead dies intestate the homestead descends free of judgments and claims against the deceased owner or his homestead estate, except mortgages executed thereon and laborers' and mechanics' liens, to the persons in the manner provided by law. Such exemption shall not extend to any person other than a child or grandchild, widow or widower, and father or mother of the deceased owner. Such homestead shall be subject to and charged with the expenses of his last sickness and for his funeral, the costs and charges of administration and the claim of the State Public Welfare Commission for the net amount of public assistance, as defined in ORS 411.010, which was paid to or on behalf of the deceased and the recovery of which from the estate of the deceased recipient is authorized by statute other than this section. Nothing in this section shall prevent or limit the court or judge from setting apart for the widow, widower or minor children of the deceased the homestead.

4. When a homestead is devised the devisee takes it free of judgments and claims against the testator or his homestead estate, except mortgages executed thereon and laborers' and mechanics' liens. Such exemption shall not extend to any devisee other than a child or grandchild, widow or widower, and father or mother of the testator. Such homestead shall be

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

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

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

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

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

N O T E S

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

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

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

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

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

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

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

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

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

Section 4 is a redraft of 116.595.

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

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

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

Section 8 is the same as ORS 116.025.

STANTON W. ALLISON

REPORT
April 12, 1966

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

From: Robert W. Lundy
Chief Deputy Legislative Counsel

Subject: Revised Probate Codes Recently Enacted in Other States.

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

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

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

CODES ENACTED AFTER MODEL PROBATE CODE

1965 District of Columbia

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

1965 Washington

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

1963 Iowa

Iowa Code Annotated, chapter 633.

1960 Louisiana

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

1959, 1953 North Carolina

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

1955 Missouri

Missouri Annotated Statutes, chapters 472-475.

1955 Texas

Texas Probate Code Annotated.

1953 Indiana

Indiana Annotated Statutes, titles 6-8.

1951 New Jersey

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

1949 Arkansas

Arkansas Statutes Annotated, titles 57, 60-63.

1947, 1949, 1951 Pennsylvania

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

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

CODES ENACTED BEFORE MODEL PROBATE CODE

1941 Nevada

Nevada Revised Statutes, titles 12 (chapters 133-156) and 13 (chapters 159-167).

1939 Illinois

Illinois Annotated Statutes, chapter 3.

1939 Kansas

Kansas Statutes Annotated, chapter 59.

1939 Michigan

Michigan Statutes Annotated, section 27.3178.

1935 Minnesota

Minnesota Statutes Annotated, chapters 525 and 526.

1933, 1945 Florida

Florida Statutes Annotated, chapters 731-737 and 744-746. [Note: The 1933 revision related to estates of decedents (chapters 731-737). The 1945 revision related to guardianship (chapters 744-746).]

1931 California

California Probate Code.

1931 Ohio

Ohio Revised Code, title 21.

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

A PROPOSED ACT RELATING TO SUCCESSION OR TESTAMENTARY DISPOSITION TO ALIENS

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

It seems to us that the questions raised at the meeting were triggered by the third sentence of Section 2 of the redraft which reads as follows: "The petition shall allege that at the time of filing the alien heir, legatee, devisee, or distributee, or, if deceased, his heirs or beneficiaries, would receive the benefit, use, or control of the money."

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

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

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

Stanton W. Allison

REPORT
April 1, 1966

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

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

Subject: Rough Draft on Claims Against Decedents' Estates

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

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

TIME AND MANNER OF FILING CLAIMS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 10. Claims against personal representative. The naming of a personal representative in a will shall not operate to extinguish any just claim which the deceased had against him; and, in all cases where a personal representative is indebted to his testator or intestate, he shall account for the debt in the same manner as if it were cash in his hands; provided, however, that if such debt was not due at the time of receiving letters, he shall be required to account for it only from the date when it

becomes due.

CLASSIFICATION, ALLOWANCE AND PAYMENT OF DEBTS AND CHARGES

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

(1) Court costs.

(2) Other costs of administration.

(3) Reasonable funeral and burial expenses.

(4) All debts and taxes having preference under the laws of the United States.

(5) Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him at his last illness.

(6) All taxes having preferences under the laws of this state.

(7) All debts owing to employes for labor performed during the 90 days next preceding the death of the decedent.

(8) The claim of the State Public Welfare Commission for the net amount of public assistance, as defined in ORS 411.010, paid to or for the decedent and the claim of the Oregon State Board of Control for care and maintenance of any decedent who was at a state institution to the extent provided in ORS 179.610 to 179.770.

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

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

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

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

Section 14. Personal representative's liability.

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

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

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

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

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

DENIAL AND CONTEST OF CLAIMS

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

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

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

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

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

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

Section 23. Applicability of rules of procedure. Within 20 days from the filing of the request for hearing on a claim, the personal representative shall move or plead to such claim in the same manner as though the claim were a complaint filed in an ordinary action or suit; and thereafter, all provisions of law and rules of procedure applicable to motions, pleadings and the trial of ordinary actions and suits, to and including appeal, shall apply as in ordinary actions and suits.

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

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

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

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

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

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

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

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

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

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

TO: The Advisory Commmittee - Probate Law Revision

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

RE: Creditor's Rights

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

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

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

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

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

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

1. File with Clerk, with proof of service upon representative or attorney. Mundorff #153.

2. Others provide for the claim to be filed in duplicate with the Clerk to mail copy to the representative or attorney. Iowa #418; Texas #308.

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

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

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

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

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

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

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

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

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

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

1. Creditor exhausts security and is paid deficiency, or

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

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

1. Agreement, arbitration or compromise of probable present worth approved by Court.

2. Court orders representative to distribute estate but retain sufficient funds to pay claim when it becomes absolute but for no longer than two years. If not then absolute, distribution is made and distributees liable

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

3. Court order distribution as though contingent claim did not exist but distributees liable to the extent of estate received if contingent claim becomes absolute and Court may require distributees to give bond, or

4. Such other method as Court may order. Iowa #424, Missouri #473.390. Note: See ORS 117.170.

CLAIM OF EXECUTOR OR ADMINISTRATOR IN DETERMINATION: ORS116.580 and .585 provides for summary allowance with the right to object preserved until the time of the settlement of the account.

1. Same as Mundorff #161 and 162.

2. Except in the case of disinterested co-representatives, Court appoints administrator ad litem to represent estate, file a report and recommendation. If disallowed then handled as contested claim. Iowa #431-432; Missouri #473.423; Texas #317.

3. Foregoing provision does not apply to a claim of an heir, devisee or legatee claiming in such capacity or to any claim that accrues against the estate after the granting of Letters for which a representative of the estate has contracted. Texas #317.

4. Representative shall not purchase claims; if so, Court can cancel claim and remove representative. Texas #324.

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

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

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

1. Mundorff, #156 provides a Bill of Particulars, and other motions and proceedings had at law or equity, the demand of a jury trial, independent corrobative evidence etc. with the Court having exclusive jurisdiction.

2. Iowa, #415 provides for the continuance of a pending action in lieu of a claim , or the filing of a separate action in lieu of a claim and sets forth the elaborate procedures for notice, venue etc. Also see #417. The other procedure is in #438-449 as follows:

    a. If not admitted, deemed denied and personal representative gives written notice of disallowance by certified mail advising that it is disallowed and forever barred unless within 20 days a hearing request is filed wi th the Clerk with a copy to the representative and proofs of service.

b. #422, 433 and 444 -- if hearing not duly requested it is disallowed and barred. After request, representative moves or pleads to the same "as though the claim were a petition filed in an ordinary action, and thereafter all provisions of law and rules of civil procedure are applicable to motions, pleadings and the trial of ordinary actions shall apply.

c. Claimant does not have to prove claim is unpaid but is subjected to examination on the question of payment or consideration and the estate is not concluded or bound by his examination.

d. Trial and hearing without a jury unless requested and governed by the rules of the procedure in ordinary action and judgment is rendered as in ordinary cases.

3. Missouri, #473.407-420 provides for ordinary defenses, assertion of offsets or counterclaims within 10 days after service of a claim and a hearing by the Court governed by individual Court rules, depositions, jury trial for a claim over $100. If the Court believes there is a probability that any judgment rendered will be appealed, it may on its own motion transfer the same to the Circuit Court. Claimant pays Circuit Court costs upon a claim based upon an expressed or implied contract but not where the suit is cognizable in the probate court. #473.377. Texas procedures are in #312-314.

a. Any interested person may appear and object before approval, "as in ordinary suits." All allowed claims shall be acted on by the Court and approved by the Court may disallow an approved claim if he is not satisfied that it is just; after examination of the claimant and personal representative or other evidence, if then not convinced the claim is just, he shall disapprove it.

b. Appeal is to the next Court.

c. Due presentment of a claim is a prerequisite to judgment.

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

1. Mundorff #156 is to the same effect.

2. Iowa #445 does not require claimant to prove that claim is unpaid.

3. Texas #312 does not require independent testimony.

4. Missouri # does not require independent testimony. But provides that affidavit is not received as evidence of claim. #473.380.

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

1. Iowa #411-431, allow the "personal representative" the discretion where he believes the claim to be just, and

a. Except where he was appointed upon application of the creditor,

b. Limitation not a bar if claim not barred at the date of death and

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

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

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

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

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

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

1. Even a creditor who has filed a late claim can obtain this relief.

2. If representative fails to pay when ordered, execution issues and representative and sureties can be cited to show cause why they should not be personally held for such debt, interest, costs and damages.

PROTECTION OF CREDITORS:

1. Shouldn't there be a provision requiring Court approval before payment of claims? This may help to prevent perferring creditors.

2. Shouldn't creditors be given notice of an application to pay creditors so that they might object to any claims they might deem spurious?

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

MEMORANDUM
March 28, 1966

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

From: Robert W. Lundy
Chief Deputy Legislative Counsel

Subject: Matters for consideration at April meeting

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

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

LIST OF MATTERS FOR APRIL MEETING

1. Inheritance by nonresident aliens.

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

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

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

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

b. Notice to State Land Board.

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

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

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

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

2. Establishing foreign wills and ancillary administration.

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

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

3. Form of letters testamentary and of administration.

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

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

(1) The present Oregon designation of letters (i.e., letters testamentary and letters of administration) should be retained, instead of the designation "letters of representation."

(2) The headings of the forms should be revised to include designations (e.g., "LETTERS TESTAMENTARY" and "LETTERS OF ADMINISTRATION"), and perhaps a blank for insertion of the estate file number.

(3) The testate form should be revised by insertion of "of the estate of the decedent" after the blank for insertion of the name of the personal representative.

(4) The testate and intestate forms should be revised to include more direct statements of the authority of the named personal representatives to act as such as of the date of the letters (e.g., "and is (are) as of the date hereof the appointed, qualified and acting personal representative of the estate).

(5) The forms should include a blank for insertion for the date of death of the decedent. See section 11.28.140, 1965 Washington Probate Code.

(6) The provision on form of letters issued to special administrators in subsection (3) of section 9a might be eliminated.

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

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

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

5. Claims against decedents' estates.

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

6. Sale or lease of estate property.

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

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

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

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

MATTERS REMAINING TO BE CONSIDERED

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

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

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

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

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

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

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

4. Escheats.

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

5. Estates of persons presumed to be dead.

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

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

ADVISORY COMMITTEE
Probate Law Revision

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

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

Suggested Agenda

1. Approval of minutes of April meeting.

2. Reports on miscellaneous matters.

3. Claims against decedents' estates.

   a. Unmatured, unliquidated and contingent claims; secured and unsecured claims; encumbered property devised or bequeathed.

      Report and draft by subcommittee (Carson, Gooding and Riddlesbarger).

   b. Claim of personal representative.

      Report and draft by subcommittee (Frohnmayer, Gooding and Riddlesbarger).

   c. Sections 10 to 32, Gooding's rough draft, 4/1/66.

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

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

5. Establishing foreign wills and ancillary administration.

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

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

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

7. Next meeting.

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

ADVISORY COMMITTEE
Probate Law Revision

Twenty-fifth Meeting, May 20 and 21, 1966
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The twenty-fifth meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:30 p.m., Friday, May 20, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

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

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

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

Minutes of April Meeting

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

Miscellaneous Matters

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

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

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

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

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

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

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

Claims Against Decedents' Estates

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

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

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

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

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

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

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

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

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

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

Zollinger suggested the following revised section:

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

"(1) Withdraw his claim, or

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

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

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

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

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

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

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

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

> "When a creditor holds security, he may at his option present a claim based on the secured debt. If he presents a claim upon an unmatured debt which is finally allowed pursuant to this section, he may either:
>
> "(1) Accept payment in the amount allowed in satisfaction of the claim, or
>
> "(2) Withdraw his claim without prejudice to other remedies."

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

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

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

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

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

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

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

> "Section 6. Claims not due. Claims upon debts not due may be presented to the personal representative as other claims. They shall be allowed in such sum as shall be equal to the value of the obligation as of the date of the allowance. When a creditor holds security, he may at his option present a claim based on the secured debt. Payment of the amount finally allowed discharges the debt and exonerates the security, if any, but the claimant may, after allowance, withdraw his claim without prejudice to other remedies." Motion carried.

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

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

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

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

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

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

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

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

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

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

Also present was Lundy.

Claims Against Decedents' Estates (continued)

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

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

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

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

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

> "Section 8. Contingent and unliquidated claims. Contingent or unliquidated claims which cannot be allowed as absolute debts shall, nevertheless, be presented to the personal representative as other claims. If such claim shall become absolute before distribution of the estate . . .
>
> "(1) (No change)
>
> "(2) The court may order the personal representative to make distribution of the estate but to retain in his hands sufficient funds to pay the claim if and when the same becomes absolute; but for this purpose the estate shall not be kept open longer than two years . . .
>
> "(3) . . .and the court may require such distributees to give corporate surety bond for the performance of their liability to the contingent creditor; or
>
> "(4) (No change) " Motion carried.

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

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

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

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

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

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

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

time objections could also be made.

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

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

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

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

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

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

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

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

claim until it was determined that the estate was solvent.

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

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

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

Mapp moved, seconded by Zollinger, that the following wording be deleted from the first sentence of revised section 9: "And does not conclude a creditor, heir, or other person interested in the estate in any action, suit, or proceeding between the personal representative and such creditor, heir, or other person." Mapp explained that this deletion would permit the law to apply equally to personal representatives and other creditors. Motion carried.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Claims Against Decedents' Estates (continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "Section 13. If a contingent or unliquidated claim shall have been presented and allowed against an estate pursuant to section 8 and all the assets of the estate shall have been distributed, and the claim shall thereafter become absolute or certain, the creditor shall have the right to recover thereon against those distributees whose distributive shares have been increased by reason of the fact that the amount of such claim as finally determined was not paid prior to final distribution, provided an action therefor shall be commenced within one year after the claim becomes absolute or certain. Such distributees shall be jointly and severally liable, but no distributee shall be liable for an amount exceeding the amount of the estate or fund so distributed to him. If more than one distributee is liable to the creditor, the creditor shall make parties to the action all such distributees who can be reached by process. By its judgment, the court shall determine the amount of the liability of each of the distributees as among themselves, but if any be insolvent or unable to pay his proportion, or beyond the reach of process, the others, to the extent of their respective liabilities, shall nevertheless be liable to the creditor for the whole amount of the claim. If any person liable for the claim fails to pay his just proportion to the creditor, he shall be liable to indemnify all who, by reason of such failure on his part, have paid more than their just proportion of the debt, the indemnity to be recovered in the same action or in separate actions." Motion carried.

A discussion of section 14 followed, after which Mapp asked that the committees return to a consideration of section 13. He pointed out that section 13 was copied almost verbatim from section 141, Model Probate Code, which provided, in part: "Such distributees shall be jointly and severally liable, but no distributee shall be liable for an amount

exceeding the amount of the estate or fund so distributed to him. If more than one distributee is liable to the creditor, he shall make all distributees who can be reached by process parties to the action." Mapp noted that the Model section at this point substituted "defendants" for "distributees," because use of the term "distributees" would purport to bind persons beyond the reach of process.

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

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

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

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

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

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

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

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

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

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

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

Allison moved approval of the following wording for section 15: "Any creditor of an estate of a decedent whose claim, or part thereof, has been <u>allowed</u> or established by suit, may, <u>thereafter and not less than four months after</u> the granting of letters testamentary . . ." Zollinger stated two objections to Allison's proposed wording: (1) The appropriate time was not the time of granting of letters testamentary or of administration, but rather the first publication of notice of the personal representative's appointment; and (2) four months was not a

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

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

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

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

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

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

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

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

APPENDIX A

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

REPORT
May 20, 1966

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

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

Subject: Revised Draft of Sections 6 to 9, Claims Against Decedents' Estates

Section 6. Unsecured claims not yet due. Claims upon debts not due shall be presented to the personal representative as other claims. They shall be allowed in such sum as shall be equal to the value of the obligation as of the date of the decedent's death.

Section 7. Secured, unmatured claims. When a creditor holds any security for a claim not yet due, he may present his claim as a claim not yet due with the right of withdrawing the claim if the personal representative's compromise offer is not satisfactory, and, after such withdrawal, rely entirely on his security, or he may elect to rely entirely on his security without the necessity of presenting a claim.

Section 7a. Secured, matured claims. When a creditor holds any security for his claim, which is then due, he may present his claim as a mature claim, or he may elect to rely entirely on his security

without the necessity of presenting a claim. If the claim is presented, and if such claim is secured by a mortgage, pledge or other lien which has been recorded, it shall be sufficient to describe the lien by date, and refer to the volume, page and place of recording; the claim shall be allowed in the amount remaining unpaid at the time of its allowance, and the order of the court allowing it shall describe the security; payment of the claim shall be upon the basis of the full amount thereof if the creditor shall surrender his security; otherwise payment shall be upon the basis of one of the following:

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

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

Section 8. Contingent and unliquidated claims. Contingent or unliquidated claims which cannot be allowed as absolute debts shall, nevertheless, be filed in the court and proved. If allowed as a contingent or unliquidated claim, the order of allowance shall state its contingent or unliquidated nature. If such claim shall become absolute before distribution of the estate, it shall be paid in the same manner as absolute

claims of the same class. In all other cases, the court may provide for the payment of contingent or unliquidated claims in any one of the following methods:

(1) The creditor and personal representative may determine, by agreement, arbitration or compromise, the value thereof, and upon approval thereof by the Court, it may be allowed and paid in the same manner as an absolute claim; or

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

(3) The court may order distribution of the estate as though such contingent claim did not exist, but the distributees shall be liable to the creditor to the extent of the estate received by them, if the contingent

claim thereafter becomes absolute; and the court may require such distributees to give bond for the performance of their liability to the contingent creditor; or

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

Section 8a. Compromise of claims. When a claim against the estate has been filed or suit is pending, the creditor and personal representative may, if it appears for the best interest of the estate, compromise the claim, whether due or not due, absolute or contingent, liquidated or unliquidated. In the absence of prior authorization or subsequent approval by the court, no compromise shall bind the estate.

Section 9. Claim of personal representative. If the personal representative is a creditor of the decedent, his claim shall be presented to the court within the time allowed by law for presentment of claims; but the allowance of such claim by such court does not conclude a creditor, heir, or other person interested in the estate in any action, suit, or proceeding between the personal representative and such creditor, heir or other person. If the court rejects the claim of the personal representative either in whole or in part, the personal representative shall retain the amount thereof until the final settlement of his accounts, when, if the same is controverted or objected to by any person interested in the estate, the right of the personal representative to have the allowance claimed shall be tried and determined by the court.

APPENDIX B

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

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

CLAIM OF PERSONAL REPRESENTATIVE

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

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

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

(2) Retain the amount of the claim until final settlement of his accounts when, if the same is objected to by any person interested in the estate, the right of the personal representative to have the allowance claimed shall be tried and determined by the court. If no objection is made to the allowance and payment of the claim, it may be paid forthwith upon settlement of the final account.

MEMORANDUM
April 25, 1966

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

From: Robert W. Lundy
Chief Deputy Legislative Counsel

Subject: Matters for consideration at May meeting.

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

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

LIST OF MATTERS FOR MAY MEETING

1. Claims against decedents' estates.

   a. Unmatured, unliquidated and contingent claims; secured and unsecured claims; encumbered property devised or bequeathed.

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

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

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

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

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

b. Claim of personal representative.

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

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

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

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

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

Section 2. Approved.

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

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

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

Sections 6 and 8. Motion carried that section

6 be revised to read: "Claims upon debts not due shall be presented to the personal representative as other claims. They shall be allowed in such sum as shall be equal to the value of the obligation at the date of decedent's death." Question raised whether there should be specific provision that payment satisfies debt.

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

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

General provision on compromise of claims suggested, such as section 147, Model Probate Code, which provides: "When a claim against the estate has been filed or suit thereon is pending, the creditor and personal representative may, if it appears for the best interests of the estate, compromise the claim, whether due or not due, absolute or contingent, liquidated or unliquidated. In the absence of prior authorization or subsequent approval by the court, no compromise shall bind the estate."

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

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

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

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

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

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

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

3. Establishing foreign wills and ancillary administration.

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

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

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

OUTLINE OF PROPOSED REVISED PROBATE CODE

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

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

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

ADVISORY COMMITTEE
Probate Law Revision

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

Dates) 1:30 p.m., Friday, June 17, 1966
and : and
Times) 9:00 a.m., Saturday, June 18, 1966
Place : Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of May meeting.

2. Reports on miscellaneous matters.

3. Claims against decedents' estates.

   a. Time and manner of filing claims; classification, allowance and payment of debts and charges.

      Review of previous action on sections 1 to 17, Gooding's rough draft, 4/1/66.

   b. Denial and contest of claims.

      Consideration of sections 18 to 32, Gooding's rough draft, 4/1/66.

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

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

5. Establishing foreign wills and ancillary administration.

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

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

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

7. Next Meeting.

ADVISORY COMMITTEE
Probate Law Revision

Twenty-sixth Meeting, June 17 and 18, 1966
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The twenty-sixth 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, June 17, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

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

The following members of the Bar committee were present: Bettis (arrived 4 p.m.), Gilley (arrived 2 p.m.), Braun (arrived 2 p.m.), Krause, Lovett, Richardson (arrived 2:10 p.m.), Thalhofer and Warden, Boivin, Copenhaver, Field, Hornecker, Luoma, Rhoten and Tassock were absent.

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

Minutes of May Meeting

There being no objection, Dickson ordered that reading of the minutes of the last meeting (May 20 and 21, 1966) be dispensed with and that they be approved as submitted.

Miscellaneous Matters

Materials received by Legislative Counsel. Lundy reported that his office had received tentative drafts from the special probate committees of the American Bar Association and National Conference of Commissioners on Uniform State Laws covering the following subjects: Intestate succession; simultaneous death; execution of wills; sale, mortgage and lease of property; independent administration; foreign representatives and ancillary administration; and guardianship and other protections for persons under disability and their property. He indicated he would make copies of these materials available to committee members as soon as these organizations reached more definite decisions concerning the subjects under consideration.

Convention of title companies. Dickson sketched the contents of his address to the convention of title company representatives at Salishan, Lincoln City, on June 10, 1966. He stated he had acquainted

those in attendance with the names of the members of the advisory and Bar committees and had outlined the work thus far accomplished. He was enthusiastic over the reception his speech had received and noted that there had been no adverse comments voiced with respect to any of the proposals made thus far by the committees.

Meeting with Legislative Counsel. Dickson reported that he had met with Sam R. Haley, Legislative Counsel, together with Zollinger, Allison, Husband and Lundy, immediately prior to today's meeting, at which time the following conclusions had been reached:

(1) The proposed revised probate code would not be ready for introduction at the 1967 session of the Oregon legislature, but the advisory committee would continue to employ its best efforts to complete the code as soon as possible, with a view to having it printed and widely circulated at least a year in advance of the 1969 session.

(2) After today's meeting, Lundy would devote his chief efforts to the drafting of proposed statutory provisions on which the committee had acted. Except as Lundy's time would permit, he would not be in attendance at future meetings.

(3) A lawyer employed by the Legislative Counsel would be made available to work under the direction of Lundy and Haley, and to attend committee meetings, edit minutes, prepare agenda and do other routine committee work heretofore accomplished by Lundy.

(4) Committee meetings would continue to be held on the third Saturday of each month and the preceding Friday afternoon, until completion of the code.

(5) It was tentatively concluded that no legislation would be presented to the 1967 legislative session and that the entire revised probate code would be offered in a single package to the 1969 session.

Publicity. Dickson noted that Lundy had prepared a news release outlining the contents of the speech Dickson had made to the convention of title companies on June 10, 1966. He indicated the local press had not been interested in printing the story, but the Oregon Voter had asked for a resume and some publicity might be forthcoming from that source. He returned the extra copies of the news release to Lundy and asked that he contact the editor of the Oregon State Bar Bulletin to investigate the possibility of an article appearing in that periodical for the purpose of keeping Oregon lawyers abreast of the decisions being made by the advisory committee.

Dinner invitation. Dickson extended an invitation to all committee members and their spouses, on behalf of the Portland members of the advisory and Bar committees, to be their guests at a dinner on Friday evening,

July 15, 1966, following the committee meeting.

Claims Against Decedents' Estates

Lundy distributed to members present copies of his report, dated June 16, 1966, entitled "Revised Rough Draft on Presentment, Allowance and Payment of Claims Against Decedents' Estates."

Payment of claims and expenses (section 12). Lundy explained that section 12 of his draft dated June 16, 1966, was the one section thereof that had not been approved by the committees at the May meeting. He asked if a funeral expense was considered to be a claim or an expense of administration and was told by Dickson that numerous court decisions had held it to be an expense of administration. Dickson added that funeral expense was also subject to modification by the court if it was considered to be improper in view of the assets of the estate. A claim, he explained, was defined as a fixed amount incurred by the deceased before death. Zollinger pointed out that court authority to modify funeral expense was contained in section 10 of Lundy's draft.

Allison called attention to the fact that the committees had decided that the four-month period would apply only to time of presentment of the claim, but the claim need not be allowed or established within that time period whereas subsection (1) of section 12 stated that claims "presented and allowed or established" within four months should be paid in the order specified in section 9. Lundy commented that this confusion existed in the present statutes. /Note: Compare wording of ORS 116.510, 117.030 and 117.110/

In order to assure the creditor's protection providing he filed his claim within the four-month period, Allison moved, seconded by Zollinger, that "and allowed or established" be deleted from subsection (1) of section 12. Motion carried. Lundy commented that the ultimate draft should clearly provide that no payment could be made until allowance or establishment of the claim.

Zollinger moved, seconded by Gooding, that the following amendment be made to subsection (2) of section 12:

"(2) If, after the expiration of four months . . . the estate is sufficient to satisfy in full all claims allowed or established, and /after payment of/ including expenses of administration, /and of/ funeral and burial of the decedent, . . . " Motion carried.

Funeral and burial expenses (section 10). Zollinger commented that frequently the surviving spouse desired to purchase space for entombment of two bodies and this, he suggested, could appropriately be considered an expense of administration, providing the estate was solvent. Zollinger suggested that the following wording be added to paragraph (b) of subsection

(1) of section 10 of Lundy's draft: "and if the spouse of the decedent survives him, a space for the burial of the spouse." Following a brief discussion, it was agreed that better wording would be "and a space for the burial of the spouse."

Zollinger next suggested that "of the decedent" be inserted after "burial" in the fourth line of subsection (2). Thalhofer proposed that the wording be "of the decedent only," to which Zollinger agreed. Lundy observed that this insertion would make a high priority administration expense of the purchase of a space for the spouse, except in the case of an insolvent estate. Zollinger moved that the amendments discussed above be incorporated in section 10, but later withdrew his motion to allow inclusion of material subsequently discussed.

Dickson indicated that the trade made a sharp distinction between burial expense, including charges for a cemetery lot or tomb, cremation, permanent upkeep, opening the grave and a concrete liner, and funeral expense, under which was included flowers, minister, music and embalming, with the marker considered as still another separate cost. Lundy commented that the draft being considered did not distinguish between funeral and burial expense in so far as order of payment was concurred, and, in fact, the existing statute (i.e., ORS 117.150) appeared to use the two terms interchangeably. He suggested that the definitions could be changed if the committees wished to make two definite classifications. Allison suggested the following definitions in an attempt to distinguish between the funeral and burial charges:

> "(a) 'Burial' means the disposition of the human remains of a decedent by cremation or entombment and the burial plot, including space for the burial of a spouse and a vault, monument, inurnment or marker.
>
> "(b) 'Funeral' means the funeral and other customary incidents to the disposition of the remains "

Lundy suggested use of the term "funeral and interment expenses" in lieu of an attempt to define "burial" and "funeral," and this suggestion received general approval.

Gooding moved, seconded by Thalhofer, that section 10 be referred to Lundy for revision, with the direction that he include the suggestions discussed above and also include provision for a resting place for the remains of the spouse of the deceased in cases where the estate was solvent. Motion carried.

Lundy asked for more explicit instructions concerning the definitions of "burial" and "funeral," and Zollinger expressed the view, with which Allison agreed, that it was not worthwhile to distinguish between the two and the distinction should be avoided if possible. Dickson remarked that "interment" was the better word. There was a brief discussion of the

meaning of "interment," and Gilley found that the dictionary definition of "interment" included "entombment."

Allison moved, seconded by Krause, that section 10 be amended by deletion of subsection (1) and that "burial" in subsection (2) be deleted and "disposition of the remains" substituted; that subsection (2) of section 12 be amended by deletion of "burial" and substitution of "disposition of the remains"; and, at Richardson's suggestion, that the latter amendment also be made in subsection (2) of section 9. Motion carried, with the understanding that it was not intended in any way to restrict Lundy in his drafting of the statute.

The committees then turned to consideration of Gooding's report, dated June 13, 1966, entitled "Revised Rough Draft on Denial and Contest of Claims Against Decedents' Estates," copies of which were distributed to all members of both committees prior to the meeting.

Presumption of allowance (section 18). Gooding questioned the accuracy of the title "Presumption of allowance" for section 18 of his draft dated June 13, 1966. He also questioned the need for "totally or partially," and suggested that "disallow" might be defined to incompass total or partial disallowance. He indicated that the basic question to be determined was whether or not the committees desired to sanction a partial disallowance. Allison expressed the view that if a claim was not allowed as presented, it should be disallowed, but Zollinger remarked, and Frohnmayer agreed, that he would be opposed to a statute which stated that the personal representative must deny all liability on a claim which was partially justified. After further discussion, Frohnmayer moved, seconded by Warden, that "as presented" be inserted after "allowed" in section 18. Motion carried.

Gooding inquired concerning the meaning of "date of presentment" in a circumstance where presentment was made by mail. The committees apparently agreed that the date of the postmark would constitute "date of presentment" in such a circumstance.

Disallowance by personal representative (section 19). Thalhofer suggested that "serve a copy," rather than "personally deliver or mail a copy" be used in section 19 of Gooding's draft, and Gooding agreed that this would be preferable. Allison suggested that the following wording be substituted for section 19:

> "If the claim is totally or partially disallowed, the personal representative shall, within 60 days of the date of presentment, file with the clerk his proof that the claim was presented."

Zollinger proposed that "60 days prior to the notice of disallowance" be added, rather than to require a filing with the clerk. He noted that the 60 days should run prior to the notice and suggested the following

wording:

> "If the claim be disallowed in whole or in part, the personal representative or his attorney shall give notice personally or by mail to the claimant not more than 60 days after the presentment of the claim and shall thereupon file with the clerk a copy of his disallowance."

Braun objected to the requirement of filing with the clerk in every instance, but other members pointed out the advantages of such a filing. The question of a requirement for proof of service was discussed and it was decided that, if necessary, the court could require proof of service in any appropriate manner without placing this requirement in the statute. Dickson's view was that the rules of pleading would cover the situation.

Zollinger moved, seconded by Thalhofer, that section 19 be amended in the manner he suggested (as set forth above). Motion carried.

Gooding called attention to the fact that the wording just approved did not require the filing of the claim, and Zollinger indicated that he had no objection to such a requirement. There being no objection, Dickson ordered that Lundy amend section 19 to state that the filing was to include the original claim as well as the notice of disallowance.

Butler noted that section 19, as amended, provided that failure of the personal representative to act upon a claim within a given length of time created an act of acceptance of the amount specified in the claim, which was a complete reversal of present law. He expressed disapproval of reversal of this long established practice. Allison pointed out that the general question had been previously discussed by the committees and that members had informally agreed to put the burden on the personal representative to give notice of disallowance of a claim. After further discussion, Butler moved that the present law remain unchanged; i.e., failure of the personal representative to act within a given period of time constituted disallowance or rejection. Motion failed for lack of a second.

Contents of notice of disallowance (section 20). Lundy remarked that if section 18 of Gooding's draft were to state that a claim could be either totally or partially disallowed, "disallowance" and "disallowed" in sections 19, 20 and subsequent sections would incompass total and partial disallowance. Zollinger recommended insertion of "except as allowed" before "will be forever barred" in section 20. Butler preferred to say "except to the extent allowed." Lundy pointed out that there were a number of exceptions to "forever barred," and Frohnmayer suggested deletion of "forever."

Zollinger noted that section 20 did not appear to contemplate an independent action against a personal representative, and asked if the 20-day limitation was intended to apply to the bringing of such an action. There was a discussion concerning the desirability of giving the claimant

the right of either having the claim determined in a summary manner by the probate judge or filing a separate action and having it tried by a jury. Dickson was of the opinion that the claimant should have an opportunity to be heard by the probate or circuit court, with an appeal to the Supreme Court, and to that end, he said, all probate jurisdiction should be in the circuit court.

This assertion introduced a discussion of the advisability of presenting a bill to the 1967 legislature which would transfer all probate jurisdiction to the circuit court. It was the concensus of the committees that it would be wiser to include this transfer as a part of the finished revised probate code and to draft the statute on the basis that all probate jurisdiction would be in the circuit court.

Frohnmayer expressed the view that the probate court also should have the right to pass on title to real property, so that when this question was involved it would not be necessary to bring a separate suit in the circuit court, and other members agreed.

Zollinger observed that the personal representative would necessarily have some good reasons for denying liability on a claim, which reasons might not be set forth fully in his disallowance. The personal representative might not be content to rest on the information set forth in the disallowance, and Zollinger believed the personal representative should be allowed to amend his pleadings to make them adequate for presentation in a jury trial. Dickson contended, and Frohnmayer agreed, that the personal representative should not be permitted to vary the terms of the original disallowance. Gilley pointed out that section 23 of Gooding's draft would allow the personal representative to move for more particulars or otherwise amend his pleadings.

There was a further discussion concerning a summary hearing versus a jury trial on disallowed claims, and it was generally agreed that the proposed statute should provide that if both parties agreed to a summary hearing, the determination of the court in that hearing would be final and no appeal could be taken from such determination order of the court. If one or both parties objected to the summary procedure prior to the hearing, a complaint could be filed and the matter tried by a jury, with a right of appeal to the Supreme Court. Zollinger noted that the present guardianship statutes contained a similar provision /Note: See ORS 126.331/.

Claims barred after 20 days (section 21). Allison suggested that the following wording be substituted for section 21 of Gooding's draft:

> "Section 21. Unless the claimant shall within 20 days after the date of delivery or mailing such notice of disallowance, either file a request with the clerk for a summary hearing by the probate court or file a complaint with a request for jury trial in the circuit court, and personally deliver or mail a copy thereof to the personal representative or his attorney, the claim shall be deemed disallowed, except to the extent

allowed by the notice, and shall be barred as to the portion disallowed."

Zollinger remarked that a request for a jury trial need not accompany the complaint, and Allison agreed to deletion of "with a request for jury trial."

Request for hearing by claimant (section 22). Frohnmayer suggested that section 22 of Gooding's draft be combined with section 21, and other members agreed. Allison proposed to reverse the order of wording of section 22 by first requiring that either the request for a summary hearing or a complaint be filed and unless this was done, the claim would be barred in whole or in part.

Contest by others (section 24). Braun noted that section 24 of Gooding's draft was intended to give anyone an opportunity to object to a claim at any time prior to the filing of the final account. Zollinger expressed disapproval of section 24 and advocated its deletion. Warden agreed and pointed out that if an heir believed the personal representative was not properly protecting the estate, he could petition for removal of the personal representative. Zollinger noted that the requirement of a corporate surety bond for a personal representative would provide considerable protection and relief in situations such as those envisioned by section 24.

Dickson indicated that the Supreme Court had ruled that the personal representative might waive the requirement on quantum of proof. If an heir had interposed an objection to a claim, he said, the heir could require the personal representative to make the necessary objection or the heir could make it himself. Dickson referred sections 21 through 24 to Gooding and Frohnmayer for revision along the lines suggested by the committees.

Quantum of proof (section 25). Husband asked if section 25 of Gooding's draft should contain wording to make it clear that it referred to a claim disallowed in whole or in part, and Frohnmayer suggested that the definition section state that a disallowed claim was one allowed in whole or in part so that the revised code could thereafter refer only to a "disallowed claim." Lundy commented that if "disallowed" was used only in the sections on claims, it might be preferable to place the definition at the beginning of the claim sections rather than at the beginning of the revised code.

Krause inquired if it would be desirable to strengthen the corroborative evidence requirement in section 25 in view of the Supreme Court decision referred to by Dickson during the discussion of section 24. Dickson expressed satisfaction with the present law and the manner in which it had been interpreted by the court. Gooding moved, seconded by Krause, that section 25 be approved. Motion carried.

Pleading statute of limitations (section 26). Zollinger commented that the person benefited by the statute of limitations should make the waiver thereof, and by the terms of section 26 of Gooding's draft the personal representative would make the waiver. Butler observed that if the personal representative were to be placed in a position where he could waive the applicable statute of limitations with respect to a claim, such waiver should not be discretionary.

Krause moved, seconded by Thalhofer, that ORS 116.555 be substituted for sections 25 and 26. Dickson proposed that the last sentence of ORS 116.555 be a separate section. Krause withdrew his motion and moved, seconded by Warden, that section 26 be deleted and the following be inserted in lieu thereof: "No claim which is barred by the statute of limitations shall be allowed by any personal representative or court."

Zollinger suggested that Krause's motion be amended by adding "without the prior written consent of the persons to whom distribution would otherwise be made." Richardson proposed "without the written consent of those whose interest are adversely affected by the allowance of the claim," and Zollinger concurred with this wording. Butler asked Zollinger if his suggestion implied that the personal representative had any discretion and was told that no such discretion was implied. Butler then suggested that the amendment state "without the direction," rather than "without the consent." Gilley suggested "without the consent of distributees or creditors whose interests would be adversely affected."

After further discussion, Zollinger moved, seconded by Braun, that Krause's motion be amended by adding "except with the written direction of the distributees and creditors adversely affected by the allowance of the claim." Motion to amend carried. Main motion carried.

When claim not affected by statute of limitation (section 27). Allison suggested that a period be placed after "death" in section 27 of Gooding's draft and the section be terminated at that point. Zollinger proposed that reference be made to subsection (3) of section 1 of Lundy's draft dated June 16, 1966, and suggested the following wording:

> "No claim presented within the time limit of subsection (3) of section 1 shall be barred by the statute of limitation which was not barred at the time of the decedent's death."

Dickson contended that present law adequately covered this situation and read to the committees ORS 12.190, 12.210 and 12.220. He asked that consideration of section 27 be postponed until the following morning to give him an opportunity to research the subject. There being no objection, it was so ordered.

Claims barred when no administration commenced (section 28). Inasmuch as section 28 of Gooding's draft dealt with the same general subject as

section 27, Dickson asked that discussion of section 28 also be postponed until Saturday morning.

Liens not affected by failure to present claims (section 29). Zollinger suggested use in section 29 of Gooding's draft of the broader term "security interest" in place of "pledge," and the committees concurred. Lundy inquired if "security interest" should be included in the definition section and was told by Zollinger that the Uniform Commercial Code amply defined "security interest." Gilley proposed that the wording be "other encumbrance." Zollinger concurred and moved, seconded by Gilley, that "mortgage, pledge or other lien" be deleted and "encumbrance" substituted in section 29. Motion carried.

Richardson noted that the title, "Liens not affected by failure to present claims," was not included in the body of section 29 and indicated that the section should set forth the consequenses of failure to present a claim or failure to have it allowed within the applicable statute of limitation. Zollinger pointed out that nothing in "this Act" (i.e., the revised code) precluded enforcement of liens, but Richardson contended that this point was not entirely clear.

Gooding moved, and it was seconded, that section 29 be approved as amended. Motion carried.

Proof of judgment (section 30). Frohnmayer expressed the opinion that section 30 of Gooding's draft (i.e., ORS 116.570) was too broad in that it permitted execution against personalty, and suggested that the section state: "This section does not affect the lien and the judgment as to any real estate owned by the decedent." Dickson proposed "This section does not obliterate the lien, if any, of the judgment," and Frohnmayer agreed. Gooding observed that there would be no real or personal property subject to levy after the decedent's death because both would pass to the heirs.

After further discussion, it was determined that the necessary provisions for proof of judgment were contained in other sections. Gooding moved, seconded by Zollinger, that section 30 be deleted. Motion carried.

The meeting was recessed at 5:15 p.m.

The meeting was reconvened at 9 a.m., Saturday, June 18, 1966, in Chairman Dickson's courtroom 244 Multnomah County Courthouse, Portland.

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

The following members of the Bar committee were present: Bettis,

Gilley, Braun, Thalhofer and Warden.

Also present was Lundy.

Claims Against Decedents' Estates (continued)

When claim not affected by statute of limitation (section 27). Dickson reported on his research with respect to the statute of limitation and outlined the provisions of ORS 121.080, 121.090, 12.190, 12.210 and 13.080. He cited and explained the effects of the following cases: Clostermann v. Reynolds, (1963) 237 Or. 114; Chalaby v. Driskell, (1964) 237 Or. 245; In re McKinney's Estate, (1944) 175 Or. 1. Dickson suggested that section 27 of Gooding's draft be amended by referring to the applicable statute of limitation and reiterating the existing statute of nonclaim, and added that he did not deem it either desirable or necessary to adopt a special statute of limitation for probate matters. In view of Clostermann v. Reynolds, he noted that rejected claims were in the same category as actions and the statute of limitation did not apply.

Frohnmayer pointed out that one purpose of the revised probate code was to be expedite the closing of estates and the statutes to which Dickson referred allowed an unnecessarily long time lapse. He suggested the committees study those statutes with a view to cutting down the time limit and accelerating the closure of estates. He also proposed that the germane statutes be collected in one place in the revised code, and Dickson agreed that the statute of nonclaim and reference to the statute of limitation should be in juxtaposition in the code.

Nonabatement of action are sent by death, disability or transfer; continuing proceedings (ORS 13.080). Lundy pointed out that subsection (3) of section 1 of his draft dated June 16, 1966, was the nonclaim statute. Frohnmayer asked that the committees discuss the situation where an action was pending against the decedent at the time of his death, with specific reference to ORS 13.080, and suggested that the claimant be required to present his claim within four months. Zollinger proposed to follow the pattern of section 2, Lundy's draft, and to provide that the action should be effective within four months of the first publication of notice. After further discussion, Allison moved, seconded by Frohnmayer, that section 2 of Lundy's draft and ORS 13.080 be amended to provide that the action must be continued within four months from the publication of the first notice to creditors, but not more than one year following the death of the deceased. Gilley commented that approval of this motion would require a substitution of the personal representative. Motion carried.

Suspension by death; revival; maximum limitation on claim against decedent's estate (ORS 12.190). The committees next discussed ORS 12.190. Frohnmayer noted that ORS 12.190 referred to an action that was in existence but not filed during the lifetime of the decedent, and suggested that the claimant in this instance was in the same category as all other claimants.

Zollinger remarked that ORS chapter 12 (Limitations of Actions and Suits) should contain a statement conforming it to the probate code. He explained that the creditor whose claim had not been barred at the time the decedent died could present his claim within the period for any other claim against the estate, which was at least four months and could be as long as one year, and the committees agreed that creditor claims should be barred by limitation one year from decedent's death even though there were no probate. Zollinger suggested the following wording:

> "No claim shall be barred by the statute of limitation which was not barred at the time of the decedent's death until one year thereafter."

Zollinger expressed the view that the statute should contain a provision that the creditor would bear some responsibility to obtain an administration of the decedent's estate.

