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Chapter 154.

Executors and Administrators.

Limitations.

Sec. 1. Limitation as to minimum amount of property; as to period of time since death.—No administration shall be granted on the estate of any intestate deceased person, unless it appears to the judge that he left personal estate to the amount of at least $20, or owed debts to that amount, and left real estate of that value; and when no administration is granted for want of such estate, the personal property of the deceased becomes the property of the widow, or, if none, of the next of kin, who are not, in such case, chargeable as executors in their own wrong. After 20 years from the death of any person, no probate of his last will or administration on his estate shall be originally granted except as provided in the following section, unless it appears that there are moneys due to said estate from this state or the United States; but this does not apply to foreign wills previously proved and allowed in another state or country. (R. S. c. 141, § 1.)

Administration cannot be granted unless estate amounts to $20.—The judge has no jurisdiction, so that he can grant administration, if it does not appear, to his satisfaction, that there is personal estate of the deceased, amounting to at least $20; or that the debts due from him amount to that sum. Bean v. Bumpus, 22 Me. 549; Gross v. Howard, 52 Me. 192.

This section gives the probate court no authority to appoint an administrator for a partnership, or for a deceased partner, that he may act for the partnership. It prohibits the granting of an administration upon the individual estate of the partner, in all cases, unless the deceased left the prescribed amount of property. Shaw, Appellant, 81 Me. 207, 16 A. 662.

Which fact must be found whether alleged or not.—By this section, no administration is to be granted, "unless it appears to the judge" that the requisite amount of estate was left by the deceased. The fact must be found by the judge whether alleged or not. Danby v. Dawes, 81 Me. 30, 16 A. 255.

Twenty-year limitation not applicable in case of fraudulent concealment. — It does not necessarily follow that, because more than twenty years have elapsed since the death of the testator, his will may not be admitted to probate. For fraudulent concealment of a cause of action has long been considered a good replication to a statute bar, in actions at law as well as in suits in equity. And, this being the rule governing matters in law and in equity, there is no reason why it should not apply to wills fraudulently concealed. Deake, Appellant, 80 Me. 50, 12 A. 790. See generally, c. 112, § 104 and note. See also, § 10 and note, re time will lost, etc., not part of 20-year limitation.

Applied in Lord v. Bourne, 63 Me. 368.

Quoted in part in Smith, Appellant, 144 Me. 235, 67 A. (2d) 529.

Sec. 2. Administration on estate of intestate taken in certain cases after 20 years from death.—When administration has not been taken on the

estate of an intestate within 20 years after the death of such intestate, and thereafter any property of at least $20 in value accrues to said estate, or belonging thereto first comes to the knowledge of any person interested in said estate, original administration may be granted on such property at any time within 2 years next after it so accrued or first became known, but such administration shall affect no other property and shall not revive debts due to or by said intestate. (R. S. c. 141, § 2.)

Wills and Executors.

Cross Reference.—See c. 119, § 1, sub-§ VII, re statute of frauds.

Sec. 3. Wills deposited in registry of probate; proceedings after death of testator.—A will may be deposited for safekeeping in the registry of probate in the county where the testator lives; and the register, on being paid $1, shall receive and keep it and give a certificate of the deposit thereof. Such will shall be enclosed in a sealed wrapper, indorsed with the name and residence of the testator, and the date when deposited, and may have indorsed thereon the name of any person to whom it is to be delivered after the death of the testator, and shall not be opened nor read until delivered to the testator, or to some person authorized to receive it by a written order signed by the testator and attested by 1 witness, and the register may require the person presenting the same to make oath that it is genuine. After the testator's death the will shall be delivered to the person, if any, entitled by the indorsement on the wrapper to receive it; or, if not demanded before the next probate court thereafter, it may then be publicly opened and retained in the probate office until offered for probate; but, if the jurisdiction of the estate belongs in another court, it shall be delivered to the executors or other persons entitled to its custody, to be presented for probate in such other court. (R. S. c. 141, § 3.)

Sec. 4. Duty of executors and others having custody of wills.—Whoever has the custody of a will shall, after the testator's death, deliver it into the probate court having jurisdiction thereof or to the executor therein named; and any executor, having such will in his custody, shall file it in such court. If such executor or other person, having been duly cited for that purpose, neglects to do so without reasonable cause for 30 days after notice of the testator's death, he may be committed to jail by the judge's warrant, there to be kept in close custody until he so delivers the will or is released by the judge or otherwise by order of law; and he is also liable to any party for the damage which he has sustained by such neglect. (R. S. c. 141, § 4.)

Cross reference.—See c. 133, § 30, re suppressing, secreting or destroying last will.

Section imposes duty of filing will.—Additional to the moral obligation imposed either by express or implied direction of the maker, this section charges upon every supposed executor having custody of an unprobated will, the imperative legal duty of filing it for probate. Nichols v. Leavitt, 118 Me. 464, 109 A. 6.

Former provision of section.—For a consideration of this section when it provided for a forfeiture for neglect, see Moore v. Smith, 5 Me. 490; Smith v. Moore, 6 Me. 274.

Cited in Deake, Appellant, 80 Me. 50, 12 A. 790; Rawley, Appellant, 118 Me. 109, 106 A. 120; Smith, Appellant, 144 Me. 235, 67 A. (2d) 529.

Sec. 5. Public notice of hearing on petitions for probate of wills.—Whenever a will is presented for probate, the judge of probate having jurisdiction thereof shall assign a time and place for a hearing and cause public notice thereof to be given; and in addition thereto, said judge may, at his discretion, order personal notice upon such persons as he deems necessary. (R. S. c. 141, § 5.)

Stated in Nichols v. Leavitt, 118 Me. 464, 109 A. 6.

Sec. 6. Depositions. — When any of the witnesses of a will offered for probate live out of the state or more than 30 miles distant or, by age or indisposition of body, are unable to attend court, their depositions, taken as provided in chapter 117 or before a magistrate authorized by commission from the judge, shall be competent evidence in the absence of such witnesses. (R. S. c. 141, § 6.)

Section does not require all testimony to be produced.—The testimony of all the attesting witnesses to a will are indispensable, notwithstanding they may be beyond the jurisdiction of the court. The statute allows depositions so taken to be used, but is entirely silent as to the necessity of having all the testimony of attesting witnesses at the trial produced. It may be, and often is, impossible to compel a witness in another state to testify in a deposition; the court of another state cannot do this, and, unless the statutes of the state in which the witness may be found provide some compulsory means, the attempt to obtain his evidence may be abortive. McKeen v. Frost, 46 Me. 239.

Sec. 7. If no objection to will, 1 witness or 1 deposition only required.—When it clearly appears to the judge by the written consent of the heirs at law or otherwise that there is no objection thereto, he may decree the probate of any will upon the testimony of one or more of the 3 subscribing witnesses required by law, who can substantiate all the requisite facts, and the affidavit of such witness or witnesses taken before the register of probate may be received as evidence; or, in the cases described in the preceding section, upon the depositions of one or more of the subscribing witnesses, substantiating the facts. (R. S. c. 141, § 7.)

Cross reference.—See c. 169, § 15, re will to be effective must be proved and allowed.

Affidavit before register is evidence.—The statute contemplates the testimony of one or more of the subscribing witnesses, or a deposition, to be sufficient when there is no objection raised to the probate of a will. The statute further contemplates, when there is no objection to the probate, that the proponent may offer for evidence the affidavit of a subscribing witness taken before the register. The affidavit becomes and is evidence by virtue of the statute. Knapp, Appellant, 145 Me. 189, 74 A. (2d) 217.

Receivable on or after return day.—It is in open court on, or after the return day, that the judge of probate may receive an affidavit previously taken before the register. Knapp, Appellant, 145 Me. 189, 74 A. (2d) 217.

If there is no objection.—It is only when there is no objection that such an affidavit becomes or is evidence. Knapp, Appellant, 145 Me. 189, 74 A. (2d) 217.

The affidavit cannot be used if there are objections to the probate of the will, and it is not evidence if there are objections. Knapp, Appellant, 145 Me. 189, 74 A. (2d) 217.

But appeal may be entered in such case.—If an affidavit taken before the register under this section is the evidence upon which the decree is made, because no objections to the probate of the will, an appeal may still be entered by any person aggrieved under c. 153, § 32. Knapp, Appellant, 145 Me. 189, 74 A. (2d) 217.

Affidavit may be taken any time after petition for probate filed. — No time is fixed as to when the affidavit is to be taken, and, as the statute was to remedy inconvenience and unnecessary expense, it must be presumed that the affidavit can be taken at any convenient time after the petition for probate is filed. Knapp, Appellant, 145 Me. 189, 74 A. (2d) 217.

And before return day. — No time is stated in the statute as to when the affidavit may be made before the register. It must, of course, be made before it is offered, and before it becomes statutory evidence. It may be made sometime before the coming in of the court on return day, because the court return day does not commence until the hour for the court to come in. There is nothing to prevent the making of the affidavit with the register at any time after the petition for probate is filed and before the return day. Knapp, Appellant, 145 Me. 189, 74 A. (2d) 217.

Section not modified by rules of probate court. — See Knapp, Appellant, 145 Me. 189, 74 A. (2d) 217.

Sec. 8. Proving wills when subscribing witnesses in armed forces. —When it appears to the judge that a will offered for probate was executed

before witnesses who at the time they subscribed their names thereto were serving in or present with the armed forces of the United States or as merchant seamen, and that such will cannot be proved as otherwise provided by law because one or more or all of the subscribing witnesses to the will, at the time the will is offered for probate, are serving in or present with the armed forces of the United States or as merchant seamen, or are dead or mentally or physically incapable of testifying or otherwise unavailable, the judge may decree the probate of such will upon the testimony in person or by deposition of at least 2 credible disinterested witnesses that the signature to the will is in the handwriting of the person whose will it purports to be or upon other sufficient proof of such handwriting. The foregoing provision shall not preclude the judge, in his discretion, from requiring in addition, the testimony in person or by deposition of any available subscribing witness, or proof of such other pertinent facts and circumstances as the judge may deem necessary to decree the probate of such will. When such will is proved and allowed, it shall have the same force and effect as a will proved and allowed as otherwise provided by law. (1945, c. 18.)

Sec. 9. When letters testamentary granted. — When a will is proved and allowed, the judge of probate may issue letters testamentary thereon to the executor named therein, if he is legally competent, accepts the trust and gives bond to discharge the same when required; but if he refuses to accept on being duly cited for that purpose, or if he neglects for 20 days after probate of the will so to give bond, the judge may grant such letters to the other executors if there are any capable and willing to accept the trust. (R. S. c. 141, § 8.)

Cross reference.—See § 42, re appointment of administrator with will annexed.

Nomination in will does not empower person to act as executor.—The person named in the will as an executor has no power to act as a party, in that character, merely by such nomination. The will may never be approved; the judge may withhold, absolutely, letters testamentary from him; or he may not be qualified for the trust, by omitting to obtain the security required for the faithful execution of the trust. McKeen v. Frost, 46 Me. 239.

The power of an executor to act in the settlement of the estate of a testator is not derived solely from his nomination in the will. His authority is not complete until there has been a compliance with all of the prerequisites named in this section. Chadwick v. Stilphen, 105 Me. 242, 74 A. 50.

And the probate of the will does not determine the person to whom letters testamentary shall issue. Chadwick v. Stilphen, 105 Me. 242, 74 A. 50.

Letters testamentary issue after the will is allowed and, in some instances, not for at least twenty days after. The probate of the will does not determine the person to whom, or the time when, letters testamentary shall issue. These may depend upon the executor named being a suitable person, accepting the trust, and giving bond if a bond is required. If he refuses to accept the trust, or neglects for twenty days after the probate of the will to give bond, then letters testamentary cannot be issued until some other person is found capable and willing to accept the trust. Gurdy, Appellant, 101 Me. 73, 63 A. 322.

Plainly under this statute the allowance or probate of the will and the granting of letters testamentary are two distinct things, involving two different judgments or decrees of the judge of probate and dependent upon different conditions; though the record evidence of both judgments may be and often is contained in the same paper. Gurdy, Appellant, 101 Me. 73, 63 A. 322.

But the following prerequisites are necessary, to constitute the person an executor: First, the probate of the will, which any person interested in may offer for probate. Second, competency, in the opinion of the probate judge. Third, acceptance of the trust, for which purpose he may be cited in. Fourth, delivery of a bond to discharge the same. And fifth and last, reception of letters testamentary. Millay v. Wiley, 46 Me. 230; Chadwick v. Stilphen, 105 Me. 242, 74 A. 50.

Letters properly refused if will not admitted to probate.—An appeal from a decree, refusing to grant letters testamentary, will be dismissed when it does not

appear that the will has been allowed and admitted to probate. Gurdy, Appellant, 101 Me. 73, 63 A. 322.

Cited in Farnsworth v. Whiting, 102 Me. 303, 66 A. 833; Glidden v. Rines, 124 Me. 286, 128 A. 4.

Sec. 10. Wills lost or carried out of state proved; time during which will lost, not taken as part of statute of limitations.—When the last will of any deceased person, who had his domicile in the state at the time of his death, is lost, destroyed, suppressed or carried out of the state and cannot be obtained after reasonable diligence, or is in the custody of any tribunal or magistrate in another state or in a foreign country and cannot be produced in this state, its execution and contents may be proved by a copy, and by the testimony of the subscribing witnesses thereto, or by any other evidence competent to prove the execution and contents of a will, and upon proof of the continued existence of such lost will, unrevoked up to the time of the testator's death, letters testamentary shall be granted as on the last will of the deceased, the same as if the original had been produced and proved. When such original will is produced for probate, the time during which it has been lost, suppressed, concealed or carried out of the state shall not be taken as a part of the limitation provided in section 1. (R. S. c. 141, § 9.)

