NINTH REVISION

REVISED STATUTES

OF THE

STATE OF MAINE

1954

FIRST ANNOTATED REVISION

IN FIVE VOLUMES

VOLUME 4

THE MICHIE COMPANY
CHARLOTTESVILLE, VIRGINIA

Chapter 153.

Courts of Probate.

Courts of Record. Jurisdiction in Equity.

Sec. 1. Courts of record; seal; punishment for contempt. — Courts of probate are courts of record. Each shall have an official seal, of which the register shall have the custody. They may issue any process necessary for the discharge of their official duties and punish for contempt of their authority. (R. S. c. 140, § 1.)

Courts of probate are of statutory jurisdiction only. — Although courts of probate are declared by this section to be "courts of record," having "an official seal," and power to issue any process necessary for the discharge of their official duties," still their proceedings are not according to the course of the common law, but they are creatures of the statute, having a special and limited jurisdiction only. Fowle v. Coe, 63 Me. 245.

Quoted in Harmon v. Fagan, 130 Me. 171, 154 A. 267.

Sec. 2. Jurisdiction in equity.—The courts of probate shall have jurisdiction in equity, concurrent with the supreme judicial court and the superior court, of all cases and matters relating to the administration of the estates of deceased persons, to wills and to trusts which are created by will or other written instrument. Such jurisdiction may be exercised upon bill or petition according to the usual course of proceedings in equity. (R. S. c. 140, § 2.)

Cross reference. — See note to c. 156, § 21, re two different courts established by statutes.

Section empowers probate judge to hold equity court.—There are, in virtue of legislation, two different courts: one a probate court, or full panoply; the other an equity court, of special and limited authorization, which can decide finally a question properly presented, subject, of course, to the right of appeal. The two courts have but a single judge. In other words, a judge in the probate court derives from the statute his power to hold the equity court. In re Neely's Estate, 136 Me. 79, 1 A. (2d) 772.

The probate court has jurisdiction as a court of equity in specified cases. In re Neely's Estate, 136 Me. 79, 1 A. (2d) 772.

Jurisdiction exists where cy pres doctrine applicable. — Under this section the judge of probate has authority to act in equity proceedings where the cy pres doctrine might be adopted. Knapp, Appellant, 149 Me. 130, 99 A. (2d) 331.

Probate court has power to annul prior decree. — It is well settled that a probate court has the power and duty upon subsequent petition, notice, and hearing to vacate or annul a prior decree, even a decree of probate of will clearly shown to be without foundation in law or fact and in derogation of legal right. Tripp v. Clapp, 126 Me. 534, 140 A. 199.

It has final jurisdiction subject to appeal. — The word "concurrent" does not mean exclusive and final. If so it would negative the right to resort to the law court. The lower court is given final jurisdiction subject to appeal. Norris v. Moody, 120 Me. 151, 113 A. 24.

But its jurisdiction does not include method of appeal.—The language "such jurisdiction may be exercised . . . according to the usual course of proceedings in equity" does not relate to procedure following the final decree of the judge of probate. As contemplated by this section the jurisdiction of the probate court does not include the method of appeal from

that court. Norris v. Moody, 120 Me. 151, 113 A. 24.

Section 32 applies equally to probate and equity cases.—The language of § 32 is equally appropriate whether the decree appealed from is that of a judge exercising probate or equity jurisdiction. Norris v. Moody, 120 Me. 151, 113 A. 24.

Appeal is to supreme court of probate. — The proper procedure by a party aggrieved by a decree of a judge of probate exercising equity jurisdiction, is by appeal to the supreme court of probate, and not by direct appeal to the law court. Norris v. Moody, 120 Me. 151, 113 A. 24; In re Neely's Estate, 136 Me. 79, 1 A. (2d) 772.

Equity jurisdiction exercised.—A bill in equity was properly brought in the probate court to have the decree of that court, assigning the plaintiff's interest in the estate of her deceased uncle to the widow, declared null and void. Robie, Appellant, 141 Me. 369, 44 A. (2d) 889.

Applied in Singhi v. Dean, 119 Me. 287, 110 A. 865; Maxim v. Maxim, 129 Me. 349, 152 A. 268.

Cited in McCarthy v. McCarthy, 121 Me. 398, 117 A. 313.

Judges of Probate.

Sec. 3. Judges; terms; salary. — Judges of probate are elected or appointed as provided in the constitution. Only attorneys at law admitted to the general practice of law in this state and resident therein may be elected or appointed as judges of probate. Their election is effected and determined as is provided respecting county commissioners; and they enter upon the discharge of their duties on the 1st day of January following; but, when appointed to fill vacancies, their terms commence on their appointment.

Judges of probate in the several counties shall receive annual salaries from the treasuries of the counties in monthly payments paid on the last day of each month, as follows:

Androscoggin, $3,300,
Aroostook, $3,750,
Cumberland, $6,000,
Franklin, $1,200,
Hancock, $3,000,
Kennebec, $3,500,
Knox, $1,920,
Lincoln, $1,800,
Oxford, $2,000,
Penobscot, $3,000,
Piscataquis, $1,800,
Sagadahoc, $1,750,
Somerset, $3,000,
Waldo, $2,400,
Washington, $1,800,
York, $5,750.

The fees to which judges of probate are entitled by law shall be taxed and collected and paid over by the registers of probate to the county treasurers for the use of their counties with the exception of the fees provided in section 6 and in section 145 of chapter 27, which shall be retained by the judge who collects the same in addition to the above-stated salary. (R. S. c. 140, § 3. 1945, c. 36; c. 161, § 7; c. 167, § 5; c. 205, § 2; c. 240, § 1; c. 262, § 3; c. 280, § 8; c. 296; c. 322, § 7. 1947, c. 118; c. 154, § 7; c. 157, § 6; cc. 283, 299; c. 371, § 2. 1949, c. 188, § 1; c. 215, § 1; cc. 254, 256, 294; c. 424, § 6. 1951, c. 197; c. 311, § 7; c. 312, § 8; c. 313, § 6; c. 315. 1953, cc. 27, 62, 117; c. 142, § 4; c. 179, § 4; c. 216, § 5; c. 247, § 4; c. 269, § 8; c. 276, § 7; c. 278, § 8; c. 348.)

See Me. Const., Art. 6, § 7, re election and tenure of office of judges and registers of probate; c. 5, § 50, re mode of determining who elected; c. 89, §§ 1-5, re election and tenure of office of county commissioners.

Sec. 4. Officers to execute processes and attend courts.—Sheriffs, their deputies and constables shall execute all legal processes directed to them by any such judge of probate who may, when necessary, require such officer, when not in attendance upon any other court, to attend during the sitting of the probate court, for which he shall be paid as in other courts for similar services. (R. S. c. 140, § 4.)

Sec. 5. Probate courts in constant session; certain days fixed upon which matters requiring public notice made returnable. — Probate court shall always be open in each county for all matters over which it has jurisdiction, except upon days on which by law no court is held, but it shall have certain fixed days and places to be made known by public notification thereof in their respective counties to which all matters requiring public notice shall be made returnable; and in case of the absence of the judge or vacancy in the office at the time of holding any court, the register or acting register may adjourn the same until the judge can attend or some other probate judge can be notified and attend. (R. S. c. 140, § 5.)

Court may take evidence on return day or thereafter. — The terms of the probate court were abolished in 1923, since which time probate courts are in constant session. The judge may now on the return day, or after, receive evidence from a witness to a will by taking oral testimony from the witness, or by receiving an affidavit previously taken before the register if there are no objections. Knapp, Appellant, 145 Me. 189, 74 A. (2d) 217.

Validity of decree not affected by affixture of signature outside probate office.— The fact that the judge of probate affixed his signature to a decree in his law office, instead of in the probate office, did not affect the validity of the decree. Newell v. Delorme, 109 Me. 421, 86 A. 31.

Former provision of section. — For a case relating to a former provision of this section providing that probate courts shall have "certain fixed days and places" for holding court, see White v. Riggs, 27 Me. 114.

Sec. 6. Time and place for hearings in equity and contested cases. — Judges of probate may hold hearings for matters in equity and contested cases at such time and place in the county as the judge of probate may appoint and make all necessary orders and decrees relating thereto, and when hearings are held at other places than those fixed for holding the regular terms of court, the judge shall be allowed, in addition to his regular salary, $5 per day and actual expenses which shall be paid by the state unless otherwise provided by law. (R. S. c. 140, § 6.)

Sec. 7. Term of probate court at Fort Kent.—The judge of probate in and for the county of Aroostook shall hold a court of probate once in each year at Fort Kent in said county. The time for holding said court shall be appointed by said judge and made known by public notification as provided in section 5. (R. S. c. 140, § 7.)

Sec. 8. Probate judges may interchange duties; expenses.—During the sickness, absence from the state or inability of any judge of probate to hold the regular terms of his court, such terms, at his request or that of the register of the county, may be held by the judge of any other county; the judges may interchange service or perform each others' duties when they find it necessary or convenient, and in case of the death of a judge, all necessary terms of the probate court for the county may, at the request of the register, be held by the judge of another county until the vacancy is filled. The orders, decrees and decisions of the judge holding such terms have the same force and validity as if made by the judge of the county in which such terms are held.

When any judge of probate holds court or a hearing in any probate matter, or in equity, in any county other than the one in which he resides, such judge shall be reimbursed by the county in which such court or hearing is held for

his expenses actually and reasonably incurred, upon presentation to the county commissioners of said county of a detailed statement of such expenses. (R. S. c. 140, § 8.)

Cited in Marston, Petitioner, 79 Me. 25, 8 A. 87.

Sec. 9. Jurisdiction.—Each judge may take the probate of wills and grant letters testamentary or of administration on the estates of all deceased persons who, at the time of their death, were inhabitants or residents of his county or who, not being residents of the state, died leaving estate to be administered in his county, or whose estate is afterwards found therein; also on the estate of any person confined in the state prison under sentence of imprisonment for life; and has jurisdiction of all matters relating to the settlement of such estates. He may grant leave to adopt children, change the names of persons, appoint guardians for minors and others according to law, and has jurisdiction as to persons under guardianship, and as to whatever else is conferred on him by law. (R. S. c. 140, § 9. 1945, c. 378, § 75.)

I. General Consideration.
II. Administration.
III. Wills.
IV. Guardians.

Cross References.

See c. 25, § 168, re cases of persons suffering from use of drugs; c. 25, § 249, re cases neglected children and cases involving custody of children; c. 27, § 91, re commitment to state school for girls; c. 27, § 110, re commitment to insane hospitals; c. 27, § 120, re taking of bond for safekeeping of insane criminals; c. 27, § 145, re commitment to Pownal State School; c. 57, § 34, re approval of transfer of funds held for religious or benevolent purposes; c. 117, § 22, re taking depositions in perpetuam; c. 120, § 23, re taking examination of poor debtor; c. 126, § 38, re issuing writ of habeas corpus in case of insane persons under arrest or imprisoned; c. 154, § 1, and note, re minimum value of estate required to authorize granting of administration; c. 154, § 74, and note, re jurisdiction of probate court over disputed claims committed; c. 166, § 19, re cases involving custody of children; c. 166, § 43, re proceedings for support of family; c. 166, § 44, re decree of judicial separation of husband and wife; c. 168, § 4-6, re sales of contingent remainders; c. 169, § 14, re cases of contribution under wills.

I. GENERAL CONSIDERATION.

Courts of probate are of statutory jurisdiction only.—Although courts of probate are declared by § 1 to be "courts of record," having "an official seal," and "power to issue any process necessary for the discharge of their official duties," still their proceedings are not according to the course of the common law, but they are creatures of the statute, having a special and limited jurisdiction only. Fowle v. Coe, 63 Me. 245; Bradstreet v. Bradstreet, 64 Me. 204; Marston, Petitioner, 79 Me. 25, 8 A. 87; Chadwick v. Stilphen, 105 Me. 242, 74 A. 50; Shannon v. Shannon, 142 Me. 307, 51 A. (2d) 181; Knapp, Appellant, 145 Me. 189, 74 A. (2d) 217.

The probate court has only such jurisdiction as is conferred upon it by statute. And the supreme court of probate has no more. Thompson, Appellant, 114 Me. 338, 96 A. 238.

It is familiar law that the probate court is without common law jurisdiction, and is limited in its powers to those directly conferred by statute, and to those necessarily incident to the execution of such powers. Thompson, Appellant, 116 Me. 473, 102 A. 303; Harmon v. Fagan, 130 Me. 171, 154 A. 267.

And they must comply with statutory procedure and requisites.—Probate courts are creatures of statute and not of the common law, and have a special and limited jurisdiction. They have no jurisdiction, no powers, no modes of procedure or practice, except such as are derived from the provisions of the statutes. The record of their proceedings must show their jurisdiction. The preliminary requisites and the course of proceedings prescribed by law must be complied with or jurisdiction does not attach. Waitt, Appellant, 140 Me. 109, 34 A. (2d) 476; Knapp, Appellant, 145 Me. 189, 74 A. (2d) 217.

Proceedings wherein probate court has

exclusive jurisdiction.—The probate court has exclusive jurisdiction, subject to appeal to the supreme court of probate, of the estates of decedents, and of their final settlement and distribution, including the settlement of the accounts of the personal representative. The probate court is invested with ample power in these respects. Hoyt v. Hubbard, 141 Me. 1, 38 A. (2d) 135.

Without deciding that under no circumstances will a court of equity afford relief from a decree of a probate court shown to have been grounded on fraud where there is no adequate remedy at law, the overwhelming weight of authority supports the general rule that exclusive jurisdiction rests in the probate courts over all matters relating to the probate of wills and the administration of estates. Tripp v. Clapp, 126 Me. 534, 140 A. 199.

Courts of probate have jurisdiction to review proceedings in the supreme court of probate on allegations of irregularities in procedure. Kimball, Petitioner, 142 Me. 182, 49 A. (2d) 70.

And on jurisdictional grounds. — A decree of the supreme court of probate is open to direct attack in a court of probate as to all matters within the exclusive original jurisdiction of the probate courts. Kimball, Petitioner, 142 Me. 182, 49 A. (2d) 70.

Probate judge is empowered to hold equity court.—There are, in virtue of legislation, two different courts: one a probate court, of full panoply; the other an equity court, of special and limited authorization, which can decide finally a question properly presented, subject, of course, to the right of appeal. The two courts have but a single judge. In other words, a judge in the probate court derives from the statute his power to hold the equity court. In re Neely's Estate, 136 Me. 79, 1 A. (2d) 772.

Formal pleadings not requisite. — The probate court is not one of general or common law jurisdiction, and formal pleadings are unknown in its procedure. Danby v. Dawes, 81 Me. 30, 16 A. 255.

But the records of the probate court must show that it had jurisdiction in the cases in which it acts. Still it does not necessarily follow that the petition for appointment of an administrator shall aver everything which may be proved in order to authorize jurisdiction. Danby v. Dawes, 81 Me. 30, 16 A. 255.

And that proceedings were regular.—Using the term jurisdiction in its strictly appropriate sense, it must appear not only that the probate court had jurisdiction over the parties and the cause but also that all proceedings prescribed by law have been rigidly complied with. Thompson, Appellant, 116 Me. 473, 102 A. 303.

And decree may be repelled by showing departure from requirements of law.—As the proceedings of a court of probate are not according to the course of the common law, and therefore not examinable upon a writ of error, it is doubtless competent for a party, attempted to be charged by a decree of that court, to repel its operation upon him by showing in the proceedings a substantial departure from the requirements of law. Moody v. Moody, 11 Me. 247; Waitt, Appellant, 140 Me. 109, 34 A. (2d) 476.

But court may allow amendment of pleadings formally incorrect. — When jurisdictional allegations are sufficient, the probate court has authority, at any stage to the close of the proceedings, on finding the necessary facts to exist, to allow amendment of merely formally incorrect pleading. Chaplin, Appellant, 131 Me. 446, 163 A. 774.

A probate decree may be attacked collaterally on jurisdictional grounds.—While all of the decrees of courts of probate made within their jurisdiction are conclusive unless appealed from, those without their jurisdiction may be called in question, even collaterally. And the fact that a court of probate, in giving judgment, passed upon the question of jurisdiction, does not preclude courts of common law from inquiring into the jurisdictional facts collaterally, and declaring the judgment of the probate court valid or void, as they shall find those facts true or false. To this rule, however, § 16 attaches an exception. Fowle v. Coe, 63 Me. 245.