Frohnmayer inquired if an action could be filed a year after decedent's death on a claim on which no action was filed prior to death and was told by Dickson that under Chalaby v. Driskell the action could not be filed because the decision held that the claim was barred when the final account was filed, notwithstanding the fact that the statute of limitation had not run. Frohnmay commented that this point should be clarified in the statute.

Zollinger suggested that section 27 of Gooding's draft be amended by inserting, at the beginning of the section, "until one year after the death of the decedent"; by inserting a period after "at the time of the decedent's death"; and by deleting the balance of the section. Carson suggested the section begin "until the expiration of one year." Jaureguy commented that the suggested wording inferred that the claim would be barred in one year, whereas the claimant could have four years under the statute of limitation. After further discussion, Carson moved, seconded by Zollinger, that the following wording be substituted for section 27:

> "No claim shall be barred by the statute of limitation within one year immediately following the date of the death of the decedent which was not barred at the time of the decedent's death." Motion carried.

Zollinger indicated that ORS 12.190 could be conformed to amended section 27 by deleting the second sentence of ORS 12.190 and substituting a reference to section 27.

Claims barred when no administration commenced (section 28). Gilley referred to section 28 of Gooding's draft, asked if it was necessary to retain "whether testate or intestate, original or ancillary." Gooding read the comment following section 413, 1963 Iowa Probate Code, outlining the purpose for retention of that wording.

Zollinger questioned the need for section 28, inasmuch as Oregon adopts the statute of limitation of other states in ancillary administrations.

/Note: See ORS 12.260/ Carson noted that the title companies in Oregon are the major users of this statute, and Thalhofer agreed, adding that the period in section 28 should be extended to six years to conform to the statute of limitation.

Lundy asked if the appointment of the personal representative constituted the point of commencement, and Zollinger replied that the appointment and qualification of the personal representative would be appropriate as the point of commencement.

Frohnmayer moved, seconded by Thalhofer, that Lundy harmonize the content of section 28 with ORS 12.190 by rephrasing the second sentence of ORS 12.190 and substituting that sentence for section 28. Motion carried.

Time within which actions against representative may be commenced (ORS 121.080); action against representative not to be commenced until claim is presented and rejected; liability on claim presented after six months from appointment of representative (ORS 121.090); and provisional remedies against executors or admistrators (ORS 121.100). After a brief discussion, Gooding moved, seconded by Frohnmayer, that ORS 121.080, 121.090 and 121.100 be repealed. Motion carried.

Reference of claims (section 31). Gooding noted that inasmuch as the probate court would have equitable powers under the revised probate code, there was no longer a need for section 31 of his draft (i.e., ORS 116.575). He moved, seconded by Frohnmayer, that ORS 116.575 be repealed. Motion carried.

Exemption of homestead devised or not devised (section 32). Dickson indicated that section 32 of Gooding's draft would be considered later when the subject of homestead comes under discussion.

Request for hearing or filing separate action (section 21). Section 21 of Gooding's draft had been considered by the committees the previous day, and Frohnmayer explained that he had rewritten the section and had reviewed in connection therewith sections 415 and 443, 1963 Iowa Probate Code. A claim need not be filed against the estate in Iowa, he explained, but a separate action might be commenced in lieu of filing a claim. Frohnmayer considered this to be an undesirable procedure and had rewritten section 21 to require that all claims must be filed, and if there was a rejection, either wholly or in part, the claimant had the alternative of filing with the clerk a request for a summary hearing or filing a separate suit or action against the personal representative. He proposed the following wording:

> "Section 21. Request for hearing or filing separate action. (1) If the claim has been disallowed in whole or in part, the claimant shall within 20 days after the date of delivery or mailing of the notice of disallowance to him either:
>
> "(a) File with the clerk a request for a summary hearing with proof of service of a copy of the request upon the personal

representative or his attorney, or

"(b) File a separate action against the personal representative, in lieu of requesting the summary hearing. Such action must be filed in the county where the probate proceedings are pending and shall proceed and be tried as any other action at law.

"(2) If the claimant shall fail to request a summary hearing or file a separate action, the claim shall be deemed disallowed and barred, except to the extent the personal representative may have partially allowed the claim."

Zollinger asked Frohnmayer if he had prepared another section dealing with the content of the separate action and received a negative reply. Zollinger suggested a provision requiring that the separate action be brought in the circuit court of the county in which the probate proceeding was pending and that the action be heard by the probate judge. Gilley expressed approval of keeping all proceedings in the probate court because of the advantage of having a complete record of contested claims in the probate file. Gooding pointed out that there could conceivably be many defendants or many plaintiffs, and Frohnmayer remarked that the majority of such cases would be personal injury cases which need not be tried in the probate department of the circuit court. Gilley proposed to omit questions of venue by eliminating reference to where the suit or action must be filed, and it was apparently agreed that the statute should not limit the suit or action to any particular court.

Gilley commented that equity could be involved in these cases, and it was agreed to change Frohnmayer's proposed wording to "suit or action," rather than "action at law". The second sentence of paragraph (b) of subsection (1) would then read: "Such suit or action shall proceed and be tried as any other suit or action."

Zollinger commented that 20 days might not be enough time for the claimant to make his decision, and suggested 60 days. The committees apparently agreed and the time period was so amended. Warden remarked that there was no minimum limitation set on the amount of the claim and the probate judge could be required to spend a great deal of time on small claims.

Request for hearing by claimant (section 22). Section 22 of Gooding's draft, as rewritten by Frohnmayer, was read to the committees as follows:

"Section 22. Right for plenary action by personal representative. If the claimant shall elect to request a summary hearing upon his claim, nevertheless the personal representative shall have the right within 20 days of the filing of the request to demand that the claimant shall file a separate action upon his claim in the manner provided in paragraph (b) of subsection (1) of section 21. The failure of the claimant to file a separate action within 20 days after the personal representative has made such demand and served notice of such demand upon him shall result

in the disallowance and barring of the claim, except to the extent the personal representative may have partially allowed the claim."

Frohnmayer commented that another way of handling this situation would be to put the burden to file on the personal representative if he wanted a plenary action.

The 20-day limitation in rewritten section 22 was discussed, and Frohnmayer suggested that it be extended to 30 days with the same change in section 21. Zollinger pointed out that the comparable guardianship statute (i.e., ORS 126.331) provides for a period of 30 days, whereas the committees had decided on 60 days in rewritten section 21, and suggested that the probate and guardianship statutes should be made uniform. Lundy commented that it might be advisable to amend the guardianship statute to conform to the 60-day period. No definite decision was reached on this matter.

Summary hearing (section 23). Frohnmayer commented that he had rewritten section 23 of Gooding's draft, after studying ORS 126.331 and sections 444 and 447, 1963 Iowa Probate Code as follows:

"Section 23. Summary hearing. (1) If there shall be a summary hearing upon the claim, the personal representative shall move or plead to such claim in the same manner as though the claim were a complaint filed in an ordinary action or suit.

"(2) The trial of the claim and the offsets or counterclaims, if any, shall be to the court without a jury. However, the court may, in its discretion, either on its own motion or upon the motion of any party, submit the cause to a jury; provided, however, that if the amount of the claim or counterclaim exceeds the sum of $300, either party shall be entitled to a jury if written demand is made within 10 days after the cause is at issue.

"(3) There shall be no appeal from the judgment of the court or verdict of the jury."

Frohnmayer explained that by the terms of rewritten section 23 if both parties elected a summary hearing, it would be final. He had concluded that if both parties were satisfied to have it tried in a summary manner and both the claimant and the personal representative were given clear cut rights, the jury trial should not be had. His contention was that inasmuch as the summary hearing was a matter of election, there was no issue of constitutionality involved in cutting off the right of appeal. Zollinger pointed out that this followed the provisions of the guardianship statue (i.e., ORS 126.331).

After further discussion, Frohnmayer moved, seconded by Gilley, that rewritten sections 21, 22 and 23 be approved with the amendments discussed above and to provide that the summary proceeding not include a jury trial and that the court determination should be final. Motion carried.

Next Meeting of Committees

The next joint meeting of the committees was scheduled for Friday, July 15, 1966, at 1:30 p.m., and the following Saturday, July 16, in Dickson's courtroom, 244 Multnomah County Courthouse, Portland. It was agreed that the agenda items for the July meeting should be discussed in the following sequence:

(1) Butler presentation on powers and duties of executors and administrators generally; discovery of assets; inventory and appraisal.

(2) Claims against decedents' estates.

(a) Consideration of sections 21, 22 and 23 of Gooding's draft, as rewritten by Frohnmayer and amended by committee action.

(b) Consideration of revised provisions on statute of limitations.

(3) Presentation by Jaureguy concerning actions and suits affecting decedents' estates and administration (ORS chapter 121).

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

(5) Establishing foreign wills and ancillary administration.

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

Butler distributed to menbers present copies of his report on ORS 116.105 to 116.465, relating to powers and duties of executors and administrators generally, discovery of assets and inventory and appraisal.

/Note: A copy of Butler's report constitutes the Appendix to these minutes./

Possession and control of property (ORS 116.105). Butler commented that sections 350 to 355, 1963 Iowa Probate Code dealt with the subject of title and possession of decedent's property. He was of the opinion that the present Oregon statute (i.e., ORS 116.105) had posed no problems from an administrative standpoint and recommended no change in substance.

Dickson posed the situation of a widow entitled to life tenancy of a home and claiming that the heirs should bear the expense of repairing the property to make it habitable for her. He commented that he was inclined to the view that the life tenant should take the property as it was at the date of decedent's death and should then be required to preserve it and keep it from decay.

Zollinger remarked that the statute should distinguish between the right to possession and the duty to take possession. Husband commented that the

personal representative should be entitled to the rents of the real property during the course of administration as provided in the present law. Zollinger contended that if the person to whom real property was devised was entitled to receive the rents and profits collected by the personal representative during administration from the date of death, the personal representative should not be charged with the duty of collecting rents and profits or protecting the property against loss or damage unless it appeared that there was a potential need for that money to pay creditors' claims. Frohnmayer expressed agreement, adding that the only time the personal representative should be saddled with this burden was when the money was needed to pay the debts of the estate. In the case of devised property, Frohnmayer pointed out that the personal representative was not entitled to the income of the property because it belonged to the devisees.

Butler pointed out that one of the requirements where the marital share was in trust was that the income was payable to the wife for her lifetime in annual or more frequent installments. If the statute were to require that the income would be available to the personal representative for payment of expenses, serious problems could be created as to ability to qualify for a marital deduction.

Zollinger suggested the following addition to ORS 116.105:

"The personal representative is entitled to the control of the property . . . by order of the court or judge thereof. Until the representative shall take possession and exercise control, the owner of any property of the estate may retain or take possession and exercise control; but where any such property . . ."

Frohnmayer read section 350, 1963 Iowa Probate Code to the committees, which provided that property would go to the heirs, devisees or legatees, subject to being returned to the estate if needed to pay the debts. He suggested that this section 350 be incorporated in ORS 116.105, to be followed by a statement setting forth precisely who was entitled to collect the income from the property. Gooding remarked that all cash in the estate should be used to pay the debts before the sale of any assets.

Frohnmayer pointed out that Richardson had done a great deal of research on this subject and suggested postponement of further consideration of ORS 116.105 in order to obtain the benefit of his remarks. There being no objection, Dickson so ordered. Butler agreed to contact some of the banks to elicit their opinions on this subject. Following the noon recess, Zollinger suggested that sections 349 to 355, 1963 Iowa Probate Code be taken into consideration by Butler in preparing any amendments to ORS 116.105.

The meeting was recessed at 12:30 p.m.

The meeting was reconvened at 1:30 p.m. In Dickson's absence, Zollinger presided, with the following members of the advisory committee also present: Allison (arrived 2:30 p.m.), Butler, Carson, Frohnmayer, Gooding, Husband (arrived 2:10 p.m.), Jaureguy and Lisbakken.

The following members of the Bar committee were present: Bettis, Gilley, Braun, Thalhofer and Warden.

Also present was Lundy.

Powers and Duties of Executors and Administrators Generally (continued)

Performance of contract to convey (ORS 116.110). Butler explained that sections 95, 96 and 97, 1963 Iowa Probate Code, dealt with the subject of contracts to convey property, and he outlined the provisions of these Iowa statutes. Zollinger inquired if an order of court under ORS 116.110 served a useful purpose, and Bettis replied that it was useful to satisfy title companies, if for no other purpose. Bettis suggested that "any enforceable contract" be substituted for "bond for a deed or other enforceable contract."

Gilley advocated deletion of subsection (2) of ORS 116.110, which would remove the requirement for a court order. In cases where doubt existed, he said, it would be possible to petition the court and obtain an order. Zollinger agreed that if the deed contained a recital of the contract, it would be sufficient. Carson expressed the opposite view, pointing out that a court order was better for the recorded title of the property and maintaining that the record should contain a full showing of the existence of a contract. Jaureguy concurred that there should be a filing of a report with the court.

Gilley moved, seconded by Frohnmayer, that subsection (2) of ORS 116.110 be deleted. Motion failed, the advisary committee voting 3 yes and 4 no, and the Bar committee voting 3 yes and 2 no.

Lundy inquired if ORS 116.110 should have any application to contracts of sale of personal property and pointed out that the comparable provision of the guardianship statutes (i.e., ORS 126.285) applied to both real and personal property. This point was discussed and it was generally agreed that ORS 116.110 should be amended to apply to both real and personal property.

Bettis moved, seconded by Thalhofer, that subsection (1) of ORS 116.110 be amended to read as follows:

> "If any deceased person was at the time of his death a party to /a bond for a deed or other / an enforceable contract requiring him to convey real /estate/ and personal property, the interest and title of the deceased may be conveyed by his / executor or administrator / personal representative upon full compliance with the terms and conditions of such / bond or / contract by the other party thereto, and a deed or bill of sale so made transfers the same title as though made by the deceased / if / while living." No vote was taken on the motion and it was agreed that further discussion would be deferred pending Allison's return to the meeting.

Upon Allison's return following discussion of ORS 116.130, Zollinger recounted the problems discussed in connection with the requirement of a court order in subsection (2) of ORS 116.110. Allison expressed the view that title companies in all probability would require the personal representative to obtain a court order in all cases involving real property whether or not the statute contained this requirement. He expressed the view that title companies were entitled to know there was a binding and enforceable contract in existence prior to the death of the decedent.

The advisability of a court order requiring the personal representative to execute a transfer instrument in cases involving personal property was discussed, and it was the concensus of the committees that ORS 116.110 should be amended to apply to both real and personal property, and in both cases an order of court should be required as a condition to the instrument of transfer.

Authority of executor when will includes gift of body for scientific and medical purposes; nonliability for actions (ORS 116.115). Butler indicated that he had originally recommended no changes in ORS 116.115, but it had later occurred to him that it had become fairly common practice for people to arrange in advance of death to have their eyes delivered to an eye bank. This donation is usually accomplished by means of a form provided by the eye bank, rather than by a provision in the will, he said, and ORS 116.115 would not cover the situation where a family member objected to the gift of the decedent's eyes.

Frohnmayer read ORS 97.132 to the committees and, after a discussion, Butler indicated that he would revert to his original recommendation that no change be made in ORS 116.115 inasmuch as his apprehension concerning the difficulty with eye donations was taken care of by ORS 97.132. He moved, and it was seconded, that no change be made in the substance of ORS 116.115. Motion carried.

Right to file notice of and perfect lien (ORS 116.120). Butler suggested the substitution of "personal representative" for "executor, administrator or legal representative" in ORS 116.120. There was a brief discussion concerning extension of the time period for a personal representative to perfect a lien, but it was decided that no extension was necessary in view of other applicable provisions of law.

Butler moved, and it was seconded, that ORS 116.120 be retained without material change. Motion carried.

Power to borrow money (ORS 116.125). Butler explained that under ORS 116.125 the personal representative could borrow money with proper authority without the necessity of pledging or mortgaging specific property. He

recommended no change in ORS 116.125, but said he had no objection to the following revised wording which had been prepared by Zollinger:

> "A personal representative may borrow money, when authorized by the will of the decedent or by order of court, for the purpose of paying debts, taxes or expenses of administration or for payment of legacies or for distribution. Any debts incurred by the personal representative for borrowed money shall be evidenced by his promissory note signed in his representative capacity. The note may be secured pursuant to ORS _____. No distribution of assets of the estate shall be made without the consent of the holder of the note while it is outstanding."

Zollinger was of the opinion that it was appropriate to permit an executor to borrow money by authority of the will or by order of the court. He remarked that the proposed wording would simplify the elaborate, awkward and inadequate procedure required under present law and would be harmful to no one. Husband inquired if the proposal envisioned payment of a mortgage on a homestead and was told by Frohnmayer that the personal representative had no authority to make such a payment.

In reply to a comment by Frohnmayer, Zollinger indicated that if the homestead exemption provisions were to be rewritten in a manner that would permit payment of money to the surviving spouse in substitution of residential property, he had no objection to stating this policy in the statute, but he pointed out that this question had not yet been decided. Frohnmayer suggested that ", homestead, exempt property rights, dower or curtesy," be inserted after "payment of legacies" in Zollinger's proposed wording, and the committees concurred.

Butler moved, seconded by Gooding, that Zollinger's proposed wording as amended, be substituted for ORS 116.125. Motion carried.

Executor or administrator may compound for debts due estate (ORS 116.130). Frohnmayer moved, seconded by Butler, that ORS 116.130 be approved in substance, with suitable modernization of the wording. Motion carried.

Frohnmayer proposed that the substance of section 114, 1963 Iowa Probate Code, which was derived from section 126, Model Probate Code, be incorporated substantially in ORS 116.130. The committees concurred with this proposal.

Medium of compromise of secured debts; bonds of federal corporations (ORS 116.135). Butler suggested elimination of ORS 116.135 for the reasons set forth in his report. Butler moved, seconded by Carson, that ORS 116.135 be repealed. Motion carried.

Right to redeem mortgaged property (ORS 116.140). Lundy commented that Riddlesbarger's draft on wills, considered at the November and December 1965 meetings, included a proposal (i.e., section 13) substantially similar to Bill No. 7, which had been submitted to the Law Improvement Committee during the 1965 legislative session but was not introduced, and which had embodied provisions on exoneration that appeared to replace ORS 116.140. [Note: See Minutes, Probate Advisory Committee, 11/19,20/65, pages 7 and 8, and Appendix A, Minutes, Probate Advisory Committee, 12/17, 18/65.] Lundy also called attention to the draft dated April 8, 1965, which had been distributed to committee members. Zollinger recalled the difficulties encountered by the committees in their discussion of the secured claims issue. [Note: See Minutes, Probate Advisory Committee, 4/15,16/66, pages 31 to 33, and Minutes, Probate Advisory Committee, 5/20,21/66, pages 3 to 9.] Zollinger stated that he could see no objection to the retention of the substance of ORS 116.140. Braun suggested deletion of "out of the proceeds of the other personal property" in order that ORS 116.140 not be limited as to the source of the moneys for redemption purposes, and other members agreed.

Butler moved, seconded by Frohnmayer, that the substance of ORS 116.140 be preserved. Braun moved, seconded by Frohnmayer, to amend the motion by deleting "out of the proceeds of the other personal property" from ORS 116.140. Motion to amend carried, Main motion carried.

Order for sale where redemption deemed improper (ORS 116.145). Butler referred to his comments on ORS 116.145 as set forth in his report. Zollinger indicated that he saw no need for the section because provision for sale had already been made and if the property was encumbered, it could be sold only subject to the conditions of the mortgage. After further discussion, Butler moved, seconded by Braun, that ORS 116.145 be repealed. Motion carried.

Citation to mortgagee or payee; application of proceeds of sale (ORS 116.150). Zollinger commented that ORS 116.150 extended the procedure in ORS 116.145. Butler moved, seconded by Thalhofer, that ORS 116.150 be repealed. Motion carried.

Inapplicability of sections to certain mortgages and liens (ORS 116.155). Zollinger commented that since ORS 116.140 did not provide for redemption in the circumstances described in ORS 116.155, he could see no purpose in preserving ORS 116.155. Frohnmayer moved, seconded by Butler, that ORS 116.155 be repealed. Motion carried.

Satisfaction of debt not due (ORS 116.160). Zollinger pointed out that ORS 116.160 permitted the executor to require that the creditor accept in satisfaction the present value of the secured obligation. This point, he commented, was extensively debated at the May 1966 meeting and it was decided the secured creditor would not be deprived of the right to wait for

his money. /Note: See Minutes, Probate Advisory Committee, 5/20,21/66, pages 3 to 9./ Gooding moved, seconded by Butler, that ORS 116.160 be repealed. Motion carried.

Power to redeem property sold at foreclosure or execution sale (ORS 116.165). Zollinger expressed the view that right of redemption should terminate at the same time the decedent's redemption right would have terminated had he lived. He suggested that ORS 116.165 be modified to provide that the personal representative could redeem property from foreclosure within that time and wherever a right of redemption existed prior to decedent's death. Butler noted that extending this power of redemption to a personal representative was tantamount to giving him a power of investment, and expressed doubt that this was a proper function of a personal representative.

Allison noted that a situation could exist where valuable property would be sold on execution to satisfy a minor debt, and suggested that the statute be broadened to allow a general redemption under court order by using wording similar to that in ORS 116.140. Further discussion led to the decision to consolidate the two sections.

Butler moved, seconded by Allison, that ORS 116.140 and 116.165 be consolidated substantially upon the terms of ORS 116.140. Motion carried.

Authority of executor or administrator to continue a business (ORS 116.170). Butler noted that Iowa's provision comparable to ORS 116.170 was section 83, 1963 Iowa Probate Code. Lundy remarked that the Iowa section was derived from section 131, Model Probate Code, and that when the revised Oregon guardianship statutes were adopted in 1961, a similar statute was incorporated therein (i.e., ORS 126.255). Frohnmayer and Butler concurred that the Iowa statute was better than Oregon's, which was too restrictive. Braun asked if the Iowa statute envisioned a situation where a personal representative was given additional powers under the will and could thereby continue operation of the decedent's business. Carson and Butler expressed doubt that the statute could be so construed, and Zollinger suggested that it provide that when the will so authorized or upon order of the court, the personal representative would be given authority to perform certain acts.

Carson pointed out that the Uniform Partnership Law (i.e., ORS chapter 68) puts the burden of conducting a business on the surviving partner and only in the case of the last surviving partner does the personal representative have the authority to liquidate. In reply to a question by Frohnmayer, Carson advised that reference to partnership situations be omitted from the statute, unless the committees wished to make conforming amendments to the Uniform Partnership Law.

Butler suggested the substance of section 83, 1963 Iowa Probate Code, with modifications, be approved in lieu of ORS 116.170.

Carson called attention to the fact that the Iowa statute was silent concerning bond requirements, and urged that an additional bond for the personal representative be required in instances where he was required to conduct a business for the decedent. Allison shared Carson's opinion and added that the surety upon the bond of the personal representative should not be liable for obligations arising as a result of his continuing the business in which the decedent was engaged. He recommended retention of the wording of ORS 116.170, obliging the court to require the personal representative to file such additional bond as the court should direct and approve. Jaureguy suggested that the original bond protect against the personal representative's liabilities, and that if that bond was not sufficient, the court could order an additional bond. Frohnmayer expressed approval of this procedure and objected to separating the responsibility of the bonding company into one area covering the administration of the estate and another area covering the operation of the decedent's business. He suggested the statute requiring bond be broadened to cover operation of a business conducted pursuant to court authority, with provision for additional bond in the discretion of the court. Allison stated that he had some doubt whether the original bonding company could be held liabile for a defalcation incurred through operation of a business, but Frohnmayer did not agree with this premise.

The meeting was adjourned at 4 p.m.

APPENDIX

(Minutes, Probate Advisory Committee Meeting, June 17 & 18, 1966)

COMMENTS AND SUGGESTIONS WITH RESPECT
TO ORS 116.105 TO ORS 116.465 INCLUSIVE

Submitted to Advisory Committee on
Probate Law Revision
by
Herbert E. Butler

* * * * * *

116.105 No change suggested.

116.110 No change suggested.

116.115 No change suggested.

116.120 No change suggested.

116.125 No change suggested.

116.130 No change suggested.

116.135 It is suggested that this provision in the Code be eliminated in its entirety. In general, ORS 116.135 empowers the executor or administrator of a decedent's estate, if authorized to do so by the probate court, to compromise any debt owing the estate secured by mortgage on real or personal property and by such compromise to accept in lieu thereof bonds issued by the Home Owners' Loan Corporation, bonds of the Federal Farm Mortgage Corporation and the bonds of any other corporation all the stock of which is owned beneficially by the United States, or to accept part cash and the balance in such bonds and to give a discharge to the debtor upon receiving such bonds, or bonds and cash. If such compromising is procured or induced by faults or fraudulent representations of the debtor, the payment shall operate only to discharge a like amount of his debt. This provision of the Code was enacted by the legislature in 1935. Our general ecomony has undergone so many changes since that time that the Statute appears to have no present utility.

116.140 This Code provision authorizes the probate court to order the executor or administrator of a decedent's estate to redeem real or personal property left by the decedent under mortgage if it appears that such redemption out of the proceeds of other personal property would be for the interests of the estate and not prejudical to creditors.

On several occasions in the past the Advisory Committee discussed new statutory provisions dealing with the exoneration of indebtedness outstanding against property which is specifically bequeathed or devised. No conclusions satisfactory to the committee as a whole were reached in those discussions. One of the proposals considered (Bill No. 7) would have repealed ORS 116.140 in its entirety.

If the committee is to renew its efforts to arrive at a satisfactory proposal covering encumbrances on real and personal property of a decedent's estate, revision or repeal of ORS 116.140 should be considered at the same time. On the other hand, if the Advisory Committee decides that it will be best to abandon any efforts to enact legislation with respect to the exoneration of encumbrances on real and personal property which is specifically devised or bequeathed, I suggest that ORS 116.140 remain unchanged.

116.145)
116.150)
116.155)
116.160)
116.165) All of these sections, particularly the first four, refer back to ORS 116.140. ORS 116.145 provides for sale of real property if the court determines that the application for redemption thereof is improper or inexpedient. ORS 116.150 provides for citation to the mortgagee 10 days before making an order for the application of the proceeds of sale and specified that the proceeds of sale shall be applied first to the payment of proper sale expenses and secondly to the satisfaction of the mortgage debt, the residue, if any, to be applied in due course of administration. ORS 116.155 specifies that the three preceding sections do not include a mortgage which has been forclosed or upon which a suit for forclosure has been commenced nor to any other lien arising upon judgment or decree given against the deceased in his lifetime. ORS 116.160 provides that if the debt secured by the mortgage mentioned in ORS 116.140 is not due at the time of entry of the order for redemption or application of sale proceeds, the creditor is entitled to receive in satisfaction thereof such sum as may be ascertained to be equal to the present value of the debt. ORS 116.165 authorizes an executor or administrator to redeem for the benefit of the estate any real estate belonging to the estate which may be sold at public auction by decree of court on foreclusure of mortgage or upon judgment, such redemption to be in the same manner and upon the same terms that the property may be redeemed by any debtor.

All of the sections should be taken into account in the committee's consideration of the questions proviously raised as to whether a bill should be formulated with respect to exoneration of encumbrances on real and personal property

which is specifically devised and bequeathed and with respect to the question as to whether ORS 116.140 should be repealed, revised or left unchanged.

Personally, I am inclined to leave the statutes unchanged and to make no additional provisions which would cover exoneration of encumbrances on specifically devised and bequeathed real and personal property.

116.170 This section authorizes the probate court to permit an executor or administrator of a decedent's estate to continue and carry on a trader business in which the decedent was engaged at the time of his death, other than one in which he was engaged as a partner, for a period not to exceed 12 months. I have the feeling that this statute may be too restrictive, particularly so in those cases where the provisions of the decedent's will grant more extensive powers to an executor. Perhaps it would be desirable to qualify the statute so that it will apply only in the absence of provisions in the will of the decedent to the contrary, in which cases the provisions of the will are to control. Also, it might be desirable to authorize the personal representative of the decedent's estate to change the form of business entity as, for example, through incorporation thereof, and it might be desirable to give the probate court some further latitude in emergency situations.

116.175 This section requires the executor or administrator in the conduct of a trader business to keep full and accurate accounts of all receipts and expenditures, including accounts payable and receivable, and to make monthly reports thereof to the court. It is my impression that the monthly reporting requirement is complied with in very few cases and I suggest that it be removed because of its ineffectiveness.

116.180 This section permits any interested party to petition the probate court for an order requiring the executor or administrator to discontinue and wind up the trader business or for an order modifying or limiting authority theretofore conferred. After 10 days' notice, the petition is to be heard by the court, and thereafter the court may require an audit or additional information as may be necessary for a complete understanding of the issues and shall then enter such order as may be to the best interests of the estate. Even though such a petition has not been filed, the court is given the authority at any time to order discontinuance and winding up of the business. This section appears to be clearly stated and desirable. No change is suggested.

116.186 This section has to do with delivery of personal property and payment of debts to foreign administrators and executors. It was adopted by the 1961 Legislative Assembly and to the best of my knowledge it has proved entirely workable to the financial institutions in this state, such institutions being the ones which are primarily concerned.

116.190 This section has to do with the recording of copies of records in other counties wherein real property of a decedent estate is situated. I know of no difficulty which has been encountered and no changes are suggested unless existing laws with respect to the descent of real property are changed. I mention this proviso because there has been a suggestion that title to real property owned by a decedent descend to the executor or administrator rather than to the devisees and heirs. If title descends to an executor or administrator, it would appear that the executor's or administrator's deed to the devisees or heirs would take the place of the transcript being filed in the county where the property is located.

116.195 Similar comments to those made with respect to ORS 116.190 would seem to apply to this section.

116.305)
116.310) These sections deal with the discovery of assets. No changes are suggested.
116.315)
116.320)
116.325)
116.330)
116.335)
116.340)

116.405)
116.410) These sections deal with the inventory of a decedent's estate. No changes are suggested.
116.415)

116.420)
116.425) These sections deal with the appraisement of the estate, the appointment of appraisers and the compensation of appraisers. Both sections were given considerable attention by the Advisory Committee in previous meetings. I suggest that we renew our efforts to have the legislature adopt the changes which were suggested by the Law Improvement Committee during the 1965 legislative session. The one additional change which I would suggest is that ORS 116.420, if revised in accord with our recommendations, include a statement as to the manner in which value is to be determined and established for assets with respect to which appraisal has been waived.

116.430 No change suggested.

116.435 No change suggested.

116.440 No change suggested.

116.445 No change suggested.

116.450 This section has to do with the inventory and appraisal of partnership property. It is so worded that the surviving partner has the duty to file an inventory of the partnership assets whether or not letters testamentary or of administration are issued on the estate of the decedent. In addition, if letters testamentary or of administration have issued on the decedent's estate, the surviving partner has the duty to cause the partnership assets to be appraised in like manner as the individual property of a deceased person. There appears to be no provision for appraisal of partnership assets if letters testamentary or of administration have not been issued. It would appear desirable that this area be given further consideration.

116.455 No change suggested.

116.460 No change suggested.

116.465 No change suggested.

REPORT
June 16, 1966

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

From: Robert W. Lundy

Subject: Revised Rough Draft on Presentment, Allowance and Payment of Claims Against Decedents' Estates

One of the matters scheduled for consideration by the Advisory and Bar Committees at the meeting to be held June 17 and 18, 1966, is review of previous committee action on sections 1 to 17, Mr. Gooding's rough draft on claims against decedents' estates, dated April 1, 1966.

This report contains a revised rough draft reflecting my interpretation of committee action at the April and May meetings on sections 1 to 17 of Mr. Gooding's April 1 rough draft. Also, in preparing the revised draft I have made certain additions, deletions and other changes not previously considered by the committees.

The following sections of Mr. Gooding's April 1 rough draft were omitted by committee action at the May meeting, and therefore are not included in the revised draft:

Section 10. Claims against personal representative. (See Minutes, 5/20,21/66, pages 16, 17)

Section 14. Personal representative's liability. (See Minutes, 5/20,21/66, page 23)

Section 16. Liability for nonpayment of claims. (See Minutes, 5/20,21/66, page 25)

Section 17. Source of payment. (See Minutes, 5/20,21/66, page 25)

REVISED ROUGH DRAFT

Section 1. Presentment of claims; time limitations. Except as otherwise provided (insert "by law" or references to appropriate

sections):

(1) All claims against the estate of a decedent, other than claims of the personal representative as creditor of the decedent, shall be presented to the personal representative.

(2) Claims presented within four months after the date of the first publication of notice of the appointment of the personal representative shall be paid, as provided in section 12, before claims presented after the four-month period.

(3) Claims not presented before the expiration of 12 months after the date of the first publication of notice of the appointment of the personal representative, or before the date the personal representative files his final account, whichever occurs first, are barred from payment; but the claim of a claimant entitled to equitable relief due to peculiar circumstances is not so barred.

References: Minutes, 4/15,16/66, pages 20 to 24, 34
Minutes, 5/20,21/66, page 11

Gooding's Draft, 4/1/66, sections 1,4

ORS 116.510
Mundorff Code, sections 153, 154
Iowa Probate Code, section 410
Washington Probate Code, section 11.40.010
Model Probate Code, section 135

Section 2. Revival of action without claim presentment. An action against a decedent commenced before and pending on the date of his death may be revived as provided by law without presentation of a claim against the estate of the decedent.

References: Gooding's Draft, 4/1/66, section 1

Mundorff Code, section 153
Iowa Probate Code, sections 415, 417
Washington Probate Code, section 11.40.100
Model Probate Code, section 136

Section 3. Form and verification of claims. (1) Each claim presented shall:

(a) Be in writing.

(b) Describe the nature and the amount thereof, if ascertainable.

(c) State the names and addresses of the claimant and, if any, his attorney.

(d) Be accompanied by the affidavit of the claimant, or someone on his behalf who has personal knowledge of the fact, to the effect that the amount claimed is justly due, or if not due, when it will or may become due; that no payments have been made thereon which are not credited; and that there is no just counterclaim thereto, to the knowledge of the affiant, except as therein stated.

(2) Any defect of form or any insufficiency of a claim presented to the personal representative may be waived by the personal representative.

References: Minutes, 4/15,16/66, pages 21, 22

Gooding's Draft, 4/1/66, sections 2,3

ORS 116.515, 126.321
Mundorff Code, sections 153, 155
Iowa Probate Code, section 418
Texas Probate Code, section 302
Washington Probate Code, section 11.40.020
Model Probate Code, section 137

Section 4. Written evidence of claim. When it appears or is alleged that there is any written evidence of a claim presented to the personal representative, the personal representative may demand that the evidence be produced or its nonproduction accounted for.

References: Minutes, 4/15,16/66, page 21

Gooding's Draft, 4/1/66, section 2

ORS 116.515, 126.321
Mundorff Code, section 155
Iowa Probate Code, section 419
Model Probate Code, section 137

Section 5. Claims not due. A claim on a debt not due, whether or not the creditor holds security therefor, may be presented as a claim on a debt due. If the claim is presented and allowed, allowance shall be in an amount equal to the value of the debt on the date of allowance. Payment on the basis of the amount finally allowed discharges the debt and the security, if any, held by the creditor therefor; but the creditor, after allowance of the claim, may withdraw the claim without prejudice to other remedies.

References: Minutes, 4/15,16/66, pages 25 to 28, 31, 32
Minutes, 5/20,21/66, pages 3 to 8

Gooding's Draft, 4/1/66, sections 5, 7
Gooding's Draft, 5/20/66, sections 6, 7

ORS 116.510, 117.170
Mundorff Code, sections 154, 164
Iowa Probate Code, sections 421 to 423
Washington Probate Code, section 11.76.180
Model Probate Code, sections 138, 139

Section 6. Secured claims due. (1) A claim on a debt due for which the creditor holds security may be presented as a claim on an

unsecured debt due, or the creditor may elect to rely entirely on the security without presentation of a claim.

(2) If the claim is presented, it shall describe the security. If the security is an encumbrance that is recorded, it is sufficient to describe the encumbrance by date and refer to the volume, page and place of recording.

(3) If the claim is presented and allowed, the allowance shall be in the amount of the debt remaining unpaid on the date of allowance.

(4) If the claim is presented and allowed and if the creditor surrenders the security, payment shall be on the basis of the amount finally allowed.

(5) If the claim is presented and allowed, but the creditor does not surrender the security, payment shall be on the basis of:

(a) If the creditor exhausts the security before receiving payment, the amount finally allowed, less the amount realized on exhausting the security; or

(b) If the creditor does not exhaust the security before receiving payment or does not have the right to exhaust the security, the amount finally allowed, less the value of the security determined by agreement or as the court may order.

References: Minutes, 4/15,16/66, pages 31 to 33
Minutes, 5/20,21/66, pages 8, 9

Gooding's Draft, 4/1/66, section 7
Gooding's Draft, 5/20/66, section 7a

Iowa Probate Code, section 423
Model Probate Code, section 139

Section 7. Contingent and unliquidated claims. (1) A claim on a contingent or unliquidated debt shall be presented as any other claim.

(2) If the debt becomes absolute or liquidated before distribution of the estate, the claim shall be paid in the same manner as absolute or liquidated claims of the same class.

(3) If the debt does not become absolute or liquidated before distribution of the estate, the court shall provide for payment of the claim by any of the following methods:

(a) The creditor and personal representative may determine, by agreement, arbitration or compromise, the value of the debt, and upon approval thereof by the court, the claim may be allowed and paid in the same manner as a claim on an absolute or liquidated debt.

(b) The court may order the personal representative to make distribution of the estate, but to retain sufficient funds to pay the claim if and when the debt becomes absolute or liquidated. The estate proceeding may not be kept open for this purpose more than two years after distribution of the remainder of the estate. If the debt does not become absolute or liquidated within that time, the funds retained, after payment therefrom of any expenses accruing during that time, shall be distributed to the distributees. If the debt thereafter becomes absolute or liquidated, the distributees are liable to the creditor to the extent of the estate received by them. The court may require the distributees to give bond approved by the court and executed by a surety company qualified to transact surety business in this state, for the satisfaction of their

liability to the creditor.

(c) The court may order the personal representative to make distribution of the estate as though the claim did not exist. If the debt thereafter becomes absolute or liquidated, the distributees are liable to the creditor to the extent of the estate received by them. The court may require the distributees to give bond approved by the court and executed by a surety company qualified to transact surety business in this state, for the satisfaction of their liability to the creditor.

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

References: Minutes, 4/15,16/66, pages 28 to 31
Minutes, 5/20,21/66, pages 9, 10

Gooding's Draft, 4/1/66, section 8
Gooding's Draft, 5/20/66, section 8

ORS 116.510, 117.170
Mundorff Code, sections 154, 164
Iowa Probate Code, section 424
Washington Probate Code, section 11.76.190
Model Probate Code, section 140

Section 8. Claims of personal representative. If the personal representative is a creditor of the decedent, his claim against the estate of the decedent shall be filed with the clerk of the court within the time required by law for presentment of claims to a personal representative, and shall be presented to the court for allowance or disallowance. Upon application by the personal representative or any person interested in the estate, the allowance or disallowance of the claim may be reconsidered by the court on the hearing on the final account of the personal representative.

References: Minutes, 4/15,16/66, pages 33 to 38
Minutes, 5/20,21/66, pages 11 to 15

Gooding's Draft, 4/1/66, section 9
Gooding's Draft, 5/20/66, section 9

ORS 116.580, 116.585
Mundorff Code, sections 161, 162
Iowa Probate Code, sections 431, 432
Washington Probate Code, section 11.40.140
Model Probate Code, section 146

Section 9. Classification of debts and expenses. If the estate of a decedent is or appears to be insufficient to satisfy in full all debts and expenses, the personal representative shall classify debts and expenses as follows:

(1) Expenses of administration.

(2) Reasonable expenses of funeral and burial of the decedent.

(3) Debts and taxes having preference under the laws of the United States.

(4) Expenses of last sickness of the decedent.

(5) Taxes having preference under the laws of this state.

(6) Debts owed employes of the decedent for labor performed within the 90 days immediately preceding the date of death of the decedent.

(7) The claim of the State Public Welfare Commission for the net amount of public assistance, as defined in ORS 411.010, paid to or for the decedent, and the claim of the Oregon State Board of Control for care and maintenance of any decedent who was at a state institution to the extent provided in ORS 179.610 to 179.770.

(8) All other claims against the estate.

References: Minutes, 5/20,21/66, pages 17, 18

Gooding's Draft, 4/1/66, section 11

ORS 117.110, 117.120, 117.160
Mundorff Code, section 163
Iowa Probate Code, section 425
Washington Probate Code, section 11.76.110
Model Probate Code, section 142

Section 10. Funeral and burial expenses. (1) As used in this section:

(a) "Burial" means the disposition of the human remains of a decedent by cremation, inurnment, entombment, burial or otherwise.

(b) "Funeral" means the funeral, monument or other marker and other customary incidents to the burial of a decedent.

(2) The funeral and burial of a decedent may be in a manner and at an expense according to the circumstances and condition of the decedent in life; but only the expense necessary to effect a plain and decent funeral and burial may be allowed and paid from the estate of the decedent if the estate is insufficient to satisfy in full all other debts and expenses and any devises and bequests.

References: Minutes, 4/15,16/66, pages 24, 25

Gooding's Draft, 4/1/66, section 5

ORS 117.150
Mundorff Code, section 128
Washington Probate Code, section 11.76.130

Section 11. Compromise of claims. The personal representative

and creditor, with prior or subsequent approval by the court, may compromise a claim against the estate of a decedent, whether the debt is due or or not due, absolute or contingent, liquidated or unliquidated.

References: Minutes, 4/15,16/66, pages 29, 30
Minutes, 5/20,21/66, pages 10, 11

Gooding's Draft, 5/20/66, section 8a

Model Probate Code, section 147

Section 12. Payment of claims and expenses. (1) Claims against the estate of a decedent presented and allowed or established by action or suit within four months after the date of the first publication of notice of the appointment of the personal representative shall be paid in the order specified in section 9. After payment of those claims, claims presented and allowed or established after the four-month period shall be paid in the same order and manner.

(2) If, after the expiration of four months after the date of the first publication of notice of the appointment of the personal representative, the estate is sufficient to satisfy in full all claims allowed or established, and after payment of expenses of administration and of funeral and burial of the decedent, the personal representative may pay the claims so allowed or established. If the estate is insufficient to satisfy in full those claims, the personal representative shall report to the court the financial situation of the estate, and the court shall determine the percentage of the claims the estate is sufficient

to pay and shall order payment accordingly. If the estate is insufficient to satisfy all claims or expenses of any one class specified in section 9, each claim or expense of that class shall be paid only in proportion to the amount thereof.

References: Minutes, 5/20,21/66, pages 18 to 20

Gooding's Draft, 4/1/66, section 12

ORS 117.030, 117.110, 117.140
Mundorff Code, sections 163, 165
Iowa Probate Code, sections 426, 433, 434
Washington Probate Code, sections 11.40.040, 11.76.110, 11.76.150
Model Probate Code, sections 142, 148

Section 13. Creditor may obtain order for payment. A creditor whose claim against the estate of a decedent is allowed or established by action or suit may apply to the court, not less than six months after the date of the first publication of notice of the appointment of the personal representative, for an order directing that payment be made. Upon that application, the court shall order the issuance of a citation to the personal representative requiring him to appear and show cause why the order for payment should not be made. If it appears to the court that the estate has sufficient available funds for payment of the claim, the court shall order payment. If it appears to the court that the estate does not have sufficient available funds and that to await the receipt of funds from other sources would unreasonably delay payment, the court may order the sale of property of the estate

sufficient to pay the claim.

References: Minutes, 5/20,21/66, pages 23 to 25

Gooding's Draft, 4/1/66, section 15

Texas Probate Code, section 326

Section 14. Payment of contingent and unliquidated claims by distributees. (1) If a claim on a contingent or unliquidated debt is presented and allowed as provided in section 7, all the estate is distributed and the debt thereafter becomes absolute or liquidated, the creditor has the right to recover on the debt against the distributees whose shares were increased by reason of the fact that the amount of the claim as finally allowed was not paid before final distribution if an action therefor is commenced within one year after the date the debt becomes absolute or liquidated.

