Chapter 113

Initiation of Estate Proceedings

Chapter 113

NOTES OF DECISIONS

1. Under former similar statute

The petition, citation and proof of service were essential parts of the record in a probate case. Gilmore v. Taylor, (1873) 5 Or 89.

After an administrator had been removed, he had no authority to represent the estate nor did his appeal from the deposing order suspend its operation. Knight v. Hamaker, (1898) 33 Or 154, 54 P 277, 659.

The purpose of statutory proceedings for the administration of estates was to marshal the assets so that debts could be promptly paid and the remaining assets could be promptly distributed to those entitled thereto. In re Marks & Co.'s Estate, (1913) 66 Or 340, 133 P 777.

FURTHER CITATIONS: Malagamba v. McLean, (1918) 89 Or 307, 173 P 1175.

LAW REVIEW CITATIONS: 16 OLR 271.

113.005

NOTES OF DECISIONS

Under former similar statute a special administrator was not appointed pending appeal where there was no delay in issuing letters testamentary or of administration. In re Workman's Estate, (1937) 156 Or 333, 65 P2d 1395, 68 P2d 479.

Under former similar statute a special administrator should not be appointed to substitute as plaintiff in a suit. Dibble v. Meyer, (1955) 203 Or 541, 278 P2d 901, 280 P2d 765.

FURTHER CITATIONS: Malone v. Cornelius, (1899) 34 Or 192, 55 P 536.

113.015

NOTES OF DECISIONS

1. Under former similar statute

The decision of a probate court on the question of inhabitancy, properly presented for its adjudication, was not open to examination in subsequent proceedings in a federal court. Holmes v. Ore. & Calif. R. Co., (1881) 7 Sawy 380, 9 Fed 229.

The county court when exercising probate jurisdiction had exclusive jurisdiction in the first instance to grant or revoke letters testamentary or of administration. Ramp v. McDaniel, (1885) 12 Or 108, 6 P 456.

In the case of a nonresident testator dying out of the state, the jurisdictional fact was the existence of an estate within the state. Thomas Kay Woolen Mill Co. v. Sprague, (1919) 259 Fed 338.

Automobile insurance carried by a deceased Washington motorist in a company authorized to do business in Oregon was an asset in the state supporting the appointment of an administrator. In re Vilas' Estate, (1941) 166 Or 115, 110 P2d 940.

Jurisdiction could not be conferred by the parties by consent, nor could want of jurisdiction be remedied by waiver or estoppel. Wink v. Marshall, (1964) 237 Or 589, 392 P2d 768.

FURTHER CITATIONS: Hubbard v. Hubbard, (1879) 7 Or 42; Moore v. Willamette Trans. & Land Co., (1879) 7 Or 359; In re Slate's Estate, (1902) 40 Or 349, 68 P 399; Slate v. Henkle, (1904) 45 Or 430, 78 P 325; Sappingfield v. Sappingfield, (1913) 67 Or 156, 135 P 333; In re Armstrong's Estate, (1938) 159 Or 698, 82 P2d 880; Wilson v. Hendricks, (1940) 164 Or 486, 102 P2d 714; In re Rowe's Estate, (1943) 172 Or 293, 141 P2d 832; In re Noyes' Estate, (1947) 182 Or 1, 185 P2d 555.

CASE CITATIONS: Chow v. Brockway, (1891) 21 Or 440, 28 P 384; Holmes v. Ore. & Calif. R. Co., (1881) 6 Sawy 276, 5 Fed 523.

113.035

NOTES OF DECISIONS

1. Under former similar statute

The petition was required to state the residence of the decedent. Moore v. Willamette Trans. & Land Co., (1879) 7 Or 359; Holmes v. Ore. & Calif. R. Co., (1881) 6 Sawy 276, 5 Fed 523.

An averment that intestate was "at or immediately before his death an inhabitant of Multnomah county" presented an issue as to intestate's inhabitancy in the county. Holmes v. Ore. & Calif. R. Co., (1881) 7 Sawy 380, 9 Fed 229.

A will which appoints an executor was entitled to probate regardless of whether it purported to dispose of anything or not. In re John's Will, (1897) 30 Or 494, 47 P 341, 50 P 226, 36 LRA 242.

