1941 Supplement

To

Mason's Minnesota Statutes, 1927

and

Mason's 1940 Supplement

Containing the text of the acts of the 1941 and 1943 Sessions of the Legislature, both new and amendatory, and notes showing repeals, together with annotations from the various courts, state and federal, and the opinions of the Attorney General, construing the constitution, statutes, charters and court rules of Minnesota together with Law Review Articles and digest of all common law decisions.

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Part III. Civil Actions and Proceedings

CHAPTER 74

Probate Courts

GENERAL PROVISIONS

8706-5. Minimum salary of Judge of Probate.
Minimum salary would remain same as it was in 1930, but salaries are now to be determined with reference to §§8707-1 to 8707-5. Op. Atty. Gen., (347i), June 12, 1941.
In determining salary to be paid to judge of probate court of county coming within this section, it is not the assessed valuation of the property in that county in 1930, but the minimum salary is not now less than it was in the year 1930. Op. Atty. Gen. (347i), Oct. 9, 1942.

8707. Salaries of judges of probate in certain counties—Clerk hire.
In determining salary of judge of probate assessed valuation should be determined by figuring class 3b and class 3c property at 33⅓ and 40% of full and true value thereof. Op. Atty. Gen., (347i), July 18, 1941.
In counties where no special act prevails, salaries of clerks and employees shall be fixed by judge of probate, and this duty cannot be delegated to county board. Op. Atty. Gen. (348A), Aug. 4, 1941.
Judge of probate is not entitled to a fee in an insanity proceeding for a neighboring county. Op. Atty. Gen. (347e), Oct. 25. 1941.
Under provision that clerk hire be "$400 and such further sum as the county board may allow not to exceed a total of $800", no action by county board is required to enable probate judge to prescribe annual compensation for clerk hire up to and including $400, but if a sum in excess of $400 is required, county board must vote the increase. Op. Atty. Gen. (348A), Mar. 4, 1942.
Salaries of clerks and employees of probate court in Otter Tail County are to be fixed by probate judge, and maximum clerk hire may not exceed $3500, and within statutory limits matter is entirely in hands of judge. Op. Atty. Gen. (348a), Jan. 5, 1943.
Probate judge of Lac Qui Parle County may fix the clerk's salary of his office without action by the county board, providing the salary so fixed does not exceed the sum of $800.00. Op. Atty. Gen. (348a), Aug. 13, 1943, revising opinion of March 4, 1942 to conform to the opinion of Feb. 17, 1939.

8707-1. Salaries of judges of probate court in certain counties.—The probate judges in all counties in this state shall receive as compensation for services rendered by them for their respective counties annual salaries to be paid in 12 equal monthly installments based on the then last preceding completed state or federal census, as follows:

In counties having a population of 6,000 and less than 9,000—$1500.00; if the population is 9,000 and less than 13,000—$1800.00; if the population is 13,000 and less than 14,500—$1900.00; if the population is 14,500 and less than 16,500—$2100.00; if the population is 16,500 and less than 18,500—$2200.00; if the population is 18,500 and less than 21,500—$2350.00; if the population is 21,500 and less than 24,500—$2500.00; if the population is 24,500 and less than 27,500—$2650.00; if the population exceeds 27,500—$3000.00; provided, further, that in any county having an area of not less than 1700 square miles and not more than 2000 square miles, and having not less than 50 full or fractional Government townships and not more than 60 full or fractional Government townships, and having an assessed valuation of not less than $2,000,000 and not more than $3,000,000, the provisions of this act shall not apply. (Act Apr. 28, 1941, c. 487, §1.)
[526.123]
Salaries of probate judges are now fixed by this act, with certain exceptions. Op. Atty. Gen., (347i), June 12, 1941.

8707-2. Same—Exception.—This Act shall not apply to the salary of the probate judge of any county having a population of less than 11,200, or whose salary is fixed by other existing laws in a greater amount than herein provided, and provided further that this act shall not operate to increase the salary of any probate judge more than $300.00 per year nor to increase the salary in any county where the salary is set by Laws 1937, Chapter 69. (Act Apr. 28, 1941, c. 487, §2.)
[526.123]

8707-3. Same.—Provided that this act shall not apply in counties containing not less than 46 nor more than 49 full and fractional congressional townships and having an assessed valuation of not less than $4,500,000 and not more than $5,000,000, and having a population of not less than 20,000 nor more than 22,500. (Act Apr. 28, 1941, c. 487, §3.)
[526.123]

8707-4. Repealer.—All acts or parts of acts inconsistent herewith are hereby repealed upon the effective date of this act. (Act Apr. 28, 1941, c. 487, §4.)

8707-5. Time act takes effect.—This act shall take effect and be in force from and after January 1, 1943. (Act Apr. 28, 1941, c. 487, §5.)

SALARY AND CLERK HIRE IN PARTICULAR COUNTIES

Laws 1933, c. 16. Amended. Laws 1943, c. 221.
Laws 1933, c. 143. Amended. Laws 1943, c. 52.
Laws 1937, c. 69. Amended. Laws 1943, c. 221.
Under Laws 1937, c. 133, and Laws 1937, c. 134, judge of probate has authority to determine and fix clerk hire, subject to maximum of $1,200. Op. Atty. Gen. (348A), Sept. 10, 1941.
Counties having between 14 and 19 organized townships, with population of between 32,000 and 35,500, and containing a city of the third class. Act Mar. 6, 1941, c. 48, §§1-3, fixes salary of probate judge at $3,000, and allows not to exceed $4,000 for clerk hire.
Act Apr. 1, 1941, c. 111, §1, amends Laws 1939, c. 296, §1, fixing salary of probate judge at $3,500, and allows $2,500 per annum as clerk hire in certain counties containing a city of the second class, and between 18 and 21 townships.
Act Apr. 10, 1941, c. 204 provides that probate judge in a county with area of 600 to 700 square miles, population 19,000 to 20,300, and an assessed valuation of $9,500,000, shall have an annual salary of $2350.
Laws 1941, c. 208 amends Laws 1933, c. 76, as amended by Laws 1935, cc. 70 and 278 as amended by Laws 1939, c. 286.
Act Apr. 18, 1941, c. 311, §3, authorizes salaries for probate judges of from $1,800 to $2,500, in certain counties having populations of from 20,000 to 22,500.
Laws 1941, c. 311. Repealed. Laws 1943, c. 15, §12.
Act Apr. 19, 1941, c. 322, §1, fixes salary of judges of probate court in certain counties having populations of between 13,500 and 14,500, at $2,000 per annum.
Act Apr. 24, 1941, c. 414 provides that in counties of 16,000 to 20,000 inhabitants, assessed valuation of $10,000,000 to $15,000,000 and with 22 to 30 congressional townships the probate judge shall have a salary of $2200 for all services performed, and $12.00 per annum for clerk hire.
Act Apr. 25, 1941, c. 449, fixes salaries of probate judges in certain counties having populations of between 39,000 and 41,000, at $3,000 per annum, and authorizes certain salaries for the clerks and deputy clerks.
Laws 1943, c. 15, §4, provides that in counties with 46 to 49 full or fractional congressional townships and population of 20,000 to 27,500 that judge of probate shall receive salary of $1,800 to $2,500 annually. Repealing c. 311, Laws of 1941.
Laws 1943, c. 97, amends c. 337, Laws 1941, c. 337, which amended c. 491, Laws 1937, in respect to salary and clerk hire judges of probate in counties have 44 to 45 congressional townships and an assessed valuation of $8,000,000 to $14,000,000.
Laws 1943, c. 112, provides that: "In all counties of the state having not less than 27 full and fractional congressional townships nor more than 28 full and fractional congressional townships and a land area of not less than 950 square miles nor more than 1,000 square miles, and a land area of 604,261 acres, the salary of the clerk of the probate court shall be fixed by order of the judge of probate at a sum not to exceed $1,500.00 per annum to be paid in monthly installments."
Laws 1943, c. 139, provides that "in all counties having not less than 35 nor more than 55 full and fractional congressional townships and an assessed valuation of not more than $2,000,000, and a population of 5,000 to

7,000, the judge probate shall receive a salary of $1,230 per annum, in addition to fees.

Laws 1943, c. 186, provides that in counties having 18 to 20 congressional townships, with an area of 362,000 to 364,000 acres, an assessed valuation of $2,000,000 to $10,000,000, the salary of judge of probate shall be $1,800.

Laws 1943, c. 214, provides that in counties having an area of not less than 490 square miles and not more than 510 square miles, a population of 18,000 to 23,000 the salary of probate judge shall be $3,000 per year.

Laws 1943, c. 219, provides that in counties having population of 60,000 to 75,000 and 35 to 49 congressional townships county board shall fix by resolution salary of judge of probate at not more than $4,000 per year.

Laws 1943, c. 221, provides that in counties having 81 to 85 full or fractional congressional townships and a population of 18,000 to 30,000 the judge of probate shall receive a salary of $2,100 per year.

Laws 1943, c. 255, authorizes board of county commissioners in counties having 30 to 35 full or fractional congressional townships, a population of 11,000 to 12,000, a valuation of $1,000,000 to $2,000,000, to fix the salary of the judge of probate at no less than $1,500 nor more than $1,800.

Laws 1943, c. 302, provides that in counties having population of 8,000 to 10,000, an assessed valuation of $1,000,000 to $1,500,000, 16 to 17 full and fractional congressional townships and a land area of 350,000 to 400,000 acres, the judge of probate and the clerk of district court may be employed as deputy or clerk for each other or by other county officials during such time as their services are not required in the discharge of the duties of the respective offices to which they have been elected, and paid in the same manner as other employees, and such payments heretofore made is validated.

Laws 1943, c. 303, provides that in counties having an assessed value of $1,000,000 to $1,500,000, a population of 8,000 to 10,000, 15 to 17 full or fractional congressional townships and a land area of 350,000 to 400,000 acres, the board of county commissioners may fix the salary of the judge of probate at $1,500 to $1,700 annually.

Laws of Apr. 6, 1943, c. 325, §1, provides: In any county having an assessed valuation of more than $4,000,000 and less than $5,000,000, 10,000 to 15,000 inhabitants, 17 to 21 full and fractional congressional townships, and containing less than 500 square miles, the salary of the judge of probate shall be $1,700 per annum.

Laws 1943, c. 378, §1. Counties of 600 to 700 square miles and population 19,000 to 20,300.

Laws 1943, c. 385, §§1, 2. Salary and clerk hire, population 25,000 to 26,000, townships 24.

Laws 1943, c. 451. Appointment and compensation of employees in counties of 500,000 population.

Laws 1943, c. 516, §1. Valuation $5,500,000 to $8,000,000, population 10,000 to 15,000, townships 17 to 21, area less than 500 square miles.

Laws 1943, c. 531, amends Laws 1943, c. 411, §1, to read as follows: Counties containing not less than 19 nor more than 21 organized townships, and having a population of not less than 35,000 nor more than 42,000 inhabitants, according to the last federal census, and having an assessed valuation of not less than $32,000,000 and not more than $45,000,000.