(2) Those distributees are jointly and severally liable, but no distributee is liable for an amount exceeding the amount of the estate received by him.

(3) If more than one distributee is liable to the creditor, the creditor shall make parties to the action all distributees who can be reached by process.

(4) By its judgment in the action, the court shall determine the amount of the liability of each of the defendants as among themselves, but if any distributee is insolvent, unable to pay his proportion or

beyond the reach of process, the others, to the extent of their respective liabilities, are liable to the creditor for the full amount of the debt.

(5) If any person liable for the debt fails to pay his just proportion to the creditor, he is liable to indemnify all others who, by reason of that failure, have paid more than their just proportion of the debt. The indemnity may be recovered in the same action or in separate actions.

References: Minutes, 5/20,21/66, pages 20 to 23

Gooding's Draft, 4/1/66, section 13

Iowa Probate Code, section 427
Model Probate Code, section 141

REPORT
June 13, 1966

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

From: Tom Gooding

Subject: Revised Rough Draft on Denial and Contest of Claims Against Decedents' Estates

One of the matters scheduled for consideration by the Advisory and Bar Committees at the meeting to be held June 17 and 18, 1966, is consideration of sections 18 to 32 of my rough draft, dated April 1, 1966, on claims against decedents' estates.

This report contains a revised rough draft of sections 18 to 32. Purposes of the revision are to reflect consistency with committee action on previous sections of the April 1 draft and to make certain other changes in sections 18 to 32 considered desirable.

For purposes of comparison with the April 1 draft, the revised draft indicates, in the body of a section, deleted wording in brackets, /like this/, and added wording by underscoring, like this.

DENIAL AND CONTEST OF CLAIMS

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

Section 19. Disallowance by personal representative. Within 60 days of the date of the /filing/ presentment of any claim, the personal representative or his attorney /shall/ may file with the clerk, with

proof of service by affidavit, the claim as presented and a notice of total or partial disallowance of the claim and shall personally deliver or mail a copy of the notice to the claimant or claimant's attorney, if any, by certified mail at the claimant's address or the attorney's address stated in the claim.

(Note: Compare sections 439 and 441, 1963 Iowa Probate Code.)

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

(Note: Compare section 440, 1963 Iowa Probate Code.)

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

(Note: Compare section 442, 1963 Iowa Probate Code.)

Section 22. Request for hearing by claimant. At the time of the /filing/ presentment of a claim against an estate, or at any time there-

after prior to the time that the claim may be barred by the provisions of section 21, /or the approval of the final report of the personal representative after notice to the claimant,/ the claimant may file a written request for hearing on his claim with the clerk of the court and shall personally deliver or mail a copy of such request for hearing by certified mail to the personal representative or to his attorney.

(Note: Compare section 443, 1963 Iowa Probate Code.)

Section 23. Applicability of rules of procedure. Within 20 days from the filing of the request for hearing on a claim, the personal representative shall move or plead to such claim in the same manner as though the claim were a complaint filed in an ordinary action or suit; and thereafter, all provisions of law and rules of procedure applicable to /motions,/ pleadings and the trial of ordinary actions and suits, to and including appeal, shall apply as in ordinary actions and suits.

(Note: Compare section 444, 1963 Iowa Probate Code.)

Section 24. Contest by others. Any other person interested in an estate at any time prior to the approval of any claim may appear and object in writing to the approval of the same, or any part thereof. The objections shall be filed with the clerk and the objector shall personally deliver or mail a copy of the objection by certified mail to the personal representative or his attorney and to the claimant or his attorney. Thereafter, all provisions of law and rules of procedure applicable to pleadings and the trial of ordinary actions and suits, to and including

appeal, shall apply as in ordinary actions and suits. /~~The~~ personal representative and the claimant shall move or plead to the objection in the manner provided in section 23, and it shall be determined by the court in the manner provided in section 23./~~~~

(Note: Compare section 312, Texas Probate Code.)

Section 25. Quantum of proof. No claim which is /~~rejected~~/ disallowed by the personal representative shall be allowed by any court except upon some competent, satisfactory evidence other than the testimony of the claimant.

(Note: Compare ORS 116.555.)

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

(Note: Compare section 411, 1963 Iowa Probate Code.)

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

(Note: Compare section 412, 1963 Iowa Probate Code.)

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

(Note: Compare section 413, 1963 Iowa Probate Code.)

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

(Note: Compare section 414, 1963 Iowa Probate Code.)

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

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

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

ADVISORY COMMITTEE
Probate Law Revision

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

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

Suggested Agenda

1. Reports on miscellaneous matters.

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

   a. Possession and control of property (ORS 116.103) (Butler and Richardson).

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

      Compare sections 350 to 354, 1963 Iowa Probate Code.

   b. Continuation of business by personal representative (ORS 116.170) (Butler).

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

      Compare ORS 126.255 and section 83, 1963 Iowa Probate Code.

   c. Report and recommendation for revision of ORS 116.175 to 116.455 (Butler).

3. Claims against decedents' estates.

   a. Procedure on disallowance of claims.

   b. Statute of limitations.

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

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

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

6. Establishing foreign wills and ancillary administration.

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

7. Approval of minutes of June meeting.

8. Next meeting.

ADVISORY COMMITTEE
Probate Law Revision

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

Minutes

The twenty-seventh meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:30 p.m., Friday, July 15, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Carson (arrived 2:10 p.m.), Gooding, Husband, Jaureguy, Lisbakken, Mapp and Riddlesbarger. Frohnmayer was absent.

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

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

Miscellaneous Matters

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discovery of Assets (continued)

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

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

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

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

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

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

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

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

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

Claims Against Decedents' Estates

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Actions and Suits Affecting Decedents' Estates and Administration

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

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

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

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

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

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

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

Dickson inquired whether the application of ORS 116.565 should be

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

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

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

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

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

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

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

Riddlesbarger moved, and the motion was seconded, that Lundy check previous action by the committees to make certain that the substance of the first sentence of ORS 121.090 was perpetuated in an appropriate place in the claims area of the proposed probate code. Motion carried.

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

The meeting was reconvened at 1:30 p.m. All members of the advisory committee were present except Butler, Frohnmayer and Husband. The following members of the Bar committee were present: Bettis, Gilley, Braun, Hornecker, Lovett, Rhoten and Richardson. Also present was Lundy.

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

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

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

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

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

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

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

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

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

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

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

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

Claims Against Decedents' Estates (continued)

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

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

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

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

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

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

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

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

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

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

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

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

Actions and Suits By and Against Personal Representatives

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

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

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

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

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

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

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

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

Minutes of June Meeting

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

Next Meeting of Committees

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

(1) Inventory and appraisal. Consideration of ORS 116.405 to 116.465, and Butler's report thereon.

(2) Nonintervention will statute (chapter 11.68, 1965 Washington Probate Code). Discussion to be led by Zollinger, Allison and Mapp.

(3) Nonabatement of action or suit by death, disability or transfer; continuing proceedings. Revised statute to be prepared by Lundy.

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

(5) Establishing foreign wills and ancillary administration.

October Meeting of Committees

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

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

REPORT
July 14, 1966

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

From: Robert W. Lundy

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

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

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

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

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

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

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

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

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

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

ORS 121.100 (provisional remedies against executors or administrators).

REVISED ROUGH DRAFT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 9. ORS 12.190 is amended to read:

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

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

the death of the decedent.]

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

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

Section 12. ORS 13.080 is amended to read:

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

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

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

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

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

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

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

REPORT
July 8, 1966

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Tom Gooding

Subject: Actions and Suits Affecting Decedents' Estates and Administration (ORS chapter 121)

One of the matters scheduled for consideration by the Advisory and Bar Committees at the meeting to be held July 15 and 16, 1966, is review of ORS chapter 121 (Actions and Suits Affecting Decedents' Estates and Administration).

This report contains my summary of the statute sections that constitute ORS chapter 121, and some commentary and recommendation thereon.

* * * * *

ORS 121.020 provides that all causes of action survive death. The section was recently enacted (section 2, chapter 620, Oregon Laws 1965), and retention thereof is suggested.

ORS 121.030 provides that several representatives are regarded as one person. The section was enacted in 1862, has not been amended since that enactment and has not been cited in an Oregon Supreme Court opinion.

ORS 121.040 provides that default judgments are not evidence of assets in the estate unless the complaint alleges the same and summons is served upon the defendant. The section has existed since 1862 without amendment. It is cited in Jaureguy & Love, Oregon Probate Law and Practice, section 735. Seemingly, the section is superfluous if we retain ORS 116.565.

ORS 121.050 has existed since 1862, without amendment and without judicial comment. The section provides for the legal effect of an inventory as evidence.

ORS 121.060 has existed since 1862 without amendment, and concerns the "executor of his own wrong." The section restricts the action against such an executor to the rightful personal representative, not allowing action by other interested persons, such as creditors or distributees, as could be done at common law. Rutherford v. Thompson, (1886) 14 Or. 236, 239-240. The section applies to a good faith administrator acting under a void order of appointment. Slate v. Henkle, (1904) 45 Or. 430. If the intermeddler applies property in a manner beneficial to the estate, he can offer this in mitigation. Rutherford v. Thompson, supra. Since it is closely akin to ORS 116.325 (relating to conversion of property and double damages), it is suggested that ORS 121.050 be put in ORS 116.325 and removed from chapter 121.

ORS 121.070 provides that the deceased executor's personal representative has no authority respecting the first estate. If the section is retained, it should be placed in the chapter on administration of estates.

ORS 121.080, 121.090 and 121.100 have been repealed by committee action.

ORS 121.210 applies the above provisions to suits by and against personal representatives, and defines the word "debt." This section could be eliminated by inserting the word "suit" in the above provisions that are retained, and by not using the word "debt" but using the word "claim." "Claim" has received extensive treatment in another area.

ORS 121.220 provides that all causes of suit survive, and this could be eliminated by inserting the word "suit" in ORS 121.020 pertaining to actions. Subsection (2) of this section, having to do with subsequent sections concerning liability of distributees, is not clear.

ORS 121.230, 121.240 and 121.250 state that distributees of personal property are liable to pay creditors to the extent of their shares and so much thereof as may be necessary to satisfy the debts. Joinder is provided for, as well as apportionment between the distributees and a suit for contribution among them.

ORS 121.260 provides for similar liability of the legatee of specific personal property if there is no intestate personal property available. Also, there is apportionment between legatees.

ORS 121.270 provides for the apportionment of costs in the foregoing suits against distributees of intestate personal property or legatees.

ORS 121.280 provides for the satisfaction of a decree against distributees or legatees.

ORS 121.290 provides for the liability of an heir or devisee. ORS 121.300 states that this liability arises only after exhaustion of personal property, excepting (ORS 121.310) where the will charged the claim to the real property.

ORS 121.320, 121.330 and 121.340 state that the liability of a devisee arises only after exhaustion of the personal property and the intestate real property, limited to the extent of the devise received. The above order of exhaustion does not apply if the will provides otherwise, such as making the debt a charge on the devise.

ORS 121.350 provides for the enforcement of the decree against the heir or devisee to the real property and as having preference over any judgment lien pertaining separately to any devisee or heir. ORS 121.360 renders the property responsible unless conveyed to a bona fide purchaser, in which event the devisee is personally liable.

ORS 121.370 provides for the apportionment of recovery against heirs and devisees.

The Mundorff code and 1963 Iowa Probate Code do not have comparable provisions on recovery against distributees. If it is desirable to retain the existing provisions, it would appear that no distinction should be made between personal and real property, and the abatement provisions of the Iowa Code (i.e., sections 436 and 437) could be borrowed in the following form:

Section___. (i) Distributees shall be responsible for the payment of debts and charges, federal and state estate taxes, legacies, the shares of children or the share of the surviving spouse electing to take against the will, without any preference or priority as between real and personal property, in the following order:

(a) Distributees of property not disposed of by will.

(b) Residuary distributees, except a surviving spouse who takes under the will.

(c) Distributees of property disposed of by will, but not specifically devised and not devised to the residuary distributee, except property devised to a surviving spouse who takes under the will.

(d) Distributees of property specifically devised, except property devised to a surviving spouse who takes under the will.

(e) The surviving spouse who takes under the will.

(2) A general devise charged on any specific property or fund shall be deemed property specifically devised to the extent of the value of the property on which it is charged. Upon the failure or insufficiency of the property upon which it is charged, it shall be deemed property not specifically devised to the extent of such failure or insufficiency.

(3) If the provisions of the will, the testamentary plan, or the express or the implied purpose of the devise would be defeated by the order of liability stated in this section, the respective distributees shall be responsible in such other manner as may be found necessary to give effect to the intention of the testator.

The above section should be placed with provisions for payment of claims, and then we can prescribe further procedural rules presently in effect for the following matters:

1. Joinder (ORS 121.230).

2. Apportionment among defendants (ORS 121.240).

3. Contributions among distributees (ORS 121.250).

4. Apportionment of costs among distributees (ORS 121.270).

5. Satisfaction of decree (ORS 121.280).

6. Enforcement of decree and lien thereof (ORS 121.350).

7. Personal liability where property is conveyed to a BFP (ORS 121.360).

The following ORS sections were submitted to the advisory and Bar committees and commented upon by Mr. Jaureguy at the Saturday afternoon session of the July 1966 meeting of the committees.

Ch. 12

Limitations of Actions and Suits

12.190 Suspension by death; revival; maximum limitation on claim against decedent's estate. If a person entitled to bring an action dies before the expiration of the time limited for its commencement, and the cause of action survives, an action may be commenced by his personal representatives after the expiration of the time, and within one year from his death. If a person against whom an action may be brought dies before the expiration of the time limited for its commencement, and the cause of action survives, an action may be commenced against his personal representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration; but no suit or action for collection of any claim against the estate of a decedent may be maintained, when no letters testamentary or of administration shall have been issued before the expiration of six years after the death of the decedent.

12.220 Commencement of new action within one year after dismissal or reversal. Except as otherwise provided in ORS 72.7250, if an action is commenced within the time prescribed therefor and the action is dismissed upon the trial thereof, or upon appeal, after the time limited for bringing a new action, the plaintiff, or if he dies and any cause of action in his favor survives, his heirs or personal representatives, may commence a new action upon such cause of action within one year after the dismissal or reversal on appeal; however, all defenses that would have been available against the action, if brought within the time limited for the bringing of the action, shall be available against the new action when brought under this section.
[Amended by 1961 c.726 §397]

Ch. 13

Parties

13.030 Real party in interest; except fiduciary. Every action or suit shall be prosecuted in the name of the real party in interest, except that an executor or an administrator, a trustee of an express trust, or a person expressly authorized to sue by statute, may sue without joining with him the person for whose benefit the action or suit is prosecuted. A person with whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section. This section does not authorize the assignment of a thing in action not arising out of contract.

13.080 Nonabatement of action or suit by death, disability or transfer; continuing proceedings. No action or suit shall abate by the death or disability of a party, or by the transfer of any interest therein, if the cause of action survives or continues. In case of the death or disability of a party, the court may, at any time within one year thereafter, on motion, allow the action or suit to be continued by or against his personal representatives or successors in interest.

Declaratory Judgments

28.040 Declaratory judgments on trusts or estates. Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, ward or insolvent, may have a declaration of rights or legal relations in respect thereto:

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or other; or

(b) To direct the executors, administrators, trustees, guardians or conservators to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

[Amended by 1961 c.344 §101]

ACTIONS FOR INJURY OR DEATH

30.020 Action for injury or death of child. A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child. [Amended by 1981 c.344 §102]

30.020 Action by personal representative for wrongful death. When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the decedent, for the benefit of the surviving spouse and dependents and in case there is no surviving spouse or dependents, then for the benefit of the estate of the decedent, may maintain an action against the wrongdoer, if the decedent might have maintained an action, had he lived, against the wrongdoer for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed $25,000, which may include a recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital or nursing services for the deceased. [Amended by 1953 c.600 §3; 1981 c.437 §1]

30.030 Distribution of damages. Upon settlement of a claim, or recovery of judgment in an action, for damages for wrongful death, by the personal representative of a decedent, for the benefit of the surviving spouse or dependents, or both, the amount of damages so accepted or recovered shall be distributed as follows:

(1) One-half to the surviving spouse and one-half to the dependents.

(2) If there is no surviving spouse, all to the dependents.

(3) If there is no dependent, all to the surviving spouse.

30.040 Apportionment among dependents upon settlement. If settlement, with or without action, is effected and there is more than one dependent, the amount to be distributed to the dependents shall be apportioned among them in accordance with their respective expectancies of dependency as determined by the probate court of appointment by order entered in the matter of the estate.

30.050 Apportionment among dependents after judgment. If the action described in ORS 30.030 is brought, and a judgment for the plaintiff is given, and there is more than one dependent, the amount to be distributed to the dependents shall be apportioned among them in accordance with their respective expectancies of dependency as determined by the trial court by order entered in such action.

30.060 Appeal from order of apportionment. In the case of an order of apportionment made under either ORS 30.040 or 30.050, any dependent may appeal therefrom, or from any part thereof, to the Supreme Court, within the time, in the manner and with like effect as though such order was a judgment of the circuit court.

30.070 Settlement; discharge of claim. The personal representative of the decedent, with the approval of the court of appointment, shall have full power to compromise and settle any claim of the class described in ORS 30.030, whether the claim is reduced to judgment or not, and to execute such releases and other instruments as may be necessary to satisfy and discharge the claim. The party paying any such claim or judgment, whether in full or in part, or in an amount agreed upon in compromise, shall not be required to see that the amount paid is applied or apportioned as provided in ORS 30.030 to 30.060, but shall be fully discharged from all liability on payment to the personal representative.

30.075 Death of injured person. (1) Causes of action arising out of injuries to a person, caused by the wrongful act or omission of another, shall not abate upon the death of the injured person, and the personal representatives of the decedent may maintain an action against the wrongdoer, if the decedent might have maintained an action, had he lived, against the wrongdoer for an injury done by the same act or omission. The action shall be commenced within two years by the injured person himself, as provided in ORS 12.110, and continued by his personal representatives under ORS 121.020 and this section, or within three years by his personal representatives, if not commenced prior to death. Damages recoverable under ORS 121.020 and this section shall not exceed $25,000, and shall be limited to reasonable expenses paid or incurred for doctor, hospital or nursing services for the deceased and for his loss of earnings.

(2) In any such action if the plaintiff prevails, there shall be taxed and allowed to the plaintiff, as a part of the costs of the action, a reasonable amount to be fixed by the court as attorney fees for the prosecution of the action, if the court finds that

written demand for the payment of such claim was made on the defendant either in the form of an action filed or a letter 10 days before commencement of the action; provided, that no attorney fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, at least 20 days before trial in an action that was pending at the death of the injured party, or otherwise prior to the commencement of the action, an amount not less than the damages awarded to the plaintiff.
[1965 c.620 §4]

30.080 Death of wrongdoer. Causes of action arising out of injury to or death of a person, caused by the wrongful act or negligence of another, shall not abate upon the death of the wrongdoer, and the injured person or the personal representatives of one meeting death, as above stated, shall have a cause of action against the personal representatives of the wrongdoer; however, the injured person shall not recover judgment except upon some competent satisfactory evidence other than the testimony of the injured person, and the damages recoverable under this section shall not exceed $25,000, which may include a recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital or nursing services for the deceased.
[Amended by 1953 c.600 §3; 1961 c.437 §2]

30.090 Appointment of administrator of estate of wrongdoer. If no probate of the estate of the wrongdoer has been instituted within 60 days from the death of the wrongdoer, the court, upon motion of the injured person, or of the personal representatives of one meeting death, as stated in ORS 30.080, shall appoint an administrator of the estate of the wrongdoer.

30.100 Substitution of personal representative as party defendant. In the event of the death of a wrongdoer, as designated in ORS 30.080, while an action is pending, the court, upon motion of the plaintiff, shall cause to be substituted as defendant the personal representative of the wrongdoer, and the action shall continue against such personal representative.

41.840 Declaration, act or omission of a member of a family on questions of pedigree. The declaration, act or omission of a member of a family, who is deceased or out of the state, is admissible as evidence of common reputation in cases where, on questions of pedigree, such reputation is admissible.

41.850 Declaration, act or omission of decedent. The declaration, act or omission of a deceased person, having sufficient knowledge of the subject, against his pecuniary interest, is admissible as evidence to that extent against his successor in interest. When a party to an action, suit or proceeding by or against an executor or administrator appears as a witness in his own behalf, or offers evidence of statements made by deceased against the interest of the deceased, statements of the deceased concerning the same matter in his own favor may also be proven.

41.860 Entries of deceased persons or persons without the state. Entries or other writings of like character of a person deceased or without the state, made at or near the time of the transaction and in a position to know the facts stated therein, may be read as primary evidence of those facts when it was made:

(1) Against the interest of the person making it;

(2) In a professional capacity, and in the ordinary course of professional conduct; or

(3) In the performance of a duty specially enjoined by law.

41.900 Facts which may be proved, generally. Evidence may be given of the following facts:

(1) The precise facts in dispute.

(2) The declaration, act, or omission of a party as evidence against such party.

(3) A declaration or act of another, in the presence and within the observation of a party, and his conduct in relation thereto.

(4) The declaration or act, verbal or written, of a deceased person, in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person; the declaration or act of a deceased person, made or done against his interest in respect to his real property; and also the declaration or act of a dying person, made or done under a sense of impending death, respecting the cause of his death.

116.550 Appeal to Supreme Court. An appeal shall lie to the Supreme Court from the judgment, decree or other determinative order of the circuit court made in such matter, as in the ordinary case.

116.565 Effect of judgment or decree against executor or administrator. The effect of a judgment or decree against an executor or administrator, on account of a claim against the estate of his testator or intestate, is only to establish the claim, as if it had been allowed by him, so as to require it to be satisfied in due course of administration, unless it appears that the complaint alleged assets in his hands applicable to the satisfaction of such claim, and that such allegation was admitted or found to be true, in which case the judgment or decree may be enforced against such executor or administrator personally.

Actions and Suits Affecting Decents' Estates and Administration.

121.020 What causes of action survive; parties. All causes of action, by one person against another, whether arising on contract or otherwise, survive to the personal representatives of the former and against the personal representatives of the latter. The executors or administrators may maintain an action thereon against the party against whom the cause of action accrued, or after his death against his personal representatives.
[Amended by 1965 c.620 §2]

121.040 Judgment against representative on failure to answer not evidence of assets in his hands. When a judgment is given against an executor or administrator for want of answer, such judgment is not to be deemed evidence of assets in his hands, unless it appears that the complaint alleged assets, and that the summons was served upon him.

121.090 Action against representative not to be commenced until claim is presented and rejected; liability on claim presented after six months from appointment of representative. An action against an executor or administrator shall not be commenced until the claim of the plaintiff has been duly presented to the executor or administrator, and by him rejected. If the claim is presented after the expiration of the period of six months from and after the date of the published notice of his appointment, the executor or administrator, in an action thereon, is liable only to the extent of the assets in his hands at the time the summons is served upon him and allocable to the payment of such claim under and pursuant to the provisions of ORS 116.510.

ADVISORY COMMITTEE
Probate Law Revision

Twenty-eighth Meeting
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Dates) and Times): 1:30 p.m., Friday, August 19, 1966 and 9:00 a.m., Saturday, August 20, 1966
Place: Judge Dickson's courtroom
254 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of July meeting.

2. Reports on miscellaneous matters.

3. Inventory and appraisal.

   Consideration of ORS 116.405 to 116.465, and report by Butler thereon (see Appendix, Minutes, Probate Advisory Committee, 6/17,18/66).

4. Nonintervention will procedure.

   Report by Allison, Mapp and Zollinger.

5. Actions and suits affecting decedents' estates and administration.

   a. Court authorization for personal representative to sue.

      Reports by Carson and Richardson.

   b. Nonabatement of action or suit by death, disability or transfer; continuing proceedings (ORS 13.080).

      Revised draft by Lundy.

6. Support of surviving spouse and minor children; homestead.

   Reports and drafts by three subcommittees (subcommittee #1: Gilley and Krause; subcommittee #2: Husband and Mapp; subcommittee #3: Allison, Braun and Lisbakken). Copies of reports by subcommittees #1 and #2 have been mailed to all members of both committees.

7. Establishing foreign wills and ancillary administration.

   Report by Mapp and Riddlesbarger, and consideration of Uniform Probate of Foreign Wills Act and Uniform Ancillary Administration of Estates Act.

8. Next meeting.

ADVISORY COMMITTEE
Probate Law Revision

Twenty-eighth Meeting, August 19 and 20, 1966
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The twenty-eighth 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, August 19, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Frohnmayer, Jaureguy (arrived 1:50 p.m.), Lisbakken and Mapp. Butler, Carson, Gooding, Husband and Riddlesbarger were absent.

The following members of the Bar committee were present: Gilley, Braun (arrived 2 p.m.), Copenhaver, Krause, Richardson and Warden. Bettis, Boivin, Field, Hornecker, Lovett, Luoma, Rhoten, Tassock and Thalhofer were absent.

Also present was Robert W. Lundy, Chief Deputy Legislative Counsel.

Miscellaneous Matters

Publicity. Lundy reported that, in accordance with instructions given him at the July meeting, he had communicated to Allan G. Carson, Chairman of the Law Improvement Committee, the suggestion that Carson might wish to contact the Portland The Oregonian on the possibility of giving some publicity to the Oregon probate law revision project, in the light of a recent The Oregonian article on the book "How to Avoid Probate," and had sent Carson a revised version of the news release previously prepared for the Oregon Voter. Carson had subsequently told Lundy that Norman Stoll, a member of the Law Improvement Committee, had previously contacted The Oregonian which had promised publicity on the probate project, and Carson had done nothing further pending development of this possibility. Lundy called attention to the editorial and news story on the probate project in the July issue of the Oregon State Bar Bulletin.

Revised Probate Codes in Other States. Lundy referred

to materials he had sent to members of both committees in the latter part of July, consisting of an explanation of the Uniform or Model Probate Code project being undertaken by special committees of the National Conference of the Commissioners on Uniform State Laws and American Bar Association, and a Forbes magazine article on Norman F. Dacey and his book "How to Avoid Probate."

Lundy noted that committees of the Wisconsin State Bar planned to present a proposed revised probate code to the 1967 session of the Wisconsin legislature, and commented that he would attempt to procure copies of the proposed code for members of the advisory and Bar committees as soon as they became available.

Lundy reported that he had received information indicating that the revised New York probate codes, both substantive and procedural, had been enacted and would become effective September 1, 1967. Dickson appointed a subcommittee, consisting of Lisbakken and Mapp, to make a study of the New York probate codes, with a view to determining whether they contained provisions worthy of consideration for inclusion in the proposed revised Oregon probate code. Dickson directed that the report of the subcommittee be scheduled for consideration at the October meeting of the committees.

Minutes of July Meeting.

There being no objection, Dickson ordered that reading of the minutes of the last meeting (July 15 and 16, 1966) be dispensed with and that they be approved as submitted.

Nonintervention Will Procedure

Allison explained in some detail the Washington nonintervention will statutes as set forth in chapter 11.68, 1965 Washington Probate Code, commenting that, under these statutes, the will was required to provide specifically that the decedent wished the estate to be settled without court intervention. He noted that Lundy had referred the subcommittee working on this project, consisting of Allison, Mapp and Zollinger, to an article by Professor Robert L. Fletcher, entitled "Washington's Non-intervention Executor-Starting Point for Probate Simplification," appearing in the January 1966 issue of the Washington Law Review. Allison reviewed Fletcher's article, which outlined the history of the Washington nonintervention will statutes

and set forth Fletcher's criticisms of the procedure in detail. Allison reported that Fletcher's final analysis was that an urgent need existed for two distinct types of probate systems. Fletcher recommended that one system encompass the formal probate procedure, with all the safeguards and court controls necessary, in decedents' estates which involved problem areas such as insolvency, claims resulting in adversary proceedings or administration complicated by an incompetent, dishonest or negligent personal representative. The second probate procedure Fletcher's article advocated would apply to solvent estates where precautionary proceedings were unnecessary.

Allison stated that the subcommittee agreed with Fletcher's recommendation for two separate types of probate proceeding, the second of which would be similar to Washington's nonintervention will statutes, and that the subcommittee further recommended that the proposed statutes should not be limited, as in Washington, to those cases where there was a will calling for the nonintervention procedure, but should be available to all simple, solvent estates, testate or intestate.

Zollinger agreed that the subcommittee was favorably disposed toward the approach outlined by Allison, and added that the proposed statutes should contain adequate provision by which those who were beneficially interested in an estate in any capacity could seek a full and formal administration of the estate. Zollinger noted that the special committee of the National Conference of Commissioners on Uniform State Laws had prepared a second tentative draft, dated May 18, 1966, of a portion of the proposed Uniform or Model Probate Code entitled "Independent Administration." He outlined the provisions of this independent administration draft, and indicated that the draft was free from many of the criticisms directed at the Small Estates Act previously proposed by the Oregon probate advisory committee. Zollinger reported that the joint conclusion of the subcommittee was that the independent administration draft merited serious consideration by the committees.

Krause asked if the independent administration draft referred to by Zollinger contained a limitation on the size of estates to which it could apply. Zollinger replied that the draft did not contain such a limitation, and expressed the view that it might be advisable to test the practicability of such a statute by first making it applicable to small estates only. Dickson observed that he saw no need

for a nonintervention will statute, and expressed the view that it was neither awkward nor cumbersome to handle any type of estate under regular probate proceedings pursuant to existing statutes.

After further discussion, Dickson directed that Lundy distribute copies of the May 18 draft on independent administration of the proposed Uniform or Model Probate Code to all members of both committees. Dickson appointed Allison, Lisbakken, Mapp and Zollinger as a subcommittee to study the draft and submit their separate suggestions for revision and possible inclusion thereof in the proposed revised Oregon probate code at the October meeting of the committees. Lisbakken and Mapp were in possession of copies of the recently enacted New York probate codes, and Lisbakken agreed to distribute copies of the small estates portion of those codes to Allison and Zollinger in order that the New York provisions could be considered in the subcommittee's study of the subject.

Abatement and Continuance of Actions and Suits

Lundy distributed to members present copies of his revised rough draft on abatement and continuance of actions and suits, which he had been asked at the July meeting to prepare [Note: See Minutes, Probate Advisory Committee, 7/15,16/66, page 21]. The revised rough draft read as follows:

"Section 12. ORS 13.080 is amended to read:

"13.080. Abatement and continuance of action or suit. [No] An action or suit shall abate by the death or disability of a party, [or by the transfer of any interest therein, if the cause of action survives or continues.] except that:

"(1) In case of the [death or] disability of a party, [the court may, at any time within one year thereafter, on motion, allow] the action or suit [to] shall be continued by or against [his personal representatives or successors in interest] the guardian or conservator of his estate on motion for substitution of the guardian or conservator made within one year after the date the guardian or conservator qualifies.

"(2) In case of the death of a party, the action or suit shall be continued by or against the personal representative of his estate on motion for substitution of the personal representative made before the expiration of one year after the date of death

of the party, or before the date the personal representative files his final account, whichever occurs first.

"Section 13. Continuance of action or suit without claim presentment. An action or suit against a decedent commenced before and pending on the date of his death may be continued as provided in subsection (2) of ORS 13.080 without presentation of a claim against the estate of the decedent."

Abatement and continuance of action or suit (ORS 13.080) (section 12). Lundy explained that section 12 of his revised rough draft, which would amend ORS 13.080, was based upon a proposal made by Zollinger at the July meeting. [Note: See Minutes, Probate Advisory Committee, 7/15,16/66, page 21.]

Lundy remarked that one of the problems he had encountered in preparing the revised rough draft arose from deletion of the provision in ORS 13.080 that an action or suit should not abate by the transfer of any interest therein, and inquired as to the effect of this deletion. He also pointed out that ORS 13.080, as amended by the draft, would apply only to cases of the death of an individual or the disability of an individual, and asked if it was intended that the statute refer to a disability of an individual person as opposed to, for example, a corporation in the event an action was brought by a corporation which had been dissolved pending disposition of the action.

Zollinger expressed the view that the provision on transfer of interest should remain in ORS 13.080, and suggested that the following wording be inserted at the beginning of ORS 13.080, as amended by section 12 of the revised rough draft: "No action shall abate by the transfer of any interest in the cause of action, but the transferee may be joined or substituted as a party upon the application of the transferee or any party." Frohnmayer asked Zollinger if the ordinary rules of court would apply in such a situation and received an affirmative reply.

Lundy noted that subsection (1) of ORS 13.080, as amended by the revised rough draft, referred to the "guardian or conservator of his estate, and that the guardianship statutes provided for representation of a ward

in actions and suits only by a guardian of the estate. [Note: See ORS 126.275], while ORS 13.051 provided for appearance of an incompetent in an action or suit by "general guardian." ORS 13.051, he said, gave the impression that the guardian of the person might appear for an incompetent. Zollinger remarked that "guardian of the estate" should be used in both ORS 13.041 and 13.051, rather than "general guardian." Gilley commented that, by court decision, a guardian was not a party in an action and there would be no occasion for substitution when an individual became disabled because the action would continue against the original party as represented by his guardian.

Zollinger moved, and the motion was seconded, that "guardian of the estate" be substituted for "general guardian" wherever the latter words appeared in statute sections that had reference to the guardian appearing in place of the ward. Motion carried.

After further discussion, Zollinger moved, seconded by Gilley, that ORS 13.080 be amended to read:

> "(1) No action shall abate by the transfer of any interest in the cause of action, but the transferee of any interest in the cause of action may be joined or substituted as a party upon the application of the transferee or any party."
>
> "(2) An action or suit shall abate by the death of a party unless the personal representative of his estate be substituted upon motion by any party or the personal representative before the expiration of one year after the date of death of the party, or before the date the personal representative files his final account, whichever occurs first." Motion carried.

Death of party after verdict does not abate action for wrong (ORS 13.090). Lundy called attention to the fact that ORS 13.090 provided that an action for a wrong should not abate by the death of any party after a verdict, and asked whether the situation described was not caused by ORS 13.080, as amended by action of the committees. Jaureguy commented that ORS 13.090 was not appropriate under present law, and referred to the 1965 repeal of ORS 121.010 and amendment of ORS 121.020. Zollinger moved, seconded by Jaureguy, that ORS 13.090 be repealed. Motion carried.

Continuance of action or suit without claim presentment (section 13). Lundy explained that section 13 of the revised rough draft provided that if an action or suit was pending against a person at his death, it could be continued without presentation of a claim against the estate of the deceased person. Allison inquired if section 12 of the revised rough draft would be included in the proposed revised probate code, and was told by Lundy that it would remain in ORS chapter 13, but that section 13 would be in the probate code and would have the built-in reference to ORS 13.080, as amended by section 12. Zollinger moved, seconded by Jaureguy, that section 13 be approved without change. Motion carried.

Support of Surviving Spouse and Minor Children; Homestead

[Note: Copies of the following two reports were distributed to all members of both committees prior to the meeting: "Support of Surviving Spouse and Minor Children; Homestead," dated May 14, 1966, prepared by Gilley and Krause; and "Support of Surviving Spouse and Minor Children; Exemptions (Homesteads), and Family Allowances," dated May 20, 1966, prepared by Mapp. Allison had distributed copies of his report entitled "Revised Draft--Support of Surviving Spouse and Minor Children" to members present at the June meeting. A copy of Allison's report constitutes the Appendix to these minutes.]

Gilley read the draft he and Krause had prepared, and commented that it was based upon a suggestion made at the April meeting by Zollinger. [Note: See Minutes, Probate Advisory Committee, 4/15,16/66, pages 12 to 14.]

Mapp read his report to the committee, and explained that the basic theory he was advancing would grant an exemption of the beneficiary's choice of the property of the estate, real or personal, to the total appraised value of $10,000.

Allison next read his draft to the committee, and remarked that section 1 thereof was based on ORS 116.025, and that section 2 was derived from ORS 116.590 and 116.595, section 3 from ORS 116.020 and section 4 from ORS 113.070 and 116.005.

Braun asked Mapp what would happen under the latter's proposal if the family home were devised to someone other than the spouse, and was told that if the spouse chose to keep the house, an interest equal to the value of that house would have to be made up and given to the

devisee from whom the house was taken. Dickson commented that Mapp's proposal would deprive the widow of her right to an allowance according to her station in life and expressed the view that she was entitled to such an allowance in addition to her property. Gilley suggested that the right to limited occupancy of the place of abode be preserved in the statute, and Mapp agreed.

Zollinger suggested that there be a provision that the surviving spouse or minor children were entitled to property to the total appraised value of $10,000, to be selected first from property not specifically bequeathed or devised, except that the beneficiaries could take the homestead, whether or not specifically devised, and if they did so, the devisee thereof could select property of a like value. Dickson commented that such a provision would result in a widow taking exempt property out of her residuary share, if she were the residuary beneficiary, rather than from the estate as a whole.

Allison contended that it would be preferable, in providing for an allowance, to allow the court to take into consideration the value of nonprobate property of the surviving spouse. He advocated adoption of the wording contained in section 5 of his draft, which was derived from a Wisconsin preliminary draft [Note: See Staff Report No. 2 dated June 1964, page 20.], as follows "In making or denying such order the court shall take into consideration all assets and income available for the support of the spouse and children outside of the probate estate." Richardson expressed the view that the court should have discretion in such matters.

Allison asked Mapp if the latter's proposal envisioned setting aside $10,000, all or part of which might be liquid assets of the estate, to the surviving spouse without setting aside money for funeral expenses and expenses of administration, and received an affirmative reply. Dickson suggested that the simplest procedure would be to abolish all exemptions and let the court award support payments whether the estate was solvent or insolvent. Richardson suggested that the $10,000 exemption be eliminated and that the court be given authority to award support to the family for a year, whether or not the estate was solvent. Allison pointed out that the creditors would be alert to see that the court did not make extravagant support allowances from insolvent estates.

After further discussion, Zollinger observed that the trend of the discussion appeared to be in favor of the

proposal advanced by Gilley and Krause. Mapp objected to section 1 of the Gilley-Krause draft, stating that he was opposed to using the homestead or place of abode as a basis for exemption. Gilley explained that the purpose of section 1 was to avoid the immediate displacement of the family and to give them a right to occupy the home for at least one year. Richardson remarked that he would agree with section 2 of the Gilley-Krause draft with an added provision that the support not exceed $10,000. Gilley observed that $10,000 maximum would be more than necessary in many cases, and indicated a preference to leave the amount completely in the discretion of the court.

After further discussion, Dickson suggested that members of the committees devote additional thought to the problems under consideration and discuss them further the following morning.

The meeting was recessed at 5:10 p.m.

The meeting was reconvened at 9 a.m., Saturday, August 20, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Carson, Frohnmayer, Jaureguy, Lisbakken and Mapp. The following members of the Bar committee were present: Gilley, Braun, Copenhaver, Krause, Richardson (arrived 9:30 a.m.) and Warden (arrived 10:15 a.m.). Also present was Lundy.

Support of Surviving Spouse and Minor Children; Homestead (continued)

Draft by Gilley and Krause, dated May 14, 1966. Frohnmayer requested an explanation of the general theory of the proposal submitted by Gilley and Krause, as set forth in their draft dated May 14, 1966. Gilley advised that the purpose of his and Krause's proposal was to provide the surviving spouse and minor children with a place to live, at least temporarily, and that section 1 of the draft would assure their right to occupancy of their place of abode for one year if it had been owned by the decedent. The Gilley-Krause proposal would then, under section 2 of the draft, vest the court with almost unlimited power to make whatever allocation of property was reasonable under all the circumstances. Gilley noted that the proposal had been criticized because it contained no amount limitation on the allowance. Allison suggested addition of the following provision to section 2 of the draft:

> "The allowance hereunder shall have priority over debts and administration expenses, but if the estate is insolvent, no more than one-half of the estate assets shall be available for such allowance, and it may not be granted for more than one year after the date of death."

Allison explained that his suggested additional provision was a compromise to avoid cutting off claims entirely by providing a reasonable or equal division of the assets of the estate between the allowance on the one hand and claims and administration expense on the other. The provision would be applicable, he stated, only in the case of insolvent estates.

Gilley pointed out that the 12-month time limitation in Allison's suggested additional provision was inconsistent with section 2 of the draft, which imposed a 24-month time limitation. He also suggested that the wording in Allison's suggested provision be changed to "but if the estate appears to be insolvent," because solvency could not be determined definitely in all cases. Zollinger commented that the court would know at least what one-half of the assets were at the beginning of probate, and before that amount was exhausted, it would be possible to find out whether the estate was insolvent. Gilley outlined a hypothetical situation wherein the court might want to make an award of $20,000 home, but the total value of the estate was $30,000, and Dickson remarked that in such an event the court would undoubtedly require a re-estimate of the estate at the end of the first six months. Dickson and Gilley agreed that the court order for support should not be final, but should be subject to change by the court.

Braun objected to limiting the period for keeping a solvent estate open to 24 months, and urged that the allowance right be continued throughout administration in the case of a solvent estate. Frohnmayer disagreed, commenting that there should be some incentive to bring estates to a conclusion as early as possible. Dickson asked Gilley for his opinion on shortening the time period, and Gilley pointed out that the time period would not be 24 months automatically; that it could be shorter. In keeping with the principle of enabling the court to meet unpredictable circumstances, Gilley said he would not like to see a stringent time limitation imposed. Dickson pointed out that if 24 months was set forth in the statute, it undoubtedly would become standard procedure for all estate attorneys to request the allowance for the 24-month period. Carson suggested that a shorter period of time be set forth, followed by "unless otherwise ordered by the court" or "unless extended by the court." Frohnmayer remarked that he could see no objection to the 24-month period.

Zollinger moved, seconded by Richardson, that the following be inserted as subsection (4) of section 2 of the Gilley-Krause draft, to be followed by Allison's suggested provision as subsection (5):

> "(4) In making or denying such order, the court shall take into consideration all assets and income available for the support of the spouse and children outside of the probate estate."

Motion carried.

Carson noted that the last sentence of subsection (1) of section 2 of the Gilley-Krause draft was phrased in the alternative, and suggested that "or both" be added at the end of the sentence. Frohnmayer suggested that the wording of the sentence be ". . . personal property and for periodic payment . . ." Allison suggested the following wording for the sentence: "The order may be for periodic payment of funds while administration of the estate continues, not exceeding 24 months from the date of decedent's death, and for setting aside real and personal property of the estate to the survivor or to the minor children." The committees agreed to leave the matter of rewording the sentence to Lundy, with the understanding that the intent of the committees was that the order of court could be, for example, a transfer of specific real property, a transfer of specific personal property or periodic payments, or any combination thereof.

Braun suggested that property received by a widow under the Gilley-Krause draft should be charged against the widow's distributive share. Gilley expressed opposition to charging the court's allowance award against a widow's distribute share, but Richardson agreed with Braun, commenting that in a substantial estate the plan of distribution set up by the decedent could be distorted if such a charge were not made. Zollinger suggested extension of the court's discretion to allow certain sums given to a widow to constitute an expense of administration and other sums given to her to be charged against distribution to be made to her at a later time. Dickson pointed out that under present law testators must make provision in their wills to escape disruption of testamentary plans through allowance granted by the court, and urged that the law remain unchanged in this respect.

After further discussion, Gilley moved that the draft be amended by inserting the following as subsection (5) of section 2, and by renumbering subsection (5) previously approved by the committees as subsection (6):

"(5) The court may in its order direct that the amount of the allowance be charged against the distributive share of the person to whom the allowance is made."

Dickson suggested, and Frohnmayer and Zollinger agreed, that the problem might be solved by providing that the court could make partial distribution at any time, and that this could be accomplished by amendment of the present statute on partial distribution (i. e., ORS 117.350). Braun inquired if the partial distribution would be in lieu of support payments, and received a negative reply from Dickson, who explained that the statute would provide that partial distribution could be made to the surviving spouse and children at any time upon the proper showing. Gilley withdrew his motion.

Frohnmayer moved, seconded by Allison, that the Gilley-Krause draft be approved, with the revisions:

1. Last sentence of subsection (1) of section 2 to be reworded by Lundy in accordance with the expressed intent of the committees.

