

## Chapter 111

### General Provisions

#### Chapter 111

##### NOTES OF DECISIONS

Under former similar statutes the right of succession was entirely statutory. *Smallman v. Powell*, (1890) 18 Or 367, 23 P 249; *In re Estate of Miller*, (1926) 117 Or 399, 244 P 526.

##### 111.005

CASE CITATIONS: *Garrett v. Clark*, (1875) 5 Or 464; *Edwards v. Perkins*, (1879) 7 Or 149; *Montague v. Schieffelin*, (1905) 46 Or 413, 80 P 654; *State v. Atwood*, (1909) 54 Or 526, 102 P 295, 104 P 195, 21 Ann Cas 516; *State Sav. and Loan Assn. v. Bryant*, (1938) 159 Or 601, 81 P2d 116; *In re Frazier's Estate*, (1947) 180 Or 232, 177 P2d 254, 170 ALR 729; *Bones v. Lollis*, (1951) 192 Or 376, 234 P2d 788.

ATTY. GEN. OPINIONS: Mortgage on leasehold interest as personal property, 1924-26, p 222.

LAW REVIEW CITATIONS: 14 OLR 485; 21 OLR 205; 23 OLR 69; 49 OLR 348; 6 WLJ 449-483.

##### 111.015

CASE CITATIONS: *Capper v. Tarlow*, (1971) 92 Or App Adv Sh 1789, 486 P2d 1289.

##### 111.085

##### NOTES OF DECISIONS

###### 1. Under former similar statute

(1) **In general.** Federal district court sitting in Oregon did not have power to decide claim that administration of estate was negligently conducted and widow's allowance not paid. *McCan v. First Nat. Bank*, (1956) 139 F Supp 224.

Jurisdiction was conferred not upon the probate department of the circuit court but upon the Circuit Court for Multnomah County. *McCulloch v. United States Nat. Bank*, (1956) 207 Or 508, 297 P2d 1077.

An action against the executor had to be upon the disallowed claim. *Trumbo v. Trumbo*, (1956) 208 Or 114, 299 P2d 609.

The State of Oregon controlled probate proceedings, to exclusion of federal courts, as parents patriae. *Id.*

The probate court had jurisdiction to try the issue of whether decedent died intestate. *Dolven v. First Nat. Bank*, (1964) 238 Or 306, 393 P2d 196.

(2) **Proof of wills.** The proponent of a probated will had to offer the instrument to be reprobated where it had been directly attacked. *Hubbard v. Hubbard*, (1877) 7 Or 43.

A proceeding could be undertaken in the county court to set aside the probate of a will and have the will declared void. *Richardson v. Green*, (1894) 61 Fed 435.

The circuit court of the United States could hear a proceeding to set aside the probate and declare a will void

where the parties were citizens of different states and the cause of action existed in the county court. *Id.*

The probate courts of Oregon were empowered to construe wills and the decision rendered was res judicata as to all matters considered. *John v. Smith*, (1899) 91 Fed 827.

Where the laws of a state required that all matters pertaining to probating wills be decided before the courts of the state, a citizen of another state was not prevented from bringing suit in a federal court to have a will, about to be probated in the state court, declared void. *Wahl v. Franz*, (1900) 100 Fed 680.

Where state statutes gave equity courts original jurisdiction to hear and decide the contest of a will, such power could also be exercised by the federal courts where there was diversity of citizenship and the required amount was involved. *Williams v. Crabb*, (1902) 117 Fed 193.

(3) **Administration.** Discovery against the person charged with secreting or refusing to account for property belonging to the estate was within the jurisdiction of the court. *Gardner v. Gillihan*, (1891) 20 Or 598, 27 P 220.

Where there was danger of mismanagement, the county court could require the executor to file a bond upon the application of a creditor or legatee, even though the will expressly stated that no bond would be necessary. *Bellinger v. Thompson*, (1894) 26 Or 320, 37 P 714.

County courts in the exercise of their probate jurisdiction could pass upon the validity of claims presented to but disallowed by executors or administrators. *In re Morgan's Estate*, (1904) 46 Or 233, 77 P 608, 78 P 1029.

Equity had power to set aside an order or decree of the county court approving and settling the final account of an administrator, notwithstanding the power conferred on the county court by the former statute. *Froebrich v. Lane*, (1904) 45 Or 13, 76 P 351, 106 Am St Rep 634.

The appointment of guardians by the county court was part of the probate jurisdiction conferred upon that tribunal. *Godfrey v. Gempler*, (1937) 157 Or 251, 70 P2d 551.

An attempt by a guardian to accept the cash surrender value of an insurance policy covering a mental incompetent was a judicial act and required the permission of the court. *Oregon Mut. Life Ins. Co. v. James*, (1941) 166 Or 336, 111 P2d 1026.

