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Chapter 164.

Probate Bonds.

Sufficiency of Probate Bonds.

Sec. 1. Approval by judge.—No bond required to be given to the judge of probate, or to be filed in the probate office, is sufficient until it has been examined by the judge and his approval written thereon. (R. S. c. 151, § 1.)

Sec. 2. Insufficient, new required.—When the sureties in any such bond are insufficient, on petition of any person interested and notice to the principal, the judge may require a new bond with sureties approved by him. (R. S. c. 151, § 2.)

See c. 154, § 69, re additional bonds may be required; c. 158, § 25, re judge may require new bond upon settlement of account; c. 160, § 3, re proceedings when trustee neglects to give bond.

Sec. 3. Surety on bond discharged.—On application of any surety or principal in such bond, the judge on due notice to all parties interested may, in his discretion, discharge the surety or sureties from all liability for any subsequent but not for any prior breaches thereof, and may require a new bond of the principal with sureties approved by him. (R. S. c. 151, § 3.)

Filing of second bond does not per se discharge sureties. — In the absence of statutory proceedings for discharging the sureties, in view of the existence of this section, the filing of a second bond and its acceptance and approval by the judge of probate cannot have the effect by implication to supersede the original bond. Both bonds are valid and constitute cumulative and concurrent security. Miller v. Kelsey, 100 Me. 103, 60 A. 717.

Former provision of section. — For case under this section prior to its present form when application could be made by the surety only, see Fidelity Deposit Co., Appellant, 103 Me. 382, 69 A. 616.

Sec. 4. Principal to give new bond or be removed.—In either case, if the principal does not give the new bond within the time ordered by the judge, he shall be removed and another appointed. (R. S. c. 151, § 4.)

Sec. 5. Court may reduce penal sum of bond signed by surety company.—If a surety company becomes surety on a bond given to a judge of probate, the court may, upon petition of any party in interest and after due notice to all parties interested, reduce the penal sum in which the principal and surety shall be liable for a violation thereafter of the conditions of said bond. (R. S. c. 151, § 5.)

Actions on Bonds.

Sec. 6. Suits on bonds in name of judge.—Suits on probate bonds of any kind payable to the judge shall be originally commenced in the superior court for the county where said judge belongs and in his name or that of his successor at the time; and they shall not abate by the death of the plaintiff, his resignation or the expiration of his term of office, but the process may be amended and prosecuted, without notice, in the name of his successor; but no costs shall be awarded against the judge therein. (R. S. c. 151, § 6.)

Applied in Wing v. Rowe, 69 Me. 282.
Stated in part in Rawson v. Piper, 34 Me. 98.

Sec. 7. In suit against surety, principal made party.—If the principal in any such bond resides in the state when an action is brought thereon, and is not made a party thereto, or if at the trial thereof, or on scire facias on a judgment against the sureties only, he is in the state, the court, at the request of any such surety, may postpone or continue the action long enough to summon or bring him into court. (R. S. c. 151, § 7.)

Stated in Williams v. Esty, 36 Me. 243.

Sec. 8. Proceedings and judgment.—Such surety may thereupon take out a writ, in the form prescribed by the court, to arrest the principal, if liable to arrest, or to attach his estate and summon him to appear and answer as a defendant in the action; and if, after 14 days' previous service of such process, he fails thus to appear at the time appointed and judgment is rendered for the plaintiff, it shall be against him and the other defendants as if he had been originally a party, and any attachment made or bail taken on such process is liable to respond to the judgment as if made or taken in the original suit. (R. S. c. 151, § 8.)

Sec. 9. Action on administrator's or executor's bond.—Every action against sureties on an administrator's or an executor's bond must be commenced within 6 years after such administrator or executor has been cited to appear to settle his account in the probate court where administration is granted on the estate, or, if not so cited, within 6 years from the time of the breach of his bond, unless such breach is fraudulently concealed by the administrator or executor from the heirs, legatees or persons pecuniarily interested, who are parties to the suit, and in such case within 3 years from the time such breach is discovered. (R. S. c. 151, § 9.)

