An Act to Establish a Probate Code, Including the Law in Relation to Descent and Distribution, Wills, Administration and Guardianship

Comment. As to the constitutionality of the enactment of an entire probate code under a single title where there are constitutional provisions requiring each legislative enactment to have a single subject, see Johnson v. Harrison, 47 Minn. 575, 50 N.W. 923 (1891); Evans v. Superior Court, 215 Cal. 58, 8 P.(2d) 467 (1932); Fins, "Analysis of the Illinois Probate Code," 34 Ill. L. Rev. 405 (1939); Evans, "Comments on the Probate Code of California," 19 Cal. L. Rev. 602 (1931) (see particularly the footnote on page 602); Clark and Walrath, "Questions Arising Under the Probate Act," 8 Fla. L. J. 77 at 84 (1934).

PART I. GENERAL PROVISIONS

§ 1. Short title. This Act shall be known and may be cited as the Probate Code.

§ 2. How Code to take effect.
(a) Effective date. This Code shall take effect and be in force on and after January 1, 19—. The procedure herein prescribed shall govern all proceedings in probate brought after the effective date of the act and also all further procedure in proceedings in probate then pending, except to the extent that in the opinion of the court their application in particular proceedings or parts thereof would not be feasible or would work injustice, in which event the former procedure shall apply.

(b) Rights not affected. No act done in any proceeding commenced before this Code takes effect and no accrued right shall be impaired by its provisions. When a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provision of
any statute in force before this Code takes effect, such provision shall remain in force and be deemed a part of this Code with respect to such right.

(c) **Severability.** If any provision of this Code or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Code which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

*Comment.* Statutes of this type are usual in codes and in acts of any considerable length. Subsection (a) is modeled after Fed. Rules Civ. Proc., Rule 86. North Dakota Compiled Laws (1913) §§ 8509 and 8510 furnished the model for subsection (b). Subsection (c) follows the form recommended by the National Conference of Commissioners on Uniform State Laws. See Handbook of the National Conference of Commissioners on Uniform State Laws (1943) p. 288.

§ 3. **Definitions and use of terms.** When used in this Code, unless otherwise apparent from the context:

(a) "Child" includes an adopted child but does not include a grandchild or other more remote descendants, nor, except as provided in section 26, an illegitimate child.

(b) "Claims" include liabilities of the decedent which survive, whether arising in contract or in tort or otherwise, funeral expenses, the expense of a tombstone, expenses of administration and all estate and inheritance taxes.

(c) "Devise," when used as a noun, means a testamentary disposition of real or personal property or both.

(d) "Devise," when used as a verb, means to dispose of real or personal property or both by will.

(e) "Devisee" includes legatee.

(f) "Distributee" denotes those persons who are entitled to the real and personal property of a decedent under his will or under the statutes of intestate succession.
(g) "Estate" denotes the real and personal property of the decedent or ward, as from time to time changed in form by sale, reinvestment or otherwise, and augmented by any accretions and additions thereto and substitutions therefor and diminished by any decreases and distributions therefrom.

(h) "Exempt property" refers to that property of a decedent's estate which is described in section 43 hereof.

(i) "Fiduciary" includes personal representative, guardian and testamentary trustee.

(j) "Heirs" denotes those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the real and personal property of a decedent on his death intestate.

(k) "Interested persons" means heirs, devisees, spouses, creditors or any others having a property right in or claim against the estate of a decedent being administered. This meaning may vary at different stages and different parts of a proceeding and must be determined according to the particular purpose and matter involved.

(l) "Issue" of a person, when used to refer to persons who take by intestate succession, includes all lawful lineal descendants except those who are the lineal descendants of living lineal descendants of the intestate.

(m) "Lease" includes an oil and gas lease or other mineral lease.

(n) "Legacy" means a testamentary disposition of personal property.

(o) "Legatee" means a person entitled to personal property under a will.

(p) "Letters" includes letters testamentary, letters of administration and letters of guardianship.

(q) "Mortgage" includes deed of trust, vendor's lien and chattel mortgage.
("Net estate" refers to the real and personal property of a decedent exclusive of homestead rights, exempt property, the family allowance and enforceable claims against the estate.)

("Person" includes natural persons and corporations.)

("Personal property" includes interests in goods, money, choses in action, evidences of debt and chattels real.)

("Personal representative" includes executor, administrator, and special administrator.)

("Property" includes both real and personal property.)

("Real property" includes estates and interests in land, corporeal or incorporeal, legal or equitable, other than chattels real.)

("Will" includes codicil; it also includes a testamentary instrument which merely appoints an executor and a testamentary instrument which merely revokes or revives another will.)

The singular number includes the plural; the plural number includes the singular.)

(-- The masculine gender includes the feminine and neuter.

Comment. Definitional sections such as this are sometimes found in various codes. They are believed to be important aids to clearness and precision. An example of such a statute in the Florida probate Code is Fla. Stat. Ann. (1941) § 731.03. See, also, a statute of this type in Cal. Code Civ. Proc. (Deering, 1941) § 17.

For definitional sections applicable only to particular parts of this Code, see §§ 196, 238 and 256.

§ 4. Qualifications of judge. No person shall be eligible to the office of [judge] unless he shall have been admitted to practice in this state for a period of at least [five] years immediately before assuming his office and shall have practiced law or held judicial office in this state for [five] years.

Comment. As is indicated in the introduction to this Code, the most desirable form of judicial organization is one in which the judge
of the trial court of general jurisdiction is also a judge in probate matters. If such a form of organization is provided, this and the next succeeding section would normally be found in the general provisions on judicial organization. But whether there is a separate court for probate matters or not, high standards for the office of judge are indispensable to the successful operation of this Code; and it is contemplated that the requirements for judges be substantially the same as those for judges in the trial court of general jurisdiction.

In any jurisdiction where probate judges have not, in the past, been required to be members of the bar, it may be desirable to insert in this section a further provision to the effect that all persons otherwise qualified to hold the office of probate judge, who have held that office immediately prior to the date when this Code becomes operative, shall be qualified to hold the office of judge in probate matters. Examples of provisions of this kind may be found in existing legislation. Thus, Ohio Gen. Code (Page, 1937) § 10501-1 is as follows: “Quadrennially, in each county having a separate probate court, one probate judge shall be elected who shall have been admitted to practice as attorney and counselor at law in this state, or who shall have previously served as probate judge immediately prior to his election.” Wis. Stat. (1943) § 253.02, in stating the qualifications for county judge in counties of over 145,000 population, adds “Such provision shall not disqualify any person who held such office in this state on or before the first day of July, 1933.” The Missouri Constitution, just adopted, provides (Art. V, § 25) “... every judge and magistrate shall be licensed to practice law in this state, except that probate judges now in office may succeed themselves as probate judges without being so licensed.”

§ 5. Salaries of judges. The salaries of [judges] shall be $[ ] per annum, which shall not be decreased during their respective terms of office.

§ 6. Jurisdiction. The [ ] court shall have plenary jurisdiction of the administration, settlement and distribution of estates of decedents, whether consisting of real or personal property or both, the probate of wills, the granting of letters testamentary, of administration and of guardianship, the construction of wills, whether incident to the administration of an estate or as a separate proceeding, the determination of heirship, the administration of testamentary trusts, and the
administration of guardianships of minors and other incompetents. It shall have the same legal and equitable powers to effectuate its jurisdiction and to carry out its orders, judgments and decrees, and the same presumptions shall exist as to the validity of such orders, judgments and decrees in probate as in other matters.

Comment. It is assumed that the jurisdiction to probate and to administer estates is exclusive except to the extent that legislation otherwise provides. Administration of decedents' estates in chancery as recognized in English law would not be permissible under this Code. If the former practice of a jurisdiction is such that the opposite conclusion might be reached by a court, it would be desirable to insert at the end of the first paragraph of this section a statement to the effect that administration of decedents' estates in Chancery is hereby abolished. As to the jurisdiction to administer estates under guardianship, see § 199 and Introductory Comment to Part IV.

The chief reason for giving a probate court jurisdiction over testamentary trusts is that the judge's familiarity with the decedent's estate from which the trust is set up enables him to decide questions about the trust with a fuller appreciation of the factual problems involved than would another judge. Sometimes, however, an inter vivos trust has been set up by a testator prior to his death which has a very close relation to a trust set up by his will. Indeed, the provisions in the will may be such that it is difficult to determine whether there is a separate testamentary trust or whether the testator has merely increased the corpus of the inter vivos trust. To take care of these and similar situations, it would be desirable to have a statute in the general procedural or court organization sections of the statutes of a state which would permit the transfer of a testamentary trust to a judge or court handling a related inter vivos trust or vice versa. No such provision is included in this Code because its scope would be somewhat broader than probate matters.

If there is a separate probate court, there should be substituted for the phrase "in probate as in other matters" the following: "as in the trial court of general jurisdiction." The sentence of which this phrase is a part is designed to eliminate any trace of the notion that the court of general jurisdiction sitting as a probate court, or that the probate court, is a court of inferior jurisdiction. Since this idea was once very widespread, it is important to negative it expressly. For an excellent statute which accomplishes this purpose, see Mass. Ann. Laws (1932) c. 215, § 2.
It should be observed that, if the Uniform Declaratory Judgments Act is in force, it would apply to the jurisdiction of the court to make declaratory judgments in probate matters. Compare also § 60 of this Code which specifically provides for declaratory judgments in the construction of a will.

§ 7. Distribution of business. In all counties in which the court is composed of two or more judges, such court shall provide by local rule for the distribution of the business of the court between the judges and also for the order of business.

Comment. If probate matters are handled by the trial court of general jurisdiction, the business would normally be distributed so that one or more of the judges handles probate matters exclusively. In California, where probate matters are handled by the Superior Court, such a provision is employed to accomplish this result in the larger counties of that state. See Rules 21–24 inclusive of the Rules of Superior Courts, in Larmac, Index to California Laws (1943) pp. 1786–1790.

If a separate probate court is provided for and there are two or more probate judges, this section can still be used to bring about some distribution of business on the basis of its character. Thus, one judge may handle exclusively matters of decedents’ estates, while to another may be assigned matters of guardianship and related matters.

In general, as to the subject matter of this section, see Pound, Organization of Courts (1940); Arnold, What Is My Jurisdiction? —A Treatise on the Constitutional Jurisdiction of Probate Courts in Missouri (1944).

§ 8. Court open at reasonable hours. The court shall be open for the transaction of probate business at all reasonable hours.

Comment. Due to the nature of its business, the court should not be subject to the strictures of terms of court, but should be open at all reasonable hours for the conduct of probate business. Fiduciaries must be appointed promptly in order to preserve the estates; and emergencies in administration may arise at any time which require a prompt decision. Statutes such as this section are not uncommon. See, for example, Kan. Gen. Stat. (Supp. 1943) § 59–211; Mich. Stat. Ann. (1943) § 27.3178(30); Minn. Stat. (1941) § 525.01. Indeed, some legislation provides that the probate court shall be open at all

(a) When and how judge disqualified. When any judge or his spouse shall be related within the third degree of consanguinity according to the civil law to any of the parties or their attorneys, shall have drawn the will of the decedent, or shall be interested or have been counsel in any probate proceeding or any matter therein, the same shall be grounds for disqualifying such judge from acting in such proceeding or the particular matter with respect to which his disqualification exists. When grounds for disqualification exist, the judge may refuse to act as judge therein; or, upon the filing of a petition to disqualify such judge, stating the grounds therefor, by any person interested in the estate or the particular matter with respect to which his disqualification exists, the judge must not act therein.

(b) How another judge obtained; validity of his acts. When any judge shall be disqualified, or unable to act as judge due to illness or absence from the county, or when in his opinion the interest of the public or of any person interested in any matter requires that another judge act in his stead, such judge or the presiding judge, if any, may request another judge of a court of record of the same or another district to act in his place; but in either case, if all persons or their attorneys interested in the proceeding or matter shall agree by written stipulation, a member of the bar having the same qualifications as are required for judge may be requested and appointed to act as judge therein. All orders, judgments and decrees made by such acting judge shall have the same force and effect as if made by the regular judge.

Comment. The provisions of this section were suggested by Minn. Stat. (1941) §§ 525.05, 525.051, 525.052. Compare Kan. Gen. Stat. (Supp. 1943) § 59-203. The only disqualifications considered here are those in connection with probate proceedings. If a judge is
prejudiced against any party in a particular matter, or is temporarily or permanently disabled from performing his duties, other provisions may be necessary, but will ordinarily be contained in other statutes on judicial organization.

§ 10. Power of courts to make rules. The [supreme court] may, on the recommendation of the majority of the [judges], or on its own motion, promulgate rules and forms of procedure for probate proceedings, not inconsistent with the provisions of this Code. Each [ ] court may promulgate rules and forms of procedure for probate proceedings, not inconsistent with the provisions of this Code nor with such rules and forms as are promulgated by the [supreme court]. If in any probate proceeding a situation arises which is not provided for by any statute or rule of procedure, the court may formulate and declare a rule of procedure for that particular case.


In some states it is provided by statute that where there is no other applicable statute or rule, the rules of civil procedure may be applied. See Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 155, and Ohio Gen. Code (Page, Supp. 1944) § 10501-22. Such legislation is not recommended. Much of the proceedings in matters of probate is administrative in character and not adversary. It is believed, therefore, that rules of civil procedure designed primarily for adversary proceedings should not be applied.

The term "supreme court" as used in this section refers to the highest appellate court of the state to which appeals are taken. If that court is referred to by some other designation in a given state, that designation should be substituted in this section. The blanks preceding
the word "judges" and the word "court" in this section are to be filled by the name of the court of original jurisdiction in probate matters.


(a) Ministerial matters. The clerk shall have power to take acknowledgments, administer oaths, and to certify and authenticate copies of instruments, documents and records of the court, and to perform the usual functions of his office.

(b) Notices of hearing. Subject to control of the judge, the clerk shall have power to issue notices and to make all necessary orders for the hearing of any petition or other matter to be heard in the court.

(c) Judicial powers. If a matter is not contested, the clerk may hear and determine it and make all orders, judgments and decrees in connection therewith which the judge could make, subject to be set aside or modified by the judge at any time within thirty days thereafter; but if not so set aside or modified such orders, judgments and decrees shall have the same effect as if made by the court or judge.

Comment. In most states clerks of probate courts have been given some judicial powers, or are authorized to exercise judicial powers under special circumstances, as in the absence of the judge, or in non-contentious matters. This is believed justified in the interests of the efficient conduct of the business of the court, provided that general supervision or revision of the acts of the clerk is adequately provided for. See Simes and Basye, "Organization of the Probate Court in America," 42 Mich. L. Rev. 965 (1944) and 43 Mich. L. Rev. 113 at 145-150 (1944). For a provision in the Federal Rules of Civil Procedure giving certain judicial powers to the clerk, see Fed. Rules Civ. Proc., Rule 77(c).

Due to the nature of probate business, the court should be easily accessible to all persons. Hence, it is almost the universal practice, where there are separate courts of probate, to have at least one in each county. Upon the adoption of the recommendations made herein to the effect that probate matters be handled by the trial court of general jurisdiction, that court may be organized to serve a larger district than a county as a circuit or district court. Nevertheless, it is desirable that such a court sit in each county, and that a clerk and probate records be found in each county. This is the practice in some states where such
a judicial organization is now in force, and it is assumed that such practice would be followed where this Code is adopted.

§ 12. Application to court by verified petition. Every application to the court, unless otherwise provided, shall be by petition signed and verified by or on behalf of the petitioner. No defect of form or substance in any petition, nor the absence of a petition, shall invalidate any proceedings.

Comment. In civil procedural rules there has been a modern tendency to do away with a requirement of verification of pleadings. See, for example, Fed. Rules Civ. Proc., Rule 11. However, in probate matters the situation is believed to call for verification. Often the proceeding is ex parte or is not contested and little or no evidence is introduced other than the verified petition. Moreover, in such a case, if the petitioner is present in court, the verified petition not only may be accepted in lieu of his testimony, but may be substituted for a written record of such testimony.

The last line of this section is similar to Kan. Gen. Stat. (Supp. 1943) § 59-2201 and Minn. Stat. (1941) § 525.81. It should be noted that it merely states that such a defective petition or the absence of a petition does not make the proceeding void. It does not prevent an opposing litigant from insisting upon the filing of an amended petition, nor does it dispense with proof of the necessary facts.

§ 13. Filing objections to petition. Any interested person, on or before the day set for hearing, may file written objections to a petition previously filed, and, upon special order or general rule of the court, objections to such petition must be filed in writing as a prerequisite of being heard by the court.

(a) When notice to be given. No notice to interested persons need be given except as specifically provided for in this Code or as ordered by the court. When no notice is required by this Code, the court may require such notice as it deems desirable by a general rule or by an order in a particular case.

(b) Kinds of notice required. Unless waived and except as otherwise provided by law, all notices required by this
Code to be served upon any person shall be served as the court shall direct, by rule or in a particular case, either

(1) By delivering a copy of the same at least seven days before the hearing to such person personally; or

(2) By publishing once in each week for three weeks consecutively in some newspaper printed and circulating in the county where said court is held, the first day of publication to be at least thirty days prior to the date set for hearing; or in case there be no newspaper printed in said county, then in some newspaper published in this state and designated by the judge or clerk, circulating in the county where the proceeding is pending; or

(3) By registered mail, requesting a return receipt signed by addressee only, addressed to such person located in the United States at his address stated in the petition for the hearing, to be posted by depositing in any United States post office in this state at least fourteen days prior to the date set for hearing in said notice; or

(4) By any combination of two or more of the above.

In all cases where service by publication is ordered, but personal service or service by registered mail is not ordered, all persons whose names and addresses are given in the petition shall be served by ordinary mail in the same manner and with the same requirements as provided herein for service by registered mail except that no registration shall be required.

(c) **By whom service made.** Service by publication and by registered and ordinary mail shall be made by the clerk at the instance of the party who requires such service to be made. Personal service may be made in any part of this state by any competent person.
(d) Service on attorney. If an attorney shall have entered his appearance in writing for any party in any probate proceeding or matter pending in the court, all notices required to be served on the party in such proceeding or matter shall be served on the attorney and such service shall be in lieu of service upon the party for whom the attorney appears.

Comment. In some instances the Code requires a particular kind of notice to be given. See, for example, §§ 69 and 70 requiring notice by publication and by registered mail either prior to the hearing on the petition for probate or administration or on the appointment of the personal representative. In other instances the Code merely states that notice must be given. In such case this section provides the different kinds of notices from which the court makes a selection. This selection may be made in each particular case or by a rule of court. Moreover, in any case where the Code requires no notice, the court may in its discretion order notice or may make a general rule as to notice in any class of cases. The kind of notice so ordered is to be determined by the court. For example, a court order could make express provision for service by ordinary mail, or for service in any other reasonable manner whether expressly provided for in subsection (b) hereof or not. Under § 11(b) the clerk may, subject to the control of the court and any standing rules of court, direct the manner of service.

§ 15. Proof of service. Proof of service in all cases requiring notice, whether by publication, mailing or otherwise, shall be filed before the hearing. Service made by a private person shall be proved by the affidavit of the person; service made by the clerk or other official shall be proved by certificaté or return of service. In the case of service by registered mail, the return receipt shall be attached to the proof of service if a receipt has been received; if no receipt has been received the court may, in its discretion, order further service on the party.

§ 16. Waiver of notice. Any person legally competent who is interested in any hearing in a probate proceeding may in person or by attorney waive in writing notice of such hearing. A guardian of the estate or a guardian ad litem may make such a waiver on behalf of his ward, and a trustee may make
such a waiver on behalf of the beneficiary of his trust. A consul or other representative of a foreign government, whose appearance has been entered as provided by law on behalf of any person residing in a foreign country, may make such waiver of notice on behalf of such person. Any person who submits to the jurisdiction of the court in any hearing shall be deemed to have waived notice thereof.

§ 17. Stenographic record. The judge may of his own motion, or on the request of an interested person, direct the stenographer of his court to attend any hearing in a probate proceeding and make a stenographic record of the same.

Comment. In metropolitan areas it might be desirable to provide for a court stenographer who would make a stenographic record of all hearings. This can easily be accomplished under the Code by a rule of court to that effect. However, in less populous areas the rule laid down in this section would appear to be sufficient.

§ 18. Jury trial.

(a) Right to jury trial; waiver. Whenever the right to trial by jury is guaranteed by the constitution of this state, any person entitled thereto may file a written demand for trial by jury prior to the hearing of the issues of fact. The right to trial by jury is waived if a demand is not so filed, or if the person claiming the right fails to appear at the hearing or fails to object to trial by the court before evidence is commenced.

(b) When not of right. When, under subsection (a) hereof, there is no right to trial by jury or if the right is waived, the court in its discretion may call a jury to decide any issues of fact, but the verdict in such case shall be advisory only.

Comment. Most of the questions of fact likely to arise in connection with probate matters can be decided more satisfactorily by the judge than by the jury and at less expense. Therefore, if it were not for the possibility of violating constitutional provisions which preserve the right to jury trial, it would be desirable to provide that there shall be no trial by jury except under the circumstances stated in subsection (b) hereof. It is clear that there was no right of trial by jury in
England in chancery or in the ecclesiastical courts, which were the predecessors of probate courts. But certain steps in a modern proceeding for the administration of the estate of a decedent may be regarded as merely proceedings at law which, for convenience, have been transferred to the court having jurisdiction of probate matters. Most important among these are the adjudication of creditors' claims and the determination of title in disclosure proceedings. This section seeks to insure that the constitutional right to trial by jury is not violated and at the same time to minimize as far as possible the use of the jury. Similar provisions are found in Fed. Rules Civ. Proc., Rules 38 and 39, and N. Y. Surr. Ct. Act, §§ 67 and 68.

It should be noted that, if the constitution of a state does not guarantee a right to trial by jury in probate matters, then a statute which denies such a jury trial would not violate any provision of the Federal constitution, either as to jury trial or as to due process of law. Hence, if it is clear that a state constitution does not guarantee a right to trial by jury in probate matters, it would be desirable, instead of the form of § 18 here proposed, to substitute a provision to the effect that there should be no right to a jury trial but that the court might, in its discretion, order a trial of issues of fact by a jury, the verdict of which would be purely advisory.

By the great weight of authority there is no constitutional right to jury trial of a will contest. Annotation, 62 A.L.R. 82; but see Corley v. McElmeel, 149 N. Y. 228, 43 N. E. 628 (1896). Many jurisdictions, however, grant jury trial of right by statute. See annotation, 62 A.L.R. 82, 85. This is not recommended; but if it were thought to be desirable, a subsection to this effect could be added to § 18, and appropriate changes made in subsections (a) and (b). In Massachusetts and New York a jury issue in a probate proceeding may be transferred for trial to the ordinary trial court of general jurisdiction. Mass. Ann. Laws (1932) c. 215, § 16; N. Y. Surr. Ct. Act, § 68.

§ 19. Vacation and modification of judgments. For good cause, at any time within the period allowed for appeal after the final termination of the administration of the estate of a decedent or ward, the court may vacate or modify its orders, judgments and decrees, or grant a rehearing therein, except that no such power shall exist as to any orders, judgments or decrees from which an appeal has been taken, prior to a final disposition thereof on such appeal, or to set aside the
probate of a will after the time allowed for contest thereof. No vacation or modification under this section shall affect any act done or any right acquired in reliance on any such order, judgment or decree.

Comment. One of the reasons for the inferior position of probate courts in our system of judicial organization has been their lack of power over their own orders and judgments such as exists in courts of general jurisdiction. It is true that over a long period of years some small amount of control has been granted with respect to particular orders and usually for short periods of time; but it has been wholly inadequate for the needs. Obviously some effective control is necessary in the interests of efficient administration. The very fact of the ex parte nature of much of probate procedure makes this highly desirable.

If the need for such control is granted, the time element is also important. A few statutes have restricted this control to a time corresponding to the period allowed for filing a motion for a new trial; others to a period corresponding to the time for taking an appeal. In view of the fact that an administration proceeding is one proceeding consisting of many steps or stages which are inextricably connected and related, it seems advisable to extend this control throughout the entire proceeding and also for a time thereafter corresponding to the time for taking an appeal.

It is not intended that this power be arbitrary, but must depend for its exercise upon the existence of facts constituting "good cause." Furthermore, the exercise of such power may not affect acts done or rights acquired in reliance on any order, judgment or decree prior to its vacation or modification.

In addition to statutory provisions such as this for relief against a judgment or decree, there are rules of equity giving relief from the judgment of a court of general jurisdiction in certain cases of fraud, duress and error. See Restatement, Judgments (1942) §§118–126. As will be seen from §6 of this Code, the court having jurisdiction in probate matters is a court of general jurisdiction. Hence, the relief provided for in §19 hereof is supplementary to the relief given in equity against judgments in the absence of statute.

§ 20. Appeals.

(a) Appeal to [supreme court] permitted. Except as provided in subsection (b) hereof, a person aggrieved by an order, judgment or decree of the [ ] court, in pro-
ceedings under the provisions of this Code, may obtain a review of the same by the [supreme court].

(b) Orders which are not appealable. There shall be no appeal from any order removing any fiduciary for failure to give a new bond or to render an account as required by the court, nor from an order appointing a special administrator, nor from an order granting a rehearing, nor, by any person except the widow or children affected thereby, from an order granting an allowance to the widow or children of a decedent pending settlement of the estate or setting apart exempt personal property to them.

(c) When appeal heard with appeal from decree of final distribution. When an appeal is taken with respect to any appealable order, judgment or decree in the administration of a decedent's estate, made prior to the decree of final distribution, other than an order admitting or denying the probate of a will or appointing or refusing to appoint a personal representative, the [ ] court may, in its discretion, order that the appeal be stayed until the decree of final distribution is made and that the appeal be heard only as a part of any appeal which may be taken from the decree of final distribution. This subsection shall not apply to guardianships and testamentary trusts.

(d) When appeal from decree of final distribution includes appeal from prior orders. When an appeal is taken from the decree of final distribution in the administration of a decedent's estate, all prior appealable orders, judgments and decrees to which the appellant has filed objections in writing within five days after the order, judgment or decree was rendered and from which an appeal has not theretofore been taken, except orders admitting or denying the probate of a will or appointing a personal representative shall, at the election of the appellant, be reviewed. The appellant shall indicate such election by clearly stating in the appeal the orders, judgments and decrees which he desires to have reviewed.
(e) **Stay.** An appeal shall stay other proceedings in the court from which the appeal is taken unless, or to the extent that, such court finds that neither the interested persons nor the court will be prejudiced and by order permits other proceedings to be had.

(f) **When fiduciary not required to give appeal bond.** No appeal bond shall be required of a fiduciary when he appeals on behalf of the estate.

(g) **Applicability of general appellate rules.** Except as provided in this section, the provisions as to time, manner, notice, appeal bonds, stays, scope of review and all other matters relating to appellate review shall be determined by the rules applicable to appeals to the [supreme court] in equity cases except that in cases where jury trial has been had of right, the rules applicable to the scope of review in jury cases shall apply.

*Comment.* This section follows the lead of several states in discarding the notion of an appeal from the probate court as a trial de novo in the trial court of general jurisdiction. For the reasons in favor of the position taken herein, see Simes and Basye, "The Organization of the Probate Court in America," 42 Mich. L. Rev. 965 (1944), and 43 Mich. L. Rev. 113 (1944).

The general plan of making all orders appealable except such as are expressly excluded follows the Michigan statute. See Mich. Stat. Ann. (1943) § 27.3178(37). It is believed that this form is much less cumbersome than that of the Kansas statute which purports to list practically all appealable orders. See Kan. Gen. Stat. (Supp. 1943) § 59-2401.

In subsections (a) and (c), the name of the trial court or the probate court, as the case may be, should be supplied in the bracketed blank preceding the word "court."

The provisions of subsections (c) and (d) for postponing appeals as to particular orders are designed to mitigate the evils involved in permitting numerous appeals to the supreme court in the same probate proceeding. As to the applicability of subsections (b), (c) and (d) to guardianship, see comment to § 215.

The appeal follows the procedure of an appeal in equity in most cases. The provision to that effect was suggested by Mass. Ann. Laws (1932) c. 215, § 9. If, in a given state, equity and law appeals are the same, then subsection (g) should be modified. Of course, if the supreme
court is not the tribunal to which cases are appealed from the trial court of general jurisdiction, then the name of the proper appellate tribunal should be substituted.

§ 21. Records. The court shall keep the following records:

(a) An index in which files pertaining to estates of deceased persons shall be indexed under the name of the decedent, and those pertaining to guardianships under the name of the ward; after the name of each file shall be shown the file number and the book and page of the register.

(b) A register, in which shall be listed in chronological order under the name of the decedent or ward, all documents filed or issued and all orders, judgments and decrees made pertaining to the estate, the date thereof, and a reference to the volume and page of any other book in which any record shall have been made of such document.

(c) A record of wills, properly indexed, in which shall be recorded all wills admitted to probate with the certificate of probate thereof;

(d) A record of bonds, properly indexed, in which shall be recorded all bonds filed;

(e) A record of letters, properly indexed, in which shall be entered all letters issued;

(f) A record of probate proceedings, which shall contain the minutes of the proceedings, and all orders, judgments and decrees of the court.

PART II. INTESTATE SUCCESSION AND WILLS

INTESTATE SUCCESSION

§ 22. General rules of descent. The net estate of a person dying intestate shall descend and be distributed as follows:
(a) **Share of surviving spouse.** The surviving spouse shall receive the following share:

1. One-half of the net estate if the intestate is survived by issue; or

2. The first five thousand dollars and one-half of the remainder of the net estate, if there is no surviving issue, but the intestate is survived by one or more of his parents, or of his brothers, sisters or their issue; or

3. All of the net estate, if there is no surviving issue nor parent nor issue of a parent.

(b) **Shares of others than surviving spouse.** The share of the net estate not distributable to the surviving spouse, or the entire net estate if there is no surviving spouse, shall descend and be distributed as follows:

1. To the issue of the intestate; if they are all in the same degree of kinship to the intestate they shall take equally, or if of unequal degree, then those of more remote degrees shall take by representation.

2. If there is no surviving issue of the intestate, then to the surviving parents, brothers and sisters and the issue of deceased brothers and sisters of the intestate. Each living parent of the intestate shall be treated as of the same degree as a brother or sister, and shall be entitled to the same share as a brother or sister. Issue of deceased brothers and sisters shall take by representation.

3. If there is no surviving parent or brother or sister of the intestate, then to the issue of brothers and sisters. If such distributees are all in the same degree of kinship to the intestate they shall take equally, or if of unequal degree,
then those of more remote degrees shall take by representation.

(4) If there is no surviving issue, or parent of the intestate, or issue of a parent, then to the surviving grandparents of the intestate equally.

(5) If there is no surviving issue, or parent, or issue of a parent, or grandparent of the intestate, then to the issue of deceased grandparents in the nearest degree of kinship to the intestate per capita without representation. The degree of kinship shall be computed according to the rules of the civil law; that is, by counting upward from the intestate to the nearest common ancestor and then downward to the relative, the degree of kinship being the sum of these two counts.

(6) If there is no person mentioned in the preceding five parts of this subsection, then to the State of [ ].

(c) Meaning of representation. “Representation” refers to a method of determining distribution in which the takers are in unequal degrees of kinship with respect to the intestate, and is accomplished as follows: after first determining who are in the nearest degree of kinship of those entitled to share in the estate, the estate is divided into equal shares, the number of shares being the sum of the number of living persons who are in the nearest degree of kinship and the number of persons in the same degree of kinship who died before the intestate, but who left issue surviving; each share of a deceased person in the nearest degree shall in turn be divided in the same manner among his surviving children and the issue of his children who have died leaving issue who survive the intestate; this
division shall continue until each portion falls to a living person. All distributees except those in the nearest degree are said to take by representation.

Comment. This section is in accord with certain modern trends. First, real and personal property are distributed in exactly the same way. While in feudal England a person might well desire one person to inherit his real estate on his death intestate and another to be the distributee of his personalty, there is no reason why such a differentiation should be made today. Examples of statutes of descent and distribution in which real and personal estate pass in exactly the same way are: Fla. Stat. Ann. (1941) § 731.23; Ohio Gen. Code (Page, 1937) § 10503-1.

Second, no distinction is made between ancestral and non-ancestral real estate. Under English rules it was once the law that the heir must trace descent from the person last seized. This doctrine was adapted to American statutes of descent and distribution in a number of states by provisions for a different line of descent when real property came to the intestate by "descent, devise or deed of gift" from some one of his ancestors. Gradually such provisions have been repealed, although some of them remain on the statute books. See Pa. Stat. Ann. (Purdon, 1930) t. 20, § 75, and Ohio Gen. Code (Page, 1937) § 10503-1 for statutes which eliminate any distinction as to ancestral land. It is believed that such a distinction only complicates land titles and does not serve to carry out any wish of the intestate.

Third, this section, unlike many American statutes, does not permit all persons of the blood of the intestate, however remote, to take as heirs. This is believed to accord with the wishes of the average person who dies intestate. Relatives may be so distant that the decedent might well prefer that his property go to the state rather than to such relatives. The present English statute of descent and distribution recognizes this principle. See Administration of Estates Act, 15 Geo. V, c. 23, § 46 (1925). Some American states also cut off the line of inheritance short of the most remote relative of the blood of the intestate. See D. C. Code (1940) § 18-717 (as to personalty only); Kan. Gen. Stat. (Supp. 1943) § 59-509; Md. Code (1939) art. 93, § 143.

The general scheme of this Code is first to give a very substantial share to the surviving spouse. Then, lineal heirs take to the most remote degree, which is in accordance with the statutes in all states. According to the English rule, lineal descendants take per stirpes, the children being the stirpes even though all children are dead. Such is the rule in some states. However, in a larger number of states the
rule here announced is followed, namely, that distribution is per stirpes only if the claimants are in unequal degrees, and in that case the stirpes are those represented by the claimants in the nearest degree to the intestate. See, for example, Mich. Stat. Ann. (1943) § 27-3178 (150) subd. 2; Wis. Stat. (1943) § 237.01, subd. 1. But compare the interpretation of Cal. Prob. Code Ann. (Deering, 1944) §§ 222 and 250 in Maud v. Catherwood (Cal. App. 1945), 155 P. (2d) 111.

In general, Anglo-American statutes dealing with inheritance by collateral heirs are based on two systems, the parentelic system and the civil law system, although most of them represent a combination of these two. Under the parentelic system, if there are no lineal descend­ants, the nearest ascendants, namely, the parents, take, and then their issue to the remotest degree take by representation. In the absence of parents and their issue, then grandparents take, and if there are none, then the issue of grandparents in like manner as the issue of parents. This process may be continued indefinitely as more and more remote ascendants and their issue are permitted to take.

In accordance with the civil law system, the heirs are those who are nearest in degree to the intestate. Degrees are determined by counting from the decedent up to the common ancestor and then down to the claimant. The total is the degree of relationship of the claimant to the testator. As between two claimants, the one who is removed from the intestate by the smaller number of degrees is the distributee.

With some modifications, the parentelic scheme is followed in this statute up to a certain point. As is commonly provided in statutes, however, parents take equally with, and not in preference to, brothers and sisters. See, for example, Ga. Code Ann. (1936) § 113-903, subd. 6; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 162; Miss. Code (1942) § 468; Mo. Rev. Stat. Ann. (1942) § 306. When we come to provide for inheritance by issue of deceased grandparents, the civil law system is followed.

It is, of course, recognized that any scheme of intestate succession is, to some extent, arbitrary. It should in the main express what the typical intestate would have wished had he expressed his desires in the form of a will or otherwise. This is a highly speculative matter, and legislators may deem it desirable to modify the scheme herein set out. For a similar scheme of intestate succession set out in a statute which was once drafted for the Conference of Commissioners on Uniform State Laws, see Eagleton, “Introduction to the Intestacy Act and the Dower Rights Act,” 20 Iowa L. Rev. 241 (1935); Eagleton, “The Intestacy Act,” 20 Iowa L. Rev. 244 (1935).

It will be noticed that this section deals with the net estate and does not include the homestead (§ 42), exempt property (§ 43) or family
allowances (§ 44). See the definition of “net estate” in § 3(r) and of “claims” in § 3(b).

§ 23. Partial intestacy. If part but not all of the estate of a decedent is validly disposed of by will, the part not disposed of by will shall be distributed as provided herein for intestate estates.

§ 24. Kindred of the half blood. Kindred of the half blood shall inherit the same share which they would have inherited if they had been of the whole blood.

Comment. The modern tendency is in the direction of abolishing distinctions between persons of the half blood and the whole blood. In twelve states all distinctions have been abolished, while in a score of others the only distinction is in the case of ancestral estates, persons not of the blood of the ancestor being barred or deferred. This proviso for ancestral estates does not logically fit in with the half blood statute. Thus, the ancestral clause has been applied where none of the claimants were of the half blood. In re Wortmann’s Estate, 210 Mich. 541, 177 N. W. 967 (1920). In a few states the half bloods take after the whole bloods of the same degree of kinship, while in a few others half bloods take half as much as whole bloods of the same degree. Jurisdictions in which the distinction has been abolished are as follows: D.C. Code (1940) §§ 18-104 and 18-715; Ga. Code Ann. (1936) § 113-903, subd. 5; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 162; Me. Rev. Stat. (1944) c. 156, § 2; Md. Code (1939) art. 93, § 138; Mass. Ann. Laws (1932) c. 190, § 4; N. Y. Dec. Est. Law, § 83, subd. 11; Ohio Gen. Code (Page, 1937) § 10503-4; Ore. Comp. Laws (1940) § 16-204; Pa. Stat. Ann. (Purdon, 1930) t. 20, § 62; Vt. Pub. Laws (1933) § 2967; Wash. Rev. Stat. (1932) § 1347.

§ 25. Afterborn heirs; time of determining relationships. Descendants and other relatives of the intestate, begotten before his death but born thereafter, shall inherit as if they had been born in the lifetime of the intestate and had survived him. With this exception, the descent and distribution of intestate estates shall be determined by the relationships existing at the time of the death of the intestate.
§ 26. Illegitimate children. For the purpose of inheritance to, through and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit from his mother and from his maternal kindred, both descendants and collaterals, in all degrees, and they may inherit from him. Such child shall also be treated the same as if he were a legitimate child of his mother for the purpose of determining homestead rights, the distribution of exempt property and the making of family allowances. When the parents of an illegitimate child shall marry subsequent to his birth, such child shall be deemed to have been made the legitimate child of both of the parents for purposes of intestate succession.

