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CHARLOTTESVILLE VIRGINIA

Chapter 163.

Sales of Real Estate by License of Court.

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Granting of License.

Sec. 1. Sale, lease, mortgage or exchange of real estate.—Judges of probate who have jurisdiction of the estate may license the sale, mortgage, lease or exchange of real estate and any interests therein, in whatever county situated, in the following cases, on application:

I. Of executors and administrators, including public administrators, for power to sell so much of such estate of the deceased as is necessary to pay debts, funeral charges, legacies, expenses of sale and administration and for the erection of a suitable marker or gravestone.

Cross references.—See c. 155, § 24, re sale of real estate to pay inheritance tax; c. 161, § 7, re sale of copartnership real estate when partner dies.

Subsection confers jurisdiction where personal property insufficient to pay debts.—This subsection is the authority for a probate court to assume jurisdiction when allegation is made of the insufficiency of personal property to pay debts, etc. In re Roukos' Estate, 141 Me. 83, 39 A. (2d) 663.

Sale must be necessary to pay debts, etc., in order to justify administrator in selling real estate.—To justify a decree licensing an executor or administrator to sell any real estate belonging to the estate which he represents, except such as is held in mortgage, or taken in execution by the executor or administrator for a debt due the estate, it must be made to appear that such sale is necessary to pay debts, legacies or expenses of sale and administration; or, under subsection III, that a sale of some portion of the real estate is necessary for these purposes, and that by a

partial sale the residue would be greatly depreciated. Gross v. Howard, 52 Me. 192; Snow, Appellant, 96 Me. 570, 53 A. 116.

And such necessity must be proved upon appeal.—The decree granting license to sell is not evidence of necessity to sell because of debts, nor of depreciation in value because of partial sale. The party seeking the decree, or to have the decree affirmed, must prove them. Snow, Appellant, 96 Me. 570, 53 A. 116.

To authorize the appellate court to affirm the decree granting license to sell real estate, enough facts must be proved or admitted in the supreme court of probate to make out a case for the original petitioner showing debts and necessity to sell real estate in order to pay them. Snow, Appellant, 96 Me. 570, 53 A. 116.

Applied in Paine v. Paulk, 39 Me. 15; Colburn v. Grover, 44 Me. 47; Austin v. Austin, 50 Me. 74; Poor v. Larrabee, 58 Me. 543; Fowle v. Coe, 63 Me. 245; French, Appellant, 134 Me. 140, 183 A. 130.

Stated in Mayall, Appellant, 29 Me. 474.

II. Of the friends or guardians of minors and other incapacitated persons, that the guardians or some other suitable persons may be authorized to sell real estate of their wards, or trees or timber standing thereon, for payment of debts, expenses of sale and of guardianship and for support and education of their wards, and to provide a reasonable sum in anticipation of accruing expenses, when there is not sufficient personal property therefor, exclusive of such as the judge deems proper to reserve for the use of said wards; or to sell the same and place the proceeds at interest; or to sell it for 2 or more

of these purposes; or to lease such real estate for any term of years, including any term which may extend beyond the termination of the guardianship, or exchange it for other real estate, when it clearly appears that such sale, lease or exchange would be for the benefit of the wards. When sold in order to place the proceeds at interest, any part thereof may be used for support of the wards if it becomes necessary. (1947, c. 217.)

Cross reference.—See c. 168, § 10, re entailments may be barred by conveyance in fee simple.

Ward may ratify or affirm invalid sale.—When a sale by guardian under license is invalid for want of compliance with some requirement of law by the guardian, it is competent for the ward when he becomes of age to ratify and affirm the sale, or he may avoid it within a reasonable time. Tracy v. Roberts, 88 Me. 310, 34 A. 68.

Sale void where no license covering land sold, no bond or notice of sale.—A guardian's sale of real estate pursuant to a license issued under this subsection is irregular and void where there is no petition or license covering the premises conveyed, and where there is no bond or notice of such sale. In such case the pro-

bate court has no jurisdiction over the subject matter. Tracy v. Roberts, 88 Me. 310, 34 A. 68.

But equitable estoppel may be invoked in event of a defective sale.—Where the consideration has been received and retained upon a defective sale by license given under this subsection, and such sale was made by the guardian in good faith and the wards have received the benefit of the proceeds, there being no fraud or mistake, but full knowledge of the facts, the doctrine of equitable estoppel applies, and the party cannot afterwards claim the land itself. Tracy v. Roberts, 88 Me. 310, 34 A. 68.

Applied in Pelletier v. Langlois, 130 Me. 486, 157 A. 577.

III. Of executors, administrators, guardians or public administrators, when it appears by the petition and proof that the residue would be greatly depreciated by a sale of any portion under the foregoing authority, to sell the whole or such parts thereof as will not injure the residue. (1945, c. 325, § 7.)