Will must have had continued legal existence until testator's death.—The phrase, "continued existence * * * unrevoked," means no more than that the will shall continue or remain unrevoked. The statute, in this respect, merely repeats the requirement of the common law, that a person setting up a destroyed will shall show that such will had a continued legal existence down to the testator's death, that is, that the testator continued in the same mind down to the day of his death. Rich v. Gilkey, 73 Me. 595.

But this does not mean physical existence.—The phrase, "continued existence of such lost will * * * unrevoked," does not mean the continued physical existence of the will. The word "existence" sometimes means a physical and sometimes a legal existence. A will may have a physical and not a legal existence, and vice versa, or it may have both. Rich v. Gilkey, 73 Me. 595; Thompson, Appellant, 114 Me. 338, 96 A. 238.

And will may exist although lost.—If a will is made and adhered to by a testator until his death, and he desires it to exist, or supposes it to, then it does legally exist until his death, unrevoked, though prior thereto it has been lost or mislaid, or accidentally or fraudulently despoiled. The writing or script may be gone, but the will remains. Rich v. Gilkey, 73 Me. 595.

Or destroyed. — A deed may be destroyed, so as to have no physical existence, and still have a legal existence, if its contents can be proved. So a will may exist, although the written instrument be destroyed. And oftentimes a will does not exist as a will, although not destroyed. Rich v. Gilkey, 73 Me. 595.

The "continued existence of the will" does not mean its continued physical existence. A will may continue to exist though the paper it was written upon is destroyed. Thompson, Apellant, 114 Me. 338, 96 A. 238.

The limitation of the power of the probate court to admit lost or detroyed wills to probate when proved by copy is not that probate may be granted only "upon proof of the continued existence of such lost will undestroyed up to the time of the testator's death," but "upon proof of the continued existence of such lost will unrevoked up to the time of the testator's death." Thompson, Appellant, 114 Me. 338, 96 A. 238.

Admission to probate condition precedent to granting of letters.—This section does not use the express terms "allowed" as does the preceding section but says "letters testamentary shall be granted as on the last will of the deceased, the same as if the original had been produced and proved." If the original had been produced and proved, it must still have been allowed by the judge of probate as the last will and testament of the deceased before letters testamentary could issue. The admission of the will to probate is therefore made, in the one case as in the other, a condition precedent to the issuing of letters testamentary. It is not reasonable to believe that the legislature intended that in the case of a lost will letters testamentary should issue and the estate of the deceased be administered in accordance with such will, without a finding by the probate court that such will was his last will and testament and its allowances as such. Gurdy, Appellant, 101 Me. 73, 63 A. 322. See note to § 9.

Time during which will mislaid in reg-

ister's office not part of limitation period.—A will which has been mislaid in the office of the register of probate is a lost will so far as the petitioner is concerned and the time during which it was lost is not to be taken as part of the limitation period. Smith, Appellant, 144 Me. 235, 67 A. (2d) 529.

For a case holding that the last sentence of this section did not apply where the limitation period had expired before the section was enacted, see Deake, Appellant, 80 Me. 50, 12 A. 790.

Applied in Thompson, Appellant, 116 Me. 473, 102 A. 303.

Quoted in part in Cousens v. Advent Church, 93 Me. 292, 45 A. 43.

Sec. 11. Bond executor shall give.—Letters testamentary may issue and all acts required by law or otherwise under the provisions of the will may be done and performed by the executor without giving bond, or by his giving one in a specified sum, or without sureties, when the will so provides; but when it appears necessary or proper, the judge may require him to give bond with sureties as in other cases. (R. S. c. 141, § 10.)

All executors are not required to give bond. Dyer v. Walls, 84 Me. 143, 24 A. 801.

But bond may be required despite provisions of will.—This section authorizes the judge of probate to require an executor to give bond "when it appears necessary," even when the will provides that no bond shall be required. Chadwick v. Stilphen, 105 Me. 242, 74 A. 50.

Where, by the express desire of the testator, the executors are relieved from giving bonds, when it appears necessary or proper the judge of probate on application of any party interested may require them to give bonds as in other cases. Fuller v. Fuller, 84 Me. 475, 24 A. 946.

Former provision of section.—For consideration of a former provision of this section concerning the sale of real estate by the executor without giving bond, see Snow v. Russell, 93 Me. 362, 45 A. 305.

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

Sec. 12. Bond of executor.—Every executor before entering on the execution of his trust shall give bond, except when otherwise provided in the will, 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 orders, payable to him or his successors, conditioned, in substance, as follows:

I. To make and return to the probate court, within 3 months, a true inventory of all the real estate, and all the goods, chattels, rights and credits of the testator, which are by law to be administered and which come to his possession or knowledge.

II. To administer, according to law and to the will of the testator, all his goods, chattels, rights and credits.

III. To render, upon oath, a just and true account of his administration within 1 year, and at any other times when required by the judge of probate.

IV. To account, in case the estate should be represented insolvent, for 3 times the amount of any injury done to the real estate of the deceased by him or with his consent, between such representation and the sale of such real estate for the payment of debts, by waste or trespass committed on any building thereon or on any trees standing and growing thereon, except as necessary for repairs or fuel for the family of the deceased; or by waste or trespass of any other kind; and for such damages as he recovers for the like waste or trespass committed thereon. (R. S. c. 141, § 11.)

Cross references.—See c. 59, § 90, re organization and powers of trust companies; c. 60, § 219, re foreign insurance companies as sureties on bonds; c. 124, § 17, re liability of executor for waste.

Failure to give statute bond does not vitiate acts rightfully done.—Where the person nominated as executor in a will was appointed and filed a bond approved by the judge of probate at the time the will was proved, neither the fact that the bond was not such in all respects as is required by the statute, nor that the executor neglected to return an inventory or settle an account in accordance with his bond, vitiates what he has rightfully done in the

discharge of his trust, unless the opposite party has been prejudiced thereby. Pettingill v. Pettingill, 60 Me. 411.

A mistake or omission in an executor's bond, when it has been duly approved by the probate judge, ought not to be held to vitiate what he has rightfully done in the discharge of his trust, unless the opposite party has been in some manner prejudiced thereby. Pettingill v. Pettingill, 60 Me. 411.

As statute considered directory to this extent.—When the executor has given a bond approved by the judge of probate when the will was proved, the statute provisions respecting the conditions of the bond which he shall give must be so far considered as only directory, that he may have the benefit of such of his doings in the premises, as are found conformable to law and the will of the testator, and the account, which he has bound himself to render, should be considered, and, so far as it is found correct and well vouched, allowed. Pettingill v. Pettingill, 60 Me. 411.

Executor chargeable with goods whether included in inventory or not. — An executor is made chargeable in his account with all goods, chattels, rights and credits of the testator, which may come to his hands, and which are by law to be administered, whether included in the inventory or not. Smith v. Lambert, 30 Me. 137.

For a case under a former statute which provided for a different bond when the executor was a residuary legatee, see Frye v. Crockett, 77 Me. 157.

Applied in McKeen v. Frost, 46 Me. 239; Gilman v. Gilman, 54 Me. 453.

Cited in Stewart, Appellant, 56 Me. 300; Dyer v. Walls, 84 Me. 143, 24 A. 801; Davis v. American Surety Co., 144 Me. 187, 67 A. (2d) 421.

Sec. 13. What executors may act; powers of majority.—When two or more persons are named executors in any will and are not released thereby from giving bonds, none shall act as such, or intermeddle, except those who give bonds as aforesaid; but a majority of those legally qualified, unless it is otherwise prescribed therein, may do all the acts in the execution of such trust, which all could do, and all acts so done are as valid in law as if all had agreed thereto; and a suit may be maintained against the executors, so acting, on their bond, for the benefit of any person aggrieved by their acts, without joining the other parties to such bond. (R. S. c. 141, § 12.)

There is no reason why an executor who is nominated in a will must serve, and provision is made by this section for the exercise of the duties of the office by those who legally qualify. Davis v. Scavone, 149 Me. 189, 100 A. (2d) 425.

Will held not to require all executors to act.—See Davis v. Scavone, 149 Me. 189, 100 A. (2d) 425.

Applied in Gilman v. Gilman, 54 Me. 453.

Cited in Dyer v. Walls, 84 Me. 143, 24 A. 801.

Wills Made in Other States or Countries.

Sec. 14. Wills made in other states or countries proved. — Any will executed in another state or country, according to the laws thereof, may be presented for probate in this state in the county where the testator resided at the time of his death, and may be proved and allowed and the estate of the testator settled, as in case of wills executed in this state. (R. S. c. 141, § 13.)

Cross reference.—See § 89, re foreign executors, etc., licensed to collect and receive personal estate.

Applied in Chadwick v. Stilphen, 105 Me. 242, 74 A. 50.

Cited in Lyon v. Ogden, 85 Me. 374, 27 A. 258.

Sec. 15. Wills proved in other states or countries allowed.—A will proved and allowed in another state or country according to the laws thereof may be allowed and recorded in this state in the manner and for the purposes hereinafter mentioned. A copy of the will and the probate thereof, duly authenticated, shall be produced by the executor or by any person interested, to the judge of probate in any county in which there is estate, real or personal, on which the will can operate; whereupon the judge shall assign a time and place for hearing and cause public notice thereof to be given. After such hearing, if the judge con-

siders that the instrument should be allowed in this state as the will of the deceased, he shall order the copy to be filed and recorded. Such will shall then have the same force as if it had been originally proved and allowed in the same court in the usual manner; but nothing herein shall give any operation and effect to the will of an alien different from what it would have had if originally proved and allowed in this state. (R. S. c. 141, § 14.)

Foreign court's judgment conclusive as to facts necessary to establish will.—In a case where it had jurisdiction in fact, the foreign court's judgment is conclusive as to all facts which are necessary to the establishment of a will, and as to the regularity of its proceedings, and their conformity to the law of the state where they were had. Such is the effect of the "full faith and credit" clause in the federal constitution. Holyoke v. Holyoke, 110 Me. 469, 87 A. 40.

But if the foreign court had no jurisdiction in fact, its judgment is conclusive of nothing. And whether it had jurisdiction in fact is always open to inquiry, when the efficacy of the judgment is questioned. The "full faith and credit" clause does not apply in such a case. Holyoke v. Holyoke, 110 Me. 469, 87 A. 40.

And will not allowed in Maine as foreign will.—If the court in the foreign state or country had no jurisdiction to probate the will as a domestic will, it cannot be allowed in Maine as a foreign will. Holyoke v. Holyoke, 110 Me. 469, 87 A. 40.

However, it is considered that the judgment is prima facie proof of jurisdiction, that is to say, it is sufficient unless attacked. Holyoke v. Holyoke, 110 Me. 469, 87 A. 40.

And decree cannot be collaterally attacked.—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.

Estate of devisee vests as of time of testator's death.—Where the will was made and proved in another state, and a copy was subsequently filed and recorded in a probate court in this state, pursuant to the provisions of this section, the estate of the devisee would vest by relation back to the time of the death of the testator, and not to the time of filing and recording the will. Spring v. Parkman, 12 Me. 127.

Residence of deceased need not be stated in petition.—This section, providing that wills proved and allowed in another state or country, according to the laws thereof, may be allowed and recorded in this state, and providing procedure in such cases, does not require, as one step in the procedure, that the residence of the deceased should be stated in the petition. Spencer v. Bouchard, 123 Me. 15, 121 A. 164.

Applied in Crofton v. Ilsley, 4 Me. 134; Putnam Free School v. Fisher, 30 Me. 523; Green v. Alden, 92 Me. 177, 42 A. 358.

Cited in Gilman v. Gilman, 52 Me. 165; Lyon v. Ogden, 85 Me. 374, 27 A. 258; Brown v. Smith, 101 Me. 545, 64 A. 915; Fort Fairfield Nash Co. v. Noltemier, 135 Me. 84, 189 A. 415.

Sec. 16. Foreign wills from states and countries not requiring probate; notarial wills.—When a duly authenticated copy of a will from any state or country where probate is not required by the laws of such state or country, with a duly authenticated certificate of the legal custodian of such original will that the same is a true copy and that such will has become operative by the laws of such state or country, and when a copy of a notarial will in possession of a notary in a foreign state or country entitled to the custody thereof, the laws of which state or country require that such will remain in the custody of such notary, duly authenticated by such notary, is presented by the executor or other persons interested to the proper court in this state, such court shall appoint a time and place of hearing and notice thereof shall be given as in case of an original will presented for probate. If it appears to the court that the instrument ought to be allowed in this state as the last will and testament of the deceased, the copy shall be filed and recorded and the will shall have the same effect as if originally proved and allowed in the said court. (R. S. c. 141, § 15.)

Sec. 17. Letters granted and estate settled. — After allowing and recording any will as aforesaid, the judge of probate may grant letters testamentary

or of administration with the will annexed thereon, and proceed in the settlement of the estate found in this state in the manner provided by its laws with respect to the estates of persons who were inhabitants of any other state or country; and the letters thus granted shall extend to all the estate of the deceased within this state and exclude the jurisdiction of the probate court in every other county. Such administration may be granted in any county in which lands of the testator, subject to the operation of his will, remain undisposed of for more than 20 years from his decease. The provisions of section 11 apply to such proceedings; or the court may, upon issuing letters testamentary, require such bond, with or without sureties, as may have been required by the court before which such will was originally approved and allowed. (R. S. c. 141, § 16.)