A petition stating jurisdictional facts was a necessary prerequisite to the probate of a will. In re Burke's Estate, (1913) 66 Or 252, 134 P 11.

Legatees named in another will than that in contest could petition the court for probate of such other will. Re Faling Estate, (1924) 113 Or 6, 228 P 821, 231 P 148.

The statute conferred potential jurisdiction which became actual by the filing of a petition complying with the requirements of the law. Woodburn Lodge v. Wilson, (1934) 148 Or 150, 34 P2d 611.

Possession of the will was not necessary to petition for probate. Wilson v. Hendricks, (1940) 164 Or 486, 102 P2d 714.

The appointment of an executor and probate of a will were proper where the will revoked a prior will although allegedly the prior will was made in performance of contract between testator and beneficiary. Van Vlack v. Van Vlack, (1947) 181 Or 646, 182 P2d 969, 185 P2d 575.

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.

FURTHER CITATIONS: Jones v. Dove, (1876) 6 Or 188; Hubbard v. Hubbard, (1879) 7 Or 43; In re Rowe's Estate, (1943) 172 Or 293, 141 P2d 832; Richardson v. Green, (1894) 61 Fed 423; In re Holman's Will, (1902) 42 Or 345, 70 P 908; In re Pickett's Will, (1907) 49 Or 127, 89 P 377; Anderson v. Clough, (1951) 191 Or 292, 230 P2d 204; Wink v. Marshall, (1964) 237 Or 589, 392 P2d 768.

ATTY. GEN. OPINIONS: Filing fee for probate of will when estate is in course of administration, 1942-44, p 164.

LAW REVIEW CITATIONS: 49 OLR 347.

113.055

NOTES OF DECISIONS

1. In general

If a will which was last seen in the possession of the testator cannot presently be found, there is a prima facie presumption, in the absence of other evidence, that the testator destroyed and revoked the will. Fry v. Edwards, (1971) 5 Or App 471, 484 P2d 322.

The fact that disinherited heirs or other persons had access to a will may be considered in determining the issue of revocation and, in connection with other facts, may be sufficient to rebut the presumption that testator destroyed it when it cannot presently be found. Id.

2. Under former similar statute

Where probate was wholly ex parte, there were no parties to notify. Malone v. Cornelius, (1899) 34 Or 192, 55 P 536; Thomas Kay Woolen Mill v. Sprague, (1919) 259 Fed 338.

The attestation of a will raised a presumption that the attesting witness would support its validity, but when he was called and testified to the contrary, the presumption was overcome. In re Lambert's Estate, (1941) 166 Or 529, 114 P2d 125.

The affidavit signed by a witness to a will could be considered, in a will contest, upon the question of his credibility, but not as substantive proof of its contents. Id.

Administration of an estate was not in all cases necessary to pass legally enforceable rights and titles to the heirs. Dover v. Horger, (1960) 225 Or 492, 358 P2d 484.

Where there were no debts and no question of the persons entitled to the estate, there was no policy that required the court to grant administration. Id.

FURTHER CITATIONS: Moore v. Willamette Trans. & Land Co., (1879) 7 Or 359; Dolven v. First Nat. Bank, (1964) 238 Or 306, 393 P2d 196.

LAW REVIEW CITATIONS: 42 OLR 263.

113.065

NOTES OF DECISIONS

Under former similar statute if the will was probated outside the state, certified copies of the will and probate could be recorded in the same manner as wills executed and probated in this state. Montague v. Schieffelin, (1905) 46 Or 413, 80 P 654.

Under former similar statute applicable only where the testator was not an inhabitant of, but owned property in Oregon. In re Noyes' Estate, (1947) 182 Or 1, 185 P2d 555.

FURTHER CITATIONS: In re Clayson's Will, (1893) 24 Or 542, 34 P 358; In re Carlson's Estate, (1936) 153 Or 327, 56 P2d 347.

ATTY. GEN. OPINIONS: Sufficiency of authentication of certified copies of foreign wills and probate thereof to convey property located in Oregon, 1924-26, p 219.

