Chapter 115

Claims; Actions and Suits

115.005

NOTES OF DECISIONS

1. Under former similar statute

Generally claims were required to be presented before the final settlement of an estate or they became forever barred. In re Traaen's Estate, (1936) 154 Or 263, 59 P2d 406; In re Hattrem's Estate, (1943) 170 Or 613, 135 P2d 777; First Nat. Bank v. Connolly, (1943) 172 Or 434, 138 P2d 613, 143 P2d 243.

The requirement that claims be presented within six months only postponed claims not presented within that time until the payment of those so presented. In re Murray's Estate, (1910) 56 Or 132, 107 P 19.

Plaintiff received notice sufficient under due process. Chalaby v. Driskell, (1964) 237 Or 245, 390 P2d 632, 391 P2d 624.

FURTHER CITATIONS: Zachary v. Chambers, (1860) 1 Or 321; Re Estate of Houcks & Meyer, (1888) 23 Or 10, 17 P 461; Brown v. Drake, (1922) 103 Or 607, 205 P 1002, 210 P 710; Hughes v. Honeyman, (1949) 186 Or 616, 208 P2d 355; Stevens v. Scanlon, (1967) 248 Or 229, 430 P2d 1019; Lowes v. First Nat. Bank, (1968) 295 F Supp 260.

LAW REVIEW CITATIONS: 37 OLR 72; 46 OLR 57-64.

115.025

NOTES OF DECISIONS

1. Under former similar statute

The provision requiring verification was enacted primarily for the benefit of the executor or administrator to enable him to pass intelligently upon claims presented and to prevent spurious or fictitious claims. Zachary v. Chambers, (1860) 1 Or 321; Estate of Gibson & Son, (1928) 124 Or 193, 264 P 371.

The ordinary mode in making out a claim against the estate of a deceased person was to state an account and then to verify it. Aiken v. Coolidge, (1885) 12 Or 244, 6 P 712.

A claim included in a general affidavit complied substantially with the statutory requirements where claimant deposed to the fact that the estate was indebted to her in a stated amount, that there were no legal setoffs or counterclaims existing against it, and that the amount was due her. Id.

Claimant could replevy from the administrator the paper on which his verified claim was written. Willis v. Marks, (1896) 29 Or 493, 45 P 293.

The statute neither provided for nor required any particular form for a claim; and a claimant did not need to set out the evidence upon which he expected to recover if action should become necessary. Goltra v. Penland, (1902) 42 Or 18, 69 P 925.

The administrator had no right to waive verification in favor of or against any particular creditor. Estate of Gibson & Son, (1928) 124 Or 193, 264 P 371.

The requirement of verification was imperative. Id.

A statement that there was no just counterclaim to the claim had to be included in the verification. Kirchner v. Clostermann, (1929) 128 Or 183, 272 P 278.

Claims within the contemplation of the statute were such demands as the personal representative could satisfy out of the general funds of the estate. Harris v. Craven, (1939) 162 Or 1, 91 P2d 302.

The demand of a cestui que trust for property held by decedent in trust for him at the time of his death was not a claim within the contemplation of the statute. Id.

A verified claim of a corporation against an estate was not bad merely because the person verifying the claim failed to disclose his authority. Brown v. Stephenson, (1943) 171 Or 239, 137 P2d 289.

A claim need not state the particulars of a cause of action but was sufficient if it showed a substantial subsisting liability and notified the executor of the character and amount of the claim. Brackett v. United States Nat. Bank, (1949) 185 Or 642, 205 P2d 167.

115.055

CASE CITATIONS: Willis v. Marks, (1896) 29 Or 493, 45 P 293; Re Chambers' Estate, (1900) 38 Or 131, 62 P 1013.

115.065

NOTES OF DECISIONS

1. Under former similar statute

The holder of a judgment was not required to present his claim, established by judgment, to the executor for allowance. Knott v. Shaw, (1875) 5 Or 482, 484.

A judgment creditor whose judgment was recovered against the debtor during his lifetime could issue execution against the property of the debtor or for the delivery of real or personal property after such debtor's decease. Bower v. Holladay, (1890) 18 Or 491, 22 P 553.

A claimant was allowed to replevy a verified claim from the administrator. Willis v. Marks, (1896) 29 Or 493, 45 P 293.

An executor was not given a lien for administration expenses which was superior to a mortgage on the property, even though other assets were insufficient to pay such expenses. Shepard v. Saltzman, (1898) 34 Or 40, 54 P 882.

An administrator's sale of the realty did not affect defendant's judgment lien where defendant had not been served notice of the probate proceedings and the petition for sale did not mention the lien. Petke v. Pratt, (1942) 168 Or 425, 123 P2d 797.