Upon the application of any party in interest, the probate court had to annul letters of administration where it was shown that the court lacked jurisdiction. *In re Noyes' Estate*, (1947) 182 Or 1, 185 P2d 555.

An executor did not need to include in his final account those items reported and approved in his semi-annual account; they could be put in issue in the final accounting, but were presumed correct, which presumption had to be overcome by the objector. *Lelek v. Hemshorn*, (1948) 184 Or 364, 198 P2d 597.

Where an appellant had actual knowledge that executor was continuing the operation of decedent's farm over a period of years, she was estopped from objecting at time of executor's final accounting. *Id.*

Since state court had not adjudicated validity of testamentary trust provisions, federal court did not undertake construction and declaration of their validity. *Jackson v.*

United States Nat. Bank of Portland, (1957) 153 F Supp 104.

(4) **Distribution.** The court's jurisdiction was exclusive over the distribution of estates of intestates among the heirs or other persons entitled thereto. *State v. McDonald*, (1910) 55 Or 419, 103 P 512, 104 P 967, 106 P 444.

The county court in the exercise of its probate jurisdiction could direct executors to distribute property and as an incident of this power, the court could construe the will. *In re Wilson's Estate*, (1917) 85 Or 604, 167 P 580.

Where the will gave the widow the entire estate with power to dispose thereof during her life, she was empowered to mortgage. *Rose City Co. v. Langloe*, (1932) 141 Or 232, 16 P2d 22.

The county court could carry into effect a decree of a circuit court adjudging the ownership of money in the possession of the administrator of the estate of a deceased attorney and awarding it to the client. *In re Mannix Estate*, (1934) 146 Or 187, 29 P2d 364.

Decree of distribution upon final settlement of estate should have designated the amount or specific thing due each distributee, and it should have determined the amount to which the executor was entitled for services as executor and manager of testator's business and whether he was payable in money or with machinery purchased with funds of the estate. *Lelek v. Hemshorn*, (1948) 184 Or 364, 198 P2d 597.

Executor's account should have been surcharged for a payment to a devisee made as a compromise settlement of objections to executor's final account, since appellant was a joint objector and continued to urge objections. *Id.*

**FURTHER CITATIONS:** *Gird v. Morehouse*, (1862) 2 Or 53; *Hanner v. Silver*, (1868) 2 Or 336; *Ramp v. McDaniel*, (1885) 12 Or 108, 6 P 456; *Russell v. Lewis*, (1871) 3 Or 380; *State v. Officer*, (1871) 4 Or 180; *Tustin v. Gaunt*, (1873) 4 Or 305; *Monastes v. Catlin*, (1876) 6 Or 119; *Adams v. Lewis*, (1878) 5 Sawy 229, Fed Cas No. 60; *Gager v. Henry*, (1878) 5 Sawy 237, Fed Cas No. 5,172; *Winkle v. Winkle*, (1879) 8 Or 194; *Re Estate of Houck & Meyer*, (1888) 23 Or 10, 17 P 461; *In re John's Will*, (1896) 30 Or 494, 47 P 341, 50 P 226, 36 LRA 242; *Re Plunkett's Estate*, (1898) 33 Or 414, 54 P 152; *Re Bolander's Estate*, (1901) 38 Or 490, 63 P 689; *In re Wilson's Guardianship*, (1901) 40 Or 356, 68 P 393, 69 P 439; *State v. O'Day*, (1902) 41 Or 495, 69 P 542; *Lawrey v. Sterling*, (1902) 41 Or 518, 527, 69 P 460; *Haun v. Martin*, (1906) 48 Or 304, 86 P 371; *In re Morrison's Estate*, (1906) 48 Or 612, 614, 87 P 1043; *In re Roach's Estate*, (1907) 50 Or 179, 186, 92 P 118; *De Bow v. Wollenburg*, (1908) 52 Or 404, 96 P 536, 97 P 717; *Harrington v. Jones*, (1909) 53 Or 237, 99 P 935; *Mansfield v. Hill*, (1910) 56 Or 400, 107 P 471, 108 P 1007; *In re Manser's Estate*, (1911) 60 Or 240, 118 P 1024; *In re McCormick's Estate*, (1914) 72 Or 608, 143 P 915, 144 P 425; *Branch v. McCormick's Estate*, (1914) 72 Or 608, 613, 143 P 915, 144 P 425; *Yeaton v. Barnhart*, (1915) 78 Or 249, 150 P 742, 152 P 1192; *Stadelman v. Miner*, (1917) 83 Or 348, 393, 155 P 708, 163 P 585, 983; *In re McGinnis' Estate*, (1919) 91 Or 407, 414, 179 P 254; *Kirk v. Mullen*, (1921) 100 Or 563, 197 P 300; *Re Faling Estate*, (1924) 113 Or 6, 228 P 821, 231 P 148; *Skyles v. Kincaid*, (1928) 124 Or 443, 453, 264 P 432.