Suit on executor's bond for breach occurring after his death. — There can be a breach of his bond after the death of an executor, for which the sureties can be held liable. It is no defense that action on such breach was not commenced within 6 years after his death. It is necessary only that the suit be commenced within 6 years of the breach. Cook v. Titcomb, 115 Me. 38, 97 A. 133.

Sec. 10. Judgment for plaintiff.—When judgment is for the plaintiff by verdict, default or otherwise in any suit on a probate bond, it shall be entered for the penalty in common form, and the subsequent proceedings shall be had by the court as hereinafter provided. (R. S. c. 151, § 10.)

Applied in Cook v. Titcomb, 115 Me. 38, 97 A. 133; Brackett v. Thompson, 119 Me. 359, 111 A. 416; Davis v. American Surety Co., 144 Me. 187, 67 A. (2d) 421.

Actions without Authority of Judge.

Sec. 11. Suit on bond.—Any person interested personally or in any official capacity in a probate bond, or in a judgment rendered thereon, whose interest has been specifically ascertained by a decree of the judge of probate or by judgment of law, as hereinafter provided, may originate a suit on such bond or scire facias on such judgment without applying to the judge whose name was used in the bond or judgment, or to his successor; and 2 or more such persons may unite in the prosecution of the action, but the original writ shall allege the name and addition of such person, and that the same is sued out by him, "in the name of the Honorable ...., judge of probate for the county of .....;" otherwise it shall abate. (R. S. c. 151, § 11.)

Theory of remedy.—The remedy under this section is based upon the theory that when an interest in an estate in his favor has been ascertained and the administrator has failed to adjust it, the party interested has a personal remedy against the bond. Hayes v. Briggs, 106 Me. 423, 76 A. 905.

Allegation that action authorized by judge of probate is not faulty.—A declaration under this section is not faulty for alleging that the action has been author-

ized by the judge of probate, when it is immaterial whether he assented to the action or not; the overaverment may be disregarded or stricken out. McFadden v. Hewett, 78 Me. 24, 1 A. 893.

Declaration may be amended to insert averment that interest ascertained. — A declaration on a guardian's bond brought under this section, which omits the averment that the interest of the persons suing has been specifically ascertained by probate decree, may be amended by adding the omitted words. McFadden v. Hewett, 78 Me. 24, 1 A. 893.

Failure to plead insolvency in original action estops administrator from thereafter pleading it.—A creditor, who has recovered a default judgment against an administrator, is entitled to recover upon his bond notwithstanding the estate is insolvent. Not pleading a want of assets in the original action, the administrator is thereafter estopped to plead it in defense. Thurlough v. Kendall, 62 Me. 166.

But such estoppel may be waived.—An administrator who permits a creditor to obtain a default judgment against him is thereafter estopped from pleading insolvency in an action upon his bond. However, an admission of insolvency in the agreed statement of facts in the case is a waiver of the estoppel created by the default judgment. Thurlough v. Kendall, 62 Me. 166.

Sureties may show administrator's lack of authority. — In an action upon an administration bond, a judgment against the administrator in favor of a creditor of the intestate under § 14 does not estop the sureties from showing that, prior to the commencement of the action in which such judgment was recovered, the administrator's authority had become extinguished. Bourne v. Todd, 63 Me. 427.

Administrator d. b. n. is "person interested" as to unadministered property.—An administrator de bonis non is a "person interested personally, or in any official capacity" within the meaning of this section only as to the unadministered property of the intestate. Meservey v. Kalloch, 97 Me. 91, 53 A. 876.

And he may sue on predecessor's bond. — An administrator de bonis non may originate a suit on his predecessor's bond without applying to the judge of probate, provided his interest has been specifically ascertained as provided in this section, and this should be alleged if such preliminary action has been taken; and if not, the action cannot be maintained under this section. Waterman v. Dockray, 78 Me. 139, 3 A. 49.