Notes of Decisions

Judge whose salary is fixed by Laws 1939, chapter 296, must file an annual statement of fees collected pursuant to §976. Op. Atty. Gen. (347E), Jan. 9, 1940.

Probate judge of Carlton County, governed by Laws 1937, c. 34, has no right of appeal to district court from determination of County Commissioner's refusing to approve clerk hire. Op. Atty. Gen., (348a), July 21, 1941.

Monies and credits are to be included in determining classification of counties for salary purposes where assessed valuation is a factor in such determination. Op. Atty. Gen. (104a-9), Dec. 31, 1942.

Laws 1943, c. 15, is constitutional and applies to judge of probate and must be put into effect at once. Op. Atty. Gen. (104a-9), Mar. 22, 1943.

Construing Laws 1943, c. 411, and Laws 1943, c. 531, together, officers of Mower County were not entitled to increased salaries between the approval dates of the two acts, in view of Laws 1941, c. 492, §31. Op. Atty. Gen. (104a-9), June 7, 1943.

Law is valid and probate judge may act as deputy clerk of district court, and clerk of district court may act as clerk of probate court, and county auditor may issue warrants to pay for services rendered by those officers previous to enactment of this law. Op. Atty. Gen. (358b-1), June 23, 1943.

PAYMENT OF DEBTS AND LEGACIES

8833. Claim for maintenance of patient in state institutions. [Repealed.]

Repealed. Laws 1943, c. 636.

COMMITMENT OF FEEBLE-MINDED, INEBRIATES AND INSANE PERSONS

8960. Commitment of feeble minded person—Discharge. [Repealed.]

Repealed. Laws 1935, c. 72, §196.

Reenacted under §§8992-176, 8992-179, 8992-183, 8992-184 this chapter.

Provision giving the state board of control discretionary power with respect to release of patient is not unconstitutional. State v. Carlgren, 209M362, 296NW573. See Dun. Dig. 4523.

8976. Support of insane persons. Subdivision (1). For the purpose of defraying expenses and costs of maintenance of any inmate in a state asylum, detention hospital or hospital for the insane, the state of Minnesota shall have a valid claim for reimbursement to the extent of $10.00 per month for each such inmate, for all money paid and expenses incurred by the state for such maintenance,—first, against the property or estate of such person so maintained, second, against the relatives of such persons in the following order, to-wit: spouse, children and parents provided, that if the state director of public institutions shall determine that the property or estate of any such insane person is not sufficient to more than care for and maintain the wife and minor children of such inmate, or that the means and property of the classes of persons herein secondarily charged with the liability and cost of the maintenance of such insane person in said institutions, is not more than sufficient to properly provide for themselves and those otherwise dependent upon them, the said director of public institutions shall relieve the estate of such insane person and the relatives of such insane person from a portion or all of such charge or liability as they in their judgment and upon investigation may deem just and proper.

Subdivision (2). In case of increase or decrease in the estate of such insane person, or in the estates of those persons herein secondarily liable for the cost of the maintenance of an insane person in such institutions, or in case of the death of such persons, or either of them, the director of public institutions is hereby authorized to modify or cancel its previous order made in relation thereto, and from time to time make such other and further order with reference thereto as it may seem just and proper. Provided, if an inmate has not dependents the director of public institutions may fix a charge in excess of $10.00 per month but not to exceed the per capita cost for the previous fiscal year of the institution of which he is an inmate and the state shall have a valid claim against the property or estate of such inmate for the amount so fixed.

Subdivision (3). In all cases under the provision of this act, the property which under the laws of this state, is exempt from attachment or sale on any final process, issued from any court, shall be exempt also to the estates and persons charged with or upon whom any liability is imposed under the provisions of this act. (As amended Act Apr. 18, 1941, c. 313, §1.)

Particular counties, see §8707-5(N).

Estate and guardian of one committed to asylum for dangerous insane by district court for safekeeping and treatment until recovery and trial for crime are liable for cost of maintenance while a patient in state hospital, the same as a patient committed by probate court. Op. Atty. Gen. (248A-1), Jan. 3, 1942.

Director of department of social security division of public institutions has power to make proper determinations and orders for reimbursements to the state, and establish rules for accounting convenience, and also how reimbursements and refunds, if any, shall be made, and also that in such cases a certain fractional month shall be considered a month. Op. Atty. Gen. (248a), May 6, 1942.

Lien for aid age assistance has priority over claim filed in probate court for hospitalization in state hospital for insane. Op. Atty. Gen. (521p-4), Dec. 21, 1943.

MINNESOTA PROBATE CODE

ARTICLE I.—POWERS, ETC., OF COURT

8992-1. General provisions.

Fact that one child of an intestate was also administrator did not affect his liability as a coheir or district court's authority to compel him to account to other heirs for a note which he did not inventory in administration proceeding which was closed. Lewis v. Lewis, 211M587, 2NW(2d)134. See Dun. Dig. 2734a.

Where proceedings for probate of purported wills are started in two counties, county in which proceed-

ings are first commenced has jurisdiction to decide the question of venue, and its decision thereof is reviewable by appeal or certiorari, and proceedings in the second county should be stayed. State v. Probate Court of Olmsted County, 215M322, 9NW(2d)765. See Dun. Dig. 7772.

Probate court has no jurisdiction of a bank deposit of a person in the United States Navy "missing" in action. Op. Atty. Gen. (349a), Apr. 9, 1942.

8992-2. Powers.

District court, not probate court, has jurisdiction of an action for damages for fraud in inducing a party not to file a claim against estate of a deceased person. Bulau v. B., 208M529, 294NW845. See Dun. Dig. 2759.

A state has the undoubted power to regulate the transmission, administration, and distribution of property, real and personal, having a situs within its borders regardless of the domicile of the owner. Hencke's Estate, 212M407, 4NW(2d)353. See Dun. Dig. 7770.

(4).

Probate courts have same power and authority to vacate their orders and judgments as district courts, but no greater. Woodworth's Estate, 207M563, 292NW192. See Dun. Dig. 7784.

Probate court has power to vacate a previous order allowing a final account where it is made to appear that the order was procured without a hearing because of mistake and inadvertence on the part of the court, and such power does not terminate upon the expiration of the time to appeal from the order sought to be vacated. Henry's Estate, 207M609, 292NW249. See Dun. Dig. 7784.

Where parties, for about one year through no fault of theirs, had no knowledge of pendency of probate proceedings or of an order made therein and moved to vacate such order promptly upon discovery of the order, they are not guilty of laches barring right to have order vacated. Daniel's Estate, 208M420, 294NW465. See Dun. Dig. 7784(2).

After time for appeal from an order has expired, only a restricted power is possessed by probate court to vacate or amend the previous order, but such court has same power as a district court to vacate an order, judgment or decree procured through surprise or excusable inadvertence or neglect. Showell's Estate, 209M539, 297 NW111. See Dun. Dig. 7784.

Main purpose of administration—to give creditors an opportunity to be heard—was satisfied by an administration and decree of distribution of an intestate estate, and, if additional assets should be discovered after close of administration, it would be an idle proceeding to again ask for administration simply for purpose of distribution when all parties in interest are of full age. Lewis v. Lewis, 211M587, 2NW(2d)134. See Dun. Dig. 3558, 3663a.

Where because of a scrivener's mistake in drafting an original decree of distribution and not because of judicial error property was erroneously decreed to persons not entitled thereto under the will, probate court had power to open proceedings and amend its decree to conform with terms of will. Gooch's Estate, 212M272, 3 NW(2d)494. See Dun. Dig. 7784(2).

Probate court is vested with power to correct, modify, or amend its records to conform to the facts, and to vacate its order procured through fraud, mistake, inadvertence, or excusable neglect, provided application therefor is seasonably made. Id.

ARTICLE II.—PERSONNEL

A.—JUDGE

8992-5. Bond.

Where judge of probate elected for term expiring first Monday of January 1943 died in February 1942, and vacancy was filled by appointment, person elected judge at election in November 1943 will hold office for full term of four years, and there may not be any election of a judge to serve for remainder of unexpired term of deceased officer, and filing for such a period should not be accepted. Op. Atty. Gen. (347k), July 20, 1942.

Offices of probate judge and village clerk are not incompatible. Op. Atty. Gen. (358b-3), Nov. 30, 1942.

8992-6. Filing of decisions.

On appeal from order of probate court vacating a previous appealable order admitting one of two wills to probate after time for appeal had expired upon ground that its failure to notify party of order constituted excusable neglect, district court should decide merits of application to vacate and it was error to vacate probate court's vacating order on ground that it acted without jurisdiction. Showell's Estate, 209M539, 297NW111. See Dun. Dig. 7783h.

Lack of notice admitting one of two wills to probate does not limit or otherwise affect time for appeal, which expired six months from date of filing independently of the notice. Id.

8992-12. Not to be counsel.

A judge of probate in general law practice may not draw wills, since he might be called upon to preside on probate of will. Such judge may occupy offices with another attorney if not connected with his "official" office. Op. Atty. Gen. (347F), Jan. 16, 1942.

8992-13. Salaries.

Probate judge of Carlton County, governed by Laws 1937, c. 34, has no right of appeal to district court from determination of County Commissioner's refusing to approve clerk hire. Op. Atty. Gen., (348a), July 21, 1941.

In counties where no special act prevails, salaries of clerks and employees shall be fixed by judge of probate, and this duty cannot be delegated to county board. Op. Atty. Gen. (348A), Aug. 4, 1941.

Salaries of clerks and employees of probate court in Otter Tail County are to be fixed by probate judge, and maximum clerk hire may not exceed $3500, and within statutory limits matter is entirely in hands of judge. Op. Atty. Gen. (348a), Jan. 5, 1943.

Probate judge of Lac Qui Parle County may fix the clerk's salary of his office without action by the county board, providing the salary so fixed does not exceed the sum of $800.00. Op. Atty. Gen. (348a), Aug. 13, 1943, revising opinion of March 4, 1942 to conform to the opinion of Feb. 17, 1939.

D.—REPORTER

8992-21a. Court Reporters for Probate Court in Certain Counties.—The judge of probate of any county now having or which may hereafter have a population of 400,000 inhabitants or over, may appoint a competent stenographer as court reporter and secretary, who shall be paid a salary of $3,000 per annum; and in addition to said salary the court reporter may also be paid such fees for transcripts of evidence made in relation to probate hearings, as the judge of probate shall fix and allow, and appoint two additional clerks who shall be competent stenographers, who shall each be paid a salary of $1,200 per annum. (As amended, Act Apr. 10, 1941, c. 179, §1.)

ARTICLE III.—INTESTATE SUCCESSION

8992-25. Definition of estate.

Uniform Simultaneous Death Act. Laws 1943, c. 248 [8992-33c to 8992-33i].

8992-27. Descent of homestead.—(a) Where there is a surviving spouse, the homestead shall descend free from any testamentary or other disposition thereof to which such spouse has not consented in writing or by election to take under the will as provided by law, as follows:

(1) If there is no surviving child or issue of any deceased child, to the spouse;

(2) If there be children or issue of deceased children surviving, then to the spouse for the term of his natural life, and the remainder in equal shares to such children and the issue of deceased children by right of representation.