Subsection confers jurisdiction upon allegations of insufficiency of personal estate, and depreciation by partial sale of land.—This subsection is authority for a probate court to assume jurisdiction when allegation is made of the insufficiency of personal property to authorize the sale of all of the real estate, and upon allegation that the residue would be greatly depreciated by a sale of any portion. In re Roukos' Estate, 141 Me. 83, 39 A. (2d) 663.

shown to authorize sale of more land than necessary to pay debts.—To authorize a sale of all the real estate of the deceased, where the debts amount to less than the value of the whole, it must appear by the petition and proof that the residue would be greatly depreciated by a sale of any portion. Snow, Appellant, 96 Me. 570, 53 A. 116.

Applied in Fowle v. Coe, 63 Me. 245; Roukos, Appellant, 140 Me. 183, 35 A. (2d) 861.

Great depreciation of residue must be

IV. Of a husband or guardian of an incapacitated wife, resident in the county, to sell or mortgage, on such terms and conditions as the judge thinks proper, for a sufficient consideration, any real estate held by him in right of his wife, or any of her right and interest by descent in any real estate owned by him; and of the guardian of an incapacitated husband, resident in the county, to sell in like manner the right and interest by descent, of such ward, in any real estate owned by his wife. For the purposes of this subsection, an insane husband or wife who has been committed to an asylum for insane persons within this state shall be deemed to remain a resident of the county in which he or she had a residence at the time he or she was committed, so long as he or she shall remain in such asylum by virtue of such commitment.

V. Of executors or administrators, to sell wood and timber standing on the real estate of their testator or intestate, for payment of debts, when it clearly appears to the judge to be for the advantage of those interested in the estate.

VI. Of executors or administrators, to sell as real estate the interest which

their testator or intestate had in a land warrant issued by virtue of an act of congress, when not disposed of by will, and to distribute the net proceeds thereof among those entitled by law to such interest.

VII. Of guardians, when a highway, railroad or canal is authorized to be constructed through the lands of any ward, or a dam is constructed by which such lands are liable to be flowed, to give, for a reasonable compensation, a full release of such ward's claim for damages, which shall be binding on the ward and his heirs forever.

See c. 45, § 32, re guardian may release for damages for land taken by railroads.

VIII. Of executors or administrators, to sell real estate held in mortgage or taken on execution and the right of redemption foreclosed, when it appears to be for the benefit of the parties in interest, and to distribute the proceeds as in other cases of personal estate.

See c. 156, § 31, re distribution of lands held by executor, etc., in mortgage or execution if not sold or redeemed; c. 177, § 13, re mortgages are assets in hands of executor, etc.

IX. Of public administrators, after 1 year from the granting of administration, to sell any or all of the real estate of the deceased, when it appears to be for the interest of all concerned and that no heir or other person interested therein, except creditors, can be found in the United States. (1945, c. 325, § 6.)

X. Of a part or all of the heirs or devisees living in different states or countries of a person deceased, who left real estate in this state undivided, or real estate devised in undivided shares to different persons, where the devisees reside in different states or countries, the owners of which cannot dispose of their separate interests without loss, that the executor, administrator or other suitable person be authorized to sell such estate and distribute the proceeds, after paying expenses, among such heirs or devisees, according to their respective rights therein as determined by the judge of probate; unless, after public notice, the 1st publication being 30 days prior to the hearing, or longer if the judge deems it necessary, any owner objects to such sale; and if so sold, the share of any absent owner shall be placed on interest until called for by him or his legal representatives. (R. S. c. 150, § 1. 1945, c. 325, §§ 6, 7. 1947, c. 217.)

The power of the court under the provisions of this section to grant or refuse a license to sell is discretionary, not imperative. The words of the statute imply such discretion. The court is authorized to grant a license, and not required to do so. *Nowell v. Nowell*, 8 Me. 220.

It should be exercised cautiously.—The power to grant license is a power which is to be exercised cautiously and upon thorough examination, inasmuch as by its exercise the real estate, which otherwise would descend to the heirs, is placed at the disposal of the administrator. *Nowell v. Nowell*, 8 Me. 220.

And only under this statute can a decree licensing an executor or administrator to sell real estate of the deceased be justified. *Edwards v. Packard*, 129 Me. 74, 149 A. 623.

Petition must present case thereunder.—An administrator who seeks a license to sell land must unquestionably show that

the petition presents a case under some one of the clauses of this section. *Snow, Appellant*, 96 Me. 570, 53 A. 116.

And it must allege sufficient jurisdictional facts.—The petition to the probate court is the foundation upon which to base the jurisdiction of the court, and must allege sufficient facts to give the court jurisdiction and power to authorize the sale. *Tracy v. Roberts*, 88 Me. 310, 34 A. 68.

Proceedings and conditions precedent to valid sales regulated by statute.—Proceedings in petitioning for license to sell real estate, when it is necessary for the payment of debts, the granting of the license, and the conditions precedent to the authority to make a valid sale, are all regulated by statute. *Snow v. Russell*, 93 Me. 362, 45 A. 305.