2. Subsection (4) to be added to section 2, to read as follows: "(4) In making or denying such order, the court shall take into consideration all assets and income available for the support of the spouse and children outside of the probate estate."

3. Subsection (5) to be added to section 2, to read as follows: "(5) The allowance hereunder shall have priority over debts and administration expenses, but if the estate is insolvent, no more than one-half of the estate assets shall be available for such allowance, and it may not be granted for more than one year after date of death."

4. Section 3 to be added to the draft, to be a repealer of existing statute sections covered by or inconsistent with the draft. Motion carried.

Repeal of ORS sections conflicting with proposed support statute. Lundy asked if ORS 113.070 should be repealed, and received an affirmative reply from Dickson.

The committees next discussed ORS 116.005, and concurred that it should be repealed. Allison suggested addition to the Gilley-Krause draft of a provision entitling the surviving spouse and minor children to "all the wearing apparel of the family and household furniture of the deceased," but other

members agreed that such a provision was unnecessary. The committees also agreed to the repeal of ORS 116.010 and 116.015.

ORS 116.020 was discussed, and Allison suggested that the limit on the value of the estate be increased to $2,500 and the section be retained. Zollinger contended, and Dickson agreed, that if ORS 116.020 was repealed, the court's discretionary power to award support would accomplish everything necessary. Other members also concurred in the repeal of ORS 116.020, as well as of ORS 116.025, 116.590 and 116.595.

Gilley moved, seconded by Zollinger, that the following ORS sections be repealed: ORS 113.070, 116.005, 116.010, 116.015, 116.020, 116.025, 116.590 and 116.595. Motion carried.

Court Authorization for Personal Representative to Sue

Carson noted that at the July meeting he and Richardson had been requested to separately study and submit recommendations on the question of court authorization for personal representatives to sue generally. [Note: See Minutes, Probate Advisory Committee, 7/15,16/66, page 10.] Carson read to the committees a letter dated August 5, 1966, which he had written to Lundy with a copy to Richardson, as follows:

> "As you have indicated in the second paragraph on page 2 of your letter, I did, at the July, 1966, meeting, eventually take the position that a personal representative should not be required, as a condition precedent to instituting action or suit, to obtain an order of the probate court authorizing him to do so, unless otherwise expressly provided by statute, as is, for example, provided by ORS 116.330 et seq. (avoidance of a fraudulent transaction made or suffered by the decedent).
>
> "Although I do not fail to recognize the merits of the suggestion made by Mr. Campbell Richardson to the effect that a personal representative might obtain some protection by procuring authorization by order of the probate court before engaging in litigation, I suggest that, if the personal representative desires to have such protection as an ex parte order of the probate court may afford, he may, on his own initiative, and without being required so to do, take that step before engaging in the litigation,

and that the personal representative's adversary in the litigation should not be permitted to thwart the personal representative's action by reason of the absence of an authorizing order of the probate court. It appears to me that the authorizing order of the probate court could be granted by that court pursuant to its right to exercise supervisory control, generally of the personal representative pursuant to the last sentence of ORS 115.490, if not otherwise. That sentence is, as you will recall:

> "'It is the duty of the court or judge thereof to exercise a supervisory control over an executor or administrator, to the end that he faithfully and diligently performs the duties of his trust according to law.'

"The matter of allowance of recovery of costs and disbursements in a suit or action to which a personal representative is a party seems to be governed appropriately by ORS 20.150, which provides, among other things, that the costs and disbursements

> "'shall be chargeable only upon or collected from the estate, . . ., unless the court or judge thereof shall order such costs and disbursements to be recovered from the executor, administrator, . . . personally for mismanagement or bad faith in the commencement, prosecution or defense of the action, suit or proceeding.'

"In view of the provisions of ORS 121.020 (survival of causes, generally) as well as the provisions of ORS 13.030 (real party in interest), it appears to me that it is not necessary, so far, at least, as personal representatives are concerned, to enact an Oregon statute such as Section 81, 1963 Iowa Probate Code ('Any fiduciary may sue, be sued and defend in such capacity.'), which you mentioned in the fourth paragraph on page 2 of your letter, but I do not suggest that a general statute such as that would be of no benefit for any purpose. In any event, I believe that that Iowa statute is preferable to the Washington statute quoted, in part, in the same paragraph of your letter.

"In response to the two questions appearing in the final paragraph of your letter, I respectfully submit:

"(1) That there should not be 'any requirement that a personal representative, generally, obtain a court order authorizing him to sue;' and

"(2) That the substance (only) of ORS 116.330, 116.335, and 116.340 should be preserved and included in the proposed, revised Oregon probate code."

Richardson read to the committees a letter dated August 9, 1966, which he had written to Lundy with a copy to Carson, as follows:

"I agree in theory with Mr. Carson's position that a court order authorizing a personal representative to sue should not be required. I also feel that our code should contain general authority of a fiduciary to sue in addition to that provided by implication in ORS 13.030.

"However, as a practical matter, I also feel that a fiduciary should be provided some statutory protection against second guessing based upon hindsight where litigation is involved. At the last meeting I expressed the thought that to a limited extent prior court authorization for litigation, even of an ex parte nature, offered such protection. Better protection would be offered, I believe, by the insertion in the code of a general standard governing the actions of fiduciaries where litigation is involved. I looked quickly at the Washington, Iowa and Model codes, and found no helpful language. I like the language in ORS 20.150, quoted by Mr. Carson. I propose that this language be grafted on the substance of the Iowa statute, to produce the following for the consideration of the committees:

"'Any personal representative may sue, be sued and defend in his fiduciary capacity, and shall be accountable only for mismanagement or bad faith in the commencement, prosecution or defense of the action, suit or proceeding.'"

Frohnmayer expressed the belief that the wording suggested by Richardson's letter was existing common law, and commented that a personal representative should not be given special protection by obtaining prior approval of the court to bring a lawsuit. Zollinger indicated concern over inclusion of a provision which would make a

personal representative accountable for mismanagement of the prosecution or defense of an action or suit if, for example, he did not call a witness and the omission might have caused a different result in the action or suit. Allison was of the opinion that a surcharge against the personal representative would be a better way to handle the situation, and Zollinger expressed an inclination to approve the first part of Richardson's suggested wording, which was derived from section 81, 1963 Iowa Probate Code, without making any provision for a surcharge. Allison concurred in Zollinger's proposal.

Carson indicated that it would not be necessary to repeal any of the existing statute sections related to the matter under discussion (i.e., ORS 20,150, 115.490, 116.330 to 116.340 and 121.020). Richardson called attention to section 172(c), Model Probate Code, and suggested the committees consider inclusion of a similar provision in the proposed revised Oregon probate code. Mapp noted that section 160, 1963 Iowa Probate Code, was similar to the Model provision.

Richardson moved, seconded by Mapp, that the following provision be included in the proposed revised Oregon probate code:

> "Any personal representative may sue, be sued and defend in his fiduciary capacity."

Zollinger moved, seconded by Richardson, that the motion be amended by the following addition to the provision:

> "No order of court shall be required prior to the commencement or defense of the suit or action by the personal representative except as otherwise provided in this code."

Motion to amend carried. Main motion carried.

Dickson suggested that a cross reference be inserted in ORS 13.030, dealing with real parties in interest, to refer to the provision just approved by the committees. Zollinger remarked that he did not recognize a need for this type of cross reference, and Dickson requested Lundy to determine whether or not the insertion was advisable or necessary.

Inventory and Appraisal

The committees began a consideration of ORS 116.405, relating to inventory and appraisal, and Butler's report thereon [Note: See Appendix, Minutes, Probate Advisory Committee, 6/17,18/66].

Inventory of estate; when and how made (ORS 116.405). Frohnmayer expressed disapproval of the requirement in ORS 116.405 for filing an inventory within 30 days, but Allison took the opposing view, commenting that an early filing of the inventory was advantageous to the court. Frohnmayer indicated that in some cases it might be desirable to sell particular real property prior to appraisal, but Butler pointed out that such a procedure could create abuses when the person making the sale was not knowledgeable concerning property values.

Zollinger suggested a requirement that the inventory be filed within 30 days and, to the extent required by the order of the court, the inventoried property be appraised by one or more appraisers. This, he noted, would allow an appraisal if and when the court order was entered, and if no appraisal was necessary, as in the case of bank accounts, none would be required by the court. Frohnmayer concurred with Zollinger's suggestion. Dickson also expressed approval of the suggested procedure for the reason that the information would not then become public knowledge. With respect to determining clerk's fees, Dickson pointed out that such fees could be stipulated at the time of the final accounting. Zollinger indicated that his suggestion could be further modified by providing that with respect to the assets of readily ascertainable value, the value should appear on the inventory, and with respect to other assets, to the extent the court deemed an appraisal appropriate, the court should order an appraisal within a period to be determined by the committees. Richardson suggested that the time period conform with the comparable provision of the guardianship statutes. Frohnmayer noted that the guardianship statutes (i.e., ORS 126.230) prescribed a 60-day period for filing the inventory, and suggested that the provisions in the probate and guardianship codes be made consistent.

Appraisement; appointment of appraisers (ORS 116.420); compensation of appraisers (ORS 116.425). Butler recommended approval of the provisions of Senate Bill 308, amending ORS 116.420 and 116.425, which had been prepared by the advisory committee and introduced at the 1965 legislative session at the request of the Law Improvement Committee, and

which had provided that the court could waive the appointment of appraisers, and other members concurred in this recommendation.

Dickson pointed out that any revisions made in the inventory and appraisal provisions in ORS chapter 116 should be correlated with provisions on the same subject in ORS chapter 118. He then appointed Butler and Carson as a subcommittee to meet with the State Treasurer, or a representative of his office, to draft proposed provisions on inventory and appraisal. Dickson asked Butler and Carson if they could, in conjunction with the State Treasurer's office, have a draft of proposed provisions on inventory and appraisal completed in time for the October meeting of the committees, and they agreed to attempt to do so. Carson requested that Lundy submit a synopsis of the committees' discussion on this subject to him and to Butler for their use in drafting the proposed provision.

Dickson summarized the policies apparently agreed upon by the committees thus far in the discussion as follows:

1. The inventory should be separated from the appraisal.

2. The inventory should contain the estimated value of securities, if necessary, for the purpose of determing clerk's fees.

3. The appraisal should be on application of the personal representative at some later time, in connection with determining taxes, sale of property, etc.

4. Senate Bill 308, introduced at the 1965 legislature, should be incorporated.

5. All revisions should be correlated with ORS chapter 118.

6. The period for filing the inventory should be changed to 60 days to conform to the guardianship statutes.

Frohnmayer recommended that in the first filing of the inventory the values, if readily ascertainable, should be included.

Zollinger called attention to subsection (3) of ORS 126.230, which provided that the court could order all or any part of the property of the ward appraised as provided

in ORS 116.420 to 116.435. He remarked that similar wording should be incorporated in the revised probate code, and suggested that the subcommittee give consideration to inclusion of the following provision:

> "The court may order all or any part of the property of the estate appraised as shall appear to be necessary for the determination of taxes or expenses of administration or otherwise."

Zollinger pointed out that his suggestion would include a determination of clerk's fees, a determination of personal representative's fees, a determination of attorney's fees and a determination of tax liabilities, and he reiterated that an appraisal should not be required if a conclusion as to value could be reached without an appraisal.

Oath of appraisers (ORS 116.430). Allison expressed doubt that the affidavits required by ORS 116.430 were of any significant value, and other members agreed.

Inventory and appraisal of copartnership property; duties of surviving partner (ORS 116.450). Butler remarked that ORS 116.450 was cumbersome and asked if there was a better way of requiring the surviving partner to disclose the assets of the partnership. Zollinger pointed out that the Uniform Partnership Law (see ORS 68.650) imposed the burden of disclosure on the surviving partner, and remarked that the assets of the partnership were essentially a debt owing to the estate of the deceased partner and the surviving partner should not be in a position different from any other debtor to the estate. Dickson commented that it was basically wrong to require a surviving partner to disclose the value of assets and liabilities of a partnership for the public record in an estate proceeding, but that the information should be made available to the personal representative on a confidential basis. Frohnmayer suggested that after 30 days, or whatever time might be determined by the committees, the surviving partner be required to furnish the necessary information to the personal representative.

Allison expressed disapproval of the requirements of ORS 116.450, and suggested that the committees study the Uniform Partnership Law (i.e., ORS chapter 68) with a view to making the necessary changes in that law rather than in

ORS 116.450. He said he assumed that a partnership was dissolved by the death of a partner, so that in the appraisal the personal representative would have to indicate for tax purposes the amount owing to the estate from the dissolved partnership. Frohnmayer objected to deletion of ORS 116.450. Braun called attention to the changes previously made by the committees in ORS 116.305, which expanded the discovery of assets procedures [Note: See Minutes, Probate Advisory Committee, 7/15,16/66, pages 5 and 6].

Carson pointed out that it was common practice among some attorneys to include in their partnership agreements a condition that the surviving partner had the right to purchase the share of the deceased partner on particular terms, with the value to be determined by appraisal at the time of administration of the estate by the court. In view of this practice, Carson asked if the committees agreed or disagreed that apprisal of the partnership interest should be made in connection with the administration of the estate. Zollinger replied that a compulsory appraisal of a partnership interest would be erroneous because the value might be determined by distribution, agreement or negotiation, and expressed the opinion that appraisal should be discretionary with the court.

Carson requested the view of the committees on this question and Dickson replied that the committees apparently agreed that the appraisal served no useful purpose except for tax purposes and for setting a valuation on property for sale or distribution, such valuation, however, to be arrived at either with or without appraisal. Carson then asked if the value of the interest of the deceased partner in the partnership should be excluded from the general inventory even though there was no appraisal, and received an affirmative reply from Dickson, who added that an appraisal of individual items of property should not be required.

Allison suggested that, in view of the clear provisions concerning dissolution of a partnership, the subcommittee consider appropriate wording in the draft of proposed provisions on inventory and appraisal to eliminate the necessity of having a separate provision for appraisal of partnership assets in the case of a dissolved partnership.

Debt due from person named as executor; inclusion in inventory; liability for debt (ORS 116.440); discharge by will or bequest of a claim of decedent (ORS 116.445). Lundy pointed out that ORS 116.440 and 116.445 dealt with debts owed by the personal representative to the decedent, and

asked whether these provisions should be included with the provisions on inventory and appraisal as a part of Butler's and Carson's assignment. Dickson answered that ORS 116.440 and 116.445 would be included in the subcommittee's assignment. He expressed the view that a debt of the personal representative should be treated the same as any other just debt owing to the estate. Dickson also asked Lundy to make a special note to remind the committees to discuss this question when they reconsider obligations of fiduciaries, and Butler called attention to the fact that Bettis had accepted an assignment to make a study of that particular problem.

Establishing Foreign Wills and Ancillary Administration

[Note: In March 1966 Lundy distributed to all members of both committees pamphlet copies of the Uniform Probate of Foreign Wills Act, Uniform Ancillary Administration of Estates Act and Uniform Powers of Foreign Representatives Act, all drafted by the National Conference of Commissioners on Uniform State Laws.]

Mapp reviewed the history of the three Uniform Acts, and suggested that committee consideration on proposed adoption of the Acts in Oregon be postponed until the Acts had been reconsidered and finally approved by the special committees of the National Conference and American Bar Association in connection with the Uniform or Model Probate Code project presently in progress. He expressed the belief that uniformity among states was particularly important in these areas, and he was opposed to adopting portions of the Acts, rather than adopting the Acts intact. Frohnmayer and Zollinger did not agree that such postponement of consideration of adoption of an Act was necessarily advisable for the sake of uniformity. Mapp pointed out that the Bar committee had considered the three Acts at two different times in the past. On one occasion, he said, the Bar committee had recommended that all three be adopted, and on the other occasion it had recommended that none be adopted. Mapp commented that he and Riddlesbarger had discussed the Acts and did not feel that they would recommend their adoption.

Uniform Probate of Foreign Wills Act (drafted by National Conference of Commissioners on Uniform State Laws and approved September, 1950). Mapp noted that the Uniform Probate of Foreign Wills Act had been adopted in only two

states--Wisconsin in 1952 and Texas in 1955. He read the Act section by section, together with excerpts from the commissioners' prefatory note and portions of the commissioners' notes of explanation following each section. Mapp explained that the purpose of section 1 was to permit a will to be accepted in Oregon if it had been proven in another jurisdiction. In reply to a question by Frohnmayer, Mapp stated that if a will had not been submitted in another jurisdiction and was submitted for probate in Oregon in the first instance, section 5 would permit its acceptance in Oregon. Section 5, he stated, would also permit probate of a will which did not comply with requirements of the other jurisdiction, but did comply with Oregon requirements.

Zollinger recalled that the committees had previously discussed requirements of a will for probate and decided that a will could be received in Oregon if it was executed in a manner satisfactory to the requirements of the Oregon law, or the law of the state of execution or the law of the state where the decedent was resident. He expressed the view that this was a more sensible approach than that contained in the Uniform Act. Mapp suggested that Oregon might want to reject the will if a court in another state had rejected it for a reason such as undue influence. Section 5 of the Uniform Act, he explained, would require Oregon courts to follow the determination of the court of the decedent's domicile at the time of his death. Zollinger was opposed to the concept that an Oregon court should be bound by a finding of fact made in a court of another jurisdiction. Dickson expressed agreement with Zollinger's view, remarking that the law where the property was located should govern. Frohnmayer expressed the opposing view, commenting that his office, being close to California, had handled a number of such cases, that they simply took what California had admitted and proceeded to carry out the laws of Oregon in relation thereto, and that no great problems had been encountered in this procedure.

Mapp pointed out that under section 4 of the Uniform Act the Oregon probate court could decide not to admit a will if to admit it when it had been rejected elsewhere would upset the overall testamentary plan. He suggested insertion of the following provision, derived from the commissioners' notes following section 4, at the end of section 4: "Unless such admission would so badly disrupt the testator's plan for distribution of his estate that admission of the will to local probate would not promote the testator's overall intention as to his estate."

Butler suggested adoption of a reciprocity statute on admission of foreign wills. Allison observed that the proper approach to a Uniform Act was to treat it as such, and suggested that the Uniform Act under discussion be referred to the Bar Committee on Uniform State Laws. Zollinger expressed disapproval of this suggestion, and Dickson concurred that a matter pertaining to probate should not be referred to another committee.

Frohnmayer inquired concerning Iowa's approach to the problem, and was told by Lundy that Iowa's provisions (i.e., sections 495 to 499, 1963 Iowa Probate Code) appeared to have little relationship to the Uniform Act. Zollinger read section 497, 1963 Iowa Probate Code, pertaining to foreign wills as documentary evidence of title to property, and observed that Oregon had no comparable statutory provision, but that one should be adopted.

After further discussion, Zollinger read from pages 28 and 29 of the minutes of the January 1966 meeting of the committees. Frohnmayer moved, seconded by Zollinger, that in view of the action taken at the January 1966 meeting, the committees adhere to their original position on the matter of admission of foreign wills. Motion carried, with Mapp voting no.

Foreign personal representatives and ancillary administration. Lundy was directed to distribute copies of a first tentative draft, dated April 28, 1966, of a portion of the proposed Uniform or Model Probate Code entitled "Foreign Personal Representatives: Ancillary Administration" to all members of both committees, and to schedule this matter for consideration at the October meeting.

October Meeting of Committees

The following items were scheduled for consideration at the October meeting:

1. Independent administration (report by Allison, Lisbakken, Mapp and Zollinger).

2. Discussion of recently enacted New York probate codes (report by Lisbakken and Mapp).

3. Inventory and appraisal (report by Butler and Carson).

4. Foreign personal representatives ancillary administration (discussion to be led by Mapp and Riddlesbarger).

5. Possession and control of property (ORS 116.105) (report by Richardson on income disposition).

The meeting was adjourned at 1:10 p.m.

APPENDIX

(Minutes, Probate Advisory Committee Meeting, August 19 & 20, 1966)

REVISED DRAFT
SUPPORT OF SURVIVING SPOUSE AND MINOR CHILDREN

(submitted by Stanton W. Allison)

1. If an intestate leaves neither surviving spouse nor minor children, all the property of the estate is assets in the hands of the administrator for the payment of funeral expenses, expenses of administration, the debts of the deceased, or distribution according to law.

2. When a homestead descends to or is devised to a child or grandchild, widow or widower, father or mother of the deceased owner of the homestead, it is taken free of judgments and claims against the deceased owner or his homestead estate except mortgages executed thereon and laborers' and mechanics' liens. Such homestead shall be subject to the expenses of his last sickness and for his funeral, the expenses of administration, and the claims of the State Public Welfare Commission and the State Board of Control.

3. If upon filing the inventory of the estate of an intestate decedent who died leaving a spouse or minor children, it appears from the inventory that the value of the estate does not exceed $10,000 exclusive of the amount of liens and encumbrances thereon, the court or judge thereof shall make a decree providing that the whole of the estate, after the payment of funeral expenses and expenses of administration, be set apart for such spouse or minor children in like manner and with like effect as in case of property exempt from execution. There shall be no further proceeding in the administration of such estate unless further property is discovered.

4. The surviving spouse and minor children of the deceased are entitled to remain for one year following the date of death in the possession of the home occupied by them and owned by the decedent, all the wearing apparel of the family, and the household furnishings, and during such occupancy the home, apparel, and furnishings shall be exempt from execution.

5. The court may by order provide an allowance to the surviving spouse for the support of such spouse and any minor children, or to the minor children alone if there be no surviving spouse, in an amount adequate for support during the administration of the estate. In making or denying such order the court shall take into consideration all assets and income available for the support of the spouse and children outside of the probate estate. The allowance hereunder shall have priority over debts and administration expenses; but if the estate is insolvent, the allowance may not be granted for more than one year after date of death.

Note: The provisions for sale of real and personal property should provide that sales may be made for support of surviving spouse and minor children.

REPORT
May 14, 1966

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Robert W. Gilley and Donald G. Krause

Subject: Support of Surviving Spouse and Minor Children; Homestead

One of the matters scheduled for consideration by the Advisory and Bar Committees at the meeting to be held May 20 and 21, 1966, is support of surviving spouse and minor children and homestead.

At the April meeting three subcommittees were appointed to prepare independently and submit for consideration at the May meeting different proposals for support and other family rights. The following draft was prepared by Subcommittee #1, consisting of Mr. Gilley and Mr. Krause, and is submitted for your consideration.

DRAFT

Section 1. A surviving spouse and minor or incompetent children of the decedent may continue for one year after the death of the decedent to occupy the place of abode, owned by the decedent, which they occupied at his death. During their occupancy, such place of abode shall continue to be exempt from execution to the extent that it was exempt from execution while decedent lived. They shall not commit or permit waste. They shall keep the improvements insured against fire. They shall pay taxes as payment becomes due.

Section 2. (1) Upon the petition of the surviving spouse or the guardian of the estate of minor or incompetent children for the award of property or funds for their support, citation to parties in interest and the personal representative, and hearing thereon, the court shall make by order such provision for their support as shall be reasonable. The order may be for the transfer of real or personal property or for

periodic payment of funds while administration of the estate continues, not exceeding 24 months from the date of decedent's death.

(2) The petition for such award shall show what other assets and income are available for the support of the spouse and children and what expenses for their support are anticipated.

(3) The personal representative shall show in his answer to the petition the nature and value of the assets of the estate and the nature and amount of claims, taxes and expenses, so far as known.

[Note: One of the matters scheduled for consideration by the Advisory and Bar Committees at the meeting to be held June 17 and 18, 1966, is support of surviving spouse and minor child and homestead.

At the April meeting three subcommittees were appointed to prepare independently and submit for consideration at a future meeting different proposals for support and other family rights.

A draft prepared by Subcommittee #1, consisting of Mr. Gilley and Mr. Krause, was embodied in a report dated May 14, 1966, copies of which were distributed to all members of both committees prior to the May meeting.

Subcommittee #2 consists of Senator Husband and Professor Mapp. Copies of the following report, dated May 20, 1966, by Professor Mapp were distributed to most members present at the May meeting.]

REPORT
May 20, 1966

To: Members of the Advisory Committee on Probate Law Revision and Members of the Bar Committee on Probate Law and Procedure

From: Thomas W. Mapp

Subject: Support of Surviving Spouse and Minor Children; Exemptions (Homesteads), and Family Allowances

Exemptions (Homesteads)

Statutes protecting certain basic personal property assets of a family unit from the claims of creditors existed in the United States as early as 1773 and are in force in virtually all of the states. Atkinson, Wills 127 (2d ed. 1953). Their stated purpose is to protect the family members from privation, and from becoming public charges, because of the economic misfortunes and/or follies of the head of the family. Applied to real property, the exemption principle has taken the form of the Homestead Exemption.

The following table summarizes the current Oregon exemption provisions.

ORS		Exempt Property	Exempt Value
23.240		Homestead (abode of the family)	$ 7,500
23.160	(a)	Books, pictures, musical instruments	75
	(b)	Wearing apparel of deceased, plus for each member of the family	100 50
	(c)&(d)	Tools used to earn living, and vehicle to value of $400, total	800
	(e)	Domestic animals for family use	300
	(f)	Household goods, furniture, TV, and provisions and food for family for 60 days	400
23.164		Mobile home (if no homestead claimed)	3,000
23.181		Wages, for each 30 day period	250

In most states it has been considered important to continue these exemptions after the death of the husband for the benefit of the surviving spouses and minor children. See ORS 116.010.

But, in addition to sheltering a minimal amount of property from the deceased's creditors, these provisions also with draw this minimal amount of property from the deceased's possible irresponsible testation, and provide an immediate fund free of the delays of administration.

Granting that these provisions impose some limitations on freedom of testation, and result in some injustice to creditors, it is believed that the net benefits to the family unit greatly outweigh the disadvantages, and that the principle should be continued. However, statutes such as those of Oregon, whatever relevance they may have had in a strictly agrarian economy, fail to accomplish their purpose in a society in which the families most in need of protection depend on a wage-earner who may not own any interest in real property, have his own tools, or keep livestock for family use.

Therefore, it is recommended that the Oregon Probate Code exempt assets of a certain value, as $10,000.

Recommendation:

§1. Exempt property. (Outline of content of section)
- a. The surviving spouse or minor children of a decedent shall be entitled to property of the estate, real or personal, of the total appraised value of $10,000.
- b. The selection shall be made by the surviving spouse, if living, or by the guardians of the estates of the respective minor children, or by the court.
- c. Such property shall not be subject to administration, and shall be exempt from claims of creditors except such as hold liens on the specific property selected.
- d. Such property shall be in addition to the interstate share of any recipient.
- e. Such property shall be in addition to the testate share of any recipient unless the testator expressly conditions benefits under the will by waiver of exempt property.

Comment:

This provision would give the family the greatest flexibility in selecting property needed for support. The decedent's equity in the family residence, or a favorable lease on the family residence, might be chosen in order to avoid a move. Articles of sentimental value could be selected. The family car and household equipment could be selected, thus reducing common distribution problems.

Recommendation:

§2. Order to dispense with administration. (Substance of § 7 of original Allison draft, substituting "$10,000" for "$2,500 over and above property exempt from execution.")

Comment:

Considering that most spouses now hold much of their property in joint tenancy, the further blanket exemption of $10,000 of the deceased's property from administration could have a profound effect on the speed of small estate administration in Oregon.

Family Allowances

Recommendation:

§3. Family Allowance
(Section 2 of Gilley-Krause draft with addition of "in addition to exempt property" after first comma in subsection (1).)

(I have assumed that provision will be made elsewhere to the effect that family allowance is to be paid after administration and funeral expenses, but before all other claims. Exempt property is not treated as part of the estate for any purpose.)

ADVISORY COMMITTEE
Probate Law Revision

Twenty-ninth Meeting
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Dates) and: Times) 1:30 p.m., Friday, October 14, 1966 and 9:00 a.m., Saturday, October 15, 1966
Place: Judge Dickson's courtroom, 244 Multnomah County Courthouse, Portland

Suggested Agenda

1. Approval of minutes of August meeting.

2. Reports on miscellaneous matters.

3. Independent administration.

   Reports by members of subcommittee (Allison, Lisbakken, Mapp and Zollinger) on second tentative draft, 5/18/66, "Part X. Independent Administration," of proposed Uniform or Model Probate Code, with suggestions for revision and possible inclusion thereof in proposed revised Oregon probate code.

4. 1966 New York probate codes.

   Report by subcommittee (Lisbakken and Mapp) on revised probate codes recently enacted in New York, and provisions thereof worthy of consideration for inclusion in proposed revised Oregon probate code.

5. Inventory and appraisal.

   Report and draft by subcommittee (Butler and Carson), encompassing ORS 116.405 to 116.465 and pertinent provisions of the inheritance tax statutes (i.e., ORS 118.610 to 118.700).

6. Foreign personal representatives; ancillary administration.

   Consideration of first tentative draft, 4/28/66, of part of proposed Uniform or Model Probate Code entitled "Foreign Personal Representatives: Ancillary Administration." Discussion to be led by Mapp and Riddlesbarger.

7. Possession and control of property (ORS 116.105).

   Report by Richardson on income disposition.

Consideration of such matters as : (1) Who should make repairs and otherwise protect property against loss or damage; (2) who is entitled to income from property during administration; (3) whether personal representative has duty to take possession and produce income.

8. Sale or lease of estate property.

Report and draft by Zollinger on ORS 116.705 to 116.900.

Also, recommendation by Zollinger on disposition of ORS 116.990, which provides a criminal penalty for unauthorized administration of the personal estate of a decedent.

9. Next meeting.

ADVISORY COMMITTEE
Probate Law Revision

Twenty-ninth Meeting, October 14 and 15, 1966
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The twenty-ninth 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, October 14, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Frohnmayer, Gooding, Husband, Jaureguy, Lisbakken, Mapp and Riddlesbarger. Carson was absent.

The following members of the Bar committee with terms expiring in 1966 were present: Richardson and Warden.

The membership of the Bar committee had recently been revised and tentatively appointed for the 1966-67 term of office were:

Robert W. Gilley
Donald G. Krause
Paul R. Biggs
Patricia Braun
Kenneth Kraemer
Charles M. Lovett
Duncan L. McKay
C. Laird McKenna
Lilliam Meyers
John D. Mosser
Walter H. Pendergrass
A. E. Piazza
David C. Silven
Judge Joseph J. Thalhofer
William R. Thomas

The following members of the 1966-67 Bar committee were present: Gilley (arrived 4:30 p.m.), Braun, Lovett, McKenna, Meyers, Pendergrass, Piazza, Thalhofer and Thomas. Krause, Biggs, Kraemer, McKay, Mosser and Silven were absent.

Also present were Robert W. Lundy, Chief Deputy Legislative Counsel, and James Sorte who had recently been appointed to the Legislative Counsel staff to assist with the probate law revision.

Miscellaneous Matters

Introduction of new members. The new members of the Bar committee were presented and Lundy introduced Mr. James Sorte who had recently been appointed to the staff of Legislative Counsel to assist with the probate law revision.

Probable Date of Completion of Probate Law Revision and Future Procedures. Dickson called attention to recently published articles criticizing probate procedures throughout the United States and made particular reference to "The Mess in Our Probate Courts" appearing in the October 1966 issue of the Reader's Digest. Husband pointed out that the article was not entirely accurate and that the attorney's fee for a $25,000 estate in Oregon would be $800 less than that described in the magazine.

Dickson suggested, in view of the increase of adverse publicity, the committees consider accelerating the probate law revision with the expectation of completing it in time for introduction at the 1967 session of the legislature. Riddlesbarger pointed out that it would be unrealistic to anticipate that the probate revision would be adopted by the legislature without first selling it to lawyers throughout the state and that the time remaining before the legislative session was too short to accomplish this task. Allison suggested that the revision might be completed in time for introduction before the end of the legislative session and this would allow legislators and attorneys an opportunity to study the proposal in the interim preceding the 1969 session. Husband expressed agreement with Riddlesbarger's view and commented that the committees would be doing well to complete the project in 1968. Zollinger agreed there was not the slightest possibility the revision could be completed in time for introduction at the 1967 session. He pointed out that the initial consideration of the proposed probate code might be accomplished by the end of 1966 after which it would take substantial time, probably a year, to go over the first draft. By the middle of 1968, he said, the committees should have the proposed probate code in print and ready to present to local Bar associations and other interested groups.

Allison called attention to the explanatory notes following code sections in recently completed probate code revisions in other states and suggested the Oregon code should also have appended to each section or each group of sections a comment explaining the reason the committees considered the changes made to be appropriate. Zollinger agreed with Allison's suggestion and noted that the comments could be prepared by the draftsman which added a further reason for extending the date of completion of the probate code revision.

Frohnmayer indicated that sections of the probate code which the committees had reviewed and approved were not being made available in rough draft form and urged that a Legislative Counsel staff member be made available to devote his entire time to the probate project. Zollinger pointed out that the committees originally contemplated completion of their initial study before receiving a first draft and had been proceeding on that premise. Husband questioned the advisability of adopting a different plan, and Frohnmayer agreed that the basic plan should not be changed, but urged that some of the committee's deliberations be returned in written form at an early date so that members of the subcommittees who had done the original work on particular sections could be reviewing the drafts.

After further discussion, Frohnmayer moved, seconded by Zollinger, that the chairman appear before the Law Improvement Committee, explain the problem, and urge that the probate committees be provided with the full time services of an attorney capable of drafting the revised probate code.

Zollinger commented that he would be in favor of arranging for a much larger share of Lundy's time and letting some other person on the Legislative Counsel staff take over the duties Lundy was expected to perform for the legislature. Mapp suggested it might be possible to hire someone who had worked on probate revision in another state. Frohnmayer agreed that there were probably men in Wisconsin, Iowa or Michigan who would be available to come to Oregon. Dickson expressed the view that it would probably not be necessary to hire outside help but, in view of the time and talent donated to this project at no cost to the State of Oregon, the committees were entitled to Lundy's undivided attention until the probate project was completed.

After further discussion, it was decided that the chairman should appear before the Legislative Counsel Committee rather than the Law Improvement Committee. Vote was then taken on Frohmayer's motion which was modified to include the appearance of a subcommittee with the chairman. Motion carried unanimously.

Richardson asked about the possibility of obtaining assistance from a foundation and was told by Lundy that it was difficult to interest foundations in granting money to a state-supported group. Lundy added that it was easier to find the money than to find a competent bill draftsman.

Lundy noted that a new Legislative Counsel Committee would be appointed when the legislature convened and there

was no meeting of this committee scheduled in the near future whereas the Law Improvement Committee had a meeting scheduled for November 10, 1966. Dickson appointed Zollinger, Allison and Frohnmayer to appear with him in Salem before either or both the Law Improvement Committee and the Legislative Counsel Committee with final arrangements to be made by Lundy.

Proposed 1966 Wisconsin Probate Code. Lundy said that he had received a copy of the proposed 1966 Wisconsin Probate Code and had requested copies in sufficient number to distribute to all members of the advisory and bar committees.

Zollinger read and presented a brief explanation of a few of the provisions contained in the proposed 1966 Wisconsin Probate Code covering the following subjects: Section 856.25 relating to the bonding of a personal representative; section 857.01 relating to title to all property in the personal representative; chapter 861 relating to provision for family rights; section 861.31 relating to allowance to family during administration; and section 867.01 having to do with summary procedures for small estates.

Minutes of August Meeting

There being no objection, Dickson ordered that reading of the minutes of the last meeting (August 19 and 20, 1966) be dispensed with and that they be approved as submitted.

Abatement and Continuance of Actions and Suits

Jaureguy asked the committees to reconsider the action taken at the previous meeting with respect to abatement and continuance of actions and suits. [Note: See Minutes, Probate Advisory Committee, 8/19, 20/66, page 6.] He pointed out that the Oregon Supreme Court had held that an abatement was the destruction of a suit and that the action was thus quashed and ended. Since the action was destroyed by an abatement, he was of the opinion that language different from that adopted at the previous meeting would be more appropriate and proposed the following:

> "(1) No suit or action shall abate by the disability of a party. In any such case the party disabled shall appear by his guardian. If he has no guardian or if the guardian has been disqualified or refuses to act, the court shall appoint a guardian ad litem for him.
>
> "(2) No suit or action shall abate by the death of a party. In any such case the suit or action shall appear by or against the personal representative of the decedent."

Zollinger pointed out that the conclusion reached by the committees at the August 1966 meeting was that they intended the action should abate unless there was a substitution within a year. After further discussion, Frohnmayer moved, seconded by Mapp, that the committees adhere to the action taken on page 6 of the August 1966 minutes. Motion carried.

Independent Administration

Allison distributed to members copies of his report relating to independent administration. [Note: A copy of Allison's report constitutes Appendix A to these minutes.]

Allison indicated that his report had been prepared in accordance with the discussion of the Washington nonintervention will statute at the previous meeting. [Note: See Minutes, Probate Advisory Committee, 8/19, 20/66, pages 2 to 4.] He explained various provisions of his report in some detail and noted that the court would be given authority to require a bond in all cases if it appeared proper. The theory of the procedure, Allison said, was that the personal representative would conduct the administration of the estate without the necessity of going to the court for orders during the course of the administration. He commented that the creditors would present their claims to the personal representative who would pay them if they appeared to be proper. When the personal representative had completed his administration of the estate, he would be required to file an application for a decree of distribution and at the same time would file a full, complete accounting of his proceedings in all matters. The court would then, if it found everything in order, issue a decree of distribution and the estate would be closed. Allison further explained that if any kind of a contest developed, the estate would be brought immediately into formal probate proceedings. He pointed out that the Act did not deal with inheritance tax problems and if it were adopted by the committees, he suggested the committees discuss the Act with the appropriate people in the Inheritance Tax Division of the State Treasurer's office.

Dickson expressed the view that the procedure as outlined by Allison would not be an improvement over either the existing system or the proposed probate code and said he could see no reason for changing from a proven method to one about which they knew nothing.

There was a discussion of various methods used by laymen to avoid probate and Mapp indicated that the committees should try to discourage methods of avoiding probate by adopting a simple system which would bring everyone into the

central probate system and provide creditors an opportunity to force formal probate administration should it become necessary.

Zollinger indicated that the procedure on sale, particularly of real property, was somewhat burdensome and observed that the sale of property during probate might be the principle problem with which the committees should concern themselves. He proposed that adoption of section 867.01, proposed 1966 Wisconsin Probate Code, might dispel much of the basis for the criticism of probate. Dickson agreed that the Wisconsin proposal, coupled with the other streamlined provisions of the probate code adopted by the committees, would solve most of the problems.

Allison suggested that further consideration of an independent administration statute be postponed until completion of the initial review of the probate code at which time the committees would be in a better position to know whether or not adoption of the proposal would be desirable. The committees agreed and Dickson asked that independent administration be placed on the agenda for further consideration at the time the initial study of the code was completed.

Riddlesbarger requested that the matter of joint accounts also be considered at that time and added that a spouse who elected to take her statutory rights could wholly defeat the testator's intent. Frohnmayer commented that creditors should probably be permitted access to the funds.

Possession and Control of Property (ORS 116.105)

Item 7 of the Suggested Agenda was the next item considered. Mr. Richardson introduced Mr. Jack McMurchie, Portland attorney, who discussed who is entitled to income from property during administration and problems with income allocation. Detailed minutes of this discussion are being prepared for all members of the advisory and bar committees, and will be sent to the members at a later date.

Meeting recessed at 5:00 p.m.

The following are detailed minutes of the report of Mr. Jack McMurchie at the October 14, 15, 1966, meeting of the Advisory Committee on Probate Law Revision at a joint meeting with the Bar Committee on Probate Law and Procedure.

Refer to page 6 of the minutes Possession and Control of Property (ORS 116.105).

Possession and Control of Property (ORS 116.105)

DICKSON: If you will permit me to vary from our agenda, we will go to item 7. Richardson has to leave.

RICHARDSON: Oregon is not unique in this respect in that it has very little law on the subject. It is a matter of practice rather than recorded decisions. Introduced Jack McMurchie, Portland attorney.

McMURCHIE: Cam asked me to appear here today to report some views that our office has come up with in the last year or so as a result of an estate we are handling which has some significant income allocation problems.

The Oregon Supreme Court has spoken very little on this subject. Also in Oregon the court has held that the Uniform Principal and Income Act does not apply to estates and as a result we have the situation now that pretty much whatever is brought before the court as a suggested method of allocating income earned during administration is adopted and approved by the court in the final account if the matter is even raised in the final account. Perhaps at that point any beneficiary other than a trustee doesn't have to concern themselves with whether the allocation was proper or not. I don't intend, in making my presentation here today, to go back and review the general rules with respect to what types of bequests are entitled to income and what aren't, unless you wish me to do so.

DICKSON: I think it would be beneficial and desirable.

McMURCHIE: Everything I say is "the general rule" or "the Restatement of Trusts" rule and is not necessarily the rule in Oregon.

The recipient of a specific devise or bequest or a bequest of an annuity is entitled to the income earned by the property bequeathed during the period of administration. This assumes, of course, that you have a residue out of which you can pay expenses of administration and taxes.

The next category is a general legacy. A general legacy is usually pecuniary in nature. You can have a general legacy which is in the nature of a specific legacy such as a gift of a number of shares of stock which you don't own at the time of your death. However, even then the legacy would be in the nature of a pecuniary legacy during the period of administration. For one reason or

another, the rule has grown up over the years that an outright pecuniary bequest is not entitled to share in the income earned during administration except in the event that the legacy is not satisfied within the "common law period of administration," whatever that is in Oregon. There is some feeling that if you have not satisfied a pecuniary legacy within one year after the date of death, the legatee is entitled to interest at the going rate on the bequest from that date until such time as it is paid. This is consistent with the common law except we don't know what the common law period of administration is in Oregon.

Contrary to the situation where an outright pecuniary legacy is entitled to no income, courts have generally held that a pecuniary legacy in trust is entitled to participate in the income earned during the period of administration. The amount of the income is another problem, but the general rule is that it is entitled to its proportionate share of the income. The question is whether you must make periodic adjustments in the ratio of the fixed value bequest to the entire estate -- whether you must make periodic adjustments so that the general legacy in trust actually gets a proportionate share of the income earned by the estate. This is a problem that is not covered in Oregon -- that is whether or not this general rule and the distinction between an outright bequest and a bequest in trust is the law in Oregon or should be the law in Oregon.

Residue. The present rule and the Restatement rule is that gifts of the entire residue or a portion of the residue in trust and a portion outright all are entitled to share pro rata in the income.

With respect to the so-called pre-residuary legacies, I don't believe there is any significant problem that needs to be resolved except in the limited situations where people are using pecuniary marital deduction bequests or a pre-residuary marital bequest or pecuniary or net estate type bequests where you don't give a fractional share of the residual estate. This area is not covered by the Uniform Principal and Income Act revision and I think probably needs to be covered because a pecuniary gift intended to take advantage of the marital deduction is certainly to be distinguished from a pecuniary bequest of $10,000 or $25,000 to a person other than the testator's spouse. I think that the pre-residuary marital deduction, whether it be pecuniary or not, should receive a pro rata share of the income.

To go back to the problem of the allocation of income to the pre-residuary legatees. Where a general legacy of $250,000 is given to A and the residue to B with a provision that all of the taxes and expenses be paid out of the residue, the problem is whether you start out by taking the inventory values of the gross estate and $250,000 over that inventory value times the income is what the recipient gets throughout the period of administration, or whether you try to determine what will be the net residue available for actual distribution and make an allocation of income on the basis of $250,000 over that net. These two methods are called the gross share or the net share methods.

The so-called gross share rule, where you allocate on the basis of inventory values, without adjustment, is the easiest method. It is not the most equitable because of the fact that the recipient of the general legacy is not actually getting his share of the total income after the taxes and expenses are paid. Of course, the net share rule has the disadvantage of being more difficult and also has inequities.

The answer to the problem, which is suggested by the revision to the Uniform Principal and Income Act, is to require periodic adjustments in the ratio of the value of general legacy to the entire estate at each time when you make at least a major expenditure. These adjustments would be made when you paid such things as inheritance taxes, attorneys' fees, executor's commission, federal estate tax. Unfortunately, this method is more difficult to deal with and I don't think that any of the major trust departments in the city are even trying to do it. If they aren't, it may be too much to ask of a personal executor.