113.075

NOTES OF DECISIONS

1. Under former similar statute

(1) In general. A beneficiary of a revoked will having no interest in the estate of the decedent could not contest validity of a subsequent will. In re Carlson's Estate, (1936) 153 Or 327, 56 P2d 347; Johnston v. Goakey, (1954) 202 Or 4, 271 P2d 658.

Executrix could prosecute appeal from decree of probate court setting aside the will. In re Will of Hough, (1926) 120 Or 223, 251 P 711.

Only those persons having an interest in a will, or in the estate, of such a character that the interest would be affected by the probate were entitled to contest the will. In re Carlson's Estate, (1936) 153 Or 327, 56 P2d 347.

It was essential that there be a financial interest adversely affected in order to entitle a person to contest the proffered will. Id.

Court had jurisdiction when petition was filed within the time limited, although verification of the petition was allowed after expiration of the period. Dean v. First Nat. Bank, (1959) 217 Or 340, 341 P2d 512.

Generally an amended pleading which introduced no new cause of action related back to the filing of the original complaint for determining if the statute of limitations had tolled. Mills v. Feiock, (1962) 229 Or 618, 368 P2d 327.

(2) Contesting the will. Where the validity of a probated will was attacked, the proponent, had to probate the instrument de novo. Hubbard v. Hubbard, (1879) 7 Or 42; Heirs of Clark v. Ellis, (1881) 9 Or 128.

The objection to paying costs from an estate in an unsuccessful contest was that it might tend to promote litigation. In re Johnson's Estate, (1921) 100 Or 142, 196 P 385, 1115; Richards v. De Lin, (1930) 135 Or 8, 282 P 119, 294 P 600.

The formal probate was not considered of any importance when the validity of the will was attacked by a direct proceeding. Luper v. Werts, (1890) 19 Or 122, 23 P 850.

Contestant was not entitled to jury trial. Stevens v. Myers, (1912) 62 Or 372, 121 P 434, 126 P 29.

Contestants had the burden to establish by a preponderance of the evidence that testatrix was mentally incompetent or that undue influence was exercised to bring about execution of the will. In re Dunn's Will, (1918) 88 Or 416, 171 P 1173.

Residents of another state who had timely notice of proceedings to probate deceased's will as to corporate stock having its situs in this state and who failed to avail themselves of the statute were bound by the decree. Thomas Kay Woolen Mill Co. v. Sprague, (1919) 259 Fed 338.

A will contest did not abate upon the death of contestant pending appeal from a decision in her favor. In re Estate of Riggs, (1926) 120 Or 38, 241 P 70, 250 P 753.

A contestant was not entitled to costs from an estate where there was no reasonable ground for the contest. Richards v. De Lin, (1930) 135 Or 8, 282 P 119, 294 P 600.

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.

Contestants have the burden to establish by a preponderance of the evidence that testatrix was mentally incompetent or that undue influence was exercised to bring about execution of the will. Nelson v. O'Connor, (1970) 3 Or App 215, 473 P2d 161.

FURTHER CITATIONS: Mansfield v. Hill, (1910) 56 Or 400, 107 P 471, 108 P 1007; In re Burke's Estate, (1913) 66 Or 252, 134 P 11; Ingraham v. Struve, (1952) 196 Or 219, 246 P2d 858; Ehry v. Blackford, (1961) 228 Or 248, 364 P2d 626; Barchus v. Pioneer Trust Co., (1961) 229 Or 268; 366 P2d

890; Kastner v. Husband, (1962) 231 Or 133, 372 P2d 520; Cline v. Larson, (1963) 234 Or 384, 383 P2d 74; Dolven v. First Nat. Bank, (1964) 238 Or 306, 393 P2d 196.

ATTY. GEN. OPINIONS: Advisability of contest by State Land Board, 1938-40, p 595; time limitations in contest by State Land Board, 1938-40, p 617.

113.085

NOTES OF DECISIONS

1. Under former similar statute

An executor was a person to whom the decedent had confided the execution of his last will. Holladay v. Holladay, (1888) 16 Or 147, 19 P 81.

Letters testamentary were but the authentic evidence of the power conferred by the will, and were founded upon the probate of that instrument. Id.

A collateral attack on an order appointing or removing an administrator could not be sustained. Gardner v. Gillihan, (1891) 20 Or 598, 27 P 220.