Ancillary administration must be obtained for protection of resident creditors. —It may fairly be regarded as the settled policy of this state that, when assets of a foreign decedent are found here, ancillary administration must be obtained here for the protection of resident creditors, before our courts will enforce the recovery of debts due the foreign decedent. Otherwise the assets could be converted into money, taken outside the state, distributed under the jurisdiction of foreign courts, and our citizens compelled to go into other jurisdictions to collect their just dues. Brown v. Smith, 101 Me. 545, 64 A. 915.

And because power of administrator confined to sovereignty where appointed. —It is a well settled principle of the common law that the power and authority of an administrator or executor, over the estate of the deceased, is confined to the sovereignty by virtue of whose laws he is appointed. In recognition of this principle, provision is made by our statutes for the granting of ancillary administration on the estate of nonresidents, who die leaving estate to be administered in this state, or whose estate is afterwards found therein. Brown v. Smith, 101 Me. 545, 64 A. 915.

The provisions of our statutes authorizing the granting of ancillary administration on the estate of nonresidents who die leaving property to be administered in this state, were obviously enacted in recognition of the familiar principle of the common law that the authority of an executor over the estate of a deceased person is confined to the sovereignty by virtue of whose laws he is appointed. Chadwick v. Stilphen, 105 Me. 242, 74 A. 50.

Foreign administrator cannot assign mortgage. — An administrator cannot, by virtue of letters granted in another state, assign a mortgage of land situated in this state, so as to enable the assignee to enforce payment thereof. Brown v. Smith, 101 Me. 545, 64 A. 915.

Estate may be settled as in case of will executed in state. — When this section is construed in connection with §§ 11 and 14, it becomes obvious that a foreign will may be proved and allowed and the estate of the testator settled as in the case of a will executed in this state. Chadwick v. Stilphen, 105 Me. 242, 74 A. 50.

Cited in Lyon v. Ogden, 85 Me. 374, 27 A. 258; Fort Fairfield Nash Co. v. Noltemier, 135 Me. 84, 189 A. 415.

Nuncupative Wills.

Sec. 18. Nuncupative wills approved; notice.—No letters testamentary or probate of any nuncupative will shall pass the seal of any court of probate until 14 days after the decease of the testator; nor shall such will be approved and allowed at any time unless due notice is given to all persons interested specifying that the will to be proved is a nuncupative will. (R. S. c. 141, § 17.)

See c. 169, §§ 18-20, re nuncupative wills.

Administrators.

Sec. 19. Grant of administration on estates of persons deceased, intestate. — Upon the death of any person intestate, the judge having jurisdiction shall grant administration of such intestate's goods or estate to the widow, husband, next of kin, or husband of the daughter of the deceased, or to two or more of them, as he thinks fit, if the applicants are more than 21 years old and are in other respects qualified for the trust, but if unsuitable or being residents

in the county they, after due notice, neglect or refuse for 30 days from the death of the intestate to take out letters of administration, he may commit administration on such estate to such person as he deems suitable. (R. S. c. 141, § 18.)

Cross reference.—See c. 177, § 8, re administrator may be appointed to redeem real estate.

Notice of appointment not given.—No notice is required to be given previous to the appointment of either of the persons named in this section, and it has not been the practice with judges of probate to give such notice. Bean v. Bumpus, 22 Me. 549.

Applied in Farnsworth v. Whiting, 102 Me. 303, 66 A. 833.

Sec. 20. Administration on estates of persons civilly dead. — When any person is under sentence of imprisonment for life and is confined in pursuance thereof, he is, from the time of such imprisonment, to all intents and purposes, civilly dead; and his estate shall be administered upon and distributed, and his contracts and relations to persons and things are affected, in all respects, as if he were dead. (R. S. c. 141, § 19. 1945, c. 378, § 76.)

Imprisonment for a term less than life does not render a prisoner civiliter mortuus. Topsham v. Lewiston, 74 Me. 236.

But a convict serving a life term in prison is, to all intents and purposes, civilly dead. Sullivan v. Prudential Ins. Co., 131 Me. 228, 160 A. 777.

And all legal rights, etc., arising from natural death follow.—All the legal rights, consequences and relations, which would arise or exist in case of the natural death of a person, follows sentence and imprisonment for life. Knight v. Brown, 47 Me. 468.

Civil death is the state of one who, although possessing natural life, is, on account of the commission of crime for which he has been convicted, incarcerated, in execution of sentence, for so long as he shall live, and thereby loses all civil rights; he is considered, in law, dead. His capacities among his fellow members of society are extinct. He can no longer perform any legal function. It is not that he is in fact deceased, but dead in the law. Sullivan v. Prudential Ins. Co., 131 Me. 228, 160 A. 777.

From moment of imprisonment. — From the moment of his imprisonment, the statute operates as to personalty, clearly enough, to deprive the person civilly dead of his property. His rights and responsibilities are transferred to his legal representatives, as would be done had he really died. After administration charges are paid, and debts satisfied, distribution of his estate should follow. Sullivan v. Prudential Ins. Co., 131 Me. 228, 160 A. 777.

A man civilly dead is disabled to sue in his own name. He cannot prosecute actions begun before his imprisonment. Sullivan v. Prudential Ins. Co., 131 Me. 228, 160 A. 777.

And his contracts of agency, etc., are terminated. — Contracts of partnership are affected, as the statute uses the term, by the civil death of the party; so also are contracts altogether personal, as to serve the other party to the contract; and contracts where one is acting for another, such as agencies or powers of attorney, where the agency or power is not coupled with an interest. As to these, civil death and its consequences work a termination not unlike a revocation by natural death. Sullivan v. Prudential Ins. Co., 131 Me. 228, 160 A. 777.

But other contracts are not.—By civil death, contracts in general are affected only in the sense that the administrator of the party civilly dead must fulfil all his engagements, and may enforce all those in his favor. Sullivan v. Prudential Ins. Co., 131 Me. 228, 160 A. 777.

And insurance is not accelerated. — There is in every contract of life insurance, an implied obligation on the part of the insured, that he will do nothing wrongfully to hasten its maturity. His civil death under this section does not accelerate his insurance contract, the risk of which is that of natural, actual death. Sullivan v. Prudential Ins. Co., 131 Me. 228, 160 A. 777.

Sec. 21. Administration granted without bond. — A judge of probate may in his discretion grant administration or administration with the will annexed upon any estate, to the widow, widower or next of kin, without requiring bond for the faithful discharge of the duties of the trust, whenever all persons interested in said estate who are of full age and legal capacity, other than creditors, assent in writing thereto; provided that public notice shall first be given

upon the petition for such appointment. The judge of probate may, however, upon or after granting letters of administration or letters of administration with the will annexed, whenever it appears necessary or proper, require that a bond be given as in other cases. (R. S. c. 141, § 20.)

Sec. 22. Appointment of administrators, if judge of probate refuses or delays.—If any judge of probate shall refuse or unreasonably delay the appointment of an administrator upon the estate of any person deceased upon due application therefor, an application may be made to the superior court sitting in the county where the person deceased had his residence at the time of his death, or to any judge thereof in vacation, for such appointment; and said court or such judge shall have the same power to appoint an administrator as the probate court now has. (R. S. c. 141, § 21.)

Superior court has original jurisdiction to appoint administrator. — "The superior court is the supreme court of probate, and has appellate jurisdiction in all matters determinable by the several judges of probate." (c. 153, § 32). It has, however, original jurisdiction to appoint an administrator when a judge of probate shall refuse or unreasonably delay such appointment. Kneeland v. Buzzell, 135 Me. 363, 197 A. 155.

Sec. 23. Bonds of administrators.—Except when a bond is not required as provided in section 21, every administrator, before entering on the execution of his trust, shall give bond with good and sufficient sureties resident within the state or with a surety company authorized to do business in the state, as surety, in such sum as the judge orders, payable to him or his successors, conditioned in substance as follows:

I. To make and return into the probate court, within 3 months, a true inventory of all the real estate and all the goods, chattels, rights and credits of the deceased, which come into his possession or knowledge.

The failure to render a true and perfect inventory of the rights and credits which have come to the knowledge of the administrator is a breach of one of the conditions of the bond; and a suit can be maintained for the benefit of the estate, by special permission of the judge of probate first had and obtained therefor, although the administrator has returned an imperfect inventory, and has not been cited before the probate judge to add to it, or to account for the items omitted. Gilbert v. Duncan, 65 Me. 469.

Stated in Bean v. Bumpus, 22 Me. 549.

II. To administer according to law all the goods, chattels, rights and credits of the deceased.

Subsection not applicable to realty. — This condition obviously relates to personalty only, and not to the real estate, over which the administrator, except by consent of the heirs, has no authority or control, unless by virtue of a license from the probate judge to sell it for the payment of debts, upon the granting of which, he is required to furnish another bond differently conditioned. Gilbert v. Duncan, 65 Me. 469. See c. 163, §§ 1, 3.

And condition not broken by suffering fraudulent judgment levied on realty.— The condition in an administrator's bond, to administer according to law all the goods, chattels, rights and credits of the deceased, is not broken by the administrator suffering a fraudulent and collusive judgment to be rendered against him, where there is no personal property upon which the execution can be levied, and it is in fact levied on the real estate of the deceased. Gilbert v. Duncan, 65 Me. 469.

Stated in Bean v. Bumpus, 22 Me. 549.

III. To render, upon oath, a true account of his administration within 1 year and at any other times when required by the judge of probate.

There cannot be a breach of this condition until the administrator has been cited to account by the judge of probate. Gilbert v. Duncan, 65 Me. 469.

Account rendered after decree of distribution.—The administering of the goods, chattels, rights and credits, and the rendering of a true account of that administration, in accordance with the conditions of the bond, necessarily come before the decree of distribution. After such administration, and accounting, it only remains

"to pay and deliver any balance." The bond makes no provision in subsection IV for the rendering of an account after the balance is paid and delivered. Mudgett, Appellant, 105 Me. 387, 74 A. 916.

And all property must be accounted for. —It is familiar law that the bond of the executor or administrator binds him to account for every dollar's worth of the property as set forth in the inventory unless by proper evidence and procedure he is relieved of some portion of his obligation. Jones v. Grindal, 121 Me. 348, 117 A. 308.

IV. To pay and deliver any balance, any goods and chattels or rights and credits, remaining in his hands upon the settlement of his accounts, to such persons as the judge of probate directs.

V. To deliver the letters of administration into the probate court in case any will of the deceased is thereafter proved and allowed.

The power of the probate court to revoke a decree granting administration is recognized in this subsection. Cousens v. Advent Church, 93 Me. 292, 45 A. 43.

VI. To account, in case the estate should be represented insolvent, for 3 times the amount of any injury done to the real estate of the deceased by him or with his consent, between such representation and the sale of such real estate for the payment of debts, by waste or trespass committed on any building thereon, or on any trees standing and growing thereon, except as necessary for repairs or fuel for the family of the deceased; or by waste or trespass of any other kind; and for such damages as he recovers for the like waste or trespass committed thereon. (R. S. c. 141, § 22.)

Cross references.—See c. 60, § 219, re foreign insurance companies as sureties on bonds, c. 124, § 17, re liability of administrator for waste.

Subsection VI not only does not deprive the heirs of a right of possession until the land is sold, but it provides to some extent for the necessities of such a possession, by exempting from liability to trespass, the cutting down of any trees that may be required "for repairs or fuel for the family of the deceased." Kimball v. Sumner, 62 Me. 305.

Liability under subsection VI is only for injury done to real estate.—By this condition of an administrator's bond, in case of insolvency, he shall account for treble the amount of injury done by him, or with his consent, upon the real estate of the deceased, by any "waste or trespass" committed thereon; and for such damages as he recovers for like waste or trespass committed by others. This refers to an injury to the freehold, such as will lessen its value when sold for debts, and not to its use and occupation. The liability is only for an "injury done to the real estate." Kimball v. Sumner, 62 Me. 305.

And condition applies only to cases of insolvency. — This condition applies only to cases where proceedings are had in the probate court upon the estate as an insolvent estate. Gilbert v. Duncan, 65 Me. 469.

If the estate has not been "represented insolvent," within the meaning of that phrase as used in the sixth condition of the bond, no waste or trespass committed with the consent of the administrator, however clearly proved, is within the condition or amounts to a breach of it. Gilbert v. Duncan, 65 Me. 469.

Section applied in Thurston v. Lowder, 47 Me. 72.

Sec. 24. Administration upon estates of persons who have disappeared and not heard from for at least 7 years; exception.—If a person entitled to or having an interest in personal property within the jurisdiction of this state has disappeared from the place within this state where he was last known to be or resided, and his disappearance is followed by a continued absence for a period of not less than 7 years from the date of disappearance, during which period he is unheard from; and a petition is made to the probate court in the county in which said person last resided or in which he left said property of the value of at least $20, which petition shall allege the disappearance, continued absence and presumption of death of said person and request the allowance of the will of said person, if he left one, or the appointment of an administrator, if he is alleged to have died intestate; and the said probate court, after notice and hearing thereon, shall issue letters testamentary or of adminis-

tration upon his estate; then any payment due the estate of said person made to the executor or administrator thereof shall be valid, and the receipt or release given by said executor or administrator shall be a bar to any further or other action therefor. Except that persons on active duty with the armed forces of the United States classed as "missing in action" shall be presumed to be dead after continued absence of 1 year from the date such persons are so classed upon written finding of presumed death made by the Secretary of War, the Secretary of the Navy, or other officer or employee of the United States authorized to make such finding pursuant to the Federal Missing Persons Act (56 Stat. 143, 1092, and P. L. 408, Ch. 371, 2nd Sess. 78th Cong.; 50 U.S.C. App. Supp. 1001-17), as now or hereafter amended, or upon a duly certified copy of said finding. (R. S. c. 141, § 23. 1945, c. 312, § 1. 1951, c. 157, § 16.)