The same problem arises much more often and with much more case authority when you are concerned with the allocation of income among residuary legatees and there is a provision in the will for payment of these expenses or taxes out of a particular share of the residue only. What do you do in these instances? Do you apply the gross share, the net share or the periodic adjustment rule? The same problem occurs in the area of charitable bequests where you have a charitable bequest which is out of the residue, but is not going to bear a portion of the taxes.

In each of these areas, the solution proposed by the revised Principal and Income Act is the periodic adjustment rule. This is far and away the most equitable rule and certainly when you get into estates where there are significant amounts of income, it can make a substantial difference whether a residuary legatee's share of the estate is going to be reduced at the end of 15 months by a substantial amount to pay federal estate taxes. At that time the executor should make an adjustment and establish a new ratio of the shares of the residue remaining and carry that ratio forth from that time, at all times using inventory values for this purpose.

One thing which I did not touch on and which is a problem that is more crucial in Oregon than in many jurisdictions is raised by a case which many of you may be familiar with, In re Feeheley's Estate, 179 Or 250. There the court held that income on assets which are expended and which will never become a part of the residue of the estate, is to be added to the residue and not distributed as income for the reason that the testator never really intended the income beneficiary to get the income earned on those assets. This is the English rule. It was then but no longer is the general rule. The court relied extensively on the fact that it was the general rule and the rule of the Restatement of Trusts which it no longer is. No one has taken this problem to the Supreme Court again so we are bound by that decision and to some extent, it affects the general question of whether or not you can make periodic adjustments. It does in effect adopt the net share rule.

I wanted to hand out to you a couple of pages from an article in Trusts and Estates which deals with this problem and which contains in it a quotation of Section 5 of the Revised Uniform Principal and Income Act which was adopted by the National Conference of Commissioners in 1962 but has never been considered by the Oregon State Bar Committee on Uniform Laws. It is, to my way of thinking, at least the first step in the solution to the problem. The only other way is if you draft your will with detailed instructions as to how income should be allocated. Unfortunately many attorneys today are not aware of the problems in this area and wills are drafted without these problems in mind.

The provision appears on the second page of what I gave you. It would either have to be adopted as a part of the Uniform Principal and Income Act or it would have to become a part of the general probate code. This provision still leaves it available to the testator's attorney to draw a will which will change the results of the Act. However, it does contain specific detail covering most of the problems I have just discussed and what will happen if there is no language in the will to cover the problem. It adopts the more equitable rule, the combination of the gross share and net share rule, requiring periodic adjustments. The Act also provides that income received by a trustee under this subsection should be treated as income of the trust. Subparagraph (b) you will note is contrary to the Peeheley rule.

My recommendation is that the revised Uniform Principal and Income Act makes a substantial step forward and I think it is the right step in solving this problem. I have only one suggested change and that is that some language should be inserted to make it clear that the legatee of a pecuniary bequest which is intended to take advantage of the marital deduction provisions of the Internal Revenue Code would also share in the income in the same way as a residuary legatee.

(Citation to the article distributed to committee members: October 1963 issue of Trusts and Estates, page 916; also see, 2 ALR 3d, p. 1061; IXI Scott on Trusts, Sec. 234.)

ZOLLINGER: Would it be of value to have some of this statutory provision incorporated in the probate code or is the proper place in the Principal and Income Act?

McMURCHIE: In the Uniform Principal and Income Act if we can get it there. If we cannot, this committee should work to be assured it will either get it there or in the probate code.

ZOLLINGER: With the change you suggest relating to pecuniary gifts to spouse it will no longer be a direct adoption of section 5 of the revised Act. There are some other revisions in the revised Act and it might be sensible to propose the substance for our present Principal and Income Act. If we are concerned only with the disposition of income in probate estates, there would be nothing improper about putting it in the probate code.

JAUREGUY: Don't you think it should be there?

ZOLLINGER: I would rather like to see it there myself.

McMURCHIE: If put in there, it would have to be revised to the extent that the last sentence about the trustee would not be appropriate.

ZOLLINGER: Yes, this language is not appropriate, but the substance may be. My final question is: Will you draft something for us?

DICKSON: We would be deeply grateful if you would prepare the appropriate Act embracing all your suggestions.

RICHARDSON: The conclusion Jack came to is the same conclusion that the American Bar Section of Probate Property came to after quite an extensive report.

McMURCHIE: I assume you just want that in a form that you could work on. I would not have to concern myself with the ramifications this might have on other sections of the revised Code.

DICKSON: We will take care of that.

ALLISON: . . . When putting that into probate language the reference to "times of distribution" should have a substitute phrase.

FROHNMAYER: We do have in Oregon the Uniform Principal and Income Act.

McMURCHIE: Yes, but not the revision and the revision not only incorporated this section but made other substantial changes in such things as income on wasting assets and timber problems.

FROHNMAYER: Do you think the legislature would buy this part of it?

McMURCHIE: I don't know that because I don't know the reason why this Act has not been brought up or discussed at least in the committee reports of the Committee on Uniform State Laws of the Oregon State Bar since the revision took place. I don't know whether they have missed it or don't see fit to adopt it.

FROHNMAYER: This is a problem we are confronted with every day. I am wondering if we should try to do something about it in the 1967 session which we might approach through the Principal and Income Act. Not to amend it in any other respect; just in accordance with section 5.

ZOLLINGER: If it is paid to the trustee as income, he can determine pretty easily what to do, can't he?

McMURCHIE: He should be able to but he might still be faced with the problem of In re Feehely's estate.

DICKSON: If he will prepare this proposal for incorporation in the probate code, then we can, if we wish, offer it as an amendment to the Principal and Income Act.

ZOLLINGER: Let's put it in the probate code and keep it as clear as we can so it will not be a fearsome thing.

McMURCHIE: You would be willing to adopt the more complicated periodic adjustment approach than go to one of these other methods?

ZOLLINGER: I don't feel strongly on it. If it makes substantially greater difficulty, perhaps the less equitable course would be the better one to choose. I would think that once we had the rule laid down, it wouldn't be difficult to follow. Bert, would it be difficult to follow if we had the law laid down?

BUTLER: No, I don't think so.

LUNDY: Is there any other action you want to take on 116.105?

DICKSON: Let's postpone the whole thing until we have Mr. McMurchie's proposal and then take it up again.

ZOLLINGER: I should think we could put it on next month's agenda.

DICKSON: We will put this on the agenda for the November meeting as the first item of business.

Meeting recessed at 5:00 p.m.

The meeting was reconvened at 9:00 a.m., Saturday, October 15, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

All members of the advisory committee were present. The following members of the Bar committee were present: Gilley, Braun, Lovett, McKenna, Meyers, Piazza, Thalhofer and Thomas. Also present were Lundy and Sorte.

1966 New York Probate Codes

Mapp and Lisbakken had been appointed as a subcommittee to study the 1966 New York Probate Codes and report on provisions which the committees might be interested in incorporating into the Oregon probate revision.

Mapp reported that he and Lisbakken, working independently, had studied the 1966 New York Probate Codes and had reached the conclusion that it would be impossible to cover in one meeting all of the provisions which the committees might want to consider. He indicated that they would commit themselves to becoming familiar with the New York codes as well as appropriate portions of codes of other states and would be prepared to relate these code provisions to the committees' discussions.

Inventory and Appraisal

Butler and Carson had been appointed as a subcommittee to submit a draft relating to inventory and appraisal provisions (i.e., ORS 116.405 to 116.465) and pertinent provisions of the inheritance tax statutes (i.e., ORS 118.610 to 118.700). [Note: See Minutes, Probate Advisory Committee, 8/19, 20/66, pages 17 to 21.]

Carson explained that J. J. Ferder, State Inheritance Tax Supervisor, was not able to meet with Butler and him on the day they had planned and Carson had, therefore, met with Ferder and two members of his staff prior to the appointed day. Carson expressed the view that the suggestions Butler and he would propose to the committees were such that they would not anticipate objections from the Inheritance Tax Division except in minor respects. He said that he had written the memo relating to the inventory and appraisal statutes appearing in ORS chapter 118 while Butler had undertaken writing recommendations relating to the inventory and appraisal statutes in ORS chapter 116.

ORS chapter 116. Butler distributed to members copies of his report entitled "Inventory and Appraisal." [Note: A copy of Butler's report constitutes Appendix B to these minutes.]

Section 4. Butler explained that his report restated the law without noting deletions or revisions in existing law. He read his report and, having read section 4, was questioned by Husband concerning its meaning. He was told by Butler that no appraisal of any of the assets of an estate would be required unless the appraisal was required for inheritance tax, administration or distribution purposes or by order of the court and that the appraisement could be of specific assets or the estate as a whole. Butler also noted that the deletion of the appraisal requirement was borrowed from section 365 of the 1963 Iowa Probate Code.

Husband indicated that friends and neighbors frequently appraised property in his county without charge to the estate and appraisals caused few, if any, problems. Butler remarked that this was not true in Multnomah County where appraiser's fees and attorney's fees created many problems. He pointed out that the statute was permissive and that no appraisal was required unless it served a useful purpose.

Allison asked how the court could set an adequate bond when no values were listed in the inventory and was told by Carson that the court could follow present practice and the bond could be increased later if it appeared necessary.

Piazza suggested that it might be simpler to have a value assigned on the inventory when it was filed and the inventory could then be used as the work sheet for the State Treasurer's report. He observed that it would be of some value to have the assigned values in the file. Frohnmayer indicated that in difficult cases he would prefer not to be forced to bind the estate to a specific value until sufficient time had passed for determination of the fair value. Piazza pointed out that the discussion concerned property which did not require an appraisal.

Section 1. Zollinger suggested that section 1 of Butler's report be amended to provide that the inventory show the estimated value of each item of property. He proposed that if the exact value was ascertainable, it would be shown, while in the case of real estate, the value of which was not easily ascertainable, the estimated value would be shown and no one would be bound by that value. Carson asked Zollinger if he would agree to showing the personal representative's estimate and received an affirmative reply. Carson suggested the addition of the following sentence to section 1: "The inventory shall show the personal representative's estimate of the true cash values of the items included therein." Riddlesbarger questioned the use of "items" because it could require the listing of

every small item in a household. Zollinger suggested that a value should be set opposite each item or group of items as opposed to one total value. Carson then suggested the following:

> "The inventory shall show the personal representative's estimates of the respective true cash values of the properties described in the inventory."

Zollinger moved, seconded by Allison, that section 1 of Butler's report be approved with the addition of the sentence suggested by Carson. Motion carried.

Lundy asked if "true cash values" meant something different than "value." Zollinger replied that it was meant to be a more precise term than the valuations included in the petitions, and Riddlesbarger suggested that "true cash value" might be included in the definitions section of the probate code. Dickson commented that the section should be broad enough to permit the personal representative to assign a value for each separate item or for a roomful of furniture. Zollinger suggested that further refinement of language be left to the draftsman.

Riddlesbarger inquired as to the meaning of "verified inventory" in section 1 and was told by Carson that "verified" to the subcommittee meant verified under oath by the personal representative. Riddlesbarger noted that since the values were estimated, the personal representative was merely verifying that it was a list of properties in the estate and the oath added nothing. After a brief discussion, Frohnmayer moved, seconded by Thalhofer, that section 1 be amended to omit the verification requirement on the inventory. Motion carried.

Allison called attention to the fact that the draft changed the time period from 30 days in existing law to 60 days. Butler pointed out that this was discussed at the previous meeting and the committees had decided 30 days was too short a time in many cases.

Section 2. Lovett noted that "appraisement" on the last line of section 2 of Butler's report should be "inventory" and Butler concurred. Butler moved, seconded by Zollinger, that section 2 be adopted with the revision suggested by Lovett. Motion carried.

Section 3. Husband pointed out that section 3 of Butler's report again referred to a "verified" inventory and suggested the verification requirement be deleted.

Allison commented that he understood there would be only a final account and inquired concerning the need for the last clause in section 3, "but the court may order which of the two methods the personal representative shall follow." Butler explained that this phrase was taken from the Guardianship Code (i.e., ORS 126.230 (2)). Zollinger remarked that many estates will necessarily continue for longer periods of time and asked if it was intended that there should be intervening accounts in those extended cases. Dickson expressed the view that there should be at least an annual accounting.

Zollinger moved, seconded by Riddlesbarger, that the final clause of section 3 of Butler's report be deleted. Motion carried.

Butler moved, seconded by Zollinger, that section 3 be adopted with the following revisions: Delete "verified" preceding "supplemental inventory"; place a period after "accounting" and delete the balance of the section. Motion carried.

Section 4. In reply to a question by Allison, Butler explained that the subcommittee contemplated that the personal representative could, on his own initiative, cause an appraisement to be made and that this might be done because of negotiations with the State Treasurer, and it would not be necessary to obtain an order of the court in such cases. Dickson suggested "or by order of the court" be deleted from section 4 of Butler's report. Butler agreed adding that it was included because it appeared in the 1963 Iowa Probate Code.

Carson said that the last sentence of section 4 was intended to show that the whole estate was not necessarily to be appraised, and that one appraiser might be appointed for one kind of asset and another appraiser for a different type of asset. This concept, he said, was based on Senate Bill 308, introduced at the 1965 legislature. Martin asked if the last sentence of section 4 meant that an appraiser had to be appointed unless the court by order declared such appointment unnecessary, and Zollinger said that this was the implication. Lundy noted that the House Judiciary Committee had added the following language to Senate Bill 308: "Different appraisers may be appointed to appraise different parts of the property."

There followed a lengthy discussion of the proper wording of section 4 after which Butler moved, seconded by Thalhofer, that section 4 be adopted to read:

"Section 4. Property belonging to the estate of a decedent need not be appraised unless the court requires an appraisement for inheritance tax purposes. The court may direct that specific property or any part of the property may be appraised by one or more appraisers appointed by the court. Different appraisers may be appointed to appraise different parts of the property." Motion carried.

Section 5. Riddlesbarger questioned the intent of "all which shall be paid by the personal representative as expenses of administration" in section 5 of Butler's report. He was told by Carson that this was an amendment to Senate Bill 308 made by the legislature and the subcommittee had adopted it. Gilley suggested "disbursements and" be deleted and Zollinger proposed "as may be approved by the court" rather than "fixed by the court." Martin asked if section 5 would take the place of the appraisal scale in the existing statute and, if so, suggested it would broaden the statute. Lundy commented that he had received correspondence from real estate appraisers who indicated the scale was in conflict with their code of ethics. He had, he said, received a letter from Oregon Chapter 14, American Institute of Real Estate Appraisers, in which they set forth the following four specific recommendations:

... "1. That some form of qualification as evidenced by membership in a properly recognized professional organization or by examination or by demonstration, be a requirement of eligibility to appraise an estate or a portion of an estate and that appointment be made only for such portion of an estate for which proper qualification is so evidenced.

"2. That appraisal fees be agreed upon in advance (prior to assignment) and that they be based on the investigation and analysis necessary for a proper appraisal, rather than on the amount of value found. A procedure somewhat similar to that which is in current use by the State Highway Commission is suggested.

"3. That any appraiser for an estate or a portion of an estate should sign and attest to his opinion of value only on types of assets for which his qualifications are in evidence.

"4. That the over-all value of an estate be submitted to the court by the attorney conducting probate thereof, and that such be a composite of values found on various types of assets; each by persons qualified to appraise the specific types involved."

Dickson pointed out that the four recommendations assumed that only real property would be appraised and this was not a valid assumption. There followed a lengthy discussion concerning appraiser's fees with the following alternatives being presented and discussed:

(1) The scale set forth in Senate Bill 308.

(2) Section 21, 1963 Iowa Probate Code.

(3) Establishment of schedules of appraiser's fees by court rule.

(4) Maximum appraiser's fee of $1 per thousand.

(5) The State Highway Commission appraisal fee ranging from $100 to $200 per day.

Following the discussion, Butler moved, seconded by Carson, that section 5 be adopted to read:

> "Section 5. Each appraiser shall be allowed such reasonable fees and necessary expenses as may be approved by the court."

Motion carried.

Section 6. Riddlesbarger suggested deletion of "Each article of" from section 6 of Butler's report in order that each individual item would not have to be appraised. He also questioned the necessity of "appointed by the court to make the appraisal" and was told by Butler that the phrase was intended to show that each appraiser signed only that portion of the appraisal in which he participated. There was further discussion of the second sentence of section 6 after which Butler moved, seconded by Carson, that section 6 be approved to read:

> "Section 6. Property for which appraisement is required shall be appraised at its true cash value as of the date of the decedent's death. Each appraisement shall be in writing and shall be subscribed by the appraiser or appraisers making it."

Motion carried.

Section 7. Riddlesbarger suggested deletion of the words "of a will" from section 7 of Butler's report because there were no executors other than executors "of a will." Butler moved, seconded by Thalhofer, that section 7 be approved with the revision suggested by Riddlesbarger. Motion carried.

Jaureguy commented that the second sentence of section 7 was unnecessary. Butler remarked that the common law rule was to the contrary and the purpose of the second sentence was to make clear that the common law did not apply. Jaureguy stated that the inference was that if the executor did not accept administration of the estate, he would not be liable for it.

After further discussion, Thalhofer moved, seconded by Jaureguy, that section 7 be adopted to read:

> "Section 7. The naming of any one as executor shall not operate to discharge that person from any claim which the testator had against him, and the claim shall be included in the inventory whether or not he accepts the administration of the estate."

Motion carried.

Section 8. Frohnmayer expressed the view that "The discharge or bequest" in section 8 of Butler's report was awkward phraseology. After Carson indicated that this was the language of the present statute and the subcommittee had attempted to make a minimum number of changes, Frohnmayer withdrew his objection. Martin questioned the meaning of "for the purposes of administration" in section 8 and was told by Zollinger that this phrase made the discharge or bequest in a will of a claim of the testator that of a specific legacy.

Butler moved, seconded by Carson, that section 8 be approved. Motion carried.

ORS 116.450 through 116.465. Butler moved, seconded by Carson, that ORS 116.450 through 116.465 be repealed. Motion carried.

ORS chapter 118. Carson distributed to members copies of his report entitled "ORS 118.610 to 118.700 (Inheritance tax statutes relating to inventory and appraisement.)" [Note: A copy of Carson's report constitutes Appendix C to these minutes.]

Carson explained that the subcommittee had attempted to make necessary corrections in ORS chapter 116 and delete repetitious matter in ORS chapter 118.

ORS 118.610. Carson moved, seconded by Butler, that ORS 118.610 be repealed.

Motion carried.

ORS 118.620. Carson moved, seconded by Butler, that ORS 118.620 be repealed. Motion carried.

ORS 118.630. Carson moved, seconded by Butler, that ORS 118.630 be repealed. Braun asked Carson if he would assume, after deletion of ORS 118.630, that the court could require an appraisal on motion of a creditor or an heir and received an affirmative reply. Motion carried.

ORS 118.640, section(1). Carson explained that House Bill 1480 introduced at the 1965 session of the legislature contained substantive changes which would be covered by the committees at the time they considered the inheritance tax features of ORS chapter 118. In the interest of saving time, he suggested that work at this meeting be confined to inventory and appraisement.

Carson moved, seconded by Butler, that consideration of ORS 118.640, section (1), be postponed until the committees considered the entire ORS chapter 118. Motion carried.

ORS 118.640, section (2). Carson moved, seconded by Butler, that the recommendation in his report with respect to ORS 118.640, section (2), be adopted. Motion carried.

ORS 118.640, section (3). Carson moved, seconded by Butler, that the recommendation in his report with respect to ORS 118.640, section (3), be adopted. Motion carried.

ORS 118.640, section (4). Carson moved, seconded by Butler, that the recommendation in his report with respect to ORS 118.640, section (4), be adopted. Motion carried.

ORS 118.650. Carson explained that ORS 118.650 contained a provision requiring notice of appraisement to the State Treasurer but that few people complied with the notice requirement. Carson moved, seconded by Thalhofer, that ORS 118.650 be repealed. Motion carried.

ORS 118.660, section (1). Butler pointed out that since appraisement would not be mandatory under the revisions adopted, reference to "appraisement and reappraisement" in section (1) of ORS 118.660 would be inappropriate. Thalhofer noted that this section contained the first reference to a court in this chapter and asked if it was to be assumed that the reference applied to a probate court. Carson replied

that until it became necessary to differentiate between courts in the appeal provisions, it could be assumed that the reference is to the probate court.

After further discussion, Carson moved, seconded by Butler, that section (1) of ORS 118.660 be adopted to read:

> "(1) Every personal representative or trustee of any estate subject to an inheritance tax under the laws of this state, whether or not any such tax may be payable, before the court authorizes any payment or distribution to the legatees or to any parties entitled to a beneficial interest therein, shall deliver to the State Treasurer a copy of each inventory and each appraisement duly certified to be such by the clerk of the court, or by the personal representative or trustee personally or by his attorney of record, and shall file with the clerk proof of such delivery." Motion carried.

ORS 118.660, section (2). Carson moved, seconded by Thalhofer, that the recommendations of the subcommittee concerning amendment of section (2) of ORS 118.660 be adopted. Motion carried.

ORS 118.670. Carson moved, seconded by Butler, that consideration of ORS 118.670 be postponed until the committees' consideration of the entire ORS chapter 118 because the section did not relate strictly to inventory and appraisal. Motion carried.

The meeting was recessed at 12:45 p.m.

The meeting was reconvened at 2:00 p.m. All members of the advisory committee were present except Allison. The following members of the Bar committee were present: Gilley, Braun, Meyers, Piazza and Thalhofer. Also present were Lundy and Sorte.

Inventory and Appraisal (Continued)

ORS 118.680. Braun noted that ORS 118.680 also related to determination of tax. Carson moved, seconded by Butler, that consideration of ORS 118.680 be postponed pending consideration of the entire ORS chapter 118. Motion carried. Butler indicated that ORS 118.680 was no longer necessary. Zollinger questioned postponing consideration of the section and moved, seconded by Butler, that ORS 118.680 be repealed. Motion carried.

ORS 118.690. Riddlesbarger moved, seconded by Braun, that consideration of ORS 118.690 be postponed. Motion carried.

ORS 118.700. Zollinger indicated that ORS 118.700 provided that if the court found a tax determination erroneous, it could make a redetermination of the tax, and, under subsection (3) an appeal could be taken from the order redetermining the tax. Zollinger asked if an appeal might also be taken from the court's failure to redetermine in the event it found no error. Carson replied that if the court found no error, it in effect redetermined that the first determination was correct and there was, therefor, a redetermination inherent in the finding. Zollinger suggested that in Carson's proposed section (3), ORS 118.700, "from its order refusing redetermination" be inserted after "order of the probate court redetermining."

After further discussion Riddlesbarger moved, seconded by Braun, that further consideration of ORS 118.700 be deferred pending the committees' subsequent consideration of ORS chapter 118. Motion carried.

Frohnmayer pointed out that section (3), ORS 118.700, as proposed by Carson in his report, referred three times to "other determinative order" and expressed the view that these three phrases should be deleted at the time ORS chapter 118 was considered. Carson explained that the section had been drafted to conform to similar statutes but added that he did not disagree with Frohmayer's suggestion.

Inheritance Tax (ORS chapter 118)

Miscellaneous matters. Lundy pointed out that the committees had previously decided that the probate court should be the circuit court in every county. In many instances, not only in ORS chapter 118 but throughout the probate code, he indicated that a question would arise, particularly in matters relating to appeals, when a procedure would depend upon whether or not the probate proceeding was in a county court or a circuit court. He asked whether the draftsman should consider and draft the proposed statutes on the assumption that the probate court would be the circuit court in every instance, in which case the appeals would be to the Supreme Court only, or whether alternative possibilities should be considered where some probate courts would be inferior to others.

Thalhofer suggested it would be consistent to assume probate was going to be in the circuit court and advocated that the proposed code be drafted accordingly. Dickson

commented that there might be a bill in the 1967 legislature eliminating the jurisdiction of county courts in probate proceedings and observed that it would be wise to refer to the "probate court" throughout the code with changes to be made at a later time if they were necessary.

Carson indicated that he had considered this problem when he prepared his report on ORS chapter 118. He suggested that time could be saved if the committees would outline the principles they wished to adopt and make less detailed effort to put those principles into final language, relying instead upon the draftsman to prepare the draft and make decisions as to particular wording, punctuation, etc. Riddlesbarger expressed agreement with Carson's suggestion and added that the proper time to edit was after the initial draft had been prepared. He felt the only advantage of going over the statute carefully in the first instance was to gain a deeper understanding of the problems involved. Dickson agreed that this was a material advantage.

Carson told the committees that during his meeting with Ferder he had asked Ferder to contact him if he had additional suggestions to make concerning amendment or repeal of the sections they had discussed. Carson said because he had not heard from Ferder he assumed that Ferder had nothing further to suggest. Carson said he had also informed Ferder that eventually the probate committees would consider the inheritance tax provisions of ORS chapter 118 and he had asked Ferder to submit suggestions for revision. Carson indicated that he and Ferder had also discussed the nonintervention type of will statute and, because Ferder remarked that he was not familiar with this type of procedure, Carson had forwarded a photocopy of the Washington statute to him.

Zollinger expressed the view that it would probably be more expedient to present the committees' recommendations to Ferder and invite his comment, rather than expect him to volunteer suggestions for change. He suggested that the subcommittee prepare a tentative draft and request Ferder's comments in advance of the committees' December meeting at which time the matter could be placed on the agenda.

Proposed revisions to ORS chapter 118. Braun remarked that she, as a member of the subcommittee on inheritance tax revision, planned to propose a change which would divorce the probate court completely from inheritance tax questions by requiring the personal representative to deal directly with the State Treasurer. Under this proposal Braun explained that all inheritance tax questions would be appealed to the tax court rather than to the probate court. Dickson

suggested that some research would be necessary to determine the number of additional judges which would be required to be added to the tax court if such a proposal were adopted. Frohnmayer expressed objection to the transfer of inheritance tax questions to the tax court. Braun indicated that the main argument for doing so would be that a state-wide body of law would be developed under uniform guidelines. She indicated that she would not urge that jurisdiction be removed from the probate court on inheritance tax questions, but would advocate that the personal representative deal directly with the State Treasurer in much the same way as federal estate tax matters were handled. Frohnmayer agreed that this would be a reasonable procedure providing appeals were to the probate court.

Braun observed that New York permitted the personal representative to use the federal estate tax return to be filed with the state inheritance tax division with necessary adjustments. Butler expressed disapproval of such a procedure and also noted that the tax court was not as accessible as the probate court.

Carson asked for a show of hands on the following proposition: Shall the initial determination of inheritance tax be made by the personal representative and the State Treasurer without reference to the probate court? Committee voted in favor of this proposition.

Carson then posed this proposition: In case of a controversy arising between the State Treasurer and the personal representative, shall that issue be resolved in the tax court? The committee voted unanimously to retain jurisdiction in the probate court.

In line with the discussion of suggested revisions to the inheritance tax chapter, Husband noted that no provision was made for deducting claims unless they were secured, and he considered it unfair that a $10,000 promissory note could not be deducted, whereas a $10,000 note for which property was mortgaged, or stock had been pledged, could be deducted. Carson commented that perhaps the reason a promissory note was not deductible was because it was not chargeable against a taxable asset. Zollinger suggested that the subcommittee might want to propose that if the claim were enforceable against the recipient of the nonprobated estate, it would be deductible; if it were not enforceable, it would not be deductible.

Butler outlined an area in the inheritance tax laws which had caused him concern and explained that for many

years a general power of appointment was taxable in the State of Oregon only if the power was exercised; if not exercised, it was not taxable. The State Treasurer had initiated a change in this policy, he said, and the result was a complete reversal from the treatment received under the federal estate tax law where the property subject to the general power under a marital deduction is not taxed in the first instance, but upon the survivor's death it is taxed. Under the Oregon law that property is presently being taxed in both instances, and Butler contended that this practice had developed in Oregon law without being given the attention it should have had. He advocated either a provision in the inheritance tax code for a marital deduction or reversion to the previous situation where it was the exercise of the power that was taxable and not its mere existence. Dickson asked Butler which of the alternatives he would prefer and Butler replied that he would favor reversion to the previous situation in this respect because it would not entail revision of the marital deduction provisions. Butler so moved, Riddlesbarger seconded and the motion carried.

Husband suggested that the collateral tax rate for recipients other than direct heirs was too high and Dickson expressed agreement. A question was also raised concerning the policy of termination of the relationship of a stepchild or a grandstepchild upon the death of the parent or grandparent. Gilley asked if it was within the purview of the committeesto consider tax rates and Dickson commented that any time a deduction was changed, the amount of money received would be affected. Zollinger recommended, and others agreed, that the committees should not attempt to fix tax rates but it was proper to concern themselves with such matters as the one suggested by Butler and with questions of whether relationships were properly divided. Frohnmayer expressed the opposing view and Piazza agreed, adding that in order to avoid problems in the legislature, the committees should not interfere with anything that affected the amount of money collected.

Riddlesbarger moved, and the motion was seconded, that the committees refrain from consideration of the subject of inheritance or estate taxes except as an incident to preparing a probate code. Gilley asked Riddlesbarger if his motion would be construed to leave the committees free to consider the procedures of estate and inheritance tax determinations and received an affirmative reply. Dickson asked Riddlesbarger if adoption of his motion would mean that the committees would avoid consideration of everything that would affect the amounts collected and was told that this was not quite true. Riddlesbarger defined his motion to

mean that the committees would confine their efforts to revising the probate code, excluding from consideration state inheritance tax matters as such. Zollinger stated his understanding of the motion was that it was the purpose of the committees to consider the procedures for determination of inheritance and estate taxes but refrain from consideration of proposals to amend the substantive laws for the determination of the amount of the taxes payable. Zollinger further explained that the motion would allow the committees to consider the procedural questions relating to the procedures for determination but not to the substantive matters. Dickson commented that Zollinger's statement would preclude consideration of Husband's or Butler's propositions. Motion carried.

Riddlesbarger expressed the view that wherever the committees discovered problems such as those defined by Butler and Husband, they should be referred to the Law Improvement Committee. Dickson concurred.

Dickson added Lisbakken to the inheritance tax subcommittee to which Carson and Braun had previously been appointed and requested that the report of this subcommittee be placed on the agenda for the December meeting.

Foreign Personal Representatives; Ancillary Administration

Mapp and Riddlesbarger had been appointed as a subcommittee to report on foreign personal representatives and ancillary administration. Mapp referred to the first tentative draft, dated April 28, 1966, entitled "Foreign Personal Representatives: Ancillary Administrations" which, he explained, was a composite of provisions from the two uniform Acts, "Uniform Ancillary Administration of Estates Act" and "Uniform Powers of Foreign Representatives Act" drafted by the National Conference of Commissioners on Uniform State Laws, copies of which were mailed to all members of both committees in March 1966. The draft, Mapp stated, was the first draft of what would one day become a part of the uniform or model probate code.

Mapp read through the draft section by section and also read many of the applicable comments from the uniform Acts. Zollinger pointed out that the definitions would not cover, for example, the case of a man domiciled in California who died leaving property in Washington and Oregon when the personal representative was appointed in Washington and there was no ancillary administration. Lundy pointed out that the definitions would not cover foreign personal representatives appointed in foreign courts.

After Mapp had read section 5 of the draft, Butler commented that the committees had adopted provisions covering many of the conditions set forth in the draft under discussion. Lundy pointed out that revisions to ORS 116.186 had been approved. Zollinger read section 497, 1963 Iowa Probate Code, and suggested that it be incorporated in an appropriate place into the probate code. He expressed the opinion that the Iowa section referred to was good legislation but was not sufficient and that ancillary administration would also be needed. Frohnmayer expressed agreement and indicated that instead of combining the two uniform Acts, ancillary administration should be set forth separately.

There was a discussion of other provisions of the draft after which Zollinger asked if the committees considered it necessary to make a separate provision respecting ancillary administration. The committees unanimously agreed that it would be desirable to provide for ancillary administration.

Zollinger remarked that there were some difficult problems in administration of foreign estates where there was an ancillary administration. One of them was a pecuniary bequest; another, he said, the question of whether a creditor's claim had been filed in each jurisdiction and might have been paid twice. At the conclusion of administration, Zollinger observed that another question was whether distribution should be made to the domiciliary administrator or to the heirs. He suggested that the committees decide on the policy considerations of these and other matters and include those provisions in the proposed code without going into any more detail than necessary.

After further discussion, it was decided that the subcommittee would prepare a draft on ancillary administration for presentation to the committees at their November meeting. Frohnmayer suggested that they incorporate the decisions already adopted by the committee with respect to ORS 116.186 into their proposal.

Statutes Remaining to be Reviewed

Dickson requested Lundy to prepare a list of the remaining statutes not yet considered by the committees and stated that at the November meeting he would assign subcommittees to study these matters.

November Meeting of Committees

The following items were scheduled for consideration at the November meeting:

Possession and control of property on income disposition (ORS 116.105)
Revisions on income disposition to be prepared and submitted by Jack McMurchie

Ancillary administration
Draft by Mapp and Riddlesbarger

Sale or lease of estate property
Report and draft by Zollinger on ORS 116.705 to 116.900

Also, recommendation by Zollinger on disposition of ORS 116.990, which provides a criminal penalty for unauthorized administration of the personal estate of a decedent.

December Meeting of Committees

Inheritance tax (ORS chapter 118)
Draft by Carson, Braun and Lisbakken

The meeting was adjourned at 5:00 p.m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, October 14, 15, 1966)

INDEPENDENT ADMINISTRATION
(Refer to Second Tentative Draft)

(submitted by Stanton W. Allison)

SECTION 1. (Definitions and Use of Terms.) When used in this Part, unless otherwise apparent from the context:

(1) "independent administrator" means any personal representative qualifying under the terms of this chapter.

(2) "independent administration" means the process whereby an independent administrator administers an estate as provided in this chapter.

(3) "full administration" means the process whereby a personal representative administers an estate under complete judicial supervision as provided in chapters_____of this Code.

SECTION 2. (Independent Administration not Exclusive.) Independent administration shall be an alternative to full administration for settling estates. While an independent administration is pending, any person named as personal representative in the decedent's will or any heir, distributee, or creditor of the estate may petition the probate court for a full administration. The court thereupon shall terminate the independent administration and appoint a personal representative under the full administration to succeed to the responsibility of administering the decedent's estate.

SECTION 3. (Who May Make Application.) Any person named as personal representative in the decedent's will, or any heir, distributee, or creditor of the decedent, if otherwise qualified to act as a personal representative of the decedent, may make application for the independent administration of the estate and seek the appointment of himself or another person so qualified, as independent administrator.

SECTION 4. Same as Second Tentative Draft except on line 12, page 66, change "should" to "must", and delete "or its absence explained." On line 31, add "if any" after "relationship."

SECTION 5. (Time to File Application.) Same as Second Tentative Draft.

SECTION 6. (Time for Hearing; Notice.) Line 9, add after "general circulation," "published in the county where application is filed" . . . . .

SECTION 7. (Court's Discretion in Appointment.) If, at the hearing, the Court is persuaded that the requirements of the Code have been met, he may appoint an independent administrator of the estate, and grant letters of independent administration to such independent administrator, provided that the Court may in his discretion appoint any qualified person, instead of the person whose appointment is sought in the application, if he considers such an appointment in the best interest of the estate. However, if the court finds that the estate is or may become insolvent, or that full administration is otherwise proper, he shall appoint a personal representative to administer the decedent's estate under full administration.

SECTION 8. Delete Section 8 of Second Tentative Draft.

SECTION 8. (Bond of Independent Administrator.) The court may provide that no bond need be filed by an independent administrator, but any person interested in the estate may, for good cause, request that a bond be filed, and the court shall require that such bond be filed if it finds that such good cause exists. The court may, however, require that a bond be filed in such amount as in his opinion would protect the estate, or that the amount of a bond be increased.

SECTION 9. (When Letters Issued.) Same as Section 10 of Second Tentative Draft except on line 2 delete "his oath and". . . .

SECTION 10. (Powers of The Independent Administrator.) Same as Section 11 except on line 6 after "approval" add, "save and except the power to sell real property."

SECTION 11. (Claims.) Same as Section 12 except (b) (1) should read "institute full administration proceedings."

Delete paragraph (2) and change (3) to (2).

SECTION 12. (Title to Property.) Same as Section 13 except in lines 6 and 7 delete "whether real or personal."

SECTION 13. (Application for Decree of Distribution.) Same as Section 14 except on lines 6 and 10 change "may" to "shall."

SECTION 14. (Hearing and Notice on Decree of Distribution.) Same as Section 15.

SECTION 15. (Decree of Distribution.) Same as Section 16.

SECTION 16. (Effect of Decree of Distribution.) Same as Section 17.

SECTION 17. Delete Section 18 of Second Tentative Draft.

SECTION 17. (Removal for Cause.) Same as Section 19.

SECTION 18. Delete Section 20 of Second Tentative Draft.

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, October 14, 15, 1966)

TO: Advisory Committee on Probate Law Revision and Oregon State Bar Committee on Probate Law and Procedure

FROM: Wallace P. Carson and Herbert E. Butler, Sub-committee

SUBJECT: Inventory and Appraisal

The following draft is as it was submitted, without the changes made at the October meeting.

It is the recommendation of this sub-committee that the following be substituted for ORS 116.405 to 116.465 inclusive.

(1) Within 60 days after the date of his appointment, the personal representative of a decedent's estate shall make and file in the estate proceeding a verified inventory of all the property of the decedent which comes to his possession or knowledge.

(2) Whenever, by reason of the complicated nature of the estate, or by reason of other circumstances, it is impracticable for the personal representative of the estate to file with the clerk of the court a complete and accurate inventory of the assets belonging to the estate within 60 days from the date of the personal representative's appointment, the court may, upon the application of such representative, extend the time for filing the appraisement for such period as the court may determine to be necessary.

(3) Whenever any property of the decedent not mentioned in the inventory comes to the possession or knowledge of the personal representative of the estate, he shall either make and file in the estate proceeding a verified supplemental

inventory within 30 days after the property comes to his possession or knowledge, or include the property in his next accounting but the court may order which of the two methods the personal representative shall follow.

(4) Property belonging to the estate of a decedent need not be appraised unless appraisement is required for inheritance tax purposes or for purposes of administration or distribution or by order of the court. The court may direct that specific property be appraised by a person or persons appointed by the court. The court may dispense with the appointment of any appraiser or appraisers with respect to any property described in the inventory.

(5) Each appraiser shall be allowed such reasonable fees, and expenses as may be fixed by the court, all which shall be paid by the personal representative as expenses of administration.

(6) Each article of property for which appraisement is required shall be appraised at its true cash value as of the date of the decedent's death. The appraisement shall be in writing and shall be subscribed by the appraiser or appraisers appointed by the court to make the appraisal.

(7) The naming of any one as executor of a will shall not operate to discharge that person from any claim which the testator had against him, and the claim shall be included in the inventory. If a person so named accepts the administration of the estate he shall be liable for the claim as would any other debtor of the decedent.

(8) The discharge or bequest in a will of any claim of the testator against a person named as executor therein or against any other person, shall, as against the creditors of the decedent, be ineffective. The claim shall be included in the inventory, and for the purposes of administration shall be deemed and treated as a specific legacy of that amount.

NOTE: The foregoing proposal constitutes a substantial departure from existing statutes. The following changes are deserving of particular attention:

(1) The subjects of inventory and appraisal are treated separately.

(2) Changes from one month to 60 days the time from date of appointment for the personal representative to file the inventory.

(3) Permits extension of time for filing the inventory if necessary by reason of the complicated nature of the estate or by reason of other circumstances. This is in keeping with existing provisions of the Inheritance Tax Code (ORS 118.620) and is designed to assist the State Treasurer's office in administering the inheritance tax law.

(4) Eliminates the need for appraisement unless required for inheritance tax, administration or distribution purposes or by order of the court. Further, the court is authorized to direct that specific property be appraised by one or more persons and specifies that the appraisers so appointed shall be allowed reasonable fees and expenses approved by the court. These provisions constitute a combination of Section 365 of the Iowa Probate Code and Senate Bill 308,

as amended, introduced in the 1965 Session of the Oregon Legislature.

(5) Deletes ORS 116.430 having to do with oath of appraisers and simply requires the appraisement to be in writing and to be subscribed by the appraisers.

(6) Substitutes for ORS 116.435 a requirement that each article of property for which appraisement is required shall be appraised at its true cash value. This language has been adopted in preference to the term "full and true value" now appearing in the Inheritance Tax Code (ORS 118.640.)

(7) Revises ORS 116.440 having to do with debts due a decedent's estate from a person named as executor by making clear that acceptance of administration by the person named as executor renders him liable for the claim in the same manner as a claim against any other debtor of the deceased without causing acceleration of a debt which by its terms would not be due until some future date. The general tenor of ORS 116.440 is preserved because it is in derogation of common law.

(8) The provisions of ORS 116.450 have been adopted verbatim in our proposal except that the word "ineffective" has been substituted for the word "invalid."

(9) ORS 116.450 to 116.465 inclusive have been deleted in their entirety. These code sections have to do with partnership interests in a decedent's estate. It is the

sub-committee's view that there is no more justification for special partnership provisions than there would be for comparable provisions dealing with interests in closely held corporations. It is submitted that the Uniform Partnership Act adequately establishes the relationship between partners and the nature of their interests in the partnership assets. If a surviving partner is reluctant to cooperate with the personal representative of a deceased partner in providing required information concerning the nature and conduct of the partnership business, the personal representative is in a position to seek required assistance of the courts through discovery statutes and otherwise.

APPENDIX C

(Minutes, Probate Advisory Committee Meeting, October 14, 15, 1966)

TO: Advisory Committee on Probate Law Revision and Oregon State Bar Committee on Probate Law and Procedure

FROM: Wallace P. Carson and Herbert E. Butler, Sub-committee

SUBJECT: ORS 118.610 to 118.700 (Inheritance tax statutes relating to inventory and appraisement).

It is the recommendation of this sub-committee that those ORS sections be repealed or amended as indicated below.

118.610 Duty of representative; filing inventory and appraisement.

Repeal.

118.620 Extension of time to file appraisement.

Repeal.

118.630 Appointment of appraisers.

Repeal.

118.640 Immediate appraisal; evaluating particular interests.

(1) Delete that part thereof preceding the semicolon, and amend the remainder of this subsection substantially as was proposed by House Bill 1480 introduced on February 9, 1965.

(2) Delete "each * * * in common" and insert in lieu thereof "the grantees or devisees took undivided halves of the real property as tenants in common".

(3) Delete "if" and insert "though" in lieu thereof.

(4) No alteration now is suggested, except deletion of "every" and insertion of "a" in lieu thereof; and substitute "the" for each "such".

118.650 Fixing time and place of appraisement; notice; attendance of witnesses; report of appraisers; limitation on fees.

Repeal.

118.660 Delivery to State Treasurer of copy of inventory and appraisement and other information.

(1) Delete "executor, administrator" and insert "personal representative" in lieu thereof, in two places; and delete "beneficiary" and insert "beneficial" in lieu thereof.

(2) Delete "such executor, administrator" and insert "personal representative" in lieu thereof; delete "deceased" and insert "decedent" in lieu thereof; delete "beneficiary" and insert "beneficial" in lieu thereof; delete "full and true value" and insert "true cash value" in lieu thereof, in two places; delete "probated or"; and insert "the" between "of" and "decedent" in the twenty-second line of this subsection.

118.670 Court's duty to determine tax.

(1) Delete "From * * * such" and insert "Based on the evidence relating to the estate that is before the court" in lieu thereof; delete "forthwith"; delete "full and true value of all such estates" and insert "true cash value of the estate" in lieu thereof; and delete "the same are" and insert "it is" in lieu thereof.

(2) Delete "full and true value of all such estates" and insert "true cash value of the estate" in lieu thereof; and delete "the same are" and insert "it is" in lieu thereof.

118.680 Court may act on first inventory.

Delete "such" from sixth line of this section and insert "the" in lieu thereof; delete "executor, administrator" and insert "personal representative" in lieu thereof; delete "as provided in ORS 118.005 to 118.840"; and delete "full and true value" and insert "true cash value" in lieu thereof.

118.690 Court to give notice on determination of value.

Delete "probate" from the first line of this section.