Where petitioner alleged merely that he was the principal creditor of decedent's estate, the appointed administrator, another creditor, was not removed. Cusick v. Hammer, (1894) 25 Or 472, 36 P 525.

Decrees of county courts transacting probate business could not be collaterally assailed, except for want of jurisdiction apparent on the face of the record. In re Slate's Estate, (1902) 40 Or 349, 68 P 399.

It was an irregularity only where plaintiff, a stranger, was appointed administrator of decedent's estate within 30 days after the death where decedent left widow and heirs in foreign country; but another stranger could not attack the appointment. Franciscovich v. Walton, (1915) 77 Or 36, 150 P 261.

Where neither petitioner had a preference for appointment, an appointment made within three days of petition, contrary to a rule of court, was irregular only and would not be set aside on application of other petitioner. Re Estate of Roedler, (1924) 110 Or 147, 222 P 301.

The order in which administration was granted was mandatory, and left the court no discretion save where there were persons equally entitled or the fitness or qualification of a person was concerned. Id.

Where petition for letters of administration showed on its face that decedent left daughter living in county of venue, appointment thereunder was voidable only. In re Estate of MacMullen, (1926) 117 Or 505, 243 P 89, 244 P 664.

The issuance of letters testamentary was essential to give the exeuctor authority to act. State v. Tazwell, (1930) 132 Or 122, 283 P 745.

The court had no discretion as to the issuance of letters testamentary to the executor or executors named in the will, if they were willing to assume the trust, unless such person or persons were disqualified by law. In re Workman's Estate, (1935) 151 Or 475, 49 P2d 1136.

The testator had a right to confide the execution of his will to any person whom he could choose, who was not disqualified by law. Id.

Claimant who had notice of administration proceedings but failed to present claim for almost three years after estate was closed and adminstratrix discharged could not have administrator de bonis non appointed. In re Traaen's Estate, (1936) 154 Or 263, 59 P2d 406.

Plaintiff as the widow of the intestate had no preferential right to be appointed administratrix of the estate over the decedent's children. Biersdorf v. Putnam, (1947) 181 Or 522, 182 P2d 992.

The administratrix was not the widow of decedent. Walker v. Hildenbrand, (1966) 243 Or 117, 410 P2d 244.

FURTHER CITATIONS: Ramp v. McDaniel, (1885) 12 Or 108, 6 P 456; Wilson v. Hendricks, (1940) 164 Or 486, 102 P2d 714; Holmes v. Ore. & Calif. R. Co., (1881) 5 Fed 523, 9 Fed 229; Crawford v. Karr, (1965) 242 Or 259, 409 P2d 330; Department of Rev. v. First Nat. Bank, (1971) 5 Or App 65, 482 P2d 750.

ATTY. GEN. OPINIONS: Authority of probate court to appoint trust company as administrator, 1922-24, p 288; district attorney representing county relief committee as a creditor of estate of old age assistance recipient, 1922-24, p 83.

LAW REVIEW CITATIONS: 16 OLR 271; 49 OLR 363.

113.095

NOTES OF DECISIONS

1. Under former similar statute

All persons not expressly forbidden by statute could serve as executors and the court had to heed the testator's choice and issue the necessary letters. Holladay v. Holladay, (1888) 16 Or 147, 19 P 81; In re Workman's Estate, (1935) 151 Or 475, 49 P2d 1136.

A person who was an inactive officer of a corporation which held a deed of trust for property belonging to the decedent and who knew little about the affairs of such corporation was not incompetent to act as executor. Id.

A surety of a former administrator was not disqualified to act as administrator de bonis non. In re Marks' Estate, (1916) 81 Or 632, 160 P 540.

Where the foreign administrator merely acted as trustee to effect recovery for wrongful death for the benefit of statutorily designated beneficiaries, he did not need to qualify under the statute. Elliott v. Day, (1962) 218 F Supp 90. **Distinguished in** Gidinski v. McWilliams, (1970) 308 F Supp 772.

A foreign administrator has no capacity to maintain an action for wrongful death in Oregon if the proceeds of any recovery go to decedent's estate. Gidinski v. McWilliams, (1970) 308 F Supp 772.

ATTY. GEN. OPINIONS: Right of alien to act as administrator of an estate, 1926-28, p 557; status of county commissioner as judicial officer, 1950-52, p 332.

