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Chapter 156.

Partition of Real Estate. Allowances. Distributions.

Partition of Real Estate.

History of §§ 1-12.—See Dean v. Hooper, 31 Me. 107.

Sec. 1. Jurisdiction.—The court of probate, having jurisdiction of the estate of any deceased person, may make partition of all the real estate of such person in this state among the widow or widower and heirs or devisees of such person, and all holding under them, when the proportions of the respective parties are not in dispute between them or do not appear to the judge to be uncertain, depending upon the construction of any devise or other conveyance, or upon other questions that he thinks proper for the consideration of a jury and a court of common law. (R. S. c. 143, § 1.)

The exercise of the power conferred by this section is not limited to any particular time or number of years after the estate is settled. Earl v. Rowe, 35 Me. 414.

And may be exercised many years after estate has been settled.—The authority of the probate court under this section to make partition of real estate among heirs and devisees, not being limited as to time, may be exercised when occasion calls, though many years after the estate has been settled. Earl v. Rowe, 35 Me. 414.

Degree of uncertainty necessary to deprive probate court of jurisdiction. — To deprive the probate court of jurisdiction to act, there must be a real doubt, an uncertainty as to the rights of the respective parties. It is not enough that assertion be made that there is a dispute nor even that the parties are not in agreement as to their rights. There must be that uncertainty as to facts or law that warrants submission to a jury or other legal tribunal for decision. In re Roukos' Estate, 140 Me. 183, 35 A. (2d) 861.

Applied in Robbins v. Gleason, 47 Me. 259.

Sec. 2. Reversions or remainders divided.—Any reversion or remainder vested in his heirs, expectant on the determination of a particular estate under his will or otherwise, may in like manner be divided either during the existence of such particular estate or after its determination. (R. S. c. 143, § 2.)

Section contemplates division long after settlement of estate.—The provisions of this section show that the estate might be expected to be divided in certain cases long after the decease of a testator and the settlement of his estate, for a partition of a remainder or reversion is authorized after the termination of a life or particular estate created by devise. Earl v. Rowe, 35 Me. 414.

Sec. 3. Commissioners.—The partition shall be made by 3 disinterested commissioners, appointed by said judge, who shall first be sworn, and shall make such partition pursuant to the will of the deceased or the laws regulating the descent of intestate estates, as the case may be, among all the parties owning shares, whether they joined in the petition therefor or not. (R. S. c. 143, § 3.)

Sec. 4. Partition of estate in different counties.—If there is estate in different counties to be divided, the judge may appoint separate commissioners for each county and issue warrants accordingly; and in such case, the partition shall be made of the estate in each county as if there were no other to be divided. (R. S. c. 143, § 4.)

Sec. 5. When equal division cannot be made.—When the whole or any part of the premises, of greater value than any party's share, cannot be divided without great inconvenience, the same may be assigned to any one or more of the parties, who will accept and pay to the others such sums as the commissioners award to make the partition just; but such partition shall not be established by the court until all such sums are paid or secured, with interest, to the satisfaction of the parties entitled thereto or to the satisfaction of the judge of the probate court having jurisdiction thereof; nor if inconsistent with the condition of the devise under which they claim; but in such assignment males shall be preferred to females and the elder to the younger children of the same sex. (R. S. c. 143, § 5.)

Estate assigned as collateral security for sums to be paid.—See Robbins v. Gleason, 47 Me. 259.

Stated in Wilson v. European & North American R. R., 62 Me. 112.

Sec. 6. When interest of widow or widower, heir or devisee alienated.—No conveyance of the interest of a widow or widower, or any heir or devisee, in the lands of the deceased, by deed, levy of execution or otherwise shall take from the judge of probate his jurisdiction to divide and assign such lands in manner aforesaid; but the same shall inure to the equitable owner of the part so conveyed; and in case of the unequal division provided for in the preceding section, such owner may make written application to the judge before he accepts such division, for the share of such widow or widower, heir or devisee, and after notice to such widow or widower, heir or devisee, the judge may decide in favor of such owner, and he shall receive said share of the money, or so much thereof, as is proportional to his equitable interest. (R. S. c. 143, § 6.)

Sec. 7. When such interest under attachment. — If the share of any such widow or widower, heir or devisee, or anyone claiming under such widow or widower, heir or devisee, is under attachment, the judge, on like application from the plaintiff in the suit or from the attaching officer, shall require the money, not exceeding the amount of the attachment, to be paid to the officer, who shall be answerable therefor in his official capacity, subject to the rights of the parties, as if originally attached. (R. S. c. 143, § 7.)

Sec. 8. Estate included in partition.—When such partition is made on application of an heir or one holding under him, it shall be made among all the owners and include all the ancestor's estate, which any interested party requires to have included; and when made on the application of a devisee or one holding under him, it shall be made of all the estate held by him jointly or in common with others holding under the testator, which any devisee requires to have included. (R. S. c. 143, § 8.)

Commissioners' return construed to divide fee in road.—See Bucknam v. Bucknam, 12 Me. 463.

Sec. 9. Any owner may apply for partition; notice.—Such partition may be ordered on the petition of any of the owners of any share, after giving personal notice to each of the other owners in the state, and public notice, if any reside out of the state. (R. S. c. 143, § 9.)

Sec. 10. Warrant revoked.—The judge may, for sufficient cause, revoke any warrant issued by him for making partition or for settling or determining other interests in real or personal estate, and grant a new warrant or proceed otherwise, as circumstances require. (R. S. c. 143, § 10.)

Sec. 11. Guardians appointed for minors, agents for owners out of state.—If it appears to the court that any minor or insane person, who has no guardian in the state, is interested in the premises, the court shall assign him a

guardian for the suit, to appear for him and defend his interest; and if any owner resides without the state, having no agent therein, the judge shall appoint an agent to act for him. (R. S. c. 143, § 11.)