The term "real estate" includes any and all rights thereto and interests therein. *Baxter v. Baxter*, 62 Me. 540.

Statute must be strictly complied with.—Courts of probate are created by statute and possess special and limited jurisdiction only. The record of their proceedings must show their jurisdiction. Nothing is to be presumed in favor of the right to divest an heir of his title by a sale licensed under this section. The authority to do so is derived wholly from the statute, and its provisions must be strictly complied with. *Tracy v. Roberts*, 88 Me. 310, 34 A. 68.

And purchaser must show such compliance if title questioned.—Such sales as are authorized under § 1 are in derogation of the rights of heirs and devisees, and it has always been held that a purchaser under such a statute sale is bound to show strict compliance with statutory requirements, if his title is called into question. *Snow v. Russell*, 93 Me. 362, 45 A. 305.

License to accept advantageous offer may be granted only where sale at public auction allowable.—Courts of probate have no authority to grant licenses to sell real estate to accept advantageous offers as such. They can do so in cases where they may grant licenses to sell at public auction, and those cases are alone those enumerated in this section. *Snow, Appellant*, 96 Me. 570, 53 A. 116.

And license not granted if claims barred.—License to sell real estate for the payment of debts will not be granted where the claims appear to be barred by the statute of limitations. *Nowell v. Nowell*, 8 Me. 220.

Sale in excess of authorization is void.—If an administrator, under a license from the probate court to sell real estate for the payment of debts, sells and conveys land for an entire sum of money for the whole tract sold, exceeding in amount the sum he was authorized to raise, such sale is void. *Wakefield v. Campbell*, 20 Me. 393.

License affirmed upon proof in appellate court of facts making out case.—To authorize the appellate court to affirm the decree granting a license, enough facts must be proved or admitted in the supreme court of probate to make out a case for the original petitioner. *Gross v. Howard*, 52 Me. 192.

Granting of license not subject to collateral attack.—The granting of the license to sell the real estate of a decedent is a matter within the jurisdiction of the judge of probate and cannot therefore be attacked collaterally. *Roukos, Appellant*, 140 Me. 183, 35 A. (2d) 861.

Sales at Auction.

Sec. 2. Sales at auction; appeal; jurisdiction.—All sales aforesaid shall be at public auction, except as hereinafter provided, and the decision of the judge on such applications may be appealed from as in other cases; and the superior court shall have original and concurrent jurisdiction with the probate court in all cases aforesaid. (R. S. c. 150, § 2.)

Cited in *Mayall, Appellant*, 29 Me. 474.

Sec. 3. Bond.—Persons licensed as aforesaid, before proceeding to make such sales, leases, mortgages or exchanges, except executors exempted therefrom by the provisions of section 11 of chapter 154, shall give bond to the judge for a sum, and with sureties, resident in the state, or with a surety company authorized to do business in the state, as surety, to his satisfaction, with the following conditions:

I. That they will observe all provisions of law for the sale, leasing, mortgaging or exchange of such real estate or interests therein, and use diligence in executing the trust.

II. That they will truly apply and account for the proceeds of sale, lease or mortgage according to law. (R. S. c. 150, § 3.)

Cross references.—See c. 154, § 11, re bond not required where authority to sell real estate given by will; c. 164, § 1, re bond required to be approved in writing by judge.

Sale by guardian without giving bond vests no title in grantee.—A sale and conveyance of the real estate of his wards by their guardian, under a license of the pro-

bate court, without complying with the requirement of the statute as to giving a bond, will vest no title in the grantee; and the money paid for such a deed may be recovered back in an action upon its covenants, or for money had and received. *Williams v. Morton*, 38 Me. 47; *Tracy v. Roberts*, 88 Me. 310, 34 A. 68.

The giving of such a bond, as required

by this section, is a prerequisite to the right by the executor to make a valid sale. *Snow v. Russell*, 93 Me. 362, 45 A. 305.

And decree excusing bond is void.—A decree of a judge of probate licensing the sale of real estate by an executor for the purpose of paying debts, and excusing the executor from giving bond before making the sale, is void; and the sale under such license, no bond in fact having been given, is equally void; and the validity of the decree and the sale may be attacked collaterally, though no appeal was taken from the decree. *Snow v. Russell*, 93 Me. 362, 45 A. 305.

Though the judge of probate must of necessity decide in each instance whether a bond is required by statute, yet if he decides erroneously, it does not follow that his decree, in violation of the statute, would remain in force until reversed; but such decree would be void. *Snow v. Russell*, 93 Me. 362, 45 A. 305.

It is the statute, and not the judge of probate, which imposes upon the executor the duty of giving bond. The decree of the judge cannot make it any more or any less his duty to give a bond. The judge has no authority given him by statute to excuse the giving of such a bond. *Snow v. Russell*, 93 Me. 362, 45 A. 305.