Where the probate court has no jurisdiction, its decrees are entirely and absolutely void and of no effect, and may be set aside in any collateral proceeding by plea and proof. Veazie Bank v. Young, 53 Me. 555.

When decree conclusive. — When the case and the subject are apparently within the jurisdiction of the probate court, and due proceedings have been had thereon, without objection or appeal, the final decree of that court is conclusive. Simpson v. Norton, 45 Me. 281; Chadwick v. Stilphen, 105 Me. 242, 74 A. 50; Thompson, Appellant, 116 Me. 473, 102 A. 303; Neely v. Havana Electric Ry., 136 Me. 352, 10 A. (2d) 358.

Applied in Stilphen, Appellant, 100 Me.

146, 60 A. 888; Heath, Appellant, 146 Me. 229, 79 A. (2d) 810.

Stated in Mudgett, Appellant, 105 Me. 387, 74 A. 916.

Cited in Brown v. Smith, 101 Me. 545, 64 A. 915; Knapp, Appellant, 149 Me. 130, 99 A. (2d) 331.

II. ADMINISTRATION.

Jurisdiction under this section is limited by c. 154, § 1, to cases where it appears to the judge that there is personal estate of the deceased amounting to at least $20, or that the debts due from him amount to that sum, and in the latter case, that he left that amount in value of real estate. Fowle v. Coe, 63 Me. 245.

And court must examine fact of jurisdictional value of estate. — Where the jurisdiction of the probate court in granting administration depends upon the question, whether the deceased left a certain amount of assets, the court must examine the fact, as proved, before it can decide the question of jurisdiction. This question cannot be raised except by appeal; nor would a denial of jurisdiction in the probate court be a felo de se. Shaw, Appellant, 81 Me. 207, 16 A. 662.

For administration and proceedings therein, where jurisdiction does not exist, is void.—Where administration is granted upon the estate of one who had his domicil in this state at the time of his decease, in a county where he did not reside, such administration is void. And if a judge of probate has no jurisdiction over the case upon which he undertakes to adjudicate, his proceedings by the common law are coram non judice, and have no binding force upon any one. Moore v. Philbrick, 32 Me. 102.

Probate court deprived of jurisdiction over administrator's accounts only by removal to another tribunal.—The court of probate can only be deprived of its jurisdiction for the settlement of the accounts of an administrator by some process or course of proceeding, which would legally remove the settlement to another tribunal. And its jurisdiction remains, although the administrator had before been cited to settle his accounts, had neglected to do so, and leave had been granted to the persons interested to commence a suit upon his bond, if no suit is commenced. Sturtevant v. Tallman, 27 Me. 78.

Only administrator of deceased partner can require accounting of partnership estate. — Until he shall have performed his full duty, or shall have been regularly superseded, the administrator of a deceased partner is the only party who has access to the court of probate to require of the administrator of the partnership estate any accounting. Ordinarily the widow and legatees of a deceased partner cannot act directly against the surviving partners but must compel the executor or administrator to act for them. The remedy of such is to compel the representative of decedent to account or have him removed. Hume, Appellant, 130 Me. 338, 155 A. 730.

If commissioners on disputed claims accept their appointments, the probate court has power to compel obedience to its decree and warrant, including the power to extend the time for the commissioners' action and report. Harmon v. Fagan, 130 Me. 171, 154 A. 267.

Determination of distributive shares is within probate jurisdiction.—Where plaintiff sues as administrator d. b. n. of the widow of the deceased to collect her share from the heirs who had received the money, his remedy is in the probate court, where such matters are heard and determined. He sues for a distributive share of an estate. Such action does not lie in a court of equity before the amount to be distributed has been ascertained in the probate court. Hoyt v. Hubbard, 141 Me. 1, 38 A. (2d) 135.

But validity of assignment of distributive share is not considered in decree of distribution.—The question of the validity of an alleged assignment of his distributive share by a person entitled thereto, does not arise either in the probate court or in the supreme court of probate upon the question of distribution. This question must be settled in the common law courts, and the decree of distribution is to be made irrespectively of any such alleged assignment. Bergeron, Appellant, 98 Me. 415, 57 A. 584.

"Whose estate is afterwards found therein" refers to property brought into the county subsequent to the death of the intestate. Saunders v. Weston, 74 Me. 85.

And such property authorizes granting of administration.—Under this statute, the judge of probate is to grant letters of administration on the estate of persons dying out of the state, not only when they leave property to be administered in his county, but when such property "is afterwards found therein." Saunders v. Weston, 74 Me. 85.

III. WILLS.

Wills not operative until established in probate court or supreme court of probate. —Wills do not become operative until proved and established in some court

having jurisdiction for that purpose — in this state, by allowance by the court of probate, or by the appellate supreme court of probate. No other tribunal can give effect to a will. Martin, Appellant, 133 Me. 422, 179 A. 655.

Decree admitting foreign will to probate not subject to collateral attack.—A decree of the probate court in Maine admitting a will to probate as a foreign will cannot be collaterally attacked for want of jurisdiction by attempting to show that the testatrix was a resident of this state at the time of her decease, no fraud being shown. Spencer v. Bouchard, 123 Me. 15, 121 A. 164.

And the probate court has jurisdiction to admit a lost or destroyed will to probate, when proved by copy, upon proof of the continued existence of such will unrevoked up to the time of the testator's death. Thompson, Appellant, 114 Me. 338, 96 A. 238.

Distinction between suit at law and proceeding in probate of will.—There is a distinction between an ordinary suit at law and a proceeding in the probate of a will. In the former the courts act upon the concessions of the parties of record, they being the only parties in interest; in the latter there are usually other persons interested, who will be concluded by the result, besides the proponent and contestant, and their rights are not to be conceded away by the parties of record. If the contestant takes issue upon a single point only, he does not thereby admit the other facts necessary to be established and thus relieve the proponent from his obligation to prove them. This he cannot do by his pleadings or otherwise. Rawley, Appellant, 118 Me. 109, 106 A. 120.

Proceedings of court when will offered.—Proceedings for probate of a will are unlike almost all other judicial investigations. When that which bespeaks itself a will has been propounded, it is in control of the probate court. That court, after public notice, and personal notice also, if deemed by it expedient, in open session at an appointed time and place, proceeds to determine whether the presented instrument is adequate in the law to dispose of property after the death of him who formerly owned it. This it does uninfluenced even by agreement lending validity or otherwise, between proponent and contestant. Nichols v. Leavitt, 118 Me. 464, 109 A. 6.

Persons other than parties are interested in probate of wills. — Generally in litigation the parties before the court are alone interested. Not so in the case of wills. The rights of creditors of heirs and legatees, the interests of persons unborn or unascertained and the purpose of the testator are all to be guarded by the court. Rawley, Appellant, 118 Me. 109, 106 A. 120.

All interested parties have right to legal notice.—The interested parties to a petition for probate have an absolute and unqualified right to expect that legal notice of the return day of the petition will be given. Notice and hearing is fundamental. Knapp, Appellant, 145 Me. 189, 74 A. (2d) 217.

And may make objections. — After notice of the pendency of the petition, any interested party may appear in the probate court for the purpose of making objections. Knapp, Appellant, 145 Me. 189, 74 A. (2d) 217.

Probate court can approve subsequent will, and can correct or annul its decrees.—It is impossible to deny the power of a court of probate to approve a subsequent will or codicil, after admitting to probate an earlier will by a decree, the time of appealing from which is past; or to correct errors arising out of fraud or mistake in its own decrees. Bergeron, Appellant, 98 Me. 415, 57 A. 584.

Before a probate decree has been acted upon, upon application by a person interested and after notice to all persons interested, the probate court may annul or modify a previous decree containing manifest errors and mistakes, inadvertently made and which were not considered by the probate court and determined by it. Bergeron, Appellant, 98 Me. 415, 57 A. 584; Tripp v. Clapp, 126 Me. 534, 140 A. 199; First Auburn Trust Co., Appellant, 135 Me. 277, 195 A. 202; Knapp, Appellant, 145 Me. 189, 74 A. (2d) 217.

But decree affecting prior probate requires notice to all parties.—No decree admitting a later instrument to probate, or modifying or revoking a probate already granted, can be made without notice to all parties interested; and an application of this nature, when one will has already been proved, would never be granted except upon the clearest evidence. Bergeron, Appellant, 98 Me. 415, 57 A. 584.

And modification or revocation of decree is subject to appeal.—Every action of the probate court in modifying or revoking a decree previously made is subject to the right of appeal, by any person aggrieved, to the supreme court of probate. Bergeron, Appellant, 98 Me. 415, 57 A. 584.

Power to modify decrees does not impair their conclusiveness.—The power to

modify a decree for error does not make the decree of a court of probate less conclusive in any other court, or in any way impair the probate jurisdiction; but renders that jurisdiction more complete and effectual, and by enabling a court of probate to correct mistakes and supply defects in its own decrees, better entitles them to be deemed conclusive upon other courts. Bergeron, Appellant, 98 Me. 415, 57 A. 584.

IV. GUARDIANS.

Court in its discretion appoints guardians, subject to appeal. — No person on strictly legal right can claim to be appointed as the guardian of another, but with the exception of certain legal disqualifications, the appointment is left to the discretion of the judge of probate. But the statute authorizes an appeal from his decree by anyone aggrieved thereby. Lunt v. Aubens, 39 Me. 392.

Jurisdiction is granted to the probate court with relation to the guardianship of minors and in all matters affecting their property and welfare. Waitt, Appellant, 140 Me. 109, 34 A. (2d) 476.

Only legally interested person may petition for dismissal of guardian.—Procedural requirements relating to dismissal of a guardian for a minor are not here specified. There is no substantive provision that petition must be presented by some person having a definite legal right to initiate the proceedings. But by rules and forms authorized under § 50, such interest has been required and sustained by decision. Waitt, Appellant, 140 Me. 109, 34 A. (2d) 476.

A petition for removal of a guardian must, under established procedure, be brought by a party in interest. That a guardian ad litem, appointed by a probate court in Massachusetts for a particular proceeding there pending, does not qualify as a party in interest in a proceeding in this state to remove a guardian, is well established. Waitt, Appellant, 140 Me. 109, 34 A. (2d) 476.

Sec. 10. Stenographer; duties.—The judge of any court of probate or court of insolvency may appoint a stenographer to report the proceedings at any hearing or examination in his court, whenever such judge deems it necessary or advisable. Such stenographer shall be sworn to a faithful discharge of his duty and, under the direction of the judge, shall take full notes of all oral testimony at such hearing or examination and also such other proceedings at such hearing or examination as the judge directs; and when required by the judge shall furnish for the files of the court a correct and legible longhand or typewritten transcript of his notes of the oral testimony of any person testifying at such hearing or submitting to such examination, and in making said transcript the stenographer shall transcribe his said notes in full by questions and answers. (R. S. c. 140, § 10.)

See § 48, re compensation of stenographers.

Sec. 11. Transcript of testimony read to person testifying, and signed when required by law; otherwise deemed correct without signing.—In cases where the person testifying or submitting to examination is required by law to sign his testimony or examination, the transcript made as provided in the preceding section shall be read to the person whose testimony or examination it is, at a time and place to be appointed by the judge, unless such person or his counsel in writing waives such reading; and if it is found to be accurate, or if it contains errors or mistakes or alleged errors or mistakes and such errors or mistakes are either corrected or the proceedings had in relation to the same as hereinafter provided, such transcript shall be signed by the person whose testimony or examination it is. When the reading of a transcript is waived as provided by this section, such transcript shall be deemed correct. In all other cases the transcript need not be signed but shall be deemed to be complete and correct without signing and shall have the same effect as if signed. (R. S. c. 140, § 11.)

Sec. 12. Certified copies of transcript taken as evidence. — Whenever it becomes necessary in any court in the state to prove the testimony or examination taken as provided in the 2 preceding sections, the certified copy of

the transcript of such testimony or examination taken by such stenographer is evidence to prove the same. (R. S. c. 140, § 12.)

Sec. 13. Correction of mistakes in transcript.—Manifest errors or mistakes in any transcript may be corrected, under the direction of the judge, according to the facts; but when an error or mistake is alleged by the party conducting the hearing or examination or by his counsel, or by the person testifying or submitting to examination or by his counsel, and said parties cannot agree whether or not there is such an error or mistake as alleged, or what correction should be made, the judge shall decide whether or not such an error or mistake exists, and may allow or disallow a correction according as he may find the fact; but in such case the judge shall annex to the transcript a certificate signed by him stating the alleged error or mistake and by whom alleged, and the correction allowed or disallowed. In case the said parties mutually agree that there is an error or mistake in the transcript, and in like manner agree what the correction should be, the transcript may be corrected according to such agreement, but such correction shall be stated and made in the presence of the judge. No changes or alterations shall be made in any transcript except in the presence of the judge or the person appointed by the judge to take the examination. (R. S. c. 140, § 13.)

Sec. 14. When examination before some person appointed by judge, he may appoint stenographer.—When an examination is taken before some person appointed by the judge to take it, the judge may also appoint a stenographer to attend such examination for the purposes mentioned in section 10, and the duties of such stenographer shall be the same as in examinations before the judge. The powers and duties of any person appointed by the judge to take an examination shall be the same at such examination as those of the judge, and the same proceedings for the correction or alteration of transcripts may be had before such person as before the judge. (R. S. c. 140, § 14.)

Sec. 15. Transcripts deemed original papers.—All transcripts made and signed as herein provided shall be deemed original papers. (R. S. c. 140, § 15.)

Sec. 16. Court first commencing probate proceedings to have jurisdiction.—When a case is originally within the jurisdiction of the probate court in 2 or more counties, the one which first commences proceedings therein retains the same exclusively throughout; and the jurisdiction assumed in any case, except in cases of fraud, so far as it depends on the residence of any person or the locality or amount of property, shall not be contested in any proceeding whatever, except on an appeal from the probate court in the original case or when the want of jurisdiction appears on the same record. (R. S. c. 140, § 16.)

History of section. — See Spencer v. Bouchard, 123 Me. 15, 121 A. 164.

Appointment of administrator is determinable by court, subject to appeal. — Whether an administrator shall be appointed, is determinable by the court and the result depends upon the facts as they shall be found. Moreover, the statute makes such finding conclusive and forbids any inquiry into the question of jurisdiction, "except in cases of fraud, so far as it depends on the residence of any person or the locality or amount of property . . . in any proceeding whatever, except on an appeal from the original case or when the want of jurisdiction appears on the same record." This seems tantamount to a direct grant of the right of appeal. Shaw, Appellant, 81 Me. 207, 16 A. 662.

And domicile of deceased may be conclusively settled by court taking jurisdiction.—Where jurisdiction assumed by the probate court was upon a representation, then satisfactorily proved, that the deceased at the time of his death was a citizen of this state, and the record so states, no appeal having been taken, and no suggestion of fraud being made; the question of domicile must be regarded as conclusively settled for all purposes connected with the administration of the estate. To hold otherwise would subject the settlement of the estate to all the inconveniences which it was plainly the object of this

statute to avoid. Record v. Howard, 58 Me. 225.

But record showing citizenship of deceased in another state indicates want of jurisdiction.—This section does not apply to cases where the want of jurisdiction is apparent upon the face of the record. The moment, therefore, that the record should be made to say that the deceased, at the time of his death, was a citizen of another state, and not a citizen of Maine, that moment the jurisdiction assumed in this case would be shown to be erroneous, and all the proceedings under it would become void, ab initio. Record v. Howard, 58 Me. 225.

Admission of will as foreign will is not subject to collateral attack, barring fraud.—A decree of the probate court in Maine admitting a will to probate as a foreign will cannot be collaterally attacked for want of jurisdiction, by attempting to show that the testatrix was a resident of this state at the time of her decease, no fraud being shown. Spencer v. Bouchard, 123 Me. 15, 121 A. 164.

Similarly as to jurisdictional value of estate.—Relative to probate proceedings, the element of the amount of property may not, save for fraud, or defect evident on inspection of the original record, be the subject of collateral attack. The remedy for relief is on appeal. In re Neely's Estate, 136 Me. 79, 1 A. (2d) 772.