(b) Where there is no surviving spouse and the homestead has not been disposed of by will, it shall descend as other real estate.

(c) Where the homestead passes by descent or will to the spouse or children or issue of deceased children, it shall be exempt from all debts which were not valid charges thereon at the time of decedent's death; in all other cases it shall be subject to the payment of the items mentioned in Section 29. [§8992-29.] No lien or other charge against any homestead which is so exempted shall be enforced in the probate court, but the claimant may enforce such lien or charge by an appropriate action in the district court. (As amended Apr. 7, 1943, c. 329, §1.)

(c).

An action may now be maintained in district court against representatives and heirs of a deceased person to enforce a lien or charge for work and materials furnished for improvement of homestead at request of deceased, without presenting claim therefor to probate court for allowance, it appearing that deceased left no property other than homestead. Anderson v. J., 208M152, 293NW131. See Dun. Dig. 3592a.

8992-28. Allowances to spouse, etc.

Employer must pay to surviving spouse wages earned by a deceased employee prior to death. Laws 1941, c. 408.

No part of the recovery under the death by wrongful act statute goes to the decedent's estate, and it is no part of it, since recovery is for the exclusive benefit of the "surviving spouse and next of kin", and the widow may not even select her statutory allowance out of the amount so recovered under the statute of descent. Fehland v. City of St. Paul, 215M94, 9NW(2d) 349. See Dun. Dig. 2732.

8992-29. Descent of property.

Sale of escheated property by State Treasurer, §95-4.

Section 9657 is not amended or supplemented by §4272-5(2) so as to affect rights of next of kin, who are not dependents. Joel v. P., 206M580, 289NW524. See Dun. Dig. 2608.

Where there was a devise of non-homestead real estate to the widow for life, with remainder over, land had to be sold for payment of debts and expenses of administration and after such payment residue is less than value of widow's life estate, having elected to take under will and so surrendering right to renounce, she takes her devise as purchaser and for consideration, and in consequence value of remainder should first have been resorted to for payment of debts and expenses, thereby preferring devise to widow. Paulson's Estate, 208M231, 293NW607. See Dun. Dig. 10285a.

Absence of probate proceedings in estate of owner of a leasehold interest did not bar sole heir from asserting her rights to such interest, including right to remove building constructed by lessee, she having been accepted as a tenant in place of original lessee. Justen v. O., 209M 327, 296NW169. See Dun. Dig. 2722.

In absence of clear tokens of contrary intention, statute of descent is to be taken as standard of division where "next of kin," used in connection with words "share and share alike" is named in a will as a substituted class to take in case there be no children surviving a life tenant donee. Coss v. Goembel, 210M32, 297NW114. See Dun. Dig. 10272b.

In action for accounting between distributees of estate of deceased person, evidence justified finding that agreement between children and widow entitled latter to their share of personal property and income therefrom for her life only. Lewis v. Lewis, 211M587, 2NW(2d)134. See Dun. Dig. 2734a.

Provisions of Mason's St., 1938 Supp., §8992-30, did not entitle next of kin of blood of the ancestor from whom an estate came to an intestate to inherit the ancestral estate in preference to the children of intestate's half brother not of such ancestor's blood, since half brother's children's right to take was under Mason's St., 1938 Supp., §8992-29(4)(d), as a member of a class of relations with prior right of inheritance to that of next of kin under Mason's St., 1938 Supp., §8992-29(4)(e), and blood kindred of ancestor are preferred to exclusion of half blood kindred of intestate only where both classes are "in the same degree" or class entitled to inherit. McDonnall v. Drawz, 212M283, 3NW(2d)419, 141ALR970. See Dun. Dig. 2722e.

An equitable conversion is a constructive, not an actual, change of realty into personalty or personalty into realty, and is a judicial device for giving effect to the intention of testators, donors, and perhaps others, and doctrine is based in maxim that equity regards that as done which ought to have been done. Hencke's Estate, 212M407, 4NW(2d)353. See Dun. Dig. 3132.

An equitable conversion of a testator's realty into personalty cannot be predicated on a discretionary power of sale devised to a trustee named in will or a direction to executor to pay debts. Id. See Dun. Dig. 3133, 3614b.

Rents from real estate are subject to the same disposition as land itself, rents following the title to land. Id. See Dun. Dig. 3586d.

Title to real property of a decedent passes by operation of law at once upon his death to those entitled to it, subject only to claims of administration. Taylor's Estate, 213M509, 7NW(2d)320. See Dun. Dig. 2722.

Statute evidently contemplates a division of personal property, but descent of an undivided share in realty. Id. See Dun. Dig. 2725b.

Upon renunciation of will, a widow takes an undivided interest in all real estate of which her husband was seized or possessed during their marriage, to disposition whereof by will or otherwise she has not consented in writing or by election to take under his will, with certain statutory exceptions. Id. See Dun. Dig. 10301a.

(4).

Preference of kindred of the half blood not of the blood of the ancestor to kindred of the whole blood of a more remote statutory class. 27MinnLawRev313.

(4)(d).

Under will bequeathing all property to "heirs at law to be divided between them in the same proportions as though" no will was left, and there being no issue, spouse, father or mother, but one sister, twelve nephews and nieces, children of predeceased five brothers and sisters, and six grandnephews and grandnieces, children of a predeceased nephew and niece, court rightly applied this section and distributed estate to heirs of testatrix per stirpes. Galbraith's Estate, 210M356, 298NW253. See Dun. Dig. 10272a.

(6).

State auditor's certificate of escheated lands located in certain cities of the fourth class, reinstated. Laws 1941, c. 40.

8992-30. Degree of kindred.

Provisions of Mason's St., 1938 Supp., §8992-30, did not entitle next of kin of blood of the ancestor from whom an estate came to an intestate to inherit the ancestral estate in preference to the children of intestate's half brother not of such ancestor's blood, since half brother's children's right to take was under Mason's St., 1938 Supp., §8992-29(4)(d), as a member of a class of relations with prior right of inheritance to that of next of kin under Mason's St., 1938 Supp., §8992-29(4)(e), and blood kindred of ancestor are preferred to exclusion of half blood kindred of intestate only where both classes are "in the same degree" or class entitled to inherit. McDonnall v. Drawz, 212M283, 3NW(2d)419, 141ALR970. See Dun. Dig. 2722e.

Ordinance of 1787 for government of Northwest Territory established a policy of equal right of inheritance by half and whole bloods subject to change by local statute. Id.

Preference of kindred of the half blood not of the blood of the ancestor to kindred of the whole blood of a more remote statutory class. 27MinnLawRev313.

8992-33a. Employer, definition.—For the purposes of this act the word "employer" shall include every person, firm, partnership, corporation, the State of Minnesota, and all municipal corporations. (Act Apr. 24, 1941, c. 408, §1.)
[181.58]

Compensation earned by town assessor prior to his death may be paid to surviving spouse. Op. Atty. Gen. (270m), Sept. 29, 1942.

8992-33b. Payment of money owed upon death of employee.—If at the time of the death of any person, his employer is indebted to him for work, labor or services performed, and no executor or administrator of his estate has been appointed, such employer shall upon the request of the surviving spouse forthwith pay said indebtedness, in such an amount as may be due not exceeding the sum of two hundred dollars ($200), to the said surviving spouse. The employer shall require proof of claimant's relationship to decedent by affidavit, and shall require claimant to acknowledge receipt of such payment in writing. Any payments made by an employer pursuant to the provisions of this act shall operate as a full and complete discharge of the employer's indebtedness to the extent of said payment, and no employer shall thereafter be liable therefor to the decedent's estate, or the decedent's executor or administrator thereafter appointed. Provided, however, that any amount so received by a spouse shall be considered in diminution of the allowance to the spouse under Laws of 1935, Chapter 72, Section 28. (Act Apr. 24, 1941, c. 408, §2.)
[181.58]

UNIFORM SIMULTANEOUS DEATH ACT

8992-33c. Disposition of property of persons dying simultaneously.—Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this act. (Act Apr. 1, 1943, c. 248, §1.)
[525.90]

Adopted in Arkansas, Florida, Hawaii, Idaho, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, New Hampshire, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia, Wisconsin and Wyoming.

8992-33d. Division of property.—Where two or more beneficiaries are designated to take successively by reason of survivorship under another person's disposition of property and there is no sufficient evidence that these beneficiaries have died otherwise than simultaneously the property thus disposed of shall be divided into as many equal portions as there are successive beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each designated beneficiary had survived. (Act Apr. 1, 1943, c. 248, §2.)
[525.90]

8992-33e. Joint tenancy.—Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived. If there are more than two joint tenants and all of them have so died the property thus distributed shall be in the proportion that one bears

to the whole number of joint tenants. (Act Apr. 1, 1943, c. 248, §3.)
[525.90]

8992-33f. Insurance policies.—Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary. (Act Apr. 1, 1943, c. 248, §4.)
[525.90]

8992-33g. Act not retroactive.—This act shall not apply to the distribution of the property of a person who has died before it takes effect. (Act Apr. 1, 1943, c. 248, §5.)
[525.90]

8992-33h. Application of act.—This act shall not apply in the case of wills, living trusts, deeds, or contracts of insurance wherein provision has been made for distribution of property different from the provisions of this act. (Act Apr. 1, 1943, c. 248, §6.)
[525.90]

8992-33i. May be cited as the Uniform Simultaneous Death Act.—This act may be cited as the Uniform Simultaneous Death Act. (Act Apr. 1, 1943, c. 248, §7.)
[525.90]

ARTICLE IV.—WILLS

8992-34. Requisites.

Powers of appointment. Laws 1943, c. 322.

1. In general.

A beneficiary may devise and bequeath his interest in a trust, if it does not terminate at his death. First & American Nat. Bank of Duluth v. H., 208M295, 293NW585. See Dun. Dig. 9890, 10279.

There is no inherent right to make a disposition of property by will, and whether a man can control disposition of his property after death is, subject to constitutional limitations, completely in hands of legislature. Taylor's Estate, 213M509, 7NW(2d)320. See Dun. Dig. 10205.

In will contest, fact that jury divided on issue of forgery did not require a new trial where jury in a special verdict found that the testator lacked mental capacity. Boese's Estate, 213M440, 7NW(2d)355. See Dun. Dig. 7115c, 10215.

Where an attorney is requested by his client to attest a deed or will prepared for client by attorney, the attorney may disclose, after death of client, statements made by latter at time of transaction relative thereto, since client in requesting attorney to witness document, by implication, waives privilege which would otherwise bar the disclosure of his statements. Larson v. Dahlstrom, 214M304, 8NW(2d)48, 146ALR245. See Dun. Dig. 10252.

2. Mental capacity and undue influence.

Existence of undue influence is to be determined by ascertaining effect of influence which was, in fact, exerted upon mind of testatrix, considering her physical and mental condition, person by whom it was exerted, and place and all of surrounding circumstances; and not by determining effect which such influence would have had upon mind of the ordinary strong and intelligent person. Stephens' Estate, 207M597, 293NW90. See Dun. Dig. 10208.