This section, besides validating payments to executors and administrators, fixes the rights of persons known to be living, in the estates of persons determined presumably dead. Wilson v. Prudential Ins. Co., 132 Me. 63, 166 A 57.

Sec. 25. Evidence of presumption of death after 1 year.—A written finding of presumed death made by the Secretary of War, the Secretary of the Navy, or other officer or employee of the United States authorized to make such findings pursuant to the Federal Missing Persons Act, or a duly certified copy of such finding, shall be received in any court, office or other place in this state as evidence of the death of the person therein found to be dead, and the date, circumstances and place of his disappearance. (1945, c. 312, § 2.)

Sec. 26. Establishing fact of life or death.—An official written report or record, or duly certified copy thereof, that a person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead, or is alive, made by any officer or employee of the United States authorized by the Federal Missing Persons Act or by any other law of the United States to make same, shall be received in any court, office or other place in this state as evidence that such person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead, or is alive, as the case may be. (1945, c. 312, § 2.)

Sec. 27. Evidence of fact of execution of instrument.—For the purposes of sections 25 and 26, any finding, report or record, or duly certified copy thereof, purporting to have been signed by such an officer or employee of the United States as is described in said sections, shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing same shall prima facie be deemed to have acted within the scope of his authority. If a copy purports to have been certified by a person authorized by law to certify the same, such certified copy shall be prima facie evidence of his authority so to certify. (1945, c. 312, § 2.)

Estates of Absentees.

Sec. 28. Estates of absentees.—If a person entitled to or having an interest in property within the jurisdiction of the state has disappeared or absconded from the place within or without the state where he was last known to be, and has no agent in the state, and it is not known where he is, or if such person, having a wife or minor child dependent to any extent upon him for support, has thus disappeared or absconded without making sufficient provision for such support, and it is not known where he is, or, if it is known that he is without the state, anyone who would under the law of the state be entitled to administer upon the estate of such absentee if he were deceased, or if no one is known to be so entitled, any creditor, or such wife, or someone in her or such minor's behalf, may file a petition under oath in the probate court for the county where

such property is situated or found, stating the name, age, occupation and last known residence or address of such absentee, the date and circumstances of the disappearing or absconding, and the names and residences of other persons, whether members of such absentee's family or otherwise, of whom inquiry may be made, and containing a schedule of the property, real and personal, so far as known, and its location within the state, and praying that such property may be taken possession of, and a receiver thereof appointed under the provisions of sections 28 to 41, inclusive. (R. S. c. 141, § 24.)

Sec. 29. Warrant. — The court may thereupon issue a warrant, directed to the public administrator in the county where the property or some of it is situated, which may run throughout the state, commanding him to take possession of the property named in said schedule and make return of said warrant as soon as may be with his doings thereon with a schedule of the property so taken. The public administrator shall cause so much of the warrant as relates to land to be recorded in the registry of deeds for the county where the land is located. He shall receive such fees for serving the warrant as the court allows, but not more than those established by law for similar service upon a writ of attachment. Fees and the costs of publishing and serving the notice hereinafter provided shall be paid by the petitioner; if a receiver is appointed, said fees shall be repaid by the receiver to the petitioner and allowed the receiver in his account. (R. S. c. 141, § 25.)

Sec. 30. Notice.—Upon the return of such warrant, the court may issue a notice reciting the substance of the petition, warrant and return, which shall be addressed to such absentee and to all persons who claim an interest in said property, and to all to whom it may concern, citing them to appear at a time and place named and show cause why a receiver of the property named in the schedule should not be appointed and said property held and disposed of under the provisions of sections 28 to 41, inclusive. (R. S. c. 141, § 26.)

Sec. 31. Publication of notice.—The return day of said notice shall be not less than 30 days nor more than 60 days after its date. The court shall order said notice to be published once in each of 3 successive weeks in one or more newspapers within the said county and a copy to be mailed to the last known address of such absentee. The court may order other and further notice to be given within or without the state. (R. S. c. 141, § 27.)

Sec. 32. Hearing.—The absentee or any person who claims an interest in any of the property may appear and show cause why the prayer of the petitioner should not be granted. The court may, after hearing, dismiss the petition and order the property in possession of the public administrator to be returned to the person entitled thereto, or it may appoint the person who, under the law of the state, would be entitled to administer upon the estate of such absentee if he were deceased, or if no such person is known or such person declines to serve, then he may appoint the public administrator for said county as receiver of the property which is in the possession of the public administrator and named in his schedule. If a receiver is appointed, the court shall find and record the date of the disappearance or absconding of the absentee and such receiver shall give bond to the judge of probate and his successors in office in such sum and with such condition as the court orders. (R. S. c. 141, § 28.)

Sec. 33. When receiver may take property.—After the approval of such bond, the court may order the public administrator to transfer and deliver to such receiver the possession of the property under the aforesaid warrant, and the receiver shall file in the registry of probate a schedule of the property received by him. (R. S. c. 141, § 29.)

Sec. 34. Receiver to collect debts.—Such receiver shall take possession of any additional property within the state which belongs to such absentee and demand and collect all debts due such absentee from any person within the state and hold the same as if it had been transferred and delivered to him by the public administrator. Provided that if he takes any additional real estate said receiver shall file a certificate describing said real estate with the register of deeds for the county where the real estate is located. (R. S. c. 141, § 30.)

Sec. 35. Appointment of receiver.—If such absentee has left no corporeal property within the state, but there are debts or obligations due or owing to him from persons within the state, a petition may be filed as provided in section 28, stating the nature and amount of such debts and obligations so far as known, and praying that a receiver thereof may be appointed. The court may thereupon issue a notice as above provided, without issuing a warrant, and may, upon the return of said notice and after a hearing, dismiss the petition or appoint a receiver and authorize and direct him to demand and collect the debts and obligations of said absentee. Said receiver shall give bond as provided in section 32, and shall hold the proceeds of such debts and obligations and all property received by him and distribute the same as hereinafter provided. (R. S. c. 141, § 31.)

Sec. 36. Perishable goods involved.—The court may make orders for the care, custody, leasing and investing of all property and its proceeds in the possession of the receiver. If any of the said property consists of live animals or is perishable or cannot be kept without great or disproportionate expense, the court may, after the return of the warrant, order such property to be sold at public or private sale. After the appointment of a receiver, upon his petition, the court may order all or part of said property, including the rights of the absentee in land, to be sold at public or private sale to supply money for payments authorized by sections 28 to 41, inclusive, or for reinvestment approved by the court. (R. S. c. 141, § 32.)

Sec. 37. Support of dependents.—The court may order said property or its proceeds acquired by mortgage, lease or sale to be applied in payment of charges incurred or that may be incurred in the support and maintenance of the absentee's wife and dependent children, and to the discharge of such debts and claims for alimony as may be proved against said absentee. (R. S. c. 141, § 33.)

Sec. 38. Arbitration of claims.—The court may authorize the receiver to adjust by arbitration or compromise any demand in favor of or against the estate of such absentee. (R. S. c. 141, § 34.)

Sec. 39. Receiver, compensation; when duties end. — The receiver shall be allowed such compensation and disbursements as the court orders, to be paid out of said property or proceeds. If within 14 years after the date of the disappearance and absconding as found and recorded by the court, such absentee appears, or an administrator, executor, assignee in insolvency or trustee in bankruptcy of said absentee is appointed, such receiver shall account for, deliver and pay over to him the remainder of said property. If said absentee does not appear and claim said property within said 14 years, all his right, title and interest in said property, real or personal, or the proceeds thereof, shall cease, and no action shall be brought by him on account thereof. (R. S. c. 141, § 35.)

Sec. 40. End of receivership.—If at the expiration of said 14 years said property has not been accounted for, delivered or paid over under the provisions of the preceding section, the court shall order the distribution of the remainder to the persons to whom, and in the shares and proportions in which, it would have been distributed if said absentee had died intestate within the state on the day 14 years after the date of the disappearance or absconding as found and re-

corded by the court, except that said receiver shall deduct from the share of each distributee and pay to the attorney general for the use of the state such amount as said distributee would have paid in an inheritance tax to the state if said distributee had received the property by inheritance from a deceased resident of this state. (R. S. c. 141, § 36.)

Sec. 41. Limiting clause.—If such receiver is not appointed within 13 years after the date found by the court under the provisions of section 32, the time limited to accounting for, or fixed for distributing, said property or its proceeds, or for barring actions relative thereto, shall be 1 year after the date of the appointment of the receiver instead of the 14 years provided in the 2 preceding sections. (R. S. c. 141, § 37.)

Administrators with the Will Annexed and De Bonis Non.

Sec. 42. Administrator with will annexed.—If there is no person whom the judge can appoint executor of any will according to the provisions of section 9; or, if the only one appointed neglects to file the required bond within the time therein allowed, he may commit administration of the estate, with the will annexed, to any suitable person whether beneficially interested or not having regard to the best interests of the persons interested under such will; and when an executor is under 21 years of age at the time of the probate of the will, administration may be granted, with the will annexed, during his minority, unless there is another executor who accepts the trust, in which case the estate shall be administered by such other executor until the minor arrives at full age, when he may be admitted as joint executor with the former, upon giving bonds as before provided. (R. S. c. 141, § 38. 1951, c. 344.)

Applied in Farnsworth v. Whiting, 102 Me. 303, 66 A. 833.

Cited in Waterman v. Dockray, 78 Me. 139, 3 A. 49.

Sec. 43. Removal of executors or administrators; administration to other persons.—When an executor or administrator residing out of the state, after being ordered by the judge of probate, neglects to render his accounts and settle the estate according to law, or when any executor or administrator, joint or sole, becomes insane or otherwise unsuitable to perform the trust, refuses or neglects to do so, or mismanages the estate, said judge may remove him; and he may accept the resignation of any joint or sole executor or administrator when he is satisfied, after public or personal notice to those interested and a hearing, that there is reasonable cause therefor and that it will not be detrimental to the estate or to those interested therein; and in either case, if there is no other executor or administrator to discharge the trust, the judge may commit administration of the estate not already administered, with the will annexed or otherwise as the case requires, to such persons as he thinks fit, as if the one resigned or removed were dead; and such administrator shall have the same powers and be liable to the same obligations as other administrators or executors whom he succeeds. An appeal from the decree of removal of an executor or administrator shall not suspend or vacate the decree pending decision by the supreme court of probate. (R. S. c. 141, § 39.)

Conflicting personal interests renders executor or administrator unsuitable.—An executor or administrator is deemed unsuitable within the meaning of this section when he has any conflicting personal interest which prevents him from doing his official duty. McCluskey, Appellant, 116 Me. 212, 100 A. 977.

Applied in Senechal, Appellant, 122 Me. 317, 119 A. 814.

Cited in Peacock v. Ambrose, 121 Me. 297, 116 A. 832.

Sec. 44. Authority of administrators de bonis non.—An administrator de bonis non shall collect and receive from his predecessor or his heirs, executors or administrators, and from all other sources, all the property and assets

of the estate of the deceased, including the proceeds from the sale of real estate, not already distributed, and shall account for and distribute the same as though he were the original administrator or executor; and all sums recovered on any probate bond shall be a part of the estate, but so much thereof as is recovered on any real estate bond shall be distributed as is provided for the distribution of the proceeds of the sale of real estate. (R. S. c. 141, § 40.)

The authority of an administrator de bonis non has been extended by this section, and it is made his power and duty to collect from his predecessor or his heirs, etc., and from all other sources, all the property and assets of the estate of the deceased, including the proceeds from the sale of real estate, not already distributed. Walker v. Portland Savings Bank, 113 Me. 353, 93 A. 1025.

By this section, the power and duty of administrators d. b. n. are extended to effects not distributed and are no longer restricted to those unadministered. Libby v. Jerrard, 117 Me. 303, 104 A. 351.

But he has no recourse against predecessor for maladministration.—While an administrator de bonis non is understood in general terms to be the successor of the executor, still he derives his title directly from the testator and not from the executor. On his appointment there vests in him, as is indicated by his commission and official designation, title only to the unadministered property of the testator, in trust for those to whom it belongs. Therefore, in the absence of any statutory provision to the contrary, he has no recourse against the official predecessor for devastavit or maladministration, the remedy therefor being reserved to the creditors, legatees and distributees directly; the executor being responsible, in general terms, to his successor only for the goods, effects and credits which were of the testator at the time of his decease, and remain unadministered, that is, in specie, unaltered or unconverted by any act of the executor or the proceeds thereof not mixed with the latter's own money. Though in several of the states statutory provisions allow an administrator de bonis non to call for a full accounting by his predecessor and resort to an action on his bond, there are no such liberal statutory provisions in this state. Waterman v. Dockray, 78 Me. 139, 3 A. 49.

Applied in In re Rumery, 123 Me. 398, 123 A. 179.

Sec. 45. Marriage of executrix or administratrix. — When an unmarried woman who is joint or sole executrix or administratrix marries, her husband shall not exercise such trust in her right nor is her authority thereby extinguished. (R. S. c. 141, § 41.)