Applied in Saunders v. Weston, 74 Me. 85.

Quoted in McNichol v. Eaton, 77 Me. 246.

Cited in Fowle v. Coe, 63 Me. 245.

Sec. 17. When judge or register interested, proceedings in adjoining county.—When a judge or register of probate is interested in his own right, trust, or in any other manner, or is within the degree of kindred, by which in law he may, by possibility, be heir to any part of the estate of the person deceased, or is named as executor, trustee or guardian of minor children in the will of any deceased resident of the county, such estate shall be settled in the probate court of any adjoining county, which shall have as full jurisdiction thereof as if the deceased had died therein. If his interest arises after jurisdiction of such estate has been regularly assumed or existed at the time of his appointment to office, and in all cases where an executor, administrator, guardian or trustee, whose trust is not fully executed, becomes judge or register of probate for the county in which his letters were granted, further proceedings therein shall be transferred to the probate court in any adjoining county and there remain till completed, as if such court had had original jurisdiction thereof, unless said disability is removed before that time. Whenever in any case within the provisions of this section the disability of the judge or register is removed before the proceedings have been fully completed, the proceedings shall then be transferred to the probate court in the county of original jurisdiction or to the probate court which otherwise would have had jurisdiction; and in all such cases the register in such adjoining county shall transmit copies of all records relating to such estate to the probate office of the county where such estate belongs, to be there recorded. (R. S. c. 140, § 17.)

Cross references.—See § 31, re register not to be counsel or draft papers, etc.; c. 158, § 1, re appointment of guardians for minors.

History of section.—See Marston, Petitioner, 79 Me. 25, 8 A. 87.

Sec. 18. Judge to certify unfinished acts of predecessor. — Every judge, upon entering on the duties of his office, shall examine the records, decrees, certificates and all proceedings connected therewith which his predecessor left unsigned or unauthenticated; and if he finds them correct, he shall sign and authenticate them and they shall then be as valid to all intents and purposes as if such duty had been done by his predecessor while in office. (R. S. c. 140, § 18.)

Signing of decree left by predecessor relates back to his act. — The action of a judge of probate, under this section, in signing a decree left unsigned, and in approving a bond left unapproved by his predecessor, related back to the act of his predecessor in office and is to be determined solely with reference to what his predecessor has done. Ryan v. Sanborn, 104 Me. 458, 72 A. 188.

Sec. 19. Oaths and acknowledgments taken, and nominations of guardians made, before certain officials within or without state.—All oaths required to be taken by executors, administrators, trustees or guardians, and all oaths required of commissioners of insolvency, appraisers and dividers of estates, or of any other persons in relation to any proceeding in the probate court, or to perpetuate the evidence of the publication of any order of notice, or of any notice of the time and place of sale of real estate by license of a judicial or probate court, may be administered by the judge or register of probate, by any justice of the peace or notary public; and a certificate thereof, when taken out of court, shall be returned into the registry of probate and there filed. When any person of whom such oath is required, including any person making an affidavit in support of a claim against an estate, or any parent acknowledging consent to an adoption, or any child over 14 years of age nominating his guardian, resides temporarily or permanently without the state, the oath or acknowledgment may be taken before and said nomination may be certified by a notary public without the state, a commissioner for the state of Maine or a United States consul. (R. S. c. 140, § 19. 1953, c. 39.)

Sec. 20. Judges not counsel in cases incompatible; nor draft documents which they are required to pass upon.—No judge of probate shall have a voice in judging and determining nor be attorney or counselor in or out of court in any civil action or matter which depends on or relates to any sentence or decree made by him in his office, nor in any civil action for or against any executor, administrator, guardian or trustee under any last will and testament, as such, within his county; and any process or proceeding commenced by him in the probate court for his county in violation of this section is void, and he is liable to the party injured in damages; nor shall any judge of probate draft or aid in drafting any document or paper which he is by law required to pass upon. (R. S. c. 140, § 20.)

Cross reference. — See c. 60, § 24, re judges prohibited from writing surety bonds.

Section strictly construed.—This section, being in derogation of the common law, must be construed strictly. Clark, Appellant, 119 Me. 150, 109 A. 752.

Prior to the enactment of this section a will was not invalidated even though it was drawn and witnessed by the judge of probate in the county in which the testator resided and died. Clark, Appellant, 119 Me. 150, 109 A. 752.

This section does not prohibit a judge of probate from drafting a will and until the legislature shall make it clear that a judge of probate shall not act as scrivener in drafting a will, it must be left to his own good sense of propriety as to whether he shall act in that capacity. Clark, Appellant, 119 Me. 150, 109 A. 752.

For it applies only to such documents as would ordinarily be passed upon by judge. —The legislature did not intend under this section to place in the prohibited class all papers and documents that might in some event come before a judge of probate to be passed upon; but only such as by reason of their nature, as petitions initiating proceedings in a probate court, or by reason of their being a part of the administration of an estate already pending, would in the ordinary course be passed upon by the judge of that court. Clark, Appellant, 119 Me. 150, 109 A. 752.

Sec. 21. Perpetual care of cemetery lots.—Judges of probate, in any case in which an estate is under their jurisdiction for probate, shall have the power to order that an appropriate amount out of the estate be set aside for perpetual care and suitable memorials for the cemetery lot in which the deceased is buried, and to order special care of such lots when the conditions and size of the estate seem to warrant such order. (R. S. c. 140, § 21.)

See c. 154, § 80, re allowance for burial lots and monuments; c. 154, § 83, re executors, etc., may provide for perpetual care of cemetery lots.

Registers of Probate.

Sec. 22. Registers elected; bond; salary; copies.—Registers of pro-

bate are elected or appointed as provided in the constitution. Their election is effected and determined as is provided respecting county commissioners by chapter 89, and they enter upon the discharge of their duties on the 1st day of January following; but the term of those appointed to fill vacancies commences immediately. All registers, before acting, shall give bond to the treasurer of their county with sufficient sureties, in the sum of $1,000; and every register, having executed such bond, shall file it in the office of the clerk of the county commissioners of his county, to be presented to them at their next meeting for approval; and, after the bond has been so approved, the clerk shall record it and certify the fact thereon, and retaining a copy thereof, deliver the original to the register, who shall deliver it to the treasurer of the county within 10 days after its approval, to be filed in his office.

Registers of probate in the several counties shall receive annual salaries from the treasuries of the counties in monthly payments paid on the last day of each month, as follows:

Androscoggin, $2,750,
Aroostook, $2,750,
Cumberland, $4,000,
Franklin, $1,500,
Hancock, $2,500,
Kennebec, $2,300,
Knox, $1,920,
Lincoln, $1,500,
Oxford, $2,350,
Penobscot, $3,000,
Piscataquis, $2,000,
Sagadahoc, $1,500,
Somerset, $2,600,
Waldo, $2,400,
Washington, $2,250,
York, $2,750.

The sums above mentioned shall be in full compensation for the performance of all duties required of registers of probate. They may make copies of wills, accounts, inventories, petitions and decrees and furnish the same to persons calling for them and may charge a reasonable fee for such service. Fees charged by them for such copies shall be retained by them and not paid to the county. Exemplified copies of the record of the probate of wills and the granting of administrations, guardianships and conservatorships, copies of petitions and orders of notice thereon for personal service, appeal copies and the statutory fees for abstracts and copies of the waiver of wills and other copies required to be recorded in the registry of deeds shall be deemed to be official fees for the use of the county.

Nothing in this section shall be construed to change or repeal any provisions of law requiring the furnishing of certain copies without charge. (R. S. c. 140, § 22. 1945, c. 39; c. 161, § 6; c. 167, § 6; c. 228; c. 240, § 2; c. 261, § 2; c. 280, § 9; cc. 289, 310; c. 319, § 2; c. 322, § 8. 1947, cc. 119, 296, 306, 326. 1949, cc. 176, 177; c. 188, § 2; c. 215, § 2; c. 260, § 2; c. 308, § 5; c. 360; c. 424, § 7; c. 432. 1951, c. 199; c. 311, § 8; c. 312, § 9; c. 313, § 7; c. 345. 1953, c. 121; c. 142, § 5; c. 209; c. 216, § 6; c. 247, § 5; c. 269, § 9; c. 276, § 8; c. 278, § 9; c. 288, § 3.)

See Me. Const., Art. 6, § 7, re election and tenure of office of judges and registers of probate; Art. 9, § 1, re oath; c. 89, §§ 1-5, re election and tenure of office of county commissioners.

Sec. 23. Condition of bond.—The condition of such bond shall be to account, according to law, for all fees received by him or payable to him by virtue of his office and to pay the same to the county treasurer quarterly, as provided

by law; to keep up, seasonably and in good order, the records of the court; to make and keep correct and convenient alphabets of the records and to faithfully discharge all other duties of the office. If such register forfeits his bond, he is thenceforth disqualified from holding said office, and neglect to complete his records for more than 6 months at any time, sickness or extraordinary casualty excepted, shall be adjudged a forfeiture. (R. S. c. 140, § 23.)

Quoted in Cumberland County v. Pennell, 69 Me. 357.

Sec. 24. Duties; act as auditors; records attested by volume; binding of original papers.—Registers of probate shall have the care and custody of all files, papers and books belonging to the probate office; and shall duly record all wills proved, letters of administration or guardianship granted, bonds approved, accounts allowed, all petitions for distribution and decrees thereon and all petitions, decrees and licenses relating to the sale, exchange, lease or mortgage of real estate, all petitions and decrees relating to adoption and change of name, and such orders and decrees of the judge, and other matters, as he directs. They shall keep a docket of all probate cases and shall, under the appropriate heading of each case, make entries of each motion, order, decree and proceeding so that at all times the docket will show the exact condition of each case. Any register may act as an auditor of accounts when requested to do so by the judge and his decision shall be final unless appeal is taken in the same manner as other probate appeals. The records may be attested by the volume, and it shall be deemed to be a sufficient attestation of such records, when each volume thereof bears the attest with the written signature of the register or other person authorized by law to attest such records. The registers of probate may bind in volumes of convenient size original inventories and accounts filed in their respective offices, and when so bound and indexed, such inventories and accounts shall be deemed to be recorded in all cases where the law requires a record to be made, and no further record shall be required. (R. S. c. 140, § 24.)

See § 3, re duties as to fees; § 17, re cases transferred to other counties.

Other records which registers are required to make:

See c. 27, § 111, re proceedings on commitment to insane hospitals; c. 154, § 15, re foreign wills; c. 154, § 62, re appointment of agent; c. 155, re duties of registers of probate as to inheritance taxes; c. 156, § 13, re judgment on partition; c. 156, § 14, re allowance; c. 156, § 21, re account of distribution; c. 158, § 13, re appointment of agent by nonresident guardian; c. 158, § 28, re nonresident guardians; c. 158, § 44, re change of name; c. 160, § 4, re appointment of agent by nonresident trustees; c. 163, § 15, re nonresident executors, etc.; c. 163, § 26, re affidavit of notice of sale of real estate; c. 170, § 13, re decree as to will when right of widow is in doubt; c. 170, § 14, re waivers and notices of intention to claim share by widow or widower.

Sec. 25. Register to certify copy of will to register of deeds if real estate is devised, or power given to executors or trustees to sell without license.—Within 30 days after a will has been proved and allowed in the probate court or in the supreme court of probate, the register shall make out and certify to the register of deeds in the county where the real estate is situated, a true copy of so much of said will as devises real estate, with the description thereof, so far as it can be furnished from said will, including so much of said will as may relate to powers of executors and trustees named in said will to sell real estate without license of court, and the name of the testator and of the devisee; and the register of deeds receiving such copy shall forthwith file the same, minuting thereon the time of the reception thereof as aforesaid, and record it in the same manner as a deed of real estate. (R. S. c. 140, § 25.)

See § 40, re fees for abstract of wills to register of deeds; c. 89, § 230, re miscellaneous records.

Sec. 26. Beneficiaries notified of bequests; copy furnished on request.—Registers of probate shall, within the time specified in the preceding section, notify by mail all beneficiaries under any will that bequests have been made to them, stating the name of the testator and executor or administrator with the will annexed. Beneficiaries shall, upon application, be furnished with a copy of so much of the will as relates to them, upon payment of a fee of 50¢, provided the copy does not exceed 10 lines of legal cap paper of not less than 10 words in each line, and 5¢ for each additional line of 10 words. (R. S. c. 140, § 26.)

Sec. 27. Register pro tempore.—In case of the death or absence of the register, the judge shall appoint a suitable person to act as register until the register resumes his duties or another is qualified in his stead; he shall be sworn and, if the judge requires it, give bond as in case of the register. (R. S. c. 140, § 27.)

Sec. 28. Judges to inspect register's conduct of office.—Every judge of probate and the justices of the supreme court of probate shall constantly inspect the conduct of the register with respect to his records and the duties of his office, and give information in writing of any breach of his bond to the treasurer of his county, who shall put it in suit; and the money thus recovered shall be applied toward the expenses of completing the records of such register under the direction of said judge and the surplus, if any, shall inure to the county; but if it is not sufficient for that purpose, the treasurer may recover the deficiency from the register in an action on the case. (R. S. c. 140, § 28.)

Sec. 29. If register incapable or neglects duties.—When a register is unable to perform his duties or neglects them, the judge shall certify such inability or neglect to the county treasurer, the time of its commencement and termination, and what person has performed the duties for the time; such person shall be paid by the treasurer in proportion to the time that he has served and the amount shall be deducted from the register's salary. (R. S. c. 140, § 29.)

Sec. 30. Records, in case of vacancy.—When there is a vacancy in the office of register and the records are incomplete, they may be completed and certified by the person appointed to act as register or by the register's successor. (R. S. c. 140, § 30.)

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

Sec. 31. Register not counsel in probate cases; nor draft or aid in drafting any paper which he is required to record.—No register shall be an attorney or counselor in or out of court in any suit or matter pending in the court of which he is register, nor in any appeal therefrom; nor be administrator, guardian, commissioner of insolvency, appraiser or divider of any estate, in any case within the jurisdiction of said court, except as provided in section 17, nor be in any manner interested in the fees and emoluments arising therefrom, in such capacity; nor commence or conduct, either personally or by his agent or clerk, any matter, petition, process or proceeding in the court of which he is register, in violation of this section, and for each and every violation of the preceding provisions of this section, such register shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 11 months. No register shall draft or aid in drafting any document or paper, which he is by law required to record in full or in part, under a penalty of not more than $100, to be recovered by any complainant in an action of debt for his benefit or by indictment for the benefit of the county. (R. S. c. 140, § 31.)

See c. 60, § 273, re register prohibited from writing surety bonds; c. 89, §§ 111, 226, re recording officer not to be attorney nor draft document he is required to record.

Supreme Court of Probate.

Sec. 32. Supreme court of probate; appellate jurisdiction; special guardians.—The superior court is the supreme court of probate and has appellate jurisdiction in all matters determinable by the several judges of probate; and any person aggrieved by any order, sentence, decree or denial of such judges, except the appointment of a special administrator, or any order or decree requiring any administrator, executor, guardian or trustee to give an additional or new official bond, or any order or decree under the provisions of section 59 of chapter 154, or any order or decree removing a guardian from office, may appeal therefrom to the supreme court of probate to be held within the county, if he claims his appeal within 20 days from the date of the proceeding appealed from; or if, at that time, he was beyond sea, or out of the United States and had no sufficient attorney within the state, within 20 days after his return or the appointment of such attorney.

When an appeal is taken on any ground to the appointment of a guardian of a minor or an adult person by the judge of probate under the provisions of chapter 158, the judge of probate may, notwithstanding such appeal, appoint a special guardian with or without further notice, if he decides that such appointment is necessary or expedient. Such special guardian shall give the same bond, have the same powers and perform the same duties as regular guardians until the appeal is disposed of.