113.105

LAW REVIEW CITATIONS: 49 OLR 347, 364.

113.115

NOTES OF DECISIONS

1. Under former similar statute
   (1) In general
   (2) Liability of surety
   (3) Discharge of surety

1. Under former similar statute

(1) In general. The authority of an administrator ceased upon his failure to file a new undertaking when ordered by the court to do so. Levy v. Riley, (1873) 4 Or 392.

Equitable relief could be had against a sale of real property made by an administrator who failed to comply with an order to file a new undertaking. Id.

Notwithstanding an express provision in the will dispensing with security, the court could, when it had reason to believe that an estate had been or would be mismanaged or fraudulently administered, require an executor to give a bond, on a proper application by a legatee or creditor. Palicio v. Bigne, (1887) 15 Or 142, 13 P 765.

Where the surviving partner was appointed executor of

the general estate of the deceased partner to serve without bond and was also appointed executor of the partnership estate, he was required to give bond as executor of the partnership estate. Id.

An executor's bond in the sum fixed by the will was sufficient, notwithstanding the estimated amount of the estate was more than twice such sum. In re Conser's Estate, (1901) 40 Or 138, 66 P 607.

Proof of failure to file bond had to be made by one who asserted the fact. Gilbert v. Branchflower, (1925) 114 Or 508, 231 P 982.

No matter which of two persons seeking appointment as administrator was made administrator, the creditors would be protected by the bond required under the statute. In re Estate of MacMullen, (1926) 117 Or 505, 243 P 89, 244 P 664.

(2) Liability of surety. The liability of the surety on the administrator's bond was coextensive with that of the principal. Anderson v. Johnson, (1935) 150 Or 386, 45 P2d 168; Hagey v. Mass. Bonding & Ins. Co., (1942) 169 Or 132, 126 P2d 836.

Final settlement of accounts was necessary before action upon bond of administrator notwithstanding his removal for misconduct. Adams v. Petrain, (1884) 11 Or 304, 3 P 163.

Decree of final settlement concluded both administrator and his sureties in action on bond. Bellinger v. Thompson, (1894) 26 Or 320, 37 P 714, 40 P 229.

Sureties were liable for assets misapplied before the execution of the bond. Id.

The giving of a second bond by an executor on his own application did not release the sureties on the prior bond. Thompson v. Dekum, (1898) 32 Or 506, 52 P 517, 755.

Sureties of an executor were liable to creditors for a debt due from the executor to the decedent, though the executor was insolvent at the time of the appointment, and though they were not aware of this fact nor of the debt. United Brethren v. Akin, (1904) 45 Or 247, 77 P 748, 2 Ann Cas 353, 66 LRA 654.

An administrator's bond did not cover default of the principal in the performance of a duty not included in the office. Anderson v. Johnson, (1935) 150 Or 386, 45 P2d 168.

Successive or additional bonds given by an administrator were cumulative security and all sureties were liable thereon as if all had signed the same bond. Anderson v. Johnson, (1935) 150 Or 386, 45 P2d 168.

There was no liability of defendant to plaintiff in this suit until the failure, if any, of the administratrix had first been settled in probate court. Griffith v. W. Sur. Co., (1967) 248 Or 198, 432 P2d 1019.

(3) Discharge of surety. The only method provided by statute by which a surety on an executor's or an administrator's bond could be discharged or relieved was found in the probate law. Bellinger v. Thompson, (1894) 26 Or 320, 37 P 714, 40 P 229; Thompson v. Dekum, (1898) 32 Or 506, 52 P 517, 755.

FURTHER CITATIONS: Evarts v. Steger, (1876) 6 Or 55.

113.145

LAW REVIEW CITATIONS: 49 OLR 345-372.

113.155

NOTES OF DECISIONS

1. Under former similar statute

Failure for more than six months to publish a notice calling on creditors to present their claims was grounds for removal of the personal representative, in the discretion of the probate court. Re Barnes' Estate, (1899) 36 Or 279, 59 P 464.

A residuary legatee was not a claimant within the section and could not urge imperfect compliance with the section as an objection to the final account. Conser's Estate, (1901) 40 Or 138, 66 P 607.