A testator has testamentary capacity if, at the time of making will, he comprehends his relation to those who would naturally have claims on his bounty, extent and situation of his property, and effect of will in disposing of it, and is able to hold these things in his mind long enough to form a rational judgment concerning them. Holmstrom's Estate, 208M19, 292NW 622. See Dun. Dig. 10208(52, 53, 55).

A testator may be of sound disposing mind and memory sufficient to sustain a will executed by him, though state of his health and consequent mental condition may be unequal to business transactions of a more exacting nature. Id.

Evidence held insufficient to show any undue influence in execution of will. Holmstrom's Estate, 208M19, 292NW 622. See Dun. Dig. 10243.

Testimony of medical and lay witnesses on issue of testamentary capacity sustains finding that it was absent. Dahn's Estate, 208M86, 292NW776. See Dun. Dig. 10212.

Burden is upon contestant of a will to prove undue influence. Bergquist's Estate, 211M380, 1NW(2d)418. See Dun. Dig. 10240.

Evidence held to sustain finding that testamentary disposition was not result of undue influence by a "will-making clique" surrounding testator who was married in his 74th year. Id. See Dun. Dig. 10243.

Evidence held to sustain finding that one who had suffered a "stroke" had testamentary capacity. Id. See Dun. Dig. 10212.

Mere mental and physical weakness, caused by age or sickness, does not amount to mental incapacity, provided party is capable of fairly and reasonably understanding matter in hand. Geske's Estate, 211M447, 1NW (2d)423. See Dun. Dig. 10208.

Evidence sustained finding of testamentary capacity of man 86 years old, hard of hearing, and suffering from a heart ailment. Id. See Dun. Dig. 10212.

Undue influence must be influence of such a nature that it destroys free agency of testator so that will expresses mind and intent of someone else and not that of testator. Id. See Dun. Dig. 10238.

Evidence held to sustain finding that daughter and her husband did not exercise undue influence over testator who was 86 years old, rather hard of hearing, and suffering from a heart ailment. Id. See Dun. Dig. 10243.

Court by having clear instructions of its own emphasized that existence of testamentary capacity must be determined as of "the actual time of the making of the will," a requested instruction on effect of lucid intervals of testator was properly refused. Boese's Estate, 213M 440, 7NW(2d)355. See Dun. Dig. 10208.

Evidence sustained finding of mental incapacity of testator. Id. See Dun. Dig. 10212.

An executor of a prior will has no such certain or immediate interest in the disallowance of a subsequent will as to disqualify him from testifying to conversations with testator in proceedings contesting the later will. Id. See Dun. Dig. 10246d.

Test of mental capacity applied in suits for appointment of guardians should also be applied in those to avoid deeds and wills. Parrish v. Peoples, 214M589, 9NW (2d)225. See Dun. Dig. 10208.

If grantor or testator knows and understands the nature and effect of his act, he has sufficient capacity to enable him to dispose of his property. Id.

3. Construction of will.

In construing a trust or will, where two possible constructions are open the court will adopt that construction which will result in sustaining the questioned provision to the end that the intention of the settlor or testator may be carried out. Warner & Swasey Co. v. Rusterholz, (DC-Minn), 41FSupp498. See Dun. Dig. 1520, 1749a, 2037, 2040a, 2112a, 3560, 5653, 7480, 9888a, 10258.

Deviation from the plain meaning of a will to escape an undesirable result cannot be justified. First Trust Co. of St. Paul v. Reynolds, (DC-Minn), 46FSupp497. See Dun. Dig. 10257.

A wish, desire or request expressed in a will, however appealing, carries no legal significance for the will controls and the legal effect of it must be determined from the written instrument itself and not by evaluating the mental processes of the parties, however generous and laudable they may have been. Id. See Dun. Dig. 10281c.

Provisions of will and deed of trustee conveying auditorium to city of Red Wing created a gift on condition and not a charitable trust. Longcor v. C., 206M627, 289 NW570. See Dun. Dig. 10287.

Duty of court is to give effect to intention of testator as expressed in language used in will, to be gathered from whole will in light of surrounding circumstances. Radintz v. N., 207M56, 289NW777. See Dun. Dig. 10257.

Notwithstanding provisions of §§8043, 8065, 8091 and 8092, intent of a testator trustor prevails. Murray's Will, 207M7, 290NW312. See Dun. Dig. 10257.

Technical words which have a definite and well understood meaning will be presumed to have been used in that sense in absence of surrounding circumstances of context showing different meaning was intended. Holden's Trust, 207M211, 291NW104. See Dun. Dig. 10262a.

Primary purpose of construction of a will is to ascertain meaning and intent of testator, which is to be ascertained from language of will in light of surrounding circumstances, and words may be shown to have been used with a meaning different from their ordinary or technical one. Id. See Dun. Dig. 10262a.

Technical words which have a definite and well understood meaning will be presumed to have been used in that sense in absence of surrounding circumstances or context which show that a different meaning was intended. Norman's Estate, 209M19, 295NW63. See Dun. Dig. 10262a.

Broad discretionary powers in a testamentary trust do not permit trustees to go beyond sound judgment in their exercise thereof. McCann's Will, 212M233, 3NW(2d) 226. See Dun. Dig. 9931.

In construing a will all provisions should be harmonized and given meaning if possible. Id. See Dun. Dig. 10259.

In construing a will, important thing is to ascertain intention of testator. Id. See Dun. Dig. 10257.

An equitable conversion results only where there is a positive and imperative direction to sell at all events, and a mere power of sale does not work an equitable conversion, and under such a power the title remains in the heirs, devisees, and legatees until divested by an actual sale. Hencke's Estate, 212M407, 4NW(2d)353. See Dun. Dig. 3133.

An equitable conversion is a constructive, not an actual, change of realty into personalty or personalty into realty, and is a judicial device for giving effect to the intention of testators, donors, and perhaps others, and

doctrine is based on maxim that equity regards that as done which ought to have been done. Id.

An equitable conversion of a testator's realty into personalty cannot be predicated on a discretionary power of sale devised to a trustee named in will or a direction to executor to pay debts. Id. See Dun. Dig. 3133, 3614b.

Law presumes that testator made his will with knowledge of widow's right to renounce. Taylor's Estate, 213 M509, 7NW(2d)320. See Dun. Dig. 10266.

It is fundamental that intention of a testator must be found in language of his will, and, if that is clear, what he meant to say and did not or what he might have said if he had thought of it is foreign to the inquiry. Silverson's Will, 214M313, 8NW(2d)21. See Dun. Dig. 10257.

There is no room for extrinsic evidence that testator meant to say something more than he did, if by reading will as a whole no ambiguity or equivocation is discovered. Id. See Dun. Dig. 10260.

The present tendency in this country is against absolute rules of construction, and in favor of a careful consideration of the particular language of each will, as well as of its general scope and purpose, in order to determine, in view of the circumstances known to the testator when the will was made, his intention as expressed in it. Northwestern Nat. Bank & Trust Co. v. Pirich, 215M313, 9NW(2d)773. See Dun. Dig. 10257.

Rules of construction are merely aids to the court in resolving doubts arising from obscurity in the language of a will. Id.

The cardinal rule of construction to which all others must yield is that the intention of the testator as expressed in the language used in the will shall prevail if it is not inconsistent with the rules of law. Id.

Validity and kind of an estate held by life long resident of Wisconsin under a will of a resident of Minnesota may be determined by law of Wisconsin where land which is greater portion of her holdings is situate, devise by its nature being an individual grant of land, and will accomplishing transfer under laws of Wisconsin. Ruppert's Will, 233Wis527, 290NW122.

4. Persons taking and their respective shares.

Under will leaving property in trust for children and grandchildren, only grandchildren living at remarriage of their mother would take and interest would only vest. Murray's Will, 207M7, 290NW312. See Dun. Dig. 10278.

A will creating trust and providing for payment of $2,000 to each grandchild arriving at age 25 years held to contemplate payment immediately at becoming 25 years of age, regardless of condition of estate or effect upon younger grandchildren. Radintz v. N., 207M56, 289 NW777. See Dun. Dig. 10266.

Where property is given in trust to pay income to a beneficiary for life with remainder to "lawful issue" of life beneficiary, gift in remainder is to a class, which, absent context or circumstances to show a contrary intention, includes adopted children. Holden's Trust, 207M 211, 291NW104. See Dun. Dig. 10273.

A gift, devise or bequest to a named person as primary taker and to others as substitute takers in event of primary taker's death contemplates, in absence of specification to the contrary, that primary taker's death shall occur during donor's or testator's lifetime. First & American Nat. Bank v. H., 208M295, 293NW585. See Dun. Dig. 3163a.

A dividend was paid to a trustee in form of additional stock, which should be apportioned to the life tenant under a provision of a testamentary trust that all dividends on stock comprising corpus of trust, whether paid in form of cash or additional stock, should be paid to life tenant, where trustee exchanged original stock for new stock issued by corporation under arrangement whereby corporation increased its capital by a transfer of earned surplus capital, increased par value of its shares of stock so that existing number of shares represented entire capital as increased and exchanged new stock at increased par value for old stock share for share. Whitacre's Will, 208M286, 293NW784. See Dun. Dig. 9888a.

In absence of clear tokens of contrary intention, statute of descent is to be taken as standard of division where "next of kin," used in connection with words "share and share alike," is named in a will as a substituted class to take in case there be no children surviving a life tenant donee. Coss v. Goembel, 210M32, 297NW114. See Dun. Dig. 10272b.

Under a will bequeathing property to "heirs at law to be divided between them in the same proportions as though" testatrix left no will, statute in force at time of death of testatrix applied. Galbraith's Estate, 210M 356, 298NW253. See Dun. Dig. 10265a.

A direction in a will to pay debts merely states what the law requires and does not make debts a charge upon the realty. Hencke's Estate, 212M407, 4NW(2d)353. See Dun. Dig. 10286.

If the language in a will clearly purports to pass an estate or interest, it will not be construed as passing a lesser interest than an absolute estate, unless there is clear, plain, and unequivocal language showing an intent to pass such lesser estate or interest, and same rule applies to both personalty and realty. Silverson's Will, 214M313, 8NW(2d)21. See Dun. Dig. 10288.

Without language limiting provision that whole of share of certain beneficiary of a trust should pass to certain other persons, it clearly means that outright title shall pass. Id.

A will creating a testamentary trust containing inconsistent provisions stating that trust should not terminate until death of widow and daughter and also providing for distribution of the corpus to two grandchildren when they should reach 35 years of age was construed as intending distribution of one-half the corpus of the estate to each grandchild upon reaching 35 years of age notwithstanding that daughter was still alive, and corpus was distributed with provision for protection of daughter who was entitled to certain monthly payments, although under the will there were remote and contingent interests in other persons. Northwestern Nat. Bank & Trust Co. v. Pirich, 215M313, 9 NW(2d)773. See Dun. Dig. 10278.

4½. Vesting of interest.

Where a sale of property is to be made in the future for convenience of estate and not out of considerations personal to legatees, postponement of sale does not prevent vesting of gifts. First & American Nat. Bank v. H., 208M295, 293NW585. See Dun. Dig. 10298b.