Sec. 12. When land owned in common.—When any of the real estate, of which partition is prayed for, is held in common with that of other persons, the judge shall order notice of the intended partition to be given to the cotenant, which notice shall contain a description of the premises to be divided and of the proportion claimed as belonging to the estate of the deceased; specify the time and place of hearing the case, and be served by delivering to him or leaving at the place of his abode an attested copy thereof, at least 14 days before the time of hearing; but if the cotenant does not reside in the state, such notice shall be given as the judge requires. At the time appointed in the notice, the judge shall hear the parties, determine their respective rights in such estate and direct the commissioners first to divide and set off the estate of the deceased from that of such other persons and then to make the partition prayed for. (R. S. c. 143, § 12.)

Notice to cotenant is essential.—To the validity of a partition of land held in common between the heirs of a deceased and another person, as against the cotenant, it is requisite that he shall have had notice of the proceedings, prior to the decree of partition, in order that he may be heard for the protection of his rights. And the omission to give such notice is not cured by the attendance of the cotenant before the commissioners at the making of the partition. Dean v. Hooper, 31 Me. 107.

Assignment of dower in land held in common.—When the husband held lands as tenant in common, dower cannot be assigned by metes and bounds. When dower in lands thus held is assigned by the probate court, partition is first made and then dower is assigned to the widow in severalty. French v. Lord, 69 Me. 537.

Cited in Cook v. Walker, 70 Me. 232.

Sec. 13. Return of commissioners.—The judge may set aside the return of the commissioners and commit the case anew to the same or other commissioners. The return when accepted by the court shall be recorded in the probate office and the original return, or a true copy thereof attested by the register of probate, shall be recorded in the registry of deeds for the county or registry district in which the lands lie, and such partition shall be binding to all intents and purposes upon all the persons interested, saving the right of appeal to the supreme court of probate. (R. S. c. 143, § 13.)

Cross reference.—See c. 89, § 235, re filing of duplicate plans in registry of deeds; c. 153, § 47, re expenses of partition.

Division not binding unless returned to and accepted by court.—A division of the real estate of an intestate among the heirs, by commissioners appointed by the court of probate, is not effectual and binding if it has not been returned to and accepted by said court. Nor will an heir be estopped to claim his undivided share in the whole estate by an acquiescence of eight years in such division, and a conveyance to a stranger of the share as assigned to himself. Cogswell v. Reed, 12 Me. 198.

Allowances to Widows and Others.

Sec. 14. Allowance to widows from personal estate.—In the settlement of any intestate estate, or of any testate estate which is insolvent or in which no provision is made for the widow in the will of her husband, or when she duly waives the provision made, the judge may allow the widow so much of the personal estate, besides her ornaments and wearing apparel, as he deems necessary, according to the degree and estate of her husband and the state of the family under her care; he may also allow her any 1 pew in a meetinghouse, of which the deceased died seized; and such allowance, when recorded, vests the title in her; and when an estate which, at the time of said allowance, was considered insolvent,

ultimately appears to be solvent, the judge by a subsequent decree may make the widow a further reasonable allowance. When, after an allowance has been made from any estate, additional personal property belonging to said estate comes to the knowledge of the judge, he may make a further allowance to her therefrom. (R. S. c. 143, § 14.)

Cross reference.—See c. 162, § 21, re insolvency.

History of section.—See Brown v. Hodgdon, 31 Me. 65; Smith v. Howard, 86 Me. 203, 29 A. 1008.

This section has reference solely to the estates of deceased residents. It was not designed to embrace the estates of deceased nonresidents. Thus the judge of probate in this state has no jurisdiction and authority to decree an allowance to the widow of a nonresident decedent, from assets in this jurisdiction on which there is ancillary administration. Smith v. Howard, 86 Me. 203, 29 A. 1008.

A widow's claim for an allowance is not deemed a matter of legal right in this state. It rests merely in the discretion of the judge of probate. It is not a fixed and absolute interest in the estate. It is not a debt due from the estate for a distributive share of it. It is not included in the "expenses of administration." Smith v. Howard, 86 Me. 203, 29 A. 1008. See Hussey v. Titcomb, 127 Me. 423, 144 A. 218.

A widow's claim for an allowance is not a right; it rests merely in the discretion of the court. Kersey v. Bailey, 52 Me. 198.

But rests in discretion of court.—Any petition under this section is addressed to the discretion of the judge of probate, and is to be considered in the light of all the circumstances of the particular case, and the judge may make an allowance larger or smaller as the case may seem to require, or dismiss the petition altogether, if it appears that, all things considered, no allowance ought to be made. Kersey v. Bailey, 52 Me. 198.

This section vests a double discretion as to a widow's allowance in the court of probate to determine (1) whether any allowance should be granted, and (2) the amount thereof according to the degree and estate of the husband. Perkins, Appellant, 141 Me. 137, 39 A. (2d) 855.

Such discretion should be liberally construed.—The authority to grant an allowance to the widow of a deceased husband out of his personal estate vests a discretionary authority which should be liberally construed. Perkins, Appellant, 141 Me. 137, 39 A. (2d) 855.

But unauthorized exercise thereof may be challenged by exceptions.—While the authority to grant an allowance to a widow or a widower under this section is vested in the discretion of the probate court to be exercised in view of the needs and circumstances of the petitioner and the degree and estate of the deceased, and in so far as the court acts within that authority, his conclusions will not be disturbed, yet if he exercises discretion without authority his doing so may be challenged by exceptions. Hilt v. Ward, 128 Me. 191, 146 A. 439.

And amount allowed is subject to review on appeal.—The amount allowed rests in the reasonable judicial discretion of the judge of probate subject to review on appeal. Hussey v. Titcomb, 127 Me. 423, 144 A. 218.

And appeal presents issue de novo.—Such discretion is subject to review on appeal, and the appeal presents the issue de novo in the supreme court of probate where any allowance made in the probate court may be increased, diminished or disallowed. Perkins, Appellant, 141 Me. 137, 39 A. (2d) 855.

Who may appeal.—Though the amount of the allowance is discretionary, an appeal lies to the supreme court of probate. The appealing party has usually been some heir or creditor of the deceased, who has considered himself aggrieved at the amount of the allowance ordered, but the right of the petitioner to appeal is equally clear. Kersey v. Bailey, 52 Me. 198.