For section commands that bond shall be given.—It is within the jurisdiction of the judge of probate to decide whether there is a necessity for a sale or not. But the law has not authorized him to decide that an executor need, or need not, give a bond before he can sell real estate under a license. The statute itself has decided that question. *Snow v. Russell*, 93 Me. 362, 45 A. 305.

But testator may authorize sale without bond.—A testator in his will may authorize his executor to sell the real estate to pay legacies or debts, and he may authorize him to do so without giving bond. A testator may do this, but the court cannot. *Snow v. Russell*, 93 Me. 362, 45 A. 305.

This section, which requires persons licensed by the probate court to give bond before proceeding to make sales of real estate, does not apply to an executor who makes a sale of real estate in execution of the power vested in him by the will. *Bradt v. Hodgdon*, 94 Me. 559, 48 A. 179.

Bond may be given after license issued, but must be given before sale.—The statute does not require that the bond should be given when the license is granted. The giving of the bond is not a condition precedent to the issuing of the license, but it is a condition of the statute to be complied with before the authority of the license can

be lawfully exercised. The bond may be given at any time while the license is in force, provided only that it must be given "before proceeding to make such sale." *Miller v. Meservey*, 107 Me. 158, 77 A. 697.

It is not operative after expiration of license.—At the expiration of the year from the date of the license, as provided in § 18, no sale having been made, the bond is at an end, and no subsequent act of the licensee will create any liability under it. *Miller v. Meservey*, 107 Me. 158, 77 A. 697.

The sale referred to in the conditions of the bond is the sale which the licensee is authorized to make within the period prescribed by the license, and not a sale that might be attempted after that period has elapsed. *Miller v. Meservey*, 107 Me. 158, 77 A. 697.

That the obligations of a bond, where no sale has been made within the year, do not cover any sale made after the expiration of the year is unmistakably shown by the express provisions of the statute, whereby a new license may be granted "upon filing a new bond." *Miller v. Meservey*, 107 Me. 158, 77 A. 697.

Guardian's bond given upon appointment does not secure sales under license.—The bond given by a guardian on his appointment, for the faithful performance of his duties, is no security for the sale and avails of real estate of his wards sold under license. *Williams v. Morton*, 38 Me. 47.

Failure to sell within period of license not breach of bond.—The fact that the administrator does not sell the property within the period of the license cannot be held to be a breach of the condition of the bond, for § 18 provides that a new license may issue, thus recognizing that the property may not be sold within the year. *Miller v. Meservey*, 107 Me. 158, 77 A. 697.

Administrator using proceeds of sale for private purpose is chargeable with interest.—An administrator who under license of the probate court, sells the real estate of his intestate for the payment of debts and incidental charges, and makes use of the avails thereof in his business, is chargeable with lawful interest thereon while thus using it. *Paine v. Paulk*, 39 Me. 15.

And failure to pay proceeds to foreign guardian held breach of bond.—One who had been regularly licensed to sell real estate in this state, of a minor resident in another state, on the petition of the guardian residing in the same state and receiving his appointment there, was bound to pay over to such guardian the proceeds

of said sale; and upon default, his bond was thereby forfeited. *Johnson v. Avery*, 11 Me. 99.

Applied in *Austin v. Austin*, 50 Me. 74; *Davis v. American Surety Co.*, 144 Me. 187, 67 A. (2d) 421.

Sec. 4. Conditions of bond.—Persons licensed as aforesaid shall be deemed to have performed the conditions of the aforesaid bond when they have complied with all its terms and conditions and shall have charged themselves with the amount received from the sale, lease or mortgage of said real estate in an account duly filed and allowed by the judge of probate in and for the county having jurisdiction of the estate; which account must be filed within 1 year from the sale, lease or mortgage of the said real estate, and shall have given an additional bond to the said judge of probate, if required by him, to cover the balance of property found in their hands upon the settlement of said account, unless the bond of such person is exempted by the provisions of sections 11 and 21 of chapter 154; and thereafter said persons shall be liable on said bond or bonds for the amount so received from the sale of said real estate as shown in said account. (R. S. c. 150, § 4.)

Cross references.—See c. 164, § 10, re judgment entered for penalty of bond upon breach of conditions thereof; c. 164, § 16, re execution upon judgment entered for

penalty of bond.

Applied in *Davis v. American Surety Co.*, 144 Me. 187, 67 A. (2d) 421.

Sec. 5. Notice.—No license shall be granted for the sale of any such real estate, of the value of more than \$50, unless by written consent of all persons interested therein, until after public or personal notice of the time and place of hearing to all such persons to appear and object if they see cause; but such notice, when public, may be published in a consolidated form and shall contain the name of the estate or the title of the case, the names of the petitioner and the name of the city, town or plantation where such real estate is situated; but such notice need contain no other description of the real estate. If any party interested resides without the state, or the real estate is situated in a county other than the county in which the proceedings are pending, such special notice may be given as the court directs. (R. S. c. 150, § 5.)