FURTHER CITATIONS: United States v. Eggleston, (1877) 4 Sawy 199, Fed Cas No. 15,027; Brenner v. Alexander, (1888) 16 Or 349, 19 P 9, 8 Am St Rep 301; Estate of MacMullen, (1926) 117 Or 505, 243 P 89, 244 P 664; Godfrey v. Gempler, (1937) 157 Or 251, 70 P2d 551; Hughes v. Honeyman, (1949) 186 Or 616, 208 P2d 355.

ATTY. GEN. OPINIONS: Necessity for naming administrator as a party in foreclosure proceedings, 1922-24, p 150.

115.105

NOTES OF DECISIONS

1. Under former similar statute

That the probate court had no power or authority to allow a claim of the administrator not presented to the judge for allowance before being barred by limitations was properly considered in a writ of review. Farrow v. Nevin, (1904) 44 Or 496, 75 P 711.

The administrator's claim for services rendered for more than 10 years prior to his appointment was not barred by limitations where his claims were never rejected until objected to on final accounting. Re Estates of Bethel, (1924) 111 Or 178, 209 P 311, 226 P 427.

Where administrator's claim for money advanced to pay bills of heirs was not properly chargeable against the estate, the court properly took testimony to determine what should be charged against each distributive share. Id.

A corporate administrator was entitled to have the probate court pass upon its claim against the estate of the deceased for money obtained through fraud rather than compel the administrator to bring a suit in equity. In re Anderson's Estate, (1937) 157 Or 365, 71 P2d 1013.

FURTHER CITATIONS: In re Stafford's Estate, (1934) 145 Or 510, 28 P2d 840.

115.115

NOTES OF DECISIONS

1. Under former similar statute

By paying claims in advance of an order by the court, an executor or administrator took the risk of securing the approval of his acts by the court when his accounts and vouchers were presented. Rostel v. Morat, (1890) 19 Or 181, 23 P 900.

The court could order at any accounting a distribution of funds on hand to be made among creditors whose claims had been approved. Willis v. Marks, (1896) 29 Or 493, 45 P 293.

The entry of such order per se fixed a personal liability upon the administrator in favor of the claimant, in the amount required to be so distributed to him. Id.

An order approving a semi-annual account and directing payment of a claim was prima facie evidence of the correctness of the account, but objections could be made to any item in the final accounting. Re Chambers' Estate, (1900) 38 Or 131, 62 P 1013.

The administrator could become liable for payments made on unverified claims even though he acted in good faith. Estate of Gibson & Son, (1928) 124 Or 193, 264 P 371.

FURTHER CITATIONS: United States v. Eggleston, (1877) 4 Sawy 199, Fed Cas No. 15,027; In re First & Farmers' Nat. Bank, (1933) 145 Or 150, 26 P2d 1103.

115.125

NOTES OF DECISIONS

1. Under former similar statute

A debt due the United States on a surety bond, given priority by statute, was not a lien upon the property in the hands of the administrator. United States v. Eggleston, (1877) 4 Sawy 199, Fed Cas No. 15,027.

An execution issued after death of the testator and running generally against his property was precluded by the statute from taking preference. Bower v. Holladay, (1889) 18 Or 491, 22 P 553.

An executor was not given a lien for administration expenses which was superior to a mortgage on the property, even though other assets were insufficient to pay such expenses. Shepard v. Saltzman, (1898) 34 Or 40, 54 P 882.

A liability on the administrator's own contract need not be presented to the estate at all by the creditor, being a preferred claim in favor of the administrator. Murray's Estate, (1910) 56 Or 132, 107 P 19.

Disbursements constitute a charge in favor of an executor or administrator against the estate, although their allowance left no surplus to pay creditors of the deceased and such expenditures could be retained from the funds of the estate by the administrator or executor. Stewart v. Baxter, (1934) 145 Or 460, 28 P2d 642, 91 ALR 818.

Payment of taxes upon property belonging to estate located in another state, after administration in such state, was proper. Id.

Failure to file interim accounts at the prescribed period was not ground for the removal of an executor where no loss was suffered by the estate or petitioners, and they neither demanded the filing of the accounts nor sought to compel such filing. In re Johnson's Estate, (1945) 178 Or 214, 164 P2d 886.

The claim of the county for expenses of last illness was not a preferred claim. Berg v. Nelson, (1965) 240 Or 330, 301 P2d 44.

FURTHER CITATIONS: Mahon v. Harney County Nat. Bank, (1922) 104 Or 323, 206 P 224; Kay v. Meyers, (1925) 115 Or 178, 236 P 1064; Petke v. Pratt, (1942) 168 Or 425, 123 P2d 797; Beatty v. Cake, (1963) 236 Or 498, 387 P2d 355; Henderson v. State Tax Comm., (1963) 1 OTR 390; Beatty v. Cake, (1965) 242 Or 128, 407 P2d 619; Bauman v. Wright, (1968) 249 Or 212, 437 P2d 488.