The widow's allowance was originally designed to afford a temporary supply for the widow and her family pending the settlement of the estate. It had its origin in a humane and beneficent public policy that seeks to encourage the continuance of the family relations by providing against the exigencies arising from the death of the head of the family. Smith v. Howard, 86 Me. 203, 29 A. 1008.

The design of this section was to furnish a temporary support for the widow, until she can obtain her distributive share of the personal estate, or realize something from her right of dower. Tarbox v. Fisher, 50 Me. 236.

But this section does not define or limit the length of time in which the widow shall be supported by the allowance, whether it shall be a temporary or permanent relief. It is to be according to

the degree and estate of the husband, that is, according to the style and mode of living to which she had been accustomed during coverture, and the condition of the estate. Each case must depend very much upon its own circumstances, and no inflexible rule can be applied to the subject. Brown v. Hodgson, 31 Me. 65.

And authority to grant an allowance is not confined to cases of mere temporary relief. Smith v. Howard, 86 Me. 203, 29 A. 1008; Perkins, Appellant, 141 Me. 137, 39 A. (2d) 855.

Early decisions under this section asserted in substance that the statutory purpose was to provide support until the wife could realize upon her dower. Later cases, however, have made it clear that an allowance is available to provide means for a widow additional to what she would receive as her distributive share, and should be liberally construed. Perkins, Appellant, 141 Me. 137, 39 A. (2d) 855.

The original intention of this section would seem to have been the furnishing of a temporary supply for the wants of the widow and family, while the estate was in the process of settlement, and until the debts should be paid, and the distributive shares of the widow and heirs ascertained, and in cases of insolvency the furnishing of support for the helpless until such time as new arrangements could be made to enable them to gain a livelihood. But in our state the practical construction has been more liberal, and the power is not to be understood as being confined in all cases to mere temporary relief. Kersey v. Bailey, 52 Me. 198. See Hilt v. Ward, 128 Me. 191, 146 A. 439.

Nor is section affected by right of widow to renounce will.—The rights conferred by this section were not molested by c. 221, laws of 1897, providing that a widow for whom no provision is made in her husband's will, or who waives the provision made for her in her husband's will, shall take the same distributive share in his personal estate as is provided by law in intestate estates. The sole intention of c. 221, laws of 1897, was to confer upon the widow additional rights. Cheney v. Cheney, 110 Me. 61, 85 A. 387. See c. 170, §§ 13, 14.

However, allowance is based on necessities.—A widow's or widower's allowance under this section is based on her or his necessities. Hilt v. Ward, 128 Me. 191, 146 A. 439.

And is not intended to enable widow to obtain specific articles because of sentimental associations.—It was not the purpose of this section to aid a widower or widow, without regard to his or her necessities, to obtain certain specific articles belonging to the estate of the other through an allowance by the probate court, merely because of the sentiment associated therewith. Hilt v. Ward, 128 Me. 191, 146 A. 439.

And allowance not based on need is subject to exceptions.—While the degree of need such as to warrant an allowance is within the discretion of the court and when any evidence of need exists the conclusion of the court below is not subject to exception, where the conclusion of the court below is clearly based on other grounds and no evidence of need exists, such conclusion is subject to exception. Hilt v. Ward, 128 Me. 191, 146 A. 439.

Each case must be determined on its own particular facts.—Each case involving an allowance under this section should be determined upon its own particular facts. Perkins, Appellant, 141 Me. 137, 39 A. (2d) 137.

Each case will depend on its own peculiar facts. No general rule can be established, for what in one case might be an allowance amply sufficient in another might be clearly inadequate. The amount in each case must be left to the judicial discretion of the judge of probate, regard being had to what will be necessary according to the degree and estate of the husband. Gilman v. Gilman, 53 Me. 184.

And no general rule can be framed.—There is such a variety of circumstances to be taken into consideration in allowance cases, that no rule in any considerable degree generally can be framed to govern them. All depends upon the exercise of a reasonable judicial discretion. Walker, Appellant, 83 Me. 17, 21 A. 176.

All the attendant and accompanying circumstances are to be considered: the ages of the husband and wife; the length of the cohabitation; whether a first or second marriage; the number of children of each and of both; that is, by former marriages or by their joint union; the wealth of the husband; the estate of the wife in her own right; any anti-nuptial agreements; and their performance or non-performance; the treatment of each to the other; the health, place of residence and necessary expenditures of the wife; the family under her charge, and whatever other circumstances may address themselves to a sound judicial discretion, and may enable the court to approximate as nearly as possible to exact justice to all whose interests may be involved in its judgment. Gilman v. Gilman, 53 Me. 184.

Elements upon which decision must rest will vary.—The elements upon which the decision must rest, some tending to increase, some tending to diminish, the allowance, will vary as between case and case, according to the changing condition of parties. No rule can be established in advance as to the relative weight of any particular fact, for it cannot be foreknown how far it may be modified by the other facts with which it is indissolubly connected. Gilman v. Gilman, 53 Me. 184.

And evidence may cover a wide range.—A court exercising such discretion as is conferred by this section must be justified in permitting the evidence adduced before it to cover a wide range. It has heretofore been declared not only that all the circumstances of each particular case should be considered, but, expressly, that it is important whether the wife has contributed to the acquisition of the estate. Perkins, Appellant, 141 Me. 137, 39 A. (2d) 137.

And may embrace testimony showing how estate was accumulated or depleted.—The evidence may properly cover a range wide enough to embrace testimony showing when and how the estate was accumulated or depleted. Perkins, Appellant, 141 Me. 137, 39 A. (2d) 137.

It was proper for the probate court to consider evidence that the estate under consideration was larger than would otherwise have been the case as a result of the wife's contributions to household expenses, home improvements and insurance premiums, and smaller by reason of financial help given to the husband's relatives and providing a home for the husband's mother. Perkins, Appellant, 141 Me. 137, 39 A. (2d) 137.

And court may consider amount of private estate of widow.—The court, in awarding an allowance to a widow out of her husband's estate, has a right to take into consideration the amount of private estate the widow is possessed of, not received from the property of her husband. Walker, Appellant, 83 Me. 17, 21 A. 176.