By agreement of parties only exceptions may be alleged and cases certified either on agreed statements of facts or upon evidence reported by the judge of probate, in all matters determinable by the several judges of probate, as in the superior court, and the same shall be entered at the 1st or 2nd law term of the supreme judicial court to be held thereafter; and the supreme judicial court, sitting as a court of law, shall have the same jurisdiction of all questions of law arising on said exceptions, statements and reports as if they had come from the supreme court of probate; and all provisions of law and rules of the superior court or supreme court of probate relative to the transfer of actions and other matters shall apply to the transfer of cases from the probate court to said law court. Decisions of the law court in all such cases transferred directly from the probate court shall be certified to the register of probate of the county from which said transfer originated, with the same effect as if said transfer had originated from the supreme court of probate of said county. (R. S. c. 140, § 32. 1947, c. 244. 1949, c. 6. 1953, c. 219.)

I. General Consideration.
II. Procedural Aspects.
III. Persons "Aggrieved."
IV. Appeals Allowed and Disallowed.

Cross References.

See § 38, and note, re any person claiming under an heir at law may appeal; note to c. 113, § 93, re power of court as to references restricted by statute to cases pending in the supreme judicial or superior court; note to c. 154, § 7, re appeal lies when decree made on affidavit taken before register of probate; c. 163, § 24, re all heirs apparent or presumptive of the ward considered "interested in the estate"; note to c. 170, § 13, re widow may renounce husband's will within 6 months after decree of supreme court of probate.

I. GENERAL CONSIDERATION.

Section applicable to probate and equity jurisdiction.—The language of this section is equally appropriate whether the decree appealed from is that of a judge exercising probate or equity jurisdiction. Norris v. Moody, 120 Me. 151, 113 A. 24.

Appeal is to supreme court of probate, not law court.—The proper procedure by a party aggrieved by a decree of a judge of probate exercising equity jurisdiction, is by appeal to the supreme court of probate, and not by direct appeal to the law court. Norris v. Moody, 120 Me. 151, 113 A. 24.

Supreme court of probate has appellate jurisdiction coextensive with jurisdiction of probate court.—The supreme court of probate is created by the statute as an appellate court. Its jurisdiction and proceedings are clearly defined by the statute. It has the same jurisdiction as the probate court but the jurisdiction is appellate and not original. Shannon v. Shannon, 142 Me. 307, 51 A. (2d) 181.

The probate court has only such jurisdiction as is conferred upon it by statute. And the supreme court of probate has no more. Thompson, Appellant, 114 Me. 338, 96 A. 238.

And if probate court has no jurisdiction, neither has appellate court.—Assuming the want of jurisdiction in the probate court, no action which the supreme court of probate could take in the premises would be of any avail, either to confirm or reverse an act which was simply void. Veazie Bank v. Young, 53 Me. 555.

Proceedings of courts of probate are not according to common law.—Courts of probate are wholly creatures of the legislature; they are of special and limited jurisdiction, and their proceedings are not according to the course of the common law. Cotting v. Tilton, 118 Me. 91, 106 A. 113.

And jury trial cannot be claimed of right.—Courts of probate are of special and limited jurisdiction. Their proceedings are not according to the course of the common law. They have no juries. Neither party upon appeal can claim as a matter of right, a trial by jury. Thompson, Appellant, 118 Me. 114, 106 A. 526.

Appeals may be brought only by persons entitled thereto.—The supreme court of probate has an appellate jurisdiction and nothing more. Even in the appellate field its authority is confined to cases within the jurisdiction of courts of probate, and to those brought forward by one entitled to prosecute an appeal. Kimball, Petitioner, 142 Me. 182, 49 A. (2d) 70.

After complying with statutory requisites.—The right of appeal under this section is conditional, and the appeal can be prosecuted only upon complying with the requisites of the statute. Moore v. Phillips, 94 Me. 421, 47 A. 913; Abbott, Appellant, 97 Me. 278, 54 A. 755; Chaplin, Appellant, 131 Me. 187, 160 A. 27; French, Appellant, 134 Me. 140, 183 A. 130.

For without such compliance jurisdiction not conferred. — The right of appeal is statutory. If compliance with indicated requirements is not had, jurisdiction is not conferred upon the appellate tribunal. Nichols v. Leavitt, 118 Me. 464, 109 A. 6.

Decree held affirmed where requisites of appeal not observed.—Where the judge of probate refuses to grant a petition to sell real estate under c. 163, § 1, to pay the debts of the deceased and charges of administration, and dismisses the petition, and an appeal is taken to the supreme court of probate; and there is no exhibition in the decree, nor in the reasons for the appeal, of the evidence presented to the judge of probate, nor does it appear that there was satisfactory proof that the services giving rise to alleged debts had been performed, nor that the personal property was inadequate to meet what was required; the decree of the judge of probate must be affirmed. Mayall, Appellant, 29 Me. 474.

Right of appeal extends no further than statute provides.—The right of appeal from any decree or order of the probate court is conferred by statute only and can extend no further than the statute provides. Cotting v. Tilton, 118 Me. 91, 106 A. 113.

A probate appeal is not a common-law procedure. It is a matter of statutory prescription and gives no latitude for construction, as the language is plain and unambiguous. Carter, Appellant, 111 Me. 186, 88 A. 475.

Such right must be affirmatively alleged and established.—The right of appeal from any decree or order of the probate court is conferred by statute only, can extend no further than the statute provides, and must be affirmatively alleged and established by the case presented. Sprowl v. Randell, 108 Me. 350, 81 A. 80.

The right of appeal must be shown before the decree can be either reversed or affirmed. Veazie Bank v. Young, 53 Me. 555.

The statute has prescribed the conditions upon which an appeal may be claimed, and until these have been complied with, no right of appeal exists and no appeal can be entertained in the appellate court. In the hearing of a probate appeal the first duty of the appellant is to establish his right to appeal. Carter, Appellant, 111 Me. 186, 88 A. 475.

Unless the appellant's right to appeal is affirmatively established by the case presented, the appeal will be dismissed. Briard v. Goodale, 86 Me. 100, 29 A. 946; Moore v. Phillips, 94 Me. 421, 47 A. 913; Abbott, Appellant, 97 Me. 278, 54 A. 755; French, Appellant, 134 Me. 140, 183 A. 130.

There is no doubt that an appeal lies from every decision of the judge of probate, though the supreme court of probate is disposed to respect the exercise of the sound discretion of the judge of probate in all cases. Cooper, Appellant, 19 Me. 260.

Every action of the probate court in modifying or revoking a decree previously made is subject to the right of appeal to the supreme court of probate by any person aggrieved. Bergeron, Appellant, 98 Me. 415, 57 A. 584.

Though exceptions do not lie to the exercise of the judge's discretion in framing issues to a jury in a probate appeal. Sawyer v. Chase, 92 Me. 252, 42 A. 391.

Nor to discretion of presiding justice in allowing or disallowing appeal.—A petition for leave to enter an appeal from a decree of the judge of probate when heard by the presiding justice of the supreme court is addressed to his discretion, and his decision as to whether the petition should be granted is final and not subject to exception. Ellis, Petitioner, 116 Me. 462, 102 A. 291.

And appellant confined to questions raised in reasons of appeal.—In an appeal before the supreme court of probate the appellant is confined to such matters and questions as were specifically stated in the reasons of appeal. Kimball, Petitioner, 142 Me. 182, 49 A. (2d) 70; Shannon v. Shannon, 142 Me. 307, 51 A. (2d) 181.

Appellant must establish his interest.—In order to entitle him to be heard in the supreme court of probate, it is the duty of every appellant from a decree of a probate judge, as a preliminary proceeding, to establish his interest in the subject matter of the decree from which he claims an appeal, and this is as essential to his standing in the appellate court, as it is to show that he has duly claimed an appeal and filed his bond and reasons thereupon according to law. Veazie Bank v. Young, 53 Me. 555.

Which is pecuniary.—No person has the right of appeal unless he has a pecuniary interest in the subject matter of the decision or decree by which he claims to be aggrieved. This interest must be shown or the appeal will be dismissed. Abbott, Appellant, 97 Me. 278, 54 A. 755.

And such interest should be alleged in petition or motion.—In order to establish by proof, if denied, such interest as entitles one to appeal, it must be alleged in the petition or motion claiming an appeal. Abbott, Appellant, 97 Me. 278, 54 A. 755.

That an appeal has been legally made should appear to the appellate court from the records of the probate court. Moody v. Moody, 11 Me. 247.

Record should show appeal claimed, bond, and reasons of appeal.—If the proceedings in the probate court are duly and properly conducted, the superintendence of which belongs to the supreme court of probate, the appeal claimed, the bond to prosecute it, and the reasons of appeal should be found on the records and files of that court. Moody v. Moody, 11 Me. 247.

Appeal not entered according to statute is not properly before court.—Where the record in the case shows the appeal was not entered as provided by §§ 32 and 33, or by leave of court as provided by § 34, it is not properly before the court. Carter, Appellant, 113 Me. 232, 93 A. 543.

Either party may appeal, which vacates judgment.—The general principle applicable to appeals, when they are allowable, is well settled. Either party may appeal from an adverse judgment. Both parties may deem the judgment adverse and appeal therefrom. An appeal in all cases vacates the judgment appealed from. Gilman v. Gilman, 53 Me. 184.

The validity of a decree, from which an appeal has been duly claimed, is suspended; and it has no longer any validity or binding force, until affirmed in the supreme court. Moody v. Moody, 11 Me. 247.

A valid appeal vacates a valid decree ipso facto; but a void appeal gives the appellate court no jurisdiction and leaves the original decree in full force and virtue. Thompson, Appellant, 116 Me. 473, 102 A. 303.

Whereupon cause is heard de novo.—The status of a probate decree after appeal is not defined by our statutes. It is left to judicial interpretation. The effect of an appeal is generally to vacate the judgment or decree of the probate court which is thenceforth of no force or effect. The cause is to be heard de novo upon new proofs and arguments. Shannon v. Shannon, 142 Me. 307, 51 A. (2d) 181.

Entire proceedings are examinable.—On an appeal from the probate court, the whole proceedings are again examinable in the appellate court, so far as they are opened by any of the causes assigned, and new as well as the former testimony may be introduced touching those issues. Moody v. Hutchinson, 44 Me. 57.

Upon both facts and law. — The appeal for which the statute provides, from the original probate court to the higher probate court, brings up questions of fact as well as of law. Martin, Appellant, 133 Me. 422, 179 A. 655.

A case removed to a superior tribunal is reheard upon the facts as well as the law. It is treated as if it had been commenced in the superior court. The parties may produce new proof, and new proceedings may take place which law and justice may require for the investigation of the truth. These principles apply to courts of pro-

bate equally as to other courts. Shannon v. Shannon, 142 Me. 307, 51 A. (2d) 181.

And new decree is made upon evidence presented to appellate court. — An appeal vacates the decree and brings the whole subject matter of the appeal de novo before the supreme court of probate. A new decree is to be made by the appellate court upon the evidence presented to it which might have been the same or entirely different from that presented to the probate court. Shannon v. Shannon, 142 Me. 307, 51 A. (2d) 181.

The decree of the appellate court must be based on the proofs before it and cannot be based on proofs or upon the legal effect of such proofs in the court below and not before it. Shannon v. Shannon, 142 Me. 307, 51 A. (2d) 181.

The decree of the supreme court of probate is a new decree and a final judgment. Shannon v. Shannon, 142 Me. 307, 51 A. (2d) 181.

But it may be attacked in probate court on jurisdictional grounds. — A decree of the supreme court of probate is open to direct attack in a court of probate as to all matters within the exclusive original jurisdiction of the probate courts. Kimball, Petitioner, 142 Me. 182, 49 A. (2d) 70.

Also for irregularities in procedure. — Courts of probate have jurisdiction to review proceedings in the supreme court of probate on allegations involving irregularities in procedure. Kimball, Petitioner, 142 Me. 182, 49 A. (2d) 70.

For the courts of probate have an original and exclusive jurisdiction in probate matters. This principle accords with the rule prevailing in Massachusetts. Kimball, Petitioner, 142 Me. 182, 49 A. (2d) 70.

A petition for annulment addressed to the supreme court of probate is not a proper remedy, assuming an error, for that court has no original jurisdiction. Kimball, Petitioner, 142 Me. 182, 49 A. (2d) 70.

Nor has the superior court authority to set aside all action by the probate court and institute administration de novo. Kneeland v. Buzzell, 135 Me. 363, 197 A. 155.

Reference of probate appeals not authorized.—The right of reference of probate appeals is certainly not expressly given to the supreme court of probate, and that court cannot supply what the legislature has totally omitted. Chaplin, Appellant, 131 Me. 187, 160 A. 27; Kimball, Petitioner, 142 Me. 182, 49 A. (2d) 70.

And objection therefor may be raised at any time.—Although a reference is by consent of the parties, and though the action of the referee in sitting and deciding the appeal is on their waiver of any question of illegality; exception that in the first instance there could not validly be an agreement to refer, nor afterward to invest the referee with authority, may not be put aside. It goes to jurisdiction. This defect may be raised at any time. Chaplin, Appellant, 131 Me. 187, 160 A. 27.

A hearing on a probate appeal in the supreme court of probate is not essential if the parties do not desire it at the time action is taken to reverse or affirm a probate court decree in whole or in part. Kimball, Petitioner, 142 Me. 182, 49 A. (2d) 70.

Section not superseded by c. 158, § 41. —C. 158, § 41, concerning appeal by a child from an adoption decree, not being repugnant to this section, does not repeal or supersede it. It is not designed as a substitute for this section, nor to limit it, but it is rather intended to supplement and extend it. Cummings, Appellant, 126 Me. 111, 136 A. 662.

That provision relieves child from giving bond on appeal from adoption decree.—Under this section a child appealing from a decree of adoption would be required to give bond in order to appeal, but under c. 158, § 41 the child or next friend is relieved from the bond required by this section. Cummings, Appellant, 126 Me. 111, 136 A. 111.

Wills are allowable by supreme court of probate or by probate court.—Wills do not become operative until proved and established in some court having jurisdiction for that purpose—in this state, upon allowance by the court of probate, or by the appellate supreme court of probate. No other tribunal can give effect to a will. Martin, Appellant, 133 Me. 422, 179 A. 655.

There is no appeal from supreme court of probate. — There is no provision of statute for an appeal from a decree of the justice of the supreme court of probate and such attempted appeal cannot be entertained or considered. Cotting v. Tilton, 118 Me. 91, 106 A. 113.

But errors of law and questions presented by supreme court of probate are cognizable in law court.—In very many cases the doings of the supreme court of probate are subject to revision, according to the ordinary course of proceeding, by the law court; and any errors in law, into which that court may have fallen may be corrected; or any questions which that court may see fit to present by report to the law court are cognizable by it upon

proper proceedings to bring them before it. McKenney v. Alvord, 73 Me. 221.

Though findings by supreme court of probate, supported by evidence, are conclusive.—The findings of fact by the justice presiding in the supreme court of probate are conclusive and not to be reviewed by the law court if the record shows any evidence to support them. It is the finding of facts without evidence that can be challenged by exceptions. Thompson, Appellant, 116 Me. 473, 102 A. 303; Chaplin, Appellant, 133 Me. 287, 177 A. 191; First Auburn Trust Co. v. Baker, 134 Me. 231, 184 A. 767; First Auburn Trust Co., Appellant, 135 Me. 277, 195 A. 202; Edwards v. Williams, 139 Me. 210, 28 A. (2d) 560; Heath, Appellant, 146 Me. 229, 79 A. (2d) 810.

Exceptions to the decree of the supreme court of probate raise only questions of law. If as matter of law there is no evidence to sustain the decree then the exceptions must be sustained, otherwise overruled. Cotting v. Tilton, 118 Me. 91, 106 A. 113.

In the appellate court questions of law may arise in the discussion and development of the case, to which exceptions are taken. Martin, Appellant, 133 Me. 422, 179 A. 655.

And law court determines only whether there was evidence to support decree. — The law court sits to determine whether or not there was sufficient evidence (any evidence is the common expression), to justify the findings and decree of the appellate probate court. Eastman, Appellant, 135 Me. 233, 194 A. 586.

To secure review, evidence on which decree based must be presented to law court.—To enable the law court to review a decision of the supreme court of probate, the reviewing tribunal should have before it the testimony upon which the presiding justice arrived at his conclusion. Edwards v. Williams, 139 Me. 210, 28 A. (2d) 560.