*Woodburn Lodge v. Wilson*, (1934) 148 Or 150, 34 P2d 611; *In re Workman's Estate*, (1937) 156 Or 333, 65 P2d 1395, 68 P2d 479; *In re Fehl*, (1938) 159 Or 545, 81 P2d 130; *In re Witham's Estate*, (1939) 160 Or 686, 87 P2d 651; *In re Dunlap's Estate*, (1939) 161 Or 93, 87 P2d 225; *Wilson v. Hendricks*, (1940) 164 Or 486, 102 P2d 714; *In re Patton's Estate*, (1942) 170 Or 186, 132 P2d 402; *Hiller v. Smith*, (1943) 171 Or 428, 137 P2d 828; *Lothstein v. Fitzpatrick*, (1943) 171 Or 648, 138 P2d 919; *In re Hiller's Estate*, (1943) 170 Or 686, 135 P2d 462; *Independent Hospital Assn. v. Ege*, (1946) 178 Or 100, 165 P2d 576; *In re Stroman's Estate*, (1946) 178 Or

100, 165 P2d 576; *Ballard v. Mays*, (1947) 181 Or 7, 179 P2d 732; *Van Vlack v. Van Vlack*, (1947) 181 Or 646, 182 P2d 969, 185 P2d 575; *In re Going's Estate*, (1948) 183 Or 346, 193 P2d 529; *Branchflower v. Massey*, (1949) 187 Or 40, 208 P2d 341; *Brown v. Irwin*, (1949) 187 Or 462, 212 P2d 729; *Smith v. Little*, (1950) 188 Or 682, 214 P2d 345, 217 P2d 595; *Ott v. Chrisman*, (1951) 193 Or 262, 283 P2d 269; *Arnold v. Arnold*, (1951) 193 Or 490, 237 P2d 963, 239 P2d 595; *Griffith v. W. Sur. Co.*, (1967) 248 Or 198, 432 P2d 1019.

**ATTY. GEN. OPINIONS:** Whether a circuit judge may sit in a probate court, 1934-36, p 551; applying to the probate court for the registration of unreported births, 1938-40, p 414; concerning the two-fold duties of the county court, 1938-40, p 600; whether county courts have jurisdiction to order disclosure of the birth record of an illegitimate, 1942-44, p 191.

**LAW REVIEW CITATIONS:** 19 OLR 150; 44 OLR 46; 49 OLR 347, 349, 366.

## 111.095

**CASE CITATIONS:** *Re estate of Houck and Meyer*, (1888) 23 Or 10, 17 P 461; *Parr v. United States*, (1907) 153 Fed 462; *Northwestern Clearance Co. v. Jennings*, (1923) 106 Or 291, 209 P 875, 210 P 884; *Traver v. Naylor*, (1928) 126 Or 193, 268 P 75; *In re Norton's Estate*, (1944) 175 Or 115, 151 P2d 719; *Schultz v. First Nat. Bank*, (1959) 220 Or 350, 348 P2d 22, 28, 81 ALR2d 1121; *Alread v. Rickman*, (1960) 224 Or 216, 355 P2d 751; *Kankkonen v. Hendrickson*, (1962) 232 Or 49, 374 P2d 393; *Hood v. Hatfield*, (1963) 235 Or 38, 383 P2d 1021; *Lowes v. First Nat. Bank*, (1968) 295 F Supp 260; *Walker v. Sherriff*, (1970) 2 Or App 322, 468 P2d 655; *Thom v. Bailey*, (1970) 3 Or App 97, 471 P2d 809, *aff'd*, 257 Or 572, 481 P2d 355.

**LAW REVIEW CITATIONS:** 49 OLR 366.

## 111.105

**NOTES OF DECISIONS****1. Under former similar statute**

The provision for appeal was within the power of the legislature; but the appeal had to be taken within the time prescribed. *In re Norton's Estate*, (1944) 175 Or 115, 151 P2d 719, 156 ALR 617.

An order sustaining a demurrer to the cross-petition of a claimant and determining that he was not an heir and was not entitled to inherit as such, negatively determined claimant's rights as heir within the meaning of the statute. *Id.*

**FURTHER CITATIONS:** *Traver v. Naylor*, (1928) 126 Or 193, 268 P 75.

## 111.115

**CASE CITATIONS:** *In re Fehl*, (1938) 159 Or 545, 81 P2d 130; *In re Witham's Estate*, (1939) 160 Or 686, 87 P2d 651; *In re Dunlap's Estate*, (1939) 161 Or 93, 87 P2d 225; *In re Patton's Estate*, (1942) 170 Or 186, 132 P2d 402; *In re Hiller's Estate*, (1943) 170 Or 686, 135 P2d 462; *Hiller v. Smith*, (1943) 171 Or 428, 137 P2d 828; *Ballard v. Mays*, (1947) 181 Or 7, 179 P2d 732; *Van Vlack v. Van Vlack*, (1947) 181 Or 646, 182 P2d 969, 185 P2d 575; *Branchflower v. Massey*, (1949) 187 Or 40, 208 P2d 341; *Ott v. Chrisman*, (1951) 193 Or 262, 283 P2d 269; *Dolven v. First Nat. Bank*, (1964) 238 Or 306, 393 P2d 196.