Allowance can only be discharged from proceeds of personal estate.—An allowance to the widow by the judge of probate, in the settlement of estates, can only be discharged from the proceeds of the personal estate. If the allowance exceeds the value of the personal estate, for such excess it cannot be sustained. Paine v. Paulk, 39 Me. 15.

But it has priority over all other claims.—The allowance has a priority over all other claims, except those arising from the expenses of the funeral and of administration, and may be taken out of any of the personal property. If the rights of legatees are disturbed, they must adjust them among themselves. Brown v. Hodgdon, 31 Me. 65.

It takes precedence over distribution of personal estate.—A widow's allowance under this section takes precedence over any distribution of the personal estate. Hussey v. Titcomb, 127 Me. 423, 144 A. 218.

And may be granted though all personal estate was bequeathed.—The judge of probate has the power to grant the allowance notwithstanding all the personal property may have been specifically or generally bequeathed. Brown v. Hodgdon, 31 Me. 65.

But specific bequests are preserved as far as possible.—Under proper circumstances, the authority to grant an allowance, though it diminish property specifically bequeathed, may be vested in the probate court, but the policy of the court has been to preserve the specific bequests in a will in so far as possible. Hilt v. Ward, 128 Me. 191, 146 A. 439.

Judgment selected by widow as part of allowance.—See Gilman v. Gilman, 54 Me. 531.

Additional allowance.—The only authority which a judge of probate has to make any second or additional allowance is when there are newly-discovered assets, or when the estate, considered to be insolvent at the time a decree of allowance is made, turns out afterwards to be solvent. A decree of allowance, after it has been acted upon and executed, cannot be changed for the purpose of reducing the amount allowed. Nor can it be changed in order to increase it. Nor can there be a second decree while the first stands, excepting in such instances as are above indicated. Davis v. Gower, 85 Me. 167, 26 A. 1048.

A widow is entitled to an allowance out of assets coming to the estate of her husband some years after a previous allowance not based on the new assets. Paine v. Forsaith, 84 Me. 66, 24 A. 590.

Allowance where husband and wife had separated.—From the tenor of this section it is apparent that the legislature, in making the provision, were contemplating the ordinary case where the parties to the marriage relation have lived together till death severed the tie, and where the widow remains in charge of the family of the deceased. Yet the power undoubtedly extends to cases where a separation has

taken place between the husband and wife before the death of the husband, so long as the marriage relation has not been legally dissolved. But it is apparent that such cases call for more careful discrimination, and that even where the separation has been a brief one, the circumstances may be such as would make it proper to refuse an allowance. Kersey v. Bailey, 52 Me. 198.

The death of a widow abates her petition for an allowance out of the personal estate of her husband, if no final decree for an allowance has been made. Tarbox v. Fisher, 50 Me. 236.

A decree for an allowance having been vacated or suspended by an appeal, the right of the widow could not become absolute until it should be affirmed by the appellate court. Her death before that time operated as a discontinuance of her petition. Tarbox v. Fisher, 50 Me. 236.

Prior to decree allowance is not subject to trustee process.—Prior to decree of the judge of probate granting a widow's allowance, the allowance, not being a matter of right, is not subject to trustee process. Hussey v. Titcomb, 127 Me. 423, 144 A. 218.

Widow's distributive share absorbed by allowance.—Where the allowance included all the personal property of the estate from which the distributive share of the widow was payable, it must be held to have completely absorbed this share as of the date of the decree of the judge of probate granting the allowance, and the administrator of the estate was not thereafter chargeable for it on trustee process against the widow. Hussey v. Titcomb, 127 Me. 423, 144 A. 218.

Applied in Godfrey v. Getchell, 46 Me. 537; Fox v. Rumery, 68 Me. 121; Smith, Appellant, 107 Me. 247, 78 A. 97.

Cited in Given v. Curtis, 133 Me. 385, 178 A. 616.

Sec. 15. Mortgage debts assigned. — When an allowance to a widow wholly or partly consists of a debt due the estate, secured by a mortgage of real or personal property, the executor or administrator, under direction of the judge, shall assign said mortgage and deliver the evidence of such debt to her. (R. S. c. 143, § 15.)

Applied in Gilman v. Gilman, 54 Me. 531.

Sec. 16. Temporary allowances during litigation.—In the settlement of any testate estate, where no provision is made for the widow in the will of her husband or she duly waives the provision made, the judge shall make her suitable allowances from the personal estate, from time to time, for the support of herself and family under her care, during any litigation concerning the will; and on final probate of the will he shall make her a final reasonable allowance from the personal estate, according to the degree and estate of her husband and the state of the family under her care. (R. S. c. 143, § 16.)

Sec. 17. Widows support. — A widow shall have her reasonable sustenance out of the estate of her husband for 90 days after his death, and may remain in the house of her husband during said 90 days without being chargeable with rent therefor. (R. S. c. 143, § 17.)

Right to quarantine relates only to lands in which widow may claim dower.—The right of the widow to quarantine relates only to lands in which she has a right or claim to dower. Young v. Estes, 59 Me. 441.

And to house in which husband held fee.—The phrase "house of her husband" in this section means the house in which her husband owned the fee at the time of his decease. Young v. Estes, 59 Me. 441.

Thus widow is not entitled to possession as against assignee of mortgagee.—The widow of a mortgagor of a house is not entitled to remain in the house ninety days next after her husband's death, as against the assignee of the mortgagee. Young v. Estes, 59 Me. 441.

Nor may she exclude cotenant of husband.—If the husband was tenant in common of the house he occupied, the widow has no right to hold possession of the entire house to the exclusion of the cotenant of her deceased husband. Young v. Estes, 59 Me. 441.

Cited in Given v. Curtis, 133 Me. 385, 178 A. 616.

Sec. 18. Allowance to minor children. — In all insolvent estates, the judge may make a like allowance from the personal estate to the minor children

of the deceased under 14 years of age, and to those between 14 and 21 years of age who from ill health are unable to labor; and if there is a widow and such children by a former wife, the judge may, at his discretion, divide such allowance among the widow and such children of a former wife. In solvent estates, the judge may, at his discretion, make an allowance from the personal estate to minor children under 12 years of age, when the income from their distributive shares will be insufficient for their support and education. (R. S. c. 143, § 18.)