§ 27. Adopted children. For the purpose of inheritance to, through and from a legally adopted child, such child shall be treated the same as if he were the natural child of his adopting parents, and he shall cease to be treated as the child of his natural parents for purposes of intestate succession.

Comment. In some states general provisions as to adoption covering this and other matters may be found outside the probate code. If such statutes exist in a given state, this section should be made to conform with them or should be omitted altogether. An adopted child is not issue (See § 3 (I) hereof); but § 27 gives him rights of issue as to intestate succession.

§ 28. Persons related to intestate through two lines. A person who is related to the intestate through two lines of relationship, though under either one alone he might claim as next of kin, shall, nevertheless, be entitled to only one share which shall be the share based on the relationship which would entitle him to the larger share.

§ 29. Advancements.

(a) In general. If a person dies intestate as to all his estate, property which he gave in his lifetime as an advance-
ment to any person who, if the intestate had died at the time of making the advancement, would be entitled to inherit a part of his estate, shall be counted toward the advancee’s intestate share, and to the extent that it does not exceed such intestate share shall be taken into account in computing the estate to be distributed. Every gratuitous inter vivos transfer is deemed to be an absolute gift and not an advancement unless shown to be an advancement.

(b) Valuation. The advancement shall be considered as of its value at the time when the advancee came into possession or enjoyment or at the time of the death of the intestate, whichever first occurs.

(c) Death of advancee before intestate. If the advancee dies before the intestate, leaving a lineal heir who takes from the intestate, the advancement shall be taken into account in the same manner as if it had been made directly to such heir. If such heir is entitled to a lesser share in the estate than the advancee would have been entitled had he survived the intestate, then the heir shall only be charged with such proportion of the advancement as the amount he would have inherited, had there been no advancement, bears to the amount which the advancee would have inherited, had there been no advancement.

Comment. According to the statutes of all but one state, if an intestate in his lifetime makes an advancement to a child, the value of the property so advanced may be charged against the child’s intestate share in determining its amount. In a few states this doctrine is applicable to advancements to all heirs. This section so provides, and, in accordance with §§ 3(j) and 22 hereof, a surviving spouse is an heir and therefore can be an advancee. It may be argued that the recognition of an advancement is illogical in that we ordinarily require the formalities of a will to accomplish a variation in the course of intestate succession, because of the danger of fraud and misunderstanding. Yet in the case of the advancement such a variation may be accomplished orally. Doubtless, the justification for a doctrine of advancements is that people will attempt such transactions whether the statutes provide
for them or not, and if no provision for them is made, the intent of donors will often be frustrated. Moreover, the overt act of transferring title by way of advancement is somewhat less likely to be susceptible to fraud or misunderstanding than the execution of an oral will.

In a number of states, a provision is made for a writing stating the terms of the advancement. See, for example, Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 166. No such provision is made here because it is believed the intent of the donor would thereby often be frustrated. But it is provided that a gratuitous inter vivos transfer is presumed not to be an advancement, thus throwing the burden of proving that it is an advancement on the one claiming that an advancement should be charged against an intestate share.

There is authority for the proposition that, where the person to whom an advancement is made dies before the intestate, the advancement is charged to his lineal descendant only if the descendant takes by representation. See In re Person's Appeal, 74 Pa. St. 121 (1873). Thus, suppose A makes an advancement to his son B, and B dies before A leaving a son X. When A dies his heirs are his sons C and D and his grandson X. Under most statutes, since X takes by representation, his share is charged with the advancement made to his father. But suppose C and D had died before A and A's heirs at the time of his death were X, and C's children Y and Z. Under § 22 of this Code, and under many statutes, X, Y and Z take per capita. But there would seem to be no sound reason why X should not be charged with the advancement here as well as in the case where he took by representation. Subsection (c) so provides.

Closely related to the law of advancements, and overlapping it, is the law permitting a release of the entire expectancy of the distributee. This doctrine, however, has a common law basis and is broader than the principles of advancements. Thus, an advancement is only to be recognized when the decedent dies intestate as to all his property. But, though a person is testate, it is possible to have a release of the expectancy of a prospective devisee. An advancement is gratuitous, but a release of an expectancy requires fair consideration. Moreover, the doctrine of advancements is applicable only if there are two or more heirs. But, according to Restatement, Property (1940) § 316, comment f, illustration 6, if a release of the expectancy of the sole heir is attempted, it can exclude the heir and the estate will be distributed to the persons who would have been the heirs had the sole heir died before the intestate. See, however, contra, Pylant v. Burns, 153 Ga. 529, 112 S. E. 455, 28 A.L.R. 423 (1922). In general, as to the release of expectancies, see Restatement, Property (1940) c. 24.
§ 30. Alienage. In making title by descent, it shall be no bar to a person that he, or any person through whom he traces his descent, is, or has been an alien.

§ 31. Dower and curtesy abolished. The estates of dower and curtesy are hereby abolished.

Comment. Estates of curtesy and dower tend to clog land titles and make alienation more difficult. Moreover, at the present time, when so much of the wealth of a decedent is likely to be in the form of bonds and shares, these estates do not make adequate provision for a surviving spouse. For this reason, this section, which is in accordance with modern statutory trends, abolishes dower and curtesy. For the statutes in various states on this subject, see appendix note.

The substitutes for dower and curtesy provided in the Model Code are § 22(a), the share of the surviving spouse in case of intestacy, and § 32, the spouse’s share in case of election against the will. While these shares are ordinarily much more liberal than dower in case of a solvent estate, they are both subject to the decedent’s debts.

To the effect that a statute which extinguishes existing inchoate dower interests is not unconstitutional on that ground, see cases collected in 20 A.L.R. 1330. It should be noted that accrued rights are excepted by § 2(b) hereof. Hence, to the extent that existing dower or curtesy interests are deemed accrued rights, they are excepted from the operation of this Code.

TAKING AGAINST WILL

§ 32. When surviving spouse may elect to take against the will. When a married person dies testate as to any part of his estate, a right of election is given to the surviving husband or wife solely under the limitations and conditions hereinafter stated.

(a) Extent of election. The surviving spouse may elect to receive the share in the estate that would have passed to him had the testator died intestate, until the value of such share shall amount to [$5,000], and of the residue of the estate above the part from which the full intestate share amounts to [$5,000],
one-half the estate that would have passed to him had
the testator died intestate.

(b) **Effect of election.** When a surviving spouse elects
to take against the will, he shall be deemed to take by
descent, as a modified share, such part of the net estate
as comes to him under the provisions of this section.

*Comment.* The general plan of subsection (a) follows the provi-
sions for a widow’s election against the will as to personal property as
of this type can be regarded as caring for the needs of a surviving
spouse in that the percentage of the estate given by it is greater in
small estates. In a sense it may be said to provide a kind of allowance,
subject, however, to the rights of creditors.

In determining how much the surviving spouse is to receive under
this section, reference must first be made to § 22. Two illustrations
will show how this application is made. Suppose the net estate is
$12,000 and the decedent is survived by a wife and one or more chil-
dren. Under § 22 (a) (1), if there were no will, the wife would
receive one-half the net estate, or $6,000. In electing to take against
the will she receives that amount up to $5,000, and half of the re-
mainder of her intestate share under § 22 (a) (1). This remainder
would be $1,000 (the difference between $5,000 and $6,000), half
of which would amount to $500. Therefore, the total share which
she may elect to take against the will is $5,500. Or suppose the
decedent’s net estate is of the value of $8,000, and he is survived by a
widow and a brother. Under § 22 (a) (2) the widow would receive
as an intestate share the first $5,000 of the estate and half the residue,
or $1,500, a total of $6,500. Under § 32, in electing to take against
the will she receives the first $5,000 of the amount she otherwise would
take as an intestate share, and half of the remainder of such amount.
Half of this remainder is $750, making her total share upon election
against the will $5,750.

Subsection (b) is inserted to eliminate a prolific source of litigation.
Much difficulty has arisen under some election statutes in determining
whether the share which the surviving spouse takes against the will is
taken as heir or in some other capacity. This problem has arisen in
connection with the construction of devises “to heirs” and in statutes
in which the word “heirs” is used with reference to inheritance taxes
and many other matters. This subsection specifically states that the
surviving spouse takes by descent.
As to the effect of a spouse's election to take an intestate share on other provisions in the will, see comment to § 58 and Restatement, Property (1936) c. 16, topic 2.

In view of the fact that there is no single accepted theory on which statutory provisions for the election of a surviving spouse are based and that a satisfactory statute could be drawn based on entirely different theories from those involved in the above section, it seems desirable to present, as an alternative, the following provisions, which can be substituted for § 32 hereof:

"§ 32. When surviving spouse may elect to take against the will. When a married person dies testate as to any part of his estate, a right of election is given to the surviving husband or wife solely under the limitations and conditions hereinafter stated.

"(a) Net estate not over [$20,000]. If the value of the net estate does not exceed [$20,000] and the value of all legacies and devises given absolutely to the surviving spouse plus the value of any portion of the net estate undisposed of by the will which passes to the surviving spouse as an intestate share is less than half the value of the net estate, then the surviving spouse may elect to receive that amount which, when added to the value of such items, will equal one-half the value of the net estate. In so electing, the surviving spouse is deemed to renounce any legacies and devises not given absolutely.

"(b) Net estate over [$20,000]. If the value of the net estate exceeds [$20,000], the surviving spouse may act under the provisions of one or the other, but not both, of the following subdivisions:

"(1) Election to receive one-half with life income from a trust credited at value of principal. If the value of the net estate exceeds [$20,000] and if the total value of the legacies and devises given to the surviving spouse, when valued in the manner hereinafter stated, plus the portion of the net estate undisposed of by the will which passes to the surviving spouse as an intestate share, is less than half the value of the net estate, then the surviving spouse may elect to receive, in addition to all legacies and devises given to him by the will and the intestate share in any portion of the net estate undisposed of by the will, the difference between the value of such items and the value of half the net estate. When, by the terms of the
will, property of the net estate is left in trust with the income to be paid to the surviving spouse for life, the value of such gift, for purposes of determining the amount the surviving spouse is entitled to receive under the will, shall be the value of the principal from which such income is to be paid. All other legacies and devises given to the surviving spouse from the net estate shall be valued at the actual value of the interests given to the surviving spouse.

"(2) **Election to receive [[$10,000]] in value absolutely.** If the value of the net estate exceeds [[$20,000]] the surviving spouse may nevertheless treat the net estate as if it were of the value of not over [[$20,000]] and make an election in accordance with the provisions of subdivision (a) hereof, provided, however, that the total value of all items which the surviving spouse may receive from the net estate when this election is made shall be [[$10,000]] and no more.

"(c) **Effect of election.** When a surviving spouse elects to take against the will, he shall be deemed to take by descent, as a modified share, such part of the net estate as does not come to him by the terms of the will.”

The alternative provisions just stated proceed on the theory that, except in larger estates, a surviving spouse should receive one-half of the estate of a deceased spouse. However, they also follow a modern trend to limit the surviving spouse to a life interest in a trust of half of the estate which the surviving spouse may elect to receive. It is believed that in the case of a smaller estate one spouse probably contributed about as much to its accumulation as the other. Moreover, such a share is in recognition of the strong moral obligation to provide support for a surviving wife. However, it is likely that larger estates were acquired by the testator from some ancestor; and it is deemed fair to permit him to pass them on pretty much as he wishes after he has made adequate provision for the maintenance of the surviving spouse. The plan of limiting the spouse to life interests in the case of larger estates follows legislation in New York and Massachusetts. See Mass. Ann. Laws (1932) c. 191, § 15, and N. Y. Dec. Est. Law, § 18.

The general scheme of this proposed substitution is as follows: If the value of the net estate does not exceed $20,000, the surviving spouse is entitled to take absolutely one-half the net estate. This amount is first satisfied by crediting to the surviving spouse any part
of the net estate which is undisposed of by the will and which comes to him or her by intestate succession. The surviving spouse is also credited with all legacies and devises given absolutely. These are regarded as being received under the will. If this does not make up one-half, the surviving spouse can elect to take against the will a sufficient additional amount to equal one-half. In so doing the surviving spouse renounces all legacies and devises not given absolutely, such as leases, legal life estates, determinable fees, and future interests. If the value of the net estate exceeds $20,000, the surviving spouse may elect against the will in either of two ways. He may elect to take $10,000 absolutely in the same manner as if the estate were valued at $20,000. In that case, he receives no more, regardless of how large the estate is. The other election against the will gives the surviving spouse one-half of the net estate; but he must take all interests given under the will even though they are not absolute interests. Furthermore, if the will gives the surviving spouse a beneficial interest for life in a trust, that gift is credited to the share of the surviving spouse at the value of the principal from which the life income is payable, and not at the value of the life estate. Thus, it is possible for a testator in an estate in excess of $20,000 in value, however large it may be, to set up a trust with half his estate, giving his wife only the income for life from that half. The wife must then either accept the beneficial interest under the trust or be limited to taking $10,000 absolutely.

It should be observed that, although the proposed substitution is quite liberal in permitting a surviving spouse to demand a large share in the estate, it goes much farther than most statutes in compelling a surviving spouse to take what is given under the will. Thus, the tendency to upset a testamentary scheme by an election is minimized as far as is consistent with an adequate provision for the surviving spouse.

By way of comparison, it may be noted that § 32 represents an older but simpler solution of the problem. The proposed substitution is more complicated but goes much farther in leaving a testator’s will intact. In both sections, the amounts stated are necessarily somewhat arbitrary and may be varied to suit local needs.

In general, on election by the surviving spouse, see comment to § 40 hereof.

§ 33. Gifts in fraud of marital rights.

(a) Election to treat as devise: Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a
testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will.

(b) **When gift deemed fraudulent.** Any gift made by a married person within two years of the time of his death is deemed to be in fraud of the marital rights of his surviving spouse, unless shown to the contrary.

*Comment.* This section makes no attempt to define the expression "in fraud of marital rights." It is believed that only by judicial decision can that be done. Among the situations which courts would have to classify in this connection is that where a married person sets up an inter vivos trust reserving to himself a life estate and a power to revoke the trust. It has sometimes been held that such a transfer could be set aside at the instance of the surviving spouse, particularly where it deprived the settlor of most of his estate. It is sometimes said that the transfer is set aside because it is illusory. See 44 Mich. L. Rev. 151 (1945). But it is believed to be more satisfactory to say that it is fraudulent as to the share of the surviving spouse. A similar problem arises where a married person sets up a so-called savings bank trust. It is believed that no statute could adequately indicate all cases which might properly be regarded as actually or constructively fraudulent as to the share of the surviving spouse.

Subsection (b) lays down an aid in determining whether a gift is fraudulent where the proof is slight. Under this section it is possible to show that a gift made within two years of the death of a married person is not fraudulent, but the burden of proof is upon the person asserting the absence of fraud.

§ 34. **Notice of right to elect.** It shall be the duty of the clerk of the court, within one month after the will of a married person is admitted to probate, to mail a written notice, directed to the testator's surviving spouse at his last known residence address, informing him of the date before which a written election must be filed by or on behalf of such surviving spouse in order to take against the will.

§ 35. **Time limitation for filing election.** The election by a surviving spouse to take the share hereinbefore provided may be made at any time within one month after the
expiration of the time limited for the filing of claims; provided that if, at the expiration of such period for making the election, litigation is pending to test the validity or to determine the effect or construction of the will, or to determine the existence of issue surviving the deceased, or to determine any other matter of law or fact which would affect the amount of the share to be received by the surviving spouse, the right of such surviving spouse to make an election shall not be barred until the expiration of one month after the final determination of the litigation.

§ 36. Form of election; filing. The election to take the share hereinbefore provided shall be in writing, signed and acknowledged by the surviving spouse or by the guardian of his estate and shall be filed in the office of the clerk of the court. It may be in the following form:

I, A.B., surviving wife (or husband) of C.D., late of the county of _______ and state of _______ do hereby elect to take my legal share in the estate of the said C.D., and I do hereby renounce all provisions in the will of the said C.D. inconsistent herewith.

Signed,

(Acknowledgment)  [Signature]

Comment. If the alternative form proposed in the comment to § 32 is used, the following sentence should be added to the form of election, immediately before the signature:

"If it is determined that the net estate exceeds [$20,000] in value, I elect to take against the will under the terms of section 32 (b)(1) [or section 32 (b)(2)]."

§ 37. Right of election personal to surviving spouse. The right of election of the surviving spouse is personal to him. It is not transferable and cannot be exercised subsequent to his death; but if the surviving spouse is incompetent, the court may order the guardian of his estate to elect for him.
§ 38. **Election not subject to change.** An election by or on behalf of a surviving spouse to take the share provided in section 32 hereof once made shall be binding and shall not be subject to change except for such causes as would justify an equitable decree for the rescission of a deed.

§ 39. **Waiver of right to elect.** The right of election of a surviving spouse hereinbefore given may be waived before or after marriage by a written contract, agreement or waiver signed by the party waiving the right of election, after full disclosure of the nature and extent of such right, provided the thing or the promise given to such waiving party is a fair consideration under all the circumstances. This written contract, agreement or waiver may be filed in the same manner as hereinbefore provided for the filing of an election.

*Comment.* It is clear that at common law the right of a surviving spouse to take an intestate share against the will may be waived under certain circumstances. But the rules applied to determine the validity of the waiver are unique and involve something quite distinct from the requirements for the execution of a simple contract. This section is designed to express the common-law doctrine. For an analogous doctrine with respect to the release of expectancies generally, see Restatement, Property (1940) § 319, and particularly comment (d) to that section.

§ 40. **Election by surviving spouse to take under will.** When a surviving spouse makes no election to take against the will, he shall receive the benefit of all provisions in his favor in the will, if any, and shall share as heir, in accordance with the provisions of sections 22 and 23 hereof, in any estate undisposed of by the will. By taking under the will or consenting thereto, he shall not thereby waive the rights of homestead, to exempt property or to a family allowance, unless it clearly appears from the will that the provision therein made for him was intended to be in lieu of such rights.
Comment. The first sentence of this section is in accord with the general rule that mere expressions in a will of intent to disinherit an heir do not exclude him from the inheritance; there must be an effective devise of the entire estate to someone else. In general, see Phelps, "The Widow's Right of Election in the Estate of her Husband," 37 Mich. L. Rev. 236, 401 (1938-39) and Sayre, "Husband and Wife as Statutory Heirs," 42 Harv. L. Rev. 330 (1929).


§ 41. Pretermitted children.

(a) Children born or adopted after will made. When a testator fails to provide in his will for any of his children born or adopted after the making of his last will, such child, whether born before or after the testator's death, shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will that such omission was intentional, or unless when the will was executed the testator had one or more children known to him to be living and devised substantially all his estate to his surviving spouse.

(b) Children believed to be dead when will made. If, at the time of the making of his will, the testator believes any of his children to be dead, and fails to provide for such child in his will, the child shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will or from other evidence that the testator would not have devised anything to such child had he known that the child was alive.

Comment. Most pretermitted heir statutes are designed, not to force a moral obligation upon a parent, but to carry out a testator's probable intent. If this is their purpose, then subsection (b) should be limited to the one fact situation therein stated, for it is very unlikely that a testator would, by accident or mistake, omit to provide for a living child in his will, except in the case covered by that subsection. In subsection (b), since extrinsic evidence is necessary to show that the testator believed his child to be dead, it is only reasonable to allow
extrinsic evidence as to his intent to exclude the child. In subsection (a), however, an intent to exclude the child will rarely exist; if it is to be proved, it must be shown from the will.

The last clause in subsection (a) is designed to apply to the following situation. Suppose A has a small estate and feels that he should devise substantially all of it to his wife. He, therefore, so states in his will giving his two children, B and C, one dollar each, and the residue to his wife. Before his death a third child, D, is born. If it were not for the last clause in subsection (a), D would take as a pretermitted heir, but B and C would not. To avoid this obviously unfair result, the last clause was inserted; it is modeled on Tex. Civ. Stat. Ann. (Vernon, 1939) arts. 8291 and 8292.

It should be noted that subsection (a) covers only cases where the last will is made before the child is born or adopted. Thus, if a testator makes a will and afterward has children born or adopted and still later executes a second will or a codicil to his will, the facts do not come within subsection (a).

This section makes no provision for omitted grandchildren or more remote issue. See § 3(a).

HOMESTEAD, EXEMPT PROPERTY AND FAMILY ALLOWANCE

§ 42. Homestead. At any time after the return of the inventory the court, of its own motion or upon application, shall set apart the homestead to the persons entitled thereto. The homestead so set apart shall not be subject to administration and shall be exempt from all claims against the estate excepting any lien thereon at the time of the decedent's death. The title to the land set apart for the homestead property shall pass, subject to the right of homestead, the same as other property of the decedent and shall be included in the decree of final distribution.

Comment. Statutes or constitutional provisions are found in nearly every state, exempting the homestead from the claims of unsecured creditors. While there is great diversity in these legislative provisions, their principal function appears to be to reserve a residence for the use of the family. See, for example, Mich. Stat. Ann. (1938) § 27.1572.

It is obviously impracticable to work out in detail legislation of this sort as a part of a model probate code. In the first place the homestead law is much broader than the law of decedents' estates. Thus, it deals
with claims of creditors which are asserted by action before the
decedent dies; and, also, with claims of creditors of the wife and
children of the decedent, if a homestead is subsequently established for
them. In the second place, in a number of states, provisions for the
homestead are inserted in the constitution, and it is hardly to be expected
that these provisions will be amended in the near future. Furthermore,
the diversity of legislative provisions for the homestead makes it im­
possible to indicate in this code more than in barest outline, the relation
of the law of decedents’ estates to them. Therefore, in this section,
homestead is not defined, nor are the requirements for this exemption
from the claims of creditors of the decedent stated. But it is assumed
that adequate provisions along these lines will be found elsewhere in
the statute books.

While in a few jurisdictions the homestead is a fee simple interest,
in most states it appears to be either a much more limited possessory
estate or else is regarded merely as a privilege of occupation exempt
from claims of creditors. In either of these two cases, if the decedent
owned the property covered by the homestead in fee, there would be
a non-possessor interest not covered by the exemption. According
to the last sentence of this section, this interest passes like any other
property of the decedent.

If the homestead is limited in value, as is the case in many states, it
may be necessary to add provisions for its sale and a division of the
proceeds where the property exceeds the value fixed in the statute
and is not susceptible of division without injury. See, for example,
Mich. Stat. Ann. (1943) §§ 27.3178(520) to 27.3178(522) and
Cal. Prob. Code Ann. (Deering, 1944) §§ 664 to 666. Moreover,
even if there is no such limitation, it might be desirable to sell, since
the surviving members of the family may wish to live somewhere else
and there is no reason for forcing them to remain in the homestead
in order to retain the benefit of their exemption. For such a statute
see Mass. Ann. Laws (1932) c. 188, § 8. If provisions for sale are
added, it might be desirable to have a specific statement as to the ex­
emption of the proceeds or of the substituted residence. Of course, if the
homestead is regarded as an estate, it should be possible to alienate it
without specific legislation. See Roberts v. First National Bank, 126
Kan. 503, 268 P. 799 (1928). But in some states it is held that
an attempted sale is an abandonment. See Graves v. Simms Oil Co.,
189 Ark. 910, 75 S.W. (2d) 809 (1934). Moreover, there may
be a question whether the surviving spouse can sell without the consent
of minor children. If a section providing for sale of the homestead
is desired, the following form might be inserted:
“The surviving spouse may convey the homestead interest and pass good title thereto regardless of the existence of minor children. If the minor children are entitled to possession of the homestead, their interests may be conveyed by the guardians of their estates upon order of the court as in other cases for sale of lands of minors. If two or more minors become entitled to the proceeds of the sale of the homestead interest the proceeds shall be divided between them in proportion to the number of years during which they would otherwise have been entitled to the possession of the homestead.”

Commonly the homestead exemption may be asserted against all creditors except lien creditors whose liens attached prior to the death of the decedent. But in some states a mechanic's lien for improvements might attach after the owner dies. See Minn. Stat. (1941) §§ 510.01 and 510.05.

It is thus apparent that in many states a substantial amount of adaptation may be necessary before the provision for the homestead herein presented can be used. Moreover, a legislature might well consider whether it would not be desirable to revise, simplify and rationalize the whole law of homestead exemption, in its relation to exemption statutes generally, to the family allowance and to the provisions for the election of a distributive share by a surviving spouse. But such a task is obviously far beyond that undertaken in this Code.

As to liability of the homestead for debts, see comment to § 44.

§ 43. Distribution of exempt property. The surviving spouse or minor children of a decedent shall be entitled absolutely to such personal property of the estate as may be exempt from execution or forced sale under the constitution and laws of this state or such other personal property as shall be selected, of the total appraised value of [$2000], whichever is greater, any portion or all of which may be taken in money. Such property shall belong to the surviving spouse, if any, otherwise to the minor children in equal shares. The selection shall be made by the surviving spouse, if living; otherwise by the guardian of the estate of each minor child for such child, or by the court. At any time after the return of the inventory the court, of its own motion or upon application, shall set apart the exempt property to the persons entitled
thereto. Such property shall not be subject to administration and shall be exempt from all claims against the estate except any lien thereon at the time of the decedent's death.

Comment. This section, similar to the preceding one on homestead, sets off to the surviving spouse or children, the property exempted to the head of the family under other provisions of the constitution and statutes. Because of the diversity of these provisions, no attempt is made here to enumerate such property. Many of these exemption statutes are now archaic and in view of the tendency to permit a selection of other property or money in lieu of the property so exempt, such a provision is incorporated here. It permits the greatest degree of flexibility in accordance with the needs and desires of the individual members of the family. It also permits the selection of articles of sentimental family value and of an automobile for family use. As to liability of the exempt property for debts, see comment to § 44.

§ 44. Family allowance. In addition to the right to homestead and exempt property the surviving spouse and minor children of a decedent shall be entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration according to their previous standard of living, which allowance must not continue for longer than one year in the case of an insolvent estate. Such allowance may be made upon petition at any time after the filing of the inventory, but a temporary allowance may be made prior thereto in case of great need. The allowance so ordered may be made payable in one payment or in periodic installments, and shall be payable to the surviving spouse, if living, for the use of such surviving spouse and the minor children; otherwise to the guardians or other persons having the care and custody of any minor children; but in case any minor child shall not be living with the surviving spouse, the court may make such division of the allowance for maintenance as it deems just and equitable.

Comment. The purpose of this section is to provide an allowance to the surviving spouse and minor children of the decedent during the period of administration for their support in the manner to which they
have been accustomed. See § 142, providing that administration and funeral expenses have priority over the family allowance; but the homestead and exempt property are not liable for these expenses, and do not constitute assets for any purpose except to benefit the family.

EXECUTION AND REVOCATION OF WILLS

§ 45. Who may make. Any person of sound mind eighteen years of age or older may make a will.

Comment. Sections 45 to 50 inclusive are §§ 2 to 7 inclusive of the Model Execution of Wills Act.

§ 46. Who may witness.

(a) Any person competent to be a witness generally in this state may act as attesting witness to a will.

(b) No will is invalidated because attested by an interested witness; but any interested witness shall, unless the will is also attested by two disinterested witnesses, forfeit so much of the provisions therein made for him as in the aggregate exceeds in value, as of the date of the testator's death, what he would have received had the testator died intestate.

(c) No attesting witness is interested unless the will gives to him some personal and beneficial interest.

§ 47. Execution. The execution of a will, other than a holographic or nuncupative will, must be by the signature of the testator and of at least two witnesses as follows:

(a) Testator. The testator shall signify to the attesting witnesses that the instrument is his will and either

(1) Himself sign, or

(2) Acknowledge his signature already made, or

(3) At his direction and in his presence have someone else sign his name for him, and

(4) In any of the above cases the act must be done in the presence of two or more attesting witnesses.
(b) Witnesses. The attesting witnesses must sign
   (1) In the presence of the testator, and
   (2) In the presence of each other.

§ 48. Holographic will. No witness to a holographic will is necessary, but the signature and all its material provisions must be in the handwriting of the testator and his handwriting must be proved by two witnesses.

§ 49. Nuncupative will.
   (a) A nuncupative will may be made only by a person in imminent peril of death, whether from illness or otherwise, shall be valid only if the testator died as a result of the impending peril, and must be
      (1) Declared to be his will by the testator before two disinterested witnesses;
      (2) Reduced to writing by or under the direction of one of the witnesses within thirty days after such declaration; and
      (3) Submitted for probate within six months after the death of the testator.

   (b) The nuncupative will may dispose of personal property only and to an aggregate value not exceeding one thousand ($1000) dollars, except that in the case of persons in active military, air or naval service in time of war the aggregate amount may be ten thousand ($10,000) dollars.

   (c) A nuncupative will neither revokes nor changes an existing written will.

§ 50. Foreign execution. A will executed outside this state in a manner prescribed by this [Code], or a written will executed outside this state in a manner prescribed by the law of the place of its execution or by the law of the testator’s domicile at the time of its execution, shall have the same force and effect
in this state as if executed in this state in compliance with the provisions of this [Code].

§ 51. **Revocation by written will or by act on document.** A will, or any part thereof, can be revoked
(a) By a written will; or
(b) By being burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself or by another person in his presence and by his direction. If such act is done by any person other than the testator, the direction of the testator and the facts of such injury or destruction must be proved by two witnesses.

§ 52. **Revocation of nuncupative will.** A nuncupative will or any part thereof can be revoked by another nuncupative will.

§ 53. **Change in circumstances; divorce.** If after making a will the testator is divorced, all provisions in the will in favor of the testator’s spouse so divorced are thereby revoked. With this exception, no written will, nor any part thereof, can be revoked by any change in the circumstances or condition of the testator.

*Comment.* In some states the statute on revocation includes a statement to the effect that “nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator.” See, for example, Mich. Stat. Ann. (1943) § 27.3178(79). Moreover, such a doctrine is sometimes implied in the absence of any statement to the contrary in the statute. In either case, the result is believed to be unsatisfactory. Such a doctrine introduces an undesirable element of uncertainty into the question of the validity of a duly executed will. No revocation by circumstances should be permitted except on such grounds as are specifically named in the statute and these grounds should be as few as possible. Section 54 of this Code makes the grounds for revocation named in the statute exclusive.
In a number of jurisdictions, marriage of the testator, or marriage and birth of issue, revoke a will. Such a provision is believed to be unnecessary in this Code. Section 32 allows a surviving spouse to elect to take a share of the estate against the will. And § 41 provides for afterborn children taking an intestate share against the will. These sections are believed to be adequate to protect a surviving spouse or afterborn children. The only extrinsic circumstance which revokes a will, under the provisions of this Code, is a divorce. Legislation to the effect that a divorce revokes a will is not common, but does exist in a few states. See Kan. Gen. Stat. (Supp., 1943) § 59–610; Minn. Stat. (1941) § 525.191; Wash. Rev. Stat. (1932) § 1399. In general, as to revocation of a will by circumstances, see Durfee, “Revocation of Wills by Subsequent Change in the Condition or Circumstances of Testator,” 40 Mich. L. Rev. 406 (1942).

§ 54. Specific provisions for revocation exclusive. No will, nor any part thereof, can be revoked except as specifically provided in sections 51 to 53 hereof.

§ 55. Revival of revoked or invalid will. No will, nor any part thereof, which shall be in any manner revoked, or which shall be or become invalid, can be revived otherwise than by a re-execution thereof, or by the execution of another will in which the revoked or invalid will or part thereof is incorporated by reference.

MISCELLANEOUS PROVISIONS

§ 56. Will to operate on after-acquired property. Any estate, right or interest in land or other things acquired by the testator after the making of his will may pass thereby and in like manner as if title thereto was vested in him at the time of making the will, unless the contrary manifestly appears by the will to have been the intention of the testator.

Comment. This section is modeled after Cal. Prob. Code Ann. (Deering, 1944) § 121. Prior to the English Wills Act of 1837, 7 Wm. 4 and 1 Vict. c. 26, a will did not pass real estate acquired by the testator after its execution. As to the history of this matter, see Warren, “The History of Ademption,” 25 Iowa L. Rev. 290 (1940).
Hence legislation is desirable to make it clear that after-acquired real estate can pass by a will. This result was accomplished in § 3 of the English Wills Act of 1837 by a provision to the effect that it is lawful for every person to devise or bequeath all real and personal estate to which he shall be entitled at the time of his death.

§ 57. Failure of testamentary provisions by lapse or otherwise.

(a) General rule. If a devise of real or personal property, not included in the residuary clause of the will, is void, is revoked, or lapses, it shall become a part of the residue, and shall pass to the residuary devisee, unless a contrary intent is indicated by the terms of the will.

(b) Avoidance of failure of devise when devisee dies before testator. Unless a contrary intent is indicated by the will, when any adopted child of the testator or blood relative within the fourth degree

(1) Is designated as a devisee, or

(2) Would have been a devisee under the terms of a class gift, had he survived the testator,

and such adopted child or blood relative dies after the making of the will and before the testator leaving issue surviving the testator, or is dead at the making of the will leaving issue surviving the testator and the fact of his death is unknown to the testator, then such issue as represent the deceased devisee shall be deemed substituted for him so as to take the interest under the will which their deceased ancestor would have taken had he survived.

Comment. Lapse statutes of varying scope are found in a large majority of the states. One of the questions most commonly litigated with respect to such statutes concerns their application to class gifts. Do they apply to class gifts at all? If they do apply, to what extent do they apply to potential members of the class who are dead when the will is made? In a few jurisdictions, where the lapse statute makes no reference to class gifts, it is held that the lapse statute has no application to such gifts, because there is in fact no lapse. Thus, if the testator devises the residue of his estate to the children of A, it is
said that such language means "the children of A who are living at
the death of the testator." Hence, if potential members of the class
die before the testator, they never were within the terms of the devise
and so no problem of lapse arises. Most courts, however, do apply
lapse statutes to class gifts where a potential member of the class dies
before the testator but after the will is executed. The reason would
seem to be that to do so helps to effectuate the testator's desires.

The most serious difficulty in applying lapse statutes arises where a
potential member of the class dies before the will is executed. In
the case of a devise to a named person who dies before the will is
made, such as a testamentary gift of a piece of land or a sum of money
to A, it is evident that the testator supposed A was alive when he made
his will or A would not have been named as a devisee. Therefore, in
a proper case, it would effectuate the testator's intention to apply the
lapse statute to the devise to A. But suppose the testator devises a
portion of his estate "to the children of A," and at the time the will
is executed A has four children, and has had two others who died more
than ten years before the execution of the will, leaving issue. It would
seem highly unlikely that the testator would intend to include the
children already dead within the phrase "children of A." Indeed,
practically the only case in which he would intend to include potential
members of the class dead when the will is executed is a case where he
does not know they are dead. This section of the Code limits the
application of the lapse statute to such cases, and is believed to avoid
most of the litigation concerning class gifts which commonly arises
in connection with such statutes.

In general, as to the application of lapse statutes to class gifts, see
Restatement, Property (1940) § 298, together with comments and
special notes thereto.

As to what issue "represent the deceased devisee," see the definition
of "representation" in § 22 (c) hereof.

§ 58. Renunciation by heir or devisee. An heir or
device may renounce the succession to the real and personal
property of a decedent, but the renunciation shall be subject
to the rights of creditors of the heir or devisee and of the taxing
authorities. In case of an effective renunciation by the heir,
the property shall descend as if he had died before the de-
cedent.

Comment. At common law a devisee could renounce but an heir
could not as to land. The rule as to the devisee is here stated prin-
chiefly because it might otherwise be implied that a statute as to renunciation by the heir repeals the common law rule permitting a devisee to renounce. No good reason is perceived why the heir as well as the devisee should not be permitted to renounce.

However, neither the heir nor the devisee should be permitted to prejudice his creditors or the taxing authorities by a renunciation. The common law is not clear as to whether the devisee is able to defeat the rights of creditors and taxing authorities. Hence, this section makes express provision on that point.

The effect of the renunciation by a devisee on other distributees of the decedent’s estate is a matter of common law and is too complex a matter to be dealt with satisfactorily in a statute. Thus, if the interest renounced is a life estate, the whole question of the acceleration of future interests is involved. See, as to that matter, Restatement, Property (1936) c. 16, topic 2. Moreover, if the interest renounced is an interest in joint tenancy in fee simple, it would commonly devolve upon other joint tenants. If the interest renounced is given in severalty in fee simple or absolutely, it would ordinarily fall into the residuary estate unless it were a part of the residuary estate or there were no residuary clause in the will. In the latter case, the renounced interest would commonly devolve upon the heir.

§ 59. Deposit of will with court in testator’s lifetime.

(a) Deposit of will. A will may be deposited by the person making it, or by some person for him, with any [ ] court, to be safely kept until delivered or disposed of as hereinafter provided. The clerk of the court, on being paid the fee of [one dollar] therefor, shall receive and keep such will, and give a certificate of deposit for it.

(b) How enclosed. Every will intended to be deposited as aforesaid shall be enclosed in a sealed wrapper, which shall have indorsed thereon “Will of,” followed by the name of the testator. The clerk of the court shall indorse thereon the day when, and the person by whom, it was delivered. The wrapper may also be indorsed with the name of the person to whom the will is to be delivered after the death of the testator. It shall not be opened or read until delivered to a person entitled to receive it, or otherwise disposed of as hereinafter provided.
(c) **To whom delivered.** During the lifetime of the testator, such will shall be delivered only to him, or to some person authorized by him by an order in writing duly proved by the oath of a subscribing witness. After his death, the clerk shall notify the person named in the indorsement on the wrapper of the will, if there be a person so named, and deliver it to him.

(d) **When will to be opened.** If the will is not delivered to a person named in the indorsement on the wrapper, it shall be publicly opened in the court within thirty days after notice of the testator's death, and be retained by the court until offered for probate. Notice shall be given to the executor named therein and to such other persons as the court may designate. If the proper venue is in another court, the will shall be transmitted to such court; but before such transmission a true copy thereof shall be made and retained in the court in which the will was deposited.