Former provision of section.—For cases under a former provision of this section which extinguished the authority of an executrix of administratrix upon her marriage, see Hinds v. Jones, 48 Me. 348; Stewart, Appellant, 56 Me. 300; Bourne v. Todd, 63 Me. 427.

Sec. 46. Death of executor. — The executor of an executor has no authority, as such, to administer the estate of the first testator; but on the death of the sole or surviving executor of any last will, administration of said estate not already administered may be granted with the will annexed to such person as the judge thinks fit. (R. S. c. 141, § 42.)

It is the right and duty of an administrator to account in the probate court, in behalf of his intestate, as executor or administrator, but the accounting is limited to the acts and doings of the deceased representative in his lifetime, and the administrator can proceed no further in the administration of the first intestate, and so expressly by this section with executors. Libby v. Jerrard, 117 Me. 303, 104 A. 351.

Sec. 47. Bond of administrator with will annexed and de bonis non. —Except when a bond is not required as provided in section 21, every person appointed administrator with the will annexed shall, before entering upon the execution of his trust, give such bond to the judges as is required of an executor. Every administrator de bonis non shall give such bond as is required of an executor or administrator as the case may demand. (R. S. c. 141, § 43.)

Cited in Waterman v. Dockray, 78 Me. 139, 3 A. 49.

Public Administrators.

Sec. 48. Public administrators; duties; bonds. — The governor, with the advice and consent of the council, shall appoint in each county for the term of 4 years, unless sooner removed, a public administrator therein, who shall, upon petition to the probate court and after due notice thereon, take out letters of administration and administer on the estates of persons who die intestate in said county, or elsewhere leaving property in said county, not known to have in the state a widow, widower or any heirs or kindred who can lawfully inherit such estate; and who shall account in like manner and give bond to the judge with like condition as in cases of ordinary administration, subject, however, to the provisions of section 51; and provided also that if any widow, widower or next of kin of said deceased shall, prior to the issuing of letters of administration to said public administrator, file a petition in probate court asking that said administration be granted to said widow, widower or next of kin, or to any other person designated by them, the said probate court after due notice shall appoint an administrator as prayed for in said petition. (R. S. c. 141, § 44. 1945, c. 325, § 1.)

Sec. 49. Fees.—Said public administrator may be allowed the fees and commission as in case of ordinary administration; and, in addition where in the opinion of the judge such fees and commission fail to give adequate compensation for the services rendered, he may be allowed such additional compensation as the judge shall consider fair and reasonable, but not more than an additional 5% on the amount of personal assets that come into the hands of said public administrator. (1945, c. 325, § 2.)

Sec. 50. Conserving property, pending appointment. — Pending the appointment of said public administrator, when it appears necessary or expedient, said public administrator may proceed to conserve the property of the estate. (1945, c. 325, § 3.)

Sec. 51. Powers revoked.—If, before the estate of such deceased in the hands of the public administrator is fully settled, any last will and testament of such deceased is produced and duly proved or if any heirs, next of kin, widow or widower of such deceased makes application in writing to the judge having jurisdiction of the estate and claims the right to administer thereon or to have some other suitable person appointed to that trust, the judge may revoke the former administration and grant letters testamentary, or new administration, as the case requires; and thereupon the public administrator shall surrender his letters of administration to such judge, settle his account and deliver to his successor all sums of money in his hands and all goods, chattels, rights and credits of said deceased not administered upon. (R. S. c. 141, § 45. 1945, c. 325, § 4.)

Sec. 52. Balance distributed.—When there is in the hands of such public administrator an amount of money more than is necessary for the payment of the deceased's debts and for other purposes of administration, if no widow, widower or heirs of said deceased have been discovered, said administrator shall be required by the judge to deposit it with the treasurer of state, who shall receive it; the state shall be responsible for the principal thereof, for the benefit of those who may lawfully claim it; and the governor and council, on application and proof, may order the treasurer to pay it over, and such principal is appropriated to pay such lawful claims.

If during the process of administration of such estate any widow, widower or heirs of said deceased are discovered, then the probate court shall order distribution of the estate in the same manner as in the case of ordinary administration. (R. S. c. 141, § 46.)

Sec. 53. Notice; audit.—In all cases where letters of administration are granted to a public administrator, the register shall immediately send to the treas-

urer of state a copy of the petition and the decree thereon, and in all cases where the public administrator is ordered to pay the balance of the estate to the treasurer of state, the judge shall give notice to the treasurer of state of such amount and from what estate it is receivable; and if said administrator neglects for 3 months after the order of the judge therefor to deposit the same, the said treasurer shall cause his probate bond to be put in suit for the recovery thereof. The records and accounts of said public administrator shall be audited annually by the state department of audit. (R. S. c. 141, § 47. 1945, c. 325, § 5.)

Sec. 54. Balance, not claimed in 20 years, forfeited to state.—If the heirs, widow or next of kin to any such intestate, or other lawful claimants do not demand such money within 20 years from the time of its deposit, it shall be forfeited to the state. (R. S. c. 141, § 48.)

Special Administrators.

Sec. 55. Special administrator; bond.—When there is a delay in granting letters testamentary or of administration, the judge of probate may appoint a special administrator who shall, notwithstanding any pending appeal, proceed in the execution of his duties until it is otherwise ordered by the supreme court of probate, and if, for any cause other than an appeal, the judge of probate decides that it is necessary or expedient, he may at any time and place, with or without notice, appoint a special administrator; and he shall give bond like other administrators, conditioned that he will make and return into the probate court within 3 months a true inventory of all the goods, chattels, rights and credits of the deceased which come to his possession or knowledge; and that he will truly account for them under oath and deliver them to the person authorized to receive them. When, by reason of the removal or discharge of executors or administrators and appeals from the decrees of removal or discharge, there is no executor or administrator to act, the judge may appoint a special administrator who shall have the same powers and perform the same duties as other special administrators, until such appeals are disposed of and some executor or administrator may legally act. (R. S. c. 141, § 49.)

Applied in Libby v. Cobb, 76 Me. 471.

Quoted in part in Millay v. Wiley, 46 Me. 230.

Stated in part in Dennett v. Hopkinson, 63 Me. 350.

Cited in Allen v. Foss, 102 Me. 163, 66 A. 379.

Sec. 56. Powers and duties.—The special administrator shall collect all the goods, chattels and debts of the deceased, control and cause to be improved all his real estate, collect the rents and profits thereof and preserve them for the executor or administrator thereafter appointed; and for that purpose may maintain suits and sell such perishable and other goods as the judge orders; and shall have such powers to vote stock owned by the deceased as the deceased would have if living, at all corporation meetings, and the authority to sell and transfer any specific rights which may have accrued to the estate of said deceased as such stockholder and the judge may authorize and direct that the business of the deceased, in whole or in part shall, for a limited time to be determined by him, be carried on by such special administrator as a going business; pay the expenses of the funeral and last sickness and of his administration; debts preferred under the laws of the United States; public rates and taxes, and money due the state from the deceased; and pay to the widow, if any, and if not, to the guardian of the children under 14 years of age, for their temporary support, such sums as the judge orders, having regard to the state and the amount of the property; and sums so paid to the widow or guardian shall be deducted, if the estate is solvent, from the share of the widow or children, but if insolvent, shall be considered by the judge in his allowance to them. (R. S. c. 141, § 50.)

Cross reference.—See § 73, re carrying on business, etc.

Special administrator has powers commensurate with duties.—Special adminis-

trators do not have the general powers of general administrators, but it is a fair construction of their powers, to say that they are commensurate with their duties. Libby v. Cobb, 76 Me. 471.

And he is to preserve all assets. — By this section, special administrators are to inventory, and "collect all the goods, chattels and debts of the deceased, control and cause to be improved all his real estate, collect the rents and profits thereof and preserve them for the executor or administrator thereafter appointed." The words "preserve them" are not limited to rents and profits, but apply to all assets, real and personal. The special administrator is to collect the personal assets, control and improve the real estate, that he may preserve all. The very object of his appointment is the preservation of all the assets, real as well as personal, for the realty may be the only fund for creditors. His powers should be construed as sufficient for such a purpose. Libby v. Cobb, 76 Me. 471.

And he may maintain suits for such purpose.—The special administrator may maintain suits, for the purpose of preserving, as well as of collecting, controlling and improving. Libby v. Cobb, 76 Me. 471.

The statute provides for the appointment of special administrators, when there is a delay in granting letters testamentary, and such administrators may preserve and protect all the estate, both real and personal, and for that purpose may maintain suits. Allen v. Foss, 102 Me. 163, 66 A. 379.

Including bill to redeem mortgaged land. — A special administrator can maintain a bill in equity to redeem land of his intestate from a mortgage, where the right to redeem might be barred by foreclosure before a general administrator would be qualified. Libby v. Cobb, 76 Me. 471.

Applied in Paradis, Appellant, 134 Me. 333, 186 A. 672.

Stated in part in Dennett v. Hopkinson, 63 Me. 350.

Sec. 57. Compensation; when powers cease.—The special administrator shall be allowed such compensation for his services as the judge thinks reasonable, not exceeding that allowed to other administrators; and on the granting of letters testamentary or of administration his powers cease and he shall forthwith deliver all the goods, chattels, money and effects of said deceased in his hands, and the executor or administrator may prosecute any suit commenced by the special administrator as if it had been commenced by himself. (R. S. c. 141, § 51.)

Cross reference. — See c. 153, § 45, re fees of administrators, etc.

The powers and duties of the special administrator cease upon the appointment of an administrator with the will annexed. Rockland v. Farnsworth, 111 Me. 315, 89 A. 65.

Sec. 58. Not sued by creditor without decree of judge.—No special administrator is liable to an action by any creditor of the deceased, without an application by such creditor to the judge and his decree authorizing it; and the limitation of all suits against the estate begins to run from the time of granting letters testamentary or of administration in the usual form as if such special administration had not been granted. (R. S. c. 141, § 52.)

See c. 165, § 17, re continuance of actions brought within 1 year of qualification of executors, etc.

Sec. 59. Letters granted to executor, pending appeal.—When a will has been proved and allowed by the judge of probate and an appeal made therefrom, he may, instead of appointing a special administrator as aforesaid, grant letters testamentary to the executor named in such will, who shall give bond and proceed in the settlement of such estate as if no appeal had been made; and after payment of the just debts and charges of administration, he shall retain in his hands all the remaining avails of such estate to await the result of the case in the supreme court of probate, and then pay the same, under the direction of the judge of probate, to the parties legally entitled thereto. (R. S. c. 141, § 53.)

Executors in Their Own Wrong.

Sec. 60. Executors in their own wrong; liability.—Whoever sells or embezzles any of the goods or effects of a deceased person liable to administration, before taking out letters testamentary or of administration thereon and giving bond accordingly, is liable as an executor in his own wrong to the actions of the creditors and other persons aggrieved, and also to the rightful executor or administrator for the full value of the goods or effects of the deceased taken by him and for all damages caused by his acts to said estate; and he shall not retain any part of the goods or effects, except for such funeral expenses, debts of the deceased or other charges actually paid by him as the rightful executor or administrator would have had to pay. (R. S. c. 141, § 54.)

An executor de son tort is one who derives no authority from the testator, but who assumes the office by virtue of his own interference with the estate of one deceased. He intrudes himself into the office without lawful authority. This section is in affirmance of the common law in this particular. Such intermeddling, or intrusion, is in effect holding out one's self as executor, and authorizes the conclusion that he has a will of the deceased wherein he is named as executor, but has not yet taken the probate thereof. Hinds v. Jones, 48 Me. 348.

Husband not charged as executor for acts of wife. — The unauthorized acts of the wife, committed in the absence of her husband and without his knowledge, do not lay the foundation for charging him as an executor de son tort on account of them. Hinds v. Jones, 48 Me. 348.

Section protects defendant when paying charges administrator would have had to pay. — When an executor in his own wrong is sued, it is provided by this section, that "he shall not be allowed to retain any part of the goods or effects, except for such funeral expenses, debts of the deceased or other charges actually paid by him as the rightful executor or administrator would have to pay." That is, he is permitted to retain to the extent indicated. The word retain was used to protect the defendant, whatever may be the form of the action when sounding in damages, by enabling him to retain what, if not paid by him, the administrator or executor would have been compelled to pay. Tobey v. Miller, 54 Me. 480.

The necessity of a decent burial arises immediately after the decease, and the law, both ancient and modern, pledges the credit of the estate for the payment of such reasonable sums as may be necessary for that purpose, even though such expenses may have been incurred after the death and before the appointment of an administrator. Phillips v. Phillips, 87 Me. 324, 32 A. 963.

Declaration same as in action against rightful executor.—The right of action is given by this section "to creditors and other persons aggrieved" against the person interfering as executor de son tort. But in such case the declaration against an alleged executor is in the same form, whether the defendant is the rightful executor or executor de son tort. Lee v. Chase, 58 Me. 432.

And defendant must be declared against as executor. — An action which is not against the defendant as executor cannot be maintained under this section, even if the plaintiff is one of the persons referred to in the section. The defendant should be declared against as executor. Lee v. Chase, 58 Me. 432.

Applied in O'Donnell v. O'Donnell, 57 Me. 24.

Cited in Millay v. Wiley, 46 Me. 230; McLean v. Weeks, 65 Me. 411.

Provisions Relating to Both Executors and Administrators.

Sec. 61. Application that no bond be required stated in petition and in public notice on petition.—Letters testamentary shall not issue under the provisions of section 11, nor shall administration or administration with the will annexed be granted without bond under the provisions of section 21, unless the petition for probate of the will or for administration contains an application that no bond, or a bond without sureties, be required, and the fact of such application is stated in the public notice on such petition. (R. S. c. 141, § 55.)