118.700 Reappraisement; appeal.

(1) Delete "assessment and" from the first line of this subsection; insert "probate" between "the" and "court" in the sixth line of this subsection; delete "reassessment and" from the ninth line of this subsection; and delete "such" from the last line of this subsection and insert "the" in lieu thereof.

(2) Delete "objection" from the first line of this subsection and insert "objection's" in lieu thereof; at each appropriate place in this subsection delete "such" and insert "the" in lieu thereof; insert "to" between "and" and "all", and insert "other" between "all" and "parties", in the fifth line of this subsection; delete "reappraisement" from the eleventh line of this subsection and insert "redetermination" in lieu thereof; and delete the final sentence from this subsection and insert in lieu thereof:

"If, upon the hearing, the probate court finds that its previous determination of any tax imposed by ORS 118.005 to 118.840 was erroneous in any respect affecting the substantial rights of the State Treasurer, or of any other party interested, it shall, by order, set aside its previous determination and redetermine the tax."

(3) Delete all this subsection and insert in lieu thereof:

"(3) The State Treasurer, or any other party interested, may appeal from the order of the probate court redetermining any tax imposed by ORS 118.005 to 118.840 in the manner provided by law for prosecuting an appeal from the probate court. The appeal shall be heard and determined anew in the same manner, and with the same effect, as provided by law in respect of an appeal from a decree or other determinative order in a suit in equity. An appeal may be taken to the Supreme Court from the whole, or from any part, of a decree or other determinative order of the circuit court upon an appeal to the circuit court from an inferior probate court, as well as from the whole, or from any part of, a decree or other determinative order of a circuit court exercising original probate jurisdiction, which redetermines the tax, in the same manner, and with the same effect, as provided by law in respect of an appeal from the circuit court in a suit in equity."

NOTE: Matter in *italics* in an amended section is new; matter [lined out and bracketed] is existing law to be omitted; complete new sections begin with Section .

FIFTY-THIRD LEGISLATIVE ASSEMBLY—REGULAR SESSION

House Bill 1480

Introduced by Representative ANUNSEN, Senator ELFSTROM (at the request of the Oregon Bankers Association) and read first time February 9, 1965

A BILL FOR AN ACT

Relating to inheritance taxes; amending ORS 118.640; and prescribing an effective date.

Be It Enacted by the People of the State of Oregon:

Section 1. ORS 118.640 is amended to read:

118.640. (1) Every inheritance, devise, bequest, legacy or gift, upon which a tax is imposed under ORS 118.005 to 118.840, shall be appraised at its full and true value immediately upon the death of the decedent, or as soon thereafter as may be practicable; provided, that when [~~such interest is~~] *interests are* contingent, defeasible or of such a nature that [~~its~~] *their* full and true value cannot be ascertained at the date of decedent's death [~~it~~] *they* shall be appraised at the time when [~~such~~] *their actual* value first becomes ascertainable, [~~at its full and true value as of the date of decedent's death and without diminution for or on account of any valuation made or tax paid theretofore upon the particular estates upon which the devise, bequest, legacy or gift may have been limited.~~] *and the value of each interest shall be that percentage of the full and true value of the aggregate of the interests* ~~entire estate~~ *as of the date of decedent's death which the actual value of the interest is of the actual value of the aggregate interests. "Actual value" means full and true value as of the date of the* ~~decedent's death, increased by distributions of income following that date.~~ *first becomes ascertainable. Subsection (4) of this section does not apply in the determination of the value of interests described in the foregoing proviso.*

(2) Whenever a gift or devise of real property which is subject to inheritance tax passes to or vests in a husband and wife as tenants by the entirety, the inheritance tax thereon shall be determined in the same manner as though each of such tenants by the entirety took an undivided one-half of the property as tenants in common.

Note: The handwritten deletions and interlineations were not introduced in the legislature.

(3) Whenever any estate or interest is so limited that it may be divested by the act or omission of the devisee or legatees, such estate or interest shall be taxed as if there were no possibility of such divesting.

(4) The value of every limited estate, income, interest or annuity dependent upon any life or lives in being shall be determined by the rules or standards of mortality and of value used by the "Actuaries' or Combined Experience Tables," except that the rate of interest on computing the present value of all such limited estates, incomes, interests or annuities shall be four percent per year. The value of the interest or estate remaining after such limited estate, income, interest or annuity shall be determined by deducting the amount found to be the value of such limited estate, income, interest or annuity from the value of the entire property in which such limited estate, income, interest or annuity exists.

Section 2. The amendments contained in this Act are effective with respect to taxable values which become ascertainable on or after January 1, 1935.

Second Tentative Draft

PART X. INDEPENDENT ADMINISTRATION

SECTION 1. [Definitions and Use of Terms.] When used in this Part, unless otherwise apparent from the context:

(1) "independent administrator" means any personal representative qualifying under the terms of this Part providing for administration of estates independent of judicial control;

(2) "independent administration" means the process whereby an independent administrator administers an estate independent of judicial control;

(3) "full administration" means the process whereby a personal representative administers an estate under judicial supervision, as provided in Part(s) of this Code.

Comment

Definitions applicable to the entire Code are equally applicable to this Part. The above definitions are peculiar to this Part.

SECTION 2. [Independent Administration not Exclusive.] Independent administration shall be an alternative to other procedures for settling estates. When an independent administration is pending, any person interested in the estate may petition the probate court for a full administration. The court will grant such petition if in the best interest of the estate. If the court grants such petition, it shall terminate the independent administration, and appoint a personal representative under the full administration to succeed to the responsibility of administering the decedent's estate.

Comment

If a full administration is desired, it may be had by petition filed with the probate court. Independent administration is an alternative available tn all estates. The Code provides a number of additional procedures (e.g., special provisions for small estates, collection of assets on affidavit, and the like) in special situations.

SECTION 3. [Who May Make Applicatinn.] Any person named as personal representative in the decedent's will or any person interested in the decedent's estate, if otherwise qualified to act as a personal representative of the decedent, may make application for the independent administration of the estate and seek the appointment of himself or another person so qualified, as independent administrator.

Comment

In Texas and Washington, the decedent must provide for the independent executor in his will. The above section extends the principle of independent administration, as an alternative procedure, to all estates. See Fletcher, Washington's Non-Intervention Executor--Starting Point for Probate Simplification, 41 Wash. L. Rev. 33 (1966).

SECTION 4. [Contents of the Application.] The application for appointment of an independent administrator shall contain, but shall not necessarily be limited to, the following:

(1) information about the decedent, including his name, date of death, domicile at death, and a statement that he had property within the county where the petition is filed if he died domiciled outside the state;

(2) a listing of all properties comprising the estate, giving a

description of such properties, their values, and the location of all known real estate;

(3) a statement whether decedent died testate or intestate (if testate, a copy of the will should be attached or its absence explained);

(4) a statement that an independent administration is sought;

(5) information about the distributees, including names, addresses, and relationship to the decedent;

(6) information about the heirs and next of kin of the decedent, including names, addresses, and relationship to the decedent;

(7) a listing of all known claims against the estate, including names and addresses of creditors, and amount claimed by them;

(8) information about any person whose appointment is sought as independent administrator, including name, address and relationship to the decedent, and a statement that he is qualified to be appointed administrator;

(9) information about any person named in the will to serve in any fiduciary capacity, such as trustee or guardian, whether such service is to be as original, successor, or joint fiduciary, including the name, address, and relationship to the decedent, and a statement that he is qualified to serve in such capacity; and

(10) information about the person making the application, if different from the person whose appointment is sought, including name, address, and relationship to the decedent, and facts entitling him to make application for the appointment.

Comment

Section 4 requires the person seeking appointment as independent administrator to provide the probate court with a complete picture of the estate. The application serves as an inventory of both the properties in the estate and claims against the estate.

SECTION 5. [Time to File Application.] All applications for the grant of letters of independent administration must be filed within two years from the date of death of the decedent.

Comment

A short statute of limitations will prompt persons to seek an independent administration soon after the decedent's death, thereby expediting administration.

SECTION 6. [Time For Hearing; Notice.] Upon the filing of an application under this Part, the clerk of the Court shall set a day and time for a hearing on the application not less than twenty (20) days subsequent to the time of filing, and shall forthwith cause notice of the hearing to be sent by certified or registered mail to every creditor, distributee, heir, next of kin, executor, trustee, and guardian, named in the application and in the will, if any, and shall secure the publication of such notice in a newspaper of general circulation at least ten (10) days prior to the time for hearing.

Comment

The 20 day period is ample to allow time for the notice by certified or registered mail and by publication, which should satisfy the requirements of due process. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (any party to whom actual notice is given of hearing is bound by any order, made pursuant thereto). See also Fletcher, Washington's Non-Intervention Executor-Starting Point for Probate Simplification, 41 Wash. L. Rev. 33, 87 et seq. (1966).

SECTION 7. [Court's Discretion In Appointment.] If, at the hearing, the Court is persuaded that the requirements of the Code have been met, he shall appoint an independent administrator of the estate, and grant letters of independent administration to such independent administrator, provided that the Court may in his discretion appoint any qualified person, instead of the person whose appointment is sought in the application, if he considers such an appointment in the best interest of the estate.

Comment

The Court may appoint another person (e.g., an adult son, rather than the decedent's widow) independent administrator, if this is the best interest of the estate.

SECTION 8. [Oath Of Independent Administrator.] Before receiving letters, the independent administrator shall take and file with the clerk of the Court an oath to discharge faithfully the duties of independent administrator of the estate. For convenience, the oath may be filed in advance as part of the application.

Comment

The requirement of an oath emphasizes the importance of the fiduciary's role as an independent administrator.

SECTION 9. [Bond of Independent Administrator.] No bond shall be required of an independent administrator, but any person interested in the estate may, for good cause, request that a bond be filed, and the court shall require that such bond be filed if it finds that such good cause exists. The court may at any time, for good cause shown, require that a bond be posted, or that the amount of a

bond be increased.

Comment

Dispensing with the requirement of bond in the usual case will reduce the costs of administration. Granting the Court discretion provided in this section should insure that the estate is protected.

SECTION 10. [When Letters Issued.] When the independent administrator is appointed, and he has filed his oath and any bond which the Court may have required, the clerk of the court shall forthwith issue to the independent administrator as many copies as he shall desire of the letters of independent administration. Unless revoked or otherwise terminated, such letters of independent administration shall remain in full force and effect for a period of 6 months from the date of their issue. The expiration of such letters shall appear on their face. Such letters may be extended by order of the Court for additional periods of 6 months as may be necessary to complete administration of the estate. Upon extension, the Court shall endorse the letters to show the extended expiration date.

Comment

This section encourages the independent administrator to wind up the estate within 6 months of the granting of letters. If more time is needed, he may seek an extension from the probate court.

SECTION 11. [Powers of The Independent Administrator.] The independent administrator shall have the power to do, without judicial supervision or control, all things in connection with the management and distribution of the estate that a personal representa-

tive in a full administration might have the power to do with or without court approval. The independent administrator shall have such additional fiduciary powers as may be given him by the will of the decedent.

Comment

This provision is the heart of this Part. It gives the independent administrator the powers of a personal representative, but with the freedom necessary for the simplification of probate. The decedent may give the independent administrator any additional fiduciary powers (e.g., the powers of his testamentary trustee) as he may desire.

SECTION 12. [Claims.]

(a) No claim against the decedent or his estate shall be barred because of independent administration prior to the entry of a decree of distribution, except as such claim may be discharged by the independent administrator by payment or other settlement with the claimant, or may be barred by the statute of limitations applicable to such claim.

(b) Any creditor remaining unpaid at the time of the expiration of the letters of independent administration or at the time such letters would have expired had there been no extension of the expiration date, may either

(1) institute full administration proceedings in accordance with Section _____ of this Code,

(2) require the independent administrator to institute proceedings to determine claims as in full administration, as provided in Section _____of this Code, or

(3) seek recovery of his claims directly against the distributees of the estate, jointly or severally, if the independent administrator has distributed the estate to such distributees.

Comment

The statute encourages the independent administrator to settle claims quickly. The creditor is protected by being given several choices where his claim is not settled within the first 6 months term of an independent administration.

SECTION 13. [Title to Property.] The title to all property of the decedent, both real and personal, passes upon his death to the distributees, subject to the right of possession in the independent administrator for the purposes of administration, sale or other disposition, and subject to the debts of the decedent and the expenses of administration. Any sale or disposition of property, whether real or personal, made by an independent administrator, to persons other than the distributees, shall be effective to pass marketable title to such property, so long as the letters of such independent administrator are in force and effect at the time of such sale or disposition.

Comment

This section is based upon Section 300 of the California Probate Code, and Section 37 of the Texas Probate Code. Iowa has recently provided that title shall pass directly from the decedent to the distributees upon the decedent's death. Except for the difference with respect to title, the independent administrator's powers (particularly where broadened by additional powers granted in the will) will often place him, from the standpoint of dealing with the property, in much the same position as a trustee.

SECTION 14. [Application For Decree of Distribution.] At any time after the expiration of 6 months after the issuance of letters of

independent administration, and after all claims against the estate have been paid or otherwise settled and the property of the estate has been distributed to those entitled thereto, the independent administrator may prepare an application for a decree of distribution, setting out the foregoing facts, the name and address of each distributee and his interest in the decedent's property, and a complete description of all the property, both real and personal, of the estate; such application may ask that the estate be closed and title to the decedent's property be recognized as being in the distributees; and such application shall be accompanied by a final accounting setting forth a statement regarding the payment of claims and the disposition of all property in the estate.

Comment

The application pinpoints the distributees and the property in the estate. Simple forms for setting out the above information may be adopted. While filing the application is permissive, the benefits of obtaining a final decree of distribution are such that the independent administrator will normally file the application as soon as possible.

SECTION 15. [Hearing And Notice On Decree Of Distribution.] Hearing shall be set and notice given of the hearing on the application for decree of distribution in the same manner as in the filing of an application for independent administration.

Comment

In contrast to the many trips to the courthouse required in full administration, only 2 hearings will normally occur in independent administration, one to launeh the administration, and the other to close it. While the second hearing is permissive, most independent administrators will seek to since the obtaining of a decree of distribution will better protect the distributee, the creditors, and the independent administrator.

SECTION 16. [Decree of Distribution.] Upon hearing, the Court, being satisfied as to the truth of the matters contained in the application for decree of distribution and in the final accounting, shall endorse such application, and thereby cause to be entered a decree of distribution of the estate, declaring that title to the property of the estate is in the distributees, approving the final accounting, and discharging the independent administrator.

Comment

The endorsement of the independent administrator's application for the decree of distribution constitutes the issuance by the Court of a final decree of distribution.

SECTION 17. [Effect Of Decree Of Distribution.] All claims against the estate not presented to the independent administrator prior to entry of the decree of distribution are barred upon entry of the decree. Such decree may be recorded in the deed records of the county where realty of the decedent is located and will have the effect of a deed from the decedent to the distributees. The decree shall not be subject to collateral attack, but shall be presumed final and valid as to all persons and property over which the court had jurisdiction. Appeal from such decree of distribution may be taken as in full administration, as provided by Section_____of the Code.

Comment

The finality of the decree of distribution will prompt independent administrators to seek quick closing of estates and the early termination of their liability. The decree will not be subject to attack by reason of procedural discrepancies. Later contentions with respect to the decree, other than those regarding jurisdiction, will be eliminated.

SECTION 18. [Affidavit That Estate Is Closed.] At any time after the expiration of 6 months after the issuance of letters of independent administration, and after all claims against the estate have been paid or otherwise settled and the property of the estate has been distributed to those entitled thereto, the independent administrator may file an affidavit with the Court stating that the estate is closed. No claim may be asserted against the independent administrator by any creditor of the decedent, distributee of the estate, or other person interested in the estate at any time after 2 years from the date of the filing of such affidavit; provided that a distributee, heir, or next of kin may, at any time, within 3 years from the date of the death of the decedent, assert a claim against an undischarged independent administrator, for any improper handling of the estate during the course of his administration.

Comment

Normally, the independent administrator will seek a decree of distribution under Section 14 of this Part. Alternatively, he may elect to file an affidavit as permitted by this section. If he does so, a 2 year statute of limitations begins to run. But, in any event, a distributee, heir, or next of kin may question the independent administrator's handling of the estate within 3 years following the decedent's death. If the independent administration is still pending, such a person may seek a full administration under Section 2 of this Part.

SECTION 19. [Removal For Cause.] The Court shall have the right to remove the independent administrator for cause at any time, where he has been guilty of a breach of his fiduciary duty or any duty imposed upon him by this Code, upon the same notice and hearing as provided for in the case of full administration in Section ___ of this Code.

Comment

Self-explanatory.

SECTION 20. [Community Property.] The entire community property, including any interest in the surviving spouse which is not subject to the decedent's power of testation, shall be subject to independent administration under this Part, and unless otherwise exempt by law, shall remain subject to the debts of the community.

Comment

This section is to be adopted by community property jurisdictions that adopt the Code. Since the entire community is subject to his right of possession, the independent administrator is able to deal effectively with community debts.

First Tentative Draft

PART_____. FOREIGN PERSONAL REPRESENTATIVES: ANCILLARY ADMINISTRATIONS

[Definitions to be included in a general section on definitions.]

(1) "Foreign personal representative" means any representative who has been appointed by the court of another jurisdiction in which the decedent was domiciled at the time of his death, and who has not also been appointed by a court of this state.

(2) "Local personal representative" means any representative appointed as ancillary representative by a court of this state who has not been appointed by the domiciliary court.

(3) "Local and foreign personal representative" means any representative appointed by both the domiciliary court and by a court of this state.

Comment

Adapted from the Uniform Ancillary Administration of Estates Act.

SECTION 1. [Proof of Authority-Bond.] When no local administration or application therefor is pending in this state, a foreign personal representative may file with a [probate] court authenticated copies of his appointment and of his official bond if he has given a bond.

SECTION 2. [Insufficient Bond.] If the [probate] court believes that the security furnished by the foreign personal representative in the domiciliary administration is insufficient, it may at any time order the foreign representative to refrain from acting until sufficient security is furnished in the domiciliary administration.

SECTION 3. [Powers.] A foreign personal representative who has met the requirements of section 1 may exercise all powers which would exist in favor of a local personal representative, and may maintain actions and proceedings in this state subject to the conditions imposed upon nonresident suitors generally.

Comment

Adapted from Uniform Powers of Foreign Representatives ActSection 2.

SECTION 4. [Releases, Discharges, Assignments and Deeds.] A foreign personal representative who has met the requirements of section 1 may release, discharge or assign, in whole or in part as to any particular property, judgments rendered by any court of this state and mortgages belonging to an estate, and such representative may execute deeds in performance of real estate contracts entered into before the death of the decedent. Such release, discharge, assignment or deed may be made without any order of court in any manner or by any instrument which would be valid and effective if made by a like officer qualified under the law of this state.

Comment

Iowa Probate Code, § 144, modified to some extent.

SECTION 5. [Proceedings to Bar Creditors' Claims.] Upon application by a foreign representative, who has met the requirements of section 1, to the [Probate] court of the county in which property of the decedent is located, the court shall cause notice

of the appointment of the foreign representative to be published once in each of [three] consecutive weeks in some newspaper of general circulation in the county. The claims of all creditors of the decedent, unless filed with the court within [ ] after date of first publication, are barred as a lien upon all property of the decedent in this state, to the extent that claims are barred by a local administration. If any claims have been filed before the expiration of such period and remain unpaid after reasonable notice thereof to the foreign representative, ancillary administration may be had under section 7.

Comment

Adapted from: Uniform Powers of Foreign Representatives Act, § 4.

SECTION 6. [Powers in Transition.] The powers granted by preceding sections 3 through 5 shall be exercised only when there is no administration or application therefor pending in this state, except to the extent that the court granting local letters may order otherwise, but no person who, before receiving actual notice of local administration or application therefor, has changed his position by relying on the powers granted by sections 3 through 5 shall be prejudiced by reason of the application for, or grant of, local administration. The local representative or the local and foreign representative shall be subject to all burdens which have accrued by virtue of the exercise of the powers, or otherwise, under section 3 to section 5 and may be substituted for the foreign representative in any action or proceedings in this state.

Comment

Uniform Powers of Foreign Representatives Act, section 5.

SECTION 7. [Application for Ancillary Letters and Notice Thereof.]

(a) Granting of Ancillary Letters. Ancillary letters of Administration may be granted as provided in Section _____.

(b) Qualification of and Preference for Foreign Personal Representative.

(1) Any foreign, personal representative upon the filing of an authenticated copy of the domiciliary letters with the [probate] court may be granted ancillary letters in this state notwithstanding that the representative is a nonresident of this state or is a foreign corporation.

(2) If the foreign personal representative is a foreign corporation it need not qualify under any other law of this state to authorize it to act as local and foreign personal representative in the particular estate if it complies with the provisions of sections 9 and 10 of this Act.

(3) If application is made for the issuance of ancillary letters, any interested person may intervene and pray for the appointment of any person who is eligible under this Act or the law of this state.

(c) Notice to foreign representative. When application is made for issuance of ancillary letters to any person other than the foreign personal representative, the applicant shall send notice of the appli-

cation by registered mail to the foreign personal representative if the latter's name and address are known and to the court which appointed him if the court is known. These notices shall be mailed upon filing the application if the necessary facts are then known, or as soon thereafter as the facts are known. If notices are not given prior to the appointment of the local personal representative, he shall give similar notices of his appointment as soon as the necessary facts are known to him. Notice by ordinary mail is sufficient if it is impossible to send the notice by registered mail. Notice under this subsection is not jurisdictional.

Comment

Adapted from Uniform Ancillary Administration of Estates Act, section 2.

SECTION 8. [Denial of Application.] The [probate] court may deny the application for ancillary letters if it appears that the estate may be settled conveniently without ancillary administration. Such denial is without prejudice to any subsequent application if it later appears that ancillary administration should be had.

Comment

Uniform Ancillary Administration of Estates Act, section 3.

SECTION 9. [Bond.] No nonresident shall be granted ancillary letters unless he gives an administration bond.

Comment

Uniform Ancillary Administration of Estates Act, section 4.

SECTION 10. [Agent to Accept Service of Process.] No nonresident shall be granted ancillary letters and no person shall be granted leave to remove assets under section 12, until he files in the [probate court] an irrevocable power of attorney constituting the [clerk of the court] as his agent to accept and be subject to service of process of notice in any action or proceeding relating to the administration of the estate. The [clerk] shall forthwith forward to the personal representative at his last known address any process or notice so received, by registered or certified mail requesting a return receipt signed by addressee only. [Forwarding by ordinary mail is sufficient if when tendered at a United States Post Office an envelope containing such notice addressed to such representative, as aforesaid, is refused registration.]

Comment

Uniform Ancillary Administration of Estates Act, section 5.

SECTION 11. [Substitution of Foreign for Local Personal Representative.]

(a) Application and procedure. If any other person has been appointed local personal representative, the foreign personal representative, not later than [fourteen] days after the mailing of notice to him under section 7, unless this period is extended by the court for cause which the court deems adequate, may apply for revocation of the appointment and for grant of ancillary letters to himself. [Ten] days written notice of hearing shall be given to the local personal representative. If the court finds that it is for the

best interests of the estate, it may grant the application and direct the local personal representative to deliver all the assets, documents, books and papers pertaining to the estate in his possession and make a full report of his administration to the local and foreign personal representative as soon as the letters are issued and he is qualified. The local personal representative shall also account to the court. The hearing on the account may be forthwith or upon such notice as the court directs. Upon compliance with the court's directions, the local personal representative shall be discharged.

(b) Effect of substitution. Upon qualifications, the local and foreign personal representative shall be substituted in all actions and proceedings broughtby or against the local personal representative in his representative capacity, and shall be entitled to all the rights and be subject to all the burdens arising out of the uncompleted administration in all respects as if it had been continued by the local personal representative. If the latter has served or been served with any process or notice, no further service shall be necessary nor shall the time within which any steps may ormust be taken be changed unless the court in which the action or proceedings are pending so orders.

Comment

Uniform Ancillary Administration of Estates Act, section 6.

SECTION 12. [Removal of Assets to Domiciliary Jurisdiction.]

(a) Application. Prior to the final disposition of the ancillary estate under section 17 and upon giving such notice as provided in

section [General Notice Section], the foreign personal representative or the local and foreign personal representative may apply for leave to remove all or any part of the assets from this state to the domiciliary jurisdiction for the purpose of administration and distribution.

(b) Prerequisites to granting application. Before granting such application, the court shall require compliance with section 10 and the filing of a bond by the foreign personal representative or of an additional bond for the protection of the estate and all interested persons unless the court finds that the bond given under section 9 by the local and foreign personal representative is sufficient.

(c) Granting application--terms and consequences. Upon compliance with this section, the court shall grant the application upon such conditions as it sees fit unless it finds cause for the denial thereof or for postponement until further facts appear. The granting of the application shall not terminate any proceedings for the administration of property in this state unless the court finds that such proceedings are unnecessary. If the court so find, it may order the administration in this state closed, subject to reopening within [one year] for cause.

Comment

Uniform Ancillary Administration of Estates Act, section 7.

SECTION 13. [Effect or Adjudications for or against Personal Representatives.] A prior adjudication rendered in any jurisdiction for or against any personal representative of the estate shall be as

conclusive as to the local or the local and foreign personal representative as if he were a party to the adjudication unless it resulted from fraud or cullusion of the party representative to the prejudice of the estate. This section shall not apply to adjudications in another jurisdiction admitting or refusing to admit a will to probate.

Comment

Uniform Ancillary Administration of Estates Act, section 8.

SECTION 14. [Payment of Claims.] No claim against the estate shall be paid in the ancillary administration in this state unless it has been proceeded upon in the manner and within the time required for claims in domicilary administrations in this state.

Comment

Uniform Ancillary Administration of Estates Act, section 9.

SECTION 15. [Liability of Local Assets.] All local assets are subject to the payment of all claims, allowances and charges, whether they are established or incurred in this state or elsewhere. For this purpose local assets may be sold in this state and the proceeds forwarded to the representative in the jurisdiction where the claim was established or the charge incurred.

Comment

Uniform Ancillary Administration of Estates Act, section 10.

SECTION 16. [Payment of Claims in Case of Insolvency.]

(a) Equality subject to preferences and security. If the estate either in this state or as a whole is insolvent, it shall be disposed of so that, as far as possible, each creditor whose claim has been allowed, either in this state or elsewhere, shall receive an equal proportion of his claim subject to preferences and priorities and to any security which a creditor has as to particular assets. If a preference, priority or security is allowed in another jurisdiction but not in this state, the creditor so benefited shall receive dividends from local assets only upon the balance of his claim after deducting the amount of such benefit. Creditors who have security claims upon property not exempt from the claims of general creditors, and who have not released or surrendered them, shall have the value of the security determined by converting it to money according to the terms of the security agreement, or by such creditor and the personal representative by agreement, arbitration, compromise or litigation, as the court may direct, and the value so determined shall be credited upon the claim, and dividends shall be computed and paid only on the unpaid balance. Such determination shall be under the supervision and control of the court.

(b) Procedure. In case of insolvency and if local assets permit, each claim allowed in this state shall be paid its proportion, and any balance of assets shall be disposed of in accordance with Section 17. If local assets are not sufficient to pay all claims

allowed in this state the full amount to which they are entitled under this section, local assets shall be marshalled so that each claim allowed in this state shall be paid its proportion as far as possible, after taking into account all dividends on claims allowed in this state from assets in other jurisdictions.

Comment

1953 Amendment to Uniform Ancillary Administration of Estates Act.

SECTION 17. [Transfer of Residue to Domiciliary Representative.] Unless the court shall otherwise order, any moveable assets remaining on hand after payment of all claims allowed in this state and of all taxes and charges levied or incurred in this state shall be ordered transferred to the representative in the domiciliary jurisdiction. The court may decline to make the order until such representative furnishes security or additional security in the domiciliary jurisdiction, for the proper administration and distribution of the assets to be transferred.

Comment

Uniform Ancillary Administration of Estates Act, section 12.

SECTION 18. [General Law to Apply.] Except where special provision is made otherwise, the law and procedure in this state relating generally to administration and representatives apply to ancillary administration and representatives.

Comment

Uniform Ancillary Administration of Estates Act, section 13.

SECTION 19. [Payment of Debt to Spouse Without Administration.] Upon the death of a creditor it shall be lawful for a debtor to pay to the surviving spouse of the decedent not more than one thousand dollars of the debt, upon an affidavit, made by such spouse, showing that such payment and all other payments received by such spouse under this section do not in the aggregate exceed one thousand dollars.

SECTION 20. [Payment of Debt to Foreign Personal Representative Without Administration.] Not less than six months after the death of a creditor, it shall be lawful for a debtor to pay a debt which does not exceed five hundred dollars, or any part of such debt, to a foreign personal representative upon an affidavit made by the representative showing:

(1) the date of the death of the decedent,

(2) that no local administration or application therefor is pending in this state,

(3) that the affiant is entitled to the payment,

(4) that such payment and all other payments made under this section by all debtors do not in the aggregate exceed _____dollars.

SECTION 21. [Payment Discharges.] A payment made in good faith shall be a complete discharge of the debtor to the extent of the payment, even though the affidavit on which payment is made

be false, provided only that the creditor be dead and that the required number of days elapse between the death and payment and that the affiant is in fact the person designated for payment.

SECTION 22. [Accountability.] Any person receiving payment pursuant to this section is accountable therefor to any personal representative appointed in this state.

ADVISORY COMMITTEE
Probate Law Revision

Thirtieth Meeting
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Dates) and: Times) 1:30 p.m., Friday, November 18, 1966 and 9:00 a.m., Saturday, November 19, 1966
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of October meeting.

2. Reports on miscellaneous matters.

3. Chapter 117, Periodic Accounting and Distribution (Report and draft by subcommittee, Campbell Richardson, William Keller and William Tassock).

4. Proposal for Allocation of Income (Report and proposed revision, Jack McMurchie).

5. Sale or other disposition of estate property (ORS 116.705 to 116.900, Clifford Zollinger).

6. Possession and control of property (ORS 116.105).

7. Unauthorized administration of personal estate of a decedent (ORS 116.990).

8. Ancillary administration (Draft by Professor Mapp and William Riddlesbarger).

9. Next meeting.

ADVISORY COMMITTEE
Probate Law Revision

Thirtieth Meeting, November 18 and 19, 1966
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The thirtieth 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, November 18, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Husband, Jaureguy, Lisbakken and Mapp. Butler, Carson, Frohnmayer, Gooding and Riddlesbarger were absent.

The following members of the Bar committee were present: Braun, Gilley, Lovett, Meyers, Kraemer, McKenna, Piazza, Thalhofer and Thomas (arrived 3:15p.m.). Biggs, Krause, McKay, Mosser, Silven and Pendergrass were absent.

Also present were Campbell Richardson and William Keller, members of the subcommittee which had been appointed to draft proposed probate provisions relating to accounting, and James Sorte from the staff of Legislative Counsel.

Minutes of October Meeting

Jaureguy moved, and the motion was seconded, that the reading of the minutes of the last meeting (October 14 and 15, 1966) be dispensed with and that they be approved as submitted. Motion carried.

Miscellaneous Matters

Subcommittee Meeting with Law Improvement Committee. Zollinger reported that he, together with Dickson, Allison and Frohnmayer, had appeared before the Law Improvement Committee in Salem on November 10, 1966, to discuss the need for additional assistance from the Legislative Counsel staff in

accordance with the committees' discussion at the October meeting. [Note: See Minutes, Probate Advisory Committee, 10/14, 15/66, pages 2 to 4.] Zollinger indicated that the subcommittee was advised that the Law Improvement Committee was not in a position to allocate responsibilities of the Legislative Counsel staff, but had agreed to present the probate subcommittee's request to the Legislative Counsel Committee with the recommendation that the probate law revision committees be provided the services of Lundy one day a week during the forthcoming legislative session. Zollinger said that the plan was to have drafts from Lundy by the time the committees had completed the examination of the entire code, and in time to start the re-examination. In the meantime, Zollinger said, it was agreed that Sorte would continue to devote virtually full time assisting the committees and preparing materials currently being considered. Zollinger added that the subcommittee had been given expressions of good will from all members of the Law Improvement Committee.

Secretarial Assistance. Dickson remarked that the services of the current reporter at committee meetings would not be available during the 1967 legislative session and asked Sorte to obtain a replacement and report to the committees on the new arrangements at the December meeting.

Arrangement of Proposed Revised Probate Code. Dickson indicated that the arrangement of the proposed probate code should be resolved at an early date. He noted that three subcommittees had been appointed at the April, 1966, meeting to prepare independent proposed outlines of the revised code. Those appointed were: Subcommittee #1: Frohnmayer, Mapp and Warden; subcommittee #2: Copenhaver, Gooding and Thalhofer; subcommittee #3: Dickson, Lisbakken and Richardson. Dickson directed that the discussion of this subject be placed at the top of the December agenda.

Distribution of Drafts. Allison suggested that when a draft is completed by Lundy and Sorte, it be sent to the committee member or members who had originally drafted the proposal prior to the time of general distribution to all committee members. No definite conclusion was reached.

Oregon State Bar Committee on Law Revision. Sorte called attention to the minutes of the Oregon State Bar Committee on Law Revision dated August 20, 1966, and read the following excerpt from the minutes:

"Chairman Branchfield discussed deliberations of the Committee on Taxation which reported that both the Inheritance and Gift Tax statutes are in need of substantial revision. After considerable discussion concerning the need for revision of the statutes in this area, a motion was unanimously passed directing the Chairman to recommend to the Board of Governors that a special committee of lawyers be appointed to work with other interested groups to study and revise Oregon's Gift and Inheritance Tax laws. The Committee felt that the Tax Committee as presently constituted and conceived is primarily concerned with income tax matters and a new committee or a new subcommittee of the Tax Committee is needed to undertake this work. It was also agreed that the Chairman would add this recommendation to the annual report of the Law Revision Committee to be presented at the State Bar Convention."

Dickson remarked that revision of the inheritance and gift tax statutes had been assigned to a subcommittee consisting of Carson, Lisbakken and Braun and asked Lisbakken to inform Carson of the Bar committee's decision and request that he arrange for appropriate meetings with either the appropriate Bar committee or the Board of Governors.

Model Probate Code. Mapp informed the committees that a hard cover edition of the Model Probate Code was available at $5.25, including postage, from the University of Michigan Law School, Ann Arbor, Michigan.

1966 Proposed Wisconsin Probate Code. Dickson advised the committees that copies of the 1966 proposed Wisconsin Probate Code had been distributed to members of the advisory committee and the offices of the advisory committee members throughout the state where they would be available for use by Bar committee members.

Proposed Probate Provisions Relating to Accounting

Sorte had mailed to all members a memorandum dated November 14, 1966, to which was attached the draft prepared by Richardson, Keller and Tassock entitled "Draft of Proposed Probate Provisions Relating to Accounting." To facilitate referral to draft sections, Dickson asked that the sections of the draft be numbered 1 to 24 consecutively. [Note: The memorandum should be appended to these minutes with the sections numbered 1 to 24 consecutively.]

Section 1. Allison called attention to a problem raised because of the committee's previous action in deciding that upon death the real and personal property "vested" in those persons entitled to receive it. The difficulty, he indicated, is that now the discussion concerns "distribution", and the question is whether this terminology is consistent with the concept that the real and personal property vests immediately upon death. Other members acknowledged this as a problem that will have to be resolved but no definite action was taken.

Richardson read section 1 and Allison suggested that subsection (c) be revised to include "loss to the estate arising from the following:" in the opening clause, and other members agreed.

Zollinger inquired if subsection (c) authorized self-dealing by the personal representative and asked if this was the committees' intention. Allison noted that even if it might be possible to make an advantageous sale of real property under the present statute, ORS 116.820, the sale was absolutely void. This, he said, was not only senseless but had caused serious problems for title companies. He was of the opinion that a sale should not be void, but voidable, and then only if the estate suffered a loss by reason of it.

Braun moved, seconded by Jaureguy, that the concept of section 1 be adopted. Motion carried unanimously.

Kraemer suggested that "unauthorized" be inserted preceding "self-dealing" in subsection (c) of section 1, and McKenna, Gilley and Mapp expressed agreement. They noted that it would not be wise to advise a fiduciary client to buy estate property because it could be an invitation to blackmail by one of the heirs without the protection given him by insertion of "unauthorized." Zollinger expressed the opposing view and remarked that in an ex-parte proceeding, the right to surcharge the account should not be limited to those cases in which the self-dealing was authorized. Allison expressed agreement with Zollinger's position. Richardson remarked that the section as written would place the personal representative on the same basis as though the property was sold to any other party.

After further discussion, Kraemer moved, seconded by Gilley, that subsection (c) be amended to read "for loss to the estate through unauthorized self-dealing." Motion carried.

Zollinger questioned the meaning of "chargeable in his accounts" in subsection (b) of section 1. Allison suggested "in his accounts" be eliminated and Braun proposed that the entire subsection (b) be deleted. Allison observed that there should be a distinction between (a) and (b) and was of the opinion that the distinction would be made clear if "in his accounts" were eliminated.

Allison moved, seconded by Thalhofer, that "in his accounts" be deleted from subsection (b). Motion carried.

Kraemer questioned the need for including the particular circumstances under which a personal representative was responsible for non-probate assets and proposed deleting subsections (b) (1) and (b) (2) of section 1. Mapp read section 862.05 of the proposed 1966 Wisconsin Probate Code. Zollinger expressed approval of that section and commented that it included everything necessary to be covered in the accounting.

Mapp proposed a hypothetical situation where a widow collected $20,000 under the wrongful death statute and the money was put in the personal representative's account. He asked if the personal representative's fee would be based on the total amount in the final account. McKenna remarked, and others concurred, that if the personal representative were going to be held responsible for everything that passed through his hands, he should be paid for that responsibility. Zollinger commented that if the personal representative's compensation were based upon his recovery in a wrongful death action, it should not be charged against the beneficiary of the wrongful death action. He expressed the view that it would be proper to have him account separately for such assets and to have a fee payable out of the recovery for such assets.

After further discussion, Zollinger moved, seconded by Husband, that section 862.05 of the proposed 1966 Wisconsin Probate Code be substituted for sections (1) and (2). Braun suggested "all property of the estate" in the first clause be substituted for "all property of the decedent" and Dickson suggested a further amendment to read "all property of the estate of the decedent." Zollinger and Husband accepted the amendments. The motion was to substitute the following for subsections (1) and (2) of section 1:

"Every personal representative shall be charged in his accounts with all the property of the estate of the decedent which comes to his possession; with all profit and income which comes to his possession from the estate and with the proceeds of all property of the estate sold him him." Motion failed.

Allison moved, seconded by Braun, that subsection (b) of section 1 be deleted, that subsection (c) then became subsection (b) and that the latter section be referred to Richardson's subcommittee for redrafting of an appropriate statute to cover the question of non-estate assets and the duty to account for them in the original account or in a separate account and the liability of the personal representative for the non-estate assets in his possession. Motion failed.

Kraemer observed that subsection (b) of section 1 made the personal representative chargeable and responsible for assets received and said he saw no reason to set forth with particularity those assets by including subsections (1) and (2).

Kraemer moved, seconded by Jaureguy, that subsection (b) be amended to read as follows:

"Every personal representative shall be chargeable with property not a part of the estate which comes into his hands at any time and shall be liable to the persons entitled thereto." Delete "if" and subsections (1) and (2).

Gilley spoke in opposition to the motion and indicated that the personal representative's responsibility should be limited to property he received in his capacity as personal representative and he should not be held responsible for property which was not a part of the estate.

Piazza suggested subsections (b) (1) and (b) (2) of section 1 be eliminated and "in his capacity as personal representative" be added in their place. This phrase, he said, would restrict the personal representative's liability to accounting only for the property which he received. He also recommended that "in his accounts" be restored in subsection (b). Richardson pointed out that it was not unusual for funds to be inadvertently commingled with estate funds

and when this was done, it should be possible for the personal representative to withdraw the money from the estate account, pay it back to the person entitled to receive it, and account for the withdrawal at the proper time.

Kraemer withdrew his motion and Jaureguy withdrew his second.

Gilley moved, seconded by Piazza, that the committee reconsider the action previously taken in deleting "in his accounts" from subsection (b) and that the phrase be restored. Motion carried.

Dickson then recapitulated the action taken by the committee on section 1 and noted that the comma in subsection (b) (1) should be deleted. Keller read subsection (c) which was reworded to incorporate the suggestion made earlier by Allison to include "for loss to the estate arising from:":

"(c) Every personal representative shall be liable and chargeable in his accounts for loss to the estate arising from:

"(1) Neglect or unreasonable delay in collecting the credits or other assets of the estate or in selling, mortgaging or leasing the property of the estate;

"(2) Neglect in paying over money or delivering property of the estate he shall have in his hands;

"(3) Failure to account for or to close the estate within the time provided by this Code;

"(4) Embezzlement or commingling of the assets of the estate with other property;

"(5) Unauthorized self-dealing;

"(6) Wrongful acts or omissions of his co-representatives which he could have prevented by the exercise of ordinary care; and

"(7) Any other negligent or wilful act or nonfeasance in his administration of the estate by which loss to the estate arises."

Dickson took a vote on members favoring section 1 with the modifications set forth above and the section was adopted unanimously.

Section 2. Richardson explained that section 2 conformed basically to the comparable guardianship code section (i.e., ORS 126.336). Dickson remarked that "personal" should be deleted before "income tax" in subsection (3) (a) and suggested that if state and federal clearances were to be required, the section should say so. Allison asked if inheritance taxes were to be included and Husband suggested insertion of "Oregon income tax and inheritance tax."

Zollinger advised that the present statute required a showing at the time of filing the final account that taxes due had been paid and those that would become due would be paid and were secured. He contended that this was not an appropriate requirement, and what should be required at the time of approval of the final account is that taxes will have been paid or secured and appropriate receipts will be filed. Gilley agreed and noted there is often income after the final account and this, under present law, required payment of estimates. Richardson suggested subsection (3) (a) read:

> "A statement prior to the presentation of an order approving final account that, the personal representative will obtain and file appropriate receipts or releases showing that all Oregon income taxes and inheritance taxes which have become payable have been paid, and that all such taxes which will become due are secured by bond, deposit or otherwise."

Allison proposed alternative wording for subsection (3) (a):

> "An affirmative statement that all Oregon income and inheritance taxes either have been paid or will be paid prior to final closing of the estate and that appropriate receipts therefor will be procured and filed prior to such final closing."

Husband called attention to the fact that Allison's proposal did not include income taxes which would become due by reason of instalment, and Allison suggested that the following be added: "or that such taxes have been secured by bond, deposit or otherwise."

Dickson requested that Richardson and Allison prepare appropriate wording for subsection (3) (a) of section 2 to be submitted to the committees following the next item on the agenda.

Allocation of Income

Mr. Jack McMurchie had prepared a proposed statute on allocation of income in accordance with his presentation and discussion of the problems involved in such a proposal at the October, 1966, meeting. He distributed copies of his draft and read it to the committees:

> "Income from the assets of a decedent's estate which accrues and is received after the death of the decedent and before final distribution, including income from property used to discharge liabilities, shall be determined in accordance with the provisions of ORS 129.010 to 129.140 and, unless the decedent's will otherwise provides, shall be distributed as follows:
>
> (1) "To specific legatees and devisees the income received from the property bequeathed or devised to them respectively, less taxes, ordinary repairs and other expenses incurred in the management and operation of the property, any interest paid during the period of administration on account of such property, and an appropriate portion of taxes imposed on income (excluding taxes on capital gains) which are paid during the period of administration.
>
> (2) "To all residuary legatees and devisees, all legatees of pecuniary bequests in trust and all legatees of pecuniary bequests which are not in trust but which qualify for the marital deduction provided for in Section 2056 of the 1954 Internal Revenue Code, the remaining income, in proportion to the respective interests of such legatees and devisees in the assets of the estate which have not been distributed or expended for the payment of inheritance and estate taxes, claims and other expenses properly chargeable against the principal of the estate, computed at the time of each distribution or payment, on the basis of inventory values.