*Comment.* Statutes of this kind appeared early in American statute books. See N.Y. Rev. Stat. (1829) part 3, c. 7, t. 3, art. 7, §§ 67-70; Mass. Rev. Stat. (1836) part II, t. 3, c. 62, §§ 10-13. Many states still have such legislation. The principal object of enacting such a statute is to protect a testator who fears that his will may be lost or wrongfully destroyed before it can be probated. The statute presented herewith is modeled after Ohio Gen. Code (Page, 1937) §§ 10504-6 to 10504-9. The last subsection also contains some clauses found in Minn. Stat. (1941) § 525.22.

It is possible that a provision might be added to the effect that the court should keep an index of all wills deposited under the provisions of this section. See N. H. Rev. Laws (1942) c. 350, § 18, for such a provision. However, in many localities little use will be made of this section, and if the wills deposited under it are filed alphabetically, that would seem to be sufficient. If something more is thought desirable, this can be taken care of by rule of court.

§ 60. **Construction of will.** The court in which a will is probated shall have jurisdiction to construe it at any time during the administration. Such construction may be made
on the petition of the personal representative or of any other person interested in the will; or, if a construction of the will is necessary to the determination of an issue properly before the court, the court may construe the will in connection with the determination of such issue. When a petition for the construction of a will is filed, notice of the hearing thereon shall be given to interested persons.

Comment. This section does not preclude the construction of a will in a proper case in suits other than probate proceedings.

PART III. ADMINISTRATION OF DECEDENTS' ESTATES

PROBATE AND GRANT OF ADMINISTRATION

§ 61. Venue.

(a) Proper county. The venue for the probate of a will and for administration shall be

(1) In the county in this state where the decedent had his domicile at the time of his death.

(2) If the decedent had no domicile in this state, then in any county wherein he left any property or into which any property belonging to his estate may have come.

(b) Proceedings in more than one county. If proceedings are commenced in more than one county, they shall be stayed except in the county where first commenced until final determination of venue in the county where first commenced. If the proper venue is finally determined to be in another county, the court, after making and retaining a true copy of the entire file, shall transmit the original to the proper county. The proceeding shall be deemed commenced by the filing of a petition; and the proceeding first legally commenced shall extend to all of the property of the estate in this state.

(c) Transfer of proceeding. If it appears to the court at any time before the decree of final distribution in any pro-
ceeding that the proceeding was commenced in the wrong county or that it would be for the best interests of the estate, the court, in its discretion, may order the proceeding with all papers, files and a certified copy of all orders therein transferred to another [ ] court which other court shall thereupon proceed to complete the administration proceeding as if originally commenced therein.


Subsection (b) is designed to resolve conflicts between probate courts of different counties in the same state. Its language also corresponds closely to the above statutes of Minnesota and Kansas.

As between concurrent proceedings, it is a common provision of statutes to provide for priority in favor of the one "first commenced" or some similar phrase. But all too often there is no statement as to what constitutes the commencement of a proceeding. This has resulted in two views, diametrically opposed, one holding that the proceeding is commenced by the filing of a petition, the other that the proceeding is not commenced until the court acts on the petition by appointing a personal representative. A few statutes explicitly provide that the filing of the petition operates as a commencement of the proceeding. Others resolve priority upon the filing of a petition in cases where there is an alternative venue. The last sentence of subsection (b) is intended to define the manner in which and the point of time when a proceeding is commenced. In addition it provides that one administration extends to all property of the estate throughout the state, in order to preclude the practice of having an administration in every county in which any property of the decedent is located.

Subsection (c) providing for transfer of venue is intended to make possible the transfer at any time of a proceeding to another county when it is in the best interests of the estate or when it appears that the proceeding was commenced in the wrong county. Thus convenience, the prime purpose of venue, is made possible during the entire period of administration. Similar provisions are found in Minn. Stat. (1941) § 525.57 for the transfer of guardianship proceedings; in Mass. Ann. Laws (1932) c. 215, § 8A for the transfer of an administration proceeding, at any time before final decree, when originally begun in the wrong county; and in Ark. Dig. Stat. (1937) §§ 229 to 238, upon application of the administrator or of a majority of the heirs, upon proof that the greater portion of the property of the
estate is in another county or merely that the larger portion of the heirs wish such removal.

For a discussion of the subject matter of this section, together with the citation of authorities showing conflicting views, see Basye, "The Venue of Probate and Administration Proceedings," 43 Mich. L. Rev. 471 (1944).

§ 62. Character of proceeding. The administration of the estate of a decedent from the filing of the petition for probate and administration or for administration until the decree of final distribution and the discharge of the last personal representative shall be considered as one proceeding for purposes of jurisdiction. Such entire proceeding is a proceeding in rem. No notice shall be jurisdictional except as provided in sections 69 and 70.

Comment. By the great weight of authority a proceeding for the administration of the estate of a deceased person is a proceeding in rem. For this reason personal service on interested persons is not necessary to give the court jurisdiction. Indeed, in many cases personal service on all interested persons is quite impossible. It has also frequently been held that the entire course of administration is one proceeding, thus eliminating any jurisdictional requirements as to subsequent notice. See Simes, "The Administration of a Decedent's Estate as a Proceeding in Rem," 43 Mich. L. Rev. 675 (1945). Of course, in those states where the probate court does not assume jurisdiction of the land of the decedent, except where it is necessary to sell it to pay debts and legacies, it has sometimes been held that the proceeding to sell land is an independent proceeding. However, the scheme contemplated in this Code assumes that the court takes jurisdiction of the land of the decedent as well as his personalty from the start. It is true, special provisions are hereafter made for notice of proceedings to sell land. But it would seem that they should be comparable to an execution sale pursuant to a money judgment in a civil action at law, in that they constitute one step in a judicial proceeding already initiated. Thus in the example of the execution sale no notice is necessary for jurisdiction to complete the sale. The proceeding is still a unit though a will of the same decedent is later discovered and probated or though a successor personal representative is appointed and qualifies. However, this section does not apply where adverse interests of third parties in the estate are being litigated. See §§ 130 and 162 hereof.
Throughout this Code the term "proceeding," when used in connection with probate or administration matters, indicates the entire course of probate and administration of an estate. However, the term "proceedings" is often used to indicate various steps which are only parts of such proceeding.

§ 63. Duty of custodian of will; liability. After the death of a testator the person having custody of his will shall deliver it to the court which has jurisdiction of the estate. Every person who wilfully refuses or fails to deliver a will after being duly ordered by the court to do so shall be guilty of contempt of court. He shall also be liable to any party aggrieved for the damages which may be sustained by such refusal or failure.

Comment. Statutes in practically every state provide that the custodian of a will may be compelled to produce it. Some stop with a general statement, while others go into more or less detail. In some jurisdictions criminal penalties are provided for the refusal to produce a will. The statute here presented is almost identical with Kan. Gen. Stat. (Supp. 1943) § 59-621.

§ 64. Petition for probate and appointment of personal representative; who may petition. Any interested person may petition the court of a proper county

(a) To have the will admitted to probate, whether the same is written or unwritten, in his possession or not, is lost, is destroyed or is without the state;

(b) For the appointment of an executor if one is designated in the will;

(c) For the appointment of an administrator, if no executor is designated in the will, or if the person so named is disqualified or unsuitable, or refuses to serve, or if there is no will.

A petition for probate may be combined with a petition for the appointment of an executor or administrator; and a person interested in either the probate of the will or in the appointment of a personal representative may petition for both.
Comment. A person interested in the appointment of a personal representative is not necessarily interested in the probate of the will. This is true of a creditor of the decedent. However, creditors are interested in obtaining the appointment of a personal representative in order to obtain proceeds of the estate, and under the section are proper persons to petition for probate as well as for the appointment either of an executor or an administrator.

§ 65. Contents of petition for probate and appointment of personal representative. A petition for probate of a will or for the original appointment of a general personal representative or for both shall state:

(a) The name, age, domicile and date of death of the decedent;
(b) The names, ages and residence addresses of the heirs and devisees, if any, so far as known or can with reasonable diligence be ascertained;
(c) The probable value of the real and of the personal property;
(d) If the decedent was not domiciled in the state at the time of his death, what property is within the county in which the petition is filed;
(e) If the decedent died testate and the will has not been delivered to the court, the contents of the will, either by attaching a copy of it to the petition, or, if the will is unwritten, lost, destroyed or suppressed, by including a statement of the provisions of the will so far as known;
(f) The names and residence addresses of the persons, if any, named as executors; and
(g) If the appointment of a personal representative is sought, the name and residence address of the person for whom letters are prayed; and his relationship to the decedent or other facts, if any, which entitle such person to appointment.

Comment. It may be deemed desirable for the judges having probate jurisdiction to promulgate standard forms for petitions for
probate and for the appointment of a personal representative. This can be done under the powers given in § 10 of this Code.

§ 66. Demand for notice of proceedings for probate or appointment of personal representative. If any interested person desires to be notified before a will is admitted to probate or before a general personal representative is appointed, he may file a demand for notice with the court. No demand for notice is effective unless it contains a statement of the interest of the person filing it, and his address or that of his attorney. After filing the same, no will shall be admitted to probate and no personal representative shall be appointed, other than a special administrator, until the notice provided for in section 69 hereof has been given.

Comment. This section has been developed from the device used in the English ecclesiastical and probate courts, known as a caveat. The caveat is also provided for in a number of jurisdictions in this country. Where, as in this Code, provision is made for probate and grant of administration without notice, the caveat, or something comparable to it, is a desirable safeguard for the protection of interested persons who otherwise may not have notice of the hearing. There is no reason, however, why the caveat should not be applied to the appointment of the personal representative as well as to the probate of the will. Provision for this has accordingly been made in this section of the Code.

§ 67. Request for special notice of hearings. At any time after the issuance of letters, any person interested in the estate may, in person or by attorney, serve upon the personal representative, or upon his attorney, and file with the clerk of the court where the proceedings are pending, with a written admission or proof of such service, a written request, stating that he desires written notice by ordinary mail of the time and place of all hearings on the settlement of accounts, on final distribution, and on any other matters for which any notice is required by law, by rule of court or by an order in the particular case. The applicant for such notice must include in his writ-
ten request his post office address or that of his attorney. Unless the court otherwise directs, upon filing such request such person shall be entitled to notice of all hearings for which any notice is required as aforesaid, or of such of those hearings as he designates in his request.

Comment. This section is modeled after Cal. Prob. Code Ann. (Deering, 1944) § 1202.

§ 68. Hearing on petition without notice. Upon filing the petition for probate or for the appointment of a general personal representative, if no demand for notice has been filed as provided in section 66, and if such petition is not opposed by any interested person, the court may, in its discretion, hear it forthwith or at such time and place as it may direct, without requiring notice.

Comment. This and the sections which immediately follow it are drawn on the theory that it is desirable to permit a summary hearing on an application for probate or administration, and that such hearing is permissible without any notice whatever. This was the English probate in common form and has been followed in a considerable number of states. It is still a part of the English probate system. On the other hand, a large number of states require notice before any hearing can be had other than for a grant of special administration. A hearing without notice permits an immediate supervision of the estate of the decedent as soon as his death occurs. In jurisdictions requiring notice that result may be obtained only when a special administrator is appointed,—often a cumbersome and expensive procedure. On the other hand, it may be said that in the summary proceeding without notice, there is danger that unscrupulous persons get control of the estate. However, this danger is largely obviated by the fact that the judge may always, in his discretion, require notice before the hearing. Moreover, control by an improper person is not likely to continue long in view of the provision of § 70 requiring notice of the appointment of the personal representative as soon as letters are issued. In Florida, where probate without notice is permitted, notice of the admission of a will to probate may be made on the request of the personal representative or any other interested person. Fla. Stat. Ann. (1941) § 732.28. In other states the personal representative is sometimes required to give notice of his appointment. In general, as to the requirement of notice, see 43 Mich. L. Rev. 1153 (1945).
If a court should deem it advisable, a general rule requiring notice in all cases unless otherwise ordered could be promulgated under the provisions of §§ 10 and 14 hereof.

§ 69. Notice of hearing on petition.
(a) When and to whom notice given. If the petition for probate or for the appointment of a general personal representative is opposed, or if a demand for notice has been filed, under the provisions of section 66 hereof, the court must, and in all other cases the court may, fix a time and place for a hearing on such petition, and direct

(1) That notice be given by publication and
(2) That a copy of such notice be served personally or by registered mail on each heir and devisee whose name and address is known and on each person who has filed such demand for notice.

(b) Notice to alleged decedent. If it appears by the petition or otherwise that the fact of the death of the person whose estate is to be administered may be in doubt, or on the written demand of any interested person, a copy of the notice of the hearing on said petition shall be sent by registered mail to the last known residence address of the alleged decedent.

(c) Form of notice. The publication of notice required by this section shall include a notice to creditors of the decedent to file their claims in the court or be forever barred; and shall be substantially in the following form:

In the [ ] court, county, State of .

Estate of , deceased
To all persons interested in the Estate of , and to the said , if he be not deceased:

You are hereby notified that a petition has been filed in said court [to admit to probate the will of , and] for the appointment of a personal representative for said estate; that said petition will be heard at on
the ______ day of ________, 19____, or at such subsequent time or other place to which said hearing may be adjourned or transferred.

All persons having claims against said estate are hereby notified to file the same in said court within four months from the date of the first publication of this notice or be forever barred.

Date ____________

__________________________
Clerk of the [ ] Court for
__________ County, __________

Comment. This section makes provision for notice when there is a contest or when a demand for notice has been filed, or when the court determines that it would be desirable. If notice is ordered, then this notice accomplishes two things: it notifies interested parties of the beginning of the proceeding; it also notifies creditors to come in and present their claims. In this way the expense of a separate publication of notice to creditors is eliminated. The part of the notice which is bracketed is to be omitted if there is no will.

This section is designed to give the court jurisdiction over the property even if the person whose estate is to be administered be not deceased. Subsection (b) provides for notice to him; and the form set out in subsection (c) provides that he be made a party. It should be pointed out that, under the provisions of § 81, infra, even if the court has jurisdiction over the presumed decedent when he is not, in fact, dead, he has a very good chance of recovering back his property. However, his attack on the probate proceeding must be direct; he cannot make a collateral attack. Thus, the personal representative who has acted in good faith is protected.

§ 70. Notice of appointment of personal representative. In all cases where notice by publication of the hearing on the petition for probate or for the appointment of a general personal representative has not been given, the clerk shall, as soon as general letters are issued, cause to be published a notice of the appointment of the personal representative, in which shall be included a notice to creditors of the decedent to file their claims in the court or be forever barred. A copy
of such notice shall also be served personally or by registered
mail on each heir and devisee whose name and address is
known. Such notice shall be in substantially the following
form:

In the [ ] court of ——— county,
State of ————.

Estate of ————, deceased
To all persons interested in the Estate of ————,
and to the said ————, if he be not deceased:

You are hereby notified that on the ——— day of ———, 19——,[the last will of ———— was admitted to
probate and that] ———— was appointed the
[executor] administrator of the estate of ————,
deceased.

All persons having claims against said estate are hereby
notified to file the same in said court within four months from
the date of the first publication of this notice or be forever
barred.
Date ————

Clerk of the [ ] Court for
——— County, ————

Comment. This is the notice which is to be given if the first hearing
is without notice by publication. Thus notice is given to interested
persons in all cases very early in the proceeding, and in time to make
good any objections they may have to the probate or to the appoint-
ment of the personal representative.

§ 71. Search for alleged decedent. Whenever there is
any doubt that the person whose estate is to be administered
is dead, the court, upon application of any interested person,
may direct the personal representative to make search for the
alleged decedent in any manner which the court may deem
advisable, including any or all of the following methods:
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(a) By inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent;

(b) By notifying officers of justice and public welfare agencies in appropriate locations of the disappearance of the alleged decedent;

(c) By engaging the services of an investigation agency.

Comment. This section is inserted because the proceeding makes the alleged decedent a party and is intended to bind him. If the court exercises a sound discretion in ordering notice as provided in this section, it is clear that due process requirements are complied with in so far as the alleged decedent's property is concerned. Indeed, the inclusion of the decedent as a party to the notice by publication would seem to amount to a compliance with due process requirements. See the comment to § 81.

This section is modeled after § 5 of the Uniform Absence as Evidence of Death and Absentees' Property Act as promulgated by the Conference of Commissioners on Uniform State Laws. It does not, however, take the place of the uniform act. This section would be used only where the alleged decedent is believed to be dead and where it is desirable to have the whole matter determined in one probate proceeding.

§ 72. How will is contested. Any interested person may contest the probate of a will by stating in writing the grounds of his objection thereto and filing the same in the court.

Comment. No attempt is made to enumerate the grounds of contest. See, however, § 80. This section, of course, implies the well recognized proposition that a part of a will can be contested. See 69 A.L.R. 1129 and 32 Yale L.J. 294 (1923).

§ 73. Time within which contest must be filed. No will can be contested unless the grounds of objection are filed within the periods hereinafter provided.

(a) If the ground of objection is that another will of the decedent has been discovered, the ground of objection must be filed before final distribution of the estate is decreed and within the period stated in section 83.
(b) If the contest is on any other ground, and

(1) If notice of the hearing of the petition for probate has been given as provided in section 69, the grounds of objection must be filed at or before the time of the hearing on the petition for probate.

(2) If notice of the hearing of the petition for probate has not been given as provided in section 69, the grounds of objection must be filed within four months after the first publication of the notice of appointment of the personal representative.

Comment. See comment to § 75 as to another will subsequently produced.

§ 74. Notice of contest.

(a) Contest before probate. If a statement of grounds of objection to admitting the will to probate is filed before it has been admitted, and the court has already ordered the notice provided for in section 69, no further notice is necessary unless ordered by the court. If the court has not already ordered the notice provided for in section 69, the notice therein provided for shall be given, and the notice shall further state that the will is being contested.

(b) Contest after probate. If a statement of objection to admitting the will to probate is filed after the will has been admitted and within the time limitations stated in section 73, the court shall fix a time and place for hearing the same and shall direct that notice be given to each heir and devisee whose place of residence is known, and, if the grounds for contest include the presentation of another will, to each devisee in such other will, whose place of residence is known, and to such other persons as the court may direct.

Comment. See comment to § 75.
§ 75. Will subsequently presented for probate.

(a) Where original petition not yet heard. If, after a petition for the probate of a will or for the appointment of a general personal representative has been filed, and before such petition has been heard, a petition for the probate of a will of the decedent, not theretofore presented for probate, is filed, the court shall hear both petitions together and determine what instruments, if any, should be admitted to probate or whether the decedent died intestate.

(b) Where one will already admitted or administration granted. If, after a will has been admitted to probate or after letters of administration have been granted, a petition for the probate of a will of the decedent, not theretofore presented for probate is filed, the court shall determine whether the former probate or the former grant of letters should be revoked and whether such other will should be admitted to probate or whether the decedent died intestate.

(c) Time limitation on probate under this section. No will shall be admitted to probate under the provisions of this section unless it is presented for probate before the court decrees final distribution of the estate.

(d) Character of proceedings under this section; notice. When a will is presented for probate under the provisions of this section, the proceedings shall be deemed a part of the proceedings for probate or for administration already initiated. If notice by publication has been ordered as provided in section 69 or in section 70, no further notice by publication is necessary unless ordered by the court; but the court shall direct that notice of the hearing be given to each heir and to each devisee in this or in any other will offered for or admitted to probate, whose place of residence is known, and to such other persons as the court may direct.

Comment. This section and §§ 73 and 74 on contest overlap somewhat, but all are necessary. A subsequently presented will may
have a double function; it may revoke a prior will, and thus be the basis of a contest of that prior will, and it may also contain dispositive provisions which the proponent wishes to have recognized by securing its probate. Sections 73, 74 and 75 all take the position that the contest of the old will and the probate of the new are both determined at the same hearing.

However, the attempted probate of another will may not necessarily constitute a contest of the first. Thus, if the testator makes one will disposing of all his real estate and another will disposing of all his personal estate, these wills are obviously not inconsistent. Nevertheless, since the order admitting the first of these wills to probate would be a determination that such will was the testator's last and only will and that as to all property not covered by it he died intestate, it would be necessary to reopen the order or judgment made at the first hearing, but it would not be necessary to revoke the probate of the first will.

Much confusion exists in the statutes and cases as to the matter of introducing a subsequent will. Some jurisdictions bar it by the ordinary period of contest; others allow it to be introduced after the period for contest has expired; some allow it to be probated at any time. Logically, it would seem that it does not differ from any other newly discovered evidence, and that time limitations on contest should apply to it. On the other hand, if a later will is discovered before the order of distribution, it seems reasonable that it should be admitted. This Code takes the latter position.

§ 76. Testimony of subscribing witnesses. If the probate of a written, attested will is contested, at least two of the subscribing witnesses shall be examined if they are within the state and competent and able to testify. If the will is not contested, at least one of the subscribing witnesses shall be examined if such witness is within the state and competent and able to testify.

§ 77. Proof of written attested will by other evidence. The provisions of section 76 as to the testimony of subscribing witnesses shall not exclude the production of other evidence at the hearing on the petition for probate; and the due execution of the will may be proved by such other evidence.

Comment. Common-law rules as to the proof of the execution of wills are assumed to be in force without the necessity of any statute.
Thus, if attesting witnesses are not available, it is possible to prove the genuineness of their signatures and to raise a presumption that the will was duly executed. 5 Wigmore, Evidence (3d ed., 1940) §§ 1511, 1512: This section is designed to indicate that such rules are in force.

§ 78. Commission to take testimony of subscribing witnesses. When it is inconvenient for one or more of the subscribing witnesses to a written, attested will to be present at a hearing with respect to the probate of such will, or where such witness or witnesses are without the state, the court may, if there be no contest, issue a commission to take the testimony of such witness or witnesses, either without notice or upon such notice as the court shall direct. If there is a contest with respect to the probate of the will, a commission may be issued in accordance with the practice in civil actions.

§ 79. Proof of holographic or nuncupative will. Proof of holographic and nuncupative wills are subject to the requirements of sections 48 and 49 of this Code.

Comment. This provision is inserted because of the terms of the Model Execution of Wills Act, which appears as §§ 45 to 50 of this Code.

§ 80. Proof required for probate and for grant of administration.

(a) On petition for probate. On a petition for the probate of a will, if the court finds that the testator is dead and that the will was executed in all respects according to law when the testator was competent to do so and was not acting under undue influence, fraud or restraint, and does not find that the will was revoked the will shall be admitted to probate as the last will of the testator.

(b) On petition for appointment of personal representative. On a petition for the appointment of an executor or general administrator the court shall determine whether the
deceased died testate or intestate and shall grant letters accordingly or, on proper grounds, may deny the petition.

§ 81. Effect of probate or grant of administration. If the court determines the facts as provided in section 80, such order shall, if uncontested or unappealed from, be final, subject to the following exceptions:

(a) It may be reopened at any time prior to the decree of final distribution for the purpose of admitting a will to probate not theretofore presented to the court;

(b) It may be vacated or modified for good cause as provided in section 19;

(c) The finding of the fact of death shall be conclusive as to the alleged decedent only if (1) the notice of the hearing on the petition for probate or for the appointment of a personal representative is sent by registered mail addressed to the alleged decedent at his last known residence address and (2), when search is ordered for the alleged decedent as provided in section 71, the court finds that the search was made. If such notice is sent and search made, and the alleged decedent is not dead, he may nevertheless at any time recover the estate from the personal representative if it be in his hands, or he may recover the estate or its proceeds from the distributees, if either be in their hands.

Comment. The effect of the first part of this section is to say that the order admitting a will to probate determines that it is the last and only effective will of the testator and that the order granting administration to a personal representative, when no will is admitted to probate, determines that the decedent died intestate. Hence, any presentation of a will at a later time can be made only by reopening the order admitting the first will to probate or the order granting administration. However, the later will may be admitted by reopening the order at any time before the decree of final distribution is made.
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The third exception to the conclusiveness of these orders is with respect to the fact of death. According to the decision in the case of Scott v. McNeal, 154 U. S. 34, 14 S. Ct. 1108 (1894), an ordinary probate proceeding in which the alleged decedent is not made a party and is not given notice does not bind him, and he may attack the whole proceeding collaterally. This is because due process requirements have not been complied with. But if reasonable notice is given to the alleged decedent, and he is made a party to the proceeding, he is bound. The form of notice provided for in this Code makes the alleged decedent a party; and if the steps referred to in exception (c) hereof are taken, he would receive reasonable notice. This simply means that he is bound by the proceeding and cannot attack it collaterally. But, according to the provisions of this section, he can recover his property back to the extent that it is in the hands of the personal representative or distributees. He cannot recover it back from creditors, and the personal representative is protected to the extent that he acted in good faith.

§ 82. Certificate of probate. When proved as herein provided, every written will, if in the custody of the court, shall have endorsed thereon or annexed thereto a certificate by the court of such order of probate. If for any reason a written will is not in the custody of the court, or if the will is oral, the court shall find the contents thereof, and the order admitting the will to probate shall state the contents and a certificate shall be annexed as above provided. Every will certified as herein provided, or the record thereof, or a duly certified transcript of the record, may be read in evidence in all the courts within this state without further proof.

§ 83. Time limit for probate and administration. In addition to the limitations of time provided in section 73 hereof, no written will shall be admitted to probate and no administration shall be granted unless application is made to the court for the same within five years from the death of the decedent; and no oral will shall be admitted to probate except in accordance with the provisions of section 49 hereof.
Comment. The section last referred to is the portion of the Model Execution of Wills Act dealing with oral wills.

The five-year limitation laid down in this section is designed to take care of situations where there has been no probate or grant of administration during the period of five years. It is not intended to modify the restrictions laid down in §§ 73 to 75, except to the extent that it sets an outside limit of five years. This section is intended to prohibit and to render ineffective any grant of letters if the petition is filed after five years. Section 135(d) and this section both have legal effect after the five-year period. By the operation of these sections the heirs may deal with the property as owners after the five-year period.

§ 84. Devolution of estate at death. When a person dies, his real and personal property, except exempt property and homestead interests, passes to the persons to whom it is devised by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as his heirs; but it shall be subject to the possession of the personal representative and to the election of the surviving spouse and shall be chargeable with the expenses of administering the estate, the payment of other claims and allowances to the family, except as otherwise provided in this Code.

Comment. See § 124 and comment thereto.

§ 85. No will effectual until probated. Except as provided in sections 86 and 87 hereof, no will shall be effectual for the purpose of proving title to, or the right to the possession of, any real or personal property, disposed of by the will, until it has been admitted to probate.

Comment. Statutes of this general character are common. Some even go so far as to say that no will shall be effectual to pass real or personal estate until it has been admitted to probate. But it is uniformly held that this is a matter of the production of evidence and does not prevent the passing of title at the time of testator's death.

It is not the purpose of this section to preclude the use of an unprobated will to prove a tort or to establish a constructive trust in a proper case. Thus an unprobated will might be introduced in evidence
to secure a remedy for actual fraud or duress. But the mere fact that a will was not presented for probate within the statutory time for contest or for probate, or that its existence was not known within that time, would furnish no basis for imposing a constructive trust in favor of beneficiaries of the unprobated will.

It would seem, moreover, that such indirect remedies as an action for tort or a constructive trust would rarely be needed under this Code, for an after discovered will may be introduced at any time until final distribution. See § 75. Likewise, § 19 is very liberal in permitting the reopening of an order or decree for cause.

DISPENSING WITH ADMINISTRATION

Comment to §§ 86–92. The seven sections which follow are intended to provide three distinct methods by which administration may be dispensed with, in whole or in part, in small estates. (See, also, §§ 229, 235 and 237 in part IV on Guardianship.)

Sections 86 and 87 are intended to cover the small estate in which administration is neither had nor contemplated. It is intended merely to enable the surviving family of a decedent to collect assets of the estate without the necessity of resorting to administration. They are modeled after Cal. Prob. Code Ann. (Deering, 1944) §§ 630, 631 and Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, §§ 478, 481. Being limited to estates not exceeding $1,000, they will for the most part be utilized to collect bank deposits, wage claims, insurance proceeds and the like, and to transfer registered securities and automobiles. They are not intended, however, to preclude the subsequent granting of an administration if the same be desired. Where there is a surviving spouse or minor child, they will ordinarily be entitled to such assets absolutely as exempt property irrespective of the existence of creditors. On the other hand, if the surviving heirs are not so closely related to the decedent, such assets may be subject to administration, and the distributees to whom such assets are paid or delivered will be accountable to a personal representative, if one should be appointed subsequently. A lapse of thirty days is required before this section may be employed, in order to afford creditors an opportunity to demand administration. Of course, the distributees may prevent the initiation of administration by paying creditors who otherwise might insist upon administration.

Sections 88–91 provide a method for the summary distribution of a small estate to the surviving spouse or minor children where the same, exclusive of homestead and exempt property, would otherwise be entirely consumed in the payment of a family allowance. The upper
limit of $2,500 is suggested as a maximum value of an estate to which these sections should apply. In these estates, also, ordinary creditors would not share and consequently there is no reason why distribution cannot be made immediately. These provisions are not a required, but only an optional, course of procedure. They have the advantage of providing a judicial method of accomplishing their purpose, whereas the procedure contemplated by §§ 86 and 87 is entirely without judicial supervision.

Section 92 differs from the preceding sections in that it applies to estates in which administration has been commenced but which are so small in size that general creditors will not share in their distribution. A summary and early distribution is thus provided.

§ 86. **Collection of small estates by distributees upon affidavit.** The distributees of an estate shall be entitled thereto without awaiting the appointment of a personal representative or the probate of a will when

(a) No petition for the appointment of a personal representative is pending or has been granted, and

(b) Thirty days have elapsed since the death of the decedent, and

(c) The value of the entire assets of the estate, not including homestead and exempt property, does not exceed [$1,000], and

(d) There is furnished to any person owing any money, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property or right, an affidavit showing the existence of the foregoing conditions and the right of the distributees to receive such money or property or to have such evidences transferred.

§ 87. **Same; effect of affidavit; release; suit.** The person making payment, delivery, transfer or issuance pursuant to the affidavit described in section 86 shall be released to the same extent as if made to a personal representative of the decedent and he shall not be required to see to the application thereof or to inquire into the truth of any statement in the
affidavit, but the distributees to whom payment, delivery, transfer or issuance is made shall be answerable therefor to any person having a prior right and be accountable to any personal representative thereafter appointed. If the person to whom such affidavit is delivered refuses to pay, deliver, transfer, or issue the property as above provided, it may be recovered or compelled in an action brought for such purpose by or on behalf of the distributees entitled thereto, upon proof of the facts required to be stated in the affidavit.

§ 88. Petition for order of no administration. If the value of the entire assets of an estate, not including homestead and exempt property, does not exceed [$2,500] and does not exceed the amount to which the surviving spouse and minor children of the decedent are entitled as a family allowance, there may be filed by or on behalf of the surviving spouse or minor children a petition in any court of proper venue for administration, or if a petition for the appointment of a personal representative has been filed but not yet granted, then in the court where such petition has been filed, praying the court to make a family allowance and to make an order that no administration shall be necessary. The petition shall state the names of the heirs or devisees, a list of creditors of the estate together with the amounts of the claims so far as the same are known, and a description of all real and personal property belonging to the estate, together with the estimated value thereof according to the best knowledge and information of the petitioner, and the liens and encumbrances thereon, with a prayer that the court make a family allowance and that, if the entire assets of the estate are thereby exhausted, the same be set aside to the surviving spouse, if there be one, otherwise to the minor children.

Comment. This section is similar in substance to Cal. Prob. Code Ann. (Deering, 1944) §§ 640, 642. It is intended to be applicable if there is real as well as personal property, and whether the decedent
died testate or intestate. If there is a will, its probate will not affect the right to pursue the procedure provided in this section. Procedure similar to the above for a judicial dispensing with administration under certain circumstances exists in many states at the present time. See Fla. Stat. Ann. (1941) § 735.02. The procedure for making a family allowance is provided by § 44.

§ 89. **Same; hearing and order.** Upon the filing of a petition for no administration the court may hear the same forthwith without notice, or at such time and upon such notice as the court may require. Upon the hearing of the petition, if the court finds that the facts contained therein are true and that the expenses of the last illness, funeral charges and expenses of the proceeding have been paid or secured, the court shall make a family allowance and, if the entire assets of the estate are thereby exhausted, shall order that no administration be had in the estate and shall assign to the surviving spouse or, if there be no surviving spouse, then to the minor children the whole of the estate, subject to the liens and encumbrances thereon.


§ 90. **Same; effect of order.** The order that no administration be had on the estate shall, until revoked, constitute sufficient legal authority to all persons owing any money, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property or right belonging to the estate and to persons purchasing or otherwise dealing with the estate, for payment or transfer to the persons described in the order as entitled to receive the estate without administration.

*Comment.* This section follows in general the form of Fla. Stat. Ann. (1941) § 735.04.

§ 91. **Same; proceedings to revoke order.** At any time within one year after the making of an order of no administra-
tion, any person interested in the estate may file a petition to revoke the same alleging that other property has been discovered, or that property belonging to the estate was not included in the petition for no administration, or that the property described in the petition was improperly valued, and that if said property were added, included or properly valued, as the case may be, the total value of the property would exceed that necessary to justify the court in ordering no administration. Upon proof of any of such grounds, the court shall revoke the order of no administration; but the order of no administration shall not be revoked on these grounds after the expiration of one year from the date of the order. In case of any contest as to the value of any property, the court may appoint two appraisers to appraise the same in accordance with section 120 of this Code.

Comment. This section contemplates a direct attack upon the order of no administration in the probate court. It is in addition to the remedy by appeal. But it embodies reasons some of which would not be available by appeal; and, because the petition may have been granted without notice, a longer time is allowed.

If an order of no administration is revoked, the court may then grant administration upon the filing of a petition therefor.

§ 92. Summary proceedings for small estates after personal representative appointed. Whenever, after the inventory and appraisement has been filed by a personal representative, it is established that the estate of a decedent, exclusive of the homestead and exempt property and family allowances to the surviving spouse and minor children, does not exceed an amount sufficient to pay the claims of classes 1 to 6 inclusive, the personal representative upon order of the court shall pay the same in the order provided and thereafter present his account with an application for the settlement and allowance thereof. Thereupon the court, with or without notice, may adjust, correct, settle, allow or disallow such ac-
count and, if the account is settled and allowed, decree final
distribution, discharge the personal representative and close
the administration.

Comment. The above section follows the general plan of Kan.
§ 525.51. It contemplates a minimum of administration. It differs
from the preceding sections which actually dispense with administra­
tion, in that it contemplates some administration by a personal repre­
sentative under the supervision of the court until it appears that further
administration is unnecessary. See §142 for the classification of claims.

ADJUDICATED COMPROMISE OF CONTROVERSIES

§ 93. Agreement to compromise controversies author·
ized. The compromise of any contest or controversy as to
(a) Admission to probate of any instrument propounded
as the last will of any decedent,
(b) The construction, validity or effect of any such instru­
ment,
(c) The rights or interests in the estate of the decedent of
any person, whether claiming under a will or as heir,
(d) The rights or interests of any beneficiary of any tes­
tamentary trust, or
(e) The administration of the estate of any decedent or
of any testamentary trust,
whether or not there is or may be any person interested who is
a minor or otherwise without legal capacity to act in person or
whose present existence or whereabouts cannot be ascertained,
or whether or not there is any inalienable estate or future con­
tingent interest which may be affected by such compromise,
shall, if made in accordance with the provisions of this Code,
be lawful and binding upon all the parties thereto, whether
born or unborn, ascertained or unascertained, including such
as are represented by trustees, guardians of estates and guard­
ians ad litem; but no such compromise shall in any way im­
pair the rights of creditors or of taxing authorities.
Comment. It would seem that, even in the absence of legislation, interested persons who are sui juris should be able to enter into a compromise agreement as to the validity or effect of a will or as to other controverted matters with respect to an estate, which would be fully binding upon them. In view of the decision in Will of Dardis, 135 Wis. 457, 115 N.W. 332 (1908), and other similar cases, however, legislation is desirable. Moreover, it frequently happens that some of the interested parties are incompetent, unascertained or even unborn; in which case legislation is necessary in order that such parties may be bound by the compromise agreements of their guardians or guardians ad litem. This and the two sections which follow are designed to make possible an adjudicated compromise even in situations where interested parties are unborn or unascertained. Legislation of this kind is believed to be desirable in avoiding the expense of litigation and in clearing titles. These sections are modeled in substance after the Michigan compromise statute, Mich. Stat. Ann. (1943) §§ 27.3178(115) to 27.3178(119). For other statutes of this type, see Mass. Ann. Laws (1932) c. 204, §§ 14–18; N. Y. Dec. Est. Law, § 19.

§ 94. Compromise agreement to be executed and delivered to the court; appointment of guardian ad litem.

(a) Execution of compromise agreement by competent persons. The terms of such compromise shall be set forth in an agreement in writing which shall be executed by all competent persons having interests or claims which will or may be affected by such compromise, except those who may be living but whose present existence or whereabouts is unknown and cannot after diligent search be ascertained.

(b) Submission to court for execution by fiduciaries. Any interested person may then submit the agreement to the court for its approval and for the purpose of directing the execution thereof by the personal representative of the estate, by the trustees of every testamentary trust which will be affected by the compromise, and by the guardians of the estates of minors and other incompetents and of unborn and unascertained persons and of persons whose present existence or whereabouts is unknown and cannot after diligent search be ascertained, who might be affected by the compromise.
(c) Appointment of guardian ad litem. If there shall be any person who, if living, has an interest which may be affected by such compromise but whose present existence or whereabouts cannot after diligent search be ascertained, or who is a minor or otherwise incompetent and has no guardian of his estate, or if there is any future contingent interest which might be taken by any person not then in being and which might be affected by the compromise, the court shall appoint a guardian ad litem to represent such person.