Estate is not liable for personal services rendered to executor.—A creditor who recovers a judgment against an executor for services rendered to him is not entitled to a judgment against the estate, being in no wise a creditor thereof for the services rendered, and hence not interested in the bond. Baker v. Moor, 63 Me. 443.

The remedies prescribed by this section and § 17 are entirely distinct and an attempt to proceed under one section cannot possibly be sustained under the provisions of the other. Hayes v. Briggs, 106 Me. 423, 76 A. 905.

Applied in Potter v. Titcomb, 12 Me. 55; Groton v. Tallman, 27 Me. 68; Rawson v. Piper, 34 Me. 98; Wing v. Rowe, 69 Me. 282; Judge of Probate v. Toothaker, 83 Me. 195, 22 A. 119; Burgess v. American Bond & Trust Co., 103 Me. 378, 69 A. 573.

Stated in Thurston v. Lowder, 47 Me. 72.

Cited in Potter v. Cummings, 18 Me. 55; Williams v. Cushing, 34 Me. 370; Waterman v. Dockray, 79 Me. 149, 8 A. 685.

Sec. 12. Judgment, if suit fails.—If such suit is not sustained, judgment shall be rendered and execution issued for costs against the person originating it as aforesaid. (R. S. c. 151, § 12.)

Applied in Groton v. Tallman, 27 Me. 68; Wing v. Rowe, 69 Me. 282.

Cited in Williams v. Cushing, 34 Me. 370.

Sec. 13. Suit on bond, by creditor of insolvent estate.—Every creditor entitled to a dividend from an insolvent estate, originating any action mentioned in section 11, before he can recover, must produce an official copy of the decree of distribution among the creditors of said estate, particularly specifying all the claims allowed the several creditors, and must prove a demand on the administrator for his particular dividend. (R. S. c. 151, § 13.)

Stated in part in Dickinson v. Bean, 11 Me. 50; Williams v. Cushing, 34 Me. 370.

Cited in Longfellow v. Patrick, 25 Me. 18; Groton v. Tallman, 27 Me. 68.

Sec. 14. Suit by creditor or legatee of solvent estate.—If the estate is not insolvent, or the claim is one not affected by insolvency, such creditor, or any person not a residuary legatee, claiming a legacy under the will of the deceased, must first have the amount due ascertained by judgment of law against the administrator, and prove a demand therefor on him, and his neglect or refusal to satisfy the same, or to show personal estate of deceased for that purpose. (R. S. c. 151, § 14.)

Residuary legatee's rights are not affected by fact legacy held in trust. — A residuary legatee need not have the amount due from the obligor ascertained by judgment of court in order to maintain a suit on the probate bond. This right is not affected by the fact that he holds such legacy in trust. Williams v. Cushing, 34 Me. 370.

Judgment against administrator is conclusive upon sureties as to amount.—A judgment against the administrator, recovered without fraud or collusion, is conclusive upon the sureties in the administration bond, in respect to all matters of defense affecting the "amount due" on the claim. Bourne v. Todd, 63 Me. 427; Baker v. Moor, 63 Me. 443.

But is not binding on sureties if their principal had ceased to be administrator. —A judgment against one not the administrator, but who had before its recovery ceased to be such, can have no effect upon the sureties. When the authority of the principal is extinguished, his power to bind his sureties is thereby extinguished also. Bourne v. Todd, 63 Me. 427.

Applied in Burgess v. American Bond & Trust Co., 103 Me. 378, 69 A. 573.

Stated in part in Potter v. Titcomb, 7 Me. 302.

Cited in Longfellow v. Patrick, 25 Me. 18; Groton v. Tallman, 27 Me. 68; Thurlough v. Kendall, 62 Me. 166.