ATTY. GEN. OPINIONS: Refund of escheated money for payment of funeral charges, 1926-28, p 153; priority of public welfare claims against estate of person receiving old-age assistance, 1950-52, p 45.

115.135

NOTES OF DECISIONS

1. Under former similar statute

Where a claim was rejected generally and not because of its form, the latter matter was not available in a subsequent action on the claim. Aiken v. Coolidge, (1885) 12 Or 244, 6 P 712.

If the holder of a mortgage failed to present his claim, the only consequence was that a personal judgment could not be rendered for a balance of the debt remaining unpaid after the security had been exhausted. Teel v. Winston, (1892) 22 Or 489, 29 P 142.

Replevin to recover the evidence of a claim was maintainable by the claimant where the administrator refused to surrender it after he had a reasonable opportunity to examine it. Willis v. Marks, (1896) 29 Or 493, 45 P 293.

A creditor who had acquired an attachment lien did not lose his right to enforce such lien by presenting the claim to the administrator and having it allowed. White v. Ladd, (1899) 34 Or 422, 56 P 515.

Disbursement of funds of the estate without order of the county court was not ground for removal of an executor. Latourette v. Nickell, (1920) 95 Or 323, 187 P 621.

The administrator acted as an auditor and not in a judicial capacity; before he allowed a claim, he had to be satisfied of its justness and that it was not barred by the statute of limitations. In re First & Farmers' Nat. Bank, (1933) 145 Or 150, 26 P2d 1103.

Claims within the contemplation of the statute were such demands as the personal representative could satisfy out of the general funds of the estate. Harris v. Craven, (1939) 162 Or 1, 91 P2d 302.

The demand of a cestui que trust for property held by decedent in trust for him at the time of his death was not a claim within the statute. Id.

Where most of a claim was based upon transactions occurring after the death of decedent and the estate therefore lost no evidence concerning those items, expenses incurred by representative were not claims contemplated by the statute. In re Hattrem's Estate, (1943) 170 Or 613, 135 P2d 777.

FURTHER CITATIONS: Knott v. Shaw, (1875) 5 Or 482; Verdier v. Bigne, (1888) 16 Or 208, 19 P 64; Dunham v. Siglin, (1901) 39 Or 291, 295, 64 P 661; Goltra v. Penland, (1902) 42 Or 18, 69 P 925; Brown v. Truax, (1911) 58 Or 572, 115 P 597; Kern v. Fletcher, (1944) 174 Or 87, 147 P2d 498; In re McKinney's Estate, (1944) 175 Or 1, 149 P2d 976; Larabee v. Mell, (1952) 193 Or 543, 239 P2d 597; Fay v. McConnell, (1961) 229 Or 128, 366 P2d 327; Harp v. State Comp. Dept., (1967) 247 Or 129, 427 P2d 981.

115.145

NOTES OF DECISIONS

1. Under former similar statute

The formal proceedings of an action were not contemplated by the statute. Wilkes v. Cornelius, (1891) 21 Or 348, 28 P 135; Johnston v. Schofner, (1892) 23 Or 111, 31 P 254; Pruitt v. Muldrick, (1901) 39 Or 353, 65 P 20; In re Morgan's Estate, (1905) 46 Or 233, 77 P 608, 78 P 1029; In re Webster's Estate, (1915) 74 Or 489, 145 P 1063; In re First & Farmers' Nat. Bank, (1933) 145 Or 150, 26 P2d 1103; In re Stout's Estate, (1935) 151 Or 411, 50 P2d 768, 101 ALR 672.

The jurisdiction of county courts with respect to the examination and allowance of claims was not limited in amount when proceeding under the statute. In re Morgan's Estate, (1905) 46 Or 233, 77 P 608, 78 P 1029; In re McCormick's Estate, (1914) 72 Or 608, 143 P 915, 144 P 425.

Failure to make detailed findings of fact upon allowing or rejecting a claim did not constitute error. In re Stout's Estate, (1935) 151 Or 411, 50 P2d 768, 101 ALR 672; In re Swanton's Estate, (1936) 153 Or 644, 58 P2d 604.

The trial was required to be upon the claim as presented; it was error to admit evidence of an express agreement in support of a claim based on quantum meruit. Wilkes v. Cornelius, (1891) 21 Or 348, 28 P 135.

The effect of a judgment was merely to establish the claim as if allowed so as to require it to be satisfied in due course of administration. Pruitt v. Muldrick, (1901) 39 Or 353, 65 P 20.

Where the administratrix disallowed a claim of the county against the estate of a deceased sheriff for money alleged to have been received by him as tax collector, the county could present the claim to the probate court but was restrained from seeking removal of the executrix. Alderman v. Tillamook County, (1907) 50 Or 48, 91 P 298.

Where a claim was disallowed by the executor, the claimant's remedy was to present it to the probate court for allowance. Irvine v. Beck, (1912) 62 Or 593, 125 P 832.