Cross references.—See c. 158, § 40, re legal effect of adoption of child; c. 158, § 42, re allowance to adopted child.

Except as provided in § 14, the judge can make but one decree of allowance. He can divide that allowance, if he pleases, between widow and minor children such as these, but is not compelled to do so. The discretion is to divide, not to duplicate. Davis v. Gower, 85 Me. 167, 26 A. 1048.

He cannot make additional allowance to children abandoned by widow.—A judge of probate, after making an allowance to a widow out of her husband's estate for herself and his minor children by a previous wife, cannot afterwards decree an additional allowance to such children for the reason that the widow has abandoned them without their receiving the benefit of any of the funds in her hands. Davis v. Gower, 85 Me. 167, 26 A. 1048.

Sec. 19. Allowance to husband from wife's estate.—Upon the death of a wife whose estate is solvent, the judge may make an allowance to her husband from her personal estate in the same manner as to a widow from the estate of her husband. (R. S. c. 143, § 19.)

Distribution of Personal Estate.

Sec. 20. Lien for debt due to estate created on legacy or distributive share.—A debt, whether matured or not, due to the estate of a deceased person from a legatee or distributee of such estate creates a lien on the legacy or distributive share, having priority of any attachment or transfer of such legacy or share, and shall be set off against or deducted from the legacy of such legatee or from the distributive share of such distributee; and the probate court shall, after due notice, hear and determine the validity and amount of any such debt and may make all necessary or proper decrees and orders to effect such setoff or deduction; but the provisions of this section shall not prejudice any remedy of an executor or administrator for the recovery of such debt nor affect the liability of the legatee or distributee for the excess of indebtedness over the amount of his share in or claim upon the estate to which he is indebted. (R. S. c. 143, § 20.)

See c. 170, § 7, re lien on share of estate.

Sec. 21. Remainder of personal estate; unclaimed shares or pecuniary legacies; discharge after settlement; deposits in savings banks, etc., to be deposited in county treasury.—When on the settlement of any account of an administrator, executor, guardian or trustee there appears to remain in his hands property not necessary for the payment of debts and expenses of administration, or for the payment of pecuniary legacies of fixed amount, nor specifically bequeathed, the judge upon petition of any party interested, after public notice and such other notice as he may order, shall determine who are entitled to the estate and their respective shares therein under the will or according to law, and order the same to be distributed accordingly; and alienage shall be no bar to any person who, in other respects, is entitled to receive any part of such property. If an executor, administrator, guardian or trustee neglects to distribute the property in his hands in pursuance of such order, and the parties in interest reside out of the state and had no actual notice of any such settlement of account, the judge, on petition of any such party, may, within 6 years after such settlement, order such executor, administrator, guardian or trustee to render a new account. If any sum of money directed by a decree of the probate court to be

paid over, in any solvent or insolvent estate or pecuniary legacy, remains for 6 months unclaimed, the executor, administrator, guardian or trustee who was ordered to pay over the same shall pay such sum of money to the treasurer of the county in which the probate court has jurisdiction, who shall give a receipt therefor, specifying the amount, name of estate and name of person entitled thereto, which said receipt shall be filed in the probate court and allowed as a sufficient voucher therefor. When an executor, administrator, guardian or trustee has paid or delivered over to the persons entitled thereto the money or other property in his hands, as required by a decree of a probate court, he may perpetuate the evidence thereof by presenting to said court, without further notice, within 1 year after the decree is made, an account of such payments or of the delivery over of such property; which account being proved to the satisfaction of the court and verified by the oath of the party, shall be allowed as his final discharge and ordered to be recorded. If such account is presented after 1 year from the date of the decree, it may be allowed after public notice.

Any sums of money directed by a decree of the probate court to be paid over which remained unclaimed for 6 months in the hands of any executor, administrator, guardian or trustee, and were deposited in some savings bank or like institution as directed by the probate court to accumulate for the benefit of the person entitled thereto under the provisions of this section, shall with all accumulations be deposited in the treasury of the county in which said probate court has jurisdiction, for the benefit of persons entitled by the decree of the probate court having original jurisdiction of the proceedings, in which said decree ordering such deposits was originally based. (R. S. c. 143, § 21.)

Cross reference.—See c. 166, § 21, re payments to minors under order of court.

There are by virtue of this section and c. 153, § 2, two different courts, one a probate court, and the other an equity court of special and limited authority. The two courts have but a single judge. Knapp, Appellant, 149 Me. 130, 99 A. (2d) 331.

Probate court has power to determine who is entitled to balance.—The probate court under this section has power to determine on a petition for distribution or on allowance of an account, who is entitled to the balance remaining in the hands of an administrator, or executor, subject always to right of appeal. Knapp, Appellant, 149 Me. 130, 99 A. (2d) 331.

In so doing it may determine whether legacy is specific or general.—This section gives the probate court jurisdiction to determine whether a certain legacy is a specific or a demonstrative legacy. Stilphen, Appellant, 100 Me. 146, 60 A. 888, holding that, the statute existing at the time of the decision of Hanscom v. Marston, 82 Me. 288, 19 A. 460, having been superseded by the more definite and comprehensive language of chapter 49 of the laws of 1891, now found in this section, that decision is no longer to be considered an authority to support the contention that such question was not cognizable by the supreme court of probate.

And whether heirs of deceased legatee take by substitution.—The judge of probate may, subject to appeal, determine "who are entitled to take and their respective shares." He may after public notice and such other notice as he may order decide, subject to appeal, whether or not the heirs of a deceased legatee took her share by substitution. This does not affect the right of the court of equity to construe the will. The remedies are to a certain degree concurrent. Strout v. Chesley, 125 Me. 171, 132 A. 211.

But determination is not to be made until after account is settled.—This section does not authorize the probate court to construe the will and determine who is the residuary legatee until after the account is settled and the balance ascertained. Mattocks v. Moulton, 84 Me. 545, 24 A. 1004.