But review of decree of appellant court cannot be had on motion for new trial.— A decree of a justice of the supreme court of probate, under the statutes of this state, cannot be reviewed by the law court on a general motion for a new trial. Nor can it be considered on appeal. It must be brought forward on exceptions. Tuck v. Bean, 130 Me. 277, 155 A. 277.

However, such motion, without decree will be entertained. —Where an appellant files a motion for a new trial addressed to the law court, without any decree having been made by the supreme court of probate, the motion will not be dismissed without considering the merits of the case, in view of the fact that such a practice has been of long standing; but as a matter of strict statutory construction, it may well be doubted whether this course of procedure is correct within the meaning of this section and c. 103, § 15. Thompson, Appellant, 118 Me. 114, 106 A. 526.

Applied in Sturtevant v. Tallman, 27 Me. 78; White v. Riggs, 27 Me. 114; Leighton v. Chapman, 30 Me. 538; Emerson, Appellant, 32 Me. 159; Tenney v. Butler, 32 Me. 269; Gross v. Howard, 52 Me. 192; State v. Hichborn, 67 Me. 504; Backus v. Cheney, 80 Me. 17, 12 A. 636; Deake, Appellant, 80 Me. 50, 12 A. 790; Merrill v. Regan, 117 Me. 182, 103 A. 155; Nickels v. Nichols, 118 Me. 21, 105 A. 386; Clark, Appellant, 119 Me. 150, 109 A. 752; Singhi v. Dean, 119 Me. 287, 110 A. 865; Maxim v. Maxim, 129 Me. 349, 152 A. 268; Hiltz, Appellant, 130 Me. 243, 154 A. 645; Waitt, Appellant, 140 Me. 109, 34 A. (2d) 476; Robie, Appellant, 141 Me. 369, 44 A. (2d) 889; Cantillon v. Walker, 146 Me. 160, 78 A. (2d) 782.

Quoted in part in Knapp, Appellant, 145 Me. 189, 74 A. (2d) 217.

Sections 32-34 cited in Record v. Howard, 58 Me. 225.

Sections 32-37 cited in Merrill v. Crossman, 68 Me. 412.

Cited in Twitchell v. Blaney, 75 Me. 577; Abbott v. Abbott, 106 Me. 113, 75 A. 323; Perkins v. Kavanaugh, 135 Me. 344, 196 A. 645.

II. PROCEDURAL ASPECTS.

Technical precision of statement and pleading are not required in probate appeals to the same extent as in actions at law. Carter, Petitioner, 110 Me. 1, 85 A. 39.

In a will contest, technical rules of pleading, in reference to bringing the case to the law court, have never been permitted to prevent the exercise of revisory power. Martin, Appellant, 133 Me. 422, 179 A. 655.

Question whether petition can be maintained is raised by motion to dismiss.— The long and well established practice of raising the questions presented for consideration to the supreme court of probate as to whether or not the petition can be maintained, is by motion to dismiss. Edwards v. Williams, 139 Me. 210, 28 A. (2d) 560.

And misdescription of appellants held amendable.—When in an appeal the appellants have inadvertently described themselves as heirs of the deceased, instead of legatees under a prior will, such misdescription does not bar the appeal and it

may be amended. Smith v. Chaney, 93 Me. 214, 44 A. 897.

Probate appeal is transferable.—A probate appeal is a "civil action" within the purview of c. 113, § 24, authorizing the transfer of "any civil action," from one county to another for trial. Sproul v. Randell, 107 Me. 274, 78 A. 450.

Motion to set aside verdict not proper.—On an appeal to the supreme court of probate, a motion, after hearing and verdict, to set aside the verdict, or for a new trial is not appropriate procedure. Look, Appellant, 129 Me. 359, 152 A. 84.

Sufficiency of bills of exception determined by usual rules.—The sufficiency of bills of exceptions to the findings and decrees of the supreme court of probate is determined by the same rules of law which determine the sufficiency of bills of exceptions in other civil cases, and especially by those applicable to bills of exceptions from the findings and decisions of a single justice in cases tried without the intervention of a jury. Heath, Appellant, 146 Me. 229, 79 A. (2d) 810.

III. PERSONS "AGGRIEVED."

The right of appeal is allowed only to persons "aggrieved." Rawson v. Lowell, 34 Me. 201; Thompson, Appellant, 114 Me. 338, 96 A. 238.

"Aggrieved" is not mere dissatisfaction.—It is not every person who disapproves of, or is dissatisfied with, a judgment or decree of a judge of probate, who is "aggrieved" thereby, within the meaning of the law. Lunt v. Aubens, 39 Me. 392; Briard v. Goodale, 86 Me. 100, 29 A. 946; Moore v. Phillips, 94 Me. 421, 47 A. 913; Stilphen, Appellant, 100 Me. 146, 60 A. 888.

The law does not base the right of appeal upon sentimental grounds. Aggrieved does not mean grief stricken. A fortiori it does not mean merely dissatisfied. Cummings, Appellant, 126 Me. 111, 136 A. 111.

And mere remote and contingent interest does not make appellant aggrieved.—It is not a mere remote and contingent interest, or a wish dictated by whim or policy, without any pecuniary interest to be directly affected by the decree, that will suffice to place an appellant within the meaning of the word "aggrieved." Veazie Bank v. Young, 53 Me. 555.

"Aggrieved" contemplates property or interests affected.—In legal acceptation a party is "aggrieved" by a decree of probate only when it operates on his property, or bears upon his interest directly. Deering v. Adams, 34 Me. 41; Lunt v. Aubens, 39 Me. 392; Veazie Bank v. Young, 53 Me. 555; Woodbury v. Hammond, 54 Me. 332; Paine v. Goodwin, 56 Me. 411; Allen v. Smith, 80 Me. 486, 15 A. 62; Cummings, Appellant, 126 Me. 111, 136 A. 111.

And established or divested by decree.—A party aggrieved is one whose pecuniary interest is directly affected by the decree; one whose right of property may be established or divested by the decree. Veazie Bank v. Young, 53 Me. 555; Briard v. Goodale, 86 Me. 100, 29 A. 946; Sherer v. Sherer, 93 Me. 210, 44 A. 899; Moore v. Phillips, 94 Me. 421, 47 A. 913; Stilphen, Appellant, 100 Me. 146, 60 A. 888; Swan, Appellant, 115 Me. 501, 99 A. 449; French, Appellant, 134 Me. 140, 183 A. 130.

The mere fact that a person is hurt in his feelings, wounded in his affections, or subjected to inconvenience, annoyance, discomfort or even expense by a decree, does not entitle him to appeal from it, as one aggrieved, as long as he is not thereby concluded from asserting or defending his claims of personal or property rights in any proper court. Sherer v. Sherer, 93 Me. 210, 44 A. 899.

IV. APPEALS ALLOWED AND DISALLOWED.

Appeal granted to decree issuing letters of administration where jurisdiction questioned.—Where the jurisdiction of the probate court to issue letters of administration is drawn in question, and it appears that the property interests of the appellants are directly affected by the decree of that court, they have the right of appeal. Shaw, Appellant, 81 Me. 207, 16 A. 662.

And to decree granting creditor leave to sue insolvent estate.—A decree of the judge of probate, granting leave to a creditor of an insolvent estate to institute a suit at common law, is subject to the right of appeal. Bates v. Sargent, 51 Me. 423.

Also to decree giving allowance to widow.—An appeal lies from the judgment of the probate court, giving an allowance to the widow, though the amount to be allowed is a matter of discretion in the judge. Cooper, Appellant, 19 Me. 260; Bates v. Sargent, 51 Me. 423.

Unless estate appears solvent.—Where it does not appear that the estate being administered in probate is insolvent, but instead it is evident that there are sufficient assets to pay all the indebtedness of the estate, as well as the allowance to the widow of the deceased as granted by the court, a creditor of the estate is not aggrieved by such allowance and may not appeal from the decree by which it is made. French, Appellant, 134 Me. 140, 183 A. 130.

Appeal allowed to alleged legatees.—Persons named as legatees in a written

instrument purporting to be the will of one deceased, though not presented for probate, can appeal from a decree of the judge of probate allowing another instrument of a later date as the will of the deceased. Smith v. Chaney, 93 Me. 214, 44 A. 897.

And to grantee of residuary legatee.—A grantee of real estate from the residuary legatee under a will, where there is no property of the testator which can be reached to satisfy the debts and claims against his estate, except such real estate, is interested in the settlement of the account of the executor or administrator of the estate, and has a right of appeal from the decree of the judge of probate allowing the account. Blastow v. Hardy, 83 Me. 28, 21 A. 179.

A ward may appeal from a decree granting or refusing the guardianship over him. Witham, Appellant, 85 Me. 360, 27 A. 252.

As may his heir presumptive.—An heir presumptive of the ward was held entitled to have an appeal from a decree appointing a guardian. Briard v. Goodale, 86 Me. 100, 29 A. 946.

And next of kin.—The pecuniary interest of next of kin, and heirs apparent or presumptive of the ward may be as seriously affected by the appointment of an unsuitable person for guardian, as by the settlement of an erroneous account; for the guardian not only has the care and management of the ward's estate, but the protection and custody of his person. The next of kin or heir presumptive of the ward may be aggrieved within the purview of this section, and can lawfully take an appeal from such decree. Lunt v. Aubens, 39 Me. 392.

But not stepmother of ward.—The stepmother of minor children, whose parents are both dead, cannot appeal from a decree appointing some other person as guardian, though such decree may deprive her of their custody and companionship. Sherer v. Sherer, 93 Me. 210, 44 A. 899.

Nor trustees of fund held for ward.—From a decree of the judge of probate, appointing a guardian to a minor child, the trustees of a fund bequeathed for the benefit of such child have no authority to appeal as persons aggrieved. Deering v. Adams, 34 Me. 41; Sherer v. Sherer, 93 Me. 210, 44 A. 899.

Nor can sister of incompetent appeal from decree appointing guardian, unless interest shown.—A sister to a person of unsound mind cannot appeal from a decree appointing some other person to be the guardian of her relative, unless at least she has an interest in the estate of her relative as heir. Sherer v. Sherer, 93 Me. 210, 44 A. 899.

Where a sister appealed from the decree of the probate court appointing a guardian to her sister as a person of unsound mind, and neither specified in her reasons for the appeal, nor alleged in her exceptions that she is an heir apparent or an heir presumptive of the ward, it was held that the exceptions should be overruled and the appeal dismissed; for it does not appear affirmatively that the appellant is legally interested in the ward's estate, and is not, therefore, a person "aggrieved." Briard v. Goodale, 86 Me. 100, 29 A. 946.

But mother may appeal from decree depriving her of her child.—By a decree severing every tie between her minor child and herself a mother may justly claim to be "aggrieved," and may appeal. Cummings, Appellant, 126 Me. 111, 136 A. 111.

Surety upon guardian's bond cannot appeal decree allowing account.—A surety upon a guardian's bond has no right of appeal, as a person aggrieved, from the decree of a judge of probate, allowing a guardianship account, filed by the administrator of the deceased guardian. Woodbury v. Hammond, 54 Me. 332.

Nor can debtor appeal from decree of administration.—A debtor to the estate of a deceased person cannot interpose an appeal from a decree granting administration upon the estate, and thus indirectly and indefinitely postpone or defeat the assertion of a claim against himself. The alleged debtor of a debtor who denies the existence of his indebtment to the debtor of the estate is quite as remote. Veazie Bank v. Young, 53 Me. 555.

A debtor of a deceased person cannot appeal from the appointment of a particular person as administrator, notwithstanding his argument that the person appointed would act oppressively toward him. Sherer v. Sherer, 93 Me. 210, 44 A. 899.

Nor mere garnishee of such debtor.—A mere garnishee of a debtor to the estate of a deceased person, has no such interest in the appointment of an administrator upon such estate as enables him to appeal from the decree of the judge of probate making such appointment. Veazie Bank v. Young, 53 Me. 555.

A creditor cannot appeal from a decree denying a license to sell real estate for the payment of debts, though such denial may compel him to incur the expense of an action and levy. Sherer v. Sherer, 93 Me. 210, 44 A. 899.

Heirs may appeal licensing of sale of

ancestor's land.—Appellants, as heirs at law, are interested and may be aggrieved if license or authority to sell the estate of their ancestor should be improvidently granted. A person interested may appeal from a decree licensing the sale of real estate. Bates v. Sargent, 51 Me. 423.

And holder of lands fraudulently conveyed may appeal licensing of sale thereof.—When a license has been granted by a probate court to an administrator to sell lands conveyed by the deceased in his lifetime for the payment of debts, on the ground that such land had been fraudulently conveyed, under c. 163, §§ 1 and 22, the party holding such conveyance has the right of appeal. Allen v. Smith, 80 Me. 486, 15 A. 62.

Husband may appeal from distribution of wife's estate, unless he assigns his share.—A husband would be aggrieved by an adverse decree of distribution upon his wife's estate, and he may appeal therefrom. But where he has assigned his share to the administrator for certain uses, the decree of the probate court allowing the administrator's account, which accounted for the husband's share in the manner directed in his assignment, will be sustained. Tillson v. Small, 80 Me. 90, 13 A. 402.

One having testamentary life estate may appeal decree allowing executor's account.—One, who by a will is to have a life estate in land, upon certain contingencies and conditions therein named, may, as one aggrieved, appeal from the decree of the judge of probate allowing the account of the executor of the will. Paine v. Goodwin, 56 Me. 411.

But not one having distributive share in estate of residuary legatee.—A person entitled to a distributive share in the estate of a residuary legatee has no right to appeal from a decree allowing the executor's account, but such appeal must be claimed by the legal representative of such residuary legatee. Veazie Bank v. Young, 53 Me. 555.

Administrator cannot appeal from decree of distribution of funds in his hands.—It is obvious that an administrator has no pecuniary or personal interests which can be affected by a decree of distribution of funds shown by the account in his hands. He has no property rights which can be established or divested by such a decree. It is immaterial to him to whom he is required to pay over such funds and he cannot be said to be aggrieved by a decree directing him to pay to a legatee rather than to an heir. Stilphen, Appellant, 100 Me. 146, 60 A. 888.

And appeal from decree allowing his account was disallowed.—Where the account of an executor correctly shows the amount he has actually paid the appellants on their claim against the estate, an appeal from the allowance of the account will not be sustained on the alleged ground that a larger sum ought to have been paid on said claim. If that grievance exists in fact, it is to be redressed by suit against the estate, and not by an appeal from the allowance of the account of the executor. Swan, Appellant, 115 Me. 501, 99 A. 449.

As was appeal from decree authorizing action on his bond.—An administrator cannot appeal from a decree of the judge of probate authorizing an action on his bond, for he is not a person "aggrieved" in the statutory sense of that word. Nor is he thereby concluded from asserting or defending his claims of personal or property rights in any proper court. Sherer v. Sherer, 93 Me. 210, 44 A. 210.

And in §§ 32-37 is found no provision for the taking of an appeal by an executor or administrator of a person aggrieved. Sprowl v. Randell, 108 Me. 350, 81 A. 80.

Creditors may appeal from allowance of commission to executor if estate insolvent.—Creditors of an estate in process of settlement in the probate court are interested in a decree of the judge of probate allowing a commission to the executor, if such estate is insolvent or is rendered insolvent by such allowance. And if the amount of the commission is excessive, the creditors are thereby aggrieved. Swan, Appellant, 115 Me. 501, 99 A. 449.

And dismissal, without hearing on question of alleged excessive commission, is error.—Where one reason of the appeal is that the judge of probate allowed the executor a commission in excess of what should have been allowed, a ruling by the supreme court of probate dismissing the appeal without a hearing on that question is reversible error. Swan, Appellant, 115 Me. 501, 99 A. 449.

Claimant of gift causa mortis cannot appeal from decree charging administrator with such property.—A person claiming property under a gift to him causa mortis cannot appeal from a decree charging the administrator with the property and ordering its distribution among the next of kin, notwithstanding the argument that such decree would subject him to the an-

noyance and expense of a lawsuit. Sherer v. Sherer, 93 Me. 210, 44 A. 899.

Nor can petitioner for probate of will appeal merely because his attitude changed after will allowed.—A petitioner for the probate of a will cannot be said in law to be aggrieved by a decree granting his petition and admitting the will to probate, though his attitude to the proceedings may have changed. Thompson, Appellant, 114 Me. 338, 96 A. 238.