Claimants declaring upon a special contract must prove it as stated; they were confined to the terms of the claim which they asserted. Re Estate of Banzer, (1923) 106 Or 654, 213 P 406.

No particular pleadings or forms were required in probate proceedings; the court had power to hear and determine all demands against the estate. In re Anderson's Estate, (1937) 157 Or 365, 71 P2d 1013.

Giving notice of summary hearing stopped the running of the general statute of limitations. Clostermann v. Reynolds, (1963) 236 Or 114, 386 P2d 468.

FURTHER CITATIONS: Re Chambers' Estate, (1900) 38 Or 131, 62 P 1013; In re Patton's Estate, (1942) 170 Or 186, 132 P2d 402; Trumbo v. Trumbo, (1956) 208 Or 114, 299 P2d 609; Payne v. Griffin, (1964) 239 Or 91, 396 P2d 573.

LAW REVIEW CITATIONS: 37 OLR 71.

115.155

NOTES OF DECISIONS

1. Under former similar statute

A claimant could sue in the circuit court, the remedy under the statute not being exclusive. Ray v. Hodge, (1887) 15 Or 20, 13 P 599; Jacobson v. Holt, (1927) 121 Or 462, 255 P 901; Phillips v. Elliott, (1933) 144 Or 694, 17 P2d 1119, 25 P2d 557.

Where an action had not been instituted on a rejected claim, the holder could not maintain a suit in equity to recover the claim from assets in the hands of next of kin after a final settlement of the administrator's accounts was had. Grange Union v. Burkhart, (1879) 8 Or 51.

Claimant included an assignee or successor in interest of the person presenting the claim for allowance. In re Morgan's Estate, (1905) 46 Or 233, 77 P 608, 78 P 1029.

The objection that a claim was not presented by the proper person was a matter in abatement only and waived by joining issue on the merits. Id.

FURTHER CITATIONS: Pruitt v. Muldrick, (1901) 39 Or 353, 65 P 20; In re McCormick's Estate, (1914) 72 Or 608, 143 P 915, 144 P 425; Tharp v. Jackson, (1917) 85 Or 78, 165 P 585, 1173.

115.165

NOTES OF DECISIONS

1. Under former similar statute

Administratrix who successfully appealed from order allowing claims was entitled to costs under the statute but not more than the maximum abstract and brief costs as fixed by rule. In re Estate of MacMullen, (1926) 117 Or 505, 243 P 89, 244 P 664.

Attorneys and witnesses appearing on behalf of claimants from countries with which there was no reciprocity regarding inheritance were not entitled to fees payable out of the estate. State Land Bd. v. Sovenko, (1954) 202 Or 571, 277 P2d 781.

FURTHER CITATIONS: Wilkes v. Cornelius, (1891) 21 Or 341, 23 P 473; Johnston v. Schofner, (1892) 23 Or 111, 31 P 254; Herren's Estate, (1901) 40 Or 90, 66 P 688; Hillman v. Young, (1913) 64 Or 73, 127 P 793,129 P 124; In re McCormick's Estate, (1914) 72 Or 608, 143 P 915, 144 P 425; Latourette v. Nickell, (1920) 95 Or 323, 187 P 621; In re First & Farmers' Nat. Bank, (1933) 145 Or 150, 26 P2d 1103; In re Stout's Estate, (1935) 151 Or 411, 50 P2d 768, 101 ALR 672; In re Anderson's Estate, (1937) 157 Or 365, 71 P2d 1013; Hiller v. Smith, (1943) 171 Or 428, 137 P2d 828; In re Kries' Estate, (1947) 182 Or 311, 187 P2d 670; Smith v. Little, (1950) 188 Or 682, 214 P2d 345, 217 P2d 595; Moore v Schermerhorn, (1957) 210 Or 23, 307 P2d 483, 308 P2d 180.

LAW REVIEW CITATIONS: 37 OLR 72.

115.185

CASE CITATIONS: Rostel v. Morat, (1890) 19 Or 181, 23 P 900.

115.195

NOTES OF DECISIONS

1. Under former similar statute
   (1) In general
   (2) Testimony of claimant
   (3) Testimony of other persons

(4) Other evidence
(5) Instructions to jury

1. Under former similar statute

(1) In general. The allowance of a claim by an administrator did not make out a prima facie case in favor of its validity, if objected to on final hearing, but claimant must substantiate his claim by proof. Re Chambers' Estate, (1900) 38 Or 131, 62 P 1013; In re First & Farmers' Nat. Bank, (1933) 145 Or 150, 26 P2d 1103.

A claim to property as a gift could not be regarded as a claim against the estate of the donor within the requirement of other evidence than that of the claimant. Waite v. Grubbe, (1903) 43 Or 406, 73 P 206, 99 Am St Rep 764.

The provision applied only to the trial on the merits of a rejected claim and not to the preliminary question of whether there was due presentation and disallowance. Goltra v. Penland, (1904) 45 Or 254, 77 P 129.