Applied in *Decker v. Decker*, 74 Me. 465.

Sec. 6. No license to issue, if parties give bond.—No such license shall be granted if any of the parties interested in such estate gives bond to the executor, administrator or guardian in a sum and with sureties, resident in this state, or with a surety company authorized to do business in the state, as surety, approved by the court to pay all sums, for the payment of which license is asked, so far as the goods and chattels, rights and credits of the deceased or ward are insufficient therefor; but such bond shall not bar any future application for the same purposes, if the obligors, on reasonable notice and demand, fail to perform its condition. (R. S. c. 150, § 6.)

Sec. 7. Notice of sale.—Every person licensed as aforesaid, previous to such sale, shall give 30 days' notice thereof, by posting notifications in some public place in the town where the estate lies and in 2 adjoining towns, and in the town where said deceased last dwelt or where the ward resides, if within the state; or by causing an advertisement thereof to be published 3 weeks successively in such newspaper as the court, authorizing the sale, orders; the first publication being 30 days before the sale. (R. S. c. 150, § 7.)

Sec. 8. Judge to certify to superior court.—Every application for the sale of any estate, made to the superior court under the provisions of subsection III of section 1, shall be accompanied by a certificate from the judge of probate of the county where such estate was inventoried showing the value of the real

and personal estate of the deceased or ward, and the amount of his just debts or legacies, if the case requires it; also the opinion of such judge, whether it is necessary that the whole or a part of the estate should be sold and, if part only, what part; and in all applications before said court, by guardians of minors under subsection II of section 1, a certificate must likewise be produced from the judge of probate in the county where such minor's estate was inventoried, stating that in his opinion it would be for the interest of such minor that the whole or a part of said estate should be sold for the purpose specified and, if part only, what part. (R. S. c. 150, § 8.)

Sec. 9. Parties examined under oath.—Any court authorized to grant licenses may examine, under oath, the petitioner or any other person, whether interested or not, touching the truth of the facts set forth in the petition. (R. S. c. 150, § 9.)

Private Sales and Sales on Offer.

Sec. 10. Licenses to sell at private sale and on offer.—In all cases where the courts may license a person to sell real estate at auction, they may license him to sell from time to time at private sale, or to accept any advantageous offer for such estate or any part of it and to convey the same accordingly, if it appears to be for the interest of all concerned; but when so licensed, he may sell at auction by complying with all the requirements of law for sales at auction and with the particular conditions of his license, and he shall give bond as if he were licensed to sell at auction; and the court shall decide what notice, if any, shall be given of such sale and, if any is required, it shall be inserted in the license and given accordingly. (R. S. c. 150, § 10.)

A license to sell the land of a minor, under this section, may be granted in the alternative for public or private sale. *Ex parte Cousins*, 5 Me. 240.

Sales under section void if without bond.—Where a license was issued to an executor to sell real estate at private sale

without bond given by him, the sale was therefore held void, and the grantee acquired no title under his deed. *Snow, Appellant*, 96 Me. 570, 53 A. 116.

Applied in *Decker v. Decker*, 74 Me. 465.

Sales by Guardians and Wives of Incapacitated Persons.

Sec. 11. Wife of incapacitated ward may join in deed with guardian.—When the guardian of an incapacitated person is duly licensed to sell the interest of his ward in any estate held by him in right of his wife, she may, for a sufficient consideration, join with the guardian in the deed thereof, and it shall be as effectual as if made with her husband when under no disability; and when licensed to sell the real estate of his ward, she may release her right and interest by descent therein to the purchaser, by a deed duly executed solely or jointly with the guardian, and she shall thus be forever barred of such interest in the premises. (R. S. c. 150, § 11.)

See c. 170, § 9, re husband or wife may bar right of descent by deed, etc.

Sec. 12. Guardian may invest proceeds of her interest; trust enforced.—The guardian, with consent of the judge to whom he accounts, may agree in writing with such wife how to invest or otherwise dispose of a part of the proceeds of the sale of the whole estate for her sole use, equivalent to her interest therein; and the supreme judicial court or the superior court may enforce such agreement in equity, as a trust. (R. S. c. 150, § 12.)

Sec. 13. Deeds executed under license valid.—Any deed executed and recorded in due form of law, for adequate consideration, in pursuance of a

license granted under the provisions of this chapter is effectual to pass to the purchaser all the right, title and interest in the granted premises which the ward or other person on whose account the license was granted might convey by a like deed if not incapacitated. (R. S. c. 150, § 13.)

Sales of Estates of Nonresident Owners.