> "As used in this subparagraph, remaining income means the total income from all property which is not specifically bequeathed or devised less the taxes, ordinary repairs, and other expenses incurred in the management and operation of all such property from which the estate is entitled to income, any interest paid during the period of administration on account of such property and the taxes imposed on income (excluding taxes on capital gains) which are paid during the period of administration, and which are not charged against the property specifically bequeathed or devised."

McMurchie explained that his proposal made it clear that it referred only to income which accrued and was received after the death of the decedent. He also noted that no provision was made for allocation of income in an intestate estate and suggested the committee might want to include such a provision following their revision of the intestate laws.

Zollinger suggested that it might be better to refer to a specific section or sections of the Uniform Principal and Income Act rather than referring to the entire Act.

In reply to a question by Zollinger concerning testate estates, McMurchie explained that specific legatees would not share in any income from assets which were sold during administration, and in order to qualify for a share of the income it would have to be a pecuniary bequest left in trust or one which would qualify for the marital bequest. All others who would share, he said, would share proportionately in the net income realized from all of the assets either sold or remaining on hand during administration with adjustment to compensate for expenditures. McMurchie said that the main purpose of the proposed Act was to require adjustments to compensate for expenditures made and charged against another bequest.

Zollinger contended that it would be desirable to use a less complicated formula for smaller estates. He commented that the purpose of this proposal was to do justice in cases where at present the law is not clear, non-existent or arrives at an unjust result. Where the injustice was not very important because the amount was small, Zollinger was of the opinion that the procedure set forth in the proposal would call for an

additional burden on the personal representative and could meet with a considerable amount of resistance. McMurchie contended that both personal representatives and attorneys should be competent to perform the computations required and the extra time involved was worthwhile when it accomplished a just result.

Husband asked how the income distributions would be handled under a will which gave 10% to one beneficiary and 20% to another but left no specific property to a particular person. McMurchie said that in that situation the particular percentage of each particular asset would be required to be distributed to each of the beneficiaries. Keller indicated that it was his understanding under the present law the percentage bequest was considered effective as of the time of distribution and the recipient had no particular right to receive a certain asset. He asked if that had been changed by the committee's adoption of the provision which no longer vested title in the personal representative. McMurchie answered that it was his understanding that there was no particular law on the subject and in the administration of an asset of the type Husband had outlined, the personal representative probably would be required to convert all assets into cash prior to distribution.

Zollinger proposed that wording similar to the following might simplify the Act:

> "Income received during administration, including income for the payment of debts, taxes and expenses, shall be distributed as follows:
>
> "(a) If the decedent died intestate, to the beneficiaries of his estate in the proportion in which they receive principal.
>
> "(b) If the decedent died testate, leaving property specifically bequeathed or devised to the legatees or devisees, there shall be distributed the income received from such property.
>
> "(c) If the decedent died testate leaving legatees of pecuniary bequests in trust or legatees of pecuniary bequests which are not in trust but which qualify for the marital deduction, if the income shall exceed $10,000 during the period of administration."

Zollinger further suggested that the above language be followed by most of section (2) of McMurchie's draft which would end with a semicolon to be followed by: "but if the income shall not exceed $10,000, then in the proportion in which principal is distributed." He added that his subsection (b) should also contain the language in section (2) of the draft which dealt with income and expenses incident to the production of such income.

Zollinger called attention to the fact that he had omitted the statement with reference to income which had accrued at the death of the decedent because the test of when the income was received was sufficient to accomplish justice and much easier to apply. McMurchie expressed disagreement with the latter statement and explained that it had been established that income which had accrued at the date of the decedent's death was not income for purposes of trust accounting or for purposes of estate accounting.

Husband noted that the $10,000 exemption would make the Act applicable only to estate in excess of $200,000 and expressed approval of such an exemption. Dickson commented that the banks handle the vast majority of large estates and suggested that since they were the ones who deal with this problem, they should be the ones to solve it. He asked McMurchie if it would be agreeable with him if the draft were returned to him in order that he could confer with the respective legal staff of banks handling trusts and estates, and McMurchie agreed to do so.

Zollinger moved, seconded by Husband, that the concensus of the committees should be understood to be that they would eliminate from the Act estates with income during administration of less than $10,000. Motion carried.

Dickson then requested McMurchie to prepare the necessary draft in cooperation with trust officers or legal staff of the banks engaged in handling trusts and estates for presentation at the January meeting. He also requested that intestate situations be included in the Act and that those preparing the Act should bear in mind that the committees had adopted the concept that property would vest, immediately upon death, in the persons entitled to receive it. In this latter connection Dickson noted that McMurchie might wish to recommend that the committees reconsider their stand and adopt the Wisconsin approach.

The meeting recessed at 5:30 p.m.

The meeting was reconvened at 9:00 a.m., Saturday, November 19, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison (left at 10:15 a.m.), Carson, Husband, Jaureguy and Mapp. The following members of the Bar committee were present: Biggs, Gilley, Meyers, McKenna and Thomas. Also present were James Sorte, Campbell Richardson, J. Ray Rhoten and William Tassock.

Proposed Probate Provisions Relating to Accounting (Cont'd)

Section 2. The committees resumed discussion of the draft prepared by Richardson, Keller and Tassock dated November 14, 1966. Richardson reviewed the discussion of the previous day and explained that the committees apparently concurred that the matter of tax clearances should not hinder the filing of the final account and probably should follow the order of final distribution. He read subsection (3) (a) of section 2 as amended by Allison:

> "An affirmative statement that all Oregon income and inheritance taxes either have been paid or will be paid prior to final closing of the estate and that appropriate receipts therefor will be procured and filed prior to such final closing or that such taxes will be secured by bond, deposit or otherwise."

Richardson noted that if this revision were adopted, it would be necessary to amend ORS 316.530 and 118.840 to conform thereto and that ORS 118.250 should also contain an appropriate reference. Dickson asked that Carson make special note of Richardson's recommendation with respect to the aforementioned ORS sections and prepare the necessary amendments at the time his subcommittee considered ORS chapter 118.

Richardson pointed out that the probate code did not contain a reference to the personal property tax and asked if the committees would be in favor of including such reference for the purpose of alerting personal representatives to the possibility that personal property tax might be due. Allison proposed that his suggested language in subsection (3) (a) of section 2 read "An affirmative statement that all Oregon income, inheritance and property taxes, if any, either have been . . ."

Husband questioned the use of "petition" in subsection (3) (b) of section 2 and Gilley suggested that "prayer" would be more appropriate than "petition." Carson concurred and noted that if "prayer" were not used, the reference should be to "final account and petition for distribution." Zollinger noted that references were made to the petition for an order of distribution in the following sections and was of the opinion, with the majority apparently concurring, that "petition" was the proper word.

Dickson suggested the addition of a subsection (1) (f) of section 2 to include a provision for a supplemental accounting. Carson voiced objection and said that a supplemental accounting should not be required in every instance, and other members agreed.

Allison raised a question concerning the advisability of including "Recipts and vouchers" in subsection (2) (c) of section 2. Gilley read the definition of "voucher" from CJS and noted that the term was broad enough to include everything inherent in the meaning of "receipts."

Allison moved, seconded by Gilley, that "vouchers" be substituted for "receipts" in subsection (2) (c) of section 2. Motion carried.

Zollinger commented that subsection (1) (b) of section 2 contemplated an accounting at the time the personal representative's petition to resign was filed and prior to acceptance of his resignation by the court. He said the original personal representative would then continue to serve pending appointment of a successor and it would be necessary for him to make a second accounting upon such appointment. Zollinger was of the opinion that one accounting should suffice and the better time for the accounting was at the time of the successor's appointment. Allison pointed out that the question on which the court acted was the personal representative's discharge from liability rather than acceptance of his resignation.

After further discussion, Zollinger moved, seconded by Gilley, that the following language be substituted for subsections (1) (b) and (1) (c) of section 2:

> "Upon the appointment of a successor personal representative after the resignation, death or removal of the incumbent representative." Motion carried.

Gilley noted that ORS 115.520 should be repealed.

Allison moved, seconded by Zollinger, that subsection (1) (d) of section 2 be amended to read: "When the estate is ready for settlement and distribution." Motion carried.

Allison moved, seconded by Zollinger, that subsection (3) of section 2 be amended to read: "When the estate is ready for settlement and distribution, the account shall also include:". Motion carried.

Allison moved, and the motion was seconded, that subsection (3) (a) of section 2 be adopted to read:

> "An affirmative statement that all Oregon income, inheritance and personal property taxes, if any, either have been paid or will be paid prior to final closing of the estate and that appropriate receipts, releases or clearances therefor will be procured and filed prior to such closing or that such taxes will be secured by bond, deposit or otherwise." Motion carried.

Section 3. Jaureguy suggested that subsection (1) (c) read "To creditors not theretofore having received payment." Richardson explained that the subsection was seeking to abolish the existing situation where a creditor could file a claim, have it rejected and then file his objection at the time of the final accounting. He stated the purpose was to force the creditor to file his objections prior to that time. Zollinger agreed that the language was satisfactory as written.

Dickson expressed objection to subsection (1) (d) of section 3 and Zollinger suggested: "To any other person known to the personal representative to have or who may claim an interest in the estate being distributed." Gilley suggested " . . . to have or to claim . . ." and Zollinger concurred.

Mapp called attention to the organization of the Model Probate Code and the Proposed 1966 Wisconsin Probate Code which set forth in one place persons who should receive notice and the manner in which such notice was given. Thereafter, throughout the code, he explained, when notice was required, reference was made to that single notice section. He advised that this might be an appropriate manner in which to handle notice situations in the Oregon revised probate code.

Zollinger pointed out that thus far no other place requiring this particular type of notice under discussion had been considered by the committees. If others were found he said that he agreed it might be appropriate to adopt Mapp's suggestion. Dickson asked that a special note be placed in the minutes to refer to Mapp's proposal after all sections had been assembled to determine whether it would be feasible to follow such a procedure.

The matter of the court fixing the date for hearing of objections to the final account was discussed and it was decided to provide that the personal representative fix a date for "filing" rather than "hearing" and if objections were filed, a hearing date could then be set by the court.

Zollinger moved, and the motion was seconded, that section 3 be amended to read:

> "(1) Upon the filing of the final account and petition for order of distribution, the personal representative shall fix a time within which objections thereto must be filed and shall, not less than 20 days before the expiration of the time fixed for such filing, cause notice thereof to be mailed:
>
> "(a), (b) and (c) - No change.
>
> "(d) To any other person known to the personal representative to have or to claim an interest in the estate being distributed.
>
> "(2) Such notice need not be mailed to the personal representative.
>
> "(3) Proof of such mailing shall be made by affidavit and filed at or before approval of the final account." Motion carried.

Sections 4, 5 and 8. Tassock called attention to the policy considerations involved in determining the effect of orders approving final accounts and directing distribution and outlined the three choices set forth in the caveat under section 4.

Mapp referred with approval to subsection (3) of section 8, and there was a lengthy discussion concerning its

intent. Zollinger objected to the inclusion of the last clause beginning "but no transfer before or after . . ." and Dickson agreed that the clause accomplished nothing.

After further discussion, Zollinger moved, seconded by Jaureguy, that the committees adopt section 5 and section 8, subsection (3) of section 8, with the deletion of the concluding clause of subsection (3): "but no transfer before or after the decedent's death by an heir or devisee shall affect the decree, nor shall the decree affect any rights so acquired by grantees from the heirs or devisees." Motion carried. [Note: This action was subsequently revoked. See pages 19 & 20 of these minutes.]

Mapp suggested that the decree of final distribution be recorded rather than the several documents which are presently required to be recorded. There was a lengthy discussion concerning the advisability of such a revision at the termination of which Dickson asked that Mapp and Allison review the recommendations adopted by the committees in this connection and report their conclusions at the February meeting.

Richardson suggested that the second sentence of subsection (1) of section 8, be stricken as well as the third sentence through "otherwise." Zollinger indicated that the decree should not "state" but rather should "find" and proposed that "find" be substituted where used in that connection. He inquired as to the meaning of "adjudicated compromise" as used in the first sentence of section 8, subsection (1), and Richardson commented that there were many compromise situations of settlement among distributees which were not in the court record. Rhoten asked if it would be advisable to bind the Inheritance Tax Division to the terms of the ultimate distribution and Carson agreed that this point should be made clear in the law. He said that in a will contest if the will were sustained, the tax would be a certain amount whereas if the will were set aside, the tax would be a different amount. In the past, Carson stated, the Inheritance Tax Division had been on both sides of that question depending on which would produce the most revenue and expressed the view that they should be bound by the decree of final distribution in determining the tax due. Zollinger remarked that this situation could be corrected in the sections assigned to Carson dealing with inheritance tax statutes.

After further discussion, Zollinger moved, seconded by Gilley, that the first sentence of section 8, subsection (1), read:

> "In its decree of final distribution, the court shall designate the persons to whom distribution is to be made, and the proportions or parts of the estate, or the amounts, to which each is entitled under the will or by agreement approved by the court or pursuant to the provisions of this Code, including the provisions regarding advancements, election by the surviving spouse, lapse, renunciation and retainer." Motion carried.

Richardson moved, and the motion was seconded, that the second sentence of section 8, subsection (1), be eliminated; that the third sentence be eliminated through "otherwise" and that it begin: "The decree shall find that all claims . . ."; that the balance of subsection (1) remain unchanged except for the substitution of "find" wherever "state" appears; and that the last clause be eliminated: "and state specifically what modifications are made." Motion carried.

Zollinger remarked that the provisions of section 8, subsection (4), had been taken care of in another place in the proposed code and moved, seconded by Richardson, that it be deleted. Motion carried.

Sections 6 and 7. The committees concurred that sections 6 and 7 should be deleted.

The meeting recessed at 12:15 p.m.

The meeting was reconvened at 1:30 p.m. The following members of the Advisory committee were present: Dickson, Zollinger, Carson, Jaureguy, Lisbakken and Mapp. The following members of the Bar committee were present: Biggs, Braun, Gilley, Meyers, McKenna and Thomas. Also present were Richardson and Sorte.

Dickson listed the expiration dates of the Bar committee appointments:

Biggs	1967
Braun	1967
Gilley	1967
Krause	1968
Lovett	1968
Meyers	1968
Kraemer	1969
McKay	1969
Mosser	1969
McKenna	1967
Silven	1967
Piazza	1968
Thalhofer	1968
Pendergrass	1969
Thomas	1969

Proposed Probate Provisions Relating to Accounting (Cont'd)

Section 4. Richardson suggested section 4 read:

> "An heir, creditor whose claim is not otherwise barred, or other person interested in the estate may, within the time appointed for such filing, file his objections to the account or petition or any part thereof specifying the particulars of such objection. In such event the court shall designate a time for hearing of such objections."

Mapp questioned the aptness of "creditor whose claim is not otherwise barred" and was told by Richardson that it was intended to refer to creditors whose claims were approved but unpaid. Zollinger proposed "An heir, creditor whose claim has been approved but not paid or other person interested in the estate . . ." Braun asked what would happen to a creditor, under Zollinger's proposal, who presented his claim the day before the final account was filed if the claim had been neither approved nor paid. Dickson commented that the language as suggested by Richardson would take care of such a situation and recommended that it be retained.

Carson commented that "otherwise" was inappropriate and Mapp suggested that "Any interested person" would cover everyone and noted that this was the language of the Proposed Wisconsin Probate Code. Gilley proposed "Any person entitled to notice under section 3," and others agreed that this would be satisfactory.

Richardson moved, seconded by McKenna, that section 4 be amended to read:

> "Any person entitled to notice under section 3 may, within the time appointed for such filing, file his objections to the account and petition or to any part thereof specifying the particulars of such objections. In such event the court shall designate the time for hearing of such objections." Motion carried.

Section 5. Richardson noted that the last sentence of section 5 was out of place and after discussing revision of the section, Gilley moved, seconded by Braun, that the committees' previous action approving section 5 be reconsidered and that the last sentence of section 5 be adopted to read:

> "Section 5. Order settling account. The court may disapprove in whole or in part and surcharge the personal representative for any loss caused by any breach of duty. To the extent of approval of his final account . . . including the investment of the assets of the estate." Motion carried.

Section 9. Richardson noted that section 9 was derived from subsection (2) of ORS 117.310. The committee discussed the advantages and disadvantages of turning over unclaimed assets to the county treasurer and Richardson read section 109, 1963 Iowa Probate Code. Zollinger expressed approval of the Iowa provision and suggested it be adopted with an additional provision requiring unclaimed assets to be held by the State Land Board in the same manner as property presumed abandoned.

Richardson moved, seconded by Zollinger, that section 9 be approved to read:

> "Inability to distribute assets. Any personal representative having in his possession or under his control any property due or to become due to any other person to whom payment or delivery cannot be made as shown by the report of the personal representative on file may, upon order of the court, pay or deliver such property to the State Land Board and take the receipt of the State Land Board for the same. The receipt shall specifically state from whom said property was received, a description of the property, and the name of the person entitled to the same. Thereafter such property

shall be held and disposed of by the State Land Board in accordance with ORS chapter 98." Motion carried.

Section 10 and ORS 126.555. Richardson indicated that the principle change in section 10 was to raise the amount involved to $1,001 and others suggested that the increase be even more. Zollinger advised that the increase in amount would not be too significant because money bequeathed to a minor without any supervision or control would often be expended by the parent in household living expenses before the child reached majority. He read ORS 126.555 from the guardianship code and the committees agreed that a cross reference to that section would be a satisfactory solution to the problem. After further discussion, it was agreed that ORS 126.555 be amended to increase the amount to $1,500 and that section 10 would read:

"Section 10. Personal property to minor under $1.500. See ORS 126.555."

Biggs stated that there were other sections in the law relating to deposits held for minors by banks and savings and loan associations where the amounts should also be increased. Zollinger remarked that these revisions were outside of the committees' area of responsibility.

Section 11. Zollinger suggested subsection (3) read "A general devise or bequest not charged to a specific property or fund." There was a discussion of the use of "bequeath" or "devise," and Richardson observed that the committees had previously decided to use "give" so as not to be tied down by the former meanings of "bequeath" or "devise." Zollinger remarked that the purpose of section 11 had not been fully expressed unless the last sentence of paragraph (1) of the Proposed 1966 Wisconsin Probate Code, section 863.11, was included and others agreed. Biggs moved, seconded by Braun, that section 11 be adopted with the following amendments:

(a) -- Delete the comma after "abate" in the second line and the comma after "property" in the last line.

"(1) Personal property not disposed of by the will;

"(2) Residuary gifts;

"(3) General gifts not charged on any specific property or fund;

"(4) Specific gifts.

"A general gift charged on any specific property or fund is, for purposes of abatement, deemed property specifically given to the extent of the value of the thing on which it is charged. Upon the failure or insufficiency of the thing on which it is charged, it is deemed a specific gift to the extent of such failure or insufficiency. Abatement within each classification is in proportion to the amounts of such property each of the distributees would have received had full distribution of such property been made in accordance with the terms of the will.

"(b) If the provisions of the will or the testamentary plan or the express or implied purpose of the gift would be defeated by the order of abatement stated in subsection (a) hereof, the shares of distributees shall abate in such other manner as may be found necessary to give effect to the intention of the testator." Motion carried.

Section 12. Sorte called attention to the Minutes of the Probate Advisory Committee, 12/17, 18/65, Appendix A, pages 6 and 7. Zollinger asked that a notation be made in the minutes to consider the substitution of the present section 12 for section 13 of the draft in the Minutes, 12/17, 18/65, Appendix A, pages 6 and 7, and also that section 189 of the Model Probate Code be called to the committees' attention at the time they reviewed exoneration. Dickson noted that the heading of section 12 was inappropriate.

Braun moved, and the motion was seconded, that consideration of section 12 be withheld until the committees reviewed the draft on exoneration. Motion carried.

Section 13. Zollinger called attention to subsection (4) of section 11 which referred to a general gift charged on specific property and the committees agreed that inclusion of "general legacies" in section 13 was inappropriate because a general legacy, being inferior in order of priority, would not require the sale of specifically devised property.

Richardson moved, seconded by Biggs, that section 13 be revised to read:

> "When real or personal property which has been specifically given, or charged with a legacy, shall be sold or taken by the personal representative for the payment of claims, the family allowance, the shares . . . in accordance with the provision of section 11 hereof. (No further change.)" Motion carried.

Section 14. Sorte asked if section 14 should be placed with the sections having to do with advancements pertaining to intestate situations and was told by Zollinger that it might be appropriate to include a cross reference in that location and leave section 14 in its present position.

Biggs expressed the opinion that section 14 was redundant in view of the provisions of section 8, subsection (1). He moved, seconded by Braun, that section 14 be deleted. Zollinger spoke in opposition to the motion. Motion carried.

Section 15. Richardson read from the Minutes of the Probate Advisory Committee, 2/18, 19/66, Appendix, page 5, which approved that draft dealing with Retainer. (See Minutes 2/18, 19/66, page 26) Inasmuch as the provisions of section 15 had already been approved in the proposed probate code, Richardson moved, seconded by Zollinger, that it be deleted. Motion carried.

Section 16. There was a discussion of a suitable amount of interest to be required on general legacies and Dickson was of the opinion that 3% after 12 months would represent an average increment on a prudent investment. Thomas and others agreed that the period of time should relate to the period for filing the federal estate tax. Richardson suggested that the committees might want to delete section 16 inasmuch as there had been no litigation on this question in Oregon.

Biggs moved, and the motion was seconded, that section 16 be amended to require interest at the rate of 3 percent per annum beginning 12 months from the filing of the petition for appointment of a personal representative and that the section be approved without further change. Motion carried.

Sections 17 and 18. Richardson explained that section 17 had been included for purposes of discussion and read the comment under section 190 of the Model Probate Code which stated that it is not clear in all jurisdictions that a distributee of personal property can elect to take a general or residuary legacy in any form but cash. The comment in the Model Code went on to say there does not appear to be any reason why the distributee should not be able to take in kind if he so desires. Richardson expressed the view, with which Zollinger agreed, that it was not necessary to codify this common law rule in Oregon. Mapp urged that subsection (a) of section 17 be codified rather than leave it to common law. Zollinger moved, seconded by Richardson, that sections 17 and 18 be deleted. Motion carried. Mapp voted no.

Section 863.19, Proposed 1966 Wisconsin Probate Code. Richardson called attention to and read section 863.19, Proposed 1966 Wisconsin Probate Code.

The committees commented on this section being adopted to satisfy the requirements of the Internal Revenue Service.

McKenna moved, and the motion was seconded, that section 863.19 of the Proposed 1966 Wisconsin Probate Code be placed immediately following section 16. That section provides:

> "863.19 Valuation used in distribution of estate assets. If a general bequest of estate assets, including a pecuniary bequest, in a dollar amount fixed by formula or otherwise is satisfied by a distribution in kind, the distribution shall be made at current fair market values unless the will expressly provides that another value may be used. If the will requires or permits a different value to be used all assets available for distribution, including cash, shall unless otherwise expressly provided be so distributed that the assets, including cash, distributed in satisfaction of the bequest will be fairly representative of the net appreciation or depreciation in the value of the available property on the date or dates of distribution. A provision in a will that the personal representative may fix values for the purpose of distribution does not of itself constitute authorization to fix a value other than current fair market value.
>
> Comment: This section was adopted by the 1965 Legislature to meet problems involved in securing the marital deduction under federal estate tax rules." Motion carried.

The committees discussed the urgency of introduction of a bill in the 1967 legislature which would accomplish the purpose of the section just adopted. Because the committees recognized it was too late for the Oregon State Bar Committee on Taxation to introduce such a bill, Dickson requested Meyers to ask Senator Willner to introduce the bill and she agreed to do so.

Oregon State Bar Committee on Taxation. Preparation of an appropriate statute dealing with apportionment of federal and state inheritance tax statutes was discussed and Richardson suggested that the Chairman express to the Bar Committee on Taxation the committees' hopes that such a statute would be considered. Zollinger indicated that if the statutes fell within the scope of the probate committees' jurisdiction, it would be more appropriate for the Bar committee to make their recommendations to the probate committees in order that the material could be submitted as a part of the proposed probate code. Dickson agreed to write to the Bar Committee on Taxation requesting that they recommend to the probate committees matters which they considered important for incorporation in the probate code including the apportionment of state and federal inheritance taxes.

Section 19. Richardson recommended the first sentence of section 19 read: "Upon the filing of receipts, releases or clearances and upon filing of other evidence satisfactory . . ." He noted that his subcommittee had not understood why the order of discharge should be held in abeyance for two years as required by the second sentence of section 19. He remarked that the general provisions pertaining to fraud had a cut off period of one year. Carson indicated that there was an unlimited right to re-open decrees and Zollinger suggested that the time should be limited to one year with specific reference to the order of discharge. McKenna believed one year was too long and was of the opinion that when the final account was approved, the personal representative was entitled to be relieved of responsibility. After further discussion, Zollinger suggested the section remain as stated in the Model Probate Code and if experience proved the time to be too long or too short, it could easily be amended. Carson remarked that the surety companies would in all probability be happy to see even a two year limitation in the code inasmuch as a question existed in Oregon as to whether or not a surety company was ever relieved of responsibility.

Zollinger read section 19 as amended by the committees:
"Upon the filing of receipts, releases and clearances for Oregon income and inheritance taxes and for personal property taxes on all taxable personal property, and upon the filing of receipts or other evidence satisfactory to the court that distribution . . . (No further change)".

December Meeting of Committees

Dickson asked Richardson if he could attend the December meeting in order to complete the discussion of the draft under consideration and he agreed to do so.

The following items were scheduled for consideration at the December meeting:

Completion of draft on provisions relating to accounting (Richardson)

Arrangement of proposed revised probate code

Completion of November agenda

Inheritance tax (ORS chapter 118)
"Draft by Carson, Braun and Lisbakken)

January Meeting of Committees

Allocation of income (McMurchie)

February Meeting of Committees

Report on revision which would require recording of decree of final distribution (Mapp and Allison)

The meeting was adjourned at 5:15 p.m.

MEMORANDUM
November 14, 1966

TO: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

FROM: Campbell Richardson, William Keller and William Tassock

One of the matters tentatively scheduled for the November 18-19, 1966 meeting is accounting. Mr. Richardson advised Mr. Lundy in his letter transmitting the following draft that the authors did not necessarily advocate all of the proposed provisions of the draft, and some of the provisions were included in the draft for discussion purposes only. He further indicated that some of the provisions contained in the draft had been taken care of by previous action by the committees. Examples of the latter are abatement, exoneration of encumbered property, contributions, advancements, retainer and reopening administration.

DRAFT OF PROPOSED PROBATE PROVISIONS RELATING TO ACCOUNTING

Section_____ LIABILITY OF PERSONAL REPRESENTATIVE.

(a) Property of Estate. Every personal representative shall be liable for and chargeable in his accounts with all of the estate of the decedent which comes into his possession at any time, including all the income therefrom; but he shall not be accountable for any debts due to the decedent or other assets of the estate which remain uncollected without his fault. He shall not be entitled to any profit by the increase, nor be chargeable with loss by the decrease in value or destruction without his fault, of any part of the estate.

(b) Property Not a Part of Estate. Every personal representative shall be chargeable in his accounts with property not a part of the estate which comes into his hands at any time and shall be liable to the persons entitled thereto, if

(1) The property was received, under a duty imposed on him by law in the capacity of personal representative; or

(2) He has commingled such property with the assets of the estate.

(c) Breach of Duty. Every personal representative shall be liable and chargeable in his accounts for neglect or unreasonable delay in collecting the credits or other assets of the estate or in selling, mortgaging or leasing the property of the estate; for neglect in paying over money or delivering property of the estate he shall have in his hands; for failure to account for or to close the estate within the time provided by this Code; for any loss to the estate arising from his embezzlement or commingling of the assets of the estate with other property; for loss to the estate through self-dealing; for any loss to the estate arising from wrongful acts or omissions of his co-representatives which he could have prevented by the exercise of ordinary care; and for any other negligent or wilful act or nonfeasance in his administration of the estate by which loss to the estate arises.

From §172, Model Probate Code, P. 165 and 166.

Section_____ ACCOUNTING AND DISTRIBUTION. (1) The personal representative shall make and file in the estate proceeding a written verified account of his administration:

(a) Unless the Court orders otherwise, annually within thirty days after the anniversary date of his appointment.

(b) Upon filing his petition to resign and before his resignation is accepted by the Court.

(c) Within thirty days after the date of his removal.

(d) When the estate is fully administered.

(e) At such other times as the Court may order.

(2) Each account made and filed by a personal representative shall include the following information.

(a) The period of time covered by the account.

(b) The amount of the property of the estate according to the inventory, or if there was a previous account, the amount of the balance of the next previous account, and all property and rents, income, issues, profits and proceeds from property received during the period covered by the account.

(c) All disbursements made during the period covered by the account. Receipts for such disbursements shall accompany the account.

(d) The property of the estate on hand.

(e) Such other information as the personal representative considers necessary to show the condition of the affairs of the estate or as the Court may order.

(3) When the estate is fully administered the account shall also include:

(a) An affirmative showing that all personal income taxes and inheritance taxes which have become payable have been paid, and that all such taxes which will become due are secured by bond, deposit or otherwise.

(b) A petition for an order authorizing the personal representative to distribute the estate to the persons and in the proportions specified therein.

Source:

ORS 117.010 (Semiannual accounts); ORS 117.610 (Final Account); and ORS 126.336 (Guardianship Code).

Cross References:

Iowa - 469.470; 413.477. Washington - 11.76.010-020; 11.28.290; 32.060; 76.030; 76.100.

Section _____ NOTICE; HEARING ON SETTLEMENT OF ACCOUNT AND PETITION FOR DISTRIBUTION. (1) Upon the filing of the final account and petition for order of distribution, the court shall fix a day for hearing of objections thereto and the personal representative shall, not less than twenty days before the time fixed for such hearing, cause notice of the time and place thereof to be mailed:

(a) To each heir at his last known address, if such decedent died intestate.

(b) To each legatee and devisee at his last known address, if such decedent died testate.

(c) To creditors not receiving payment in full whose claims have not been otherwise barred.

(d) All other persons who have, or may claim, an interest in the estate being distributed.

(2) Such notice need not be mailed to the personal representative and proof of such mailing shall be made by affidavit and filed at or before approval of the final account.

SOURCE: ORS 117.612

(Note: Subparagraph (c), among other things, permits elimination of ORS 117.615 (the giving of notice to Welfare).

It is thought that due process requires giving actual notice to interested parties if such parties are to be bound by the terms of the order approving the account and directing distribution. If such parties are to get actual notice, there would appear to be no need for published notice; hence, the same is eliminated by the suggested provision.

ORS 117.612 required filing of the affidavit before the time set for hearing on the final account. The foregoing requires filing before the entry of an order approving such account.)

CROSS-REFERENCES: Iowa - 36, 40, 42, 44, 478. Washington - 76.040. Model Code - 178, 177.

Section _____ OBJECTIONS TO FINAL ACCOUNT AND PETITION FOR ORDER OF DISTRIBUTION. An heir, creditor whose claim is not otherwise barred, or other person interested in the estate may, on or before the day appointed for such hearing and settlement, file his objections thereto, or to any particular item thereof, specifying the particulars of such objections.

SOURCE: ORS 117.620
CROSS-REFERENCES: Washington - 77.050. Model Code - 177, 178.

COMMENT: The provision permitting a "creditor whose claim is not otherwise barred" to file an objection by implication prohibits a creditor whose claim is barred from objecting. It is believed that this is consistent with action previously taken with respect to claims procedure.

CAVEAT: A number of policy considerations are involved in determining the effect of ORDERS APPROVING FINAL ACCOUNTS AND DIRECTING DISTRIBUTION. Some of the choices are:

(A) Such orders only provide a basis for exonerating the personal representative as respects claims against him by all persons (having notice of the proceeding);
(B) Such orders are (not) res adjudicata as respects disputes between persons other than the personal representative;
(C) Such orders as respect disputes (between persons other than a personal representative) involving a decedent's estate are prima facie evidence of facts established therein.

See Sections 179 and 183 of the Model Code and Sections 487 and 488 of the Iowa Code set forth below.

Section _____ CONCLUSIVENESS OF ORDER SETTLING ACCOUNT. Upon the approval of his final account, the personal representative and his sureties shall, subject to the right of appeal and to the power of the court to vacate its final orders, be relieved from liability for the administration of his trust during the accounting period, including the investment of the assets of the estate. The court may disapprove the account in whole or in part and surcharge the personal representative for any loss caused by any breach of duty.

SOURCE: §179, Model Probate Code, P. 168.

Section _____ LIMITATION ON RIGHTS. No person, having been served with notice of the hearing upon the final report and accounting of a personal representative or having waived such notice, shall, after the entry of the final order approving the same and discharging the said personal representative, have any right to contest, in any proceeding, other than by appeal, the correctness or the legality of the inventory, the accounting, distribution, or other acts of the personal representative, or the list of the heirs set forth in the final report of the personal representative, provided, however, that nothing contained in this section shall prohibit any action

against the personal representative and his bondsman under the provisions of section one hundred ninety (190) on account of any fraud committed by the personal representative.

SOURCE: §487, Iowa Probate Code, P. 140.

Section _____ REOPENING SETTLEMENT. Whenever a final report has been approved and a final accounting has been settled in the absence of any person adversely affected and without notice to him, the hearing on such report and accounting may be reopened at any time within five years from the entry of the order approving the same, upon the application of such person, and, upon a hearing, after such notice as the court may prescribe to be served upon the personal representative and the distributees, the court may require a new accounting, or a redistribution from the distributees. In no event, however, shall any distributee be liable to account for more than the property distributed to him. If any property of the estate shall have passed into the hands of good faith purchasers for value, the rights of such purchasers shall not, in any way, be affected.

SOURCE: §488, Iowa Probate Code, P. 140.

Section _____ DECREE OF FINAL DISTRIBUTION. (1) In its decree of final distribution, the court shall designate the persons to whom distribution is to be made, and the proportions or parts of the estate, or the amounts, to which each is entitled under the will and the provisions of this Code, including the provisions regarding advancements, election by the surviving spouse, lapse, renunciation, adjudicated compromise of controversies and retainer. Every tract of real property so distributed shall be specifically described therein. The decree shall find that all state and federal inheritance and estate taxes are paid; and if all claims have been paid, it shall so state; otherwise, the decree shall state that all claims except those therein specified are paid and shall describe the claims for the payment of which a special fund is set aside, and the amount of such fund; if any contingent claims which have been duly allowed are still unpaid and have not become absolute, such claims shall be described in the decree, which shall state whether the distributees take subject to them. If a fund is set aside for the payment of contingent claims, the decree shall provide for the distribution of such fund in the event that all or a part of it is not needed to satisfy such contingent claims. If a decree of partial distribution has been previously made, the decree of final distribution shall expressly confirm it, or, for good cause, shall modify said decree and state specifically what modifications are made.

(2) If a distributee dies before distribution to him of his share of the estate, such share may be distributed to the personal representative of his estate, if there be one; or if no administration on his estate is had and none is necessary according to the provisions of sections 86 to 91 inclusive, hereof, the share of such distributee shall be distributed in accordance therewith.

(3) The decree of final distribution shall be a conclusive

determination of the persons who are the successors in interest to the estate of the decedent and of the extent and character of their interests therein, subject only to the right of appeal and the right to reopen the decree. It shall operate as the final adjudication of the transfer of the right, title and interest of the decedent to the distributees therein designated; but no transfer before or after the decedent's death by an heir or devisee shall affect the decree, nor shall the decree affect any rights so acquired by grantees from the heirs or devisees.

(4) Whenever the decree of final distribution includes real property, a certified copy thereof shall be recorded by the personal representative in every county of this state in which any real property distributed by the decree is situated. The cost of recording such decree shall be charged to the estate.

From §183, Model Probate Code. P. 171 and 172.

Section _____ DISPOSITION OF UNCLAIMED ASSETS. If upon such distribution any heir, devisee or other person entitled to any of such proceeds fails to apply for his or her portion of the proceeds, for a period of three months after the making and entering of an order of distribution by the court having probate jurisdiction of the estate, such court may, at any time thereafter, upon a showing to that effect being made, by the executor or administrator, make an order directing such executor or administrator to pay the portion which such person is entitled to receive to the county treasurer of the county. The county treasurer shall keep the same in a special fund, subject to the further order of the court, for the payment of it to the person entitled to receive it, upon application therefor. If no such order is made and the same is not applied for by the person entitled to receive it for a period of one year from the date when the county treasurer receives it, the sum shall be paid by the county treasurer to the State Land Board, and the same shall be placed in the escheat fund of the state. The person entitled thereto may thereafter and within ten years from the date of the payment thereof to the State Land Board, apply for and recover the same as provided for the recovery of escheat funds in ORS 120.130 to 120.150.

SOURCE: ORS 117.310
CROSS-REFERENCES: Iowa 109-111; Model Code §192.

Section _____ DISTRIBUTION OF PERSONAL PROPERTY UNDER $1,001 TO MINOR WHO HAS NO GUARDIAN. Where a minor child residing in this state or in any other state is entitled to distribution of any personal property, including money, of a value less than $1,001 from the estate of a decedent and has no guardian of his estate, the personal representative may, with the approval of the court, pay or transfer such personal property to a parent of the child who is entitled to the custody of the child.

SOURCE: ORS 117.315
CROSS-REFERENCES: Iowa §108; Washington 11.76.090-095; Model Code 86-92.

Section_____ORDER IN WHICH ASSETS APPROPRIATED; ABATEMENT.

(a) General Rules. Except as provided in subsection (b) hereof, shares of the distributees shall abate, for the payment of claims, legacies, the family allowance, the shares of pretermitted heirs or the share of the surviving spouse who elects to take against the will, without any preference or priority as between real and personal property, in the following order:

(1) Property not disposed of by the will;

(2) Property devised to the residuary devisee;

(3) Property disposed of by the will but not specifically devised and not devised to the residuary devisee;

(4) Property specifically devised.

A general devise charged on any specific property or fund shall, for purposes of abatement, be deemed property specifically devised to the extent of the value of the thing on which it is charged. Upon the failure or insufficiency of the thing on which it is charged, it shall be deemed property not specifically devised to the extent of such failure or insufficiency.

(b) Contrary Provisions, Plan or Purpose. If the provisions of the will or the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a) hereof, the shares of distributees shall abate in such other manner as may be found necessary to give effect to the intention of the testator.

From §184, Model Probate Code, P. 172 and 173.

Section_____EXONERATION OF ENCUMBERED PROPERTY. When any real or personal property subject to a mortgage is specifically devised, the devisee shall take such property so devised subject to such mortgage unless the will provides expressly or by necessary implication that such mortgage be otherwise paid. The term "mortgage" as used in this section shall not include a pledge of personal property.

From §189, Model Probate Code, P. 175.

Section_____CONTRIBUTION. When real or personal property which has been specifically devised, or charged with a legacy, shall be sold or taken by the personal representative for the payment of claims, general legacies, the family allowance, the shares of pretermitted heirs or the share of a surviving spouse who elects to take against the will, other legatees and devisees shall contribute according to their respective interests to the legatee or devisee whose legacy or devise has been sold or taken, so as to accomplish an abatement in accordance with the provision of section 184 hereof. The court shall, at the time of the hearing on the petition for final distribution, determine the amounts of the respective contributions and whether the same shall be made before distribution or shall constitute a lien on specific property which is distributed.

From §185, Model Probate Code, P. 174.

117.340 Contribution among legatees, devisees and heirs. When any testator in his will gives any chattel or real estate to any person, and the same is 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 the person from whom the bequest was taken.

Section_____DETERMINATION OF ADVANCEMENTS. All questions of advancements made, or alleged to have been made, by an intestate to any heir may be heard and determined by the court at the time of the hearing on the petition for final distribution. The amount of every such advancement shall be specified in the decree of final distribution.

From §186, Model Probate Code, P. 174.

Section_____RIGHT OF RETAINER. When a distributee of an estate is indebted to the estate, the amount of the indebtedness if due, or the present worth of the indebtedness, if not due, may be treated as an offset by the personal representative against any testate or intestate property, real or personal of the estate to which such distributee is entitled; but such distributee shall be entitled to the benefit of any defense which would be available to him in a direct proceeding for the recovery of such debt.

From §187, Model Probate Code, P. 174.

Section_____INTEREST ON GENERAL LEGACIES. General legacies shall bear interest at the legal rate for a period beginning nine months from the filing of the petition for the appointment of a personal representative until the payment of such legacies, unless a contrary intent is indicated by the will.

From §188, Model Probate Code, P. 175.

Section_____PAYMENT TO DISTRIBUTEES IN KIND.
(a) When distributees to take in kind. When the estate is otherwise ready to be distributed, it shall be distributed in kind, unless the terms of the will otherwise provide or unless a partition sale is ordered. Except as provided in subsection (b) hereof, any general legatee may elect to take the value of his legacy in kind, and any distributee, who by the terms of the will is to receive land or any other thing to be purchased by the personal representative, may, if he notifies the personal representative before the thing is purchased, elect to take the purchase price or property of the estate which the personal representative would otherwise sell to obtain such purchase price.
(b) Exception where will directs purchase of annuity. If the terms of the will direct the purchase of an annuity, the person to whom the income thereof shall be directed to be paid shall not have the right to elect to take the capital sum directed to be used for such purchase in lieu of such annuity except to the extent that the will expressly provides that an assignable annuity be purchased. Nothing herein contained shall affect the rights of election by a surviving spouse against a testamentary provision as provided in this Code.

From §190, Model Probate Code, P. 176.

Section_____PARTITION FOR PURPOSE OF DISTRIBUTION. When two or more distributees are entitled to distribution of undivided interests in any real or personal property of the estate, distribution shall be made of undivided interests therein unless the personal representative or one or more of such distributees shall petition the court not later than the hearing on the petition for final distribution, to make partition thereof. If such petition is filed, the court, after such notice to all interested persons as it shall direct, shall proceed to make partition, allot and divide the property in the same manner as provided by the statutes with respect to civil actions for partition, so that each party receives property of a value proportionate to his interest in the whole, and for that purpose the court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party. If partition is made in kind, the court may appoint two commissioners to partition said property, who shall have the powers and perform the duties of (commissioners) in civil actions for partition, and the court shall have the same powers with respect to their report as in such actions. In case equal partition cannot be had between the parties without prejudice to the rights or interest of some, partition may be made in unequal shares and by awarding judgment for compensation to be paid by one or more parties to one or more of the others. Any two or more parties may agree to accept undivided interests. Any sale under this section shall be conducted and confirmed in the same manner as other probate sales. The expenses of the partition, including reasonable compensation to the commissioners for their services, shall be equitably apportioned by the court among the parties, but each party must pay his own attorney's fees. The amount charged to each party shall constitute a lien on the property allotted to him.

From §191, Model Probate Code, P. 177 and 178.

Section_____DISCHARGE OF PERSONAL REPRESENTATIVE. Upon the filing of receipts or other evidence satisfactory to the court that distribution has been made as ordered in the final decree, the court shall enter an order of discharge. The discharge so obtained shall operate as a release from the duties of personal representative and shall operate as a bar to any suit against the personal representative and his sureties unless such suit be commenced within two years from the date of the discharge.

From §193, Model Probate Code, P. 179 and 180.

Section_____REOPENING ADMINISTRATION. If, after an estate has been settled and the personal representative discharged, other property of the estate shall be discovered, or if it shall appear that any necessary act remains unperformed on the part of the personal representative, or for any other proper cause, the

court, upon the petition of any person interested in the estate and, without notice or upon such notice as it may direct, may order that said estate be reopened. It may reappoint the personal representative or appoint another personal representative to administer such property or perform such acts as may be deemed necessary. Unless the court shall otherwise order, the provisions of this Code as to an original administration shall apply to the proceedings had in the reopened administration so far as may be; but no claim which is already barred can be asserted in the reopened administration.

From §194, Model Probate Code, P. 180.

Section _____ EXPENSES AND COMPENSATION OF REPRESENTATIVE. A personal representative is allowed, in the settlement of his account, all necessary expenses incurred in the care, management and settlement of the estate, including reasonable attorney's fees in any matter requiring legal counsel, and a credit for such sum, if any, as the court, in its discretion, may require him to pay to counsel for any party whose rights had to be resolved in order to properly administer the estate.

SOURCE: ORS 117.660
(Note: ORS 117.660 has been expanded to make clear the court's discretionary power to direct compensation for counsel in those instances where their advocacy has been of assistance to the court in resolving disputes.)