Claims of long standing were to be scrutinized with care and strong and convincing proof required before allowing them. Scott v. Merrill's Estate, (1915) 74 Or 568, 146 P 99.

The provision referred only to the material facts constituting the contract upon which the claim was founded; it did not extend to those collateral and incidental facts which did not touch the question of the right to recover. Franklin v. Northrup, (1923) 107 Or 537, 215 P 494.

Rejection of the claim by the representative was essential to applicability of the provision. Re Estates of Bethel, (1924) 111 Or 178, 209 P 311, 226 P 427.

The requirement with respect to evidence other than the testimony of the claimant was not repealed by Ore. Const. Art. VII(A), §3. Uhler v. Harbaugh, (1924) 110 Or 609, 224 P 89.

Where the validity of a claim was questioned it was incumbent upon the claimant to produce evidence to support its claim; where it failed to do so, it was the duty of the court to disallow the same. In re First & Farmers' Nat. Bank, (1933) 145 Or 150, 26 P2d 1103.

The purpose of the statute was to withhold full effect of survivor's testimony when the other party was dead. In re Hattrem's Estate, (1943) 170 Or 613, 135 P2d 777.

On the opening of the case claimant was not required to elect between express contract and quantum meruit. Brackett v. United States Nat. Bank, (1949) 185 Or 642, 205 P2d 167.

(2) Testimony of claimant. The statute did not make the claimant incompetent as a witness or require that his testimony be disregarded. Estate of McLain, (1928) 126 Or 456, 270 P 534; In re Steele's Estate, (1935) 152 Or 49, 52 P2d 207.

A claimant was required to make out a prima facie case sufficient to sustain a verdict in his behalf independent of his own testimony. Re Estate of Banzer, (1923) 106 Or 654, 213 P 406; Seaton v. Sec. Sav. & Trust Co., (1929) 131 Or 261, 282 P 556; In re Millon's Estate, (1936) 154 Or 615, 61 P2d 1030.

When evidence was insufficient to support a claim for services performed pursuant to alleged oral contract without the testimony of claimant personally, the claim was not allowed. Uhler v. Harbaugh, (1924) 110 Or 609, 224 P 89; In re Berger's Estate, (1933) 144 Or 631, 25 P2d 138.

Where corroborating testimony was sufficient as to performance of service and its reasonable value, claimant's testimony that claim against deceased employer's estate had not been paid did not have to be corroborated. Estate of Kukas, (1927) 120 Or 542, 252 P 947; Littlepage v. Sec. Sav. & Trust Co., (1931) 137 Or 559, 3 P2d 752.

Having laid a foundation for recovery with other competent evidence, the claimant could reinforce his case by his own evidence so as to render it more probable that the jury would find in his favor. Uhler v. Harbaugh, (1924) 110 Or 609, 224 P 89.

Testimony by employes of a corporation regarding the corporation's claim against the estate of a decedent was not testimony of a claimant within the statute. Mason, Ehrman & Co. v. Estate of Lewis, (1929) 131 Or 242, 276 P 281, 281 P 123, 282 P 772.

The reasonable value of services performed by claimant for deceased was established by the former's testimony alone. Littlepage v. Sec. Sav. & Trust Co., (1931) 137 Or 559, 3 P2d 752.

(3) Testimony of other persons. The phrase "except upon some competent satisfactory evidence other than the testimony of claimant" required that there be other material and pertinent testimony supporting or corroborating that given by him, sufficient to go to the jury and upon which it could find a verdict, so that the decision could rest upon some evidence other than that of the claimant. Goltra v. Penland, (1904) 45 Or 254, 77 P 129; Field v. Rodgers, (1929) 128 Or 661, 275 P 598; Seaton v. Sec. Sav. & Trust Co., (1929) 131 Or 261, 282 P 556.

Testimony of a stranger that the decedent once gave him money to deliver to plaintiff on a note and indorsement of credit on the note was insufficient to establish a claim on a note barred by the statute of limitations. Harding v. Grim, (1894) 25 Or 506, 36 P 634.

Evidence by third persons that no consideration passed at the time of the disputed transfer by plaintiff to decedent and that decedent acknowledged his liability, was sufficient corroborating evidence. Bull v. Payne, (1906) 47 Or 580, 84 P 697.

Verdict based on substantial evidence of persons other than claimant was conclusive as to justness of claim and reasonable value of services. Jacobson v. Holt, (1927) 121 Or 462, 255 P 901.

Corroborating testimony by decedent's brother of the nature and extent of claimant's services and of decedent's promise to pay for them was satisfactory evidence. In re Herdman's Estate, (1941) 167 Or 527, 119 P2d 277.

The fact that a person was an executor did not render him incompetent as a witness for a claimant against the estate. In re Johnson's Estate, (1946) 178 Or 214, 164 P2d 886.