Sec. 15. Suit by widow, next of kin or residuary legatee.—A widow entitled to an allowance made by the judge, a widow or next of kin entitled to a distributive share in the personal estate or a residuary legatee of the deceased, before recovering in any action on such bond, must produce a decree of the judge specifying the amount due and prove demand and refusal as aforesaid. (R. S. c. 151, § 15.)

Applied in Groton v. Tallman, 27 Me. 68.

Cited in Longfellow v. Patrick, 25 Me. 18.

Sec. 16. Judgment and execution in such suits. — When judgment in any action mentioned in section 11 is rendered in favor of the judge of probate whose name is therein used, the court shall order an execution to issue in his name for so much of the penalty of the bond as appears to be due, with interest and costs, to the person for whose use the action was brought; and when it was brought for the use of several, there shall be a separate execution in the same form for the share of each, and the costs shall be apportioned under direction of the court; and such persons are creditors to all intents and may levy their executions in their own names on real estate or otherwise. (R. S. c. 151, § 16.)

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

Cited in Williams v. Cushing, 34 Me. 370.

Actions by Authority of Judge.

Sec. 17. Judge may authorize suits; execution, in case of failure to account.—The judge of probate may expressly authorize or instruct an administrator or administrator de bonis non, on the petition of himself or any party interested, to commence a suit on a probate bond for the benefit of the estate, and such authority shall be alleged in the process; and when it appears, in any such suit against an administrator, that he has been cited by the judge to account, upon oath, for such personal property of the deceased as he has received, and has not done so, execution shall be awarded against him for the full value there-

of, without any allowance for charges of administration or debts paid. (R. S. c. 151, § 17.)

History of section. — See Hayes v. Briggs, 106 Me. 423, 76 A. 905.

This section is severe and penal and should receive a strict construction. Potter v. Titcomb, 7 Me. 302.

It may be invoked if administrator fails to perform his duties.—For failure on the part of the administrator to perform the duties required of him in the administration of an estate the remedy provided for in this section may be invoked. Hayes v. Briggs, 106 Me. 423, 76 A. 905.

Administrator must be cited to account before action can be maintained. — The provision in this section as to the necessity of a citation before an action can be maintained on a bond against the administrator does not apply only to those cases where he had never settled or rendered any account whatever. The language does not impose any such limitation, nor seem to justify so narrow a construction. Potter v. Titcomb, 7 Me. 302.

But rule does not apply to insolvent estates. — The rule that there has been no breach of an administrator's bond until he has been cited to render an account does not apply to insolvent estates. Webb v. Gross, 79 Me. 224, 9 A. 612.

Judge may give order authorizing suit without notice to obligors in bond.—The power given to the judge of probate to authorize the commencement of a suit upon a probate bond, may be exercised without notice to the obligors in the bond, and no legal right of the obligors is affected by the permission to commence a suit. Bulfinch v. Waldoboro', 54 Me. 150.

And his order is not subject to appeal. —An administrator cannot appeal from an order of the judge of probate, authorizing an action to be brought upon his official bond. Bulfinch v. Waldoboro', 54 Me. 150.

Amount of execution. — The amount of the personal property returned in the inventory of the estate is prima facie evidence of the sum for which execution shall be awarded. Williams v. Esty, 36 Me. 243.

Administrator d. b. n. is "party interested" as to unadministered property.— An administrator de bonis non is a "party interested" only as to the unadministered property of the intestate. Meservey v. Kalloch, 97 Me. 91, 53 A. 876.

Under this section the procedure is for the benefit of the estate and not for the individual benefit of the person interested. Although authorized to petition for the commencement of the suit, and become the agency to set the process in motion, yet he has no direct benefit in the result, not common to all interested in the settlement of the estate. Hayes v. Briggs, 106 Me. 423, 76 A. 905.

The remedies prescribed by this section and § 11 are entirely distinct and an attempt to proceed under one section cannot possibly be sustained under the provisions of the other. Hayes v. Briggs, 106 Me. 423, 76 A. 905.