Decree should order distribution among heirs as they existed at time of death.—The judge of probate can only decree distribution among the heirs of the decedent intestate as they existed at his death, and this he should do by naming each one in the decree; and if any heir has died prior to distribution, then his share should be ordered to be paid to his legal representative, that it may be administered and subjected to the payment of any debts existing against the estate of such deceased heir. Grant v. Bodwell, 78 Me. 460, 7 A. 12.

Cy pres is not applicable where this

section is invoked.—Under this section the probate court determines who the individuals are to whom the testator gave the remainder of his property and the amounts to which they are entitled. It is not a question of cy pres under this section. It is a question of the identity of the person named or intended. There may be a misnomer of some person to whom he intended to give. Cy pres is not applicable when this section is invoked. Knapp, Appellant, 149 Me. 130, 99 A. (2d) 331. As to authority of probate judge to act in equity when cy pres doctrine adopted, see note to c. 153, § 2.

The fourth sentence of this section is merely permissive. It creates a privilege, but it imposes no obligation. The accountant may avail himself of the privilege, but is not required to do so. Mudgett, Appellant, 105 Me. 387, 74 A. 916.

There is no obligation to file a distribution account. When an executor or administrator has paid as required by decree, he may file an account, which may be a final discharge. This section creates a privilege but imposes no obligation. Knapp, Appellant, 149 Me. 130, 99 A. (2d) 331.

Applied in Rose v. O'Brien, 50 Me. 188; Robinson, Appellant, 88 Me. 17, 33 A. 652; Mudgett, Appellant, 103 Me. 367, 69 A. 575; Daggett, Appellant, 114 Me. 167, 95 A. 809.

Cited in McCarthy v. McCarthy, 121 Me. 398, 117 A. 313; Knapp, Appellant, 149 Me. 130, 99 A. (2d) 331.

Sec. 22. Distribution of specific articles. — When such surplus consist of any other property besides money, the judge may order a specific distribution of the same in proportion to the value thereof; and for this purpose he may appoint one or more appraisers to value and make such distribution under oath and to make report thereof to him for his acceptance. (R. S. c. 143, § 22.)

Under this section the judge may, not must, appoint appraisers. The judge could order a distribution which without the aid of appraisers might be executed with mathematical certainty. Hurley v. Hewett, 89 Me. 100, 35 A. 1026.

Petition held to pray distribution in kind.—See Hurley v. Hewett, 89 Me. 100, 35 A. 1026.

Applied in Rose v. O'Brien, 50 Me. 188.

Cited in Brown v. Hodgdon, 31 Me. 65; Whiting v. Farnsworth, 108 Me. 384, 81 A. 214.

Sec. 23. Assignment of debts; conditions of suit.—If any evidence of debt or account due to the deceased is thus assigned, the assignee may use the name of the executor or administrator to collect the same, by suit or otherwise, on giving such indemnity against costs as the judge orders, saving to all supposed debtors the right to set off any claim against the estate of the deceased. (R. S. c. 143, § 23.)

Sec. 24. Payment of deposit by county treasurer; list of depositors published annually; deposits to escheat to county after 20 years.—At any time within 20 years from the date when the deposit mentioned in section 21 is made with the county treasurer, the person entitled thereto or his executor, administrator or assigns may present to the judge of probate evidence of his right to the same and, upon satisfactory proof that he or they are entitled thereto, the judge of probate shall by decree direct the county treasurer to pay over to such person or persons the amount of the original deposit. The county treasurer shall annually in the month of January publish in one or more newspapers, published and printed within the county, and in the state paper a list of all persons entitled to such deposits. The county shall have the use and income of all such deposits and after 20 years from the date of each deposit, if not claimed and paid over to the person entitled thereto, his heirs, executors, administrators or assigns, the same shall escheat to the county; provided, however, that in the case of deposits assigned by the judges of probate to the several county treasurers, the said period of 20 years shall commence on the date of such assignments; but every person entitled to receive and be paid any such deposit made before the 29th day of March, 1911 shall be entitled to receive and be paid the amount of such original deposit with such interest thereon as is shown by the bankbook of such original deposit at the date of such payment to such person. (R. S. c. 143, § 24. 1945, c. 56.)

Sec. 25. Bond required in certain cases.—When an executor or administrator pays to a creditor, heir or legatee a sum exceeding $30 on account of a debt, legacy or decree of distribution, the judge of probate may authorize him to require of the payee a sufficient bond to refund so much thereof as said sum may exceed such payee's equitable proportion on final settlement of the estate, unless such payment is made to a creditor under an order of distribution of an insolvent estate. (R. S. c. 143, § 25.)

Sec. 26. Legacies payable.—Legacies shall be payable in 20 months after final allowance of the will; but such payments shall not be affected by any claims presented to the executor or administrator with the will annexed, or filed in the probate office after the expiration of said 20 months and after such payment; nor shall the executor or administrator with the will annexed be responsible for the payments of said legacies on account of such claims. (R. S. c. 143, § 26.)

History of section.—See Nickels v. Nichols, 118 Me. 21, 105 A. 386.

Section not retroactive.—See Nickels v. Nichols, 118 Me. 21, 105 A. 386.

Cited in Given v. Curtis, 133 Me. 385, 178 A. 616.

Sec. 27. Legatee may sue for legacy.—Any legatee of a residuary or specific legacy under a will may sue for and recover the same of the executor in an action of debt at common law or other appropriate action. (R. S. c. 143, § 27.)

History of section.—See Smith v. Lambert, 30 Me. 137.

Any legacy may be recovered under section.—By this section any legatee of a residuary or specific legacy under a will may recover the same in a suit at law. The word specific is not here used in a strictly technical testamentary sense, but means definite, particular, or special. Any legacy may be recovered by legal remedy, unless from exceptional reasons equity should be resorted to. Holt v. Libby, 80 Me. 329, 14 A. 201.

But amount of legacy must have been ascertained before suit. — It is true that this section authorizes any legatee, specific or residuary, to sue for his legacy, but before suit it is necessary that that amount shall have been ascertained, as a basis for the suit. If the legacy is specific or definite in amount, the will affords the necessary basis for suit; if residuary, it should be ascertained by the probate court in the first instance, and by appeal to the supreme court of probate, if desired, after payment of all superior claims. Until this is done, the residuary legatee ordinarily has no right of action. Till then it is uncertain whether there will be any residue. Graffam v. Ray, 91 Me. 234, 39 A. 569.