Decedent's declarations to third persons were sufficient corroborating evidence of claimant's contention that she performed services for decedent which were not rendered or accepted as gratuitous and which were not paid for. Smith v. Little, (1950) 188 Or 682, 214 P2d 345, 217 P2d 595.

The testimony of other claimants was admissible. Fabre v. Halvorson, (1968) 250 Or 238, 441 P2d 640.

(4) Other evidence. Competent corroborative proof included all species of evidence other than the testimony of the claimant. In re Hattrem's Estate, (1943) 170 Or 613, 135 P2d 777; In re Johnson's Estate, (1946) 178 Or 214, 164 P2d 886.

Where claimant, daughter of deceased, introduced in evidence a power of attorney for her father to sell her land and testified she had received little of the proceeds, claimant made out a sufficient case. Quinn v. Gross, (1893) 24 Or 147, 33 P 535.

Evidence of witness as to the execution and delivery of a note and payment of money on date of alleged execution, reception of a note and mortgage into evidence, and testimony of expert witness as to genuineness of signature as compared with exhibits of admitted specimens, made a prima facie case sufficient to sustain a verdict for claimant independent of claimant's own testimony. In re Kries' Estate, (1947) 182 Or 311, 187 P2d 670.

Court erred in admitting paper in deceased claimant's handwriting containing notations of claim where there was no showing that it was made at or near the time of the transaction to which it related or in the regular course of business, as required by general law. Brackett v. United States Nat. Bank, (1949) 185 Or 642, 205 P2d 167.

(5) Instructions to jury. Instructions to jury were sufficient although the words of the statute were not spelled out as requested but where other instructions stated the law. Bull v. Payne, (1906) 47 Or 580, 84 P 697.

An instruction based upon the statute which did not define competent or satisfactory was not erroneous. Seaton v. Sec. Sav. & Trust Co., (1929) 131 Or 261, 282 P 556.

An instruction that the jury must be able to say that they are satisfied from the evidence, independent of the plaintiff, that the latter is entitled to recover in the action was proper. Mount v. Riechers, (1932) 140 Or 267, 13 P2d 335.

FURTHER CITATIONS: Morrison v. McAtee, (1893) 23 Or 530, 32 P 400; Consor v. Andrews, (1912) 61 Or 483, 123 P 46; Godfrey v. Howes, (1919) 91 Or 98, 178 P 388; Richter v. Derby, (1931) 135 Or 400, 295 P 457; In re Fulton's Estate, (1936) 154 Or 72, 58 P2d 604; In re Pottratz Estate, (1938) 158 Or 625, 77 P2d 436; In re Norman's Estate, (1938) 159 Or 197, 78 P2d 346; In re Swank's Estate, (1940) 163 Or 367, 97 P2d 723; DeWitt v. Rissman, (1959) 218 Or 549, 346 P2d 104; Hagbert v. Haas, (1964) 237 Or 34, 390 P2d 361; Cronn v. Fisher, (1966) 245 Or 407, 422 P2d 276; Story v. Hamaker, (1967) 245 Or 584, 423 P2d 185.

LAW REVIEW CITATIONS: 17 OLR 218; 42 OLR 148, 171; 44 OLR 170.

115.205

NOTES OF DECISIONS

1. Under former similar statute

The running of statute of limitations was not tolled by an alleged new promise where the promise was not accepted by the promisee and so action was barred. Brown v. Austin, (1921) 102 Or 53, 201 P 543.

The bar of the statute of limitation could not be waived by the representative. Branch v. Lambert, (1922) 103 Or 423, 205 P 995.

The statute was mandatory and could not be waived by an executrix-defendant, notwithstanding general law on limitation of actions. Ricker v. Ricker, (1954) 201 Or 416, 270 P2d 150.

ATTY. GEN. OPINIONS: Application of statute of limitations to claim of state against estate of deceased patient of a state hospital, 1942-44, p 183.

115.215

CASE CITATIONS: Branch v. Lambert, (1922) 103 Or 423, 205 P 995.

115.255 to 115.275

NOTES OF DECISIONS

Under former similar statute a creditor whose debt was secured by mortgage could, after having duly presented it to the executor or administrator and probate judge, proceed at once to foreclose his mortgage. Verdier v. Bigne, (1888) 16 Or 208, 19 P 64.

Under former similar statute the debts of the estate secured by mortgage had to first be satisfied out of the mortgaged property. Howe v. Kern, (1912) 63 Or 487, 125 P 834, 128 P 818.

FURTHER CITATIONS: Whiteaker v. Belt, (1894) 25 Or 490, 36 P 534; Shepard v. Saltzman, (1898) 34 Or 40, 54 P 882; Lawrey v. Sterling, (1902) 41 Or 518, 69 P 460.

115.255

CASE CITATIONS: Nowrocki v. Kirkpatrick, (1954) 200 Or 660, 268 P2d 363.