The giving of the notice prescribed by the section was not a prerequisite to the right of the executor to enter on discharge of his duties. Id.

Failure to file the notice would not affect the validity of the final decree if the notice was in fact published. In re Conant's Estate, (1903) 43 Or 530, 73 P 1018.

FURTHER CITATIONS: Willis v. Marks, (1869) 29 Or 493, 45 P 293; Brown v. Drake, (1922) 103 Or 607, 205 P 1002, 210 P 710; In re Traaen's Estate, (1936) 154 Or 263, 59 P2d 406; Schaefer v. Sellar, (1937) 156 Or 16, 64 P2d 1334; First Nat. Bank v. Connolly, (1943) 172 Or 434, 138 P2d 613, 143 P2d 243; Hughes v. Honeyman, (1949) 186 Or 616, 208 P2d 355; Jackson v. United States Nat. Bank, (1957) 153 F Supp 104.

LAW REVIEW CITATIONS: 16 OLR 271; 46 OLR 58; 49 OLR 345-372.

113.165

NOTES OF DECISIONS

1. Under former similar statute

A failure to make and return an inventory of the estate by an executor or administrator within the time allowed by law subjected him to removal. In re Holladay's Estate, (1889) 18 Or 168, 22 P 750; In re Estate of Mills, (1892) 22 Or 210, 29 P 443; Re Barnes' Estate, (1899) 36 Or 279, 59 P 464; Marks v. Coats, (1900) 37 Or 609, 62 P 488; Re Bolander's Estate, (1901) 38 Or 490, 63 P 689; Manser v. Baker, (1911) 60 Or 240, 244, 118 P 1024; Hillman v. Young, (1913) 64 Or 73, 127 P 793, 129 P 124; In re Marks & Wollenberg's Estate, (1913) 66 Or 347, 133 P 779; Hadley v. Hadley, (1914) 73 Or 179, 144 P 80; In re Elder's Estate, (1938) 160 Or 111, 83 P2d 477, 119 ALR 302.

The word "appointment" meant the actual installation into office. Wells v. Applegate, (1883) 10 Or 519.

A judgment in favor of the estate should have been appraised and inventoried by the executor. In re Conser's Estate, (1901) 40 Or 138, 66 P 607.

Omission of some property or the failure to file any inventory did not affect the validity of the final account if the property of the estate had been accounted for. Id.

An administrator properly included in his inventory of the estate property which had been devised to the decedent but which was still in the course of administration. D'Arcy v. Snell, (1939) 162 Or 351, 91 P2d 537.

No breach of duty resulted from an executor's alleged failure to include carpenter tools and a diamond ring in his inventory and appraisement where he did not consider the tools as those of a workman and therefore included them under the general head of "household furniture and furnishings," and where he did not know, until the hearing, that the ring had been taken from the testator's finger and given to a friend and neighbor. Jamieson v. Hanna, (1945) 178 Or 214, 164 P2d 886.

Executor's failure to include in his inventory a diamond ring which had been taken from the testator's finger after his death by another and certain other inventory errors made by the executor did not justify his removal. In re Johnson's Estate, (1946) 178 Or 214, 164 P2d 886.

FURTHER CITATIONS: Hofer v. Gofner, (1930) 134 Or 33, 292 P 1029, 72 ALR 949.

113.185

CASE CITATIONS: In re Holladay's Estate, (1889) 18 Or 168, 22 P 750; Re Pittock's Estate, (1921) 102 Or 47, 201 P 428; In re Fehlmann's Estate, (1930) 134 Or 46, 292 P 1027; Watters v. Schmeer, (1967) 245 Or 477, 422 P2d 676.

LAW REVIEW CITATIONS: 37 OLR 72.

113.195

NOTES OF DECISIONS

1. Under former similar statute
   (1) In general
   (2) Grounds for removal
   (3) Applicant seeking removal
   (4) Procedure
   (5) Effect of removal

1. Under former similar statute

(1) In general. The probate courts were vested with discretion with respect to regulation of the conduct of executors and administrators. In re Holladay's Estate, (1889) 18 Or 168, 22 P 750; Bellinger v. Thompson, (1894) 26 Or 320, 37 P 714, 40 P 229; Re Barnes' Estate, (1899) 36 Or 279, 59 P 464; In re Manser's Estate, (1911) 60 Or 240, 118 P 1024; In re Marks & Co.'s Estate, (1913) 66 Or 340, 133 P 777; In re Workman's Estate, (1937) 156 Or 333, 65 P2d 1395, 68 P2d 479.