§ 95. Order approving agreement and directing execution by fiduciaries. Upon due notice, in the manner directed by the court, to all interested persons in being, or to their guardians, and to the guardians of all unborn persons who may take contingent interests by the compromise, and to the personal representative of the estate and to all trustees of testamentary trusts which would be affected by the compromise, the court shall, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries is just and reasonable, make an order approving the agreement and directing the fiduciaries and guardians ad litem to execute such agreement. Upon the making of such order and the execution of the agreement, all further disposition of the estate shall be in accordance with the terms of the agreement.

PERSONAL REPRESENTATIVES

§ 96. Persons entitled to domiciliary letters.

(a) Order of persons entitled. Domiciliary letters testamentary or domiciliary letters of general administration may be granted to one or more of the persons hereinafter mentioned, natural or corporate, who are not disqualified, in the following order:

(1) To the executor or executors designated in the will;
(2) To the surviving spouse or next of kin, or both, or to some person or persons nominated by them or any of them, as the court may, in its discretion, determine;

(3) If there are no executors nor a surviving spouse nor any next of kin, or if none of such persons files a petition for letters within thirty days after the death of the decedent, then to any other qualified person.

(b) Who are disqualified. No person is qualified to serve as a domiciliary personal representative who is

(1) Under twenty-one years of age;

(2) Of unsound mind;

(3) A convicted felon, either under the laws of the United States or of any state or territory of the United States;

(4) A non-resident of this state who has not appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate and caused such appointment to be filed with the court;

(5) A corporation not authorized to act as a fiduciary in this state;

(6) A person whom the court finds unsuitable.

Comment. Statutes determining who are entitled to appointment as personal representatives are found in all states. While they differ widely, they seem in general to be based on two principles. Either the administrator is selected because of his interest in the estate or he is selected because of his close relationship to the decedent. Of course, the decedent's choice, if he names an executor, is preferred. In some states, such as Michigan, the idea of requiring an interest in the estate for appointment as an administrator is carried very far. An assignee of the surviving spouse or next of kin is given a priority. Mich. Stat. Ann. (1943) § 27.3178(122). As a corollary, the surviving spouse or next of kin loses his priority if he assigns his interest. The other basis of choice is relationship to the decedent. Clearly this seems reasonable when applied to a surviving spouse who probably knows
more about the property and business of the decedent than anyone else and who may have helped to accumulate the estate. It also seems reasonable in most cases when applied to heirs or next of kin. Some statutes, such as the Illinois statute, carry this principle even farther and give preference to relatives who are not next of kin but who would be next of kin if nearer relatives were dead. Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 248. Many statutes give the preferred person also a right to nominate someone else. e. g., Illinois statute cited supra.

Sometimes this right to nominate is given only to the surviving spouse. In other instances it is given to the next of kin also. In drafting this section, it was believed that the person who had a preference should also have the right to nominate in all cases except in the case of an executor.

In a number of states a preference is given to distributees on the ground of pecuniary interest in the estate, e. g., Ky. Rev. Stat. (1944) § 395.040. That seems reasonable in many instances but has not been followed in the proposed section because there are so many cases where it might not work out well. A wealthy testator bequeaths $100 to a worthy servant, yet the servant should have no preference as administrator; or the testator gives the residue of his estate to a charity in which he is not greatly interested, believing that there will not be a very large residue. This charity would hardly have the interest to become a suitable administrator. If, as some statutes do, a distinction is made between the principal devisee and other devisees, there would be many cases where it could not be decided whether the person was the principal devisee. On the whole, it has seemed best not to give devisees, as such, a preference to appointment. In reviewing the state statutes, attention should be called to particular classes which seem to come in for express disfavor. In a number of states the testator's partner is either excluded or discriminated against. In Michigan, a creditor of the deceased is excluded, Mich. Stat. Ann. (1943) § 27.3178(122), though in many other states a creditor has a preference, e. g., Colo. Stat. (1935) c. 176, § 74. Massachusetts gives a preference not only to next of kin but also to their guardians. Mass. Ann. Laws (1932) c. 193, § 1. Some statutes give a preference to the foreign consul of the country of which the decedent was a citizen, e. g., Ore. Comp. Laws (1940) § 19-210.

No fixed order of preference seems very satisfactory and for that reason the section has been made as flexible as possible, giving the court a wide discretion.

The above section permits non-resident personal representatives. In some jurisdictions the personal representative must always be a resident. In others there is no requirement that the personal repre-
sentative be a resident. Still others, like the section presented herewith, take a middle ground, and permit a non-resident personal representative subject to restrictions. It would seem that it is occasionally desirable to have a non-resident act as personal representative. Numerous situations could be suggested where that would be true. For example, the decedent may have resided near the state line and the bulk of his estate may be in the adjoining state. Or his relatives, or those who knew him best and on whom he relied in business matters, may reside just over the state line. It would be unfortunate to preclude them from qualifying as personal representatives.

§ 97. When letters to be issued. When a duly appointed personal representative has given such bond as may be required and the bond has been approved by the court, letters under the seal of the court shall be issued to him.

§ 98. When personal representative may be removed. When the personal representative becomes mentally incompetent, disqualified, unsuitable or incapable of discharging his trust, has mismanaged the estate, failed to perform any duty imposed by law or by any lawful order of the court, or has ceased to be a resident of the state without filing the authorization of an agent to accept service as provided by section 96(b) hereof, then the court may remove him. The court on its own motion may, or on the petition of any person interested in the estate shall, order the representative to appear and show cause why he should not be removed. The removal of a personal representative after letters are duly issued to him does not invalidate his official acts performed prior to removal.


§ 99. Appointment of successor personal representative. When a personal representative dies, is removed by the court, or resigns and such resignation is accepted by the court, the court may, and if he was the sole or last surviving personal representative and administration is not completed, the court shall, appoint another personal representative in his place.
§ 100. Successor personal representative and administrator with will annexed; rights and powers. When a successor personal representative or an administrator with the will annexed is appointed, he shall have all the rights and powers of his predecessor or of the executor designated in the will, except that he shall not exercise powers given in the will which by its terms are personal to the executor therein designated.

§ 101. Powers of surviving personal representative. Every power exercisable by joint personal representatives may be exercised by the survivor of them when one is dead or by the other when one appointment is terminated by order of the court, unless the power is given in the will and its terms otherwise provide as to the exercise of such power.

§ 102. What powers of personal representatives joint and what several. Where there are two or more personal representatives, the following powers can be exercised only by all of them:

(a) To institute suit on behalf of the estate;
(b) To employ an attorney;
(c) To carry on the business of the deceased;
(d) To vote corporate shares of the estate;
(e) To exercise those powers given by the will which, by the terms of the will, are to be exercised only by all of the personal representatives, or by all the survivors of them.

All other powers can be exercised by any one of the personal representatives, unless the will otherwise provides.

§ 103. Compensation. If a testator by will makes provision for the compensation of his executor or administrator, that shall be taken as his full compensation unless he files in the court a written instrument renouncing all claim for the compensation provided by the will before qualifying as per-
sonal representative. The personal representative, when no compensation is provided in the will, or when he renounces all claim to the compensation provided in the will, shall be allowed such compensation for his services as the court shall deem just and reasonable. Additional compensation may be allowed for his services as attorney and for other services not required of a personal representative. An attorney performing services for the estate at the instance of the personal representative shall have such compensation therefor out of the estate as the court shall deem just and reasonable. Such compensation may be allowed at the final settlement; but at any time during administration a personal representative or his attorney may apply to the court for an allowance upon the compensation of the personal representative and upon attorney's fees. If the court finds that the personal representative has failed to discharge his duties as such in any respect, it may deny him any compensation whatsoever or may reduce the compensation which would otherwise be allowed.

Comment. This section follows a number of statutes in leaving the fixing of fees to the discretion of the court. See, for example, Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, §§ 490 and 491. In view of the wide variety of situations which may determine the amount of fees, a hard and fast rule expressed in the statute seems undesirable. If it be thought helpful to have some sort of standard percentage basis to guide the court in ordinary cases, the local court may establish this by a rule of its own.

The idea of the executor renouncing his fee and accepting the fee fixed by the court is embodied in a number of statutes in various states. See 38 Mich. L. Rev. 381 (1940). While at first blush it may appear to go too far in overriding testamentary intent, it is believed that it is justified. Primarily, this is based upon the propositions that the court, for the benefit of all persons interested in the estate, exercises a sound discretion to appoint a suitable personal representative, and that the estate will be administered in a more competent manner if an adequate fee is paid. If we were to say that the testator should be able to set a low fee and compel his executor to accept that amount or renounce the office, then unsatisfactory results might follow. This executor might be the most highly qualified to administer the estate,
and an inferior administrator would be appointed who would receive a larger fee than the person named in the will. While this might not often happen, it is entirely possible that the testator might name a series of executors to be appointed according to a given order of preference, none of them to receive more than the low fee named in the will. By this means he could name all the competent persons in the community and thus preclude adequate payment for the services of administering his estate by any well qualified person. Yet it is clear that the law should not allow a testator to deny to the administrator all compensation beyond the amount he should name. If he could do that he could provide in his will that no fee whatever should be paid to any person for administering his estate. And it would be but one step further for him to provide that his estate should not be administered at all. It is believed that the only place to draw the line is at the point where this section draws it.

§ 104. Allowance for defending will. When any person designated as executor in a will, or the administrator with the will annexed, defends it or prosecutes any proceedings in good faith and with just cause for the purpose of having it admitted to probate, whether successful or not, he shall be allowed out of the estate his necessary expenses and disbursements including reasonable attorney’s fees in such proceedings.

Comment. If a personal representative prosecutes or defends in proceedings to construe a will, he can recover expenses and attorney’s fees without a statute such as this. This section is necessary only because, if probate is denied, it might be claimed that a personal representative named in it or defending it is not entitled to expenses and attorney’s fees.

§ 105. Special administrators. For good cause shown a special administrator may be appointed pending the appointment of an executor or a general administrator or after the appointment of an executor or a general administrator without removing the executor or general administrator. A special administrator may be appointed without notice or upon such notice as the court may direct. The appointment may be for a specified time, to perform duties respecting specific property, or to perform particular acts, as stated in the order of appoint-
ment. The special administrator shall make such reports as the court shall direct, and shall account to the court upon the termination of his authority. Otherwise, and except as the provisions of this Code by terms apply to general personal representatives, and except as ordered by the court, the law and procedure relating to personal representatives in this Code shall apply to special administrators. The order appointing a special administrator shall not be appealable.

**BOND OF PERSONAL REPRESENTATIVE**

§ 106. **Personal representative to give bond.** Except as provided in section 107, every personal representative shall, before entering upon the duties of his office and within such time as the court directs, execute and file a bond, procured at the expense of the estate, with sufficient surety or sureties in such amount as the court finds necessary for the protection of interested parties, conditioned upon the faithful discharge of all duties of his trust according to law, including his duty to account as provided in section 172. In the absence of special circumstances, the court shall fix the bond in the amount of the value of any part of the estate which it can determine from examination that the personal representative might easily convert during the period of administration plus the value of the gross annual income of the estate.

*Comment.* This section follows a number of jurisdictions in giving the court a discretion with respect to the amount of the bond. In other jurisdictions the amount of the bond is determined by a more or less rigid rule. Thus, it is common to require a bond in double the appraised value of the personal estate plus double the probable income of the real estate. However, it is believed to be impossible to determine fairly in all cases the amount of the bond by a fixed rule. The character of the assets, the fact that the personal representative is the principal distributee and that there are no debts, the fact that other assets may soon be received, and many other factors may well enter into the discretion of the court in determining the amount of the bond. However, the determination of the amount should not be capricious;
and in the absence of special circumstances, the rule laid down in the last sentence of this section should be followed. Since, under § 115 the amount of the bond may be increased if a sale takes place, it may be desirable to take the probability of such sale into consideration in fixing the original bond if it is reasonably certain that the sale will take place and its approximate terms can be anticipated.

This and the succeeding sections on bonds of personal representatives apply to special administrators, as well as general administrators and executors. See § 3(u). Under this section, the bond of a special administrator may be fixed at a nominal amount, since the very circumstances calling for the appointment of a special administrator may also constitute the "special circumstances" referred to in this section.

§ 107. When bond not required.

(a) Provisions of will. When, by the terms of the will, the testator expresses a wish that no bond shall be required of the executor, no bond shall be required unless the court, for good cause, finds it proper to require it; but the court, for good cause, may at any subsequent time require a bond to be given.

(b) Deposit of collateral by personal representative. A personal representative may at any time turn over to and deposit with the clerk of the court cash or collateral in an amount and nature satisfactory to the court in lieu of all or a part of the amount of his bond. The clerk shall be liable for the safekeeping thereof and shall pay out or deliver the same only on order of the court.

(c) Deposit of personal assets of estate. Personal assets of the estate may be deposited with a domestic banking or trust company upon such terms as may be prescribed by order of the court. The amount of the bond of the personal representative may be reduced in proportion to the value of the assets so deposited; or the court may, if the assets so deposited be deemed sufficient, accept the deposit in lieu of requiring a bond of the personal representative.

(d) Corporate fiduciary as personal representative. If the personal representative is a trust company or bank existing or doing business under the laws of this state, the deposit of
cash or collateral with the state treasurer required by such laws may, if satisfactory to the court, be accepted in lieu of requiring a bond.

Comment. Even though a will provides that the executor need not give bond, the court is empowered to require it for good cause. Thus, if there is a testamentary power of sale, the court should, in case of doubt, require a bond for the protection of creditors. See § 115 of this Code.

It should be pointed out that subsection (d) must be adapted to the local trust company and banking laws. A number of states do not have any such provisions requiring the deposit of cash or collateral with the state treasurer. In those states it will be necessary to omit this subsection. Moreover, if the deposit of cash or collateral with the state treasurer is not likely to be adequate, then subsection (d) should not be enacted.

§ 108. Agreement between personal representative and surety as to deposit of assets. It shall be lawful for the personal representative to agree with his surety for the deposit of any or all moneys and other assets of the estate with a bank, safe deposit or trust company, authorized by law to do business as such, or other depository approved by the court, if such deposit is otherwise proper, in such manner as to prevent the withdrawal of such moneys or other assets without the written consent of the surety, or on order of the court made on such notice to the surety as the court may direct.

Comment. The provision embodied in this section is similar to statutes found in many states. See Cal. Gen. Laws (Deering, 1944), Act 8317. While some courts have held that such an agreement as to withdrawals is valid without any statute, there is authority to the contrary; and it is believed that this statute should be included in order to remove any doubt about the matter.

§ 109. Obligees of bond; joint and several liability. The bond of the personal representative shall run to [the State of to the use of] all persons interested in the estate and shall be for the security and benefit of such persons. The
sureties shall be jointly and severally liable with the personal representative and with each other.

§ 110. Bonds of joint personal representatives. When two or more persons are appointed personal representatives of the same estate and are required by the provisions of this Code to give a bond, the court may require either a separate bond from each or one bond from all of them. No personal representative shall be deemed a surety for another personal representative unless the terms of the bond so provide.

§ 111. Affidavit of personal sureties. Each personal surety shall execute and file with the court an affidavit that he owns property subject to execution, of a value over and above his liabilities, equal to the amount of the bond, and shall include in such affidavit the total amount of his obligations as surety on other official or statutory bonds. If the amount of his bond exceeds $1,000, the affidavit shall also state

(a) An adequate description of the real property within this state offered by him as security, which identifies it sufficiently to establish the lien of the bond thereon as hereinafter provided;

(b) The total amount of the liens, unpaid taxes and other encumbrances against each property offered;

(c) The assessed value of such property offered, its market value and the value of the equity over and above all encumbrances, liens and unpaid taxes;

(d) That the equity of such real property offered is equal to the amount of the bond.

Comment. As to the provisions for a lien on real property of the surety, see comment to § 113 hereof.

§ 112. Approval of bond by judge. No bond of a personal representative shall be deemed sufficient unless it shall have been examined and approved by the judge, or in his ab-
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sence by the clerk, and the approval endorsed thereon in writing. Before giving approval the judge or clerk may require evidence as to the value and character of the assets of personal sureties, including an abstract, certificate or other satisfactory evidence of title of every tract of real property which is offered as security. In the event that the bond is not approved, the personal representative shall, within such time as the judge or in his absence the clerk may direct, secure a bond with satisfactory surety or sureties.

§ 113. Bond as lien on real property of personal surety; recording of lien. Upon the approval and recording of the bond of a personal surety, when the amount of such bond exceeds $1,000, a lien on the real property of the surety in this state, offered in the affidavit of the surety, shall arise as security for the performance of the obligation of the bond. The clerk of the court shall, before letters are issued to the personal representative, cause to be recorded in the office of the [register of deeds] of each county in which may be located any real property as set forth in the affidavit of the surety, a statement signed by the clerk, giving a sufficient description of the land, the name of the principal and sureties, the amount of the bond, and the name of the estate and the court in which the bond is given. The [register of deeds] shall record such statement, either in the book of liens or in a suitable book provided for liens on real property of sureties. All such recorded statements shall be duly indexed in such manner that the existence and character of the liens may conveniently be determined.

Comment. The effect of this section, together with provisions in §§111, 112, 116 and 117, is to require each personal surety, on bonds fixed in an amount in excess of $1,000, to give a lien on one or more tracts of his own real estate within the state as security for the performance of the obligation of the bond. The advantages of such a statute are obvious. If the title of the prospective bondsman to real estate is investigated, and if the bond becomes a lien on such real estate when it is approved by the court, the danger of loss from financial irresponsi-
bility of the bondsman is largely eliminated. Certainly in large metropolitan areas where "straw" bondsmen are common, strong arguments can be made for the adoption of such legislation. On the other hand, the probable result of such a statute is that corporate bondsmen would be secured in most cases, and the personal bondsman who acts as such without charging a fee would be relatively uncommon. In rural areas the use of personal bondsmen is likely to be more satisfactory, and in states having no cities of any considerable size it may be thought undesirable to adopt this feature of the Code. For a statute which adopts the principle of requiring a specific lien on real estate of the personal bondsman, see N. Y. Civ. Prac. Act, § 150-a.

If it is deemed best not to require a specific lien on the real estate of the personal bondsman, the Code can be enacted with the following changes: Omit all except the first sentence of § 111. In § 112, omit the following phrase at the end of the second sentence, "including an abstract, certificate or other satisfactory evidence of title of every tract of real property which is offered as security." Omit all of § 113. In § 116 omit subsection (b). Omit all of § 117.

§ 114. Letters deemed revoked on failure to give bond. If at any time a personal representative fails to give a bond as required by the court, within the time fixed by the court, some other person shall be appointed in his stead. If letters have been issued, they shall be revoked.

§ 115. Court may increase or decrease bond. The court may at any time increase or decrease the amount of the bond of the personal representative when good cause therefor appears. In the absence of special circumstances, the court shall increase the bond on a sale of real property, or of personal property which could not easily be converted.

§ 116. Release of sureties before estate fully administered.

(a) Release for cause. For good cause, the court may, before the estate is fully administered, order the release of the sureties of the personal representative, and require the personal representative to furnish a new bond.
(b) **Release of personal surety who has given lien on real property.** If a personal surety who has given a lien on specific real property as security applies to the court to have the lien released, the court shall order the release requested, if sufficient other real property of the surety is substituted on the same terms and conditions as required for the lien to be discharged. If such personal surety who requests the release of the lien does not offer a lien on other real property, the court shall order the personal representative to offer other security within a reasonable time to be fixed in the order, and upon the approval of such new security, the court shall order the release of such personal surety.

(c) **Extent of liability of original and new sureties.** The original sureties shall be liable for all breaches of the obligation of the bond up to the time of filing of the new bond and approval thereof by the court, but not for acts and omissions of the personal representative thereafter. The new bond shall bind the sureties thereon with respect to acts and omissions of the personal representative from the time when the sureties on the original bond are no longer liable therefor or from such prior time as the court directs.

*Comment.* In some states a surety may be released at any time on his request, without a showing of cause. N. Y. Surr. Ct. Act, § 109. In other states a showing is necessary. Ohio Gen. Code (Page, 1937) §§ 10506–26, 10506–27. As far as the corporate surety is concerned, it is felt that it should not be allowed to resign at the very moment when it is needed. Therefore under the provisions of this section such a surety may be released only when there is good cause. The same reasoning applies to the personal surety, with one exception. If the personal surety who has given a lien on land wishes to dispose of the land it may be desirable to discharge the lien. Subsection (b) provides for this situation, requiring the discharge of the lien upon the request of the surety.

§ 117. **Recording of release of lien.** The lien on the real property of a personal surety shall be cancelled of record by
the [register of deeds] upon filing with him a certified copy of
the order duly discharging the surety or releasing the lien.

Comment. See comment to § 113.

§ 118. Suit on bond.

(a) Execution of bond deemed an appearance. The
execution of the bond of a personal representative shall be
deemed an appearance by the surety in the proceeding for the
administration of the estate including all hearings with respect
to the bond.

(b) Summary enforcement in proceeding for adminis­
tration. Subject to the provisions of subsection (c) hereof,
the court may, on breach of the obligation of the bond of the
personal representative, after notice to the obligors in the bond
and to such other persons as the court directs, sum­marily de­
termine the damages as a part of the proceeding for the admin­
istration of the estate, and by appropriate process enforce the
collection thereof from those liable on the bond. Such deter­
mination and enforcement may be made by the court upon its
own motion or upon application of a successor personal repre­
sentative, or of any other personal representative, or of any
other interested person. The court may hear the application
at the time of settling the accounts of the defaulting personal
representative or at such other time as the court may direct.
Damages shall be assessed on behalf of all interested persons
and may be paid over to the successor or other non-defaulting
personal representative and distributed as other assets held by
the personal representative in his official capacity.

(c) Enforcement by separate suit. If the estate is al­
ready distributed, or if, for any reason, the procedure to re­
cover on the bond provided in subsection (b) hereof is in­
adequate, any interested person may bring a separate suit in a
court of competent jurisdiction on his own behalf for damages
suffered by him by reason of the default of the personal repre­
sentative.
(d) Bond not void upon first recovery. The bond of the personal representative shall not be void upon the first recovery, but may be proceeded upon from time to time until the whole penalty is exhausted.

(e) Denial of liability by surety; intervention. If the court has already determined the liability of the personal representative, the sureties shall not be permitted thereafter to deny such liability in any action or hearing to determine their liability; but the surety may intervene in any hearing to determine the liability of the personal representative.

Comment. Subsection (b) providing for summary enforcement of the bond is suggested by the provision on bonds in the Federal Bankruptcy Act. Fed. Code Ann., t. 11, § 78 n. As there is a provision for separate suit, under the Federal Act, a similar provision is made in this section of the Probate Code. It is believed that separate suits would rarely be brought, but that occasionally it would be impracticable to bring a summary action as a part of the probate proceeding.

§ 119. Limitation of action on bond. Proceedings upon the bond of a personal representative shall not be brought subsequent to two years after his discharge.

Comment. This section is modeled after the section of the Federal Bankruptcy Act limiting proceedings on receivers' or trustees' bonds. Fed. Code Ann., t. 11, § 78 m.

INVENTORY

§ 120. Inventory and appraisement.

(a) Requirements as to inventory. Within two months after his appointment, unless a longer time shall be granted by the court, every personal representative shall make and return a verified inventory and appraisement in one written instrument, of all the property of the decedent which shall come to his possession or knowledge, including a statement of all encumbrances, liens and other charges on any item. Such property shall be classified therein as follows:
(1) Real property, with plat or survey description, and if a homestead, designated as such;
(2) Furniture, household goods, and wearing apparel;
(3) Corporation stocks described by certificate numbers;
(4) Mortgages, bonds, notes and other written evidences of debt, described by name of debtor, recording data, and other identification;
(5) Bank accounts, insurance policies and money;
(6) All other personal property accurately identified, including the decedent’s proportionate share in any partnership, but no inventory of the partnership property shall be required.

(b) Requirements as to appraisement. At the time administration is granted, the court shall appoint two suitable, disinterested persons, as appraisers, to whom the personal representative shall exhibit the inventory. The appraisers shall determine and state in figures opposite each item contained in the inventory the fair net value thereof, as of the date of decedent’s death, after deducting the encumbrances, liens and charges thereon, and forthwith deliver such inventory and appraisement, certified by them under oath, to the personal representative who shall file it with the court. The appraisers shall be allowed such reasonable fees, necessary disbursements and expenses as may be fixed by the court, which shall be paid by the personal representative as expenses of administration.

(c) Dispensing with appraisers in certain cases. If the inventory shows that the estate consists solely of personal assets of definitely liquidated values, or of property of negligible value, the court may in its discretion accept the verified appraisal of the personal representative in lieu of appraisal by appraisers; and in such case the court need not appoint appraisers, or may revoke their appointment if already made.

Comment. The purpose of an inventory and appraisement is to make a record of the property belonging to the estate, to indicate its
presumptive value and to furnish the basis upon which the personal representative makes his accounts and for which he is chargeable. It also indicates to creditors and other persons interested in the estate the nature and extent of the property.


Provisions for the time of filing the inventory and appraisement vary from one to three months. The earlier filing seems preferable. However, most of the states providing for the shorter period are those in which a notice (up to one month) precedes the probate of the will and grant of letters. This ordinarily affords additional time to the interested persons to ascertain the nature and extent of the property belonging to the estate. Under this Code, administration may be granted without any notice. Hence, a two-month period was thought to be necessary but ample to make and return the inventory and appraisement.

A few statutes provide for a complete inventory of any partnership property to be included in the inventory of the individual decedent's estate. In view of the special nature of partnership property and of its primary liability for the payment of partnership debts, it was thought better not to require such an inventory. Hence, an appraisement of the decedent's proportionate interest only is provided in the above section. In general as to the administration of partnership assets, see the last paragraph of the Introduction to this Code.

The Kansas statute mentioned above provides for a separate listing of homestead and exempt property. Whether such property is homestead or exempt property would seem to require judicial determination necessitating some action by the court, rather than such a classification by appraisers or the personal representative.

A long statement as to the qualifications of appraisers is deemed unnecessary. They are merely required to be suitable and disinterested. Also, an oath by the appraisers before entering upon their duties is believed unnecessary. Their certificate of the appraisement under oath seems sufficient. As in the case of compensation for personal representatives, a reasonable compensation for the appraisers is to be determined by the court.

Where the property belonging to the estate is located in counties other than where administration is taken out some statutes provide that the court, or the judge of the probate court of such other county,
may appoint residents of such other county as appraisers for the property located therein. See Cal. Prob. Code Ann. (Deering, 1944) § 607. Other statutes contemplate the appraisal of all property wherever located by the same appraisers, and such is the effect of § 120(b) hereof.

A few statutes provide for a listing of claims against the estate along with the inventory. This serves to indicate the net worth of the estate, but it cannot be more than guess work by the personal representatives in many cases, since a much longer time is given to creditors to establish their claims. No such provision is included in the above section.

Tex. Civ. Stat. Ann. (Vernon, 1935) art. 3413 provides for the approval or disapproval of the inventory and appraisement. Such action would seem to have no particular significance in case a later question arises as to the accuracy or completeness of the inventory. See §§ 121 and 123 hereof.

A number of statutes expressly provide for citation, punishment or removal of the personal representative upon failure to make and file an inventory and appraisement or for making an imperfect one. Such a special provision seems unnecessary. The terms of § 98, hereof, would permit removal on this ground.

Statutes in a few states, notably those having the community property system, provide for a separate statement of all property held by husband and wife together. In view of the tendency to subject property held by the entirety or in joint tenancy to inheritance taxes, a provision requiring a separate statement of any property held in joint tenancy, by the entirety or by the community might be added in certain states.

§ 121. Supplementary inventory and appraisement. Whenever any property not mentioned in the inventory comes to the knowledge of a personal representative, he shall either make a supplemental inventory thereof and cause such property to be appraised, such supplemental inventory and appraisement to be returned within thirty days after the discovery thereof, or include the same in his next accounting, unless the court shall order a particular manner of return.


§ 122. Debt of executor. The naming of any person executor in a will shall not operate as a discharge or bequest of
any right of action which the testator had against such executor, but such right of action, if it survives, shall be included among the assets of the decedent in the inventory. If the personal representative is or becomes insolvent, debts owed to the decedent shall not be deemed assets in his hands in determining the liability on his bond.


§ 123. Inventory and appraisement as evidence. Inventories and appraisements may be given in evidence in all proceedings, but shall not be conclusive, and other evidence may be introduced to vary the effect thereof.

Comment. This section follows Mo. Rev. Stat. Ann. (1942) § 74. It is similar to statutes found in several states. See Fla. Stat. Ann. (1941) § 733.06.

COLLECTION AND MANAGEMENT OF ASSETS

§ 124. Possession. Every personal representative shall have a right to, and shall take, possession of all the real and personal property of the decedent except the homestead and exempt property of the surviving spouse and minor children. He shall pay the taxes and collect the rents and earnings thereon until the estate is settled or until delivered by order of the court to the distributees. He shall keep in tenantable repair the buildings and fixtures under his control and may protect the same by insurance. He may maintain an action for the possession of the real property or to determine the title to the same.

Comment. Early in the history of American probate courts there was a tendency in the administration of decedents' estates, to treat both real and personal property alike, at least for some purposes. Atkinson, "The Development of the Massachusetts Probate System," 42 Mich. L. Rev. 425, 437 (1943). However, where there is no statute, American courts now generally adhere to the common-law view that title and right to possession of personal property pass to the personal representative, but that both title and right to possession of
real property pass to the heirs or devisees immediately upon the death of decedent. 2 Woerner, Administration (3rd ed., 1923) § 185. The modern English statutory rule is that real property devolves upon the personal representative just as chattel interests formerly devolved upon him. Administration of Estates Act, 15–16 Geo. V, c. 23, § 1 (1925). No American system proceeds on the theory that title to real property passes to the personal representative. Cf. Honsinger v. Stewart, 34 N. D. 513, 159 N. W. 12 (1916). California and a few other states provide that title to both real and personal property passes to the heirs and devisees, subject to the possession of the personal representative. Cal. Prob. Code Ann. (Deering, 1944) § 300. However, the California Probate Code (§ 571) declares that the personal representative must take possession of all real and personal property. See also §§ 574, 575, 581, 582 of the California Probate Code. Statutes in other states depart from the common-law rule but only give the personal representative the permissive right to possess the real property. Kan. Gen. Stat. (Supp. 1943) § 59–1401; Minn. Stat. (1941) § 525.34; Nev. Comp. Laws (Supp. 1941) § 9882.106; Wis. Stat. (1943) § 312.04. It seems preferable that the personal representative should have not only the right but also the duty of possession of the entire estate until distributed or delivered over to the heir or devisee upon a showing that it is not needed for the purposes of administration. Section 124 therefore follows the California code in this regard. See also §§ 6, 84, 152, 182 and 183 of the Model Probate Code. See generally Simes and Basye, "Organization of the Probate Court in America," 43 Mich. L. Rev. 113, 123-125 (1944); note, 21 Iowa L. Rev. 793 (1936).

§ 125. Assets for payment of creditors' claims. The real and personal property liable for the payment of debts of a decedent shall include all property transferred by him with intent to defraud his creditors or any of them, or transferred by any other means which is in law void as against his creditors or any of them; and the right to recover such property, so far as necessary for the payment of the debts of the decedent, shall be exclusively in the personal representative, who shall take such steps as may be necessary to recover the same. Such property shall constitute general assets for the payment of all creditors; but no property so transferred shall be taken from
anyone who purchased it for a valuable consideration, in good faith and without knowledge of the fraud.

Comment. In view of the uncertainty and consequent litigation which has arisen concerning the subject matter of this section, it is desirable to have the applicable rule clearly stated. As to conflicting doctrines, see Evans, "The Intermeddler and the Fraudulent Trans­feree as Executor," 25 Georgetown L. J. 78 (1936), and cases cited in 148 A. L. R. 230. For statutes similar to this section, see Kan. Gen. Stat., (Supp. 1943) § 59-1411 and Vt. Pub. Laws (1933) § 2881. This section is consistent with the Uniform Fraudulent Conveyances Act. It will supplement that act in the jurisdictions where the act has been adopted.

§ 126. Compromise. When it appears for the best in­terest of the estate, the personal representative may on order of the court effect a fair and reasonable compromise with any debtor or other obligor, or extend, renew or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge or other lien upon property of another person, he may, in lieu of foreclosure, accept a conveyance or transfer of such encumbered assets from the owner thereof in satisfaction of the indebtedness secured by such lien, if it appears for the best interest of the estate and if the court shall so order. In the absence of prior authorization or subsequent approval of the court, no compromise shall bind the estate.

Comment. This section follows in part Minn. Stat. (1941) § 525.36 and Cal. Prob. Code Ann. (Deering, 1944) § 578. The second sentence is a counterpart of § 147 and that part of § 149 which provides for conveyances by the personal representative of property belonging to the estate to the holder of an encumbrance, in satisfaction thereof, in whole or in part.

§ 127. Conversion.

(a) When realty treated as personalty. Unless fore­closure shall have been completed and the redemption period shall have expired prior to the death of a decedent, real prop­
erty mortgages, the interest in the mortgaged premises conveyed thereby and the debt secured thereby or any real property acquired by the personal representative in settlement of a debt or liability shall be deemed personal assets in the hands of his personal representative and be distributed and accounted for as such, but any sale, mortgage, lease or exchange of any such real property shall be made pursuant to sections 150 to 171 inclusive unless otherwise provided in the will.

(b) When personalty treated as realty. In all cases of a sale of real property by a personal representative upon order of the court the surplus of the proceeds of such sale remaining on the final settlement of the account shall be considered as real property and disposed of among the persons and in the same proportions as the real property would have been if it had not been sold.

Comment. Subsection (a) is modeled in part after Ohio Gen. Code (Page, 1937) § 10509-68, Wis. Stat. (1943) § 312.10 and Minn. Stat. (1941) § 525.38. As real and personal property are treated alike in this Code, this section is unnecessary for most purposes and will be infrequently applied. But it may nevertheless be desirable in cases where a will distinguishing between real and personal property must be construed in connection with the administration of an estate. Subsection (b) follows Wis. Stat. (1943) § 316.43.

§ 128. Abandonment of property. When any property is valueless, or is so encumbered, or is in such condition that it is of no benefit to the estate, the court may order the personal representative to abandon it.

Comment. This section follows Minn. Stat. (1941) § 525.401.

§ 129. Property embezzled or converted. If any person embezzles or converts to his own use any of the personal property of a decedent before the appointment of a personal representative, such person shall be liable to the estate for the value of the property so embezzled or converted. No person shall be charged as executor de son tort.
Comment. The term "any person," as used in this section, includes the personal representative. This section follows Minn. Stat. (1941) § 525.392.

§ 130. Disclosure and determination of title to property. Upon the filing of a petition by the personal representative or any other person interested in the estate, alleging that any person has, or is suspected to have, concealed, embezzled, converted or disposed of any real or personal property belonging to the estate of a decedent, or has possession or knowledge of any such property or of any instruments in writing relating to such property, the [ ] court, upon such notice as it may direct, may order such person to appear before it for disclosure, and may finally adjudicate the rights of the parties before the court with respect to such property. In so far as concerns parties claiming an interest adverse to the estate, such procedure for disclosure or to determine title is an independent proceeding and not within section 62 hereof.

Comment. The term "any person," as used in this section, includes the personal representative. This section is a combination of Minn. Stat. (1941) § 525.85, Kan. Gen. Stat. (Supp. 1943) § 59-2216, and Wis. Stat. (1943) § 312.06. See also Mich. Stat. Ann. (1943) §§ 27.3178(385) and (386), and Ill. Ann. Stat. (Smith-Hurd, Supp. 1943) c. 3, §§ 335 to 339. Legal or equitable remedies are always available to recover property belonging to the estate. Most states, however, provide some summary proceedings in the probate court for making discovery. Some make such proceedings plenary, empowering the court, after a hearing, to determine title and compel the surrender of such property. Some statutes are very elaborate in describing the procedure to be followed. In line with the more recent codes, the details of such procedure are not incorporated in this section, but left to the general sections on procedure. It is contemplated, however, that the proceeding be had in the court exercising probate jurisdiction and adequate notice be given and full opportunity be afforded to present evidence both in support of and in opposition to the petition. If the person mentioned in the petition has knowledge only, but not possession, of the property, the rights of third persons cannot be affected without making them parties.
This section does not allow recovery on a chose in action owed to the decedent. No good reason is perceived why the personal representative should not proceed in the usual way by independent action to recover against the obligor.

It should be noted that, wherever this section is applied to determine the title to real or personal property as between the parties, it resembles an action at law in ejectment or replevin. For that reason it may well be that the person proceeded against could insist on a constitutional right to a jury trial. To that effect are Tappy v. Kilpatrick, 337 Ill. 600, 169 N. E. 739 (1930); Johnson v. Nelson, 341 Ill. 119, 173 N. E. 77 (1930); Matter of Wilson, 252 N. Y. 155, 169 N. E. 122 (1929). If it is desired to make sure that a jury trial could be secured in the matter involved in this section, the following language could be added at the end of § 130: "Any interested person is entitled to a jury trial of the issues of fact in accordance with the provisions of section 18." It should be noted that, even though this addition is not made, a jury trial could be secured on an issue of fact within this section under the provisions of § 18, provided the court determines that it is within the protection of the constitutional provision as to jury trial.

§ 131. Continuation of business. Upon a showing of advantage to the estate, the court may authorize the personal representative to continue any business of the decedent for the benefit of the estate; but if the decedent died testate and his estate is solvent, the order of the court shall be subject to the provisions of the will. The order may be with or without notice. If notice is not given to all interested persons before the order is made, notice of the order shall be given within five days after the order, and any such person not previously notified by publication or otherwise may show cause why the order should be revoked or modified. The order may provide:

(a) For the conduct of the business solely by the personal representative or jointly with one or more of the decedent's surviving partners, or as a corporation to be formed by the personal representative;

(b) The extent of the liability of the estate, or any part thereof, or of the personal representative, for obligations incurred in the continuation of the business;
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(c) As to whether liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate set aside for use in the business or to the estate as a whole; and

(d) As to the period of time for which the business may be conducted, and such other conditions, restrictions, regulations and requirements as the court may order.


§ 132. Contract to convey or lease land.