Sec. 33. Bond and reasons of appeal; service on other parties; service on resident attorney of record sufficient.—Within the time limited for claiming an appeal, the appellant shall file in the probate office his bond to the adverse party or to the judge of probate for the benefit of the adverse party, with sufficient sureties resident in the state or with a surety company authorized to do business in the state as surety, in such sum as the judge approves, conditioned to prosecute his appeal with effect, and to pay all intervening costs and damages and such costs as the supreme court of probate taxes against him, and he shall also file in the probate office the reasons of appeal; and, 14 days at least before the sitting of the appellate court, he shall serve all the parties who appeared before the judge of probate on the case that have entered or caused to be entered their appearance in the docket of said court, with a copy of such reasons, attested by the register. When a party appears by an attorney residing in this state before the judge of probate in any case and an appeal is taken, the service of a copy of the reasons of appeal upon such attorney shall be sufficient. In case of controversy between a person under guardianship and his guardian, the supreme court of probate may sustain an appeal on the part of the ward without such bond. (R. S. c. 140, § 33.)

Cross reference.—See c. 158, § 41, re appeal to supreme court of probate in adoption of children cases.

The security of the bond is equally required whether the appeal is under § 32 or § 34. Mathews v. Patterson, 42 Me. 257; Carter, Appellant, 111 Me. 186, 88 A. 475.

Appeal requires compliance with this section.—This right of appeal is conditional. It can be presented only upon complying with the requisites of this section. Bartlett, Appellant, 82 Me. 210, 19 A. 170.

This section prescribes conditions upon which an appeal may be claimed, and until these have been complied with, no right of appeal exists and no appeal can be entertained in the appellate court. Moore v. Phillips, 94 Me. 421, 47 A. 913.

The filing of a bond is, in general, made an essential prerequisite to the right to maintain an appeal. It is a condition precedent. Curtiss v. Morrison, 93 Me. 245, 44 A. 892; Carter, Appellant, 111 Me. 186, 88 A. 475.

The filing of the bond required by this section is an essential jurisdictional requirement, without which a probate appeal cannot be perfected. Crockett, Appellant, 147 Me. 173, 84 A. (2d) 808.

And the judge cannot dispense with bond.—While it may be conceded there is a discretionary power vested in the judge of probate authorizing him to approve the sum for which bond may be given, and the pecuniary ability of the sureties signing it, yet he has no such discretion as would authorize him to dispense with any of the requisites to such bonds expressly provided by statute. Bartlett, Appellant, 82 Me. 210, 19 A. 170.

It must be filed at or before entering appeal.—This statute is clear and plain and means precisely what it says. Within the time limited for filing an appeal, which means at or before the time of entering the appeal, the appellant must file a bond in order to make the appeal effective. Carter, Appellant, 111 Me. 186, 88 A. 475.

And must be sealed; it is not amendable if not sealed.—An instrument, although purporting to be a bond, if not sealed, cannot be regarded as a bond in contemplation of this section. And such an instrument is not amendable; for to permit the addition of seals to a bond would be equivalent to allowing them to file a new bond, inasmuch as the addition of seals would make a new contract between the obligors and the sureties in the bond, and the obligee. Carter, Appellant, 111 Me. 186, 88 A. 475.

And appeal is not effective if bond not sealed.—An instrument without seals, although perfect in all other respects, is not a bond under the requirements of the

statute; an appeal with an unsealed bond is not effective. Carter, Appellant, 111 Me. 186, 88 A. 475.

Bond held sufficient.—In a particular case although in strictness the appeal was not claimed until November 29, the date when the "appeal and reasons of appeal" were filed in the probate court, these papers were dated November 20. Although the bond was dated November 24, it was not presented to the probate court until November 29, and then simultaneously with the aforesaid appeal and reasons of appeal. The fact that the bond refers to the appeal as having been claimed on the date of the papers, November 20, instead of on November 29, the date it was filed in court, does not vitiate the bond. The fact that the bond bears a date prior to the date of filing the appeal is immaterial. It was made and dated subsequent to the making of the appeal papers, and it took effect not from the date which it bears upon its face but from the date on which it was delivered, to wit, filed in the probate court and approved by the judge thereof. The bond could be enforced with respect to the appeal, and is a sufficient bond under the statute. Crockett, Appellant, 147 Me. 173, 84 A. (2d) 808.

Section requires service of reasons of appeal.—Among the prerequisites of this section relating to appeals is the service of the reasons of appeal. Crockett, Appellant, 147 Me. 173, 84 A. (2d) 808.

The purpose of limiting the persons upon whom service of reasons of appeal must be made to those who "appeared before the judge of probate on the case that have entered or caused to be entered their appearance in the docket of said court," is to give the appellant definite record information of those upon whom the reasons of appeal must be served. Crockett, Appellant, 147 Me. 173, 84 A. (2d) 808.

And no others than those specified need be served. — This section requires that service of the reasons of appeal be made upon "all the parties who appeared before the judge of probate on the case that have entered or caused to be entered their appearance in the docket of said court." Service is not required to be made on any other persons than those specified in the section. Nor are any other persons than those specified in the section entitled to have service made upon them. Crockett, Appellant, 147 Me. 173, 84 A. (2d) 808.

Until the reasons of appeal are served, the appellate court has no jurisdiction of the matter, and can do nothing more than dismiss it. Ellis, Petitioner, 116 Me. 462, 102 A. 291.

It appears that no service of the reasons of appeal is necessary, where no other parties appear before the judge of probate in the case. Daggett, Appellant, 114 Me. 167, 95 A. 809.

And merely filing will does not entitle proposed executor to be served with reasons of appeal.—Merely filing a will for probate would not make a proposed executor party to forensic issue so as to give him the statutory status of one entitled to be served with copy of reasons of appeal. The punative executor may himself assume the burden of waging contest to establish the writing as an efficacious will, or he may leave that weight to be borne by those whom probate of the will would benefit. Nichols v. Leavitt, 118 Me. 464, 109 A. 6.

Though as petitioner that the court take proof and allow the will, the proposed executor becomes a real party, albeit a representative one, "before the judge of probate." Nichols v. Leavitt, 118 Me. 464, 109 A. 6.

New evidence and grounds allowed on appeal, but appellant restricted to reasons of appeal.—The case is to be tried anew upon appeal, and each party may adduce new evidence and rely upon new grounds to support the claim or defense. But in the mode of trial there is a manifest difference between an appeal from a common law court and from the court of probate. In the latter the appellants are restricted to such points as are specified in their reasons of appeal. Gilman v. Gilman, 53 Me. 184.

Appellee is unaffected on appeal.—Judicial construction given to this section has limited the appellant to the reasons assigned by him for his appeal. This limitation is by statute. But no such limitation is imposed upon the appellee. His rights are unaffected. Gilman v. Gilman, 53 Me. 184.

And decree as to him is vacated.—The appellee's rights are unaffected by an appeal. As to him, so far as relates to the subject matter of the appeal, the judgment of the court appealed from is vacated and a new judgment must be rendered, and this judgment must be based upon proofs before the court by which it is rendered. Gilman v. Gilman, 53 Me. 184.

Last clause liberally construed.—The last clause of this section is in the furtherance of justice and is to receive a liberal

construction. Witham, Appellant, 85 Me. 360, 27 A. 252.

And ward need not file bond where guardian is party.—There can be no doubt that it was the intention of the legislature to relieve appellants, who were incapable of contracting, from the necessity of filing bonds in cases of appeals where the guardian was a party. Witham, Appellant, 85 Me. 360, 27 A. 252; Curtiss v. Morrison, 93 Me. 245, 44 A. 892.

But minor ward becoming 21 is no longer "under guardianship."—When a ward becomes twenty-one years of age, the authority of the guardian ceases. Thus it appears that the ward is no longer "under guardianship" after he becomes of age, within the meaning of this section. And if such person, after he becomes of full age, appeals from an allowance of the guardian's account, he is not excused from giving bond. Curtiss v. Morrison, 93 Me. 245, 44 A. 892.

Applied in Moody v. Moody, 11 Me. 247; Carter, Appellant, 113 Me. 232, 93 A. 543.

Cited in Moody v. Hutchinson, 44 Me. 57; Sprowl v. Randell, 108 Me. 350, 81 A. 80.

Sec. 34. Court may allow appeal accidentally omitted.—If any such person from accident, mistake, defect of notice or otherwise without fault on his part omits to claim or prosecute his appeal as aforesaid, the supreme court of probate, if justice requires a revision, may, upon reasonable terms, allow an appeal to be entered and prosecuted with the same effect as if it had been seasonably done; but not without due notice to the party adversely interested nor unless the petition therefor is filed with the clerk of said court within 1 year after the decision complained of was made; and said petition shall be heard at the next term after the filing thereof. (R. S. c. 140, § 34.)

Prerequisites to entering appeal.—Before an appeal can be entered under § 34 there must be a petition therefor, and notice given upon the petition, and if, upon hearing, the petition is granted, the entry should be made at the term at which it is granted, but before the appeal is entered the petitioners must file an appeal bond, as required by the statute giving the right of appeal. Carter, Appellant, 113 Me. 232, 93 A. 543.

Appeal granted upon showing endeavor to claim appeal and revision required.—The provision of this section is remedial in its character, but its remedy is not to be granted for the mere asking. To entitle a petitioner to the remedy, it must appear that he made reasonable endeavors to seasonably claim an appeal and exercised reasonable diligence in prosecuting his petition; and even then his petition will not be sustained unless justice requires a revision of the decree of the judge of probate. Marston, Petitioner, 79 Me. 25, 8 A. 87.

Original issue not determined upon petition.—Upon a petition for leave to appeal under this section the presiding judge is not required to determine the original issue in the probate court. He is simply to satisfy himself that the petitioner is without fault on his part in omitting to appeal within the statute time, and that justice requires a revision of the decree. Graffam v. Cobb, 98 Me. 200, 56 A. 645.

The petition need not aver everything which may be proved in order to authorize jurisdiction. Carter, Petitioner, 110 Me. 1, 85 A. 39.

Wherein omission to appeal was accident, mistake, etc., need not be alleged.—It is not necessary that the petition should aver wherein it would appear that the petitioner's omission to enter or prosecute his appeal was from accident, mistake, defect of notice, or otherwise without fault on his part. That is a matter of proof and it need not be specifically alleged. Technical rules of pleading should not be required in cases of this kind. Ellis, Petitioner, 116 Me. 462, 102 A. 291; Edwards v. Williams, 139 Me. 210, 28 A. (2d) 560.

Nor must need of revision be alleged.—It is not a sufficient objection to the validity of a petition under this section that it does not allege that justice requires a revision. It is not necessary that it should. It is not a jurisdictional fact. Carter, Petitioner, 110 Me. 1, 85 A. 39.

It is not necessary to allege why justice requires a revision. It is only necessary that the fact be established that justice requires a revision. Ellis, Petitioner, 116 Me. 462, 102 A. 291.

But jurisdictional basis of petition must be alleged.—The jurisdictional basis for the consideration of a petition under this section must be alleged in the petition. This requirement is a condition precedent to any further inquiry. Edwards v. Williams, 139 Me. 210, 28 A. (2d) 560.

The jurisdictional averments of the statute are accident, mistake, defect of notice, and want of fault on the part of the peti-

tioner. These requirements are conditions precedent to any further inquiry, and hence must be alleged. Upon failure to aver and establish them the case ends, irrespective of its merits. Carter, Petitioner, 110 Me. 1, 85 A. 39.

And upon proof thereof, judge determines whether justice requires revision.—Upon proof of the jurisdictional prerequisites of the petition under this section, the court may go further and inquire whether "justice requires a revision," this being a matter of proof and not of jurisdiction. Carter, Petitioner, 110 Me. 1, 85 A. 39.

As prerequisite to the maintenance of the petition, the petitioner is required to prove that from accident, mistake, defect of notice or otherwise without fault on his part, he omitted to claim or prosecute his appeal. This is a distinct element, essential of proof. If shown, then the presiding justice must proceed to the second necessary element, that "justice requires a revision." The first element rests upon a finding of fact. The second calls for the exercise of judicial discretion, based upon facts. First Auburn Trust Co. v. Baker, 134 Me. 231, 184 A. 767.

Whether the petitioner has used due diligence in prosecuting his appeal, and giving notice, and whether, for want of diligence, he should be refused relief, are questions addressed to the judicial discretion of the presiding justice. Gurdy, Appellant, 103 Me. 356, 69 A. 546.

Also appeal must show what decree appealed from, and error must appear.—In addition to the jurisdictional averments, required by this section, to justify an entry of an appeal, two things are indispensable. Appeal must show what order, sentence, decree, or denial of the judge of probate is appealed from; and taking all allegations in the appeal and the reason therefor to be true, it must appear that there was error. Carter, Petitioner, 110 Me. 1, 85 A. 39.

Petition held sufficient as to allegation of jurisdictional facts.—A petition for leave to enter and prosecute an appeal, under the provisions of this section, in which the petitioner alleges that he seasonably claimed an appeal, "but that through accident, mistake, defect of notice, or otherwise without any fault on his part, said appeal papers were not properly served upon the adverse party who appeared before the judge of probate, as required by law," and "that justice requires a revision of the decree" appealed from, contains sufficient allegations of the jurisdictional facts which are prerequisites to the maintenance of such a petition. Ellis, Petitioner, 116 Me. 462, 102 A. 291.

It is enough, on petition, if petitioner's evidence is important factor in determining issue.—It is enough for the justice, in considering a petition for leave to prosecute an appeal, to be satisfied that the petitioner's evidence is of such amount and character as to be an important factor in the right determination of the issue, whatever evidence might be brought against it. He could properly adjudge himself satisfied of this before and without hearing what might be adduced in rebuttal. Goodwin v. Prime, 92 Me. 355, 42 A. 785.

He should satisfy court of his good faith and of his evidence.—It is only necessary that the petitioner satisfy the court that he petitions in good faith and actually intends to try the issues presented, and that he has good evidence tending to show the truth of his contention upon those issues. Goodwin v. Prime, 92 Me. 355, 42 A. 785.

And review generally granted without inquiring further than jurisdictional facts.—In general a new trial (a review) is granted without inquiring further than is necessary in order to ascertain whether the party by reason of some accident or misfortune has been deprived of the opportunity of being heard. Goodwin v. Prime, 92 Me. 355, 42 A. 785.

Meaning of "revision."—The word "revision," as used in this statute means "review," "re-examination," "looking at again." It does not at all follow that the result of the revision will be a reversal or an alteration. There may be a complete affirmation. Goodwin v. Prime, 92 Me. 355, 42 A. 785.

To be satisfied that "justice requires a revision" of the decree is not to be satisfied that justice requires the decree to be reversed or modified. Goodwin v. Prime, 92 Me. 355, 42 A. 785.

Petition addressed to judicial discretion.—The petition authorized under this section is addressed to the judicial discretion of the supreme court of probate. The law court cannot substitute its discretion for the discretion of that court. Goodwin v. Prime, 92 Me. 355, 42 A. 785.

Exercise whereof is not exceptionable.—Exceptions do not lie to the refusal to grant a petition to enter an appeal; and the judicial discretion of the justice hearing the cause, when exercised, is final. Sawyer v. Chase, 92 Me. 252, 42 A. 391; Graffam v. Cobb, 98 Me. 200, 56 A. 645.

And determination of issues of fact is conclusive.—On the hearing of a petition for leave to enter and prosecute an appeal

from a decree of the probate court, the questions whether the failure seasonably to claim or enter the appeal was through accident or mistake, whether it was without the fault of the petitioner, and whether justice requires a revision of the decree, present issues of fact. The determination of the justice thereon and the exercise of the judicial discretion conferred on him are final and conclusive. Gurdy, Appellant, 103 Me. 356, 69 A. 546.

Rejection of evidence upon petition is not exceptionable.—At the hearing upon a petition, under this section, for leave to enter an appeal from the probate court, the presiding justice can receive or reject particular items of offered evidence at his discretion; and exceptions cannot be taken to his action in so doing unless it is apparent that he has abused the discretion to an extent that has worked manifest injustice. Goodwin v. Prime, 92 Me. 355, 42 A. 785.