Notwithstanding the general character of the language in this section, it has been repeatedly held that a suit for the recovery of distributive share of a residue is not maintainable by a legatee until the amount of the residue to be distributed has been ascertained and finally determined by the probate court. It must necessarily be so. If there is anything in Smith v. Lambert, 30 Me. 137, inconsistent with that doctrine, it must be regarded as having been so far overruled. Northwestern Investment Co. v. Palmer, 113 Me. 395, 94 A. 481.

An action for a distributive share of an estate does not lie before the amount to be distributed has been ascertained in the probate court. Hawes v. Williams, 92 Me. 483, 43 A. 101; Palmer v. Palmer, 112 Me. 156, 91 A. 284.

Action not maintainable where estate is in process of settlement.—Where the estate is still in process of settlement, in the probate court, and the executors are acting in good faith, and are proceeding to settle the estate with due and reasonable diligence, an action to recover a residuary legacy under this section cannot be maintained. Northwestern Investment Co. v. Palmer, 113 Me. 395, 94 A. 481.

Section does not confer right to sue for devastavit.—The statute right to sue for a legacy by no means confers a right upon a residuary legatee to sue for a devastavit for his private benefit. Graffam v. Ray, 91 Me. 234, 39 A. 569.

It must appear that there are assets in hands of executor.—To maintain an action to recover a residuary legacy, it must appear that there are assets in the hands of the executor, and if it also appears that there are other and superior claims upon the assets, to their full amount, the residuary legatee must be postponed. Smith v. Lambert, 30 Me. 137.

Legatee must prove reception of assets by executor.—Although this section con-

fers upon a legatee the right to bring an action of debt against an executor to recover a specific legacy of a pecuniary nature, yet he is not entitled to judgment unless he proves reception of assets by the executor, making him liable to pay. Bragdon v. Smith, 136 Me. 474, 12 A. (2d) 665.

And he cannot recover where he admits that personal estate is exhausted.—A plaintiff cannot maintain an action to enforce payment of a particular legacy where he admits by stipulation that the personal estate of the testator has been exhausted, and the only remaining assets, using the word "in a large sense," are parcels of real estate, since an executor is not chargeable for the proceeds of real estate until the same are in his hands. Bragdon v. Smith, 136 Me. 474, 12 A. (2d) 665.

Setoff of debt due estate in action for legacy.—See Holt v. Libby, 80 Me. 329, 14 A. 201.

Applied in Hamilton v. McQuillan, 82 Me. 204, 19 A. 167.

Distribution of Lands Held in Mortgage or Taken on Execution.

Sec. 28. Lands held in mortgage or taken on execution, before foreclosure treated and sold as personal estate.—Real estate held by an executor or administrator, guardian or trustee, in mortgage, or taken on execution, shall, until the right of redemption has expired, be deemed personal assets and be held in trust for the persons who would be entitled to the money, if paid; and if it is paid, he shall release the estate; but if it is not paid, he may sell it as he could personal estate at common law and assign the mortgage and debt; and the purchaser has the same rights and liabilities as the purchaser of personal property sold by license of the probate court. All sales so made heretofore are valid. (R. S. c. 143, § 28.)

Cross reference.—See c. 177, § 13, re mortgages are assets in hands of executors, etc.

History of §§ 28-31.—See Strout v. Lord, 103 Me. 410, 69 A. 694.

Unforeclosed mortgages are in law personal estate.—Unforeclosed mortgages of real estate are not only to be administered as personal estate, but they are, in the eyes of the law, personal. This section says they are to be deemed personal assets, that is, they are personal assets. As such, the title descends on the death of the mortgagee to his executor or administrator like all other personal estate, and not to his heirs or devisees. Strout v. Lord, 103 Me. 410, 69 A. 694.

Mortgaged lands do not pass on death of mortgagee to his heirs.—It is quite apparent from this section and § 31 that mortgaged lands do not pass upon the death of the mortgagee to his heirs. They pass to the executor as fully as personal property passes to him. He administers them as he does personal property. His deed will convey them. The deed of the heirs will not convey them. An entry upon them by the heirs would be trespass against the executor. Hemmenway v. Lynde, 79 Me. 299, 9 A. 620.

But title therein passes to executor.—The title to lands held by a decedent in mortgage, passes upon his death to his executor, and remains in the executor and his successors until redemption, sale, foreclosure or distribution. The heirs only acquire title by purchase or distribution. Hemmenway v. Lynde, 79 Me. 299, 9 A. 620.

Until foreclosure is complete, the heirs or devisees have no title to the mortgaged estate, and they have no interest in the same except such as they have in personal estate generally. Strout v. Lord, 103 Me. 410, 69 A. 694.

And thus are not necessary parties to proceedings to redeem.—Since lands held by unforeclosed mortgages are, in this state, personal assets in the hands of the executor or administrator for administration, in proceedings to redeem, the executor or administrator sufficiently represents the heir or devisee, as he does with respect to other personal assets, and the heirs or devisees are not necessary parties. Strout v. Lord, 103 Me. 410, 69 A. 694.

But when such mortgages become foreclosed the lands become vested in the heirs or devisees, subject to sale for administrative purposes, and are to be distributed to the persons who are entitled to the personal estate. Strout v. Lord, 103 Me. 410, 69 A. 694.

And they must be made parties on bill to redeem.—If upon a bill to redeem, the validity of the foreclosure is attacked, the heirs or devisees have a direct interest

and a right to be heard on that question, and must be made parties. Strout v. Lord, 103 Me. 410, 69 A. 694.

Action for cutting timber on mortgaged land properly brought by executor.—An action of trespass de bonis to recover for timber and trees cut from land mortgaged is properly brought by the executor of the deceased mortgagee for the benefit of the person beneficially interested under the will, if the severance was before the death of the mortgagee. Brooks v. Goss, 61 Me. 307.