(a) Procedure applicable to cases generally. When any person legally bound to make a conveyance or lease dies before making the same, the court, with or without notice, may direct the personal representative to make the conveyance or lease to the person entitled thereto. A petition for this purpose may be made by any person claiming to be entitled to such conveyance or lease, or by the personal representative, or by any other person interested in the estate or claiming an interest in the real property or contract, and shall show the description of the land and the facts upon which such claim for conveyance or lease is based. Upon satisfactory proofs the court may order the personal representative to execute and deliver an instrument of conveyance or lease to the person entitled thereto upon performance of the contract.

(b) Warranties and recording. If the contract for a conveyance requires the giving of warranties, the deed to be given by the personal representative shall contain the warranties required. Such warranties shall be binding on the estate as though made by the decedent but shall not bind the personal representative personally. A certified copy of the order may be recorded with the deed of conveyance in the
office of the [register of deeds] of the county where the land lies, and shall be prima facie evidence of the due appointment and qualification of the personal representative, the correctness of the proceedings and the authority of the personal representative to make the conveyance.

(c) Conveyance or lease under testamentary power. If a personal representative has been given power by will to make a conveyance or lease, he may, in lieu of the foregoing procedure, and without order of the court, execute a conveyance or lease to the person entitled thereto upon performance of the contract.

Comment. If the inventory describes the contract binding the decedent to make such a conveyance or lease, this may be sufficient to justify the court in ordering the conveyance without notice under subsection (a).

The last sentence of subsection (b) is highly significant as a method of simplifying land title problems by making the deed and order of court, in and of themselves, adequate and sufficient evidence to be recorded and shown on an abstract of title for the purpose of showing a marketable title. This is intended to eliminate the necessity of showing the appointment of the personal representative, his qualifications, and the numerous other orders in an administration proceeding usually regarded as necessary to meet the requirements of a marketable title.

This section follows partly Minn. Stat. (1941) § 525.69 and partly Wis. Stat. (1943) § 316.38. Its primary purpose is to provide for a simple and expeditious method for conveying the legal title to land under a contract made by the decedent as vendor during his lifetime but which remained uncompleted at the time of his death. The power to do this is essentially equitable and is one which the probate court would not be able to exercise in the absence of statute. It involves the completion of a contract which the decedent himself would have been under obligation to complete had he been alive. The kind and manner of notice to be given is to be provided for by the order of court in setting the petition for hearing.

§ 133. Investment of funds. Subject to his primary duty to preserve the estate for prompt distribution, and to the terms of the will, if any, the personal representative shall, whenever
it is reasonable to do so, invest the funds of the estate and make them productive. Such investments shall be restricted to the kinds of investments permitted to trustees by the laws of this state.

§ 134. Bank deposits. Whenever it is consistent with a proper administration of the estate, the personal representative may deposit, as a fiduciary, the funds of the estate in a bank in this state as a general deposit, either in a checking account or in a savings account.

Comment. See § 108 and comment thereon.

CLAIMS

§ 135. Limitations on filing of claims.

(a) Statute of nonclaim. Except as provided in section 136, all claims against a decedent’s estate, other than expenses of administration and claims of the United States, but including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent, unless filed with the court within four months after the date of the first published notice to creditors.

(b) Statute of limitations. No claim shall be allowed which was barred by any statute of limitations at the time of decedent’s death.

(c) When statute of nonclaim not affected by statutes of limitation. No claim shall be barred by the statute of limitations which was not barred thereby at the time of the decedent’s death, if the claim shall be filed within four months after the date of the first published notice to creditors.

(d) Claims barred when no administration commenced. All claims barrable under the provisions of sub-
section (a) hereof shall, in any event, be barred if administra-
tion of the estate is not commenced within five years after the
death of the decedent.

(e) Liens not affected. Nothing in this section shall af-
fect or prevent any action or proceeding to enforce any mort-
gage, pledge or other lien upon property of the estate.

Comment. This section covers the usual statute of nonclaim,
statutes of limitations, and cases where a conflict may result if both are
applied. The language of subsection (a) is traditional except that it
includes claims of the state or any subdivision thereof. Subsections
(b) and (c) are often found in separate sections but are included here
because of their close relationship to one another. Subsection (c)
takes care of the case where the statute of limitations expires after the
date of the decedent’s death but before the statute of nonclaim. For
discussion of this last problem see Cook, “Executors and Adminis-
trators—Comparison of Nonclaim Statutes and the General Statute
of Limitations,” 36 Mich. L. Rev. 973 (1938). Compare subsec-
tion (d) with § 83, which prohibits the appointment of a personal
representative and the probate of a will after five years.

The older view was that the purpose of a nonclaim statute is to
protect the personal representative, and that it does not prevent a
creditor from asserting his claim against an heir, devisee or legatee who
has received assets. This view, however, is abandoned today, at least
to the extent that most claims, other than contingent claims, are barred
as to distributees as well as to the personal representative by the opera-
tion of the nonclaim statute. In the case of the contingent claim, how-
ever, the position has been taken that it is unfair to the creditor to
compel him to file before he is certain either of the amount or of the
existence of his claim. And since the distributee is a donee and not a
bona fide purchaser, it is thought that he should be liable whenever the
contingent claim becomes absolute. For well drawn statutory provi-
sions which accomplish this objective, see Ohio Gen. Code (Page,
1937 and 1944 Supp.) §§ 10509–112, and 10509–216 to 10509–
223. On the other hand, the tendency of modern legislation is defi-
nitely to bar contingent claims along with other claims by the operation
of the nonclaim statute. For a statute of this kind, see Fla. Stat. Ann.
(1941) § 733.16. And, in general, see the discussion in 41 Mich. L.
Rev. 920 (1943). If contingent claims are not barred, the dis-
tributee can never spend his legacy or his inheritance safely; for he
never would know when such a claim would be asserted against him.
Moreover, such provisions are in accordance with the policy of the
Federal Bankruptcy Act and with modern legislation for the liquidation of corporations. Death of a debtor is a hazard which all creditors should assume, and if the creditor seeks to avoid it, he can do so by taking security for his claim. The provisions of this section are in accordance with this view, and bar the contingent creditor who does not file. It is true, the court may then make an order to the effect that the claim, if the contingency happens, will constitute a liability of the distributees; and on a distribution under such circumstances, distributees would be reluctant to spend their legacies, but at least they know the character of the claim. Under the older view they have no way of knowing what claims may be asserted against them at some future time. If it is sought to follow the view that contingent claims need not be filed in order to be asserted as a liability against distributees, then it is suggested that the provisions of the Ohio statute be considered as a model. But if this change is made, it should be noted that changes must also be made in §§ 137, 140, 141 and 183.

Subsection (e) includes judgment liens which arose before the death of the decedent. The lien would be treated as a secured claim under § 139. But compare § 145 as to judgments where there is no lien.

§ 136. Commencement of separate action or revivor equivalent to filing of claim. The provisions of section 135 shall not preclude the commencement or continuance of separate actions against the personal representative as such for the debts and other liabilities of the decedent, if commenced or revived within the periods stated in section 135. Any action pending against any person at the time of his death, which survives against the personal representative, shall be considered a claim duly filed against the estate from the time such action is revived. Any action commenced against a personal representative as such after the death of the decedent shall be considered a claim duly filed against the estate from the time such action is commenced. Nothing in this section shall impair the individual liability of the personal representative for his own acts and contracts in the administration of the estate.

§ 137. Form and verification of claims.

(a) General requirements. No claim shall be allowed against an estate on application of the claimant unless it shall be in writing, describe the nature and the amount thereof, if ascertainable, and be accompanied by the affidavit of the claimant or someone for him that the amount is justly due, or if not yet due, when it will or may become due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant, except as therein stated. If the claim is contingent, the nature of the contingency shall also be stated.

(b) Requirements when claim founded on written instrument. If a claim is founded on a written instrument, the original or a copy thereof with all indorsements must be attached to the claim. The original instrument must be exhibited to the personal representative or court, upon demand, unless it is lost or destroyed, in which case its loss or destruction must be stated in the claim.

Comment. This section provides the form to be followed in filing every kind of claim. The provision of subsection (b) is found in many forms. The language used in this section follows Cal. Prob. Code Ann. (Deering, 1944) §§ 705 and 706, which was found to be among the best of the many statutes examined. For the meaning of "offsets," see § 144 hereof and comment thereto.

§ 138. Claims not due. Upon proof of a claim which will become due at some future time, the court shall allow it at the present value thereof, and payment may be made as in the case of an absolute claim which has been allowed: provided, if the obligation upon which such claim was founded was entered into before the effective date of this Code, payment may be made as above, if the creditor agrees thereto; otherwise the court may order the personal representative to retain in his hands sufficient funds to satisfy the claim upon maturity; or if the
distributees shall give a bond to be approved by the court for the payment of the creditor's claim in accordance with the terms thereof, the court may order such bond to be given in satisfaction of such claim and the estate may be closed.

Comment. This section is similar to Wis. Stat. (1943) § 313.07 and Kan. Gen. Stat. (Supp. 1943) § 59-2240. The first sentence of this statute expresses the general policy to be achieved by it. It is restricted by its terms to claims which are certain to become due in the future, but does not include contingent claims. As to the contracts entered into before the effective date of this statute, however, it would be unconstitutional. The second sentence is added to provide an alternative method for the payment of such unmatured claims and has the effect of making the section comply with constitutional requirements. Compare § 2 (b).

§ 139. Secured claims. When a creditor holds any security for his claim the security shall be described in the claim. If the claim is secured by a mortgage, pledge or other lien which has been recorded, it shall be sufficient to describe the lien by date, and refer to the volume, page and place of recording. The claim shall be allowed in the amount remaining unpaid at the time of its allowance, and the judgment allowing it shall describe the security. Payment of the claim shall be upon the basis of the full amount thereof if the creditor shall surrender his security; otherwise payment shall be upon the basis of one of the following:

(a) If the creditor shall exhaust his security before receiving payment, then upon the full amount of the claim allowed less the amount realized upon exhausting the security; or

(b) If the creditor shall not have exhausted or shall not have the right to exhaust his security, then upon the full amount of the claim allowed less the value of the security determined by converting the same into money according to the terms of the agreement pursu-
ant to which the security was delivered to the creditor, or by the creditor and personal representative by agreement, arbitration, compromise or litigation, as the court may direct.

Comment. This section follows in part Cal. Prob. Code Ann. (Deering, 1944) § 706, Minn. Stat. (1941) § 525.441 and Kan. Gen. Stat. (Supp. 1943) § 59.1303. The alternative methods for payment follow the principle laid down in the Bankruptcy Act, § 57 h, and the Uniform Act Governing Secured Creditors' Dividends in Liquidation Proceedings. Any state desiring to adopt or having already adopted the Uniform Act should simply provide at this place in its probate code that the allowance and payment of secured claims shall be made pursuant to the provisions of that act.

§ 140. Contingent claims. Contingent claims which cannot be allowed as absolute debts shall, nevertheless, be filed in the court and proved. If allowed as a contingent claim, the order of allowance shall state the nature of the contingency. If such claim shall become absolute before distribution of the estate, it shall be paid in the same manner as absolute claims of the same class. In all other cases the court may provide for the payment of contingent claims in any one of the following methods:

(a) The creditor and personal representative may determine, by agreement, arbitration or compromise, the value thereof, according to its probable present worth, and upon approval thereof by the court, it may be allowed and paid in the same manner as an absolute claim.

(b) The court may order the personal representative to make distribution of the estate but to retain in his hands sufficient funds to pay the claim if and when the same becomes absolute; but for this purpose the estate shall not be kept open longer than two years after distribution of the remainder of the estate has been made; and if such claim has not become absolute
within that time, distribution shall be made to the distributees of the funds so retained, after paying any costs and expenses accruing during such period and such distributees shall be liable to the creditor to the extent of the estate received by them, if such contingent claim thereafter becomes absolute. When distribution is so made to distributees, the court may require such distributees to give bond for the satisfaction of their liability to the contingent creditor.

(c) The court may order distribution of the estate as though such contingent claim did not exist, but the distributees shall be liable to the creditor to the extent of the estate received by them, if the contingent claim thereafter becomes absolute; and the court may require such distributees to give bond for the performance of their liability to the contingent creditor.

Comment. This section provides alternative methods for the disposition of contingent claims. Many statutes do not provide for contingent claims at all. In many instances those that do provide for them do so incompletely or unsatisfactorily. The above section has some of the provisions of the following statutes: Mich. Stat. Ann. (1943) §§ 27.3178(435), (436), (438), (439), Wis. Stat. (1943) §§ 313.22, 313.25 and the Bankruptcy Act, § 57d.

§ 141. Payment of contingent claims by distributees; contribution. If a contingent claim shall have been filed and allowed against an estate and all the assets of the estate including the fund, if any, set apart for the payment thereof, shall have been distributed, and the claim shall thereafter become absolute, the creditor shall have the right to recover thereon in the [ ] court against those distributees whose distributive shares have been increased by reason of the fact that the amount of said claim as finally determined was not paid out prior to final distribution, provided an action therefor shall be commenced within six months after the claim becomes ab-
solute. Such distributees shall be jointly and severally liable, but no distributee shall be liable for an amount exceeding the amount of the estate or fund so distributed to him. If more than one distributee is liable to the creditor, he shall make all distributees who can be reached by process parties to the action. By its judgment the court shall determine the amount of the liability of each of the defendants as between themselves, but if any be insolvent or unable to pay his proportion, or beyond the reach of process, the others, to the extent of their respective liabilities, shall nevertheless be liable to the creditor for the whole amount of his debt. If any person liable for the debt fails to pay his just proportion to the creditor, he shall be liable to indemnify all who, by reason of such failure on his part, have paid more than their just proportion of the debt, the indemnity to be recovered in the same action or in separate actions.


§ 142. Classification of claims and allowances. At the time of their allowance, all claims and allowances shall be classified in one of the following classes. If the applicable assets of the estate are insufficient to pay all claims and allowances in full, the personal representative shall make payment in the following order:

1. Costs and expenses of administration.
2. Reasonable funeral expenses.
3. Allowance made to the surviving spouse and children of the decedent.
4. All debts and taxes having preference under the laws of the United States.
5. Reasonable and necessary medical expenses of the last sickness of the decedent, including compensation of persons attending him.

6. All debts and taxes having preference under the laws of this state; but no personal representative shall be required to pay any taxes on any property of the decedent unless such taxes are due and payable before possession thereof is delivered by the personal representative pursuant to the provisions of this Code.

7. All other claims allowed.

No preference shall be given in the payment of any claim over any other claim of the same class, nor shall a claim due and payable be entitled to a preference over claims not due.

Comment. The statutes on classification of claims vary somewhat in their method of classification. The above section (1) provides that each claim shall be classified upon its allowance and (2) specifies the order of priority in the payment of expenses of administration, claims and allowances in case the estate is insolvent. The provisions of the last sentence follow Kan. Gen. Stat. (Supp. 1943) § 59-1301. It should be noted that the allowance under 3 is that referred to in § 44 hereof; but it does not include the homestead and exempt property referred to in §§ 42 and 43, since the latter are not liable for the expenses of administration nor for funeral expenses, and do not constitute assets for any purpose except to benefit the family.

It should be pointed out that the first three classes of claims and allowances designated in this section are not debts of the decedent. Under federal statutes as interpreted by the courts, debts due to the United States must be satisfied before other debts due from the deceased. See 31 Fed. Code Ann. §§ 191, 192; United States v. Weisburn, (D. C. Pa. 1943) 48 F. Supp. 393; United States v. Pate, (D. C. Ark. 1942) 47 F. Supp. 965. For this reason, debts owed to the United States are placed in the fourth class, ahead of all other debts owed by the decedent.

§ 143. Allowance of claims.

(a) In general. Except as provided in subsection (b) hereof, no claimant shall be entitled to payment unless his claim shall have been duly filed and allowed by the court.
Each court may provide by rule for the hearing and disposition of claims filed therein, or may set any individual claim or claims for hearing irrespective of rule. Upon the adjudication of any claim the court shall allow it in whole or in part, or disallow it. The order allowing the claim shall have the effect of a judgment and bear interest at the legal rate, unless the claim provides for a higher rate in which case the judgment shall be rendered accordingly. Except in case of the personal representative's own claim, any claim which is approved by him in writing and which has been duly filed, may be allowed by the court at any time without formal hearing.

(b) Expenses of administration. Claims for expenses of administration may be allowed upon application of the claimant or of the personal representative, or may be allowed at any accounting, regardless of whether or not they have been paid by the personal representative.

Comment. The above section follows in part Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 350; Minn. Stat. (1941) § 525.42, and Kan. Gen. Stat. (Supp. 1943) § 59-2237. In a number of jurisdictions, the statutes guarantee a jury trial in a litigation to determine a claim. Indeed, it is entirely possible that it might be held that actions on claims are within constitutional guaranties of trial by jury. See comment to § 18 hereof. If it is desired to insure a jury trial of issues of fact concerning claims, the following sentence should be added to § 143(a): "Either the creditor or the personal representative is entitled to a jury trial of common law issues of fact in accordance with the provisions of § 18." Of course, a jury trial can be secured under the provisions of § 18 without this sentence, if the court is convinced that the situation is within existing constitutional guaranties.

As to claims of the personal representative, see § 146 hereof. As to the individual liability of the personal representative for expenses of administration, see § 136.

§ 144. Offsets to claims. On or before the hearing on any claim, the personal representative shall file a statement of all offsets claimed against the creditor. Upon the hearing of claims and offsets the court shall determine the amount due by
and against the estate and shall render judgment in favor of or against the estate for the net amount. If a judgment is rendered against a claimant for any net amount, execution may issue in the same manner as on judgments in civil cases. An offset may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the claim of the creditor.

*Comment.* The last sentence of § 144 is substantially the same as Fed. Rules of Civ. Proc., Rule 13(c). The word "offset" has been used here and in § 137 instead of "counterclaim" which appears in the Federal Rules. "Offset" is used in California, in the states which follow its code and in Minnesota and Kansas. As indicated in the above section it includes unliquidated claims and claims for specific property.

§ 145. Execution and levies prohibited. No execution shall issue upon nor shall any levy be made against any property of the estate under any judgment against a decedent or a personal representative, but the provisions of this section shall not be construed to prevent the enforcement of mortgages, pledges or liens upon real or personal property in an appropriate proceeding.

*Comment.* This section withdraws the estate of a decedent from ordinary execution by creditors and subjects it solely to the orderly process of administration. This may be implied from the other provisions of the Code but is included here to remove all doubts as to the matter and also to specifically authorize such executions as are necessary for the enforcement of liens upon the property of the estate. See Fla. Stat. Ann. (1941) § 733.19.

§ 146. Claims of personal representative. If the personal representative is a creditor of the decedent, he shall file his claim as other persons and the court may appoint any suitable person, whether interested in the estate or not, to represent the estate on the hearing thereof.
§ 147. Compromise of claims. When a claim against the estate has been filed or suit thereon is pending, the creditor and personal representative may, if it appears for the best interests of the estate, compromise the claim, whether due or not due, absolute or contingent, liquidated or unliquidated. In the absence of prior authorization or subsequent approval by the court, no compromise shall bind the estate.


§ 148. Payment of claims. Upon the expiration of four months after the date of the first published notice to creditors and the final adjudication of all claims filed against the estate, the personal representative shall proceed to pay the claims allowed against the estate in accordance with the provisions of this Code. If it appears at any time that the estate is or may be insolvent, that there are insufficient funds on hand, or that there is other good and sufficient cause, the personal representative may report that fact to the court and apply for any order that he deems necessary in connection therewith. Prior to the expiration of such period of four months, the personal representative shall pay such of said claims as the court shall order, and the court may require bond or security to be given by the creditor to refund such part of such payment as may be necessary to make payment in accordance with the provisions of this Code, but all payments made by the personal representative without order of court shall be at his own peril.

§ 149. Encumbered assets. When any assets of the estate are encumbered by mortgage, pledge or other lien, the personal representative may pay such encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance or may convey or transfer such assets to the creditor in satisfaction of his lien, in whole or in part, whether or not the holder of the encumbrance has filed a claim, if it appears to be for the best interest of the estate and if the court shall so order. The making of such payment shall not increase the share of the distributee entitled to such encumbered assets.

Comment. The above section follows Minn. Stat. (1941) § 525.442 and Kan. Gen. Stat. (Supp. 1943) § 59-1304. See also Wis. Stat. (1943) § 316.47. The following related sections of this Code should be noted: § 126, as to a compromise in lieu of foreclosure of a lien; § 135, as to the inapplicability of the nonclaim statute to liens; § 139, as to marshalling assets in satisfaction of secured claims; § 143, as to a hearing on claims; § 161, as to a sale of mortgaged real property subject to the lien, and § 189, as to the exoneration of encumbered property.

SALES, MORTGAGES, LEASES, EXCHANGES

In General

§ 150. No priority between real and personal property. In determining what property of the estate shall be sold, mortgaged, leased or exchanged for any purpose provided in section 152, there shall be no priority as between real and personal property, except as provided by the will, if any, or by order of the court or by the provisions of section 184.

Comment. Since the historical distinction between real and personal property is becoming less important, and because of the widespread tendency to subject real property to the possession and control of the personal representative during the period of administration to the same extent as personal property, as is done in §§ 84 and 124 of this Code, it is desirable to express this assimilation in connection with sales and similar transactions. The substance of this section is taken from Cal. Prob. Code Ann. (Deering, 1944) § 754.
§ 151. When power given in will. When power to sell, mortgage, lease or exchange property of the estate has been given to any personal representative under the terms of any will, the personal representative may proceed under such power, or may proceed under the provisions of this Code, as he may determine.

Comment. The purpose of this section is to recognize as valid testamentary provisions to sell, mortgage, lease or exchange property, and also to provide that the personal representative may nevertheless proceed under the terms of this Code. The latter course may be deemed by him to be for the best interests of the estate, or the power given to him may be doubtful or inadequate. Statutes of this kind exist in several states. See Ohio Gen. Code (Page, Supp. 1944) § 10510–1; Fla. Stat. Ann. (1941) § 733.22.

§ 152. Transfer under court order; purposes. Any real or personal property belonging to an estate may be sold, mortgaged, leased or exchanged under court order when necessary for any of the following purposes:

(a) For the payment of claims allowed against the estate;
(b) For the payment of any allowance made to the surviving spouse and minor children of the decedent;
(c) For the payment of any legacy given by the will of the decedent;
(d) For the payment of expenses of administration;
(e) For the payment of any gift, estate, inheritance or transfer taxes assessed upon the transfer of the estate or due from the decedent or his estate;
(f) For making distribution of the estate or any part thereof;
(g) For any other purpose in the best interests of the estate.

Comment. In the absence of provisions in the will, a statute was necessary to authorize a sale in all cases where the decedent had not taken affirmative steps to make the land liable for his debts. Gradually these purposes have been broadened, many of the statutory purposes...
appearing in current statutes being that expressed in (g), viz., for any purpose beneficial to the estate. Thus if a small tract of land were to be divided among many heirs or devisees, some of whom were under disabilities, a serious problem of marketability would be presented if it were distributed to them in kind. Under this section it could be sold by the personal representative and the proceeds distributed, thus eliminating a difficult and otherwise expensive problem for the interested persons. The above section was taken in part from N. Y. Surr. Ct. Act, § 234.

It should be noted that a sale cannot be ordered solely on the ground that there is any rule of law to the effect that it is necessary to make distribution in cash. See § 190 hereof.

§ 153. Order to sell, mortgage or lease to be refused if bond given. An order authorizing a personal representative to sell, mortgage or lease real or personal property for the payment of obligations of the estate shall not be granted if any of the persons interested in the estate shall execute and file in the court a bond in such sum and with such sureties as the court may approve, conditioned to pay all obligations of the estate to the extent that the other property of the estate is insufficient therefor, within such time as the court shall direct. An action may be maintained on such bond by the personal representative on behalf of any person interested in the estate who is prejudiced by breach of any obligation of the bond.


§ 154. Terms of sale. In all sales of real or personal property, the court may authorize credit to be given by the personal representative for a period not exceeding one year from the date of his qualification and for an amount not exceeding fifty per cent of the purchase price, the payment of which shall be secured by notes or bonds with approved sureties or by a purchase money mortgage. If credit is authorized, the order shall specify the time of payment, the minimum rate of interest on deferred payments and the manner in which such
payments shall be secured. If the estate is solvent, credit may be extended by the personal representative for a time longer than one year with the written consent of the distributees.


§ 155. When personal representative may purchase.

Any personal representative may purchase, take a mortgage on, lease or take by exchange, real or personal property belonging to the estate, but such transaction shall always be reported to the court and be subject to confirmation.

Comment. This section modifies the common law rule as to the fiduciary duty owed by a trustee or personal representative. However, in the interests of benefit to the estate, a few statutes have relaxed the common law rule by provisions of this kind. See Fla. Stat. Ann. (1941) § 733.31 and Pa. Stat. Ann. (Purdon, Supp. 1944) t. 20, § 714.1. Since such transactions are to be reported to the court and confirmed, this section is believed to be desirable. Of course, report and confirmation would be required without this section in the case of real property (see § 166), but in the case of personal property it is not generally required. See § 158.

§ 156. Purchase by holder of lien.

At any sale of real or personal property upon which there is a mortgage, pledge or other lien, the holder thereof may become the purchaser and may apply the amount of his lien on the purchase price in the following manner. If no claim thereon has been filed or allowed, the court, at the hearing on the report of sale and for confirmation of the sale, may examine into the validity and enforceability of the lien or charge and the amount due thereunder and secured thereby and may authorize the personal representative to accept the receipt of such purchaser for the amount due thereunder and secured thereby as payment pro tanto. If such mortgage, pledge or other lien is a valid claim against the estate and has been allowed, the receipt of the purchaser for the amount due him from the proceeds of the
sale is a payment pro tanto. If the amount for which the property is purchased, whether or not such claim was filed or allowed, is insufficient to defray the expenses and discharge his mortgage, pledge or other lien, the purchaser must pay an amount sufficient to pay the balance of such expenses. Nothing permitted under the terms of this section shall be deemed to be an allowance of a claim based upon such mortgage, pledge or other lien.

Comment. This section is taken in substance from Cal. Prob. Code Ann. (Deering, 1944) § 764. It includes liens on property owned by the estate for the payment of which the estate was not liable, as where the decedent purchased property subject to a mortgage but did not assume its payment, or where a mortgagee could have filed a claim but did not do so.

§ 157. Validity of proceedings. No proceedings for sale, mortgage, lease, exchange or conveyance by a personal representative of property belonging to the estate shall be subject to collateral attack on account of any irregularity in the proceedings if the court which ordered the same had jurisdiction of the estate.

Comment. This section is the modern version of a statute intended to be a substitute for the Massachusetts statute of 1836 based upon the philosophy of that time that probate courts were courts of limited and inferior jurisdiction, but that their sales should be upheld unless defective in certain particulars. The above section is taken from Minn. Stat. (1941) § 525.70 (first adopted in 1935 at which time their statute based upon the early Massachusetts statute was repealed) and is predicated upon the assumption that probate courts now have the same superior status within their sphere as do courts of general jurisdiction. It should be noted that, according to § 62 hereof, failure to give the required notice is not jurisdictional and therefore under § 157 would not invalidate the transfer.

Personal Property

§ 158. Sale, mortgage or lease of personal property. A personal representative may file a petition to sell, mortgage
or lease any personal property belonging to the estate. The petition shall set forth the reasons for the application and describe the property involved. The petition may be heard with or without notice as the court may direct. Notice of the hearing, if required, shall state briefly the nature of the application and shall be given as provided in section 14 hereof. At the hearing and upon proof of the petition the court may order the sale, mortgage or lease of the property described or any part thereof, at such price and upon such terms and conditions as the court shall require. No report or confirmation of such transaction shall be necessary except as required by section 155 or as required by the court; but no sale, mortgage or lease, except as provided in section 159, shall be valid unless prior authorization or subsequent approval of the court is secured.

Comment. If report and confirmation are ordered the procedure in § 166 would be followed.

§ 159. Sales of perishable or depreciable property. Perishable property and other personal property which will depreciate in value if not disposed of promptly, or which will incur loss or expense by being kept, and so much other personal property as may be necessary to provide allowance to the surviving spouse and children pending the receipt of other sufficient funds, may be sold without notice, and title shall pass without confirmation; but the personal representative shall be responsible for the actual value of the property unless, after making a report of such sale, and on a proper showing, the court shall approve the sale.

Comment. This section follows Cal. Prob. Code Ann. (Deering, 1944) § 770.

§ 160. Sale, mortgage or lease of real and personal property as a unit. Whenever it is for the best interests of the estate, real and personal property of the estate may be sold, mortgaged or leased as a unit, but the provisions of this Code
with respect to the sale, mortgage or lease of real property shall apply so far as may be.

**Real Property**

§ 161. Petition to sell, mortgage or lease real property; notice; hearing. A personal representative may file a petition to sell, mortgage or lease any real property belonging to the estate. The petition shall set forth the reasons for the application and describe the property involved. It may apply for different authority as to separate parts of the property; or it may apply in the alternative for authority to sell, mortgage or lease. Upon the filing of the petition, the court shall fix the time and place for the hearing thereof, provided, however, that as to any real property which was last appraised at not more than $500, the court may, in its discretion, hear the petition without notice. Notice of the hearing shall state briefly the nature of the application and shall be given as provided in section 14 hereof. At the hearing and upon satisfactory proofs, the court may order the sale, mortgage or lease of the property described or any part thereof. When a claim secured by a mortgage on real property is, under the provisions of this Code, payable at the time of distribution of the estate or prior thereto, the court with the consent of the mortgagee may, nevertheless, order the sale of the real property subject to the mortgage, but such consent shall release the estate should a deficiency later appear.

*Comment.* This section is taken partly from Minn. Stat. (1941) § 525.64 and Kan. Gen. Stat. (Supp. 1943) § 59-2304. As to the matter of increasing the bond of the personal representative on a sale, see § 115 hereof. To the effect that notice is not jurisdictional, see § 62 hereof.

§ 162. Quieting adverse claims. Upon any petition to sell or mortgage real property the court shall have power to investigate and determine all questions of conflicting and con-
troverted title, remove clouds from any title or interest involved, and invest purchasers or mortgagees with a good and indefeasible title to the property sold or mortgaged. When the petition to sell or mortgage seeks such relief notice shall be given as in civil actions of like nature and the court is authorized to issue appropriate process and notices in order to obtain jurisdiction to so proceed against adverse parties.


§ 163. Order for sale, mortgage or lease of real property. The order shall describe the property to be sold, mortgaged or leased and may designate the sequence in which the several parcels shall be sold, mortgaged or leased. An order for sale shall direct whether the property shall be sold at private sale or public auction, and, if the latter, the place or places of sale. If real property is to be sold it shall direct that the same shall not be sold for less than the appraised value; or if real property is to be leased, it shall direct that the same shall not be leased for less than the appraised rental value. An order of sale shall direct whether the sale shall be for cash or for cash and deferred payments, and the terms on which such deferred payments are to be made. If real property is to be mortgaged, it shall fix the maximum amount of principal, the maximum rate of interest, the earliest and latest date of maturity, and shall direct the purpose for which the proceeds shall be used. An order for sale, mortgage or lease shall remain in force until terminated by the court, but no sale or lease shall be made after one year from the date of the order unless the real property or rental value thereof shall have been reappraised under order of the court within three months preceding the sale or lease.

§ 164. **Appraisement of real property.** Before any personal representative shall sell or lease any real property he shall, unless the court directs that he be permitted to use the appraisal filed with the inventory, have it appraised by two disinterested persons appointed by the court, who are residents of the county in which at least part of it lies. The appraisers shall appraise such real property or its rental value, as the case may be, at its full and fair value, and forthwith deliver the appraisement certified by them under oath to the personal representative.

Comment. Corresponding to § 120 providing for the making of an inventory and appraisement, two appraisers only are provided for. The above section follows in substance Kan. Gen. Stat. (Supp. 1943) § 59-2307.

§ 165. **Sales at public auction.** In all sales of real property at public auction the personal representative shall give notice thereof particularly describing the property to be sold, and stating the time, terms, and place of sale. The notice shall be published once a week for three consecutive weeks in some newspaper, authorized to publish legal notices, of the county in which the real property is situated, but if no newspaper is published in the county or the real property is appraised at not more than $500, the personal representative may, in lieu of publication, post a copy of the notice in three public places in the county where the real property or some part thereof lies, at least two weeks before the sale is made. If the notice is published, the date set for the sale shall not be earlier than one day nor later than seven days after the date of the third publication of notice. Proof of publication or posting shall be filed before confirmation of the sale. If the tracts to be sold are contiguous and lie in more than one county, notice may be given and the sale made in either county. The personal representative may adjourn the sale from time to
time, if for the best interests of the estate, but not for longer than three months in all. Every adjournment shall be announced publicly at the time and place fixed for the sale.


§ 166. Report and confirmation. Within ten days after making any sale, mortgage or lease of real property, the personal representative shall make a verified report of his proceedings to the court, with the certificate of appraisement in case special appraisement is required, and with proof of publication or posting in case the sale is made at public auction, which report shall state that he did not directly or indirectly acquire any beneficial interest in the real property, or the lease thereof, except as stated in his report. Any person interested in the estate desiring to object to confirmation may file objections in writing, setting forth the reasons therefor. The court shall examine said report and if satisfied that the sale, mortgage or lease has been at the price and terms most advantageous to the estate and in all respects made in conformity with law and ought to be confirmed, shall confirm the same and order the personal representative to make a deed, mortgage, lease or other proper instruments to the person entitled thereto; but no report shall be confirmed within five days after the filing thereof unless all persons interested in the estate shall in person, or by attorney or guardian, consent in writing to such confirmation, or unless, in the opinion of the court, such delay would not be for the best interests of the estate. Such instrument shall refer to the order of sale, mortgage or lease by its date, and the court by which it was made, and shall transfer to the grantee, mortgagee or lessee all the right, title and interest of the decedent granted by the instrument, discharged from liability for all debts and obligations incident to the admin-
administration of the estate, except encumbrances assumed. If not satisfied that the sale, mortgage or lease has been made in conformity with law or that it is for the best interests of the estate, the court may reject the sale, mortgage or lease or require a re-execution of the order upon such terms and conditions as it may direct.


§ 167. Execution of conveyance or other instrument by personal representative; recording. Upon the confirmation of any sale, mortgage or lease in accordance with section 166, the personal representative shall execute a conveyance to the grantee or mortgagee or a lease with the lessee according to the order of confirmation. A certified copy of the order may be recorded with the deed or other instrument in the office of the [register of deeds] of the county where the land lies, and shall be prima facie evidence of the due appointment and qualification of the personal representative, the correctness of the proceedings and the authority of the personal representative to execute the instrument.

Comment. This section corresponds to § 132 providing for a conveyance by the personal representative under a land contract executed by the decedent. The purpose of both of these sections is to simplify land title problems by making the deed of the personal representative and the order of the court confirming the transaction adequate and sufficient evidence to be recorded and shown on the abstract of title for the purpose of showing a marketable title, thus eliminating the necessity of showing all the antecedent steps at the probate proceedings.

No attempt is made to set out in this Code the rules with respect to the rights of purchasers where the title of the decedent totally fails. Common law doctrines deal with that situation adequately; and it would be unsatisfactory to state them in statutory form. As to these doctrines, see Atkinson, Wills (1937) 635, 636.
§ 168. Taxes not to be liens in hands of transferee. The lien of the state for inheritance or estate taxes shall not extend to any interest acquired by a purchaser, mortgagee, or lessee through any transfer made by a personal representative under a power contained in a will or under order of the court.

Comment. The purpose of this section is to make it clear that the disposition of property for the payment of taxes shall pass title to such property free from such claims. Otherwise purchasers would not buy and the purpose of authorizing the disposition of property would be thwarted.

This section is modeled after Minn. Stat. (1941) § 525.693 and Wash. Rev. Stat. (Supp. 1940) § 11201. The Washington statute was amended after the decision in In re Kennedy's Estate, 188 Wash. 84, 61 P. (2d) 998 (1936).

§ 169. Brokers' fees and title documents. In connection with the sale, mortgage, lease or exchange of property, the court may authorize the personal representative to pay, out of the proceeds realized therefrom or out of the estate, the customary and reasonable auctioneers' and brokers' fees and any necessary expenses for abstracting, title insurance, survey, revenue stamps and other necessary costs and expenses in connection therewith.


§ 170. Platting. When it is for the best interests of the estate in order to dispose of real property, the court, upon application by the personal representative or any other interested person, may authorize the personal representative, either alone or together with other owners, to plat any land belonging to the estate in accordance with the statutes in regard to platting.

Comment. For other statutes authorizing a personal representative to plat real estate see Minn. Stat. (1941) § 525.68 and Wis. Stat. (1943) § 316.10.
§ 171. Exchange of property. Whenever it shall appear upon the petition of the personal representative or of any person interested in the estate to be to the best interests of the estate to exchange any real or personal property of the estate for other property, the court may authorize the exchange upon such terms and conditions as it may prescribe, which may include the payment or receipt of part cash by the personal representative. If personal property of the estate is to be exchanged, the proceedings required for the sale of such property shall apply so far as may be; if real property of the estate is to be exchanged, the procedure for the sale of such property shall apply so far as may be.

Comment. This section is similar in substance to Cal. Prob. Code Ann. (Deering, 1944) § 860. See also N. Y. Surr. Ct. Act, § 250—a authorizing exchanges by testamentary trustees under the direction of the court.

ACCOUNTING

§ 172. Liability of personal representative.

(a) Property of estate. Every personal representative shall be liable for and chargeable in his accounts with all of the estate of the decedent which comes into his possession at any time, including all the income therefrom; but he shall not be accountable for any debts due to the decedent or other assets of the estate which remain uncollected without his fault. He shall not be entitled to any profit by the increase, nor be chargeable with loss by the decrease in value or destruction without his fault, of any part of the estate.

(b) Property not a part of estate. Every personal representative shall be chargeable in his accounts with property not a part of the estate which comes into his hands at any time, and shall be liable to the persons entitled thereto, if

1. The property was received, under a duty imposed on him by law in the capacity of personal representative; or
(2) He has commingled such property with the assets of the estate.