Sec. 62. Nonresident executors or administrators to appoint agent or attorney in state.—No person residing out of the state shall be appointed

an executor or administrator unless he shall have appointed an agent or attorney in the state. Such appointment shall be made in writing and shall give the name and address of the agent or attorney. Said written appointment shall be filed and recorded in the probate office for the county in which the principal is appointed, and by such appointment the subscriber shall agree that the service of any legal process against him as such executor or administrator, or that the service of any such process against him in his individual capacity in any action founded upon or arising out of any of his acts or omissions as such executor or administrator shall, if made on such agent, have like effect as if made on himself personally within the state, and such service shall have such effect. An executor or administrator who after his appointment removes from and resides without the state shall so appoint an agent within 30 days after such removal. If an agent appointed under the provisions of this section dies or removes from the state before the final settlement of the accounts of his principal, another appointment shall be made, filed and recorded as above provided; the powers of an agent appointed under the provisions of this section shall not be revoked prior to the final settlement of the estate unless another appointment shall be made as herein provided. Neglect or refusal by an executor or administrator to comply with any provision of this section shall be cause for removal. An executor or administrator residing out of the state shall not appoint his coexecutor or coadministrator, residing in the state, as his agent. (R. S. c. 141, § 56.)

History of section. — See Camden Auto Co. v. Mansfield, 120 Me. 187, 113 A. 175.

Service on agent may be same as on other resident.—The agent is a resident of Maine, and whatever constitutes a legal and valid service on him as a resident constitutes a legal and valid service upon him as agent and therefore upon his principal, the executor or administrator. Such service can be either personal, or made by leaving the summons at the last and usual place of abode, the same as in the case of any other resident. There is no distinction between the forms of service allowed to be made upon the resident who is acting as the agent of a foreign executor or administrator and those upon any other resident of Maine. Camden Auto Co. v. Mansfield, 120 Me. 187, 113 A. 175.

Applied in Dyer v. Walls, 84 Me. 143, 24 A. 801.

Sec. 63. Inventory; when returned.—Every executor or administrator, within 3 months after his appointment, or within such further time not exceeding 3 months as the judge allows, shall make and return upon oath into the probate court a true inventory of the real estate and of all the goods, chattels, rights and credits of the deceased which are by law to be administered and which come to his possession or knowledge. If any executor or administrator neglects or refuses to file an inventory of the estate under his charge within said 3 months, or within such further time as the judge may have allowed therefor, he may be cited to file such inventory by the judge upon petition of any surety on the bond or bonds of such executor or administrator or upon the petition of any person interested in the estate. (R. S. c. 141, § 57.)

Cross reference. — See c. 161, § 1, re partnership property.

Every executor or administrator must make inventory. — Every executor or administrator is required to make and return upon oath a true inventory of the real estate and of all the goods, chattels, rights and credits of the deceased which are by law to be administered and which come to his possession or knowledge. Jones v. Grindal, 121 Me. 348, 117 A. 308.

From which nothing to be omitted except items enumerated in § 68. — By this section, every executor or administrator is required to "make and return upon oath into the probate court a true inventory of the real estate and of all the goods, chattels, rights, and credits of the deceased which are by law to be administered and which come to his possession or knowledge." From this inventory nothing is to be omitted except the items enumerated in § 68. Hathaway v. Sherman, 61 Me. 466.

And the omission of an administrator to return an inventory is a breach of his bond. Woodbridge v. Tilton, 84 Me. 92, 24 A. 582. See § 23, sub-§ I.

An inventory is not conclusive either for or against an administrator but is open to

denial or explanation. Jones v. Grindal, 121 Me. 348, 117 A. 308.

But it is prima facie evidence of amount of estate.—The inventory of an estate duly sworn to and filed in the probate court is prima facie evidence of the amount of the estate which came into the hands of the executor or administrator, but not conclusive, and may be introduced to show, prima facie, the financial benefits which a widow of the deceased may receive from that estate. Such evidence is open to denial or explanation either as to property improperly scheduled, or as to title or value of the same. Jones v. Grindal, 121 Me. 348, 117 A. 308.

Cited in Richburg, Appellant, 148 Me. 323, 92 A. (2d) 724.

Sec. 64. Appointment of appraisers.—The real estate, goods and chattels, and rights and credits comprised in the inventory shall be appraised by 1 or 3 disinterested persons appointed by the judge or register, and sworn; and when any part of such estate is in another county, the judge or register may appoint appraisers for such county to return an inventory thereof, who shall also be sworn. Only 1 appraiser may be appointed, if in the opinion of the judge or register the nature of the property makes it desirable to do so; otherwise 3 appraisers shall be appointed. (R. S. c. 141, § 58.)

See c. 112, § 57, re appraisal of property under attachment.

Sec. 65. Warrants revoked.—Any warrant for the appraisement of an estate may be revoked by the judge for sufficient cause, and a new one issued if necessary. (R. S. c. 141, § 59.)

Sec. 66. Choses in action appraised. — Such of the credits of the deceased and rights to personal property not in possession, as the appraisers judge to be available as assets, shall be enumerated in a schedule part of said inventory, with the names of the debtors or parties obligated, the sums supposed to be due thereon, and the nature of the rights aforesaid, whether absolute or conditional; and they shall state, in one general sum at the foot of such schedule, the amount which in their judgment may be realized from the same, exclusive of expenses and risk of settlement or collection. (R. S. c. 141, § 60.)

See c. 112, § 57, re appraisal of property under attachment.

Sec. 67. Additional inventories required.—The judge may, at any time afterward, when any estate or effects, rights or credits come to the knowledge or possession of any executor or administrator, require of him an additional inventory; appraisers in like manner shall be appointed and sworn; and return shall be made within the time directed by the judge in his warrant. (R. S. c. 141, § 61.)

Sec. 68. Articles omitted from inventory.—The following articles shall be omitted in making the inventory and shall not be administered upon as assets:

I. All the articles of apparel or ornament of the widow, according to the degree and estate of her husband, and the apparel and schoolbooks of minor children of the deceased.

II. The apparel of the deceased not exceeding $100 in value, if he left a widow and minor children, or either, in which case she or they are entitled to such apparel.

III. Such provisions and other articles, not exceeding $50 in value, as have necessarily been consumed in the family of the deceased before the appraisal of such estate.

IV. Any money becoming due on the death of the deceased from an insurance on his life effected by him, after deducting the amount of premium paid therefor within 3 years, with interest, provided that such deceased left a widow,

widower or issue; but such money shall be disposed of as provided by section 21 of chapter 170. (R. S. c. 141, § 62.)

Subsection IV refers only to the distribution of money received on a life policy belonging to the estate. When, by the terms of the policy or the contract of insurance, the money is payable directly to the widow, or to the widow and children, it does not belong to the estate, and cannot be collected by the administrator. The beneficiaries take the money, not as distributees, but as donees, and not in the proportions provided by the statute, but in the proportions provided by the contract of insurance. Douglass v. Parker, 84 Me. 522, 24 A. 956.

Applied in Hathaway v. Sherman, 61 Me. 466.

Cited in Portland v. Union Mut. Life Ins. Co., 79 Me. 231, 9 A. 613; Berman v. Beaudry, 118 Me. 248, 107 A. 708.

Sec. 69. Additional bonds required.—If, after the return of an inventory or in the progress of the settlement of an estate, the judge finds that the bonds given by an executor or administrator are too small in amount or are insecure for want of responsible sureties, he may require additional or larger bonds or other sureties, and if said executor or administrator does not furnish the same, his authority may be revoked and some other person appointed. (R. S. c. 141, § 63.)

Sec. 70. Sales of personal estate ordered; collection of demands sold.—The judge, when he deems it necessary for the speedy payment of the debts of the deceased or for the benefit of all parties interested, may order any of the goods and chattels, rights and credits, pews or interests in pews, not distributed, to be sold at public or private sale; and the executor or administrator shall account for the same as sold. Any personal estate or rights of action thus sold may be assigned to the purchaser and collected in the name of the executor or administrator, the purchaser giving him reasonable indemnity against costs, but reserving to debtors their rights of setoff; or the purchaser may sue therefor in his own name, subject to the same defense as if sued in the name of the executor or administrator. The legal rights of persons to whom specific legacies are bequeathed are not affected by this section. (R. S. c. 141, § 64.)

Sec. 71. Liability of executors and administrators to account. — Every executor or administrator shall account for the personal property and effects named in the inventory at the appraised value, unless sold under license as provided in the preceding section; but if loss accrues without his fault or negligence, he may be allowed the amount of such loss in his account of administration; and if any goods or effects not sold under license, allowed to the widow, nor distributed to the heirs or devisees, are shown to be of greater value than they were appraised at, he shall account for the difference. (R. S. c. 141, § 65.)

Cited in Dalton v. Dalton, 51 Me. 170; Carter v. Manufacturers' Nat. Bank, 71 Me. 448.

Sec. 72. Compromise of claims.—The judge after a hearing, public or personal notice of which shall have been given in accordance with order of court, may authorize executors or administrators to adjust, by arbitration or compromise, any claims for money or other property in favor of or against the estates by them represented and likewise any other actions either at law or in equity of whatsoever nature wherein such executors or administrators are parties.

Any such award or compromise, if found by the judge just and reasonable in its effect upon all persons who may then or at any time thereafter be or become interested in said estate, shall be valid and binding on such persons; provided, however, that where it shall appear that the interests of any persons under disability not represented by guardian or any future contingent interest may be affected, the court may appoint some suitable person or persons to represent such persons under disability or future interest. (R. S. c. 141, § 66. 1945, c. 145, § 1.)

Cross reference.—See §§ 56, 73, re carrying on business, etc.

The object of this section was to enable executors and administrators, by obtaining

previous authority from the judge, to compromise with debtors with perfect safety and without being subjected to expense in sustaining their acts. Gilman v. Healy, 55 Me. 120.

This section does not restrict the powers of executors and administrators. It affords them protection against being called upon to account for more than they have received, when they have acted with the approbation of the judge of probate. Chase v. Bradley, 26 Me. 531.

This section only authorizes that to be done under the sanction of the court, which could have been done before its passage, without such sanction. It protects the executors when acting under the authority of the judge of probate. It in no way limits or restricts the powers of the executors or either of them. Gilman v. Healy, 55 Me. 120.

Adjustment by one executor binds the other.—When two joint executors have obtained a decree of the probate court to compromise claims between the estate of the testate and its debtor in a certain manner, an adjustment by either of the executors, in compliance with the decree, will bind the other. Gilman v. Healy, 55 Me. 120.

Sec. 73. Authority to carry on business.—Whenever it is made to appear to the judge that it is clearly for the benefit of all parties interested and will result in a material increase of the assets of the estate, the judge may authorize and direct that the business of the deceased, in whole or in part shall, for a limited time to be determined by him, be carried on by the executor or administrator as a going business. (1945, c. 145, § 2.)

See § 56, re carrying on business, etc.

Sec. 74. Special commissioners appointed on disputed claims.—When one or more claims against the estate of a person deceased, though not insolvent, are deemed by the executor or administrator to be exorbitant, unjust or illegal, on application in writing to the judge of probate and after notice to the claimants, the judge, if upon hearing he is satisfied that the allegations in said application are true, may appoint 2 or more commissioners, who shall, after being duly sworn and after notifying the parties as directed in their commission, meet at a convenient time and place and determine whether any and what amount shall be allowed on each claim and report to him at such time as he may limit. Sections 5, 6, 7, 8, 12, 13, 14, 15, 16 and 17 of chapter 157 apply to such claims and the proceedings thereon. No action shall be maintained on any claim so committed unless proved before said commissioners; and their report on all such claims shall be final, saving the right of appeal. (R. S. c. 141, § 67.)

Cross references.—See c. 113, § 187, re exemption upon award to creditor by commissioners on a solvent estate; c. 157, § 26, re report of commissioners on exorbitant claims; c. 161, § 6, re commissioners may be appointed on disputed claims of partnership property.

Commissioners deal with claims against solvent estates.—The commissioners on exorbitant claims are appointed under this section. They deal with claims against solvent estates. Their duty is "to determine whether any and what amount shall be allowed on each claim and report," etc. Rogers v. Rogers, 67 Me. 456.

And probate court given jurisdiction of claims committed.—Jurisdiction of claims when committed to commissioners under this section is taken from the common-law courts and conferred upon the probate courts. Shurtleff v. Redlon, 109 Me. 62, 82 A. 645; Harmon v. Fagan, 130 Me. 171, 154 A. 267.

Procedure regulated by c. 157.—Chapter 157 provides for the appointment of commissioners to pass upon claims against insolvent estates of deceased persons. The sections of chapter 157 incorporated by reference into this section, regulate the procedure to be followed upon commitment of claims to commissioners in both proceedings. Harmon v. Fagan, 130 Me. 171, 154 A. 267. See notes to sections cited.

Including appeals.—The evident intent of the legislature was to make all the provisions of the chapter of the revised statutes regarding appeals from the decisions of commissioners on claims against insolvent estates applicable to appeals from the like decisions on exorbitant claims against solvent estates. Brackett v. Chamberlain, 115 Me. 335, 98 A. 933.

Court may extend time for commissioners' action and report.—If commissioners on disputed claims accept their appointment, 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.

And appoint new commissioners.—If the commissioners fail to accept their appointment by qualifying, the proceeding is not terminated, but remains unfinished, still pending and subject to completion. Upon petition of the executor, administrator or creditor, after notice, new commissioners may be appointed. Harmon v. Fagan, 130 Me. 171, 154 A. 267.