LAW REVIEW CITATIONS: 34 OLR 211; 6 WLJ 53-80.

115.305

NOTES OF DECISIONS

1. In general
2. Construction of statute
3. Particular causes of action
4. Actions by and against representatives
5. Under former similar statute

1. In general

The survival of actions in the United States courts depends upon the state laws. Barker v. Ladd, (1874) 3 Sawy 44, Fed Cas No. 990.

The fundamental law of the state is not violated by this section. Nadstanek v. Trask, (1929) 130 Or 669, 281 P 840, 67 ALR 599.

Remedies administered in equity do not die with the person. Brown v. Hilleary, (1930) 133 Or 26, 286 P 593.

2. Construction of statute

The torts that survive under this section are those which clearly involve property rights as distinguished from personal rights. Nadstanek v. Trask, (1929) 130 Or 669, 281 P 840, 67 ALR 599.

3. Particular causes of action

A cause of action for fraud or deceit survives. Brown v Hilleary, (1930) 133 Or 26, 286 P 593; Barker v. Ladd, (1874) 3 Sawy 44, Fed Cas No. 990.

An action to determine an adverse claim to mining property survived. Mackay v. Fox, (1903) 121 Fed 487, 57 CCA 439 (Alaska).

The liability of a joint maker of a promissory note survived. Nadstanek v. Trask, (1929) 130 Or 669, 281 P 840, 67 ALR 599

A cause of action for the conversion of chattels survives the death of the owner, and can be sued upon by his assignee or successor. Nichols v. Jackson County Bank, (1931) 136 Or 302, 298 P 908.

A cause of action for diversion of a water course survived defendant. Adams v. Perry, (1941) 168 Or 132, 111 P2d 838, 119 P2d 581.

A cause of action against deceased by a trustee in bankruptcy of a corporation, survived. Hughes v. Honeyman, (1949) 186 Or 616, 208 P2d 355.

4. Actions by and against representatives

An executor may sue either individually or in his representative capacity, at his option, on causes of action accruing after the death of the testator, whether in contract or in tort. Burrell v. Kern, (1899) 34 Or 501, 56 P 809; Sears v. Daly, (1903) 43 Or 346, 73 P 5.

5. Under former similar statute

In general, only the executor or administrator could have sued to recover property belonging to the estate, but the heirs could sue if he did not or would not. Hillman v. Young, (1913) 64 Or 73, 89, 127 P 793, 129 P 124; Hadley v. Hadley, (1914) 73 Or 179, 183, 144 P 80, 82; In re Marks' Estate, (1916) 81 Or 632, 638, 160 P 540.

Suit to enforce a lien upon a fund received from the United States for supplies furnished was not defeated by failure to present the demand to the administrator. Dowell v. Cardwell, (1877) 4 Sawy 217, Fed Cas No. 4,039.

Heirs should have been made parties to a suit against

the executors to foreclose a mortgage on realty, otherwise the decree would not bind them. Renshaw v. Taylor, (1879) 7 Or 315.

It was not the intention of the provision to do more than provide that the executor should represent the estate of decedent, so far as the same vested in him as trustee for creditors and heirs. Id.

Suits for specific performance could be brought by the personal representative under the statute. Zeuske v. Zeuske, (1912) 62 Or 46, 51, 124 P 203.

On a note and mortgage, it was the practice first to present a claim based on the note and mortgage, and upon the rejection thereof to proceed in equity for foreclosure and judgment for the full amount of the note, if deceased was personally liable. Schaefer v. Sellar, (1937) 156 Or 16, 64 P2d 1334.

FURTHER CITATIONS: Ore. Auto-Dispatch v. Cadwell, (1913) 67 Or 301, 135 P 880; Foulkes v. Sengstacken, (1917) 83 Or 118, 158 P 952, 163 P 311; In re Potter's Estate, (1936) 154 Or 167, 59 P2d 253; Tudor v. Jaca, (1946) 178 Or 126, 164 P2d 680, 165 P2d 770; The St. Nicholas, (1891) 49 Fed 671; Amoth v. United States, (1925) 3 F2d 848; Apitz v. Dames, (1955) 205 Or 242, 287 P2d 585.

ATTY. GEN. OPINIONS: Whether cause of action to recover old-age assistance may be enforced against estate of deceased recipient, 1940-42, p 412.

LAW REVIEW CITATIONS: 9 OLR 76; 12 OLR 201, 208, 209.

115.315

CASE CITATIONS: Brown v. Drake, (1922) 103 Or 607, 210 P 710.

115.325

NOTES OF DECISIONS

1. In general

The right to enforce an attachment lien acquired before the death of the defendant was not lost by presenting the claim to the administrator and having it allowed. White v. Ladd, (1899) 34 Or 422, 56 P 515.