(c) **Breach of duty.** Every personal representative shall be liable and chargeable in his accounts for neglect or unreasonable delay in collecting the credits or other assets of the estate or in selling, mortgaging or leasing the property of the estate; for neglect in paying over money or delivering property of the estate he shall have in his hands; for failure to account for or to close the estate within the time provided by this Code; for any loss to the estate arising from his embezzlement or commingling of the assets of the estate with other property; for loss to the estate through self-dealing; for any loss to the estate arising from wrongful acts or omissions of his co-representatives which he could have prevented by the exercise of ordinary care; and for any other negligent or wilful act or nonfeasance in his administration of the estate by which loss to the estate arises.

*Comment.* Section 172(b) (1) covers cases of damages received under wrongful death statutes, or appointed property where the decedent was the donee of a general power of appointment and was insolvent.

Section 172(b) (2) includes a situation where a personal representative commingles the proceeds of a life insurance policy with assets of the estate, although the estate is not the beneficiary of the policy. For a discussion of this matter, see 29 Va. L. Rev. 951 (1943).

§ 173. **Duty to close estate.** Every personal representative shall close the estate as promptly as possible. The time for closing the estate shall not exceed nine months from the filing of the petition for the appointment of a personal representative unless for cause the time is extended by the court.

§ 174. **When personal representative must account.** Every personal representative must file in the court a verified account of his administration

(a) Upon filing a petition for final settlement;
(b) Upon the revocation of his letters;
(c) Upon his application to resign and before his resignation is accepted by the court;
(d) Annually during the period of administration unless the court otherwise directs;
(e) At any other time when directed by the court either of its own motion or on the application of any interested person.

§ 175. What accounts to contain. Accounts rendered to the court by a personal representative shall be for a period distinctly stated and shall consist of three schedules, of which the first shall show the amount of the property according to the inventory, or, if there be a prior accounting, the amount of the balance of the next prior account, and all income and other property received, and gains from the sale of any property or otherwise; the second shall show payments, charges, losses and distributions; the third shall show the property on hand constituting the balance of such account, if any, by reference to the inventory or otherwise. When an account is filed, the personal representative shall also file receipts for disbursements of assets made during the period covered by the account. The court may provide for an inspection of the balance of assets on hand.

Comment. This is modeled after Mass. Ann. Laws (1932) c. 206, § 2. See § 143(b) as to administration expenses to be allowed at accounting before payment.

§ 176. Account to include petition for settlement and distribution. At the time of filing of an account the personal representative shall petition the court to settle and allow his account; and if the estate is in a proper condition to be closed, he shall also petition the court for an order authorizing him to distribute the estate, and shall specify in the petition the per-
sons to whom distribution is to be made and the proportions or parts of the estate to which each is entitled.

§ 177. Hearing on settlement of account; notice. Upon the filing of any account, the matter shall be set for hearing and notice thereof shall be given. If there is also a petition for distribution, it shall be heard at the same time as the account, and the notice of hearing on the account shall so state.

§ 178. Objections to account. At any time prior to the hearing on an account of a personal representative, any interested person may file written objections to any item or omission in the account. All such objections shall be specific and shall indicate the modification desired.

§ 179. Conclusiveness of order settling account. Upon the approval of the account of a personal representative, the personal representative and his sureties shall, subject to the right of appeal and to the power of the court to vacate its final orders, be relieved from liability for the administration of his trust during the accounting period, including the investment of the assets of the estate. The court may disapprove the account in whole or in part and surcharge the personal representative for any loss caused by any breach of duty.

§ 180. Statement of receipts and disbursements after final account and before final distribution. Any receipts and disbursements of the personal representative subsequent to the filing of his final account must be reported to the court before making final distribution. A settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the court and included in the order of distribution, or the court may treat such statement as a supplementary account and order notice to be given as in other cases of the settlement of accounts.

§ 181. Account of deceased or incompetent personal representative. If the personal representative dies or becomes incompetent, his account may be presented by his personal representative or the guardian of his estate to, and settled by, the court in which the estate of which he was personal representative is being administered, and, upon petition of the successor of the deceased or incompetent personal representative, the court shall compel the personal representative or guardian of the deceased or incompetent personal representative to render an account of the administration of the estate of the decedent and the court shall settle the account as in other cases.

Comment. This is substantially identical with Cal. Prob. Code Ann. (Deering, 1944) § 932.

DISTRIBUTION AND DISCHARGE

§ 182. Partial distribution.
(a) Delivery of specific property to distributee before final decree. Upon application of the personal representative or of any distributee, with or without notice as the court may direct, the court may order the personal representative to deliver to any distributee who consents to it, possession of any specific real or personal property to which he is entitled under the terms of the will or by intestacy, provided that other distributees and claimants are not prejudiced thereby. The court may at any time prior to the decree of final distribution order him to return such property to the personal representative, if it is for the best interests of the estate. The court may require the distributee to give security for such return.

(b) Distribution of part of estate. After the expiration of the time limited for the filing of claims and before final
settlement of the accounts of the personal representative, a partial distribution may be decreed, with notice to interested persons, as the court may direct. Such distribution shall be as conclusive as a decree of final distribution with respect to the estate distributed except to the extent that other distributees and claimants are deprived of the fair share or amount which they would otherwise receive on final distribution. Before a partial distribution is so decreed, the court may require that security be given for the return of the property so distributed to the extent necessary to satisfy any distributees and claimants who may be prejudiced as aforesaid by the distribution.

Comment. The two subsections of § 182 are designed to accomplish quite different things. The purpose of subsection (a) is to take care of a case where there is a specific thing which can much more conveniently remain in the possession of an heir or devisee than of the personal representative. Thus, a musical instrument, a painting or a valuable piece of furniture would have to be stored by the personal representative at the expense of the estate unless some such provision as this exists. This subsection also applies to real estate so that a specific tract of land may under its terms be turned over to a particular distributee.

Subsection (b), unlike the preceding subsection, provides for a more or less final distribution of a part of the estate. The partial distribution may consist either in a cash payment or in the distribution of specific real or personal property. Subsection (a), on the other hand, merely involves the handing over of the possession of specific things for all or a part of the period of distribution, and may be employed merely for the convenience of the personal representative.

§ 183. Decree of final distribution.
(a) Petition for decree. After the expiration of the time limit for the filing of claims, and after all claims against the estate, including state and federal inheritance and estate taxes, have been finally determined and paid, except contingent and unmatured claims which cannot then be paid, the personal representative shall; if the estate is in a condition to be closed, render his final account and at the same time petition the court
to decree the final distribution of the estate. Notice of the
hearing of the petition shall be given to all interested persons.

(b) **What decree to include.** In its decree of final dis-
tribution, the court shall designate the persons to whom
distribution is to be made, and the proportions or parts of the
estate, or the amounts, to which each is entitled under the will
and the provisions of this Code, including the provisions re-
respect of advancements, election by the surviving spouse, lapse,
renunciation, adjudicated compromise of controversies and
retainer. Every tract of real property so distributed shall be
specifically described therein. The decree shall find that all
state and federal inheritance and estate taxes are paid; and if
all claims have been paid, it shall so state; otherwise the decree
shall state that all claims except those therein specified are
paid and shall describe the claims for the payment of which a
special fund is set aside, and the amount of such fund; if any
contingent claims which have been duly allowed are still un-
paid and have not become absolute, such claims shall be
described in the decree, which shall state whether the distri-
butees take subject to them. If a fund is set aside for the
payment of contingent claims, the decree shall provide for the
distribution of such fund in the event that all or a part of it is
not needed to satisfy such contingent claims. If a decree of
partial distribution has been previously made, the decree of
final distribution shall expressly confirm it, or, for good cause,
shall modify said decree and state specifically what modifica-
tions are made.

(c) **Provisions for deceased distributees.** If a distrib-
butee dies before distribution to him of his share of the estate,
such share may be distributed to the personal representative
of his estate, if there be one; or if no administration on his
estate is had and none is necessary according to the provisions
of sections 86 to 91 inclusive, hereof, the share of such dis-
tributee shall be distributed in accordance therewith.
(d) **Conclusiveness of decree.** The decree of final distribution shall be a conclusive determination of the persons who are the successors in interest to the estate of the decedent and of the extent and character of their interests therein, subject only to the right of appeal and the right to reopen the decree. It shall operate as the final adjudication of the transfer of the right, title and interest of the decedent to the distributees therein designated; but no transfer before or after the decedent's death by an heir or devisee shall affect the decree, nor shall the decree affect any rights so acquired by grantees from the heirs or devisees.

(e) **Recording of decree.** Whenever the decree of final distribution includes real property, a certified copy thereof shall be recorded by the personal representative in every county of this state in which any real property distributed by the decree is situated. The cost of recording such decree shall be charged to the estate.

*Comment.* Under the provisions of this Code, the decree of final distribution, and not the will, is the significant muniment of title. Hence, if real estate is involved, provision is made for recording a copy of the former but not of the latter. If this is done, no one should, or is likely to, purchase real estate in reliance on the will, even though it has been admitted to probate; but he will rely solely on the recorded, certified copy of the decree of distribution.

It is believed that little would be gained and considerable confusion would result if it were provided, as some states do, that the property may be distributed to the assignee of an heir or devisee. See part (3) of the appendix note to this section. This section does not deny the right of the assignee to pursue an appropriate remedy to reach the interests of his assignor, nor does it prevent his intervention at various stages of the probate proceeding as an interested person under § 3(k).

**§ 184. Order in which assets appropriated; abatement.**

(a) **General rules.** Except as provided in subsection (b) hereof, shares of the distributees shall abate, for the payment of claims, legacies, the family allowance, the shares of pretermitted heirs or the share of the surviving spouse who elects to
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take against the will, without any preference or priority as between real and personal property, in the following order:

1. Property not disposed of by the will;
2. Property devised to the residuary devisee;
3. Property disposed of by the will but not specifically devised and not devised to the residuary devisee;
4. Property specifically devised.

A general devise charged on any specific property or fund shall, for purposes of abatement, be deemed property specifically devised to the extent of the value of the thing on which it is charged. Upon the failure or insufficiency of the thing on which it is charged, it shall be deemed property not specifically devised to the extent of such failure or insufficiency.

(b) Contrary provisions, plan or purpose. If the provisions of the will or the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a) hereof, the shares of distributees shall abate in such other manner as may be found necessary to give effect to the intention of the testator.

Comment. A testator may determine the order in which the assets of his estate are applied to the payment of his debts. If he does not, then the provisions of this section lay down rules which may be regarded as approximating his intent. However, his intent may be indicated not only by an express designation of a property or fund or by an express statement of the order in which assets are to be applied, but also by the implied purpose of the devise or by the general testamentary plan. Thus, it is commonly held that, even in the absence of statute, general legacies to a wife, or to persons with respect to which the testator is in loco parentis, are to be preferred to other legacies in the same class because this accords with the probable purpose of the legacies. Moreover, the general testamentary plan is often important in determining matters of abatement when the surviving spouse elects to take against the will. The same may be true where abatement takes place to provide for the share of a pretermitted heir. The provisions of subsection (b) embrace these and other situations of similar character.
§ 185. Contribution. When real or personal property which has been specifically devised, or charged with a legacy, shall be sold or taken by the personal representative for the payment of claims, general legacies, the family allowance, the shares of pretermitted heirs or the share of a surviving spouse who elects to take against the will, other legatees and devisees shall contribute according to their respective interests to the legatee or devisee whose legacy or devise has been sold or taken, so as to accomplish an abatement in accordance with the provisions of section 184 hereof. The court shall, at the time of the hearing on the petition for final distribution, determine the amounts of the respective contributions and whether the same shall be made before distribution or shall constitute a lien on specific property which is distributed.

§ 186. Determination of advancements. All questions of advancements made, or alleged to have been made, by an intestate to any heir may be heard and determined by the court at the time of the hearing on the petition for final distribution. The amount of every such advancement shall be specified in the decree of final distribution.

§ 187. Right of retainer. When a distributee of an estate is indebted to the estate, the amount of the indebtedness if due, or the present worth of the indebtedness, if not due, may be treated as an offset by the personal representative against any testate or intestate property, real or personal, of the estate to which such distributee is entitled; but such distributee shall be entitled to the benefit of any defense which would be available to him in a direct proceeding for the recovery of such debt.

Comment. With the exception of the last clause, this is substantially the same as Ohio Gen. Code (Page, 1937) § 10509-186. The last clause follows Ala. Code (1940) t. 61, § 360, and marks a departure from the common-law rule according to which the right of
retainer was permitted with respect to debts barred by the statute of limitations or a discharge in bankruptcy. This prevents litigation such as has arisen in connection with these matters. See comment in 34 Mich. L. Rev. 395 (1936). As to the broad meaning of "offset," see § 144 and comment thereto.

§ 188. Interest on general legacies. General legacies shall bear interest at the legal rate for a period beginning nine months from the filing of the petition for the appointment of a personal representative until the payment of such legacies, unless a contrary intent is indicated by the will.

§ 189. Exoneration of encumbered property. When any real or personal property subject to a mortgage is specifically devised, the devisee shall take such property so devised subject to such mortgage unless the will provides expressly or by necessary implication that such mortgage be otherwise paid. The term "mortgage" as used in this section shall not include a pledge of personal property.

Comment. The purpose of this section is to abolish the common-law rule that the devise of specific property subject to an encumbrance is entitled to exoneration out of the personal estate. The basis of the common-law rule that the personal estate has benefited from the creation of the debt all too often has no foundation in fact. The other basis of the rule that the decedent's personalty is the primary fund for the payment of debts is no longer tenable. Furthermore, it is contrary to the express provisions of § 150 of this Code.

The doctrine of exoneration in any case rests upon an expressed or presumed intention. Consequently the terms of the act are restricted to mortgages, which include by definition vendors' liens and deeds of trust. See § 3(q) hereof. But pledges of personal property are excluded from the operation of this section.

The language of this section follows N. Y. Dec. Est. Law, § 20, which in turn was borrowed from the English Real Estate Charges Act, 17-18 Vict., c. 113 (1854), as amended by 30-31 Vict., c. 69 (1867) and 40-41 Vict., c. 34 (1877). Compare § 149 hereof, which deals with the privilege of the personal representative to pay off encumbrances, as distinguished from this section, which deals with the right of the distributee to require the personal representative to pay off encumbrances.
§ 190. Payment to distributees in kind.

(a) When distributees to take in kind. When the estate is otherwise ready to be distributed, it shall be distributed in kind, unless the terms of the will otherwise provide or unless a partition sale is ordered. Except as provided in subsection (b) hereof, any general legatee may elect to take the value of his legacy in kind, and any distributee, who by the terms of the will is to receive land or any other thing to be purchased by the personal representative, may, if he notifies the personal representative before the thing is purchased, elect to take the purchase price or property of the estate which the personal representative would otherwise sell to obtain such purchase price.

(b) Exception where will directs purchase of annuity. If the terms of the will direct the purchase of an annuity, the person to whom the income thereof shall be directed to be paid shall not have the right to elect to take the capital sum directed to be used for such purchase in lieu of such annuity except to the extent that the will expressly provides that an assignable annuity be purchased. Nothing herein contained shall affect the rights of election by a surviving spouse against a testamentary provision as provided in this Code.

Comment. It is not clear in all jurisdictions that a distributee of personal property can elect to take a general or residuary legacy in any form except in cash. See Atkinson, Wills (1937) §§ 229, 262. However, it would seem that there is no good reason why the distributee should not be permitted to take in kind if he desires. Such is the effect of subsection (a) hereof.

If a testator directs his executor to purchase specific property and deliver it to a devisee, it is commonly held that the devisee may elect to take the money set aside for this purpose. See cases collected in 130 A. L. R. 1379 at 1394. This is because the devisee could immediately sell the property and get the money, and it would be a useless thing to compel him to take the property if he prefers the money set aside for its purchase. That situation, however, is clearly distinguishable from a direction in the will to purchase an annuity. The only reason for such a direction is that the testator wished the legatee to have an as-
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sured income for life, and did not wish to give him a lump sum which he might spend foolishly. Thus, to allow the legatee to take the price of the annuity would defeat the testator's intent. If the legatee receives the annuity, he cannot readily convert it into cash; indeed, by the terms of the annuity contract, it may not be assignable at all. The direction in a will to purchase an annuity for a legatee is doubtless intended to operate much like a trust to pay income to a named beneficiary and to withhold the principal until a future date. Thus, if A devises a sum of money to T on trust to pay the income to B until B is thirty years of age, and then to pay him the corpus of the trust, the great weight of authority in the United States is to the effect that the trust is indestructible until B reaches the named age, and that the beneficiary cannot demand a termination of the trust prior to that time. The leading case to that effect is Claflin v. Claflin, 149 Mass. 19, 20 N. E. 454 (1889). And see Restatement, Trusts (1935) § 337, comment j; 3 Scott, Trusts (1939) § 337·3. In England, however, it is held that the sole beneficiary of such a trust, who is sui juris, may secure a termination of the trust. Saunders v. Vautier, 4 Beav. 115 (1841). Following the analogy of Claflin v. Claflin, supra, it would seem that American courts should hold that, even in the absence of statute, a direction in a will that an annuity be purchased should be given effect and that the legatee cannot demand the price of the annuity. It was, indeed, so held in Berry v. President and Directors of the Bank of Manhattan Co., 133 N. J. Eq. 164, 31 A. (2d) 203 (1943). But in Parker v. Cobe, 208 Mass. 260, 94 N. E. 476 (1911), and in a few other cases, it was held that the annuitants could demand the price of the annuity. It is possible that these cases may have been influenced by English decisions to that effect and may have overlooked the fact that the English cases could be justified under the doctrine of Saunders v. Vautier, supra, which is not the law in most of the United States. In New York it was necessary to provide by legislation that the annuitant, in the situation under consideration, cannot receive the price of his annuity if that is contrary to the intent of the testator as indicated by the will. See Estate of Cole, 219 N. Y. 435, 114 N. E. 785, Ann. Cas. 1918 E 807 (1916); N. Y. Dec. Est. Law, § 47b. The New York statute is believed to establish the better rule. Such is the effect of subsection (b) hereof. In general, see 3 Scott, Trusts (1939) § 346; 41 Mich. L. Rev. 276 (1942).

§ 191. Partition for purpose of distribution. When two or more distributees are entitled to distribution of undivided interests in any real or personal property of the estate,
distribution shall be made of undivided interests therein unless the personal representative or one or more of such distributees shall petition the court not later than the hearing on the petition for final distribution, to make partition thereof. If such petition is filed, the court, after such notice to all interested persons as it shall direct, shall proceed to make partition, allot and divide the property in the same manner as provided by the statutes with respect to civil actions for partition, so that each party receives property of a value proportionate to his interest in the whole, and for that purpose the court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party. If partition is made in kind, the court may appoint two commissioners to partition said property, who shall have the powers and perform the duties of [commissioners] in civil actions for partition, and the court shall have the same powers with respect to their report as in such actions. In case equal partition cannot be had between the parties without prejudice to the rights or interests of some, partition may be made in unequal shares and by awarding judgment for compensation to be paid by one or more parties to one or more of the others. Any two or more parties may agree to accept undivided interests. Any sale under this section shall be conducted and confirmed in the same manner as other probate sales. The expenses of the partition, including reasonable compensation to the commissioners for their services, shall be equitably apportioned by the court among the parties, but each party must pay his own attorney's fees. The amount charged to each party shall constitute a lien on the property allotted to him.


§ 192. Disposition of unclaimed assets.

(a) Heirs unknown. If there shall be no known heir of the decedent, all of his net estate not disposed of by will shall
be ordered paid to the [state treasurer] to become a part of the [state escheat fund], subject to the further provisions of this section.

(b) Unclaimed property or money. If any distributee or claimant cannot be found, the personal representative shall sell the share of the estate to which he is entitled, pursuant to an order of court first obtained, and pay the proceeds to the [state treasurer] to become a part of the [state escheat fund].

(c) Receipts to be given and filed. When the personal representative shall pay any money to the [state treasurer] pursuant to this section, he shall take a receipt therefor and file it with the court with the other receipts filed in the proceeding. Such receipt shall be sufficient to discharge the personal representative in the same manner and to the same extent as though such distribution or payment were made to a distributee or claimant entitled thereto.

(d) Refunds of money so paid. The moneys received by the [state treasurer] pursuant to the provisions of this section shall be paid to the person entitled on proof of his right thereto or, if the [state treasurer] refuses or fails to pay because he is doubtful as to his duties in the premises, such person may apply to the court in which the estate was administered, whereupon the court upon notice to the [state treasurer] may determine the person entitled thereto and order the [treasurer] to pay the same accordingly. No interest shall be allowed thereon and such distributee or claimant shall pay all costs and expenses incident to the proceedings. If such proceeds are not paid or no application is made to the court within seven years after such payment to the [state treasurer], no recovery thereof shall be had.

Comment. See § 22(b)(6) as to escheat.

§ 193. Discharge of personal representative. Upon the filing of receipts or other evidence satisfactory to the court that distribution has been made as ordered in the final decree,
the court shall enter an order of discharge. The discharge so obtained shall operate as a release from the duties of personal representative and shall operate as a bar to any suit against the personal representative and his sureties unless such suit be commenced within two years from the date of the discharge.

Comment. This section follows very closely the language of Fla. Stat. Ann. (1941) § 734.23. There is danger of confusion arising from the language of some statutes, as to the precise significance of the term discharge. As used in this Code, a discharge does not mean that the personal representative is thenceforth absolved from all liability for his acts in his official capacity. As this section clearly indicates, he is not relieved from liability for past acts by a discharge, but merely ceases to be under any further duties to act as personal representative. Therefore, the last clause of this section is needed to bar his liability for past acts by lapse of time, if no suit is brought. Of course, the settlement of the account of a personal representative would be a bar to most proceedings to impose liability for his acts prior to that time. See § 179.

§ 194. Reopening administration. If, after an estate has been settled and the personal representative discharged, other property of the estate shall be discovered, or if it shall appear that any necessary act remains unperformed on the part of the personal representative, or for any other proper cause, the court, upon the petition of any person interested in the estate and, without notice or upon such notice as it may direct, may order that said estate be reopened. It may reappoint the personal representative or appoint another personal representative to administer such property or perform such acts as may be deemed necessary. Unless the court shall otherwise order, the provisions of this Code as to an original administration shall apply to the proceedings had in the reopened administration so far as may be; but no claim which is already barred can be asserted in the reopened administration.

Comment. Under the provisions of this section, an estate may be reopened solely for the purpose of determining distributees. See comment to § 195. In such a case no appointment of a personal representative is necessary.
§ 195. Determination of heirship.

(a) When proceedings may be had. Whenever any person has died leaving property or any interest therein and no administration has been commenced on his estate in this state, nor has any will been offered for probate in this state, within five years after his death, any person claiming an interest in such property as heir or through an heir may file a petition in any court which would be of proper venue for the administration of such decedent's estate, to determine the heirs of said decedent and their respective interests as heirs in the estate.

(b) Contents of petition. The petition shall state

1. The name, age, domicile and date of death of the decedent;

2. The names, ages and residence addresses of the heirs, so far as known or can with reasonable diligence be ascertained;

3. The names and residence addresses of any persons claiming any interest in such property through an heir, so far as known or can with reasonable diligence be ascertained;

4. A particular description of the property with respect to which such determination is sought;

5. The net value of the estate.

(c) Procedure. Upon the filing of the petition, the court shall fix the time for the hearing thereof, notice of which shall be given to

1. All persons known or believed to claim any interest in the property as heir or through an heir of the decedent,

2. All persons who may at the date of the filing of the petition be shown by the records of conveyances of the county in which any real prop-
erty described in such petition is located to
claim any interest therein through the heirs of
the decedent and

(3) Any unknown heirs of the decedent.
Such notice shall be given by publication and, in addition, per­
sonal notice or notice by registered mail shall be given to every
such person whose address is known to the petitioner. Upon
satisfactory proofs the court shall make a decree determining
the heirs of said decedent and their respective interests as heirs
in said property.

(d) **Certified copy of decree to be recorded.** A certified
copy of the decree shall be recorded at the expense of the peti­
tioner in each county in which any real property described
therein is situated, and shall be conclusive evidence of the facts
determined therein as against all parties to the proceedings.

*Comment.* In the administration of a decedent’s estate normally
the heirs will be determined in connection with the decree of distribution
on final settlement. In two situations, however, something more is
needed: (1) where the decree of distribution fails to cover some of
the property of the estate, either because its existence was unknown at
the time of the decree, because it was then believed to have belonged to
some person other than the decedent or merely because of a mistake
in the wording of the decree; and (2) where no administration has
been commenced and the time for commencing administration has, by
the provisions of § 83, expired. In the first situation, no determination
of heirship, as such, is needed. The administration can be reopened
under the provisions of § 194 solely for the purpose of amending the
decree of distribution, and the modifications of this decree will ac­
complish everything which a separate determination of heirship could
accomplish. The provisions of this section are, therefore, limited to the
second situation. Here, neither probate nor administration is possible
because the five-year limitation provided in § 83 operates as a bar.
Moreover, under § 135(d) all creditors’ claims would be barred as
no administration is commenced within five years after the decedent’s
death.

The sole purpose of this section is to determine the title to the
property of the estate or to a designated part of it. Only after the ex­
piration of the five-year period is this possible, since otherwise the rights
of creditors must be determined, and the proceeding for the determi-
nation of heirship does not deal with creditors' rights. If a determination of heirship is desired prior to the expiration of the five-year period of limitation, a proceeding to administer the estate or to probate the will should be initiated; or, if it has already been initiated and closed, it should be reopened.

PART IV. GUARDIANSHIP

INTRODUCTORY COMMENT

Few fields of the law have been as much neglected in recent decades as that of guardianship. Even the recent probate codes, while they have advanced the statutory law of administration of decedents' estates, have apparently considered the law of guardianship as a relatively unimportant appendage. Recent decisions on the subject are seldom of a distinguished character. Little periodical literature exists and there has not been a standard American text exclusively devoted to the field since Woerner's American Law of Guardianship appeared in 1897.

Like Topsy, the law of guardianship just grew, and it grew in a very illogical fashion. At common law the father and on his death the mother was the natural guardian of minor children without judicial appointment, and, as such, entitled to their custody. Ferguson v. Phoenix Mut. Life Ins. Co., 84 Vt. 350, 79 A. 997 (1910). By statute in many states the father and mother are entitled to joint custody, e.g., Cal. Civ. Code (Deering, 1941) § 197. Parents, of course, have the duty to support their minor children, but as parents they have no control over the property of the children except the right to the children's earnings. These phases of the law are parts of the law of parent and child, which this Code assumes but with which it does not specifically deal. See, however, § 224(b).

The cases sometimes speak of one who wrongfully takes possession of an incompetent's property or assumes to act as his guardian without authority, as a de facto guardian or guardian de son tort. Kies v. Brown, 222 Iowa 54, 268 N. W. 910 (1936). However, this office is a mere fiction—Burch v. State, 4 Gill & J. (Md.) 444 (1832)—and the remedy of the lawful guardian or of the incompetent upon becoming competent proceeds upon ordinary principles of the law of torts or restitution.

Guardianship in chivalry, or the right of the lord to take charge of the infant's person and property, was abolished by 12 Car. II, c. 24 and never prevailed in this country. Guardianship by socage arose our
of land held in socage tenure. It devolved upon the nearest of kin who could not inherit the property and terminated when the minor became fourteen years of age. N. Y. Dom. Rel. Law, § 80, provides for guardianship of property with the rights, powers and duties of a guardian in socage. However, the common law peculiarities of this form of guardianship no longer exist in New York and the term is of little significance there. Matter of De Saulles, 101 Misc. 447, 167 N. Y. S. 445 (1917); Woerner, Guardianship (1897) §§ 14, 23.

By virtue of an English statute, 12 Car. II, c. 24, § 8, a father by his will could appoint a guardian of the person and of the estate of his children during their minority. This testamentary guardianship sprang from the will and required no judicial confirmation. In the United States the testamentary guardianship is common. Some statutes make no requirement of judicial confirmation but the tendency has been to require the guardian so nominated to qualify and give bond just as any other guardian. Woerner, Guardianship (1897) §§ 15, 20; Madden, Domestic Relations (1931) § 147. This Code does not recognize the office of testamentary guardian as such. It requires judicial appointment in all cases, though under § 203 the court is directed to give due regard to the parent's testamentary request for the appointment of a designated person as guardian.

At an early date the English Court of Chancery assumed jurisdiction to appoint guardians (at least of the estate) of minors. This was a general guardianship, quite distinct from the office of guardian ad litem. Woerner, Guardianship (1897) § 16. This phase of equity power has been recognized in some of the states of this country, resulting in concurrent jurisdiction to appoint guardians in equity and probate courts. Matter of De Saulles, 101 Misc. 447, 167 N. Y. S. 445 (1917); In re Sall, 59 Wash. 539, 110 P. 32, 626 (1910). More generally perhaps, the jurisdiction over guardianships given by state constitutions and statutes to courts of probate has been deemed to be exclusive and to prevent courts of equity from exercising such power. Denton v. James, 107 Kan. 729, 193 P. 307, 12 A. L. R. 1146 (1920); Leclerc v. Leclerc, 85 N. H. 121, 155 A. 249, 74 A. L. R. 1348 (1931). As to the distinction between appointment of a guardian of the person and the award of custody in a divorce case, compare the last cited case with Stafford v. Stafford, 299 Ill. 438, 132 N. E. 432 (1921), where the court of equity had general jurisdiction over guardianships. The wording of § 199 of this Code, of course, precludes the possibility of a chancery guardian.

Failure on the part of some members of the profession to realize the precise legal status of the estate under guardianship has been the source of much difficulty. This matter is well considered in an opinion
of Chief Justice Shaw in Conant v. Kendall, 21 Pick. (38 Mass.) 36, 38 (1838):

"There is considerable difficulty in treating the estate of a ward, in the custody and under the control of a guardian, as an estate held in trust by the guardian. He is appointed to take charge of the property and manage it for the benefit of the ward; but apparently the property remains vested in the ward, so that upon the death or resignation of the guardian there is no change of property. There is a manifold distinction in this respect, between the case of a guardian and that of an executor or administrator. The original owner being dead, the personal property must vest in some one; and by operation of law it vests in the executor or administrator, and is deemed so vested by relation, from the decease of the owner."

There is no reason why this rule and the concomitant principles that the guardian acts in his own name, incurs personal liability for his acts and is sued in his own name with reference to such acts, securing reimbursement in proper cases from the estate, may not be changed by statute. However, the Model Probate Code proceeds in the main upon orthodox principles. See §§ 227, 228. There is no special nonclaim statute relative to claims, as there is in some states. Title to the property is in the ward, § 221.

The Code does depart from common law in certain important respects. Thus, one having a claim of any nature against the ward or the guardian may procure its allowance by filing a claim with the court. § 227. Again, all actions which seek to benefit or charge the estate are brought by or against the guardian as such. § 228. These provisions do not alter the substantive common-law principle of personal liability of the guardian for his own transactions; they are merely procedural short-cuts which enable one to reach the assets of the estate directly instead of requiring him to pursue the guardian personally and forcing the latter to secure reimbursement from the estate assets.

A frequent source of difficulty is that the term guardian is used both for the custodian of the person and for the custodian of the estate. Statutes frequently leave in doubt whether the term is used to mean guardian of the person, or guardian of the estate, or both. The fact that the same person is often both adds to the confusion. The rights and duties connected with the two offices are quite different. The situation is much the same as if the law of parent and child purported to state the legal relations when the father was a trustee for the benefit of the son. The applicable principles are distinct and harm may result from considering the matters in the same code, particularly when there is confusion of legal nomenclature. Furthermore, many
of the problems of guardianship of the person lie outside of legal procedure and come within the realm of social work.

The Model Probate Code is primarily a property code. The major part of it deals with decedents’ estates wherein are included only property rights and procedural rules to bring these rights into effect. Nevertheless, again in accordance with tradition, the Code deals with guardianships of the person as well as of the estate. There is not only an awareness of the problems of custody of the person but specific and distinct provisions therefor. See §§ 200, 202, 203, 212, 213, 216, 219(a), 220, 223, 234(a)(2). However, there are limits beyond which the Code could not go in this regard. It does not purport to codify the law of parent and child, nor to indicate methods of dealing with juvenile delinquency, nor to provide for the commitment of insane persons. Some or all of these are proper subjects for study and for legislative enactment based on that study, but they lie outside of the undertaking of the Code. Finally, on account of the recent dearth of legislative and scholarly development of the subject of guardianship the Model Probate Code is necessarily a more nearly pioneer undertaking with regard to guardianships than with regard to decedents’ estates.

It will be noted that the Uniform Veterans’ Guardianship Act is contained as a separate portion of Part IV. There is every reason why the various states should pass this act even if they are not prepared to follow the other provisions of the Model Probate Code. Not only does this act take care of the peculiar problems of incompetent veterans and their dependents but under the statutes and regulations of the Federal government there must be compliance with many of the provisions of the act in order to secure Federal compensation. Hence, it is desirable to have the act on the statute books as a guide for guardians of veterans and for the state courts having guardianship jurisdiction. Some of the provisions of Part IV A are modeled after the uniform act. See §§ 225, 226. However, the uniform act does not fit the needs of a general guardianship code—first, because the act presupposes and leans on a general guardianship code in some particulars; second, because some of the safeguards of the uniform act are designed to prevent veterans’ guardianships from becoming a racket and the provisions would be too onerous for guardianships generally. Of course in veterans’ guardianship cases the provisions of the uniform act take precedence under the Model Probate Code. Where that act makes no provision the general law of guardianship will be applied. § 197.

The analogy between procedure in guardianships and in decedents’ estates is apparent and has been recognized in many existing codes. / In some of them this is accomplished by the enactment of subdivisions
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dealing with fiduciaries in general. See, for example, the Michigan Probate Code, which includes a chapter on “General Provisions Concerning Fiduciaries,” and chapters on “Claims” and “Sale, Mortgage or Lease of Property,” covering guardianships as well as decedents’ estates. Other states have made use of the analogy of decedents’ estates law by a sweeping provision which adopts in general terms for guardianships all the decedents’ estate provisions which are applicable and which are not contrary to the specific provisions on guardianship. The latter method of introducing this analogy is believed to be preferable for there are many particulars in which the law as to the various kinds of fiduciaries must necessarily differ. This method avoids the introduction of an artificial uniformity into the law of fiduciaries.

However, the Model Probate Code is much more certain as to exactly what provisions regarding decedents’ estates apply to guardianships, for various sections in Part IV specifically adopt by reference particular sections in Part III, except in case of contrary provisions in Part IV. This is true of §202 as to qualifications of guardians, §213 as to bonds, §216 as to removal of guardians, §218 as to inventory and appraisement, §222 as to continuation of business, §227 as to claims (in this section it is also provided that the remaining sections regarding claims in decedents’ estates do not apply), §230 as to sales and other transfers by the guardian and §233 as to accounting. Between these instances of incorporation by reference and the specific provisions of Part IV, there is almost complete coverage of all guardianship matters which require a statutory solution. However, to provide for the unusual case, §198 adopts generally other applicable portions of Part III by analogy.

Moreover, a careful analysis of the law of guardianship discloses that, at some points, it resembles more nearly the law of trusts than that of decedents’ estates. Thus, the administration of the estate of a decedent ordinarily involves a more or less immediate distribution. There will ordinarily be no more debts nor assets; and the primary object is to preserve the estate for a short time and then distribute it with fairness to creditors, heirs and devisees. But, like the trust estate, the guardianships may involve a continuous administration over a considerable period of time; new assets may come in and new creditors may arise; throughout it all there is a beneficiary to be maintained. Some statutes recognize the applicability of trust law. For example, §5882 of the Montana Revised Code (1935) is as follows: “The relation of a guardian and ward is confidential, and is subject to the provisions of this code relative to trusts.” The applicability of the law of trusts is recognized specifically in §225 of the Model Code.
as to investments of guardians of the estate, and in general, in § 219(b).
A good example of the application of trust law to the law of guardianship is found in the rule that a trustee must use reasonable care and skill to make the trust property productive. See Restatement, Trusts (1935) § 181. This same rule should be applied to determine the duties of a guardian, although the duty of a personal representative may be different. See § 133 of the Model Probate Code.

In some statutory schemes, guardianships of minors and of mentally incompetent persons are treated in more or less separate divisions of the guardianship statutes. Indeed some states also have separate provisions as to spendthrifts, drunkards and the like. The Model Probate Code does not follow this plan of organization of subject matter. For the sake of brevity and of the unification of matters which do not require diverse treatment, the Code as a whole applies to all incompetents, though of course some provisions expressly or implicitly relate only to one class. Of course, provisions as to commitments of insane persons have no application to appointment of a guardian for a minor. The Code does not set forth the procedure for commitments though even this can be inserted in a unified compilation of guardianship matters. See the recently enacted Florida Guardianship Law (1945) § 744.31, which refers to the commitment procedure found elsewhere in the statutes.

Somewhat relative to this problem is the question of permissibility of classifying both minors and insane persons as "incompetents." The definition of the latter term in § 196(c) adopts this scheme, which is followed throughout Part IV B. Clearly a minor is incompetent for the legal purposes having to do with guardianship. With reference to guardianship of the estate, particularly, the same law and procedure is appropriate to both classes. The layman's idea that a stigma is attached to the word "incompetent" can be avoided by using the word "minor" instead of "incompetent" in the entitling of petitions, orders and other documents in estates of minors.