Notice must be given within time limited.—One having a claim against an estate may commence an action against the executor or administrator at any time, within the period limited for the commencement of such actions, before service of notice of application made to the probate court for the appointment of commissioners, and unless such notice is given within the time limited, the jurisdiction of the probate court does not attach and any subsequent proceedings therein are of no avail. Shurtleff v. Redlon, 109 Me. 62, 82 A. 645.

Claim committed when notice served.—Under this section, a claim is committed when service of notice of the application filed in the probate court by the executor or administrator is made upon the claimant. Shurtleff v. Redlon, 109 Me. 62, 82 A. 645.

Claimant and executor may acknowledge notice.—It is competent for a claimant to acknowledge notice of the petition of an executor or administrator for the appointment of commissioners under this section, and for the claimant and executor or administrator to acknowledge notice of the time and place of hearing before such commissioners; and the fact that this is done, is not of itself proof of fraud in the allowance of the claim, and will not affect the validity of the proceedings. Hall v. Merrill, 67 Me. 112.

Creditor is partly entitled to be heard.—When an executor or administrator elects to submit a disputed claim against an estate to commissioners, on service of the petition therefor upon the creditor, the latter becomes a party to the proceeding, entitled to be heard and to invoke the aid of the probate court to compel an adjudication of his claim. The creditor then has an established tribunal to which he may present his claim. Harmon v. Fagan, 130 Me. 171, 154 A. 267.

And, under this section, no option is given the claimant, of either further maintaining a suit pending, or submitting his claim to the commissioners, but he must do the latter, and the report of the commissioners is final, saving the right of appeal. Shurtleff v. Redlon, 109 Me. 62, 82 A. 645.

The commitment is effective when service of the petition of the executor therefor is made upon or acknowledged by the claimant. Thereafter, the claimant's only option is to submit the claim to the commissioners. Harmon v. Fagan, 130 Me. 171, 154 A. 267.

As used in this section, the word "maintained" means to prosecute to a conclusion an action already begun and the inhibition was inserted out of abundant caution to more clearly differentiate proceedings upon such claims from those against insolvent estates where the commencement of suits is forbidden after a decree of insolvency (c. 157, § 19). To inhibit the commencement of an action after the claim is duly and legally committed to the commissioners by decree of the probate court is unnecessary in view of the fact that the report of the commissioners is made final saving only the right of appeal. Shurtleff v. Redlon, 109 Me. 62, 82 A. 645.

Proceedings operate as waiver of defect in claim.—The appointment of commissioners under this section, upon application of the administrator to whom a claim in writing against the estate has been presented, and a hearing had before such commissioners, operate as a waiver of any defect or insufficiency in the claim as presented. Canal Nat. Bank v. Cox, 120 Me. 488, 115 A. 255.

And as waiver of written claim within 2 years.—The filing of the petition in probate court by the administrator for the appointment of commissioners on the ground that he deems a claim against the estate, exorbitant, unjust and illegal is an admission or waiver by him of a presentation in writing of the claim and demand of payment within 2 years after notice of his appointment, as required by statute. Whittier v. Woodward, 71 Me. 161.

But not if claim committed after bar of statute.—The fact that after the plaintiff's claim has become barred by the statute of limitations it is committed to commissioners by the probate court under this section, on the administrator's petition on the ground that he deemed it unjust and illegal, does not deprive the administrator of his right to plead the limitation. It was neither a waiver, on his part, of the limitation, nor a new promise to pay the claim. Whittier v. Woodward, 71 Me. 161.

The jurisdiction of the probate court does not attach to a disputed claim if it is not commited to commissioners until after action upon it is barred by the special statute of limitation embodied in c. 165,

§ 17. Harmon v. Fagan, 130 Me. 171, 154 A. 267.

No statute excuses delay in or extends the time for presentation of disputed claims to commissioners. Such a presentment is to be deemed the commencement of an action to enforce a disputed claim. As such, it is subject to the special statute of limitations and within the general rule that, in the absence of any statutory provisions excusing delay or otherwise extending the time for commencement of an action against an executor or administrator, the special statute bars the claim of a creditor who has failed to avail himself of his rights during the period of its limitations, whatever may have been the reasons therefor. Harmon v. Fagan, 130 Me. 171, 154 A. 267.

The report of the commissioners is final "saving the right of appeal." Palmer v. Palmer, 61 Me. 236; Burrows v. Bourne, 67 Me. 225.

Although insolvency commissioners are appointed. See c. 157, § 26.

And amount allowed is regarded as just debt.—The report of the commissioners being duly accepted by the judge of probate, and no valid appeal having been taken, the amount allowed must be regarded as a just debt. Burrows v. Bourne, 67 Me. 225.

And every item passed upon becomes res adjudicata.—This section expressly and peremptorily declares that the report "shall be final, saving the right of appeal." If no appeal is taken to their report, then every item passed upon by them becomes res adjudicata. Rogers v. Rogers, 67 Me. 456; Harmon v. Fagan, 130 Me. 171, 154 A. 267.

But decision of commissioners vacated by appeal.—When an appeal is properly taken and completed, the decision of the commissioners is thereby vacated. Palmer v. Palmer, 61 Me. 236.

Heirs have no right of appeal.—The heirs of the intestate have no right to appeal from the decree of the judge of probate accepting the report of commissioners under this section. Burrows v. Bourne, 67 Me. 225.

Sec. 75. Executor or administrator neglecting to pay debts guilty of waste.—Any executor or administrator who neglects or unreasonably delays to raise money out of the estate under his charge or to pay the same where due, and thereby subjects said estate to be taken in execution, is guilty of waste and unfaithful administration. (R. S. c. 141, § 68.)

Sec. 76. Accounts when rendered; notice and examination.—Every executor or administrator shall render his accounts agreeably to the condition of his bond; and the judge may require him to account when he deems it necessary. Public notice shall be given before the allowance of any such account unless waived by all parties in interest other than creditors. On the examination thereof, the accountant may be interrogated under oath in relation to the same, and such record of his answers shall be made as the judge requires. (R. S. c. 141, § 69.)

Cross references.—See c. 156, § 21, re distribution of personal estate; c. 157, §§ 21, 25, re settling accounts, allowance and penalty for delay.

A highly important and early duty of an executor is to keep and settle true and just accounts. The statute requires that he shall render accounts conformably to the condition of his bond; that notice shall be given before allowing any account; and it provides that the accountant may be inquired of under oath. In re Rumery, 123 Me. 398, 123 A. 179.

Burden on executor to show claim paid was due from estate.—If the executor paid a claim against the estate upon his own judgment, without having it passed upon by the court or by commissioners, the burden is upon him, in settling his account, to prove affirmatively that the claim so paid was actually due from the estate. Eacott, Appellant, 95 Me. 522, 50 A. 708.

Judge may require account when he deems it necessary.—This section expressly gives the judge of probate authority to require of every executor or administrator an account of his trust when he deems the same to be necessary. Senechal, Appellant, 122 Me. 314, 119 A. 813.

Either with or without application from parties interested.—The judge of probate may require an administrator to account whenever he may deem it necessary, either with or without a special application from the parties interested. Thurston v. Lowder, 47 Me. 72.

Representative of executor's estate to account.—Where an executor dies, not having finally settled an account of his administration, it devolves upon the rep-

resentative of his own estate to account in his stead. In re Rumery, 123 Me. 398, 123 A. 179.

What constitutes an "accounting."—The word "account" has no rigid technical meaning. A definition bearing the impress of approval stamp is, "a list or catalogue of items, whether of debts or credits." An accounting, in the sense that the term is applied to an executor, contemplates the fixing of the charges against him and the allowances to him, on paper, under his signature, supported by oath, after notice, upon hearing in court; and thus settling, between all parties in interest, what the executor is to be responsible for. And not the least of these is hearing. In re Rumery, 123 Me. 398, 123 A. 179.

Parties in interest entitled to hearing.—All parties in interest are privileged to be heard on an executor's accounting and if one is denied that right, the exception which he reserves because of the denial, is entitled to be upheld. In re Rumery, 123 Me. 398, 123 A. 179.

An executor's account rendered in the probate court for settlement is in the nature of a declaration in a writ; and unless amended by order of court, a greater sum than is charged cannot be allowed to the executor either in that court or upon appeal. Pettingill v. Pettingill, 64 Me. 350.

Decree allowing account cannot be impeached in action against executor.—A decree of a court of probate duly allowing the final account of an executor cannot be impeached in an action at law against the executor, to recover a debt due from the estate. Harlow v. Harlow, 65 Me. 448.

Second account may be ordered if first decree not complied with.—A decree of the judge of probate ordering an administrator to file his account is not barred, on the ground of res adjudicata, by a former decree ordering him to file an account which was not fully complied with. Senechal, Appellant, 122 Me. 314, 119 A. 813.

And former settlements may be opened to rectify mistakes.—On a final settlement of an administrator's account in the probate court, former settlements may be opened for the purpose of rectifying mistakes, whether originating in fraud practiced on the court, or through a misapprehension of a true state of facts by the parties. Coburn v. Loomis, 49 Me. 406.

But any objection to the account should be first made in the probate court, and can only be brought into the supreme court by appeal. Harlow v. Harlow, 65 Me. 448.

And if this is not done mistake cannot be corrected on appeal.—An administrator may be required, on the settlement of a second account, to charge himself with any proper items not contained in the first account; and he may be called upon to correct any errors found in the first account. But when this is not done, nor refused to be done in the probate court, it cannot be required to be done on appeal. Sturtevant v. Tallman, 27 Me. 78.

Unless right of appeal exists when mistake discovered.—When a mistake is made in a settlement of an account, the course is to apply to the judge of probate for the correction of the mistake, by petition, or to state the amount claimed in a new account, unless, when the mistake is discovered, the party has a right of appeal, by which it may be corrected in the appellate court. Coburn v. Loomis, 49 Me. 406.

Former provision of section.—For consideration of a former provision of this section that "no such account shall be settled without reasonable notice to such parties," see Pierce v. Irish, 31 Me. 254.

Applied in Potter v. Cummings, 18 Me. 55; Mudgett, Appellant, 105 Me. 387, 74 A. 916.

Sec. 77. All property received accounted for. — Every executor and administrator is chargeable in his account with all goods, chattels, rights and credits of the deceased which come to his hands and are by law to be administered, whether included in the inventory or not; with all the proceeds of real estate sold for the payment of debts, legacies and incidental expenses and with all the interest, profit and income that in any way come to his hands in his said capacity from any estate of the deceased. (R. S. c. 141, § 70.)

Executor chargeable with all goods, credits, etc.—An executor is made chargeable in his account with all goods, chattels, rights and credits of the testator, which may come to his hands, and which are by law to be administered, whether included in the inventory or not. Smith v. Lambert, 30 Me. 137.

Including his own debt to estate. — When a person is appointed as the executor or administrator of an estate, who is himself debtor to the estate, the debt

is not extinguished and such personal representative must account for the same as assets in his hands. United States of America, Appellant, 137 Me. 302, 19 A. (2d) 247.

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

Rents and profits do not come to administrator in his capacity as such.—The liability is only to account for whatever may come to his hands "in his said capacity" as administrator. Rents and profits do not come to him as an administrator, but as an agent of the heirs to whom they belong. Kimball v. Sumner, 62 Me. 305.

Sec. 78. Income of real estate used accounted for.—If any part of the real estate is used or occupied by the executor or administrator, he shall account for the income thereof to the devisees or heirs in the manner ordered by the judge, with the assent of the accountant and of other parties present at the settlement of his account; and if the parties do not agree on the sum to be allowed, it shall be determined by 3 disinterested persons, appointed for that purpose by the judge, whose award, accepted by the judge, shall be final. (R. S. c. 141, § 71.)

Applied in Kimball v. Sumner, 62 Me. 305.

Quoted in Emery v. Emery, 87 Me. 281, 32 A. 900.

Stated in Dennett v. Hopkinson, 63 Me. 350.

Cited in Richberg, Appellant, 148 Me. 323, 92 A. (2d) 724.

Sec. 79. Property insured.—An executor or administrator may insure, at the expense of the estate, any property of the deceased that becomes assets in his hands or which he holds in trust by the provisions of a will. (R. S. c. 141, § 72.)

Sec. 80. Allowance for monument or gravestones; for gravestones and funeral expenses of widow.—In the settlement of the accounts of executors and administrators, the judge may allow a reasonable sum for the purchase of a suitable burial lot and for the erection of monuments or gravestones; but in insolvent estates the sum shall be fixed by the judge of probate. On petition of any person interested, the judge of probate may also allow a reasonable sum for the erection of gravestones, for funeral expenses and expenses of last sickness of the widow of the deceased, provided she dies before the final settlement of her husband's estate and her estate is insufficient for the above purposes. (R. S. c. 141, § 73.)

Cross reference.—See c. 153, § 21, re perpetual care of cemetery lots.

Funeral expenses have always been allowed as a proper disbursement in the accounts of executors and administrators, and the propriety of such practice has been confirmed by this section. Both by the terms of the statute and under the ancient common-law practice, the cost of a burial lot and of suitable monuments and tombstones is properly included under this head. In re Hill's Estate, 131 Me. 211, 160 A. 916.

But a charge for a monument or gravestone is not one for which the law pledges the credit of the estate that a decedent owned. Allowances may be made by probate judges to administrators therefor by authority of this section, but the purport of the section is the granting of judicial leave so to spend money, or the finding, when the administrator files his account, that an expenditure, previously undecreed, is reimbursable. Call v. Garland, 124 Me. 27, 125 A. 225.