A review is denied when it appears that the petitioner's predicament is due to his own fault, and want of reasonable diligence. First Auburn Trust Co. v. Baker, 134 Me. 231, 184 A. 767.

Case held not within section.—Where a judge of probate on petition and proper notice thereon by one of the heirs, decreed a distribution of the balance belonging to the estate as shown by the administrator's final account; and eleven months thereafter, the administrator, residing in the city where the probate court was held, petitioned the supreme court of probate, representing that he had no knowledge of said petition and decree, that he was ignorant of the nature of said decree; and that justice required a revision of said decree; it was held that the petitioner did not bring the case within the provisions of this section, and that the facts show nothing more than a case of mere neglect and inattention. Chase v. Bates, 81 Me. 182, 16 A. 542.

Matters of fact or law heard on petition cannot be heard again on motion to dismiss.—If leave is granted to enter and prosecute an appeal, by a justice having jurisdiction, matters of fact or law which were heard and determined by him cannot be heard again upon a motion to dismiss the appeal which he granted. The only question which can be open on such a motion is whether the justice had jurisdiction to grant leave. Gurdy, Appellant, 103 Me. 356, 69 A. 546.

Section includes omission to give any notice and omission to enter appeal.—The spirit, if not the strict letter, of this section includes an omission to give any notice, and also an omission to enter the appeal. Ellis, Petitioner, 116 Me. 462, 102 A. 291.

Remedy available upon omission to claim or prosecute appeal.—The remedial provisions of this section are not limited to cases where an appellant has omitted "to claim" an appeal, but they also include cases where an appellant has omitted to "prosecute his appeal" which he had duly claimed. Such is plainly the meaning of the words of the section. Ellis, Petitioner, 116 Me. 462, 102 A. 291.

Procedure in appeal by leave of court is same as procedure in seasonable appeal.—While the appeal is entered by leave of court, under this section, it is, nevertheless, a probate appeal "to be entered and prosecuted with the same effect as if it had been seasonably done." That is, there is no difference in the procedure in an appeal from the probate court, whether entered directly from that court or by leave of the supreme court, and no reason seems to appear why there should be any difference. All the proceedings in the prosecution of the appeal in the two cases are alike and under the same statutes; and the bond required is for precisely the same purpose. Entry by leave of court was not intended to enlarge the rights of the appellant. Carter, Appellant, 111 Me. 186, 88 A. 475.

And § 33 applies to an appeal, although entered by leave of court under this section. Carter, Appellant, 111 Me. 186, 88 A. 475.

The affirmance of a decree made under § 35 does not necessarily bar a petition under § 34. Sproul v. Randell, 107 Me. 274, 78 A. 450.

Whether previous appeal proceedings bar petition is question of law.—On the hearing of a petition for leave to enter and prosecute and appeal from a decree of the probate court, the question whether previous appeal proceedings and the judgment thereon are a bar to the petition is a question of law, to the decision of which by a justice of the supreme court of probate exceptions will lie. If no exceptions are taken, the ruling is conclusive on the parties, if the court had jurisdiction. Gurdy, Appellant, 103 Me. 356, 69 A. 546.

Judgment held not bar to petition.—When an appeal from the decree of the probate court, refusing to issue letters testamentary, is decided adversely to the appellant on the ground that it did not appear in the appeal or in the reasons therefor that the will had been allowed or admitted to probate, that judgment is not in law a bar to a petition, filed during the pendency of the appeal proceedings, for

leave to enter and prosecute an appeal from the decree refusing to admit the will to probate. Gurdy, Appellant, 103 Me. 356, 69 A. 546.

Last clause is directory, not mandatory.—It is more consonant with reason and justice, as well as constitutional law, to construe the last clause of this section as directory and not mandatory. Graffam v. Cobb, 98 Me. 200, 56 A. 645.

It would be unjust to assume that the legislature was seeking to control the discretion of the court in the discharge of ordinary judicial functions. It did not intend to impose upon the court an imperative duty to order a hearing at the first term even though it should appear that such ruling would unmistakably work a manifest injustice. Graffam v. Cobb, 98 Me. 200, 56 A. 645.

Its purpose is to insure prompt administration of law.—With respect to the purpose and effect of the clause requiring a hearing at the next term after entry, it is quite obvious that the legislature desired to impress upon the minds of the parties, as well as upon the court, the importance of an early settlement of all questions of which the probate court has jurisdiction. But the time of the hearing was not designed to be of the essence of the privilege granted so as to be a condition precedent to the enjoyment of the fruits of it. The clause was an instruction or direction given for the purpose of insuring a more prompt administration of the law. Graffam v. Cobb, 98 Me. 200, 56 A. 645.

And court in its discretion may order hearing at later term than that specified.—This section must be construed to mean that the petition is cognizable and in order for hearing at the next term after filing, and that the parties are entitled to be heard at that term, unless in the exercise of a sound discretion, and in the furtherance of justice, the court for good and sufficient cause shall otherwise order. Graffam v. Cobb, 98 Me. 200, 56 A. 645.

The supreme court of probate has jurisdiction to hear a petition to enter and prosecute an appeal at a term later than the first one after the petition is filed. Gurdy, Appellant, 103 Me. 356, 69 A. 546.

Applied in Rawson v. Lowell, 34 Me. 201; Mathews v. Patterson, 42 Me. 257.

Cited in Sturtevant v. Tallman, 27 Me. 78; Townshend, Appellant, 85 Me. 57, 26 A. 969; Sprowl v. Randell, 108 Me. 350, 81 A. 80; Jensen, Appellant, 145 Me. 1, 70 A. (2d) 248.

Sec. 35. When appeal not prosecuted.—If the appellant fails to enter and prosecute his appeal, the supreme court of probate, upon complaint of any person interested, may affirm the former sentence, assess reasonable costs for the complainant and make such further order thereon as law and justice require. (R. S. c. 140, § 35.)

The affirmance of a decree made under this section does not necessarily bar a petition under § 34. Sproul v. Randell, 107 Me. 274, 78 A. 450.

Section applies where appellant fails to prosecute and does not assent to dismissal.—Statutory authority would not be necessary to give the court power to dispose of an appeal in accordance with the agreement of the parties. It applies when an appellant fails to proceed with his appeal and does not assent to its dismissal. Kimball, Petitioner, 142 Me. 182, 49 A. (2d) 70.

Cited in Sprowl v. Randell, 108 Me. 350, 81 A. 80.

Sec. 36. Proceedings in probate court to cease after appeal.—After an appeal is claimed and the bond and reasons of appeal are filed, all further proceedings, in pursuance of the matter appealed from, cease until the determination of the supreme court of probate thereon. The register shall transmit to the appellate court all depositions relating to the matter appealed from filed in the probate court, and the same may be used in the appellate court. (R. S. c. 140, § 36.)

This section must be regarded as equally applicable to an appeal by virtue of § 32 or § 34. Mathews v. Patterson, 42 Me. 257.

Appeal vacates decree.—The status of a probate decree after appeal is not defined by this section. It is left to judicial interpretation, and courts generally, including our own, hold that an appeal vacates the decree. Rawley, Appellant, 118 Me. 109, 106 A. 120.

Applied in Kimball, Petitioner, 142 Me. 182, 49 A. (2d) 70.

Cited in Sturtevant v. Tallman, 27 Me. 78; McPhetres v. Halley, 32 Me. 72; Sprowl v. Randell, 108 Me. 350, 81 A. 80.

Sec. 37. Appeal, when heard.—Such appeal shall be cognizable at the next term of the supreme court of probate held after the expiration of 34 days from the date of the proceeding appealed from, and said appellate court may reverse or affirm, in whole or in part, the sentence or act appealed from, pass such decree thereon as the judge of probate ought to have passed, remit the case to the probate court for further proceedings or make any order therein that law and justice require; and if, upon such hearing, any question of fact occurs proper for a trial by jury, an issue may be framed for that purpose under the direction of the court and so tried. (R. S. c. 140, § 37.)

Cross reference.—See c. 103, § 15, and note, re jurisdiction of law court to set aside verdict of jury in probate case.

Section confers broad authority.—The very language of this section confers the most ample authority on the appellate court. The supreme court of probate is to decide upon the proofs and argument presented. It is to do what upon the same evidence the court of probate should have done. It is to "make any order therein that law and justice require." Gilman v. Gilman, 53 Me. 184.

It empowers court to combine several of acts authorized.—Under the power conferred by this section to make any order that law and justice require, the supreme court of probate has the power to combine in its decree two or more of the acts authorized provided they are not inconsistent. Swan, Appellant, 115 Me. 127, 98 A. 190.

But does not require all appeals to be heard.—This section does not require that every probate appeal shall be heard by the supreme court of probate. Appeals are "cognizable" therein, and the court shall take appropriate action thereon. Kimball, Petitioner, 142 Me. 182, 49 A. (2d) 70.

Appellant restricted by reasons of appeal.—There are restrictions on the part of the appellant, and he is limited by the reasons of appeal as assigned. Gilman v. Gilman, 53 Me. 184.

Upon appeal errors adverse to appellee may be corrected as well as any other errors.—This section is entirely inconsistent with the idea that the supreme court of probate may not, upon appeal, correct any error which was adverse to the appellee in relation to the subject matter of the appeal. On the contrary, it implies that the whole subject matter is before the court, and that it is its duty to correct any and all errors shown at the hearing to exist. Gilman v. Gilman, 53 Me. 184.

Larger allowance decreed for widow-appellee.—Where one of the heirs of a deceased person appealed from a decree of an allowance to the widow, for the reason that it was excessive it was held that the supreme court of probate might increase the amount decreed below, if, in its opinion, law and justice require it. Gilman v. Gilman, 53 Me. 184.

New judgment to be rendered on whole evidence as law and justice require.—The right to decree as law and justice may require, is unlimited so far as relates to the appellee. The statute imposes no restraint upon the action of the court upon the subject matter of the appeal, so far as relates to the correction of any errors injurious to the appellee, in the decision of the court from which the appeal is taken. The original judgment having been vacated by appeal, a new one is to be rendered, such "as law and justice may require," and that upon the whole evidence. Any other construction would prevent and prohibit the appellate court from acting in accordance with the requirements of law and justice. Gilman v. Gilman, 53 Me. 184.

But decided preponderance of evidence required to set aside verdict and decree.—To justify setting aside the findings of a jury empanelled to determine issues framed in a probate appeal, and the decree of the justice of the supreme court of probate affirming that of the judge of probate, there must be a very decided preponderance of the evidence against the verdict and decrees. Bradstreet v. Bradstreet, 64 Me. 204.

Reversal of decree of probate held to have left no decree in force.—Where, by the decree of the supreme court of probate, the decree of the probate court, refusing allowance of the claim of executrix, was reversed, the effect was to annul the decree and no more. The supreme court of probate might have proceeded further and determined whether the claim should be allowed in full or in part. If it did not do so, but contented itself with decreeing reversal and a further hearing by the judge of probate, the reversal left no decree in force. Swan, Appellant, 115 Me. 127, 98 A. 190.

Jury trial in probate is not matter of right.—Courts of probate are of special and limited jurisdiction. Their proceedings are not according to the course of the common law. They have no juries. Neither party,

upon appeal, can claim as a matter of right, a trial by jury. Thompson, Appellant, 118 Me. 114, 106 A. 526.

There is no statute law, or constitutional provision, which gives an absolute right to trial by jury in a probate appeal. It is true, the court may, by statute, make up issues of fact and refer them to a jury, but the parties have no right to demand the trial of any issue by a jury. Eastman, Appellant, 135 Me. 233, 194 A. 586.

Issues tried by jury in probate as in common-law proceedings.—Upon issues in probate, the law gives no sanction to a relaxation of the fixed rules relating to a jury trial in common-law proceedings. The issues are to be determined by a jury, through a verdict in form, in one case as in the other. The same precision in the issues made up, and the same direct and exclusive finding of the jury thereon, are required in probate trials as in those at common law. Withee v. Rowe, 45 Me. 571.

All the incidents of a trial by jury follow a trial of issues by a jury under this section. A foreman must be chosen; unanimity is required. The verdict may be wrong. A motion may be filed for a new trial. The rulings of the presiding justice may be erroneous. Exceptions may be alleged. This must so be for the furtherance of justice, for wrong verdicts, whether from the mistaken judgment of the jury, or induced by the erroneous instructions on the part of the judge should be corrected. Carvill v. Carvill, 73 Me. 136.

When issues are framed for a jury trial, all the incidents of such trial follow. The cause then assumes the character of an action at law. The procedure is according to the course of the common law, and is governed by legal rules throughout. Backus v. Cheney, 80 Me. 17, 12 A. 636.

Jury trial in probate analagous to feigned issue in equity.—The course of a jury trial under this section is analogous to that pursued in equity courts, where a feigned issue is prepared under the direction of the chancellor, or other person who exercises his authority. Withee v. Rowe, 45 Me. 571.

It is for the judge to determine what issues should be presented to the jury in a probate appeal, not the counsel. Bradstreet v. Bradstreet, 64 Me. 204.

Whether the facts in dispute shall all be settled by the jury or not is subject to the discretion of the court. Withee v. Rowe, 45 Me. 571.

The purpose whereof is to inform conscience of court.—The judge of the appellate court may form an issue when, in his judgment, any question of fact occurs proper for a trial by jury, and not otherwise. The issue is to be formed and tried at law, but as in equity, to inform the conscience of the court, and under its direction. Bradstreet v. Bradstreet, 64 Me. 204; Thompson, Appellant, 118 Me. 114, 106 A. 526.

For verdict is merely advisory.—The verdict of the jury under this clause is merely advisory, to inform the conscience of the court. Thompson, Appellant, 118 Me. 114, 106 A. 526.

A jury verdict in a probate appeal is advisory only and the opinion of the presiding justice cannot be supposed to be affected by the course of procedure. Rawley, Appellant, 118 Me. 109, 106 A. 120.

A jury, if called, serves only to advise; the court is not bound to defer to the judgment of the jurors. Should the judge, in the trial, need assistance as to facts, he may, in his discretion, submit issues to a jury, and obtain the findings of the panel. The verdict of the jury on such an issue is advisory only. Such is the capacity in which a probate appeal jury functions. Eastman, Appellant, 135 Me. 233, 194 A. 586.

And ineffective without decree.—A verdict being only advisory, it has no effect one way or the other without a decree, as the decree may be the one way or the other, and it often happens that the court does not follow the advice of the jury. It is interlocutory, so to speak. Hence a verdict cannot get past the sitting justice to go anywhere, either to the law court above or to the probate court below, without a decree of the sitting justice. Thompson, Appellant, 118 Me. 114, 106 A. 526.

And court cannot shift its responsibility upon jury.—In probate, as in equity, the court cannot, by means of a jury verdict, shift its own responsibility respecting the ascertainment of the truth in a disputed factual situation. Eastman, Appellant, 135 Me. 233, 194 A. 586.

Nor do parties acquire any rights by virtue of verdict.—A verdict of the jury may be disregarded or adopted by the supreme court of probate, without right of appeal or exception to the act of that court. An exception may be taken to his decree, which simply raises the legal question, whether there is any evidence to support it, but not because either party had obtained any legal rights by virtue of the verdict. Thompson, Appellant, 118 Me. 114, 106 A. 526.

Questions usually submitted to jury.—Where questions arise in the supreme court of probate upon appeal as to whether the will was executed by the one whose signa-

ture purports to be affixed thereto; whether he was of sound and disposing mind at the time of the execution; in such cases it is usual for the court to direct issues as a matter of course. Withee v. Rowe, 45 Me. 571.

Questions of sanity and of undue influence arising upon the probate of wills are usually submitted to a jury for determination. This practice has been so common and uniform as to become almost a law of the court. Backus v. Cheney, 80 Me. 17, 12 A. 636.

Venue may be changed for jury trial.—When an issue has been framed for trial to a jury, the court has power to order a change of venue for a trial of the same. And if the issue is decisive of the case, the whole case is transferred, and the decision is certified directly to the probate court; it is otherwise where other proceedings must be had in the appellate court after the decision of the issue framed for the jury. Backus v. Cheney, 80 Me. 17, 12 A. 636.