Removal by the court, of its own motion, of an executor or administrator was authorized by the statute. Ramp v. McDaniel, (1885) 12 Or 108, 6 P 456; In re Marks & Co.'s Estate, (1913) 66 Or 340, 133 P 777.

Where a will was admitted to probate and letters issued thereunder, the power of any administrator who may have been appointed ceased immediately. Malone v. Cornelius, (1898) 34 Or 192, 196, 55 P 536.

The probate court had no jurisdiction over a testamentary trustee. In re Roach's Estate, (1907) 50 Or 179, 92 P 118.

An only heir's assignee, who petitioned for removal of claimant as administrator and opposed his claim against the estate, became a "party" in a manner recognized by law and was entitled to notice of appeal from the order disallowing the claim. In re Brook's Estate, (1941) 167 Or 428, 118 P2d 103.

Where an order was made that had the effect of removing an administrator without notice or hearing, the order was reversed on appeal. In re Hiller's Estate, (1943) 170 Or 686, 135 P2d 462.

(2) Grounds for removal. Failure of an administrator within the time allowed by law to make and file an inventory or to publish a notice for creditors to present their claims was sufficient grounds for his removal. In re Holladay's Estate, (1889) 18 Or 168, 22 P 750; Estate of Mills, (1892) 22 Or 210, 29 P 443; Re Barnes' Estate, (1899) 36 Or 279, 59 P 464; In re Marks & Co.'s Estate, (1913) 66 Or 340, 133 P 777.

That he had been unfaithful to his trust was a ground for removal of an administrator. In re Mills' Estate, (1902) 40 Or 424, 67 P 107; In re Marks' Estate, (1916) 81 Or 632, 160 P 540.

The executor could be removed for wilful mismanagement of his decedent's estate. Re Partridge's Estate, (1897) 31 Or 297, 307, 51 P 82.

An administrator was removed by the court without a special hearing for that particular matter. Id.

Where interests of administrator as heir and the interest of creditors conflicted, he was properly removed. Marks v. Coats, (1900) 37 Or 609, 62 P 488.

Antagonism between the interest of the administrator and the heirs warranted removal. Bean v. Pettengill, (1910) 57 Or 22, 109 P 865.

That an administrator was surety on the bond of a former administrator was not sufficient to warrant his removal. In re Marks' Estate, (1916) 81 Or 632, 160 P 540.

Although the court was required carefully to protect the estate's interest, the executor or administrator should not have been removed except for good and sufficient cause. Hofer v. Gofner, (1930) 134 Or 33, 292 P 1029, 72 ALR 949.

Where executor did not act strictly in accordance with the statute but petitioners failed to establish that he had been unfaithful to or neglectful of the trust to their probable loss as legatees, he was not removed. In re Johnson's Estate, (1946) 178 Or 214, 164 P2d 886.

(3) Applicant seeking removal. A statement in a petition for the removal of an administrator that the estate was indebted to petitioner was a sufficient allegation of petitioner's interest to show his right to petition. In re Mills' Estate, (1902) 40 Or 424, 67 P 107.

An attorney whose claim against the estate had been allowed was a creditor of the estate within the meaning of the statute. Re Prince's Estate, (1926) 118 Or 210, 221 P 554, 246 P 713.

(4) Procedure. An administrator should be cited to appear to be heard on the question of his removal. Re Partridge's Estate, (1897) 31 Or 297, 51 P 82; Manser's Estate, (1911) 60 Or 240, 118 P 1024; In re Marks & Co.'s Estate, (1913) 66 Or 340, 133 P 377; In re Hiller's Estate, (1943) 170 Or 686, 135 P2d 462.

No particular form was required for a petition to remove an executor. Moore v. Willamette Trans. & Land Co., (1879) 7 Or 359.

Petition for removal of an executor was sufficient where it set forth enough to call the attention of the court to the matter complained of. Id.