And unless the expenditures have some relation to the testator's own interment, there is no ground for saying that they are a part of his funeral expenses. In re Hill's Estate, 131 Me. 211, 160 A. 916.

Sec. 81. Certain debts and expenses of deceased married woman paid.—In the settlement of the estate of a married woman, debts contracted by her for the benefit of herself or her family, for which the credit was given to her, and for which her husband is not liable or is not able to pay, shall be paid by her

executor or administrator, and allowed in his account; also all reasonable expenses occasioned by her last sickness. (R. S. c. 141, § 74.)

Sec. 82. Mutual debts of husbands and wives paid. — Executors or administrators may pay debts due from a deceased husband to his wife or from a deceased wife to her husband as if the marriage relation had never existed between them. (R. S. c. 141, § 75.)

Sec. 83. Perpetual care of lots provided for by executors and administrators.—Executors and administrators may pay to cemetery corporations or to cities or towns having burial places therein a reasonable sum of money for the perpetual care of the lot in which the body of their testate or intestate is buried, and the monuments thereon. The judge of probate shall determine, after notice to all parties in interest, to whom the same shall be paid and the amount thereof, and such sum shall be allowed in the accounts of such executors and administrators. (R. S. c. 141, § 76.)

Cross references.—See c. 58, §§ 14-19, re trust funds for burying grounds; c. 91, §§ 118-122, re trust funds received by towns; c. 153, § 21, re perpetual care of cemetery lots.

Cited in In re Hill's Estate, 131 Me. 211, 160 A. 916.

Sec. 84. Claims verified by affidavit if required.—Executors or administrators may require any person making a claim against the estate of their testator or intestate to present said claim in writing, supported by the affidavit of the claimant or of some other person cognizant thereof, stating what security the claimant has, if any, and the amount of credit to be given, according to the best of his knowledge and belief. (R. S. c. 141, § 77.)

Realizing that spurious claims were not confined to insolvent estates, the legislature authorized, by this section, executors or administrators to require of claimants against solvent estates, precisely the same mode of prosecuting their claims as the statute imperatively demands of claimants against insolvent estates. Marshall v. Perkins, 72 Me. 343. See c. 157, § 5.

Cited in Howe v. Gray, 119 Me. 465, 111 A. 756.

Sec. 85. Private claims of executors or administrators adjusted.—No private claim of an executor or administrator against the estate under his charge shall be allowed in his account, unless particularly stated in writing; if such claim is disputed by a person interested, it may be submitted to referees agreed upon in writing by the interested parties present or their agents or guardians; and the judge may accept or recommit their written report made pursuant to the submission, and decree accordingly. (R. S. c. 141, § 78.)

Cross reference.—See c. 157, § 8, re claim of administrator against insolvent estates.

Claims of executor must be specially passed upon.—Claims of an executor or administrator must be specially passed upon by the probate judge, or the payment of them cannot be allowed. Wadleigh v. Jordan, 74 Me. 483; Merrill v. Regan, 117 Me. 182, 103 A. 155.

And they must be properly stated.—The statute is peremptory. The claim, if not properly stated, cannot be saved by proof. Palmer, Appellant, 110 Me. 441, 86 A. 919; Palmer v. Palmer, 112 Me. 156, 91 A. 284.

With as much particularity as required in declaration.—An executor is required to state his private claim with particularity in order that all persons interested in the administration of the estate may have an opportunity to investigate the claim, and contest it if they see fit. They are entitled to have the claim stated with as much particularity, but perhaps not with as much formality, as would be required in a declaration in a suit on the claim. Palmer, Appellant, 110 Me. 441, 86 A. 919.

And it is not enough that other executors pay the claim.—If the claim of an executor is not properly stated, it is not enough that the other executors recognize the legality of the claim by paying it. Palmer, Appellant, 110 Me. 441, 86 A. 919.

Reference is not matter of absolute right.—This section permits a reference

under a written agreement of the parties interested and present, but this reference is not made a matter of absolute right and is at best subject to the approval or otherwise of the probate judge. Merrill v. Regan, 117 Me. 182, 103 A. 155.

Time for hearing not limited.—This section does not point out the time when a hearing upon such a claim may be held, nor limit such hearing to the time when the administrator files his first or subsequent account. Merrill v. Regan, 117 Me. 182, 103 A. 155.

Decree allowing claim is res adjudicata.—The decree of the probate court allowing the private claim of the executrix, previous to filing her first account, not being appealed from, was res adjudicata. Merrill v. Regan, 117 Me. 182, 103 A. 155.

Right of representative to testify in action for private claim against estate.—See Tuck v. Bean, 130 Me. 277, 155 A. 277.

Cited in Heard, Appellant, 126 Me. 495, 139 A. 670.

Sec. 86. When one of several executors or administrators is removed or resigns.—When there is more than 1 executor or administrator and either of them is removed or his resignation is accepted by the judge, the others may proceed to discharge the trust reposed in them and may bring actions of account against him and recover, by any proper legal process, such effects and assets as remain in his hands unadministered. Like actions or process may be brought by one executor or administrator against another, when the latter retains an undue proportion of the estate under his charge and refuses either to account to the other, or to pay the debts, legacies or other charges on such estate, or when the aggrieved executor is a residuary legatee. (R. S. c. 141, § 79.)

Sec. 87. Equitable remedies between coexecutors and coadministrators.—Either the supreme judicial court or the superior court may hear and determine in equity all disputes and controversies between coexecutors and coadministrators, and between their respective legal representatives, in all cases where there is not a plain, adequate and complete remedy at law; and in such case, the court has the same power and may proceed in like manner as in cases between copartners. (R. S. c. 141, § 80.)

See c. 107, § 4, sub-§ VII, re equity jurisdiction concerning partnership; c. 153, § 2, re equity jurisdiction of courts of probate.

Sec. 88. Previous acts of those removed valid.—When letters of administration are revoked or an executor or administrator is removed, all previous sales of real or personal estate made in a legal manner by him and with good faith on the part of the purchaser, and all other acts in due course of administration done by him in good faith remain valid and effectual, and he is accountable in the same manner as if he had not been removed. (R. S. c. 141, § 81.)

Sec. 89. Foreign executors, administrators, guardians, conservators, committees or trustees licensed to collect and receive personal estate.—Any executor, administrator, guardian, conservator of the property of any person living out of the state, committee of the person or property, or trustee duly appointed in another state or in a foreign country and duly qualified and acting, who may be entitled to any personal estate in this state, may file an authenticated copy of his appointment in the probate court for any county in which there is real property of his trust, or, if there is no such real property, in any county in which there is personal estate of his trust or to which he may be entitled, and may upon petition to said court, after due notice to all persons interested, be licensed to collect and receive such personal estate or to sell by public or private sale, or otherwise to dispose of, and to transfer and convey shares in a corporation or other personal property, if the court finds that there is no executor, administrator, guardian, conservator or trustee appointed in this state who is authorized so to collect and receive such personal estate or to dispose of such shares or other personal property, and that such foreign executor, administrator, guardian, conservator, committee or trustee will be liable to account for such per-

sonal estate or for the proceeds thereof in the state or country in which he was appointed; and that no person resident in this state and interested as a creditor or otherwise objects to the granting of such license or appears to be prejudiced thereby; but no such license shall be granted to a foreign executor or administrator until the expiration of 6 months after the death of his testator or intestate, nor until all inheritance taxes payable to this state, if any, are paid or secured. (R. S. c. 141, § 82.)

Cross reference.—See c. 163, § 14, re sales of estates of nonresident owners.

Cited in Fort Fairfield Nash Co. v. Noltemier, 135 Me. 84, 189 A. 415.

Discovery of Property of Deceased Persons.

Sec. 90. Discovery of estate of deceased persons.—Upon complaint by an executor, administrator, heir, legatee, creditor or other person interested in the estate of a person deceased, against anyone suspected of having concealed, withheld or conveyed away any money, goods, effects or real estate of the deceased, or of having fraudulently received any such money, goods, effects or real estate, or of aiding others in so doing, the judge of probate may cite such suspected person to appear before him to be examined on oath in relation thereto, and he may require him to produce for the inspection of the court and parties, all books, papers or other documents within his control relating to the matter under examination; such examination shall not extend over a period of time exceeding 20 years before the time said complaint is filed in the probate court. (R. S. c. 141, § 83. 1949, c. 167.)

Cross references.—See c. 153, § 10, re judge of probate may appoint stenographer; c. 164, § 21, re surety on probate bond may cite trust officers for accounting.

Process under this section can only result in a discovery of facts, to serve as the basis of ulterior proceedings. O'Dee v. McCrate, 7 Me. 467.

As that is sole object of section.—The sole object of this section is to obtain facts, known only to the party summoned, to lay the foundation for ulterior proceedings. Dunbar v. Dunbar, 80 Me. 152, 13 A. 578.

But refusal to answer may be treated as contempt.—The process under this section is in the nature of a bill in equity for a discovery, and can result only in the discovery of facts, to serve as the basis of ulterior proceedings. But if such be the nature and result, the process and proceedings have been otherwise in practice. A bill for a discovery must contain specific allegations, and is usually accompanied with interrogatories, which are to be met and answered by the respondent in writing, whereas, in this process, there is a general allegation of embezzlement, and the respondents, in the usual form, are cited to appear, and to submit themselves on oath to an examination in relation to the subject matter of the complaint. In such case, the respondents appear before the probate judge in the character of deponents to give their depositions, or witnesses upon the stand to testify. And when before even magistrates, as deponents or witnesses, their refusal to answer might be treated as a contempt, and punished as prescribed in § 92, certainly not less rigorously. Bradley v. Veazie, 47 Me. 85.

And disclosure is admissible in evidence.—The statement made in a disclosure under this section is similar to an answer to a bill of discovery and the facts obtained may be used as evidence when applicable, in any process proper to obtain the end sought. Were the disclosure incompetent evidence, in most cases it could be of no possible use. The facts wanted and thus obtained are within the knowledge of no one except the party against whom they are to be used, and can be proved only by the statement; nor does the statement furnish any means of proving them otherwise. From the necessity of the case the defendant's disclosure must be admissible and no doubt such was the intention of the statute. Dunbar v. Dunbar, 80 Me. 152, 13 A. 578.

Section authorizes examination of executor or administrator.—The judge of probate has power, by this section, to call before him and examine under oath as well the executor or administrator of an estate, when suspected and charged by the heir with embezzlement of the property, as any other person entrusted with property by the executor or administrator. O'Dee v. McCrate, 7 Me. 467.

If an executor or administrator is suspected by an heir, creditor or legatee of having concealed any part of the personal estate of the deceased, this section is applicable to such a case. O'Dee v. McCrate, 7 Me. 467.

Though an executor or administrator has a legal right to the possession of the personal estate, it is for the purpose of lawfully administering it for the benefit of all concerned; but not for the purpose of concealing it from their knowledge and clandestinely appropriating it to his own use, in violation of his duty, hence, the propriety of holding him liable to answer on oath as to his possession or disposition of property suspected and alleged to have been concealed by him. O'Dee v. McCrate, 7 Me. 467.

And he may be ordered to account for property disclosed.—If the person summoned is an executor or administrator, and reveals property belonging to the estate, without further evidence, he would be ordered by the probate court, to add to his inventory and account for the property so disclosed. Dunbar v. Dunbar, 80 Me. 152, 13 A. 578.

But, if a person other than an executor or administrator is cited, the jurisdiction of the probate court ceases with the disclosure. Dunbar v. Dunbar, 80 Me. 152, 13 A. 578.

Applied in O'Donnell v. O'Donnell, 57 Me. 24; McCluskey, Appellant, 116 Me. 212, 100 A. 977.

Cited in Caleb v. Hearn, 72 Me. 231; Farnsworth v. Whiting, 104 Me. 488, 72 A. 314.

Sec. 91. Persons entrusted with estate of deceased cited to account.—Upon complaint of any such party that a person entrusted by an executor or administrator with any part of such estate refuses to render to him a full account thereof when required, the judge of probate may cite such person to appear before him and to render a full account under oath of any money, goods, chattels, bonds, accounts or other papers belonging to such estate taken into his custody, and of his doings in relation thereto. (R. S. c. 141, § 84.)

See c. 164, § 21, re surety on probate bond may cite trust officers for accounting.

Sec. 92. Refusal to appear and answer when cited.—If a person duly cited as aforesaid refuses to appear and submit himself to such examination, or to answer all lawful interrogatories, or to produce such books, papers or documents, the judge shall commit him to jail, there to remain until he submits to the order of the court or is discharged by the complainant or the superior court; and he is also liable to any injured party in an action on the case for all the damages, expenses and charges arising from such refusal. (R. S. c. 141, § 85.)

Cross references.—See c. 59, § 90, re powers of trust companies to act as administrators and executors; c. 100, § 91, re executors, administrators or other persons authorized to sell goods, chattels or land, by order of any court or judge of probate, may do so without license from municipal officers; c. 153, § 45, re compensation of executors and administrators; c. 153, § 48, re executors and administrators to pay amount of stenographer's fees; c. 164, § 21, re surety on probate bond may cite trust officers for accounting.

Section authorizes punishment as for contempt.—The provisions of this section were manifestly intended to confer upon the probate judge plenary power to punish, as for a contempt, the person duly before him, who should refuse to answer any lawful interrogatory. Bradley v. Veazie, 47 Me. 85.

Applied in O'Dee v. McCrate, 7 Me. 467.