In this connection, it will be noted that the term "mental illness" is included in § 196(c)(2) as to the form of mental incapacity which warrants the appointment of a guardian. This is not intended to enlarge or change the sort of incapacity which is necessary for guardianship, viz., that which renders the person incapable of managing his property or caring for himself. "Mental illness" is included in this section because of the sensitiveness of many persons who would be loath to file a petition declaring that a relative was "insane," while they would readily and truthfully declare that he was "unable to care for himself or his property by reason of mental illness." Indeed the term "insanity" has no definite meaning except in connection with a particular purpose for which the mental state is to be determined.
The features of Part IV can be seen from examination of the various sections. Few, if any, are entirely untried. Of course, the major emphasis is upon the protection of the ward’s interest. Of this nature are provisions permitting the agency or institution having supervision of the ward to act as his guardian (§ 202); requiring adequate notice of the petition and subsequent proceedings to be served on the incompetent and others who will likely protect his interest (§§ 206, 207, 208, 209); defining the duties of guardians (§ 219); permitting periodic allowances for support (§ 223); requiring strict court supervision of investments (§ 225); permitting purchase of a home for the incompetent (§ 226); providing for compromise of claims under court order (§ 229); providing for annual accounts which may disclose defaults of the guardians without making the accountings binding on the ward (§ 233). In a number of these and in some other sections the ward is protected by court supervision of the administration with regard to matters which have not been so supervised at common law or under typical statutory systems. Court appointment is required for all guardians and the power to appoint is vested solely in the court having probate jurisdiction. § 199. Some of the provisions inure to the benefit of the guardian though they are not to the disadvantage of the ward. In addition to those already mentioned in this category are the provisions relative to court allowance of claims (§ 227) and the approval of expenditures in advance (§ 233). Finally several provisions expedite or simplify the administration, or dispense with it entirely. See in this connection §§ 205, 229, 235 and 237.

As in the parts dealing with decedents’ estates, the statutes of various states have sometimes been used as models. None has been used more frequently than the Florida Guardianship Law, just enacted, to which reference is made in various comments. Indeed, it has been somewhat suggestive as to certain sections where no reference was made to it. The draft of the act was prepared by a committee of the Florida State Bar Association of which D. H. Redfearn was chairman. See 19 Fla. L.J. 75 (March, 1945).

A. GENERAL PROVISIONS

§ 196. Definitions and use of terms. When used in Part IV A, unless otherwise apparent from the context:

(a) A “guardian” is one appointed by a court to have the care and custody of the person or of the estate, or of both, of an incompetent.
(b) A “guardian ad litem” is one appointed by a court, in which particular litigation is pending, to represent a ward or an unborn person in that particular litigation.

(c) An “incompetent” is any person who is

1. Under the age of majority,

2. Incapable by reason of insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness, excessive use of drugs, or other incapacity, of either managing his property or caring for himself or both.

(d) A “ward” is an incompetent for whom a guardian has been appointed.

Comment. In large measure this section follows the Florida Guardianship Law (1945) § 744.03. As to “mental illness,” see Introductory Comment to Part IV. Except for minors, an incompetent as defined in this section is one whose incapacity is mental. No matter how far a person may be incapacitated physically, he can manage his property and care for himself by an agent or servant if his mind is unimpaired. If so, he does not need a guardian. However, if his mind is such that he is incapable of managing his property or caring for himself, he is an incompetent, even though the mental condition was caused by physical disabilities. Statutes providing for guardianship for incompetents are commonly regarded as referring to the kind of incompetence herein stated. See Matter of Coburn, 165 Cal. 202, 131 P. 352 (1913). But in one case a statute was held to provide for guardianship for a person whose incompetence was purely physical and for that reason was held to be unconstitutional in that it constituted a deprivation of the right of “enjoying and defending life and liberty, acquiring, possessing and protecting property.” Shafer v. Haller, 108 Ohio St. 322, 140 N.E. 517, 30 A.L.R. 1378 (1923). In general as to the constitutionality of statutes providing for guardianship of persons under physical disability, see 37 Harv. L. Rev. 151 (1923); 30 A.L.R. 1381.

§ 197. Relation of Part IV A to Part IV B. The provisions of Part IV A hereof shall extend to the persons specifically provided for under the terms of Part IV B, known as the Uniform Veterans’ Guardianship Act. The provisions of
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Part IV A shall be cumulative to the provisions of Part IV B; but any conflict arising between Part IV B and the other sections of Part IV shall be resolved by giving effect to the law as stated in Part IV B, in cases to which the latter applies.

Comment. This section follows closely the form of a section in the Florida Guardianship Law (1945) § 744.05. It should be noted that, if Part IV A and Part IV B should, after enactment, be amended or revised by the legislature, they would be regarded as still having the same relation to each other as is indicated in § 197, unless the legislature should otherwise provide.

§ 198. Application of other parts of Code. The provisions of Part I hereof, unless therein restricted to decedents' estates, apply to guardianships. Where sections in Part III are specifically incorporated by reference by any section of Part IV they shall be applied as if “decedent” read “ward,” “personal representative” read “guardian” and the like, as the case may be, as far as applicable to guardianships and not inconsistent with the provisions of Part IV. In other cases, where no rule is set forth for guardianships in Part IV, the rule regarding decedents' estates in this Code shall likewise apply to guardianships when applicable thereto and not inconsistent with the provisions of Part IV, unless a contrary rule of court is promulgated or declared as provided by section 10 hereof.

Comment. Statutes regarding guardianships abound with specific references adopting the procedure in decedents' estates. For examples of more sweeping provisions adopting the decedents' estates law when applicable and when there is no specific provision as to guardianship procedure, see Cal. Prob. Code Ann. (Deering, 1944) § 1606; Tex. Civ. Stat. Ann. (Vernon, 1940) art. 4108.

Of course, when the guardian administers the estate of his deceased ward under § 235 hereof, any of the provisions of Part III might be applied to the administration proceedings contemplated by that section, provided that such provisions of Part III are not inconsistent with the provisions of § 235. This application would not be extensive, however, due to the relative simplicity of most estates which would be administered under § 235.
Only a few sections of Part III could possibly come under the provision of the last sentence of § 198. In this category are such sections as §§ 101, 102, 121, 123, 132(a), 134.

§ 199. Jurisdiction; non-statutory guardianships abolished. The jurisdiction of the [ ] court over all matters of guardianship, other than guardianships ad litem, shall be exclusive, subject to the right of appeal. All forms of guardianship not expressly provided for in this Code, other than guardianships ad litem, are abolished.

Comment. Chancery and testamentary guardians are abolished by this section. See Introductory Comment to Part IV. For original and appellate jurisdiction in general, see §§ 6, 20 of this Code.

§ 200. Who may be under guardianship. A guardian of the estate may be appointed for any incompetent. A guardian of the person may be appointed for any incompetent except a married minor who is incompetent solely by reason of his minority.

Comment. The reason why the married minor, who is otherwise competent, is not subject to guardianship of the person is that the control of such a guardian might interfere with the relationship of the married pair and might disrupt the marriage. If a person is legally qualified to marry, it should not be necessary to entrust the custody of his person to a guardian. Statutes to this effect are common. See, for example, Cal. Prob. Code Ann. (Deering, 1944) §§ 1433, 1500. On the other hand, in some states, it is provided by statute that the guardianship of a female minor terminates on marriage. See Ala. Code (1940) tit. 21, § 134, and Del. Rev. Code (1935) § 4422. This doubtless proceeds upon the theory that, on marriage, the estate, and perhaps also the person, of the female minor comes under the control of her husband and this control is inconsistent with a guardianship. But in view of modern statutes which largely emancipate the married woman this theory would seem to be obsolete. The more logical rule, in view of the position of the married woman in modern law, refuses to recognize any guardianship of the person of any married minor who is otherwise competent. There is no reason, however, why there should not be a guardianship of the estate of a married minor, whether male or female, as this does not interfere in

§ 201. Venue.

(a) Proper county. The venue for the appointment of a guardian shall be:

1. In the county in this state where the incompetent resides;

2. If the incompetent does not reside in this state, then in any county wherein there is any property of the incompetent.

(b) Proceedings in more than one county. If proceedings are commenced in more than one county, they shall be stayed except in the county where first commenced until final determination of venue in the county where first commenced. If the proper venue is finally determined to be in another county, the court shall transmit the original file to the proper county. The proceeding shall be deemed commenced by the filing of a petition; and the proceeding first legally commenced to appoint a guardian of the estate, or of the person and the estate, shall extend to all of the property of the incompetent in this state.

(c) Transfer of proceeding. If it appears to the court at any time before the termination of the guardianship that the proceeding was commenced in the wrong county, or that the residence of the ward has been changed to another county, or in case of guardianship of the estate that it would be for the best interest of the ward and his estate, the court, in its discretion, may order the proceeding with all papers, files and a certified copy of all orders therein transferred to another court which other court shall thereupon proceed to complete the proceeding as if originally commenced therein.

Comment. By this section venue for guardianship depends on actual residence of the ward rather than on his technical domicile. Cf. § 61 as to venue in decedents’ estates. In most instances it will
promote the best interests of the ward if the proceeding takes place in the county of the state where he actually lives.

Unless he is also the parent, a guardian appointed by the court cannot change the domicile of his ward to another state. Restatement, Conflict of Laws (1934) §§ 37, 40(e); 1 Beale, Conflict of Laws (1935) §§ 37.1, 40.3.

§ 202. Qualifications of guardian. A parent shall not be denied appointment as guardian of the person of a minor ward by reason of such parent being under the age of twenty-one. The [State Welfare Department] or any other public department, bureau or agency of this state or any political subdivision thereof, or any charitable organization of this state, which may be charged with the supervision, control or custody of the incompetent, may be appointed guardian of the person or of the estate or both. With these exceptions no one is qualified to serve as guardian of the person or of the estate who does not have the qualifications of a personal representative under section 96(b) hereof. No one shall be appointed guardian of the person unless he is qualified to have the care and custody, and in case of a minor ward to provide for the training and education of the ward, and, except as provided in this section, unless he is a natural person.

Comment. See § 210. Most of the states have provisions somewhat similar to the second sentence above, though few are as broad. In some states the guardianship by the agency or institution is confined to guardianship of the person; frequently the statutes are silent as to whether there may also be guardianship of the estate by the agency or institution. Under §§ 96(b) and 203 an official or director of the agency or institution may qualify as guardian. Minnesota permits the director of social welfare to take possession of the estate if it be personal property not exceeding $1,000 in value. Minn. Stat. (1941) § 256.93 (amended Laws 1943, c. 612). This matter and the question of what agencies and institutions are permitted to act as guardian may be largely matters of local policy and it may be necessary to alter the wording of the second sentence accordingly. Of course, if any of the agencies, institutions or their officers are appointed as guardian they must comply with the provisions of the Code generally, as in case of other appointees, including the provisions as to a bond.
In this section the expressions "supervision, control or custody" and "care and custody" both appear. One or both of them also appear in §§ 196, 204, 206 to 209, 223 and 229. See also § 233 which refers to § 207. "Care and custody" indicate the full powers and duties of a guardian of the person. See §§ 196, 219, 220. In addition, others, including particularly a parent of a minor, may have "care and custody" of an incompetent although not appointed guardian. In particular cases, the State Welfare Department, or other agency or organization may, under the law, have more limited "supervision, control or custody" of an incompetent. Of course one who has "care and custody" of an incompetent would always have "supervision, control or custody," but the reverse would not necessarily be true. The words "which may be charged with" immediately preceding "the supervision, control or custody" in § 202 indicate agencies and organizations which, under the law, are directed or authorized to act with reference to the incompetent, regardless of whether the agency or organization has or has not so acted as to the incompetent. See §§ 207, 208, 209. Cf. §§ 204, 206, 223, 229.

§ 203. Preference in granting letters. The parents of an unmarried minor, or either of them, if qualified, shall be preferred over all others for appointment as guardian of the person. Subject to this rule, the court shall appoint as guardian of an incompetent the one most suitable who is willing to serve, having due regard to: (a) any request for the appointment contained in a will or other written instrument executed by the parent for the appointment as guardian of his minor child; (b) any request made by a minor of the age of fourteen years or over for the appointment as his guardian; (c) any request for the appointment made by the spouse of an incompetent; (d) the relationship by blood or marriage to the person for whom guardianship is sought.

Comment. In many states the statutes provide that a surviving parent may nominate a guardian for his minor child by will, or by will or deed. See Ohio Gen. Code (Page, 1937) § 10507-13. See § 199 and Introductory Comment to Part IV as to testamentary guardians. Another type of statute, which is almost universal, permits a minor over the age of fourteen years to nominate his own guardian subject to the approval of the court. See, for example, Ariz. Code
§ 203. Some statutes indicate an order of preference to be followed by the court in appointing a guardian. Thus, it is sometimes provided that parents are to be preferred. See Cal. Prob. Code Ann. (Deering, 1944) § 1407. Or a preference has been accorded to the person of nearest relationship. See Ala. Code (1940) t. 21, §§ 6, 23.

Under the first sentence of § 203 the court should appoint the parent as guardian of the person if he is qualified and application is made for his appointment. See §§ 202, 210. In all other cases, the welfare of the ward is the sole consideration. This section does not require the appointment of the person named in the parent's will nor does it establish any other order of preference. The four factors named in (a) to (d) should be considered by the court, but they are not to be considered in any particular order of priority, nor to the exclusion of other factors, such as the religious faith and race of the proposed guardian of the person and the incompetent. While, if the incompetent's estate is small the court probably will endeavor to select one person to act as both guardian of the person and of the estate, some factors may be of greater weight in the selection of a guardian of the person than in the selection of a guardian of the estate or vice versa. See generally, comment, 33 Cal. L. Rev. 306 (1945).

§ 204. Petition for appointment of guardian. Any interested person may file a petition for the appointment of himself or some other qualified person as guardian of an incompetent. Such petition shall state:

(a) The name, age, residence, and post office address of the incompetent;

(b) The nature of his incapacity in accordance with the classification set forth in section 196(c) hereof;

(c) The approximate value and description of his property, including any compensation, pension, insurance or allowance to which he may be entitled;

(d) Whether there is, in any state, a guardian for the person or estate of the incompetent;

(e) The residence and post office address of the person whom petitioner asks to be appointed guardian;

(f) The names and addresses, so far as known or can reasonably be ascertained, of the persons most closely related by blood or marriage to the incompetent;
(g) The name and address of the person or institution having the care and custody of the incompetent;

(h) The names and addresses of wards for whom any natural person whose appointment is sought is already guardian;

(i) The reasons why the appointment of a guardian is sought and the interest of the petitioner in the appointment.

Comment. This section is patterned to some extent after the Florida Guardianship Law (1945) § 744.30. As to the manner of entitling the petition and subsequent papers and of designating the nature of the incapacity, see Introductory Comment to Part IV.

§ 205. Single guardianship for two or more incompetents. When application is made for the appointment of a guardian for two or more incompetents who are children of a common parent, or are parent and child, or are husband and wife, it shall not be necessary that a separate petition, bond or other paper be filed for each incompetent and the guardianship of all may be considered as one proceeding except that there shall be a separate final accounting when the guardianship terminates as to one ward but not as to the others.


§ 206. Participation by [State Welfare Department.] The [State Welfare Department] of this state may petition the court for the appointment or removal of any guardian of the person or of the estate, and may appear as a party in any hearing involving a guardianship. It may at any time investigate and report to the court concerning the care and custody of a ward and the fitness and conduct of his guardian, and shall make such investigation and report whenever ordered to do so by the court.

Comment. Cf. Minn. Stat. (1941) § 259.02 as to notification of the director of social welfare as a step in the adoption of minors. As stated in the comment to § 202, local policy may demand some
alteration of the details concerning notice to, and participation by, social agencies.

§ 207. Notice of hearing on petition for guardianship. Before appointing a guardian other than a temporary guardian, notice of hearing shall be served upon the following unless they have signed the petition for appointment of the guardian or have waived notice of the hearing:

(a) The incompetent, if over fourteen years of age;
(b) The parents if the incompetent is a minor, and the spouse of the incompetent, if any;
(c) Any other person who has been appointed guardian, or the person having the care and custody of the incompetent, if any;
(d) At least one of the closest adult relatives of the incompetent by blood or marriage;
(e) If directed by the court,
   (1) Any department, bureau or agency of the United States or of this state or any political subdivision thereof, which makes or awards compensation, pension, insurance or other allowance for the benefit of the ward's estate;
   (2) Any department, bureau or agency of this state or any political subdivision thereof or any charitable organization of this state, which may be charged with the supervision, control or custody of the incompetent;
   (3) Any interested person.
If the incompetent is over fourteen years of age, there shall be personal service upon him if personal service can be had. Service on others may be had in accordance with section 14 hereof. The court for good cause shown may reduce the number of days of notice, but in every case at least three days' notice shall be given. It shall not be necessary that the person for whom guardianship is sought shall be represented by a guardian ad litem in the proceedings.
Comment. Cf. Cal. Prob. Code Ann. (Deering, 1944) §§ 1441, 1461; Minn. Stat. (1941) § 525.55; Ohio Gen. Code (Page, 1937) § 10507–4. Under this section the court may require notice to the State Welfare Department. See §§ 206, 208, 209. Service on the parent or the spouse, and in many cases on the person having care and custody of the incompetent, would obviate compliance with service in accordance with (d) above. Of course, under (e)(3) the court could always order service on any particular person.

§ 208. What persons to receive notice of other hearings. Whenever notice of a hearing in a guardianship proceeding is required, notice of hearing shall be served upon the following who do not appear or waive notice of the hearing:

(a) The guardian of the person;
(b) The guardian of the estate;
(c) If directed by the court,
   (1) Any department, bureau or agency of the United States or of this state or any political subdivision thereof, which makes or awards compensation, pension, insurance or other allowance for the benefit of the ward’s estate;
   (2) Any department, bureau or agency of this state or any political subdivision thereof or any charitable organization of this state, which may be charged with the supervision, control or custody of the incompetent.
   (3) Any interested person.

Comment. Sections 207 and 233 provide specially for service of notice of hearing on petition for guardianship and notice of hearing upon accounts. Otherwise § 14 applies as to manner of service.

§ 209. Request for special notice of hearings. At any time after the issuance of letters of guardianship,

(a) Any department, bureau or agency of the United States or of this state or any political subdivision thereof, which makes or awards compensation, pension, insurance or other allowance for the benefit of the ward’s estate, or
(b) Any department, bureau or agency of this state or any political subdivision thereof or any charitable organization of this state, which may be charged with the supervision, control or custody of the incompetent, or

(c) Any interested person may, in person or by attorney, serve upon the guardian or upon his attorney, and file with the clerk of the court where the proceedings are pending, with a written admission or proof of service, a written request stating that he desires written notice of all hearings on petitions for the settlement of accounts, for the sale, mortgage, lease or exchange of any property of the estate, for allowances of any nature payable from the ward's estate, for the investment of funds of the estate, or for the removal, suspension, or discharge of the guardian or final termination of the guardianship. The applicant for such notice must include in his written request his post office address or that of his attorney. Unless the court otherwise directs, upon filing the request, the person shall be entitled to notice of all such hearings or of such of them as he designates in his request.

Comment. This is analogous to § 67 hereof. It is based on Cal. Prob. Code Ann. (Deering, 1944) § 1600.


Before appointing a guardian the court must be satisfied:

(a) That the person for whom a guardian is prayed is either a minor or otherwise incompetent;

(b) That a guardianship is desirable to protect the interests of the incompetent;

(c) That the person to be appointed guardian is qualified and is the person most suitable to act as such under this Code.

Comment. As to who is qualified and most suitable to act as guardian, see §§ 202, 203.
§ 211. Determination of incompetency. No guardian of the person or of the estate, or of both, of any person other than a minor, can be appointed until such person has been adjudicated to be incompetent upon sufficient competent evidence in a proceeding instituted for that purpose as provided by law.

Comment. This section assumes that there will be separate provisions for adjudication of incompetency and for commitment to institutions. See Minn. Stat. (1941) §§ 525.75 to 525.79 (amended Laws 1943, c. 612; Laws 1945, c. 425, 490, 567); 13th Ann. Rep. Jud. Council of Mich. (1943) 57; 14th id. (1944) 5; also the provision of the Uniform Veterans' Guardianship Act (§ 255 of this Code). While probate or similar courts are commonly given such jurisdiction, it involves matters quite distinct from the appointment of a guardian. Thus, a person may well be committed to an institution because of minor mental derangements, and yet it may not be desirable either to put him under guardianship or to adjudicate him to be insane. Likewise, statutes should provide specifically for his release from such an institution; but those provisions should be distinct from general guardianship provisions, although they may be included in the same probate code.

§ 212. Order appointing guardian. If on the hearing the court is satisfied that the requirements for the appointment of a guardian as set forth in this Code are proved, the court shall appoint one or two guardians of the person or of the estate or both; but not more than one guardian of the person shall be appointed unless they be husband and wife. The order shall specify the amount of the bond to be given.

Comment. The copy of the order furnished to the guardian could include the provisions of § 219 so that the guardian may be informed in a general way of his duties. This practice might be established by rule of court.

§ 213. Bond of guardian. If the guardianship be of the person only, the amount of the bond shall not exceed $1,000, or the court may dispense with the bond altogether. At every accounting the court shall inquire into the sufficiency of the
bond and of the sureties, and if either or both are found insuf­
icient the guardian shall be ordered to file a new bond. If by
the terms of a will the testator expresses the wish that no bond
be required of the person whom he requests to be appointed
 guardian, that person may be relieved of giving a guardian’s
bond so far as it applies to property given by the will to the in-
competent subject to the conditions specified in section 107(a)
hereof. Sections 106 to 118 inclusive hereof with respect to
the bonds of personal representatives shall be applicable to the
bonds of guardians.

Comment. The bond is for the protection of the ward and his
creditors, and also the ward’s distributees if the guardian administers
his deceased ward’s estate under § 235. Under the last sentence the
amount of the bond is determined in the same manner as the bond of
a personal representative. As to the testamentary request that no bond
shall be required, cf. Ala. Code (1940) t. 21, §§ 29, 30. As to time
limitations in actions upon the guardian’s bond, see § 236 of this Code
with which compare § 119.

§ 214. When letters to be issued. When a duly ap­
pointed guardian has given such bond as may be required and
the bond has been approved by the court, letters under the
seal of the court shall be issued to him.

§ 215. Temporary guardian. If the court finds that the
welfare of an incompetent requires the immediate appoint­
ment of a guardian of his person or of his estate, or of both, it
may, with or without notice, appoint a temporary guardian for
the incompetent for a specified period not to exceed sixty days,
and remove or discharge him or terminate the trust. The ap­
pointment may be to perform duties respecting specific prop­
erty or to perform particular acts, as stated in the order of
appointment. The temporary guardian shall make such re­
ports as the court shall direct, and shall account to the court
upon termination of his authority. In other respects the pro­
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orary guardians and an appeal may be taken from the order of appointment of a temporary guardian.

Comment. It will be noted that under § 20(b) no appeal is allowed from the order appointing a special administrator, while an appeal is specifically permitted by the terms of § 215 from the order appointing a temporary guardian. The reasons for preventing an improper person from acting as the temporary guardian of the person and estate are more cogent than in the decedent's estate situation where the delay caused by appeals overrides the considerations as to whether the special administrator selected was a proper one. In this regard § 20(b) does not apply to temporary guardianships under § 198 and by their terms §§ 20(c) and 20(d) do not apply in any way to guardianships. So far as may be, other provisions of § 20 apply to appeals in all guardianship matters under § 198.

The above section is suggested by Mass. Ann. Laws (Supp. 1944) c. 201, § 14, but differs in important particulars. A number of states have no provision for special or temporary guardians. Doubtless this is due to the fact that the guardian ad litem often serves the purpose of a temporary guardian. In California and the states whose legislation usually follows California guardians are classified as general or special, the former referring to the general guardian of the estate or of the person or both, the latter to all other guardians. Cal. Prob. Code Ann. (Deering, 1944) § 1401. Michigan allows appointment of a special guardian pending any application for appointment of general guardian or litigation with reference thereto. Mich. Stat. Ann. (1943) § 27.3178(211). Minnesota allows a special guardian to be appointed with or without notice "upon a showing of necessity or expediency." Minn. Stat. (1941) § 525.591. In Texas either a receiver of any incompetent or a temporary guardian of a minor may be appointed until a regular guardian qualifies. Tex. Civ. Stat. Ann. (1940) art. 4129, 4134. See § 105 of the Model Probate Code as to special administrators. While there is doubtless less need for a temporary guardian than for a special administrator, there are some occasions where there should be a temporary guardian.

§ 216. When guardian may be removed. When a minor ward has attained the age of fourteen years, the guardian of his person may be removed on petition of the ward to have another person appointed guardian if it is for the best interests of the ward that such other persons be appointed. A guardian may also be removed on the same grounds and in the
same manner as is provided in section 98 hereof for the removal of a personal representative.

§ 217. Appointment of successor guardian. When a guardian dies, is removed by order of the court, or resigns and such resignation is accepted by the court, the court may appoint another guardian in his place in the same manner and subject to the same requirements as are herein provided for an original appointment of a guardian.

Comment. Sections 216 and 217 correspond to §§ 98 and 99. Section 216 adds the additional provision as to the minor fourteen years of age who wants a different guardian.

§ 218. Inventory and appraisement. When a guardian of the estate has been appointed, an inventory and appraisement of the ward’s estate shall be made in the same manner and subject to the same requirements as are provided in section 120 hereof for the inventory and appraisement of a decedent’s estate.

§ 219. General duties of guardian.

(a) Guardian of the person. It is the duty of the guardian of the person to care for and maintain the ward and, if he is a minor, to see that he is properly trained and educated and that he has the opportunity to learn a trade, occupation or profession. The guardian of the person may be required to report the condition of his ward to the court, at regular intervals or otherwise as the court may direct.

(b) Guardian of the estate. It is the duty of the guardian of the estate to protect and preserve it, to invest it prudently, to apply it as provided in this Code, to account for it faithfully, to perform all other duties required by him by law, and, at the termination of the guardianship, to deliver the assets of the ward to the persons entitled thereto. Except as otherwise provided in Part IV hereof, the law of trusts shall apply as
far as may be in determining the duties of a guardian of the estate.

Comment. Except for the last sentence, this section is based upon the Florida Guardianship Law (1945) §§ 744.48 and 744.51. For other types of statutes stating duties of guardians, see Minn. Stat. (1941) § 525.56 and Cal. Prob. Code Ann. (Deering, 1944) § 1500 and following. As to the last sentence of subsection (b), see Introductory Comment to Part IV. Contrasting with the trustee, however, the guardian does not have title to the ward’s property. See § 221 and comment thereto.

Under subsection (a), the guardian of the person must see that the child is maintained from the guardian’s personal funds if necessary. If the guardian of the person is the parent, or stands in loco parentis, the ward’s estate cannot be used for maintenance except as directed by the court under § 224(b). If the guardian of the person is neither the parent, nor a person standing in loco parentis, the ward’s property may be used for his maintenance under § 224(a); see also § 223.

Of course, under subsection (a) and § 220 when a guardian of the person of a minor is appointed, other than the parent, the parent’s right of custody ceases. However, the guardian of the estate, as such, has no rights or duties relative to the custody of the ward. See § 221.

§ 220. Powers of guardian of the person; custody. The guardian of the person shall be entitled to the custody of the ward, but shall not have power to bind the ward or his property.

Comment. This is modeled after Florida Guardianship Law (1945) § 744.49.

§ 221. Title and possession of estate. The guardian of the estate shall take possession of all of the ward’s real and personal property, and of rents, income, issues and profits therefrom, whether accruing before or after his appointment, and of the proceeds arising from the sale, mortgage, lease or exchange thereof. Subject to such possession, the title to all such estate, and to the increment and proceeds thereof, shall be in the ward and not in the guardian.

Comment. The first sentence follows the Florida Guardianship Law (1945) § 744.52. The second sentence states the common-law
§ 222. **Continuation of business.** In all cases where the court deems it advantageous to continue the business of a ward, such business may be continued by the guardian of the estate on order of the court and according to the rules specified in section 131 hereof for the continuation of the business of a decedent by a personal representative when no testamentary provisions are involved.

§ 223. **Order for periodic allowance.** The guardian of the estate, or the person, department, bureau, agency or charitable organization having the care and custody of a ward may apply to the court for an order directing the guardian of the estate to pay to the person, department, bureau, agency or charitable organization, having the care and custody of the ward, or if the guardian of the estate has the care and custody of the ward, directing the guardian of the estate to apply, an amount weekly, monthly, quarterly, semi-annually or annually, as the court may direct, to be expended in the care, maintenance and education of the ward and of his dependents. In proper cases the court may order payment of amounts directly to the ward for his maintenance or incidental expenses. The amounts authorized under this section may be decreased or increased from time to time by direction of the court. If payments are made to another under such order of the court, the guardian of the estate is not bound to see to the application thereof.

Comment. This section is largely based on the Florida Guardianship Law (1945) § 744.50. Under § 6 of the Model Probate Code the court may require any person to whom an allowance is paid to account therefor. If the guardian of the estate applies the allowance, his regular accounting will cover this matter. See § 233 hereof.
§ 224. Application of income and principal for benefit of ward.

(a) Income and principal; order of court. So far as is necessary for the purpose except as provided in subsection (b) hereof, the income of the ward’s estate shall be first applied to his care, maintenance and education. On order of the court, any surplus of the income may be applied to the care, maintenance and education of the dependents of the ward. If the income is not sufficient to care for, maintain and educate the ward and his dependents, the court may order the expenditure of such portion of the principal as it deems necessary from time to time for such purposes.

(b) When parents able to care for ward. If the ward is a minor, and his parents or those standing in loco parentis are able to care for, maintain and educate him, neither the income nor the principal shall be expended for any purpose except as ordered by the court.

Comment. This section is based to some extent upon § 744.64 of the Florida Guardianship Law (1945). In cases coming under subsection (b) the compensation and necessary expenses of the guardian will of course be ordered by the court. See § 232 hereof.

To the effect that a guardian who stands in loco parentis must ordinarily support the ward though the ward has property of his own, see Horton’s Appeal, 94 Pa. St. 62 (1880); annotation, 64 A.L.R. 692, 694. As to when the guardian is deemed to stand in loco parentis, see also Shuey’s Estate, 1 Pa. Super. 405 (1896); cf. State ex rel. Hickey v. Freeman, 146 Tenn. 394, 241 S.W. 98 (1921).

§ 225. Investments. The guardian of the estate shall invest the property of the ward in accordance with the rules applicable to investments of trust estates by trustees, except that:

(a) No investment shall be made without prior order of the court in any property other than unconditional interest-bearing obligations of this state or of the United States and in obligations the interest and
principal of which are unconditionally guaranteed by the United States;

(b) In all cases the guardian must report in writing his purchase or sale of any trust investment on the date thereof;

(c) If it is for the best interests of the ward that his specific property be used by the ward rather than sold and the proceeds invested, the court may so order.

Comment. Practically all states have permissive or restrictive provisions regarding trust investments and, in a majority of states, the lists go into considerable detail. 3 Bogert, Trusts (1935) §§ 611-663. Dependent on the judicial interpretation of the language of the statute, the list may be exclusive, or the trustee may be authorized to invest in other securities if he uses ordinary skill and prudence. 3 Bogert, Trusts (1935) § 614. See Restatement, Trusts (1935) § 227 for a statement of the trust investment rule in absence of statute. The above § 225 of this Code would apply the law of trust investments in the particular state, whether common law, statutory or both, to investments by guardians, subject, however, to the three exceptions expressed in § 225. See Uniform Veterans' Guardianship Act (§ 250 of this Code). In accord with this general principle, some states have statutes in which the rule as to trustees applies equally to guardians. Ohio Gen. Code (Page, Supp. 1944) § 10506-41. In other states there are special provisions relative to guardians' investments. Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 413; Tex. Civ. Stat. Ann. (Vernon, 1940 and Supp. 1944) art. 4180-4182.

§ 226. Purchase of home. The court may authorize the purchase of real property in which the guardian has no interest, but such purchase can be made only for a home for the ward, or to protect the home of the ward or his interest, or, if he is not a minor, as a home for his dependent family. Such purchase of real property shall not be made except upon order of the court after notice in accordance with section 14 hereof.

Comment. This is similar to the Florida Guardianship Law (1945) § 745.03. Compare, also, the Uniform Veterans' Guardianship Act (§ 252 of this Code).
§ 227. Claims.

(a) Duty of guardian to pay. A guardian of the estate is under a duty to pay from the estate all just claims against the estate of his ward, whether they constitute liabilities of the ward which arose prior to the guardianship or liabilities properly incurred by the guardian for the benefit of the ward or his estate and whether arising in contract or in tort or otherwise, upon allowance of the claim by the court or upon approval of the court in a settlement of the guardian's accounts. The duty of the guardian to pay from the estate shall not preclude his personal liability for his own contracts and acts made and performed on behalf of the estate as it exists according to the common law. If it appears that the estate is likely to be exhausted before all existing claims are paid, preference shall be given to prior claims for the care, maintenance and education of the ward and of his dependents and existing claims for expenses of administration over other claims.

(b) Claims may be presented. Any person having a claim against the estate of a ward, or against the guardian of his estate as such, may file it with the court for determination at any time before it is barred by the statute of limitations, and, upon proof thereof, procure an order for its allowance and payment from the estate. Any action against the guardian of the estate as such shall be deemed a claim duly filed.

(c) When decedents' estate law applicable. The provisions of sections 137, 144 and 146 hereof as to claims against decedents' estates shall be applicable to claims against estates under guardianship, but other provisions regarding claims against decedents' estates shall not apply to estates under guardianship.

Comment. Under this section a guardian may pay a claim without allowance but he does so at his peril. If he has doubt as to whether the court will allow the claim he should withhold payment until the creditor procures allowance of the claim or until the guardian's next
accounting. See § 233(a) hereof. The allowance of a claim is binding upon all persons except that, as between guardian and ward, the latter is permitted to question these as well as other items of the account at any time within two years after the guardian's discharge. See § 233(b).

In some states claims against an estate under guardianship are handled in much the same way as claims against the estate of a decedent. There is a publication of notice to creditors; creditors are required to file their claims; and there is a short nonclaim period after which claims which have not been filed are barred. See Wis. Stat. (1943) § 319.41. Such provisions are believed to be undesirable. In the case of the decedent's estate, presumably there will be no more creditors and no more assets. It is a matter of distributing immediately once and for all as fairly as possible the assets of the dead man. The estate under guardianship is a continuing thing, and more creditors or more assets may come in from time to time. Moreover, if the estate under guardianship is insolvent, the bankruptcy laws apply to secure a fair distribution to creditors. Glenn, Liquidation (1935) §§ 36, 38. In the case of the insolvent decedent's estate, the rules for the administration of decedents' estates commonly provide the only method of insuring fair treatment to all creditors. Glenn, Liquidation (1935) § 143; cf. Mass. Ann. Laws (1932) c. 216, § 30. Thus, there is no occasion for a nonclaim statute for an estate under guardianship. In general, creditors of the estate under guardianship stand in the same position as creditors of a living person who is not under guardianship. However, they may file their claims if they so desire; they cannot reach the estate by levy, attachment or garnishment and they should sue the guardian as such. See § 228 hereof. In accord with the law in some states, in case of insolvency of a ward of unsound mind the law recognizes a preference for claims even for future maintenance and support of the ward and his family, as against other general creditors. Adams v. Thomas, 81 N.C. 296 (1879); cf. Matter of Application of Otis, 101 N.Y. 580, 5 N.E. 571 (1886). No precedent is found for imposing liability upon the guardian in bankruptcy proceedings on account of following such direction as is laid down in the last sentence of subsection (a). Indeed, some guardianship statutes indicate that the law of decedents' estates applies as to priority in payment of debts. Colo. Stat. (1935) c. 176, § 196. See generally Comment, 24 Va. L. Rev. 643 (1938).

§ 228. Actions.

(a) Guardian to sue and be sued. When there is a guardian of the estate, all actions between the ward or the
guardian and third persons in which it is sought to charge or
benefit the estate of the ward shall be prosecuted by or against
the guardian of the estate as such. He shall represent the in-
terests of the ward in the action and all process shall be served
on him.

(b) **Joinder, amendment and substitution.** When the
guardian of the estate is under personal liability for his own
contracts and acts made and performed on behalf of the estate
he may be sued both as guardian and in his personal capacity
in the same action. Misnomer or the bringing of the action
by or against the ward shall not be ground for dismissal of the
action and leave to amend or substitute shall be freely granted.
If an action was commenced by or against the incompetent be-
fore the appointment of a guardian of his estate, such guardian
when appointed may be substituted as a party for the incomp-
|ent. If the appointment of the guardian of the estate is
terminated, his successor may be substituted; if the ward dies,
his personal representative may be substituted; if the ward be-
comes competent, he may be substituted.

(c) **Garnishment, attachment and execution.** When
there is a guardian of the estate, the property and rights of ac-
tion of the ward shall not be subject to garnishment or attach-
ment, and execution shall not issue to obtain satisfaction of any
judgment against the ward or the guardian of his estate as
such.

*Comment.* As to subsection (a) cf. Cal. Prob. Code Ann. (Deer-
ing, 1944) § 1208; Ohio Gen. Code (Page, 1937) § 10507–18;
Fed. Rules Civ. Proc., Rule 17. There has been much confusion
in the various states as to the proper party to sue or be sued in case
of guardianship. Woerner, Guardianship (1897) §§ 58, 59. From
the practical standpoint it makes little difference whether the guardian
or the ward or both are formally named as parties. Any definite rule
would be practically as desirable as any other. The Code selects the
guardian because he should, in any event, represent the ward’s interest
in the action.

Subsection (a) applies regardless of whether the action arises out
of transactions involving the ward directly or transactions by the
guardian. However, under § 227 a guardian may be sued personally as to the latter, and a creditor may sue the guardian in both capacities in a single action under subsection (b) above.

If there is no guardian of the estate the usual rule is that actions for the incompetent are brought in the infant's name by next friend and actions against him are managed by a guardian ad litem selected by the court in which the action is commenced. These persons are in no sense guardians of the estate and are not entitled to receive the proceeds of the judgment. Their authority terminates when the judgment becomes final. Woerner, Guardianship (1897) § 22. The Code does not disturb the local practice in this regard.

The authorities are divided as to whether garnishment, attachment or execution may be employed in an action against an estate under guardianship. Most of the decisions deny the right on the basis that the estate is in custodia legis. Annotation, 92 A.L.R. 919. Creditors' rights are adequately protected by action on the guardian's bond or probate court order for allowance and payment of claims. See §§ 213, 227(b). Cf. § 145. When the guardian incurs personal liability as the result of his own transactions relative to the ward's estate and judgment is obtained against him in his personal capacity, the creditor may obtain execution from the personal assets of the guardian. See § 227 and comment.

§ 229. Compromise.