Equitable mortgage.—If the mortgage is equitable, and there is no writing or other evidence of a debt from the mortgagor that can be enforced at law independent of the security, the land may well be inventoried as real estate, and only when reduced to cash, by redemption or sale, would the proceeds become chargeable to the executor or administrator. Hawes v. Williams, 92 Me. 483, 43 A. 101.

Money received by the administrator of an equitable mortgagee, in redemption of an equitable mortgage, should be charged by the probate court to the administrator and ordered distributed as personal estate. Hawes v. Williams, 92 Me. 483, 43 A. 101.

Applied in Webber v. Webber, 6 Me. 127; Tebbetts v. Estes, 52 Me. 566; Gilman v. Gilman, 54 Me. 531; Bigelow v. Foss, 59 Me. 162.

Sec. 29. Sold by license for payment of debts, legacies and charges.—Any such real estate may, for the payment of debts, legacies or charges of administration, be sold by a license of the probate court like personal estate; and the judge, if he deems it necessary, may require due notice to be given before granting such license and an additional bond from the executor or administrator. (R. S. c. 143, § 29.)

Cross reference.—See note to § 28.

Quoted in Hawes v. Williams, 92 Me. 483, 43 A. 101.

Stated in Brooks v. Goss, 61 Me. 307.

Sec. 30. In case of death of executor or administrator.—When an executor or administrator has taken land on execution for a debt due the estate and dies without disposing thereof, the judge may license his executor or administrator to sell and convey it, in order to carry into effect the trust whereby it is held or for any other legal purpose. (R. S. c. 143, § 30.)

See note to § 28.

Sec. 31. Distribution, if not sold or redeemed.—If such real estate is not so redeemed or sold, it shall be distributed among those who are entitled to the personal estate, but in the manner provided herein for the partition of real estate; or the judge of probate or superior court, if it would be more for the benefit of the parties in interest, may order it sold by the executor or administrator and the money distributed as in other cases of personal estate. (R. S. c. 143, § 31.)

Cross references.—See note to § 28. See c. 163, § 1, sub-§ VIII, re license to sell mortgaged real estate granted to executors, etc.

Applied in Gilman v. Gilman, 54 Me. 531; Hemmenway v. Lynde, 79 Me. 299, 9 A. 620.

Quoted in Hawes v. Williams, 92 Me. 483, 43 A. 101.

Distribution of Estates of Deceased Nonresidents.

Sec. 32. Estates of deceased nonresidents disposed of. — When administration is taken in this state on the estate of any person who, at the time of his death, was not an inhabitant thereof, his estate found here, after the payment of his debts, shall be disposed of according to his last will, if he left any; but if not, his real estate shall descend according to the laws of this state; and his personal estate shall be distributed according to the laws of the state or country of which he was an inhabitant; and the judge of probate, as he thinks best, may distribute the residue of said personal estate as aforesaid or transmit it to the foreign

executor or administrator, if any, to be distributed according to the law of the place where the deceased had his domicile. (R. S. c. 143, § 32.)

History of section.—See Smith v. Howard, 86 Me. 203, 29 A. 1008.

Section defines and limits jurisdiction of probate court.—With respect to the estates of deceased nonresidents the jurisdiction of the court of probate is clearly defined and limited in this section. In case of an intestate, it is simply the duty of the judge to order the residue of the estate, after the payment of debts, to be distributed here, or transmitted to the foreign administrator, to be distributed, in either event, according to the law of the place where the deceased had his domicile. Smith v. Howard, 86 Me. 203, 29 A. 1008.

Creditors have right to have all assets appropriated to their debts.—So long as there are creditors within the jurisdiction of the ancillary administration, they have a legal right to insist upon having all the assets found there appropriated to the payment of their debts. The court has no authority to order the assets to be transmitted under this section until the creditors here are all paid, and it has no jurisdiction to determine that there are no unpaid creditors here until the expiration of the time fixed by law for presenting their claims. Smith v. Howard, 86 Me. 203, 29 A. 1008.

Section does not authorize court to make allowance to widow.—No authority to make an allowance to the widow of a nonresident decedent is expressly conferred by this section; nor is it granted by implication as necessary to the discharge of the duties that are expressly imposed. Smith v. Howard, 86 Me. 203, 29 A. 1008.

And to do so would be incompatible with rights of creditors.—To make an allowance from funds in this state to the widow of a nonresident decedent in accordance with the law of the state of decedents' domicile would be incompatible with the rights of creditors under the provisions of this section, which require all debts to be paid before any of the assets can be remitted to the place of the domicile. Smith v. Howard, 86 Me. 203, 29 A. 1008.

Applied in Lyon v. Ogden, 85 Me. 374, 27 A. 258; Gardiner Savings Institution v. Emerson, 91 Me. 535, 40 A. 551.

Sec. 33. If such person died insolvent.—If such person died insolvent, his estate found in this state shall, so far as practicable, be so distributed that all his creditors here and elsewhere may share in proportion to their debts; and to this end his estate shall not be transmitted as aforesaid until all his resident creditors have received the proportion that they would have had if the whole estate applicable to the payment of creditors, wherever found, had been divided among all said creditors in proportion to their debts without preferring any one kind of debt to another; and in such case, no foreign creditor shall be paid out of the assets found here until all the resident creditors have received their proportions as herein provided. (R. S. c. 143, § 33.)

Sec. 34. Distribution of residue.—If there is any residue after such payment to the citizens of this state, it may be paid to any other creditors who have proved their debts here, in proportion to the amount, but no one shall receive more than would be due him if the whole estate were divided ratably among all the creditors as before provided; and the balance, if any, may be transmitted to the foreign executor or administrator, or if there is none such, it shall, after 4 years from the appointment of the administrator, be distributed ratably among all the resident and foreign creditors who have proved their debts in this state. (R. S. c. 143, § 34.)

Sec. 35. Proceeds of sale of land under foreign will disposed of.—Where lands in this state held in trust under a foreign will for persons not residing here have been sold, the probate court for the county in which the will has been allowed may, in its discretion, order the money to be transmitted to the trustee, if there is any, in the state or country where the testator had his domicile. (R. S. c. 143, § 35.)