The statute of limitations is suspended during the time that a claim filed for allowance is being held without being rejected or allowed, and remains suspended until the personal representative acts on the claim. In re Morgan's Estate, (1905) 46 Or 233, 238, 77 P 608, 78 P 1029.

The claims are required to be presented in order to enable the representative to pay such of them as he deems just, thus obviating the necessity of reducing all of them to judgment. Elliott v. Mosgrove, (1939) 162 Or 507, 91 P2d 852.

Facts showing an action is prematurely brought are not available in bar, but such objection must be raised by a plea or answer in abatement, unless the facts appear on the face of the complaint, when the objection may be raised by demurrer. Fay v. McConnell, (1961) 229 Or 128, 366 P2d 327.

The selection of a remedy under another statute that was not available did not bar a later resort to an available remedy under this section. Payne v. Griffin, (1964) 239 Or 91, 396 P2d 573.

2. Necessity for presentation and disallowance of claim

Where a judgment is sought for the full amount of a mortgage debt for which deceased was personally liable, presentment should be made to the personal representative and upon rejection of the claim an action for foreclosure should be brought; nonpresentation of claim precludes a deficiency judgment. Teel v. Winston, (1892) 22 Or 489, 29 P 142; Schaefer v. Sellar, (1937) 156 Or 16, 64 P2d 1334.

No action will lie on a claim that was not legally presented before expiration of the statutory time for presentment. Zachary v. Chambers, (1861) 1 Or 321.

This provision as to presentation was applicable although plaintiff asserted the defendant's decedent became a trustee ex maleficio and that the claim was unknown until long after defendant's appointment as executrix. Lee v. Gram, (1922) 105 Or 49, 196 P 373, 209 P 474, 27 ALR 1001.

A creditor may institute an action directly in the circuit court for the recovery of his claim after disallowance and the expiration of the period prescribed by the probate statutes. Phillips v. Elliott, (1933) 144 Or 694, 17 P2d 1119, 25 P2d 557.

3. Sufficiency of claim

A claim should express with sufficient particularity the circumstances out of which it arose since its purpose is to have the representative pay those claims he deems just. Elliott v. Mosgrove, (1939) 162 Or 507, 91 P2d 852.

Substantial compliance with requirements of statute is sufficient. Id.

The character of a claim, the likelihood of there being others of substantially the same kind, and the extent to which it is necessary to describe a claim of that character in order to identify it in the representative's mind, are factors of importance in determining the sufficiency of a claim. Id.

4. Disallowance of claim

The failure of the representative to act on a claim within a reasonable time is equivalent to a disallowance. Goltra v. Penland, (1904) 45 Or 254, 77 P 129.

Six months was a reasonable time within which to act on a claim in the absence of some explanation. Id.

5. Action on the claim

The claim proved must be substantially the one presented and disallowed, not an entirely different claim. Branch v. Lambert, (1922) 103 Or 423, 205 P 995; Trumbo v. Trumbo, (1956) 208 Or 114, 299 P2d 609.

A claimant for services is not confined to evidence as to the exact dates and amounts in the claim in the action thereon. Branch v. Lambert, (1922) 103 Or 423, 205 P 995.

6. Pleading

Neither the claim nor the pleadings can be amended to allow proof of a different claim from that presented and disallowed. Branch v. Lambert, (1922) 103 Or 423, 205 P 995.

The facts constituting a claim against an estate may be averred in general terms and, if the facts show a subsisting liability in favor of the claimant, the claim is sufficiently stated. Elliott v. Mosgrove, (1939) 162 Or 507, 91 P2d 852.

7. Objections

The personal representative may waive the defense that the claim against the estate was never presented. Bramwell v. Heseltine, (1927) 122 Or 519, 259 P 1063; Benson v. Williams, (1944) 174 Or 404, 143 P2d 477, 149 P2d 549.

Joining issue on the merits was a waiver of the objection that a claim against a decedent's estate was not presented

by the proper person. In re Morgan's Estate, (1905) 46 Or 233, 77 P 608, 78 P 1029.

The defense that the claim against the estate was never presented can be urged only by the personal representative while acting in his representative capacity. Bramwell v. Heseltine, (1927) 122 Or 519, 259 P 1063.

FURTHER CITATIONS: Blaskower v. Steel, (1892) 23 Or 106, 31 P 253; Dowell v. Cardwell, (1877) 4 Sawy 217, Fed Cas No. 4,039; Pruit v. Muldrick, (1901) 39 Or 353, 65 P 20; Branch v. McCormick's Estate, (1914) 72 Or 608, 143 P 915, 144 P 425; Jacobson v. Holt, (1927) 121 Or 462, 255 P 901; Harris v. Harris, (1960) 225 Or 175, 357 P2d 419; In re Horger Estate, (1960) 225 Or 492, 358 P2d 484; Harp v. State Comp. Dept., (1967) 247 Or 129; Lowes v. First Nat. Bank, (1968) 295 F Supp 260.