(a) By guardian. Whenever it is proposed to compromise or settle any claim by or against the ward or the guardian as such, whether arising as a result of personal injury or otherwise, and whether arising before or after appointment of a guardian, the court on petition of the guardian of the estate, if satisfied that such compromise or settlement will be for the best interests of the ward, may enter an order authorizing the settlement or compromise to be made.

(b) By parent. Whenever a minor has a disputed claim, whether arising as a result of personal injury or otherwise, and no guardian of his estate has been appointed, his father, or if his father is dead or the parents of the minor are living separate or apart and his mother then has the care and custody of the minor, then his mother shall have the right to compromise or settle such claim, but before the compromise or set-
tlemnt is valid, it must be approved by the court upon the filing of a petition. If the court approves the compromise or settlement, it may direct that the money be paid over in accordance with the provisions of section 237 hereof, or may require that a guardian of the estate be appointed and that the money be delivered to such guardian.

Comment. See Ohio Gen. Code (Page, 1937) § 10507–19 for a similar provision. In this section “court” refers to the court having probate jurisdiction regardless of whether or not litigation on the claim is pending in another court. When litigation is pending in another court there are provisions in some states that small claims of a minor for whose estate no guardian has been appointed may be compromised and paid over for the minor’s benefit by order of the court in which the litigation is pending. N.Y. Civ. Prac. Act, § 980-a; N.Y. Rules Civ. Prac., Rule 294. Pa. Rules Civ. Proc., Rule 2039 in 332 Pa. lxxxviii. Such provisions seem desirable but they belong in the code of civil procedure rather than in a probate code. See § 237 and comment.

§ 230. Sales, mortgages, leases and exchanges.

(a) When permitted. The real or personal property of the ward, or any part thereof, may be sold, mortgaged, leased or exchanged by the guardian of the estate upon such terms as the court may order for the purpose of paying the ward’s debts, providing for his care, maintenance and education and the care, maintenance and education of his dependents, investing the proceeds or in any other case where it is for the best interests of the ward.

(b) Guardian forbidden to purchase. No guardian shall purchase property of the ward, unless sold at public sale with the approval of the court, and then only if the guardian is a spouse, parent, child, brother or sister of the ward and is a cotenant with the ward in the property.

(c) What decedents’ estate law applicable. In other respects, the provisions of sections 154, 156 to 167 inclusive, 170 and 171 hereof, relative to decedents’ estates apply to sales, mortgages, leases and exchanges of property of the ward.
Comment. Subsection (b) is taken from the Florida Guardianship Law (1945) § 745.14; cf. § 155 of this Code.

§ 231. Sale of ward's property not an ademption. In case of the guardian's sale or other transfer of any real or personal property specifically devised by the ward, who was competent at the time when he made the will but was incompetent at the time of the sale or transfer and never regained competency, so that the devised property is not contained in the estate at the time of the ward's death, the devisee may at his option take the value of the property at the time of the ward's death with the incidents of a general devise, or the proceeds thereof with the incidents of a specific devise.

Comment. Cf. 53 & 54 Vict., c. 5, § 123(1); N.Y. Civ. Prac. Act, § 1402; Ky. Rev. Stat. (1944) § 394.360. The Kentucky statute purports to give the value of any adeemed devise to the devisee if he is an heir of the testator. The Model Probate Code does not deal with this more general proposition but proceeds upon the theory that the remedy for the usual ademption situation lies in greater liberality by the courts in holding that devises are general or demonstrative rather than specific. See Introduction to this Code under "Omitted Matters." When the testator becomes incompetent, however, it seems unfair that acts of his guardian should work an ademption when the incompetent has no opportunity to remedy the situation by making a fresh will. The option given to the devisee in the above situation will prevent him from being totally disappointed in most cases where there are assets payable to devisees. If he chooses to take the value of the property the devise will abate as a general devise; if he can trace the proceeds and chooses to do so the devise will abate as a specific devise. As to abatement generally, see § 184.

§ 232. Compensation of guardian and attorney. A guardian shall be allowed such compensation for his services as guardian, as the court shall deem just and reasonable. Additional compensation may be allowed for his necessary services as attorney and for other necessary services not required of a guardian. He may also be allowed compensation for necessary expenses in the administration of his trust,
including reasonable attorney's fees if the employment of an attorney for the particular purpose is necessary. In all cases, compensation of the guardian and his expenses including attorney's fees shall be fixed by the court and may be allowed at any annual or final accounting; but at any time during the administration of the estate, the guardian or his attorney may apply to the court for an allowance upon the compensation or necessary expenses of the guardian and for attorney's fees for services already performed. If the court finds that the guardian has failed to discharge his duties as such in any respect, it may deny him any compensation whatsoever or may reduce the compensation which would otherwise be allowed.

Comment. If it were desired to limit the guardian's ordinary compensation to a definite percentage of the income of the estate, the provisions of the Uniform Veterans' Guardianship Act (§ 249 of this Code) are suggestive. The limitations there provided might be enacted by rule of court. Compare § 103 as to compensation of the personal representative and his attorney. No attempt has been made in § 232 to permit a testator to limit the compensation of a guardian. The situations in a decedent's estate and an incompetent's estate are not analogous in this regard. It would seem to be against public policy in all cases to permit a testator to restrict a guardian's fees, as the selection of the guardian should be determined by the best interests of the living ward and in order to secure a proper guardian the court should not be limited by any fixed amount in the allowance of reasonable compensation to the guardian. The same considerations seem to indicate the desirability of not fixing any definite statutory limitation as to amount of the guardian's compensation.

§ 233. Accounting.

(a) Guardian to account. Unless otherwise directed by the court, every guardian of the estate shall file with the court annually within thirty days after the anniversary date of his appointment, and also within thirty days after termination of his appointment, a written verified account of his administration. Notice of hearing of every accounting shall be given to the same persons and in the same manner as is required by sec-
tion 207 hereof for notice of the petition for the appointment of a guardian. The account shall show with respect to each item for which credit is claimed whether or not the amount has been paid, and in either event the court may allow any item or disallow it in whole or in part except to the extent that it has been approved in advance.

(b) **Effect of settlement.** When notice has been given as provided in subsection (a), the settlement by the court of any account, subject to the right of appeal and to the power of the court to vacate its final orders, is binding upon all persons except the ward, or, if he shall die after the settlement, his personal representative. The ward, or, if he shall die after the settlement, his personal representative, may question any item of any settlement within two years after the date of the discharge of the guardian but not afterward.

(c) **When decedents' estate law applicable.** The provisions of sections 172, 174 to 178 inclusive, 180 and 181 hereof as to accounting in decedents' estates shall apply to guardianship estates.

Comment. Of particular importance under subsection (c) is the provision of §175 that the court may provide for inspection of the balance of assets on hand. This device is more important in guardianship estates than in decedents' estates since the former normally continue over a longer period. See in this connection the provision of the Uniform Veterans' Guardianship Act (§247 of this Code) which requires inspection at each accounting.

In only a few states do the statutes provide specifically as to the conclusiveness of the annual or intermediate accounts of guardians. Some statutes provide for approval of such accounts which may be had ex parte and for judicial settlement of the final account. Statutes of this type and most other legislation on the subject are generally construed to permit re-examination of intermediate accounts upon the final account though the case law is more evenly divided as to whether the guardian may later question items of his intermediate accounts. Annotation, 99 A.L.R. 996. In the above section the position is taken that while notice to other interested persons is required in the case of annual accountings so as to bind them, the approval is not binding
on the ward until he becomes sui juris. See Pa. Stat. Ann. (Purdon, 1930) t. 50, § 962; Wash. Rev. Stat. (Supp. 1943) § 1575-1. Indeed, not even the settlement of the final account is binding on the ward until two years after the guardian's discharge.

§ 234. Termination of guardianship.

(a) Termination without court order. A guardianship is terminated

1. If the guardianship was solely because of the ward’s minority, by the ward attaining his majority;
2. If the guardianship of the person was solely because of the ward’s minority, by the marriage of the ward;
3. By an adjudication of competency of the ward;
4. By the death of the ward.

(b) Termination on court order. A guardianship may be terminated by court order after such notice as the court may require

1. If the guardianship is of the estate and the estate is exhausted;
2. If the guardianship is no longer necessary for any other reason.

(c) Effect of termination. When a guardianship terminates otherwise than by the death of the ward, the powers of the guardian cease, except that a guardian of the estate may make disbursements for claims that are or may be allowed by the court, for liabilities already properly incurred for the estate or for the ward, and for expenses of administration. When a guardianship terminates by death of the ward, the guardian of the estate may proceed under section 235 hereof but the rights of all creditors against the ward’s estate shall be determined by the law of decedents’ estates.

Comment. The particular appointment also terminates when the guardian is removed under § 216, or his resignation is accepted under § 217, though it will usually be necessary to appoint a new guardian.
§ 235. Administration of deceased ward’s estate. Upon the death of a ward intestate the guardian of his estate has power under the letters issued to him and subject to the direction of the court to administer the estate as the estate of the deceased ward without further letters unless within thirty days after death of the ward a petition is filed for letters of administration or for letters testamentary and the petition is granted. Notice to creditors and other persons interested in the estate shall be published and may be combined with the notice of the guardian’s final account. This notice shall be published in accordance with section 14(b)(2) hereof, and all claims which are not filed within sixty days after first publication shall be barred against the estate. Upon the hearing, the account may be allowed and the balance distributed to the persons entitled thereto, after the payment of such claims as may be allowed. Liability on the guardian’s bond shall continue and shall apply to the complete administration of the estate of the deceased ward. If letters of administration or letters testamentary are granted upon petition filed within thirty days after the death of the ward, the administrator or executor shall supersede the guardian in the administration of the estate and the provisions of Part III of this Code shall apply to all proceedings in the administration, including the publication of notice to creditors and other interested persons and the barring of creditors’ claims.

Comment. Cf. Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 476; Ind. Stat. (Burns, 1933) § 8–135; Pa. Stat. Ann. (Purdon, Supp. 1944) t. 20, § 872. Upon death of a ward the rights of his creditors are determined according to the law of decedents’ estates. See the last sentence of § 234(c) hereof. The shortening of the nonclaim period under § 235 is justified inasmuch as the guardian’s personal liability remains for obligations incurred by him, and in normal cases other debts of the ward would probably have been already satisfied. It should not be necessary under this section that there be a separate hearing or notice of hearing on the final account of the guardian as to the post-mortem affairs of the ward. This section contemplates that
ordinarily all matters will be closed upon a single hearing, winding up both the guardianship and also the estate of the deceased ward as a decedent’s estate. As to the application of the provisions of Part II in proceedings under § 235, see § 198 and second paragraph of comment thereto.

§ 236. **Discharge of guardian.** When a guardian of the estate shall file with the court proper receipts or other evidence satisfactory to the court, showing that he has delivered to the persons entitled thereto all the property for which he is accountable as guardian, the court shall enter an order of discharge. The discharge so obtained shall operate as a release from the duties of his office which have not theretofore terminated, and shall operate as a bar to any suit against the guardian and his sureties unless such suit be commenced within two years from the date of the discharge.

Comment. This section is designed to correspond to § 193 on discharge of personal representative.

As in case of personal representatives the discharge of the fiduciary terminates his powers and duties as to future acts. It does not, however, relieve him or his sureties from liability for past acts.

§ 237. **Dispensing with guardianship.**

(a) **Estate of minor of a value not exceeding five hundred dollars.** When the whole estate of a minor does not exceed the value of $500, the court may, in its discretion, without the appointment of a guardian or the giving of bond, authorize:

(1) The deposit thereof in a depository authorized to receive fiduciary funds, payable to the guardian of the estate when appointed or to the minor upon his attaining the age of majority; or,

(2) If the assets do not consist of money, the delivery thereof to a suitable person designated by the court, deliverable to the guardian of the estate when appointed or to the minor upon his attaining the age of majority; or,
(3) The payment or delivery thereof to the parent of the minor, or to the person having the care or custody of the minor or to the minor himself. The person receiving such money or other assets shall hold and dispose of the same in such manner as the court shall direct.

(b) Estate of adult incompetent of a value not exceeding five hundred dollars. When the whole estate of a person over the age of twenty-one who has been adjudicated incompetent does not exceed the value of $500, the court may, in its discretion, without the appointment of a guardian or the giving of bond, authorize the deposit thereof in a depository authorized to receive fiduciary funds in the name of a suitable person designated by the court, or if the assets do not consist of money, authorize the delivery thereof to a suitable person designated by the court. The person receiving such money or other assets shall hold and dispose of the same in such manner as the court shall direct.

(c) Deposit of funds subject to order of court. If the estate of an incompetent consists in money in an amount greater than $500, and it is for the best interests of the incompetent that no guardian of the estate be appointed, and that such estate be deposited in a depository authorized to receive fiduciary funds, the court may, on reasonable notice to all persons who would be entitled to receive notice of a hearing on a petition to appoint a guardian, so order. The person receiving such money shall hold and dispose of the same in such manner as the court shall direct.

Comment. Subsections (a) and (b) are based on Ohio Gen. Code (Page, Supp. 1944) § 10507-5. If an incompetent's claim is pending in a court of ordinary trial jurisdiction, the legislation described in the comment to § 229 provides another means of dispensing with guardianship.

B. UNIFORM VETERANS' GUARDIANSHIP ACT

Comment to Part IV B. Sections 238 to 255 inclusive are §§ 1 to 18 inclusive of the 1942 Uniform Veterans' Guardianship Act, which
was a revision of a prior act promulgated by the National Conference of Commissioners on Uniform State Laws under the same title in 1928. The Commissioners' comments to the various sections have been omitted here. Almost two-thirds of the states have enacted the substance of either the 1928 or 1942 acts. As to the relation of Part IV B to Part IV A of this Code, see § 197 hereof and Introductory Comment to Part IV. Sections 19 to 24 of the uniform law are unnecessary if the uniform law is enacted as part of this Code. See §§ 2, 197 of this Code. In the first line of § 238 below, the words italicized should be substituted for the bracketed words, which were contained in the uniform act. Attention is called to the definitions contained in § 238, being § 1 of the uniform act, and in particular to the definition of "administrator."

§ 238. Definitions. As used in [this Act:] Part IV B:

"Person" means an individual, a partnership, corporation or an association.

"Veterans Administration" means the Veterans Administration, its predecessors or successors.

"Income" means moneys received from the Veterans Administration and revenue or profit from any property wholly or partially acquired therewith.

"Estate" means income on hand and assets acquired partially or wholly with "income."

"Benefits" means all moneys paid or payable by the United States through the Veterans Administration.

"Administrator" means the Administrator of Veterans Affairs of the United States or his successor.

"Ward" means a beneficiary of the Veterans Administration.

"Guardian" means any fiduciary for the person or estate of a ward.

§ 239. Administrator as party in interest. The Administrator shall be a party in interest in any proceeding for the appointment or removal of a guardian or for the removal of the disability of minority or mental incapacity of a ward; and in any suit or other proceeding affecting in any manner the ad-
ministration by the guardian of the estate of any present or former ward whose estate includes assets derived in whole or in part from benefits heretofore or hereafter paid by the Veterans Administration. Not less than 15 days prior to hearing in such matter notice in writing of the time and place thereof shall be given by mail (unless waived in writing) to the office of the Veterans Administration having jurisdiction over the area in which any such suit or any such proceeding is pending.

§ 240. Application. Whenever, pursuant to any law of the United States or regulation of the Veterans Administration, it is necessary, prior to payment of benefits, that a guardian be appointed, the appointment may be made in the manner hereinafter provided.

§ 241. Limitation on number of wards. No person other than a bank or trust company shall be guardian of more than five wards at one time, unless all the wards are members of one family. Upon presentation of a petition by an attorney of the Veterans Administration or other interested person, alleging that a guardian is acting in a fiduciary capacity for more than five wards as herein provided and requesting his discharge for that reason, the court, upon proof substantiating the petition, shall require a final accounting forthwith from such guardian and shall discharge him from guardianships in excess of five and forthwith appoint a successor.

§ 242. Appointment of guardians.

(a) A petition for the appointment of a guardian may be filed by any relative or friend of the ward or by any person who is authorized by law to file such a petition. If there is no person so authorized or if the person so authorized refuses or fails to file such a petition within thirty days after mailing of notice by the Veterans Administration to the last known address of the person, if any, indicating the necessity for the same, a peti-
tion for appointment may be filed by any resident of this state.

(b) The petition for appointment shall set forth the name, age, place of residence of the ward, the name and place of residence of the nearest relative, if known, and the fact that the ward is entitled to receive benefits payable by or through the Veterans Administration and shall set forth the amount of moneys then due and the amount of probable future payments.

(c) The petition shall also set forth the name and address of the person or institution, if any, having actual custody of the ward and the name, age, relationship, if any, occupation and address of the proposed guardian and if the nominee is a natural person, the number of wards for whom the nominee is presently acting as guardian. Notwithstanding any law as to priority of persons entitled to appointment, or the nomination in the petition, the court may appoint some other individual or a bank or trust company as guardian, if the court determines it is for the best interest of the ward.

(d) In the case of a mentally incompetent ward the petition shall show that such ward has been rated incompetent by the Veterans Administration on examination in accordance with the laws and regulations governing the Veterans Administration.

§ 243. Evidence of necessity for guardian of infant. Where a petition is filed for the appointment of a guardian for a minor, a certificate of the Administrator or his authorized representative, setting forth the age of such minor as shown by the records of the Veterans Administration and the fact that the appointment of a guardian is a condition precedent to the payment of any moneys due the minor by the Veterans Administration shall be prima facie evidence of the necessity for such appointment.

§ 244. Evidence of necessity for guardian for incompetent. Where a petition is filed for the appointment of a guardian for a mentally incompetent ward, a certificate of the
Administrator or his duly authorized representative, that such person has been rated incompetent by the Veterans Administration on examination in accordance with the laws and regulations governing such Veterans Administration and that the appointment of a guardian is a condition precedent to the payment of any moneys due such ward by the Veterans Administration, shall be prima facie evidence of the necessity for such appointment.

§ 245. Notice. Upon the filing of a petition for the appointment of a guardian under this Act, notice shall be given to the ward, to such other persons, and in such manner as is provided by the general law of this state, and also to the Veterans Administration as provided by this Act.

§ 246. Bond.

(a) Upon the appointment of a guardian, he shall execute and file a bond to be approved by the court in an amount not less than the estimated value of the personal estate and anticipated income of the ward during the ensuing year. The bond shall be in the form and be conditioned as required of guardians appointed under the general guardianship laws of this state. The court may from time to time require the guardian to file an additional bond.

(b) Where a bond is tendered by a guardian with personal sureties, there shall be at least two such sureties and they shall file with the court a certificate under oath which shall describe the property owned, both real and personal, and shall state that each is worth the sum named in the bond as the penalty thereof over and above all his debts and liabilities and the aggregate of other bonds on which he is principal or surety and exclusive of property exempt from execution. The court may require additional security or may require a corporate surety bond, the premium thereon to be paid from the ward's estate.
§ 247. Petitions and accounts, notices and hearings.

(a) Every guardian, who has received or shall receive on account of his ward any moneys or other thing of value from the Veterans Administration shall file with the court annually, on the anniversary date of the appointment, in addition to such other accounts as may be required by the court, a full, true, and accurate account under oath of all moneys or other things of value so received by him, all earnings, interest or profits derived therefrom and all property acquired therewith and of all disbursements therefrom, and showing the balance thereof in his hands at the date of the account and how invested.

(b) The guardian, at the time of filing any account, shall exhibit all securities or investments held by him to an officer of the bank or other depository wherein said securities or investments are held for safekeeping or to an authorized representative of the corporation which is surety on his bond, or to the judge or clerk of a court of record in this state, or, upon request of the guardian or other interested party, to any other reputable person designated by the court, who shall certify in writing that he has examined the securities or investments and identified them with those described in the account, and shall note any omissions or discrepancies. If the depository is the guardian, the certifying officer shall not be the officer verifying the account. The guardian may exhibit the securities or investments to the judge of the court, who shall endorse on the account and copy thereof a certificate that the securities or investments shown therein as held by the guardian were each in fact exhibited to him and that those exhibited to him were the same as those shown in the account, and noting any omission or discrepancy. That certificate and the certificate of an official of the bank in which are deposited any funds for which the guardian is accountable, showing the amount on deposit, shall be prepared and signed in duplicate and one of each shall be filed by the guardian with his account.
(c) At the time of filing in the court any account, a certified copy thereof and a signed duplicate of each certificate filed with the court shall be sent by the guardian to the office of the Veterans Administration having jurisdiction over the area in which the court is located. A signed duplicate or a certified copy of any petition, motion or other pleading, pertaining to an account, or to any matter other than an account, and which is filed in the guardianship proceedings or in any proceeding for the purpose of removing the disability of minority or mental incapacity, shall be furnished by the person filing the same to the proper office of the Veterans Administration. Unless hearing be waived in writing by the attorney of the Veterans Administration, and by all other persons, if any, entitled to notice, the court shall fix a time and place for the hearing on the account, petition, motion or other pleading not less than fifteen days nor more than thirty days from the date same is filed, unless a different available date be stipulated in writing. Unless waived in writing, written notice of the time and place of hearing shall be given the Veterans Administration office concerned and the guardian and any others entitled to notice not less than 15 days prior to the date fixed for the hearing. The notice may be given by mail in which event it shall be deposited in the mails not less than 15 days prior to said date. The court, or clerk thereof, shall mail to said Veterans Administration office a copy of each order entered in any guardianship proceeding wherein the Administrator is an interested party.

(d) If the guardian is accountable for property derived from sources other than the Veterans Administration, he shall be accountable as is or may be required under the applicable law of this state pertaining to the property of minors or persons of unsound mind who are not beneficiaries of the Veterans Administration, and as to such other property shall be entitled to the compensation provided by such law. The account for other property may be combined with the account filed in accordance with this section.
§ 247. Petitions and accounts, notices and hearings (alternative section).

(a) Every guardian, who has received or shall receive on account of his ward any money or other thing of value from the Veterans Administration, at the expiration of one year from date of his appointment, and every three years thereafter on the anniversary date of his appointment, or as much oftener as the court may require, shall file with the court a full true and accurate account under oath of all moneys or other thing of value received by him, all earnings, interest or profits derived therefrom, and all property acquired therewith and of all disbursements therefrom, and showing the balance thereof in his hands at the date of the account and how invested. Each year when not required to file an account with the court, the guardian shall file an account with the proper office of the Veterans Administration. If the interim account be not filed with the Veterans Administration, or, if filed, shall be unsatisfactory, the court shall upon receipt of notice thereof from the Veterans Administration require the guardian forthwith to file an account which shall be subject in all respects to the next succeeding paragraphs. Any account filed with the Veterans Administration and approved by the Chief Attorney thereof may be filed with the court and be approved by the court without hearing, unless a hearing thereon be requested by some party in interest.

(b) The guardian, at the time of filing any account with the court or Veterans Administration shall exhibit all securities or investments held by him to an officer of the bank or other depository wherein said securities or investments are held for safekeeping or to an authorized representative of the corporation which is surety on his bond, or to the judge or clerk of a court of record in this state, or upon request of the guardian or other interested party, to any other reputable person designated by the court, who shall certify in writing that he has examined the securities or investments and identified them.
with those described in the account and shall note any omission
or discrepancies. If the depository is the guardian, the certify-
ing officer shall not be the officer verifying the account. The
guardian may exhibit the securities or investments to the judge
of the court, who shall endorse on the account and copy thereof,
a certificate that the securities or investments shown therein
as held by the guardian were each in fact exhibited to him and
that those exhibited to him were the same as those in the ac-
count and noting any omission or discrepancy. The certificate,
and the certificate of an official of the bank in which are de-
posited any funds for which the guardian is accountable, show-
ing the amount on deposit, shall be prepared and signed in
duplicate and one of each shall be filed by the guardian with
his account.

(c) At the time of filing in the court any account, a certified
copy thereof and a signed duplicate of each certificate filed
with the court shall be sent by the guardian to the office of the
Veterans Administration having jurisdiction over the area in
which such court is located. A duplicate signed copy or a
certified copy of any petition, motion or other pleading per-
taining to an account, or to any matter other than an account,
and which is filed in the guardianship proceedings or in any
proceedings for the purpose of removing the disability of mi-
nority or mental incapacity, shall be furnished by the persons
filing the same to the proper office of the Veterans Administra-
tion. Unless hearing be waived in writing by the attorney of
the Veterans Administration and by all other persons, if any,
entitled to notice, the court shall fix a time and place for the
hearing on the account, petition, motion or other pleading, not
less than fifteen days nor more than thirty days from the date
same is filed, unless a different available date be stipulated in
writing. Unless waived in writing, written notice of the time
and place of hearing shall be given the Veterans Administra-
tion office concerned and to the guardian and any others entitled
to notice, not less than fifteen days prior to the date fixed for the hearing. The notice may be given by mail, in which event it shall be deposited in the mails not less than fifteen days prior to said date. The court or clerk thereof, shall mail to said Veterans Administration office a copy of each order entered in any guardianship proceeding wherein the Administrator is an interested party.

(d) If the guardian is accountable for property derived from sources other than the Veterans Administration, he shall be accountable as is or may be required under the applicable law of this state pertaining to the property of minors or persons of unsound mind who are not beneficiaries of the Veterans Administration, and as to such other property shall be entitled to the compensation provided by such law. The account for other property may be combined with the account filed in accordance with this section.

§ 248. Penalty for failure to account. If any guardian shall fail to file with the court any account as required by this Act, or by an order of the court, when any account is due or within thirty days after citation issues as provided by law, or shall fail to furnish the Veterans Administration a true copy of any account, petition or pleading as required by this Act, such failure may in the discretion of the court be ground for his removal.

§ 249. Compensation of guardians. Compensation payable to guardians shall be based upon services rendered and shall not exceed 5% of the amount of moneys received during the period covered by the account. In the event of extraordinary services by any guardian, the court, upon petition and hearing thereon may authorize reasonable additional compensation therefor. A copy of the petition and notice of hearing thereon shall be given the proper office of the Veterans Administration in the manner provided in the case of hearing.
on a guardian's account or other pleading. No commission or compensation shall be allowed on the moneys or other assets received from a prior guardian nor upon the amount received from liquidation of loans or other investments.

§ 250. Investments. Every guardian shall invest the surplus funds of his ward's estate in such securities or property as authorized under the laws of this state but only upon prior order of the court; except that the funds may be invested, without prior court authorization, in direct unconditional interest-bearing obligations of this state or of the United States and in obligations the interest and principal of which are unconditionally guaranteed by the United States. A signed duplicate or certified copy of the petition for authority to invest shall be furnished the proper office of the Veterans Administration, and notice of hearing thereon shall be given said office as provided in the case of hearing on a guardian's account.

§ 251. Maintenance and support. A guardian shall not apply any portion of the income or the estate for the support or maintenance of any person other than the ward, the spouse and the minor children of the ward, except upon petition to and prior order of the court after a hearing. A signed duplicate or certified copy of said petition shall be furnished the proper office of the Veterans Administration and notice of hearing thereon shall be given said office as provided in the case of hearing on a guardian's account or other pleading.

§ 252. Purchase of home for ward.
(a) The court may authorize the purchase of the entire fee simple title to real estate in this state in which the guardian has no interest, but only as a home for the ward, or to protect his interest, or (if he is not a minor) as a home for his dependent family. Such purchase of real estate shall not be made except upon the entry of an order of the court after hearing
upon verified petition. A copy of the petition shall be furnished the proper office of the Veterans Administration and notice of hearing thereon shall be given said office as provided in the case of hearing on a guardian's account.

(b) Before authorizing such investment the court shall require written evidence of value and of title and of the advisability of acquiring such real estate. Title shall be taken in the ward's name. This section does not limit the right of the guardian on behalf of his ward to bid and to become the purchaser of real estate at a sale thereof pursuant to decree of foreclosure of lien held by or for the ward, or at a trustee's sale, to protect the ward's right in the property so foreclosed or sold; nor does it limit the right of the guardian, if such be necessary to protect the ward's interest and upon prior order of the court in which the guardianship is pending, to agree with co-tenants of the ward for a partition in kind, or to purchase from co-tenants the entire undivided interests held by them, or to bid and purchase the same at a sale under a partition decree, or to compromise adverse claims of title to the ward's realty.

§ 253. Copies of public records to be furnished. When a copy of any public record is required by the Veterans Administration to be used in determining the eligibility of any person to participate in benefits made available by the Veterans Administration, the official custodian of such public record shall without charge provide the applicant for such benefits or any person acting on his behalf or the authorized representative of the Veterans Administration with a certified copy of such record.

§ 254. Discharge of guardian and release of sureties. In addition to any other provisions of law relating to judicial restoration and discharge of guardian, a certificate by the Veterans Administration showing that a minor ward has attained
majority, or that an incompetent ward has been rated competent by the Veterans Administration upon examination in accordance with law shall be prima facie evidence that the ward has attained majority, or has recovered his competency. Upon hearing after notice as provided by this Act and the determination by the court that the ward has attained majority or has recovered his competency, an order shall be entered to that effect, and the guardian shall file a final account. Upon hearing after notice to the former ward and to the Veterans Administration as in case of other accounts, upon approval of the final account, and upon delivery to the ward of the assets due him from the guardian, the guardian shall be discharged and his sureties released.

§ 255. Commitment to Veterans Administration or other agency of United States Government.

(a) Whenever, in any proceeding under the laws of this state for the commitment of a person alleged to be of unsound mind or otherwise in need of confinement in a hospital or other institution for his proper care, it is determined after such adjudication of the status of such person as may be required by law that commitment to a hospital for mental disease or other institution is necessary for safekeeping or treatment and it appears that such person is eligible for care or treatment by the Veterans Administration or other agency of the United States Government, the court, upon receipt of a certificate from the Veterans Administration or such other agency showing that facilities are available and that such person is eligible for care or treatment therein, may commit such person to said Veterans Administration or other agency. The person whose commitment is sought shall be personally served with notice of the pending commitment proceeding in the manner as provided by the law of this state; and nothing in this Act shall affect his right to appear and be heard in the proceedings. Upon commitment, such person, when admitted to any facility operated
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by any such agency within or without this state shall be subject to the rules and regulations of the Veterans Administration or other agency. The Chief Officer of any facility of the Veterans Administration or institution operated by any other agency of the United States to which the person is so committed shall with respect to such person be vested with the same powers as superintendents of state hospitals for mental diseases within this state with respect to retention of custody, transfer, parole or discharge. Jurisdiction is retained in the committing or other appropriate court of this state at any time to inquire into the mental condition of the person so committed, and to determine the necessity for continuance of his restraint, and all commitments pursuant to this Act are so conditioned.

(b) The judgment or order of commitment by a court of competent jurisdiction of another state or of the District of Columbia, committing a person to the Veterans Administration, or other agency of the United States Government for care or treatment shall have the same force and effect as to the committed person while in this state as in the jurisdiction in which is situated the court entering the judgment or making the order; (and the courts of the committing state, or of the District of Columbia, shall be deemed to have retained jurisdiction of the person so committed for the purpose of inquiring into the mental condition of such person, and of determining the necessity for continuance of his restraint; as is provided in subsection (a) of this section with respect to persons committed by the courts of this state. Consent is hereby given to the application of the law of the committing state or District in respect to the authority of the chief officer of any facility of the Veterans Administration, or of any institution operated in this state by any other agency of the United States to retain custody, or transfer, parole or discharge the committed person.)

(c) Upon receipt of a certificate of the Veterans Administration or such other agency of the United States that facilities are available for the care or treatment of any person here-
tofore committed to any hospital for the insane or other institution for the care or treatment of persons similarly afflicted and that such person is eligible for care or treatment, the superintendent of the institution may cause the transfer of such person to the Veterans Administration or other agency of the United States for care or treatment. Upon effecting any such transfer, the committing court or proper officer thereof shall be notified thereof by the transferring agency. No person shall be transferred to the Veterans Administration or other agency of the United States if he be confined pursuant to conviction of any felony or misdemeanor or if he has been acquitted of the charge solely on the ground of insanity, unless prior to transfer the court or other authority originally committing such person shall enter an order for such transfer after appropriate motion and hearing.

Any person transferred as provided in this section shall be deemed to be committed to the Veterans Administration or other agency of the United States pursuant to the original commitment.

**PART V. ANCILLARY ADMINISTRATION**

**INTRODUCTORY COMMENT**

This part of the Code consists of acts promulgated or to be promulgated by the National Conference of Commissioners on Uniform State Laws. Sections 256 to 260 inclusive are sections 1 to 5 of the Uniform Powers of Foreign Representatives Act, promulgated in 1944. The remaining sections of this uniform act are merely formal and are unnecessary when the act is incorporated into a probate code. The Commissioners’ notes are omitted. The basic philosophy of the uniform act is that if the domicile of the decedent or ward is in another jurisdiction the domiciliary personal representative or guardian is given the full powers of a local personal representative or guardian if there is no administration granted in the local jurisdiction. Various drafts of the act, together with the Commissioners’ notes and other
materials are found in the Handbooks of the National Conference commencing in 1940. In the first line of § 256 below, the words italicized should be substituted for the bracketed words, which were contained in the uniform act. It should be noted that in §§ 256 to 260 the term “representative” includes guardians and testamentary trustees and should be distinguished from the term “personal representative” as used in Parts I to IV of this Code. "Representative," as used in the act and this part of the Model Probate Code, has the same meaning as “fiduciary” elsewhere in the Code. See § 3(i) hereof.

The companion act, the Uniform Ancillary Administration of Estates Act, has not yet been promulgated by the National Conference. The latest draft was considered by the Conference in 1944. Earlier drafts are contained in the Handbooks of the Conference for 1941 to 1943. This act will provide for the situations where the local jurisdiction grants ancillary administration. The basic philosophy is to unify the domiciliary and ancillary administrations in so far as it is possible to do so. Thus, the drafts contemplate that the domiciliary personal representative or guardian may act as ancillary representative and preference is given for his appointment. After setting up the procedure peculiar to ancillary administration, § 15 of the 1944 draft declares that the general law relative to administration applies to ancillary administration. Cf. § 198 of this Code. In the drafts of the Uniform Ancillary Administration of Estates Act, § 1, the definitional section, is identical with § 1 of the Uniform Powers of Foreign Representatives Act. Hence § 256 below can be declared to apply also to the sections which are taken from the Uniform Ancillary Administration of Estates Act when the latter is promulgated.

In 1915 the National Conference promulgated the Uniform Wills Act, Foreign Probated which has been enacted in five states. However, this act was withdrawn by the Conference in 1943. Undoubtedly this action was due in part to the fact that the act required proof of execution of the will and did not accept the foreign probate as proof of that fact. As to this general problem, see Hopkins, “The Extraterritorial Effect of Probate Decrees,” 53 Yale L. J. 221 (1944); Carey, “A Suggested Fundamental Basis of Jurisdiction with Special Emphasis on Judicial Proceedings Affecting Decedents’ Estates,” 24 Ill. L. Rev. 44, 170 (1929). It is expected that the National Conference will undertake the preparation of a new uniform act on this subject. When this has been done, the three uniform acts will complete the matters upon ancillary probate and administration necessary for inclusion in a probate code. Among the better existing statutes on the subject of probate of foreign wills are: Cal. Prob. Code
UNIFORM POWERS OF FOREIGN REPRESENTATIVES ACT

§ 256. Definitions. As used in [this Act:] sections 255 to 260:

(a) "Representative" means an executor, administrator, testamentary trustee, guardian or other fiduciary of the estate of a decedent or a ward, duly appointed by a court and qualified. It includes any corporation so appointed, regardless of whether the corporation is eligible to act under the law of this state. This Act does not change the powers or duties of a testamentary trustee under the non-statutory law or under the terms of a trust.

(b) "Foreign representative" means any representative who has been appointed by the court of another jurisdiction in which the decedent was domiciled at the time of his death, or in which the ward is domiciled, and who has not also been appointed by a court of this state.

(c) "Local representative" means any representative appointed as ancillary representative by a court of this state who has not been appointed by the domiciliary court.

(d) "Local and foreign representative" means any representative appointed by both the domiciliary court and by a court of this state.

§ 257. Powers of foreign representatives in general. When there is no administration or application therefore pending in this state, a foreign representative may exercise all powers which would exist in favor of a local representative,
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and may maintain actions and proceedings in this state subject to the conditions imposed upon non-resident suitors generally.

§ 258. Proof of authority in court proceedings; bond. Upon commencing any action or proceeding in any court of this state, the foreign representative shall file with the court authenticated copies of his appointment, and of his official bond if he has given a bond. If the court believes that the security furnished by him in the domiciliary administration is insufficient to cover the proceeds of the action or proceeding, it may at any time order the action or proceeding stayed until sufficient security is furnished in the domiciliary administration.

§ 259. Proceedings to bar creditors' claims. Upon application by a foreign representative to the [probate] court of the county in which property of the decedent or of the ward is located, the court shall cause notice of the appointment of the foreign representative to be published once in each of [three] consecutive weeks in some newspaper of general circulation in the county. The claims of all creditors of the decedent or of the ward, unless filed with the court within [ ] after date of the first publication are barred as a lien upon all property of the decedent or of the ward in this state, to the extent that claims are barred by a local administration. If before the expiration of such period any claims have been filed and remain unpaid after reasonable notice thereof to the foreign representative, ancillary administration may be had.

§ 260. Effect of local proceedings. The powers granted by this Act shall be exercised only when there is no administration or application therefor pending in this state, except to the extent that the court granting local letters may order otherwise, but no person who, before receiving actual notice of local administration or application therefor, has changed his position by relying on the powers granted by this Act shall be prej-
udiced by reason of the application for, or grant of, local administration. The local representative or the local and foreign representative shall be subject to all burdens which have accrued by virtue of the exercise of the powers, or otherwise, under this Act and may be substituted for the foreign representative in any action or proceeding in this state.

UNIFORM ANCILLARY ADMINISTRATION OF ESTATES ACT

(To be promulgated by the National Conference of Commissioners on Uniform State Laws. See Introductory Comment to Part V.)

UNIFORM WILLS ACT, FOREIGN PROBATED

(To be prepared by the National Conference of Commissioners on Uniform State Laws. The Act of 1915 promulgated under this title has been withdrawn by the National Conference. See Introductory Comment to Part V.)