A provision in a trust agreement for a gift in trust to named beneficiaries "and to their heirs at law by right of representation, in accordance with the then laws of descent of the State of Minnesota" and a similar provision in a will for a gift in trust to named beneficiaries "and to their heirs at law by right of representation" manifest an intention to pass absolute or fee interests in trusts to named beneficiaries in virtue of rule that words of inheritance are not necessary to pass such interests, words of inheritance being consistent with an intention to pass a fee or absolute interest and superadded words being insufficient to cut it down to a lesser one. First & American Nat. Bank of Duluth v. H., 208M 286, 293NW585. See Dun. Dig. 10278.

The law favors an immediate and early vesting of estates unless the interest is manifestly contingent. Northwestern Nat. Bank & Trust Co. v. Pirich, 215M313, 9NW(2d)773. See Dun. Dig. 10278.

Phrase "that may survive her" created a vested remainder in absence of manifestation of a contrary intention. Op. Atty. Gen. (349A-27), Aug. 26, 1941.

5. Contract to make will.

Where services are rendered upon understanding that they are to be compensated for by testmentary disposition, value of a legacy unless otherwise stated in will, shall be applied upon reasonable value of such services either in full satisfaction or pro tanto as case may be. Cooke's Estate, 207M452, 292NW95; Cooke's Estate, 207M 437, 292NW96. See Dun. Dig. 10207.

Under California law two year statute of limitations did not begin to run against claim for personal services from inception of services where expectation was that compensation would be made by will. Superior's Estate, 211M108, 300NW393. See Dun. Dig. 3593/, 5605, 10207.

Oral contract to will property and its terms must be proved by clear, positive and convincing evidence to warrant specific performance. Carlson v. Carlson, 211M 297, 300NW900. See Dun. Dig. 8789a, 8806, 10207.

Services by plaintiff in household of widowed son-in-law, who had a nephew from an orphanage living with him, held of such a personal and family nature that equity could not say that their value was estimable with reasonable accuracy so that it would be improper to award specific performance of oral agreement to leave property to plaintiff. Dill v. Kucharsky, 212M276, 3NW (2d)585. See Dun. Dig. 8789a.

As affecting right to specific performance of oral agreement to leave property at death, an equity in favor of plaintiff arises from fact that her right to recover money which she surrendered in reliance upon agreement has long since expired. Id. See Dun. Dig. 8776, 8789a.

To warrant specific performance of oral contract to leave property at death, proof must be clear, positive and convincing. Id. See Dun. Dig. 8789a, 8811.

Evidence held to establish oral agreement of 39-year old man to leave his property to 72-year old mother-in-law, in view of health of man, warranting specific performance. Id. See Dun. Dig. 8789a, 8811.

Denial of a motion for amended findings, including request for finding that services rendered by plaintiff to deceased were ascertainable and compensable in money, was equivalent to finding that services were not compensable in money, as affecting right to specific performance of contract to leave property by will. Herman v. Kelehan, 212M349, 3NW(2d)587. See Dun. Dig. 9866.

Services in furnishing food, clothing, shelter and nursing were such that remedy at law was inadequate and entitled plaintiff to specific performance of contract to leave property by will. Id. See Dun. Dig. 8776, 8789a, 10207.

Specific performance of contract to leave property by will will be ordered where real estate is involved, regardless of nature of services rendered, though part of contract relates to personal property. Id. See Dun. Dig. 8789a, 10207.

Failure to protest against probate of a will and filing make a will leaving all property to plaintiff was executed and intended by parties to take effect at once, though duplicate contracts were kept by deceased in his safety deposit box and could not be found after his death. Id. See Dun. Dig. 10207.

Failure to protest against probate of a will and filing of claim for board, room and services was only a cir-

cumstance for consideration in suit for specific performance of a contract to make a will leaving all property to plaintiff. Id. See Dun. Dig. 8789a.

In action for specific performance evidence was sufficient to sustain finding of a contract to devise or convey whereby plaintiff was to receive the homestead of his parents upon the death of the survivor of them, provided he had maintained them throughout their lives. Seitz v. Sitze, 215M452, 10NW(2d)426. See Dun. Dig. 10207.

Where parents enter into oral contract with son to devise or convey homestead if son provides for parents throughout their lives, and the son fully performs, and benefits are accepted by both parents with full knowledge of the agreement, statute requiring both husband and wife to join cannot be invoked to prevent enforcement of the contract. Id.

Oral contracts to convey or devise real property will be enforced in equity when one party thereto has partially or fully performed its provisions and has no adequate remedy at law. Id.

If a deceased person were estopped by conduct from invoking homestead statute after performance of an oral contract to convey or devise real property, the heirs are likewise estopped. Id.

Providing for parents during their lifetime constituted adequate consideration for an agreement to convey or devise real property. Id. See Dun. Dig. 8789a (21).

Cause of action to compel performance of an oral contract to devise or convey realty by parents to son upon death of survivor of the parents, provided son maintained them throughout their lives, did not mature until death of survivor. Id. See Dun. Dig. 8797.

Fact that complaint in action for specific performance or an oral contract to will property stated that part of the consideration for the contract was not to "marry anyone else during decedent's lifetime" furnished no ground for denial of relief where defendant denied any such agreement and there was no evidence to show that such promise was part of the consideration. Downing v. Maag, 215M506, 10NW(2d)778. See Dun. Dig. 8784, 10207.

Giving up plans to go abroad and continuing previous intimate relationship was sufficient consideration to support oral contract to will property. Id. See Dun. Dig. 8786. 10207.

Services of a woman, consisting of care and companionship for a period of 42 years, cannot be measured pecuniarily, and oral contracts to will property should be specifically enforced. Id. See Dun. Dig. 8789a, 10207.

Where plaintiff's services were of such peculiar and personal nature that they are not measurable in money a remedy at law is not adequate. Id. See Dun. Dig. 8789a, 10207.

In an action for a specific performance of an oral promise to make a will, the fact that decedent was a lawyer does not impeach evidence of his oral contract. Id. See Dun. Dig. 8789a, 10344a.

Evidence established oral contract to leave property by will. Id. See Dun. Dig. 8811, 10207.

6. Contracts of beneficiaries for distribution.

Agreement between legatees following death of testatrix whereby one legatee agreed to convey an interest in realty in consideration of promise not to contest probate of will on ground of incompetency of maker was not contrary to public policy where there was a good faith belief of incompetency and an unfair distribution of property. Thayer v. Knight, 210M171, 297NW625. See Dun. Dig. 10243k.

An agreement to convey to heir a part of property devised in consideration of an agreement not to contest will was supported by a consideration where will was made after testatrix was treated for insanity and before order was made restoring her to competency and a few months after restoration she hung herself. Id.

In action for specific performance of a contract to convey interest in realty in consideration of promise not to contest will, evidence held to sustain finding of good faith on part of plaintiff concerning incompetency of testatrix. Id.

In action for specific performance of contract to convey interest in land devised in consideration of promise not to contest will, evidence held to sustain finding that there was no fraud, duress or undue influence. Id.

8992-37. Wills made elsewhere.

County court of Wisconsin, in which ancillary proceedings for administration of estate were commenced after will had been admitted to probate in Minnesota, had authority to construe will as to validity and kind of estate held by life long Wisconsin resident, and greater portion of holdings being Wisconsin land, though guardian or trustee has reduced land to money pursuant to a power. Ruppert's Will, 233Wis527, 290NW122.

8992-39. Revocation.

Implied revocation of wills. 40 Mich. Law Rev. 406.

8992-42. Omitted child.

Unless it appears from will that omission of a child was intentional, and not occasioned by accident or mistake, parol testimony is admissible to show that omission was intentional or otherwise. Dorey's Estate, 210M136, 297NW561. See Dun. Dig. 10206e.

Statement by testator in his will that "no person on the Red Lake Reservation or elsewhere is a child of mine, whether bearing the name of Dorey or not" was insufficient to show intent to omit natural child. Id.

Burden is upon one claiming that omission was intentional to prove that fact. Id.

Communications between testator and attorney who drew will are not privileged and may be received in evidence. Id.

That testator was estranged from his daughter and left his property to a widow who had taken her mother's place as spouse of testator, without more, did not invalidate will, especially where daughter already had enjoyed substantial financial aid. Bergquist's Estate, 211 M380, 1NW(2d)418. See Dun. Dig. 10206e.

8992-45. Quantity devised.

A gift, devise or bequest to a named person as primary taker and to others as substitute takers in event of primary taker's death contemplates, in absence of specification to the contrary, that primary taker's death shall occur during donor's or testator's lifetime. First & American Nat. Bank v. H., 208M295, 293NW585. See Dun. Dig. 10297.

An absolute interest in personalty will pass under a will by language which would pass a fee of realty in a similar case notwithstanding superaddition of unnecessary words of inheritance. Id.

A provision in a trust agreement for a gift in trust to named beneficiaries "and to their heirs at law by right of representation, in accordance with the then laws of descent of the State of Minnesota" and a similar provision in a will for a gift in trust to named beneficiaries "and to their heirs at law by right of representation" manifest an intention to pass absolute or fee interests in trusts to named beneficiaries in virtue of rule that words of inheritance are not necessary to pass such interests, words of inheritance being consistent with an intention to pass a fee or absolute interest and superadded words being insufficient to cut it down to a lesser one. First & American Nat. Bank of Duluth v. H., 208M 295, 293NW585. See Dun. Dig. 10272a.

8992-47. Renunciation and election.

Where there was a devise of non-homestead real estate to the widow for life, with remainder over, land had to be sold for payment of debts and expenses of administration and after such payment residue is less than value of widow's life estate, having elected to take under will and so surrendering right to renounce, she takes her devise as purchaser and for consideration, and in consequence value of remainder should first have been resorted to for payment of debts and expenses, thereby preferring devise to widow. Paulson's Estate, 208M231, 293NW607. See Dun. Dig. 10285a.

Upon renunciation of will, a widow takes an undivided interest in all real estate of which her husband was seized or possessed during their marriage, to disposition whereof by will or otherwise she has not consented in writing or by election to take under his will, with certain statutory exceptions. Taylor's Estate, 213M509, 7 NW(2d)320. See Dun. Dig. 10301a.

Question of compensation to a specific legatee out of residue following renunciation of will by widow was discussed but not determined. Id.

Law presumes that testator made his will with knowledge of widow's right to renounce. Id.

8992-50. Probate essential.

General rule is that a will not duly admitted to probate is ineffectual not only as an instrument of title, but as authority of executor to execute it. Stenzel's Estate, 210M509, 299NW2. See Dun. Dig. 10243f.

ARTICLE V.—PROBATE OF WILLS

8992-51. Petitioners.

Probate Code provides separate and distinct proceedings for probate of wills under §§8992-51 to 8992-60 and for general administration in cases of intestacy under §§8992-68 to 8992-73. Stenzel's Estate, 210M509, 299NW2. See Dun. Dig. 3562c, 10245.