## 111.205

## NOTES OF DECISIONS

## I. Under former similar statute

(1) **In general.** The court had jurisdiction to control and exercise general supervision over executors and administrators, to the extent of requiring of them bonds for the faithful performance of their duties. *Bellenger v. Thompson*, (1894) 26 Or 320, 37 P 714, 40 P 229.

The court exercising probate jurisdiction had power to hear and determine all demands against the estate. In re *Anderson's Estate*, (1937) 157 Or 365, 71 P2d 1013.

Since state court had not adjudicated validity of testamentary trust provisions, federal court did not undertake construction and declaration of their validity. *Jackson v. United States Nat. Bank*, (1957) 153 F Supp 104.

(2) **Procedure.** Probate procedure was analagous to that of equity. *Richardson's Guardianship*, (1901) 39 Or 246, 64 P 390; In re *Herren's Estate*, (1901) 40 Or 90, 66 P 688; In re *Morgan's Estate*, (1905) 46 Or 233, 77 P 608, 78 P 1029; In re *Morrison's Estate*, (1906) 48 Or 612, 87 P 1043; In re *Roach's Estate*, (1907) 50 Or 179, 92 P 118; In re *Barker*, (1917) 83 Or 702, 164 P 382; *Stewart v. Baxter*, (1934) 145 Or 460, 28 P2d 642, 91 ALR 818; In re *Anderson's Estate*, (1937) 157 Or 365, 71 P2d 1013.

Probate courts observed and applied legal and equitable rules, as the case may have required and the statute provided. In re *Morgan's Estate*, (1905) 46 Or 233, 77 P 608, 78 P 1029; *Hillman v. Young*, (1913) 64 Or 73, 127 P 793, 129 P 124.

The court could not enforce a decree for the payment of money in probate proceedings, as for contempt; the proper process was an execution. *Rostel v. Morat*, (1890) 19 Or 181, 23 P 900.

Mere defects in the petition, statement or affidavit invoking the exercise by the court of its powers would not invalidate the proceeding collaterally. *Yeaton v. Barnhart*, (1915) 78 Or 249, 150 P 742, 152 P 1192.

Proceedings in probate were in the nature of a suit in equity, and while the court was not strictly bound by the statute of limitations it would withhold its aid to enforce a stale claim. In re *Webster's Estate*, (1915) 74 Or 489, 145 P 1063.

Provisions of statutes relative to new trials and motions to set aside judgments did not apply to courts of equity. In re *Shepherd's Estate*, (1935) 152 Or 15, 41 P2d 444, 49 P2d 448.

Stipulations of the parties and petitions constituted a sufficient foundation for a decree of a county court sitting in probate. In re *Baker's Estate*, (1937) 156 Or 256, 67 P2d 185.

A probate proceeding was in rem and orders and decrees therein were binding upon all persons and agencies unless the decree was directly attacked. In re *Anderson's Estate*, (1937) 157 Or 365, 71 P2d 1013.

**FURTHER CITATIONS:** *Humphreys v. Taylor*, (1874) 5 Or 260; *Wright v. Edwards*, (1882) 10 Or 298; In re *Herren's Estate*, (1901) 40 Or 90, 66 P 688; *Rutenic v. Hamakar*, (1902) 40 Or 444, 67 P 196; In re *Roach's Estate*, (1907) 50 Or 179, 92 P 118; In re *Manser's Estate*, (1911) 60 Or 240, 118 P 1024; *Stevens v. Meyers*, (1912) 62 Or 372, 121 P 434, 126 P 29; In re *McCormick's Estate*, (1914) 72 Or 608, 143 P 915, 144 P 425; *Re Faling Estate*, (1924) 113 Or 6, 228 P 821, 231 P 148; In re *Elder's Estate*, (1938) 160 Or 111, 83 P2d 477, 119 ALR 302; In re *Elder's Estate*, (1940) 164 Or 347, 101 P2d 412; In re *Miller Estate*, (1962) 229 Or 618, 368 P2d 327; *Belton v. Buesing*, (1965) 240 Or 399, 402 P2d 98; *Taylor v. Rubey*, (1970) 2 Or App 277, 467 P2d 132, Sup Ct review denied.

**ATTY. GEN. OPINIONS:** When necessary to have administration of estates of deceased persons who own lands covered by mortgages, 1934-36, p 207.