Section _____ COMPENSATION OF REPRESENTATIVE. (1) For his services the personal representative shall receive such compensation as the law provides; but when the deceased, by his Will, has made special provision for the compensation of his executor, such executor is not entitled to any other compensation for his services, unless within ten days after his appointment, he subscribes and files with the clerk a written declaration renouncing the compensation provided by the Will.

(2) The compensation provided by law for a personal representative is a commission upon the whole estate accounted for by him, as follows:

(a) Seven percent of any sum up to $1,000.
(b) Four percent of all above $1,000 and not exceeding $10,000.
(c) Three percent of all above $10,000 and not exceeding $50,000.
(d) Two percent of all above $50,000.

(3) In all cases, such further compensation as is just and reasonable may be allowed by the court or judge thereof, for any extraordinary and unusual services not ordinarily required of a personal representative in the discharge of his trust.

SOURCE: ORS 117.680
(Note: Paragraph (1) has been lifted from ORS 117.660 and placed in the foregoing section.)

Section _____ ACCOUNT OF DECEASED OR INCOMPETENT PERSONAL REPRESENTATIVE. If the personal representative dies or becomes incompetent, his account may be presented by his personal representative or the guardian of his estate to, and settled by, the court in which the estate of which he was personal representative is being administered, and, upon petition of the successor of the deceased or incompetent personal representative, the court shall compel the personal representative or guardian of the deceased or incompetent personal representative to render an account of the administration of the estate of the decedent and the court shall settle the account as in other cases.

From §181, Model Probate Code, P. 169.

Section _____ WHEN PROPERTY IS DISCHARGED FROM ADMINSTRATION; DISTRIBUTION OF SURPLUS. The property of the deceased is the property of those to whom it descends by law or is given by Will, subject to the possession of the personal representative and to be applied to the satisfaction of claims against the estate, expenses of administration or sold, as by ORS 116.705 to 116.830 provided; but upon the settlement of the estate, and the termination of the administration thereof, so much of such property as remains unsold or unappropriated is discharged from such possession and liability without any order or decree therefor; but if there is any surplus of the proceeds of the sale of such real property, or any part thereof, the court or judge thereof shall order and direct a distribution of such surplus among those who would have been entitled to the real property if it had not been sold.

SOURCE: ORS 117.320. Expanded to include personal property.

The Subcommittee on Accounting wishes to make note of the fact that a failure to account as provided should be included as a ground for removing a fiduciary and a basis for punishment as a contempt. The Subcommittee feels that this should be included elsewhere in the Revised Code.

ADVISORY COMMITTEE
Probate Law Revision

Thirty-first Meeting
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Dates) and: Times)	1:30 p.m., Friday, December 16, 1966 and 9:00 a.m., Saturday, December 17, 1966
Place:	Judge Dickson's courtroom 244 Multnomah County Courthouse Portland

Suggested Agenda

1. Approval of minutes of November meeting.

2. Reports on miscellaneous matters.

3. Chapter 117 continued, Periodic Accounting and Distribution (A draft prepared by Mr. Tassock, Mr. Richardson and Mr. Keller was sent to all committee members prior to the November meeting).

4. Probate Code Outline. (A draft prepared by Judge Dickson, Miss Lisbakken and Mr. Richardson was sent to all committee members prior to the April, 1966 meeting. A draft is to be prepared by a subcommittee consisting of Judge Thalhofer, Mr. Gooding and Mr. Copenhaver, and a third draft is to be prepared by a subcommittee consisting of Judge Warden, Mr. Frohnmayer and Professor Mapp. (A draft prepared by Professor Mapp will be sent to committee members prior to the December meeting)

5. Sale or other disposition of estate property (ORS 116.705 to 116.900, draft by Mr. Zollinger and Mr. Lovett).

6. Unauthorized administration of personal estate of a decedent (ORS 116.990).

7. Ancillary administration (Draft by Professor Mapp and Mr. Riddlesbarger).

8. Next meeting.

ADVISORY COMMITTEE
Probate Law Revision

Thirty-First Meeting, December 16 and 17, 1966
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The thirty-first 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 16, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Frohnmayer (arrived 3:10 p.m.), Gooding, Husband (arrived 2:00 p.m.), Jaureguy, Mapp (arrived 2:30 p.m.). Carson, Lisbakken and Riddlesbarger were absent.

The following members of the Bar committee were present: Gilley, Krause, Biggs, Braun, Krammer, Lovett, McKenna, Meyers, Pendergrass, Piazza, Silven, Thalhofer and Thomas. McKay and Mosser were absent.

Also present were Robert W. Lundy and James Sorte from the staff of Legislative Counsel.

Minutes of November Meeting

There being no objection, the minutes of the last meeting (November 18 and 19, 1966) were approved as submitted.

Miscellaneous Matters

Bar Committee on Probate Law and Procedure. Chairman Gilley of the Bar committee told the advisory committee that the Bar committee would, if agreeable, continue to work in conjunction with the advisory committee, and at the completion of the Probate Code revision would assist in explaining and encouraging the adoption of the revised code by the Bar at large. Dickson welcomed their assistance and offered his courtroom as a meeting place for the Bar committee to meet either preceding or following the future joint committee sessions.

Approval and time schedule of final draft of revised probate code. In reply to a question by Gilley, Lundy proposed that the first rough drafts of approved segments of the code together with questions encountered in drafting would be submitted to the individuals or subcommittees who had been primarily responsible for drafting of a particular segment prior to distribution to the committees. In that way some of the ambiguities could be resolved prior to the time they would be considered by the committees. When all segments had been approved, they could be assembled in one document to again be brought before the entire group. Gilley asked if Lundy could suggest a tentative time schedule and was told that hopefully the entire document would be ready for consideration before the end of the summer of 1967.

Secretarial assistance. Sorte reported that Legislative Counsel was receiving applications for replacement of the current reporter and would arrange to have someone available in time for the January meeting.

Recovery of preferential payments in bankruptcy. Gilley indicated that Judge Estes Snedecor, Referee in Bankruptcy, had requested him to advise the committees that Judge Snedecor was serving on a committee of referees who were considering the problem of unlawful preference as it related to decedent's estates and asked if the committees would consider setting up a procedure in the probate code for recovery of preferential payments. Dickson commented that Gooding had done considerable research on creditors' rights and appointed Gooding, Gilley and Pendergrass to meet with Judge Snedecor to discuss the problem. He directed that creditors' rights and insolvent estates be placed on the February agenda.

Arrangement of Proposed Revised Probate Code

An outline of the proposed revised probate code prepared by Dickson, Lisbakken and Richardson had been forwareded to members of the committees in May, 1966. An outline prepared by Mapp had been mailed on December 5, 1966, and the outline prepared by Gooding, McKay and Thalhofer dated December 14, 1966, was distributed to those present at the meeting. [Note: This latter outline constitutes Appendix A to these minutes.]

The committees considered the three outlines and decided to use the outline prepared by Dickson, Lisbakken and Richardson as a reference for discussion.

Zollinger was of the opinion that the pleading and procedure should be placed with the specific sections to which the proceedings referred. Krause suggested that provisions which were the same in various proceedings be placed together under general provisions.

Disposition of the remains of a decedent was discussed and Dickson pointed out that this was the first thing facing a personal representative and should appear early in the code. After further discussion, the committees agreed with Zollinger's suggestion that "Proceedings Prior to Administration" should precede "Devolution of Property."

Allison objected to including "Estates of Persons Presumed Dead" in chapter 112 because it was so seldom used. He suggested that subject be placed at the end of the code and Dickson agreed that it was not actually a proceeding prior to administration. Zollinger recommended that the cross reference to "Reopening Estates" be deleted from chapter 112 and treated in chapter 114.

Dickson noted that Mapp's outline included will contests under "Initiation of Administration", and commented that a will contest might be held at the beginning of the proceeding, and that chapter 113 would be a more logical place for that proceeding than in chapter 116.

Zollinger commented that he was not convinced it was necessary that "Proceedings Prior to Administration" be set forth in a separate chapter and suggested that it be combined in the chapter with "Administration of Estates Generally" by breaking the chapter into the following subheadings:

(a) Initiation of Administration
(b) Support of Spouse and Children
(c) Powers and Duties of Personal Representatives

Dickson remarked that the committees were agreed that this was the proper order but were not in agreement that they should all be included in one chapter. Allison expressed approval of a separate chapter for "Proceedings Prior to Administration."

The Small Estates Act and Independent Administration were discussed and it was the concensus of the committees that these proceedings should be included at the beginning of the code preceding the chapter on "Devolution of Property".

Lundy pointed out that when the revised probate code appeared in the form of a bill it would not contain chapter numbers. Zollinger suggested that when the proposed code was presented to lawyers for their consideration it should contain ORS chapter and section numbers. Gilley and Piazza were of the opinion that such a procedure would invite confusion because the bill would undoubtedly be revised by the legislature and the numbering system would necessarily have to be revamped after the

bill was passed. After further discussion it was agreed that it would be advisable to number the chapters consecutively beginning with number one, with section numbers within the chapters in consecutive order.

Dickson pointed out that Mapp's outline contained a separate chapter for ancillary procedures and it was decided that this should be included under "Administration of Estates Generally."

Authority to Bring or Defend Suits and Actions

Zollinger advised the committees that he had studied ORS 116.105 and compared it with section 857.03 of the proposed Wisconsin probate code. He concluded that the Wisconsin section was better than ORS 116.105 and had amended the Wisconsin section to read:

> "The personal representative shall collect and possess all of the decendent's estate; inventory all of the decedent's estate and property subject to inheritance tax and have appraised such as is required by law; collect all income and rent from decedent's estate; manage the estate and, when reasonable, maintain in force or purchase casualty and liability insurance; contest all claims except claims which he believes are valid [and which are not objected to by a person interested]; prosecute or defend such suits and actions as he shall deem justified in the interest of creditors, heirs, devisees and distributees; pay and discharge out of such estate all expenses of administration, taxes, charges and claims [allowed by the court, or such payments on claims as directed by the court]; render accurate accounts; make distribution; and do such other things as shall be directed by the court or required by law."

Sorte distributed the following memorandum dated December 14, 1966, dealing with title and possession of decedent's property:

"The section below is similar to section 24 of the memorandum dated November 14, 1966, prepared by Campbell Richardson, William Keller and William Tassock. The section below was approved by the committees in 1965. (See Minutes of the 9/18, 19/65 meeting at page 2). Perhaps the committees, at the December 1966 meeting, can combine the provisions of the section below and section 24 of the memorandum dated December 12, 1966."

Proposal #1

TITLE AND POSSESSION OF DECENDENT'S PROPERTY

Sec. 1. 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 and 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 and personal property and shall have power to sell, mortgage, lease or otherwise dispose of the same as provided in this title.

"NOTE: ORS 116.105 and ORS 117.320 are to be repealed."

The committees discussed the two proposals after which Zollinger moved approval of section 1 of Proposal #1 on the memorandum dated December 14, 1966, together with the repeal of ORS 116.105 and 117.320, and approval in substance of section 857.03 of the proposed Wisconsin probate code with the following two amendments in addition to those set forth above:

> " . . . inventory all of the decedent's estate [and property subject to inheritance tax] and have appraised . . . pay and discharge out of such estate all expenses of administration, taxes, charges and claims approved by him and allowed by the court . . ."

Krause seconded the motion and it carried unanimously.

Sale, Mortgage and Lease of Property (Chapter 860, Proposed 1966 Wisconsin Probate Code)

Zollinger explained that he and Lovett had prepared a draft covering unauthorized administration of personal estates of a decedent (i.e., ORS 116.990) but had decided that chapter 860 of the proposed Wisconsin code entitled "Sale, Mortgage and Lease of Property" was superior to the draft they had prepared. He distributed Xerox copies of chapter 860 of the proposed Wisconsin code for the committees' consideration and noted that the drafts of the American Bar Association Committee on Probate Law and the Uniform Committee on Probate Law contained substantially the same provisions. [Note: A copy of chapter 180 of the proposed Wisconsin probate code is attached to these minutes as Appendix B]

Zollinger read section 860.01 together with the comment thereunder and moved, seconded by Piazza, that it be approved. After a brief discussion, the committees decided to consider the entire chapter before voting on individual sections. Zollinger withdrew his motion and Piazza withdrew his second.

Zollinger read section 860.03 and suggested adding the following language after the first sentence:

> "At least ten days prior to each sale, mortgage or lease for a consideration in excess of X dollars, the personal representative shall make and file a written report thereof. The court may require that such sale, mortgage or lease be postponed until the personal representative files a bond or supplementary bond satisfactory to the court in the amount specified in the order."

Gilley asked Zollinger if he had considered the possibility of imposing penalties for contempt for violation of the restrictions in a will and was told that the penalty section would provide for contempt. Zollinger noted that he would have no objection to adding such a provision. Gilley observed that this penalty could be added to subsection (3) of section 860.11.

Gilley suggested that it might be advantageous to the estate to allow the personal representative to make a sale without prior notice to the court and proposed that an immediate report to the court after the sale be required rather than a report prior to sale. Zollinger expressed approval of the suggestion. Husband expressed the view that such a report would accomplish very little. Dickson objected to giving the personal representative an opportunity to "pass the buck" by receiving an order of confirmation of sale to provide interested parties with notice that a sale had been made. Dickson expressed the view that the report of sale would serve no useful purpose, and others agreed.

After further discussion, Zollinger read Wisconsin section 858.03, cross referenced to under section 860.03, and explained that the purpose of the section was that people interested in the estate were entitled to know the nature and value of the assets of the estate as soon as they became known. He suggested when that information was made available by the filing of an inventory, interested parties should have notice. He added that the cross reference to section 858.03 was the appropriate manner in which to handle the section and proposed that section 858.03 be incorporated into the Oregon code, but not in the sections having to do with sales. Dickson was of the opinion that 858.03 was not needed and that interested parties should be sent a notice of sale rather than an inventory. Gooding agreed and suggested elimination of the section. Allison expressed the view that if the committees were going to allow a sale by a personal representative without court order, the heirs and devisees in whom property was vested were legally entitled to a notice of a proposed sale of their property.

Dickson suggested that if the committees were concerned

about the question, they could subject the title in whom the property vested to the right to be sold by the personal representative by amending Proposal #1 which the committees had approved earlier. [Note: See page 5 of these minutes.]

Zollinger read the balance of chapter 860 and moved the adoption of section 860.01. The motion was seconded by Frohnmayer and carried in both committees.

Zollinger moved that section 860.03 not be adopted as a part of the proposed Oregon probate code. Frohnmayer seconded and the motion carried.

Piazza moved that there be a requirement that the personal representative file with the county clerk a report of the sale, describing the amount of the sale, the description of the property and information as to whom it was sold. Motion was seconded but failed to carry. Advisory committee voted 2 yes; 4 no. Bar committee voted 7 yes; 5 no.

Zollinger moved, seconded by Butler, that section 860.05 be approved with the following amendments:

> "If property in an estate is [sold,] mortgaged or leased by a personal representative, [title passes] the transfer is effective subject to the rights of creditors having secured a interest in the property [sold] but free and clear . . ."

Motion carried.

The meeting recessed at 5:15 p.m.

The meeting was reconvened at 9:00 a.m., Saturday, December 17, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Butler, Carson, Frohnmayer, Gooding, Husband, Jaureguy and Mapp. The following members of the Bar committee were present: Gilley, Krause, Biggs, Braun, Kraemer, Lovett, McKenna, Meyers, Piazza and Thomas. Also present was James Sorte.

Sale, Mortgage and Lease of Property (Chapter 860, Proposed 1966 Wisconsin Probate Code (Cont'd))

The committees discussed the problem of an improper sale of estate property which resulted in damage that would be difficult

or impossible to establish. It was suggested that one way to prevent this would be to require a bond of the personal representative for the total value of the estate in the first instance. This would make the bonding company responsible for the personal representative's actions. They also discussed the injury that could be done to an attorney-client relationship by the attorney having to suggest to his client that he would have to be bonded even though the will provided that bond was not required. Dickson and Frohnmayer were of the opinion that a bond would be a better safeguard to the estate than requiring a report of sale to the court either before or after the sale. Gilley again advocated an explicit power and duty of the court to find the personal representative in contempt if a sale were made which was not allowed by a provision in the will.

Zollinger suggested that the committees take action on the balance of the sections in chapter 860 which had not been voted on the previous day and then attempt to crystallize their views concerning the consequences of a wrongful sale. Zollinger moved, seconded by Braun, that section 860.09 be approved. Motion carried.

Gilley commented that if the personal representative was to be left free to give a personal warranty, "himself personally or on" should be eliminated from Wisconsin section 860.07. Zollinger remarked that the section should express the intended purpose that a personal representative's sale of goods would be without warranty, express or implied, and the personal representative should not be in the position of binding himself or the estate.

After further discussion, Frohnmayer moved, seconded by Gilley, that section 860.07 be adopted with the deletion of "which are binding on himself personally or on the estate of the decedent." Zollinger expressed concern over the word "give" and suggested substitution of the following:

> "Except as provided in section_____, any sale, mortgage or lease of property by a personal representative shall be without express or implied warranties."

He explained that the intent was that the personal representative could give no express or implied warranties in his capacity as personal representative. Frohnmayer withdrew his motion and Gilley withdrew his second. Zollinger moved, seconded by Frohnmayer, the adoption of the language he had just suggested. Motion carried.

Zollinger read section 860.11 and section 879.05. Piazza

contended, and Zollinger agreed, that it was not necessary to give notice to creditors. Zollinger moved, seconded by Braun, that the following language be substituted for the last two lines of section 860.11 (4):

> " . . . notice given in accordance with section_____ to the person who would receive the property affected upon distribution in the absence of such sale, mortgage or lease."

In reply to a question by Krause, Zollinger explained that the intent was that there should be no sale in any situation without the consent of the specific beneficiary or notice to him. Piazza indicated that the section should clearly state that it was intended to apply to the persons receiving the property in the situation where the will prohibited the sale, but not in a case where the property had to be sold because the estate was insolvent. Motion carried.

Zollinger moved, seconded by Frohnmayer, that section 860.11 be approved as amended. Motion carried.

Frohnmayer suggested that the following be added to subsection (4) of 860.11: "unless the beneficiary joins in such lease, mortgage or sale." Zollinger indicated it would be more clear to include a subsection (5) to state:

> "(5) If a personal representative shall threaten to make a sale in breach of duty, it may be enjoined at the suit of any party adversely affected thereby. If the personal representative shall sell any property of the estate in breach of duty, he shall be punished as for contempt. Any party adversely affected by a sale in breach of duty by the personal representative shall be entitled to recover from him all damages resulting therefrom together with such punitive damages, not exceeding twice the value of the property affected, as may be allowed by the court or jury. A sale shall not be deemed made in breach of duty if made with the consent of parties affected thereby."

Frohnmayer commented that the above subsection should include language to the effect that breach of duty would deprive the personal representative of his fee and be grounds for his removal. The committee decided that when the subsection was prepared in final form, it should include a provision that the personal representative who sells, mortgages or leases property in breach of duty shall not be entitled to compensation for his services and shall be grounds for removal of a personal representative.

Frohnmayer asked if punitive damages should be limited to twice the value of the property. There followed a discussion concerning methods of reimbursing the beneficiary for loss of an heirloom or a homestead which was wrongfully sold. Piazza urged inclusion of punitive damages irrespective of actual damages. Zollinger expressed the view that this would be too radical a departure from present practice and would establish a precedent for allowing punitive damages in cases where there were no actual damages.

Zollinger moved that the subsection be referred to Legislative Counsel for preliminary drafting and placed on the agenda for the January meeting. Gilley moved to further amend the motion to include an instruction to Legislative Counsel that provision be made for punitive damages whether or not there are actual damages. Butler seconded. Vote was taken on Zollinger's motion to refer subsection (5) to Legislative Counsel for drafting with the addition requested by Gilley and including a provision that the personal representative who sells, mortgages or leases property in breach of duty shall not be entitled to compensation for his services and shall be removed from acting in the capacity of personal representative. Motion carried.

Husband asked if the personal representative might find a loophole by saying, "I called the devisee or legatee and he said I could sell." Kraemer suggested that the provision for consent of the beneficiaries be placed in a separate subsection (6) where it would be more conspicuous and others agreed that this would be advisable.

After further discussion, Zollinger moved that subsections (4), (5) and (6) of section 860.11 be referred to Legislative Counsel for drafting, that copies be sent to all members of the committees and that it be placed on the January agenda. Frohnmayer seconded the motion, and it carried unanimously.

Carson pointed out that if section 860.13 were adopted, the committees would be abandoning provisions placed in the probate code some years ago, and which he considered to be highly desirable, which permitted the surviving partner to act as administrator for the deceased partner. Dickson pointed out that the committees had discussed self-dealing at the November meeting and agreed that it was all right if authorized. He expressed the view that section 860.13 was unnecessary. Zollinger agreed and moved, seconded by Gilley, that section 860.13 be omitted from the revised probate code. Motion carried.

Periodic Accounting and Distribution

Dickson reported that he had contacted Richardson and had

excused him from attending the meeting. Dickson asked that the remaining discussion on accounting and distribution be placed on the agenda for January 20, 1967, at 1:30 p.m., and Richardson would finish his discussion at that time.

Ancillary Administration

Dickson explained that Riddlesbarger had done a considerable amount of work on ancillary administration and wished to be present when this item was discussed. It was therefore added to the January agenda.

Unauthorized Administration of Personal Estate of a Decedent (ORS 116.990)

Zollinger commented that ORS 116.990 was bad law and moved that it be repealed without any attempt to offer any substitution in its place. Frohnmayer seconded and the motion carried unanimously.

Inheritance Tax Statutes (ORS 118.005 to 118.840)

Carson distributed the recommendations of the subcommittee with respect to inheritance tax statutes [See Appendix C of these minutes] and pointed out that it did not represent the unanimous opinion of the subcommittee on all subjects but was the first step in the preparation of a general outline.

Braun read the recommendations of the subcommittee concerning ORS 118.005 and 118.010. Husband asked why those sections were amended in 1965. Butler explained that prior to 1965 there was no tax on a general power of appointment unless the power was exercised. The husband, for example, could leave property in trust for the benefit of his wife, with a general power of appointment, and if the power was not exercised, the property would go to collateral relatives. In many instances the wife would not exercise the power and it would then pass to collateral relatives without tax. In 1965 the law was amended and the power of appointment is taxed whether exercised or not.

Carson explained the inconsistency in the law under ORS 118.020 as set forth in the subcommittee's recommendations and Dickson agreed that it should be corrected. McKenna indicated that the State Treasurer had taken the position that if a corporation is existing and a bequest is left to it, the bequest's exemption from taxation will turn upon the question of whether or not the corporation is "actually engaged" as stated in ORS 118.020 (1)(a). He suggested that the subcommittee consider

a clarification or definition of this language in view of the difficulty that had been encountered with it in the past. He pointed out that some codes say "organized and existing within the state" rather than "actually engaged." He explained that a corporation might be formed, but pending receiving more money, it was not "actually engaged."

Husband pointed out that he had encountered tax difficulties when a bequest was left to a lodge for building purposes. If the bequest was to carry on benevolent work, it was tax exempt, but if it was left for a building, it was not. He suggested that this point also be considered by the subcommittee.

Carson enlarged upon the problem set forth in the recommendations with respect to ORS 118.050. Husband noted that when the exemptions under the Federal Internal Revenue Code were adopted, they were adopted as of that moment and Carson commented that it would be helpful if the section stated this specifically.

The subcommittee recommended that elimination of the collateral tax under ORS 118.110 be considered. Frohnmayer commented that if the committees decided to parallel the state tax with the federal, the first thing they would have to do would be to eliminate the collateral tax. He suggested they might coordinate their efforts with the State Bar Committee on Taxation and abolish the collateral tax. Butler pointed out that it was an expensive tax to administer and caused estates to be held open for many years. Gooding inquired as to the amount of revenue produced from the collateral tax and it was agreed that the committees would need this information in order to know how much income would need to be recovered from another source to restore the revenue lost through abolition of the collateral tax. Zollinger remarked that it would also be helpful to have an adjustment of the lineal descendant rates that would produce the same recovery.

Dickson asked for a show of hands on a proposal to eliminate the collateral tax on both gift and inheritance taxes providing funds were recouped from some other source. The suggestion was favored unanimously. Carson indicated that he would meet with the Bar Committee on Taxation, determine whether or not it would be possible to work in conjunction with them, and report to the probate committees at the February meeting.

With respect to ORS 118.640 Braun pointed out that the committees had not covered appraisal problems in nonprobate estates and Carson said he assumed present practice would be continued.

Frohnmayer asked if it would be advisable to bring Oregon law into conformity with Federal law by granting an alternate valuation date. The committee decided to discuss this at a later time.

The provisions of ORS 118.690 were discussed and it was generally agreed that the notice requirement was both cumbersome and unnecessary.

Dickson asked if the matter of apportionment had been covered and Carson remarked that Wisconsin had a provision to the effect that all succession taxes should be chargeable against the residual estate unless the will expressly provided otherwise. Gooding suggested that the law should not be changed in this respect.

After further discussion, Dickson asked that the discussion of inheritance tax statutes be continued at the February meeting.

January Meeting of Committees

The following items were scheduled for consideration at the January meeting:

Periodic Accounting and Distribution (ORS chapter 117)
(Richardson)

Allocation of income
(McMurchie)

Subsections (4), (5) and (6) of section 860.11, Proposed 1966 Wisconsin Probate Code

Ancillary administration
(Mapp and Riddlesbarger)

February Meeting of Committees

Report on revision which would require recording of decree of final distribution (Mapp and Allison)

Creditors' rights and insolvent estates (Gooding, Gilley and Pendergrass to meet with Judge Snedecor)

Inheritancve tax statutes (Carson, Braun and Lisbakken)
Elimination of collateral tax

The meeting was adjourned at 12:00 noon.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, 12/16, 17/66)

REPORT
December 14, 1966

To: Advisory Committee on Probate Law Revision and Bar Committee on Probate Law and Procedure

From: R. Thomas Gooding, Duncan L. McKay and Judge Joseph J. Thalhofer

Subject: Proposed Outline, Revised Oregon Probate Code.

Chapter 111 GENERAL PROVISIONS

Definitions
Jurisdiction and powers
Proceedings, pleadings and process
Persons feloniously causing death of another
Inheritance by nonresident aliens
Uniform simultaneous death act (ORS Chap. 112)
Penalties
Validating Acts

Chapter 112 INTESTATE SUCCESSION (mostly from ORS Chap. 111)

Intestate succession
Advancements
Effects of adoption and illegitimacy
Abolition of dower and curtesy

Chapter 113 WILLS (mostly from ORS Chap. 114)

Execution
Revocation
Rules of construction
Election against will
Effect of particular legacies and devises
Testamentary additions to trusts
Pretermitted children
Witnesses as beneficiaries

Chapter 114 INITIATION OF ESTATE PROCEEDINGS

Commencing estate proceedings (ORS 115.110 et seq)

Qualification and removal of personal representatives (ORS 115.410 et seq)
Powers and duties of personal representatives generally (ORS 116.105 et seq)

Chapter 115 ADMINISTRATION OF ESTATES GENERALLY (mostly from ORS Chap. 116)

Support of surviving spouse and minor children
Discovery of assets
Inventory and appraisal
Processing claims against the estate
Payment of claims against the estate (ORS 117.110-180)
Sale or lease of property
Ancillary proceedings

Chapter 116 ACCOUNTING, SETTLEMENT AND DISTRIBUTION (ORS Chap. 117)

Periodic accounting
Partial distributions
Determination of heirship
Final account
Distribution to legatees, devisees and heirs
Reopening estates

Chapter 117 SUMMARY PROCEEDINGS

Small estates
Independent administration

Chapter 118 INHERITANCE TAX

Chapter 119 GIFT TAX

Chapter 120 ESCHEAT; ESTATES OF PERSONS PRESUMED TO BE DEAD

Chapter 121 ACTIONS AND SUITS AFFECTING ESTATES

Chapters 122 - 125
(Reserved for expansion)

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, 12/16, 17/66)

CHAPTER 860

SALE, MORTGAGE AND LEASE OF PROPERTY

SUMMARY OF CHAPTER

This chapter replaces chapter 316.

860.01 Power of personal representative to sell, mortgage and lease. A personal representative to whom letters have been issued by the probate court and whose letters are in effect has complete power to sell, mortgage or lease any property in the estate without notice, hearing or court order. The rights and title of any purchaser, mortgagee or lessee from such personal representative are in no way affected by any provision in a will of the decedent or any procedural irregularity or jurisdictional defect in the administration of the decedent's estate. A transfer agent or a corporation transferring its own securities incurs no liability to any person by making a transfer of securities in an estate as requested or directed by a personal representative.

COMMENT: This section gives to all personal representatives the power that is given to executors in most wills. It is the power which all personal representatives have always had over personal property in Wisconsin. Though a personal representative is given unrestricted power to sell, mortgage or lease property he will be held financially responsible to the persons interested if he acts carelessly or unreasonably. He "must act not only honestly or with good faith in the narrow sense but must also exercise the duty of loyalty toward the beneficiary for whose benefit the power of sale is to be exercised and with such care and skill as a man of ordinary prudence would exercise in dealing with his own property." Estate of Scheibe, 30 Wis.2d 116, 140 N. W. 2d 196 (1966).

In conjunction with this section 72.05 (1) is amended and 72.05 (4) is created as follows:

"72.05 Lien

"(1) Personal liability. All taxes imposed by ss. 72.01 to 72.24 shall be due and payable at the time of the decedent's death, except as hereinafter provided; and except as provided in subsection (4) every such tax shall be and remain a lien upon the property transferred until paid, and the person to whom the property is transferred and the administrators, executors and trustees of every estate so transferred shall be personally liable for such tax until its payment . . . (4). The lien described in sub. (1) is transferred to the proceeds of the sale and the property passes from the estate free of any such lien when any property is sold from an estate by a personal representative, and the person to whom the property is transferred has no liability for such tax."

860.03 Inventory to be filed. Before any sale, mortgage or lease of property, except where the sale mortgage or lease is one which would have been in the ordinary course of business if made by the decedent prior to his death, the personal representative shall file with the court his inventory showing the value of all such property. Failure of the personal representative to comply with this requirement shall in no way affect the rights or title of the purchaser, mortgagee or lessee, but is prima facie evidence of breach of duty on the party of the personal representative.

Cross Reference: See Section 858.03 as to informing persons interested.

860.05 Free of creditor's claims . If property in an estate is sold, mortgaged or leased by a personal representative, title passes subject to the rights of creditors having a secured interest in the property sold but free and clear of any right in creditors which is based on the filing and allowances of a claim in the estate. The filing and allowance of a claim in an estate does not make one a secured creditor.

Cross Reference: Section 72.05 (4) provides that property sold from an estate by a personal representative passes free of any inheritance tax lien.

860.07 No warranties. Except as provided in s. 860.09 (2), a personal representative has no power to give warranties in any sale, mortgage or lease of property which are binding on himself personally or on the estate of the decedent.

860.09 Contract of decedent to sell or lease land. (1) Generally. When any person legally bound to make a conveyance or lease dies

before making the same and the personal representative fails or refuses to perform in accordance with the decedent's contract, any person claiming to be entitled to such conveyance or lease may petition the probate court for specific performance of the contract. Upon satisfactory proof the court may order the personal representative to make a conveyance or lease or may by its own order make a conveyance or lease to the person entitled thereto upon the performance of the contract.

(2) Warranties. If the contract for a conveyance required the decedent to give warranties, any instrument given by the personal representative or order by the court shall contain the warranties required. Such warranties are binding on the estate as though made by the decedent during his lifetime but do not bind the personal representative personally.

COMMENT: The purpose of this section is to provide a forum and procedure for the purchaser or lessee who seeks to specifically enforce a contract which he had with the decedent. If the decedent's contract required him to give a warranty deed, the purchaser's right to the warranties which the decedent agreed to give should not be cut off by the decedent's death.

860.11 Special provisions in will; personal representative's duty to persons interested. (1) Restriction. If the will of the decedent contains provisions which restrict the freedom of the personal representative to sell, mortgage or lease property, the personal representative breaches his duty to the persons interested if he sells, mortgages or leases such property other than in accordance with such restrictions, except in the situation covered in sub. (4).

(2) Specific bequest. If the will of the decedent contains a specific bequest of property, the personal representative breaches his duty to the specific beneficiary if he makes a lease of such property for a period which exceeds one year or mortgages or sells such property unless the specific beneficiary joins in such lease, mortgage or sale, except in the situation covered in sub. (4).

(3) Prohibition. If the will of the decedent contains provisions which prohibit the sale, mortgage or lease of property by the personal representative, the personal representative breaches his duty to the persons interested if he sells, mortgages or leases such property, except in the situation covered in sub. (4).

(4) Court may order sale, mortgage or lease. If the will of the decedent contains limitations described in subs. (1), (2) or (3) and the personal representative is unable to pay the allowances, expenses of administration and claims while complying with such limitations in the will, the court shall order the personal representative to sell, mortgage or lease such property in accordance with the appropriate terms and conditions of an order made after petition and hearing on notice given in accordance with s. 879.05 to all persons interested and all creditors of the estate.

COMMENT: Subsection (4) establishes a simple procedure for securing court authority to sell, mortgage or lease contrary to the provisions of the will when the proceeds are required to pay allowances, expenses of administration and claims. Compliance with this subsection protects the personal representative from liability to the persons interested. It is irrelevant to the rights and title of the purchaser, mortgagee or lessee.

860.13 Who not to be purchaser, mortgagee or lessee without court approval. The personal representative may not be interested as a purchaser, mortgagee or lessee of any property in the estate unless such purchase, mortgage or lease is made with the written consent of the persons interested and of the guardian ad litem for minors and incompetents and with the approval of the court after petition and hearing on notice given in accoardance with s. 879.05 to all persons interested, or unless the will of the decedent specifically authorizes the personal representative to be interested as a purchaser, mortgagee or lessee.

APPENDIX C

(Minutes, Probate Advisory Committee Meeting, 12/16, 17/66)

To: ADVISORY COMMITTEE ON PROBATE LAW REVISION AND BAR COMMITTEE ON PROBATE LAW AND PROCEDURE

From: SUBCOMMITTEE (Wallace P. Carson, Patricia Y. Braun and Patricia A. Lisbakken) ON INHERITANCE TAX STATUTES (ORS 118.005 to 118.840)

RECOMMENDATIONS

(1) 118.005 Definitions for ORS 118.005 to 118.840. No alteration presently is recommended. May be deleted if estate tax scheme, without inheritance tax feature, is recommended.

(2) 118.010 Property, transfers and interests subject to tax. Consider whether section(s) should, or should not, be amended to the extent of restoring the provisions relating to general powers of appointment to those that existed before the 1965 amendment of this section was made. It may be presumed that the State Inheritance and Gift Tax Division would oppose an amendment of that kind.

If estate tax scheme recommended, definition of gross estate might better be cast in terms similar to Federal gross estate laws.

(3) 118.020 Taxability of transfers to governmental units and certain private institutions. Amend this section in such manner as to allow exemption of bequests and devises in trust to an Oregon resident trustee under subsection (c) of section (1) whether or not use thereof be made within Oregon.

(4) 118.030 Taxes upon devises and bequests in lieu of commissions. No alteration presently is recommended. If estate tax scheme recommended, then revise to provide a limitation on deduction, rather than tax on inheritance.

(5) 118.040 Insurance included or exempt from taxation, when: Consider adopting a greater basic exemption, rather than restricting the exemptions which have substance to decedents who were insurable, and who owned property in tenancy by the entirety.

(6) 118.050 Pension, retirement and social security benefits exempt from taxation. Consider whether adoption of "exemptions under the Federal Internal Revenue Code:" constitutes an

unconstitutional delegation of authority by the Legislative Assembly of Oregon.

Consider complete exemption of Social Security and Railroad Retirement benefits.

(7) 118.060 Reciprocal exemption of intangible personal property of nonresident decedent. No alteration is presently recommended.

(8) 118.070 Deductions from gross value of taxable estate. Consider whether to extend the provisions of section (2) "In unprobated estates," subsection (a), to permit deduction of "debts" therein mentioned to debts of the decedent paid by the surviving tenant by the entirety of real property or by the surviving holder(s) of personal property held jointly by the decedent and another, or others, with rights of survivorship.

Consider greater basic exemption in lieu of homestead deduction.

(9) 118.075 Cooperative housing unit as "homestead" under ORS 118.070. No alteration presently is recommended.

If homestead deduction is deleted, this section may be omitted.

(10) 118.080 Exemption of property previously taxed within five years. Consider graduated exemption over greater period.

(11) 118.090 Deductions in case of foreign estate liable to pay tax. No alteration presently is recommended.

(12) 118.100 Rates of tax and 118.110 Tax rate applicable to net estate after allowing deductions; apportionment. Consider elimination of collateral tax, with the understanding that the estate tax rates would be raised in order to achieve the same revenue.

(13) 118.210 to 118.390, inclusive, Lien; payment; compromise of tax. No alteration of the substance of any of these sections is presently recommended.

118.250 (3) should be revised to delete "a final accounting of an estate" and to substitute "approval of his final account of the administration of an estate." If estate tax scheme recommended, appropriate alterations would be required.

(14) 118.420 Notice to State Treasurer of administration of estates; determination of value; application by treasurer for letters. Could be omitted. If a release is required before an estate can be distributed, the PR can be counted upon to notify the Treasurer.

(15) 118.460 Reports by county clerks and custodians of deeds. Could be omitted.

(16) 118.480 Representative to notify State Treasurer of passage of real estate in trust. Could be omitted. Duplicates general filing requirements.

(17) 118.500 Appeals. Could be omitted. Appeal procedure covered in 118.700.

(18) 118.610 to 118.700 (Relating to inventory and appraisement). Recommendations of subcommittee composed of Herbert E. Butler and Wallace P. Carson presented and considered at October, 1966, joint meeting of the two principal committees. For results, see minutes of that meeting.

(19) 118.610 Duty of representative; filing inventory and appraisement; 118.620 Extension of time to file appraisement. Duplicate and are inconsistent with previous action on appraisals.

(20) 118.640 Immediate appriasal; evaluating particular interests. Matter before semicolon: Should be made clearer that the taxable values are date of death values, whether or not the estate is "appraised . . . immediately upon the death of the decedent or as soon thereafter as may be practicable."

(21) 118.650 Fixing time and place of appraisement; notice; attendance of witnesses; report of appraisers; limitation on fees. Could be omitted.

(22) 118.660 Delivery to State Treasurer a copy of inventory and appraisement and other information. Consider omission of last sentence, include "heir of decedent, acceptable to the State Treasurer" in first sentence: e.g. "Every PR, or, if the estate is not probated or administered, an heir or trustee of decedent acceptable to the ST..."

(23) 118.670 Court's duty to determine tax; 118.680 Court may act on first inventory; and 118.690 Court to give notice on determination of value. Omit if the principal of extra-judical determination of tax acceptable. However, provision for notice to persons whose taxes are being determined should be included, unless estate tax system adopted. Such notice could come from ST on receipt of report, and the giving of the notice could be the starting date for a period of objections.

(24) 118.700 Reappraisement; appeal. Consider establishing period for objection; upon whom should duty of objection be placed (i.e.: if the State Treasurer doesn't agree with the return, must he file or shall he issue notice of deficiency, binding if personal representative fails to file for judicial review); provide for appeal.

REPORT
May 12, 1966

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Judge William L. Dickson, Patricia A. Lisbakken and Campbell Richardson

Subject: Outline of Proposed Revised Probate Code

At the April meeting of the Advisory and Bar committees the matter of the outline of, or arrangement of provisions to be included in, the proposed revised Oregon probate code was discussed. Three subcommittees were appointed and each assigned the task of preparing a suggested outline. The following outline was prepared by Subcommittee #3, consisting of Judge Dickson, Miss Lisbakken and Mr. Richardson, and is submitted for your consideration.

TENTATIVE OUTLINE
Proposed Revised Oregon Probate Code

Chapter III General Provisions

Definitions
Jurisdiction of Probate Courts
Pleadings and Mode of Procedure
Process
Manner of Service of Citation
Notices
Contempt
Penalties
Validating Acts

Chapter 112 Devolution of Property (Testate and Intestate)

Intestate Succession
Wills
Advancements
Effect of Adoption and Illegitimacy
Felonious Deaths
Escheat
Uniform Simultaneous Death Act
Residue of Dower and Curtesy
Cross reference to Inheritance Rights of Nonresident Aliens; Estates of Persons Presumed Dead

Chapter 113 Proceedings Prior to Administration; Personal Representatives; Initiation of Administration; Estates of Persons Presumed Dead

Proceedings Prior to Administration
- Incorporation of ORS 97.110 to 97.230 (Disposition of Human Bodies)
- Delivery of Body for Scientific or Medical Purposes (ORS 116.115)
- Funeral Charges (ORS 117.150)
- Special Administrator

Personal Representatives
Initiation of Administration
Estates of Persons Presumed Dead
Cross reference to Reopening Estates; Notices; etc.

Chapter 114 Administration of Estates Generally

Support of Spouse and Minor Children
Homestead
Election Against Will
Powers and Duties of Personal Representative
Discovery of Assets
Inventory and Appraisal
Sale and Lease of Property
Borrowing
Continuing Business
Application of Revised Uniform Principal and Income Act
Interim Accountings
Partial Distributions

Chapter 115 Creditors' Claims and Rights; Actions and Suits Affecting Decedent's Estate

Filing Claims Against Estate
Determination of Contested Claims
Actions (ORS 121.020 to 121.100)
Suits (ORS 121.210 to 121.370)

Chapter 116 Determination of Rights, Estates and Beneficiaries

Determination of Heirship
Will Contests
Inheritance Rights of Nonresident Aliens

Chapter 117 Settlement and Distribution; Reopening Estates

Right of Retainer
Final Account
Distribution to Legatees, Devisees and Heirs (ORS 117.310 to 117.390)
Reopening Estates

Chapter 118 Inheritance Tax

Chapter 119 Gift Tax

Chapter 120 Small Estates

Chapter 121 to 125 /Reserved for Expansion/

REPORT
December 5, 1966

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Thomas W. Mapp

Subject: Proposed Outline, Revised Oregon Probate Code.

(One of the matters scheduled for consideration at the December meeting is the proposed outline of the Probate Code. Three committees working independently are to have submitted drafts by the December meeting.)

Chapter 111 General Provisions

Definitions
Jurisdiction of Probate Court
Petitions and Method of Procedure
Notice
  Manner of Service
  Proof of Service
  Waiver of Notice
Appearance
Jury Trial
Modification of Judgments
Appeal Procedure
Disposition of Human Bodies (ORS 97.110 - 230)
Delivery of Body for Scientific or Medical Purposes (ORS 116.115)
Funeral Charges (ORS 117.150)

Chapter 112 Devolution of Property (testate and intestate)

Intestate Succession
  Advancement
Wills
Election against Will
Pretermitted Issue
Effect of Adoption and Illegitimacy
Felonious Deaths
Escheat
Uniform Simultaneous Death Act
Inheritance Rights of Nonresident Aliens

Chapter 113 Initiation of Administration

Venue
Special Administrator
Probate of Will
Will Contests
Appointment of Personal Representative
Bond of Personal Representative

Chapter 114 Administration of Estates

Support of Spouse and Children
Powers and Duties of Personal Representatives (Generally)
Resignation or Removal of Personal Representatives
Inventory and Appraisal
Collection and Management of Estates
Sale, Mortgage and Lease of Property
Claims
Accounting
Distribution and Discharge
  Partial Distribution
  Final Distribution
  Determination of Heirship
Reopening Administration

Chapter 115 Summary Procedures

Small Estates Act
Independent Administration

Chapter 116 Ancillary Procedures

Uniform Probate of Foreign Wills Act
Uniform Ancillary Administration of Estates Act

Chapter 117 Liability of Beneficiaries of Estate for Decedent's Debts

(ORS 121.230 - 370)
See Article 12 of 1966 Revised New York Code (Substantive).

Chapter 118 Inheritance Tax

Chapter 119 Gift Tax

Chapters 120 - 125 (Reserved for Expansion)