Where statutes authorize a procedure for probate of will, a will cannot be probated in proceedings for administration provided for intestate estate. Id.

8992-53. Hearing and proof.

Oral testimony and communications between testator and attorney who drew will are admissible to show whether omission of a child was intentional or otherwise. Dorey's Estate, 210M136, 297NW561. See Dun. Dig. 10206e.

Though probate court acquired jurisdiction of estate on filing of petition for administration as an intestate estate, it could not proceed to probate a will without complying with §8992-53, requiring that upon filing of a petition for probate of a will court shall fix time and place of hearing thereof, notice of which shall be given pursuant to §8992-188. Stenzel's Estate, 210M509, 299NW2. See Dun. Dig. 3562c, 10245.

In will contest, fact that jury divided on issue of forgery did not require a new trial where jury in a special verdict found that the testator lacked mental capacity. Boese's Estate, 213M440, 7NW(2d)355. See Dun. Dig. 10213.

It has been a uniform practice to dispose of all grounds of contesting a will in one proceeding notwithstanding that grounds asserted may not be entirely consistent with each other. Id. See Dun. Dig. 10245b.

An executor of a prior will has no such certain or immediate interest in the disallowance of a subsequent will as to disqualify him from testifying to conversations with testator in proceedings contesting the later will. Id. See Dun. Dig. 10246d.

8992-54. Objections.

In a will contest it is proper to submit to a jury issue of forgery along with the issues of mental capacity and undue influence, notwithstanding the scrivener who prepared will is a witness on all issues, and in such case a division on issue of forgery is not a ground for setting aside a special verdict finding lack of mental capacity. Boese's Estate, 213M440, 7NW(2d)355. See Dun. Dig. 10245b.

Objection in probate court that will "was not duly and legally executed" is broad enough to include an objection that will was forged, so as to authorize an amendment to the propositions of law and fact upon appeal to district court to include specifically objection of the forgery. Id.

A person financially interested in allowance of a will is a person aggrieved by an order of probate court allowing will and may take an appeal from such order although he was present in probate court upon hearing on will, filed no written objections thereto, and entered no appearance therein. Langer's Estate, 213M482, 7NW (2d)359. See Dun. Dig. 10245b.

8992-57. Will in opposition.

Necessary effect of admitting one will to probate after consideration of separate petitions for probate of separate wills was exclusion of other because there can be only one last will and testament, and order was appealable. Showell's Estate, 209M539, 297NW111. See Dun. Dig. 10254.

On appeal from order of probate court vacating a previous appealable order admitting one of two wills to probate after time for appeal had expired upon ground that its failure to notify party of order constituted excusable neglect, district court should decide merits of application to vacate and it was error to vacate probate court's vacating order on ground that it acted without jurisdiction. Id. See Dun. Dig. 7794, 10255.

Where proceedings for probate of purported wills are started in two counties, county in which proceedings are first commenced has jurisdiction to decide the question of venue, and its decision thereof is reviewable by appeal or certiorari, and proceedings in the second county should be stayed. State v. Probate Court of Olmsted County, 215M322, 9NW(2d)765. See Dun. Dig. 7772.

ARTICLE VI.—LOST AND DESTROYED WILLS

8992-62. Sufficiency of proof.

The burden of proof necessary to establish the existence of a lost will is upon the proponent, who must prove its provisions clearly and distinctly. Calich's Estate, 214M292, 8NW(2d)337. See Dun. Dig. 10256.

In action to establish a lost will, evidence held to sustain finding that no will was executed, as against contention that testimony of witnesses was unimpeached. Id.

ARTICLE VII.—ESTATES OF NONRESIDENTS

8992-64. Wills proved elsewhere.

Rule in restatement of conflict of laws that if testator appoints as trustee a trust company of another state, presumptively his intention is that trust shall be administered in latter state and according to its laws held not applicable in absence of any language in the will or other circumstances justifying such presumption. Johnston's Estate, 14Atl(2d)(NJ)469.

8992-66. Administration.

County court of Wisconsin, in which ancillary proceedings for administration of estate were commenced after will had been admitted to probate in Minnesota, had authority to construe will as to validity and kind of estate held by life long Wisconsin resident, and greater portion of holdings being Wisconsin land, though guardian or trustee has reduced land to money pursuant to a power. Ruppert's Will, 233Wis527, 290NW122.

A foreign representative who is not entitled to a transmission of assets of an estate under ancillary administration here and who has no interest in the ancillary administration except his untenable claim that he is entitled to a transmission of assets and a foreign creditor whose claim has not been allowed here have no interest to complain of a payment of a legacy in the form of an annuity in the ancillary administration. Hencke's Estate, 212M407, 4NW(2d)353. See Dun. Dig. 3679i.

Rents from real estate are subject to the same disposition as land itself, rents following the title to land. Id. See Dun. Dig. 3586d.

A statute providing for the distribution of a nonresident's property makes an ancillary administration independent of the domiciliary administration, and to extent that distribution of a nonresident's estate is governed by local law, ancillary administration as such is abolished. Id. See Dun. Dig. 3679g.

Statute relating to filing of claims apply to resident and nonresident creditors alike, and claims may and must be filed against a nonresident's estate the same as against that of a resident decedent. Id. See Dun. Dig. 3679i.

Real property of a nonresident not sold in course of administration should be assigned according to terms of will where will is applicable, and should not be sold and proceeds transmitted by ancillary to domiciliary representative. Id. See Dun. Dig. 3679m.

ARTICLE VIII.—GENERAL ADMINISTRATION

8992-68. Persons entitled.

Where trust instrument, settling corporate stock on beneficiary, gave the corporation an option to purchase the stock either upon sale or disposal of the stock during beneficiary's lifetime or upon its passing by descent or devise, rule against perpetuities was not violated, since any claim to be made upon the option would have to be made within the applicable statute of limitations. Warner & Swasey Co. v. Rusterholz, (DC-Minn), 41F Supp498. See Dun. Dig. 1520, 1749a, 2037, 2040a, 2112a, 3560, 5653, 7480, 9888a, 10258.

Option must be exercised within six years of death of beneficiary. Id.

Heirs cannot indefinitely postpone institution of probate proceedings. Id.

A petition for administration may be granted whenever an estate is left unadministered in whole or in part. Daniel's Estate, 208M420, 294NW465. See Dun. Dig. 3558.

There is no statutory limitation on time within which administration may be granted. Id. See Dun. Dig. 7783.

Probate Code provides separate and distinct proceedings for probate of wills under §§8992-51 to 8992-60 and for general administration in cases of intestacy under §§8992-68 to 8992-73. Stenzel's Estate, 210M509, 299NW2. See Dun. Dig. 3562c, 10245.

8992-71. Subsequent admission of will.

Though probate court acquired jurisdiction of estate on filing of petition for administration as an intestate estate, it could not proceed to probate a will without complying with §8992-53, requiring that upon filing of a petition for probate of a will court shall fix time and place of hearing thereof, notice of which shall be given pursuant to §8992-188. Stenzel's Estate, 210M509, 299NW2. See Dun. Dig. 3562c, 10245.

This Section condenses prior statute (Mason's Minn. St. 1927, §8775) so as to effect only one change, that of definitely stating that new representative shall continue administration. Id. See Dun. Dig. 3562c.

ARTICLE IX.—SPECIAL ADMINISTRATION

8992-74. Appointment.

Position of attorney for guardian of minor beneficiaries is incompatible with duties as special administrator. Palm's Estate, 210M87, 297NW765 (2nd case). See Dun. Dig. 667a, 3584a.

8992-75. Powers.

Though payment of debts of deceased is beyond functions of a special administrator, he should have credit therefor notwithstanding, if estate has had benefit. Palm's Estate, 210M87, 297NW765 (2nd case). See Dun. Dig. 3584b.

A special administrator has no general authority to make an advance of money to guardian of minor beneficiaries. Id.

8992-78. Final account and discharge.

Where account books of superintendent employed to complete the contract of deceased showed payment of a certain item to a material man, special administrator on accounting is entitled to credit therefor where there is no evidence to contrary. Palm's Estate, 210M87, 297 NW765 (2nd case). See Dun. Dig. 3584b.

While a special administrator has no authority to sell chattels, he will be credited for loss on inventory thereof if it does not appear that estate was prejudiced. Id.

ARTICLE X.—DETERMINATION OF DESCENT

8992-79. Essentials.—Whenever any person has been dead for more than five years and has left real estate or any interest therein, and no will or authenticated copy of a will duly proved and allowed outside of this state in accordance with the laws in force in the place where proved has been admitted to probate nor administration had in this state; or whenever real estate or any interest therein has not been included in a final decree, any person interested in the estate or claiming an interest in such real estate may petition the probate court of the county of the decedent's residence or of the county wherein such real estate or any part thereof is situated to determine its descent and to assign it to the persons entitled thereto. (As amended Act Apr. 25, 1941, c. 444, §1.)

8992-80. Contents of petition.—Such petition shall show so far as known to the petitioner:

1. The name of the decedent, the date and place of his death, his age and address at such date, and whether testate or intestate.

2. The names, ages, and addresses of his heirs, executors, legatees, and devisees.

3. That no will or authenticated copy of a will duly proved and allowed outside of this state in accordance with the laws in force in the place where proved has been admitted to probate nor administration had in this state; or if a will or authenticated copy of a will duly proved and allowed outside of this state in accordance with the laws in force in the place where proved has been admitted to probate or administration had, that real estate or some interest therein was not included in the final decree.

4. A description of the real estate, and if a homestead, designated as such, the interest therein of the decedent, the value thereof at the date of his death, and the interest therein of the petitioner.

5. If the decedent left a will which has not been admitted to probate in this state, such will or authenticated copy of a will duly proved and allowed outside of this state in accordance with the laws in force in the place where proved shall be filed and the petition shall contain a prayer for its admission to probate. If a will or authenticated copy of a will duly proved and allowed outside of this state in accordance with the laws in force in the place where proved has been admitted to probate or if administration has been had, certified copies of such instruments in the prior administration as the court may direct shall be filed. (As amended Act Apr. 25, 1941, c. 444, §2.)

8992-81. Decree of descent.—Upon the filing of such petition, the court shall fix the time and place for the hearing thereof, notice of which shall be given pursuant to Article XIX, Section 188. Upon proof of the petition and of the will if there be one, or upon proof of the petition and of an authenticated copy of a will duly proved and allowed outside of this state in accordance with the laws in force in the place where proved if there be one, the court shall allow the same and enter its decree assigning the real estate to the persons entitled thereto pursuant to the will or such authenticated copy if there be one, otherwise pursuant to the law of intestate succession in force at the time of the decedent's death. No decree shall be entered until after the determination and payment of inheritance taxes. (As amended Act Apr. 25, 1941, c. 444, §3.)

ARTICLE XI.—BONDS

8992-82. Condition.

A joint control agreement by an administrator, his surety and depositary by its terms limited to special administration covers the administrator's bank account as general administrator, where the evidence shows that such was the intention and understanding of the parties, and bank was liable to surety for permitting withdrawal by check without counter signature of surety. Fidelity & Casualty Co. of New York v. P., 207M184, 290NW305. See Dun. Dig. 783.