A probate appeal, when it has assumed the character of, and is to be conducted as an action at law, is subject to the provisions of c. 113, § 24, providing, upon cause shown, for the transfer of cases to the docket of any other county for trial. Backus v. Cheney, 80 Me. 17, 12 A. 636.

Whereupon questions of law go to law court in district where trial had.—When a jury trial is had in another county from that where the cause was originally pending, questions of law arising upon the trial should go to the law court in the district where the trial was had and there be settled; and the mandate of the law court should be sent to the clerk of the court from whence the exceptions came, to be obeyed as its tenor may direct. Backus v. Cheney, 80 Me. 17, 12 A. 636.

Decree may be materially influenced by facts not submitted to jury, and by law.—Notwithstanding certain issues of fact may be tried and determined by a jury in probate proceedings, other questions of grave import, of law, and even of fact, may be suffered to remain, to be settled by the court, and which may materially influence the final decree. Withee v. Rowe, 45 Me. 571.

Applied in Deake, Appellant, 80 Me. 50, 12 A. 790; Smith, Appellant, 107 Me. 247, 78 A. 97; Cotting v. Tilton, 118 Me. 91, 106 A. 113; Look, Appellant, 129 Me. 359, 152 A. 84; Shannon v. Shannon, 142 Me. 307, 51 A. (2d) 181.

Cited in Sturtevant v. Tallman, 27 Me. 78; Sprowl v. Randell, 108 Me. 350, 81 A. 80.

Sec. 38. Rights of claimants under heir. — Any person claiming under an heir at law has the same rights as the heir in all proceedings in probate courts, including rights of appeal. (R. S. c. 140, § 38.)

Administrator of heir may appeal.—Under this section an executor or administrator of a deceased heir at law has the same rights of appeal that the heir at law would have if living. Sprowl v. Randell, 108 Me. 350, 81 A. 80.

Applied in Shaw, Appellant, 81 Me. 207, 16 A. 662; Stilphen, Appellant, 100 Me. 146, 60 A. 888.

Costs and Fees.

Sec. 39. Costs in contested cases.—In all contested cases in the original or appellate court of probate, costs may be allowed to either party, including expert witness fees not exceeding $25 per day, to be paid by the other, or to either or both parties, to be paid out of the estate in controversy, as justice requires; and executions may be issued therefor as in courts of common law. (R. S. c. 140, § 39.)

Costs in contested probate cases exist only by statute. Hiltz, Appellant, 130 Me. 243, 154 A. 645; Goodridge, Appellant, 137 Me. 13, 14 A. (2d) 501.

This section authorizes only the allowing of costs to the parties to the litigation. Reed v. Reed, 25 Me. 242.

And does not include attorney's fees.—Costs, as this section uses the term, means taxable costs as ordinarily taxed, and does not include attorney's fees. The whole subject of costs in probate appeals lies in judicial discretion. Hiltz, Appellant, 130 Me. 243, 154 A. 645.

Allowance of costs rests in discretion of court.—Neither party has a legal right to costs. The whole subject of costs rests in the discretion of the courts. The power of the court is precisely the same as in equity. Alvord v. Stone, 78 Me. 296, 4 A. 697; Goodridge, Appellant, 137 Me. 13, 14 A. (2d) 501.

But such discretion must be exercised, if at all, in proceedings in which costs incurred.—The whole subject of costs and the allowance of counsel fees in all contested cases in the original or appellate court of probate rests in the discretion of the court, but that discretion must be exercised in the proceedings in which the costs were incurred and the services of counsel rendered. Peabody v. Mattocks, 88 Me. 164, 33 A. 900.

After a final decree of the appellate court, affirming a decree of the probate court as to the settlement of an account of a testamentary trustee, a judge of probate has no power, in the settlement of a subsequent account, to allow costs incurred and counsel fees for services rendered in the settlement of the prior account and in the prosecution of an appeal from the decree of the probate court in relation thereto. Peabody v. Mattocks, 88 Me. 164, 33 A. 900.

Costs are awarded as a part of the judgment or decree of the cause in which they arise; and a court cannot, either at law or in equity, award in one case costs which have accrued in another, unless they are included in the judgment. Peabody v. Mattocks, 88 Me. 164, 33 A. 900.

They must be expressly decreed if allowed.—The power of the court in the allowance of costs in probate appeals, is precisely the same as in equity. There must not only be a decree in favor of a party, but there must also be an express order or decree for his costs, or they are lost. Peabody v. Mattocks, 88 Me. 164, 33 A. 900.

And if not included in judgment, are lost.—When the allowance of costs is in the discretion of the court and a final decree or judgment is entered without including costs, no costs can be recovered. Costs are the mere incident of the judgment, and if not included in it, are lost. A final decree, silent as to costs, is as conclusive a bar to a recovery of them as if it affirmatively disallowed them. Alvord v. Stone, 78 Me. 296, 4 A. 697.

In an appeal from a probate court a final decree, silent as to costs, is as conclusive a bar to a recovery of them as if it affirmatively disallowed them. The appellate court no longer has any jurisdiction over the subject. Peabody v. Mattocks, 88 Me. 164, 33 A. 900.

For a case, prior to the enactment of the provision for expert witness fees under this section, holding such fees to be not within the meaning of the word "costs," see Goodrich, Appellant, 137 Me. 13, 14 A. (2d) 501.

Applied in Carvill v. Carvill, 73 Me. 136; Hurley v. Robinson, 85 Me. 400, 27 A. 270.

Sec. 40. Fees paid for abstracts of wills recorded in registry of deeds.—For making and certifying to the register of deeds copies of devises of real estate, the register of probate shall receive $1 for each copy so certified, and the register of deeds $1.50 for entering and recording the same, said sums to be paid by the executor or administrator, when said will is proved, to the register of probate, who shall pay $1.50 to the register of deeds at the time said certified copy is furnished to him; and the executor or administrator shall charge said sums in his account. (R. S. c. 140, § 40. 1949, c. 404, § 5.)

See c. 89, § 230, re miscellaneous records.

Sec. 41. Fees for petitions for probate of wills and administrations.—The register of probate shall receive a filing fee of $3 for each petition to probate a will and for each petition for the administration of an estate, when the estimated value of such estate, as stated in the petition, is $1,000 or over. (1945, c. 359.)

Sec. 42. Fees of registers.—The register shall receive for such copies as are taxable by law, 12¢ a page; for authenticating the official signature of a magistrate, 25¢; for each certificate, under seal of the court, of the appointment and qualification of an administrator, executor, guardian or trustee, 50¢; for each such double certificate, $1; but he shall have no fee for taking from the files of his office, or transporting to the place where the probate court is held, papers necessary for the settlement of any estate or account in said court nor for furnishing to those entitled thereto, 1 copy of each will proved. (R. S. c. 140, § 41. 1945, c. 311.)

Sec. 43. Fees in case of foreign estates. — When administration is granted on the estate of a person not a resident of the state, or the will of such person is proved, or administration is granted to a public administrator or a guardian is appointed for a nonresident minor, the register shall be paid, for the use of the county, reasonable fees to be fixed by the judge, for entering and filing the orders and decrees and for making the necessary records, to be paid by the executor, administrator or guardian and allowed to him in his account. (R. S. c. 140, § 42. 1947, c. 222.)

Sec. 44. Registers to account quarterly for fees.—Registers of probate shall account quarterly under oath to the county treasurers for all fees received by them or payable to them by virtue of the office, specifying the items, and shall pay the whole amount of the same to the treasurers of their respective counties quarterly on the 1st days of January, April, July and October of each year. (R. S. c. 140, § 43.)

Sec. 45. Fees of executors, administrators, guardians, surviving partners and trustees.—Executors, administrators, guardians, surviving partners and trustees may be allowed $1 for every 10 miles travel to and from court, and $1 for each day's attendance; and also, at the discretion of the judge, having regard to the nature, liability and difficulty attending their trusts, a commission not exceeding 5% on the amount of personal assets that come into their hands and, in cases where legal counsel is necessary, a reasonable sum for professional aid; and trustees, guardians for adults and conservators may receive yearly such additional sum for the care and management of the trust property as the court having jurisdiction of said trust shall allow not exceeding, however, in any 1 year 1% of the principal of said trust fund, said additional sum so allowed to be charged against principal or income, or both, and if charged against both, to be charged in such proportions as the said court shall determine; provided that if the surviving partner or partners succeed to the business of the late firm, the benefit accruing from such succession shall be taken into account by the judge in determining the amount of commission to be allowed. (R. S. c. 140, § 44. 1949, c. 45.)

Reasonable fees for legal services allowed.—Fees for necessary services of an attorney in settling an estate are claims against the representative personally, although reasonable fees for necessary and beneficial legal services are frequently allowed by judges of probate. Jones v. Silsby, 143 Me. 275, 61 A. (2d) 117.

Court's discretion in allowing commissions is subject to appeal.—The exercise by the judge of probate of the discretion conferred upon him by this section, respecting the allowance of a commission to executors, administrators, guardians, surviving partners, and trustees, is not conclusive but is reviewable on appeal to the supreme court of probate. Swan, Appellate, 115 Me. 501, 99 A. 449.

Legacy in payment of executor's services is conclusive.—If the testator is given a legacy in lieu of commissions, the court cannot defeat the provisions of the will. If the will discloses that it was the intention of the testator to reward the executor for his services by the legacy, it is conclusive on the executor, and if he accepts the position and administers the estate by virtue of his appointment as executor, he must accept the reward for his services named in the will. Connolly v. Leonard, 114 Me. 29, 95 A. 269.

Section does not preclude compensation to guardian in excess of commissions.—Where a guardian claimed compensation for services in managing the estate of his ward, it was held that this section is no such limitation as to preclude an allowance of the character claimed. The guardian may have compensation for services, and it may be much beyond the amount of commissions. A rule different from that would tend to prevent faithfulness and care. Emerson, Appellant, 32 Me. 159.

Applied in Whittaker v. Jordan, 104 Me. 516, 72 A. 682; Tarbox v. Tarbox, 111 Me. 374, 89 A. 194.

Sec. 46. Pay of appraisers and commissioners.—Appraisers of estates, commissioners for examining claims against insolvent estates or determin-

ing disputed claims and commissioners appointed to make division of estates may be allowed a reasonable compensation for the time actually employed, including travel and expenses. The fees of witnesses to wills, appraisers and commissioners on insolvent estates or disputed claims shall be paid by the executors, administrators, trustees or guardians and allowed in the settlement of their accounts. (R. S. c. 140, § 45.)

See c. 113, § 128, re fees of witnesses.

Sec. 47. Expenses of partition. — When a partition of real estate is made by order of a judge of probate, the expenses thereof shall be paid by the parties interested in proportion to their interests; but when such expenses accrue prior to the closing of the final account of any executor or administrator of the deceased owner of such real estate, having in his hands sufficient personal assets for the purpose, the judge may order him to pay such expenses and allow the same in his account, after due notice and hearing thereon. In case of neglect or refusal of any person liable to pay such expenses, the judge may issue a warrant of distress against such delinquent for the amount due from him and costs of process. (R. S. c. 140, § 46.)

See c. 156, re partition of real estate.

Sec. 48. Compensation of stenographers. — Stenographers appointed under the provisions of this chapter shall be allowed $10 a day for their services in court or at an examination, and travel at the rate of 12¢ a mile from place of residence to the place of holding the court or examination, and 15¢ for every 100 words of transcript furnished for the files of the court, to be paid by the county in which the court or examination is held, after the stenographer's bill has been allowed by the judge of the court in which the services were rendered. If any stenographer so appointed neglects or refuses to perform any part of the duty required of him, he shall receive no pay for his services and also may be punished for contempt of court. In probate matters, the executor, administrator or guardian shall, in each case out of the estate in his hands, pay to the register for the county the amount of said stenographer's fees, and in insolvent matters the assignee shall pay the same to the register for the county before any claims are paid, other than those named in subsection I of section 42 of chapter 162. (R. S. c. 140, § 47. 1947, c. 289, § 1.)

Sec. 49. Stenographers to furnish copies. — Such stenographers shall also furnish correct and legible longhand or typewritten copies of their notes of the oral testimony taken at any hearing or examination, to any person calling for the same, upon payment of 15¢ for every 100 words of the copy furnished. (R. S. c. 140, § 48. 1947, c. 289, § 2.)

Rules of Practice.

Sec. 50. Rules of practice and procedure; blanks; revision of rules and blanks; approval.—The rules of practice and procedure in the courts of probate and insolvency, approved by a majority of the justices of the supreme judicial court June 17, 1916, and as thereafter revised and approved, are in force in all courts of probate and insolvency; and the blanks for use in said courts approved by the supreme judicial court September 30, 1916, and as thereafter revised and approved, shall be used in all courts of probate and insolvency, and no other blanks shall be used therein. The governor may at any time, upon the request in writing of a majority of the judges of the courts of probate and insolvency, appoint a commission composed of 3 judges and 2 registers of probate, who may make new rules and blanks or amendments to existing rules and blanks, which new rules and blanks or amended rules and blanks shall, when approved by the supreme judicial court or a majority of the justices thereof, take effect

and be in force in all courts of probate and insolvency. The expenses of such commission or commissions shall be reported to the governor, and upon the approval of the same by the governor and council, they shall be allowed and paid in the same manner as other claims against the state. (R. S. c. 140, § 49.)

A rule has the force of law and is binding upon the court, as well as upon parties, if not repugnant to law. But the rule cannot change a statute. The statute controls. Knapp, Appellant, 145 Me. 189, 74 A. (2d) 217.

Probate procedure should be conducted upon the rules of the broadest equity, whenever the provisions of statute do not conflict with that view. Substantial justice should be awarded by methods conducive to economy and dispatch, and without unnecessary circuity of action or prolixity in procedure. Merrill v. Regan, 117 Me. 182, 103 A. 155.

Section does not preclude remedy for which there is no prescribed form.—This section establishing uniformity in the use of blanks in the probate court is not to be so construed as to deprive the petitioner of his remedy if there is no prescribed form adapted to the existing situation. He is not prohibited from presenting a petition containing allegations appropriate to the facts of his case. McKenzie v. Webber Hospital Ass'n, 106 Me. 385, 76 A. 704; Waitt, Appellant, 140 Me. 109, 34 A. (2d) 476.

Sec. 51. Blanks and records. — Each county shall provide all necessary printed blanks and record books for its probate courts and courts of insolvency, and said record books may be printed to correspond with the printed blanks. (R. S. c. 140, § 50.)

Notices.

Sec. 52. "Notice" in probate proceedings defined.—In laws relating to probate courts and proceedings, the words "public notice" denote notice published 3 weeks successively in a newspaper published in the county whose court has jurisdiction, or in which the deceased last dwelt, as ordered by the judge or, if none, in the state paper; the words "personal notice" denote service by a copy given in hand or left at the place of last and usual abode, 7 days at least before the time of hearing; and the words "due notice" denote public or personal notice, at the discretion of the judge. (R. S. c. 140, § 51.)

Applied in First Auburn Trust Co. v. Baker, 134 Me. 231, 184 A. 767.

Sec. 53. Parties may select newspaper for notices.—Notices to be published in a newspaper shall be published in such paper published in the county as the party required to publish it selects, unless the judge deems such paper unsuitable for want of circulation or other substantial reason. (R. S. c. 140, § 52.)

Sec. 54. Public notice of appointment and qualification of executor, administrator, guardian of adult, or conservator; date of qualification. —Within 2 months after the qualification of an executor, administrator, guardian of an adult or conservator, the register of probate shall cause public notice of such appointment and the date of qualification to be given, and shall enter upon the docket the name of the newspaper and the date of the 1st publication. Such notice may be given in a list showing the name of the estate, the name and residence of each person appointed and, in each case where an agent has been appointed, the name and residence of such agent. Such executor, administrator, guardian or conservator may be required to give such further notice of his appointment as the judge may order. At the time of his qualification, such executor, administrator, conservator or guardian of an adult shall pay to the register of probate the cost of such public notice, together with such reasonable fee for such additional duty as may be fixed by the judge, and he shall be allowed said sums in his account.

An executor, administrator, guardian of an adult or conservator shall be deemed to be qualified when his bond has been filed and approved by the judge of probate; provided, however, that in cases where no bond is required, the date of appointment shall be deemed to be the date of qualification. (R. S. c. 140, § 53.)