Sec. 14. Sale of estate of deceased nonresidents or of minors out of state.—The superior court and the probate court may grant licenses to continue in force for 3 years to executors and administrators of persons dying out of the state or in a foreign country, guardians of wards living out of the state or in a foreign country, conservators of the property of persons living out of the state, committee of the person or property or any person acting under official appointment by whatever name called, or some other suitable person on their petition to sell and convey real estate or any interest therein, including rights by descent, in the state, as if such deceased persons had died and such wards or persons lived in the state, and such executors, administrators, conservators or guardians had been here appointed; and all proceedings in such cases before any probate court shall be had before the judge of probate for the county where the real estate or any part thereof lies, and the bond required shall be given to him. The person so licensed shall, within 6 months from any such sale, render an account to the probate court, and after payment of expenses and evidence that there are no debts due within the state and that all inheritance taxes due the state, if any, have been paid, on petition the court may decree that the balance of such an account may be transmitted to the foreign representative of the estate, and all future liability of surety or sureties on bond for sale of real estate shall terminate. (R. S. c. 150, § 14, 1953, c. 198.)

Applied in *Johnson v. Avery*, 11 Me. 99.

Sec. 15. Proof of appointment.—A duly authenticated copy of the appointment of such executor, administrator, conservator, guardian or committee of the person or property, or any similar official of whatever title, wherever appointed by any court of competent authority having jurisdiction in any state of the United States or any foreign country, filed, examined and allowed by any judge of probate in this state is sufficient proof of appointment to entitle such official to the benefit of the preceding section. (R. S. c. 150, § 15.)

Contracts of Deceased Persons.

Sec. 16. Conveyance on contract made by deceased authorized.—When it appears to the judge of probate having jurisdiction that any deceased person had made a legal contract to convey real estate and was prevented by death from so doing, or that such deceased person had made such a contract to convey an estate upon a condition which in its nature could not be fully performed before his decease, and that in either case the person contracted with or the petitioner has performed or is ready to perform the conditions required of him by the terms thereof, he may on petition of such person, his heirs, assigns or legal representatives authorize the executor or administrator, or special administrator of the deceased, or when there is no executor or administrator, the guardian of the heirs of the deceased, to execute deeds to carry said contract into effect; and when such conveyance is made to an executor or administrator, he shall stand seized of such estate to the same uses as in case of real estate set off to him on execution. (R. S. c. 150, § 16.)

This section relates only to legal contracts in force at the death of the obligor, the performance of which was by his death prevented. *Bates v. Sargent*, 51 Me. 423; *May v. Boyd*, 97 Me. 398, 54 A. 938. The provisions of the statute cannot ap-

ply to verbal contracts, void by the statute of frauds. *Bates v. Sargent*, 51 Me. 423.

And administrator can convey only if intestate bound.—The administrator can be empowered to convey real estate under this section only in those cases where the intestate was legally bound. *Ex parte Thomes*, 3 Me. 50.

Section does not oust or limit equitable jurisdiction of supreme judicial court.—

This section enables the judge of probate to empower the administrator, upon legal performance of the conditions required of the person with whom the contract is made, to convey the real estate agreed to be conveyed. It was not intended to oust the supreme judicial court of its equitable jurisdiction or to limit or restrict its exercise. *Bates v. Sargent*, 51 Me. 423; *May v. Boyd*, 97 Me. 398, 54 A. 938.

Sec. 17. Notice and bond.—Before granting such authority, the judge shall cause due notice to be given to the heirs and all other parties interested and require the person authorized to make conveyance, except executors exempted therefrom by the provisions of section 11 of chapter 154, to give bond with sufficient sureties to account for whatever he receives therefor. (R. S. c. 150, § 17.)

General Provisions.

Sec. 18. Licenses limited; renewable.—No license granted under the provisions of this chapter, except when otherwise provided, remains in force for more than 1 year from its date; but when that time has expired, a new license may be granted, with or without new notice, at the discretion of the judge, for the sale of all or part of the same real estate upon filing a new bond. (R. S. c. 150, § 18.)

Seasonable delivery of deed is requisite to perfect sale.—A deed of an administrator purportedly given under a license can pass no title if delivered after the expiration of a year from the time the license was obtained. Seasonable delivery is essential to make the sale perfect. *Marr v. Hobson*, 22 Me. 321; *Mason v. Ham*, 36 Me. 573.

And deed made after expiration of license is void.—An administrator's deed, made after more than one year has elapsed since the license to sell was granted by the judge of probate, is void.

Marr v. Boothby, 19 Me. 150; *Mason v. Ham*, 36 Me. 573.

Executor being excused from general bond does not authorize extension of bond to sell land.—The fact that the executor was excused from giving a general bond does not authorize the extension of a special bond for sale of certain real estate. *Davis v. American Surety Co.*, 144 Me. 187, 67 A. (2d) 421.

Applied in *Miller v. Meservey*, 107 Me. 158, 77 A. 697.

Cited in *Wilbur v. Toothaker*, 105 Me. 490, 75 A. 42.