An order allowing final account of an executor binds surety on bond of executor although not cited personally to appear at hearing. Woodworth's Estate, 207M563, 292 NW192. See Dun. Dig. 3580f.

Sureties on bond of a special administrator are not liable for costs and disbursements, awarded against him in an action brought by him in his representative capacity, where there were no assets in estate. Minneapolis St. Ry. Co. v. R., 208M187, 293NW256. See Dun. Dig. 3580s.

If surety on bond of an executor necessarily employed attorneys in good faith to appear in opposition to a petition by an heir of the estate to set aside final account and to account for proceeds of checks, alleged to have been fraudulently converted, and later compromised claim of attorneys for services, surety was entitled to recover amount actually paid from principal, provided amount was such as an ordinarily prudent person, in the conduct of his own business, would have paid to settle such attorney's claim, and jury should not determine question of reasonable attorneys' fees as a wholly independent question. U. S. Fidelity & Guaranty Co. v. Falk, 214M138, 7NW(2d)398. See Dun. Dig. 3580a.

In action by surety on executor's bond against principal to recover value of attorneys' fees expended by surety in appearing in opposition to a petition by an heir of the estate to set aside final account of executors, latter refusing to defend for reason that proceeding was allegedly one merely to reopen estate, and, if granted, executor could then defend, and could appeal to the district court for a trial de novo if unsuccessful, and answer denying necessity of the surety, or good faith of the surety, in incurring claimed counsel fees and reasonableness of amount actually expended by it, there were issues which could not be decided as a matter of law on the pleadings. Id.

Agreement in application for executor's bond providing for indemnification for counsel fees "by reason or in consequence of its having executed said bond" does not entitle surety to recover of attorneys' fees incurred in action against principal to recover expenses of a prior suit by third person against principal. Id.

Where surety on bond of executor brings action against principal to recover expenses of successful defense of a proceeding against the principal and the surety, surety is entitled to recover loss or damage, including attorneys' fees, on proof of its good faith and reasonableness of fees charged and paid. Id.

ARTICLE XII.—MANAGEMENT OF ESTATE

A.—INVENTORY AND APPRAISAL

8992-87. Contents of inventory.

An inventory in probate proceedings was not an "inventory" within income tax law for purposes of determining gain or loss from a sale or disposition of property acquired by bequest. State v. Stickney, 213M89, 5NW(2d) 351. See Dun. Dig. 9570d.

Claim against third person, reduced to judgment by administrator, was property and hence an asset of the estate. Brockmeyer & Lykin v. Droege, 215M262, 9NW (2d)753. See Dun. Dig. 3586e.

8992-88. Appraisal.

An inventory in probate proceedings was not an "inventory" within income tax law for purposes of determining gain or loss from a sale or disposition of property acquired by bequest. State v. Stickney, 5NW(2d)351. See Dun. Dig. 9570d.

B.—COLLECTION OF ASSETS

8992-89. Possession.

While investments of cash in hands of an executor are ordinarily not proper, circumstances govern, as where there is statutory authority, power given in a will, or an extended administration and order of court. Adams, (CCA8), 110F(2d)578, rev'g 39BTA1239.

In trial of claim against estate of a decedent based upon alleged oral trust as to money deposited in bank, court held not to err in granting estate new trial for insufficiency of evidence to support verdict. Halweg's Estate, 207M263, 290NW577. See Dun. Dig. 3586g.

A representative of an estate is a fiduciary, and while he is not an insurer, he must honestly exercise that degree of care which men of common prudence ordinarily exercise in their own affairs. Baker's Estate, 208M379, 294 NW222. See Dun. Dig. 3565.

Amount recovered for one's death is no part of his estate, and probate court has no jurisdiction to control action in which recovery is had or to direct the distribution of fund after it is recovered. Daniel's Estate, 208 M420, 294NW465. See Dun. Dig. 3586k.

Liability exists against representative of estate of a deceased in his individual capacity under a contract made by him with a creditor who becomes such through dealings with him, unless in plain language such contract expressly states that creditor agrees to seek his remedy against estate and not against representative in his capacity as such. Pittsburgh Coal Co. v. W., 209M 340, 296NW178. See Dun. Dig. 3569.

Administrator was trustee of property of estate and bound to administer it in good faith to highest degree of integrity, especially where he was chief beneficiary of decree subsequently reversed. Krzyzaniak v. St. Paul Mercury Indem. Co., 210M373, 298NW365. See Dun. Dig. 3565.

Evidence held to sustain finding that certain securities of decedent were not held in trust by plaintiff. Williams v. Jayne, 210M594, 299NW853. See Dun. Dig. 3588.

Rents from real estate are subject to the same disposition as land itself, rents following the title to land. Hencke's Estate, 212M407, 4NW(2d)353. See Dun. Dig. 3586d.

Where land and personal property were transferred to a son subject to an agreement that son should support parents with provision that if a breach occurred during the lifetime of the father and mother, or the survivor of either of them, son should forthwith lose possession, control, and management of the property, and the title and possession should automatically revert to its former status, and there was no breach of duty while father was still alive, no cause of action could pass to representative of his estate as result of a subsequent breach, and whatever cause surviving widow might have should be conducted by her in her own name and right, which might involve rights and remedies of a third-party beneficiary, or possibly an action as for breach of contract. Moline v. Kotch, 213M326, 6NW(2d)462. See Dun. Dig. 1896, 3586a, 3588.

Upon death of a testator, his real estate passes by operation of law to his devisees, subject to right of executor to possession for administrative purposes, and subject to rights of a tenant in possession, whose right under a tenancy from year to year can only be terminated by statutory notice to quit. State Bank of Loretto v. Dixon, 214M39, 7NW(2d)351. See Dun. Dig. 2722.

New probate form code has not changed rule that an administrator or guardian is authorized to lease real property of estate for term of administration or guardianship. Martin v. Smith, 214M9, 7NW(2d)481. See Dun. Dig. 3572.

In action by administrator to have defendants declared trustees of certain fund and for an accounting thereof, plaintiff can claim no rights greater than those possessed by decedent at the time of his death. Droege v. Brockmeyer, 214M182, 7NW(2d)538. See Dun. Dig. 3568.

Those interested in an estate of a deceased person are entitled to a full measure of honesty, diligence, and zeal as a matter of course when they engage a lawyer, and likewise when he becomes administrator. Simmons' Estate, 214M388, 8NW(2d)222. See Dun. Dig. 3565.

It is the duty of administrator to proceed promptly with collection of claims due estate. Id. See Dun. Dig. 3586r.

No part of the recovery under the death by wrongful act statute goes to the decedent's estate, and it is no part of it, since recovery is for the exclusive benefit of the "surviving spouse and next of kin", and the widow may not even select her statutory allowance out of the amount so recovered under the statute of descent. Fehland v. City of St. Paul, 215M94, 9NW(2d)349. See Dun. Dig. 3586k.

While the representative of a deceased's estate who has obtained possession of the decedent's personal property is accountable to the probate court therefor, the widow may not, in the first instance, bring an action in the district court to recover such property, or its value, since the probate court controls the property through the administrator, and its jurisdiction over him and over the estate is exclusive. Jewell v. Jewell, 215M190, 9NW(2d)513. See Dun. Dig. 3568, 3669, 7770c, 7770d.

8992-90. Liability.

Self or double dealing by a fiduciary renders transaction voidable by beneficiary, but where facts were fully disclosed to court, and action of guardian was on advice of independent counsel whose only duty was to, and whole whole interest was that of, the ward, and transaction was approved by court, it cannot thereafter be disaffirmed by ward. Fiske's Estate, 207M44, 291NW289. See Dun. Dig. 4110.

Administrator was negligent in permitting land to be lost through mortgage foreclosure and redemption by a creditor, and was liable therefor to the estate. Baker's Estate, 208M379, 294NW222. See Dun. Dig. 3579l.

8992-91. Accord with debtor.

Consent by administratrix to allowance of a claim filed by her against another estate in a definite amount does not prevent heir in former estate who contends that claim should have been allowed in a large sum from appealing to the district court from order of allowance. Owens v. O., 207M489, 292NW89. See Dun. Dig. 7785a.

Pledgee of a chose in action, under extreme circumstances indicating that loss to all concerned would have resulted if it had not accepted exchange of securities provided for by reorganization in bankruptcy of debtor, held properly to have accepted exchange as a compromise where procedure resulting in exchange was participated in by representatives of pledgor's estate without objection either to procedure or result. First & American Nat. Bank of Duluth v. W., 207M537, 292NW770. See Dun. Dig. 3579a.

Section does generally make prerequisite to an effective compromise approval of probate court, but does not vest in that tribunal right arbitrarily to withhold approval, and where issue has been litigated in district court, mere absence of probate court approval is not fatal to judgment. Id.

8992-96. Property converted.

Statute applies where one in possession of a decedent's property before appointment of representative for the estate disposes of the property, though he does not use the property himself. Owens v. O., 207M489, 292NW89. See Dun. Dig. 3588.

Where embezzlement and alienation of property of a decedent was fraudulent, statute of limitations did not begin to run until discovery of cause of action. Id. See Dun. Dig. 3588.

Section 8992-96, giving double damages for conversion of property of a deceased person, is not a penal statute since it gives same right as existed at common law and merely increases damages payable to party aggrieved, and §9192 does not apply. Id. See Dun. Dig. 5657.

Findings that shares of stock were converted by deceased during his lifetime from the estate of his father, another deceased, and market value thereof, held sustained by evidence. Id. See Dun. Dig. 3599.

8992-98. Continuation of business.

An executor or administrator cannot bind estate he represents by any new contract he may make for it. Pittsburgh Coal Co. v. W., 209M340, 296NW178. See Dun. Dig. 3569.

C.—CLAIMS

8992-100. Notice to creditors.

Until probate court is petitioned for probate or administration of estate of old age assistance recipient, clerk of probate court is not required to accept for filing claims against the estate. Op. Atty. Gen., (521g), June 5, 1941.

8992-101. Filing of claims.

Only claims arising on contract are to be determined by probate court in administering estates of decedents. Burton's Estate, 206M516, 289NW66. See Dun. Dig. 3591b.

On a claim by a son against his mother's estate for improvements made to her farm, evidence held insufficient to sustain a finding of a contract to reimburse him therefor. Sickmann's Estate, 207M65, 289NW832. See Dun. Dig. 3593l.

Execution of a promissory note by claimant to deceased created a presumption that payee was not indebted to maker, and this presumption was especially strong where note was given for borrowed money with no suggestion that a liability of any kind existed against lender. Id. See Dun. Dig. 3599.

In hearing on claim against estate of a decedent for value of improvements made by child upon deceased mother's farm, evidence offered to prove how profitably claimant had operated farm for deceased was properly excluded, having no bearing on alleged contract to pay therefor. Id. See Dun. Dig. 3599.

In hearing on claim for improvements made by son on farm of deceased mother, evidence concerning other farms of mother was immaterial on issue of existence of contract to pay for improvements. Id. See Dun. Dig. 3599.