Insufficiency of petition to revoke letters of administration was not subject to collateral attack. Ramp v. McDaniel, (1885) 12 Or 108, 6 P 456.

An appeal from an order deposing an administrator did not suspend the operation of the order, as the removal was in force until reinstatment. Knight v. Hamaker, (1898) 33 Or 154, 157, 54 P 277, 659.

When an administrator appeared in response to a petition for his removal, and contested the matter on its merits, he could not thereafter be heard to object that the petition was insufficient. Re Barnes' Estate, (1899) 36 Or 279, 59 P 464.

An administrator's failure to file his semiannual accounts and the claims against the estate did not require his removal upon the petition of a person offering to buy the real property from the administrator and thereafter acquiring the interest of the heirs, where it did not appear that the heirs were dissatisfied at any time with the administration, and there was no probable loss to the applicant. In re Witherill's Estate, (1946) 178 Or 253, 166 P2d 129.

(5) Effect of removal. A removed executor had no power to act or to bind the estate in any manner. Knight v. Hamaker, (1898) 33 Or 154, 54 P 277, 659; State v. Tazwell, (1930) 132 Or 122, 283 P 745.

An appeal taken by an administrator while in office could not be prosecuted by him after his removal. Knight v. Hamaker, (1898) 33 Or 154, 54 P 277, 659.

The power to remove an executor or administrator necessarily carried with it authority to require him to render an account, and to pay over all moneys in his hands and to deliver all property in his possession to his successor, and any failure to comply therewith was a breach of the conditions of his bond. Rutenic v. Hamakar, (1902) 40 Or 444, 67 P 196.

Administration of an estate of a personal representative prior to his removal was valid if he conducted himself honestly and the court had power to make the appointment.

In re Workman's Estate, (1937) 156 Or 333, 65 P2d 1395, 68 P2d 479.

FURTHER CITATIONS: Moore v. Willamette Trans. & Land Co., (1879) 7 Or 359, 368; Re Bolander's Estate, (1901) 38 Or 490, 63 P 689; Dedman v. Biggs, (1943) 170 Or 692, 134 P2d 428; In re Malarkey's Estate, (1969) 252 Or 261, 449 P2d 424.

LAW REVIEW CITATIONS: 8 OLR 22; 49 OLR 348, 363.

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NOTES OF DECISIONS

1. Under former similar statute

No action could be maintained on an administrator's bond until final settlement of his accounts. Adams v. Petrain, (1884) 11 Or 304, 3 P 163.

An action by the administrator with the will annexed against his predecessor would lie for devastavit, the wasting of assets of the estate contrary to the duty imposed on him. Steel v. Holladay, (1890) 20 Or 70, 25 P 69, 10 LRA 670.

An administrator de bonis non could recover from the representative of the former administrator or his surety, assets converted by the first administrator. In re Herren's Estate, (1901) 40 Or 90, 66 P 688.

An administrator de bonis non could maintain an action upon the former administrator's bond upon his failure to turn over all property upon proper citation. Rutenic v. Hamakar, (1902) 40 Or 444, 67 P 196.

Where letters of administration were void because the court was without jurisdiction, such appointee was liable only to the legal representative of the deceased for the results of his interference. Slate v. Henkle, (1904) 45 Or 430, 78 P 325.

Releases obtained by a surety company from beneficiaries not parties to the action were given no effect in an action by the administrator de bonis non against the company on its bond. Brown v. Am. Sur. Co., (1947) 181 Or 564, 182 P2d 357.

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.

FURTHER CITATIONS: Hubbard v. Hubbard, (1879) 7 Or 42; Ramp v. McDaniel, (1885) 12 Or 108, 6 P 456; Cross v. Baskett, (1888) 17 Or 84, 21 P 47; Richardson v. Green, (1894) 61 Fed 423; Davis v. Hutchinson, (1927) 22 F2d 380; In re Carlson's Estate, (1935) 149 Or 314, 40 P2d 743; In re Traaen's Estate, (1936) 154 Or 263, 59 P2d 406; National Sur. Corp. v. McArthur, (1944) 174 Or 376, 149 P2d 328.

ATTY. GEN. OPINIONS: Requirement of filing fee for probate of will when estate is in course of administration, 1942-44, p 164.