Former provision of section. — For case decided prior to enactment of this section in Maine but which construed a similar Massachusetts' statute, which construction has been adopted by this section, see Nelson v. Jaques, 1 Me. 139.

Applied in Wing v. Rowe, 69 Me. 282; Chaplin v. National Surety Corp., 134 Me. 496, 185 A. 516.

Stated in part in Potter v. Cummings, 18 Me. 55; Groton v. Tallman, 27 Me. 68; Gilbert v. Duncan, 65 Me. 469; McFadden v. Hewett, 78 Me. 24, 1 A. 893; Waterman v. Dockray, 78 Me. 139, 3 A. 49.

Cited in Cleaves v. Dockray, 67 Me. 118; Waterman v. Dockray, 79 Me. 149, 8 A. 685.

Sec. 18. Execution against administrator when no inventory and for neglect.—When an administrator has received personal estate and has not returned, on oath, a particular inventory thereof, and in all other cases of neglect or mismanagement, execution shall be awarded against him for so much of the penalty of his bond as is adjudged on trial to be just. (R. S. c. 151, § 18.)

Administrator must inventory notes due from himself. — An administrator is as much bound to inventory notes or bonds due from himself as from others; otherwise, in case of his death, an administrator de bonis non might never arrive at the knowledge of their existence. Potter v. Titcomb, 10 Me. 53.

Applied in Potter v. Titcomb, 11 Me. 157.

Stated in Miller v. Kelsey, 100 Me. 103, 60 A. 717.

Cited in Pierce v. Irish, 31 Me. 254.

Sec. 19. Judgment in trust for all interested.—Every such judgment and execution shall be recovered by the judge in trust for all parties interested in the penalty of the bond; and he shall require the delinquent administrator to account for the amount of the same, if still in office, but if not, he shall assign it to the rightful administrator to be collected, and the avails thereof to be accounted for and distributed or otherwise disposed of as assets. (R. S. c. 151, § 19.)

Stated in part in Longfellow v. Patrick, 25 Me. 18; Waterman v. Dockray, 79 Me. 149, 8 A. 685.

Remedies on Other Probate Bonds.

Sec. 20. Like proceedings on other bonds. — When not otherwise expressly provided by law, like proceedings, judgment and execution, so far as applicable, shall be had on the bonds given to any judge by executors, special administrators, guardians, testamentary trustees, surviving partners, assignees of insolvent debtors and others, as are provided in this chapter in reference to bonds of administrators. (R. S. c. 151, § 20.)

Cited in Pierce v. Irish, 31 Me. 254.

Sec. 21. Surety on probate bond may cite trust officers for accounting.—Whenever any surety on any probate bond has reason to believe that the trust officer has depleted or is wasting or mismanaging the estate, such surety may cite such trust officer before the judge of probate in the same manner as trust officers may be cited by the provisions of sections 90 to 92, inclusive, of chapter 154; and if upon hearing the judge of probate is satisfied that the estate held in trust by such officer has been depleted, wasted or mismanaged, he may remove said trust officer and appoint another in his stead. (R. S. c. 151, § 21.)

Sec. 22. Agreement for joint control.—It shall be lawful for any party of whom a bond, undertaking or other obligation is required to agree with his surety or sureties for the deposit of any or all moneys and assets for which he and his surety or sureties are or may be held responsible with a national bank, savings banks, safe-deposit or trust company, authorized by law to do business as such in this state, or with other depository approved by the court having jurisdiction over the trust or undertaking for which the bond is required, or a judge thereof, if such deposit is otherwise proper, for the safekeeping thereof, and in such manner as to prevent the withdrawal of such money or assets or any part thereof, without the written consent of such surety or sureties, or an order of such court or judge thereof, made on such notice to such surety or sureties as such court or judge may direct; provided, however, that such agreement shall not in any manner release from or change the liability of the principal or sureties as established by the terms of the said bond. (R. S. c. 151, § 22.)