Sec. 19. Sales adjourned.—Any sale, duly appointed and notified, may be adjourned within the period prescribed by the license, not exceeding 14 days in all, at the discretion of the person licensed, by giving such reasonable notice thereof as circumstances permit. (R. S. c. 150, § 19.)

The specific kind of notice under this section would seem to be submitted to the discretion of the administrator. *Fowle v. Coe*, 63 Me. 245.

Sec. 20. Licenses may include lands in other counties.—When the real estate, for the sale of which license is necessary, lies in 2 or more counties, the superior court or the probate court in either of said counties may grant licenses for the sale of the whole or any part thereof in any other county. (R. S. c. 150, § 20.)

Sec. 21. License may prescribe the land sold.—Any court, granting license to sell real estate for the payment of debts, legacies or expenses of administration may prescribe therein what particular portions thereof shall be sold, and in what order, according to the last will of the testator or the principles of equity. (R. S. c. 150, § 21.)

Sec. 22. What estate of deceased liable to sale; effect of deed.—Lands of which the deceased died seized in fee simple or fee tail, general or special, and all that he had fraudulently conveyed or of which he was colorably disseized to defraud creditors are liable to sale for payment of debts, under any license granted under the provisions of this chapter; and any deed, executed and recorded in due form of law, for adequate consideration, in pursuance of such license, is effectual to pass to the purchaser all the estate, right, title and interest in the granted premises which the deceased had therein, free from the right of descent of the widow or widower. The executor or administrator shall pay to the widow or widower 1/3 of the sale price thereof in lieu of the 1/3 interest in such real estate which descended to such party free from the payment of debts. Such widow or widower shall be given such personal notice of the proposed sale as the court may order. (R. S. c. 150, § 22.)

Sale by administrator of property fraudulently conveyed by intestate.—If property of the intestate has been fraudulently conveyed by him, it would seem that the administrator would be liable on his bond, if being notified and aware of the fraud, he should refuse to make the sale which it is his duty to make. In case of a sale the proceeds would be assets in his hands to be administered upon. It is for him to make such sale. *Brown v. Whitmore*, 71 Me. 65.

It is the duty of an administrator de bonis non when aware of a fraudulent conveyance to make a sale of land thus conveyed. A refusal or neglect so to do would create such a liability as is visited upon other malfeasance or nonfeasance in the performance of his trust. And when

sold the proceeds would be assets to be administered. *Woodbridge v. Tilton*, 84 Me. 92, 24 A. 582.

Lands held in trust inferentially excluded from liability.—The enumeration of the different lands liable omits such as may be held in trust, and the inference from this is that they were intended to be excluded. *Shaw, Appellant*, 81 Me. 207, 16 A. 662.

Applied in *Allen v. Smith*, 80 Me. 486, 15 A. 62.

Quoted in part in *Hasty v. Johnson*, 3 Me. 282.

Stated in *Caswell v. Caswell*, 28 Me. 232.

Cited in *Marr v. Hobson*, 22 Me. 321; dissenting opinion to *McLean v. Weeks*, 61 Me. 277.

Sec. 23. Surplus proceeds distributed as real estate.—In all sales of real estate or any part or interest therein, by virtue of licenses granted under the provisions of this chapter, the surplus proceeds of sale, remaining on final settlement of the accounts of such proceeds, shall be considered real estate and distributed among the same persons and in the same proportions as real estate would be. (R. S. c. 150, § 23.)

Sec. 24. Notice.—All heirs apparent or presumptive of the ward shall be considered interested in the estate and may appear and answer to the petition of any guardian or other person for the sale of his estate; and when personal notice is required, they shall be notified. (R. S. c. 150, § 24.)

Persons herein specified have right of appeal.—The persons described in this section were held to be persons "aggrieved" under c. 153, § 32, and had, there-

fore, the right of appeal. See *Lunt v. Aubens*, 39 Me. 392.

Quoted in *Briard v. Goodale*, 86 Me. 100, 29 A. 946.

Sec. 25. Costs, when license contested.—When the granting of a license is contested, if the petition or objection to it appears unreasonable, the court may award costs to the prevailing party. (R. S. c. 150, § 25.)

Sec. 26. Proof of notice of sale, certificate and record.—The affidavit of any person licensed as aforesaid, or of any person employed by him, made within 18 months after the sale and filed in the probate office with one of the original advertisements of the time, place and estate to be sold, or with a copy of such advertisement, and recorded, or such an affidavit made afterwards by any person, and filed and recorded with such copy by permission of the court, upon

satisfactory evidence that the notice was given as ordered, is sufficient proof that such notice was given and a copy of such affidavit certified by the register is competent evidence thereof. (R. S. c. 150, § 26.)

Applied in *Fowle v. Coe*, 63 Me. 245.

Sec. 27. Proof by parol, when certificate not returned.—When a person, licensed as aforesaid, has taken the oath formerly required by law, but no certificate thereof has been returned to the judge of probate, parol evidence may be received that such oath was administered in the trial of any action respecting the estate so sold; and if proved, it has the same effect as if a certificate thereof had been returned, filed and recorded. (R. S. c. 150, § 27.)

Applied in *Fowle v. Coe*, 63 Me. 245.

Sec. 28. Neglect or misconduct of person licensed.—If a person, interested in any estate sold as aforesaid, suffers damage by neglect or misconduct of the executor, administrator or guardian in such proceedings, he may recover compensation therefor in a suit on the probate bond or otherwise as the case may require. (R. S. c. 150, § 28.)

Actions to Try Title of Lands Sold by License.

Persons interested are not concluded by sales unless statute complied with.—In the sale of real estate under a license from the court authorized to grant it, the requisites provided by statute, of bonds to account, of advertisements, and of a public sale, are important to the interests of all concerned in the estate to be conveyed, as heirs at law, creditors and others. The rights of persons thus connected with the

estate conveyed, and whose interests are affected by the authority to sell, are regarded by these provisions; and they, and any claiming them, are not concluded by the exercise of the authority and license to sell in derogation of their rights, unless every essential requisite and direction of law has been complied with. *Williams v. Morton*, 38 Me. 47.

Sec. 29. Limitation of action to recover lands sold by license.—No action shall be brought to recover an estate sold under the provisions of this chapter, nor entry be made thereon, except by judgment of law, with a view to avoid the sale by persons claiming under the deceased or by the ward or persons claiming under him, unless it is done within 5 years after the sale or the termination of the guardianship, except that persons out of the state or under legal disability at said times are limited to 5 years after their return to the state or the removal of the disability. (R. S. c. 150, § 29.)

Five year limitation intended to quiet purchasers and protect administrators.—To quiet purchasers, and for the protection of executors and administrators, the legislature thought proper to enact, that sales of this kind should not be disturbed after five years, with certain exceptions, not now in question. *Beal v. Nason*, 14 Me. 344.

This section violates no provisions of the constitution. *Beal v. Nason*, 14 Me. 344.

It applies only to sales made under valid license.—A sale made after the license has expired cannot be said to be made under such license, and it is only to sales made under such license that this provision applies. *Poor v. Larrabee*, 58 Me. 543.

And limitation not applicable to void

sale.—The limitation of five years, within which an action is to be brought under this section, cannot be applied in a case where the sale was void, as not being in compliance with the statute. *Tracy v. Roberts*, 88 Me. 310, 34 A. 68.

But it applies to defective sale under license from court of competent jurisdiction.—The limitation of five years within which an action is to be brought applies to defective sales under licenses from a court of competent jurisdiction, and not to sales where no petition or license ever existed. *Tracy v. Roberts*, 88 Me. 310, 34 A. 68.

Ward may ratify or avoid invalid sale within reasonable time.—When a sale by guardian under license is invalid for a want of compliance with some requirement of law by the guardian, it is com-

petent for the ward when he becomes of age to ratify and affirm the sale, or he may avoid it within a reasonable time. *Kingsley v. Jordan*, 85 Me. 137, 26 A. 1090.

But if he retains proceeds, knowing the invalidating facts, he cannot avoid sale.—When the ward, arriving at age, with a

knowledge of the facts, and in the absence of fraud, receives and retains the purchase money arising from the guardian's sale of his land, he cannot afterwards question its validity. *Kingsley v. Jordan*, 85 Me. 137, 26 A. 1090.

Cited in *Wakefield v. Campbell*, 20 Me. 393.

Sec. 30. Requisites for valid sale as against persons claiming under deceased or ward.—In an action brought to contest the validity of any such sale, by the heir or others claiming under the deceased; by the wife or her heirs, in case of a sale of her estate by her husband; or by the ward or person claiming under him; no such sale shall be avoided on account of any irregularity in the proceedings, if it appears:

I. That the license was granted by a court of competent jurisdiction and that the deed was duly executed and recorded;

II. That the person licensed gave the bond and notice of the time and place of sale required by law;

III. That the premises were sold in such manner and within such time as the license authorized and are held by one who purchased them in good faith. (R. S. c. 150, § 30.)

Sec. 31. As against such as claim adversely to title sold.—If the validity of such sale is contested by one claiming adversely to the title of the wife, ward or deceased aforesaid, or by a title not derived through either, the sale is not void on account of any irregularity in the proceedings, if it appears that the license was granted by a court of competent jurisdiction and the deed duly executed and recorded. (R. S. c. 150, § 31.)

Cross reference.—See c. 168, § 4, re sales of real estate, subject to contingent remainder, executory devise or power of appointment.

Grounds for contesting deed issued under license.—A deed issued pursuant to a license issued under this chapter can be contested only on the grounds that the

license was not granted by a court of competent jurisdiction, and that the deed was not duly executed and recorded. *Maddocks v. Keene*, 114 Me. 469, 96 A. 785.

Applied in *Webster v. Calden*, 53 Me. 203.