The probate court has no jurisdiction to allow claims after the time fixed by the probate code. Paulson's Estate, 208M231, 293NW607. See Dun. Dig. 3592a.

Debts to be allowed and paid out of estate of deceased person must be such as were incurred, or such as arise on obligations entered into, by him, and a claim arising later, such as one for goods sold by a third party to representative, must be worked out through representative as an item of administration expense. Pittsburgh Coal Co. v. W., 209M340, 296NW178. See Dun. Dig. 3569.

Where claimant performed services for husband and wife under an agreement that since they held all their property so that it was to go to the survivor, his services should be paid out of estate of survivor, he could file his claim against estate of survivor and court would have jurisdiction to try claims against both husband and wife. Cooke's Estate, 210M397, 298NW571. See Dun. Dig. 3592, 3592a.

Verdict for $2,000 for services rendered to decedent held not excessive. Id. See Dun. Dig. 10381.

Where elderly couple held all their property so that it would go to the survivor, one having claim for services could file it against the estate of the survivor, without having filed any claim against estate of one dying first. Cooke's Estate, 210M400, 298NW572. See Dun. Dig. 3592, 3592a.

Verdict on claim against estate of a deceased for $2,150 held not excessive for services rendered in driving a car and performing various chores, though claimant kept no books of account and could only estimate time spent. Id. See Dun. Dig. 10381.

Under California law, where one person performs services for another, law implies a promise on part of recipient to pay for them, but where services were rendered for a close relative, normal legal implication of the contractual relationship may be repelled, also where services are such as one friend might perform for another, in which case circumstances must show that compensation was expected or contemplated by parties. Superior's Estate, 211M108, 300NW393. See Dun. Dig. 3593g.

In trial of claim against estate of decedent for personal services in quantum meruit, court property refused to instruct jury to disregard testimony of nurses as to statements made by decedent during her last illness, on showing by administrator that decedent had periods of irrationality, matter going to credibility rather than to admissibility. Id. See Dun. Dig. 3599.

A verdict for $22,000, reduced to $15,000, for intermittent services to an ill person over a period of twelve years held not so excessive as to require interference. Id. See Dun. Dig. 3593g.

In action by administrator to have defendants declared trustees of fund left in hands of son-in-law for the care of decedent during his lifetime, balance to be equally distributed between children after his death, evidence held to sustain findings that defendants were entitled to substantial credit for their services rendered to decedent over a long period of years. Droege v. Brockmeyer, 214 M182, 7NW(2d)538. See Dun. Dig. 3593g.

Expenses incident to an inquest should not be filed as a claim in probate court against estate of deceased. Op. Atty. Gen. (103f), March 25, 1943.

8992-103. Claims barred.

Evidence sustains findings that claim on check did not accrue within six years next preceding date of death of decedent against whose estate claim was sought to be enforced. Burton's Estate, 206M516, 289NW66. See Dun. Dig. 3593l.

If plaintiff's claim (as holder and payee of a check made and delivered as a gift) be considered an implied trust, the statute of limitations began to run from time when act was done by which decedent (maker of check) became chargeable as trustee. Id. See Dun. Dig. 3593*l*.

Under California Law two year statute of limitations did not begin to run against claim for personal services from inception of services where expectation was that compensation would be made by will. Superior's Estate, 211M108, 300NW393. See Dun. Dig. 3593*l*.

Where a claimant against estate of a decedent is not a citizen of this state and personal services were largely rendered in another state, statute of limitations of such other state controls. Id.

Indebtedness of a distributee to decedent may be set *off against his distributive share of personal property* even though statute of limitations has run, and this is true in an action for an accounting among coheirs following close of administration proceedings. Lewis v. Lewis, 211M587, 2NW(2d)134. See Dun. Dig. 3661a.

Reason for application of rule of retainer to an outlawed debt due from a distributee of a decedent's estate to decedent do not obtain in case of a claim of a guardian against estate of an incompetent for care and support of ward and expenses of guardianship, and guardian should not be charged under doctrine of retainer with outlawed note. Guardianship of Overpeck, 211M576, 2NW(2d)140, 138ALR1375. See Dun. Dig. 4122.

Right of retainer should not be confused with setoff and recoupment. Id. See Dun. Dig. 3661a.

8992-104. Adjudication on claim.

Findings that shares of stock were converted by deceased during his lifetime from the estate of his father, another deceased, and market value thereof, held sustained by evidence. Owens v. O., 207M489, 292NW89. See Dun. Dig. 3599.

Where services are rendered upon understanding that they are to be compensated for by testmentary disposition, value of a legacy unless otherwise stated in will, shall be applied upon reasonable value of such services either in full satisfaction or pro tanto as case may be. Cooke's Estate, 207M452, 292NW95; Cooke's Estate, 207M437, 292NW96. See Dun. Dig. 3602.

Where there are no assets with which to pay claims through no fault of administrator in collecting the same, neither representative nor sureties on his bond are liable for non-payment of claims against estate, administrator not being liable beyond the assets which he represents. Minneapolis St. Ry. Co. v. R., 208M187, 293NW256. See Dun. Dig. 3580s.

8992-107. Actions precluded.

An action may now be maintained in district court *against representatives and heirs of a deceased person* to enforce a lien or charge for work and materials furnished for improvement of homestead at request of deceased, without presenting claim therefor to probate court for allowance, it appearing that deceased left no property other than homestead. Anderson v. J., 208M152, 293NW131. See Dun. Dig. 3592a.

The probate court has no jurisdiction to allow claims after the time fixed by the probate code. Paulson's Estate, 208M231, 293NW607. See Dun. Dig. 3592a.

A foreign representative who is not entitled to a transmission of assets of an estate under ancillary administration here and who has no interest in the ancillary administration except his untenable claim that he is entitled to a transmission of assets and a foreign creditor whose claim has not been allowed here have no interest to complain of a payment of a legacy in the form of an annuity in the ancillary administration. Hencke's Estate, 212M407, 4NW(2d)353. See Dun. Dig. 3679i.

Claims of nonresident as well as of resident creditors are barred unless presented within five years after decedent's death, and probate court has no power to allow a claim after the five years have expired. Id. See Dun. Dig. 3592a, 3679i.

While the representative of a deceased's estate who has obtained possession of the decedent's personal property is accountable to the probate court therefor, the widow may not, in the first instance, bring an action in the district court to recover such property, or its value, since the probate court controls the property through the administrator, and its jurisdiction over him and over the estate is exclusive. Jewell v. Jewell, 215M190, 9NW(2d)513. See Dun. Dig. 3568, 3669, 7770c, 7770d.

Right of creditors of a decedent to recover from distributees after estate is closed. 41MichLawRev920.

8992-108. Priority of debts.

One advancing money to pay funeral expenses of one killed in automobile accident has a valid claim against the estate of the decedent where there is a recovery by the administratrix, subsequently appointed, for wrongful death of decedent. Kirschstein's Estate, 213M1, 4NW(2d)633. See Dun. Dig. 2610, 3593e.

By the common law, funeral expenses are a charge against the representative, and, under our statute, they are also a direct charge against the estate and may be presented and allowed as such, creditor having alternative remedy. Kirschstein's Estate, 213M1, 4NW(2d)633. See Dun. Dig. 3593e.

One advancing money to mother of decedent, subsequently appointed administratrix, for payment for funeral expenses and for the personal use of the mother has a claim against estate for the funeral expenses but not for money advanced for personal use of mother who later became administratrix. Kirschstein's Estate, 213M1, 4 NW(2d)633. See Dun. Dig. 3593e.

A valid, collectible claim against third parties is an asset of an estate from which funeral expenses can be paid after payment of the expenses of administration. Brockmeyer & Lykin v. Droege, 215M262, 9NW(2d)753. See Dun. Dig. 3586e, 3610.

The estate is primarily liable for funeral expenses, and the law will not imply liability on the part of another, to the exclusion of the estate, from a request alone, and a remark made by a daughter to the effect "that price was no object" could not be relied upon as an assumption of liability which would relieve the estate. Id. See Dun. Dig. 3610.

By the common law, funeral expenses are a charge against the representative, and, under the statute, they are also a direct charge against the estate and may be presented and allowed as such, and the creditor has alternative remedies. Id. See Dun. Dig. 3610.

Funeral expenses of $561 were suitable to decedent's station in life, and the fact that his estate had been largely expended in caring for him during a long illness extending over many years does not detract from his station in life. Id. See Dun. Dig. 3610.

After payment of expenses of administration, funeral expense, and possibly expenses of last sickness of decedent; a note made by deceased to governor of Farm Credit Administration has priority. Op. Atty. Gen. (349a-5), Aug. 26, 1943.

8992-109. Secured debts.

Lien on homestead for old age assistance has priority over expenses of administration, burial and last sickness, and where claim for old age assistance is filed against estate and homestead is sold under license of court for a price equal to expenses of administration, funeral, and last illness, without purchaser obtaining a release of the lien, county may foreclose lien and disregard of proceedings in probate court. Op. Atty. Gen. (521p04), Feb. 15, 1943.

ARTICLE XIII.—ACCOUNTING AND DISTRIBUTION

8992-114. Filing of account.

Where husband and wife perished in same calamity and administrator collected a life insurance policy in which wife was beneficiary, and beneficiaries of both estates are identical, administrator upon appeal has no grounds upon which to argue that it was error to make *a charge for insurance moneys in estate of wife*, question being moot. Palm's Estate, 210M77, 297NW765 (first case). See Dun. Dig. 3644d.

Where issue is not whether administrator should make an accounting, but rather and only whether his account as presented is correct, he cannot aver laches on part of beneficiaries. Palm's Estate, 210M87, 297NW765 (2nd case). See Dun. Dig. 3649.

8992-115. Hearing and decree.

Laws 1941, c. 79, validates certain probate proceedings and orders and conveyances and decrees of distribution made therein.

An order adjusting and allowing final account of an executor is equivalent of a judgment or decree adjudging amount due estate from executor, and may not be vacated, after expiration of time for appeal therefrom, except under §§9283 or 9405. Woodworth's Estate, 207M563, 292NW192. See Dun. Dig. 3649a.

Probate court has power to vacate a previous order allowing a final account where it is made to appear that the order was procured without a hearing because of mistake and inadvertance on the part of the court, and such power does not terminate upon the expiration of the time to appeal from the order sought to be vacated. Henry's Estate, 207M609, 292NW249. See Dun. Dig. 7784.

It is duty of fiduciary such as an administrator to keep dependable and accurate accounts of his actions as such, and the burden is on him to prove that his actions have conformed to standard of his duty. Palm's Estate, 210M87, 297NW765 (2nd case). See Dun. Dig. 3641a.

Evidence held to sustain finding that distribution of estate according to final decree of distribution and prior to expiration of time for appeal was not made in good faith by administrator. Krzyzaniak v. St. Paul Mercury Indem. Co., 210M373, 298NW365. See Dun. Dig. 3565.

A decree of distribution made by a probate court with jurisdiction is a complete protection to a representative who makes distribution thereunder in good faith and without negligence, though time for appealing from decree has not expired, or decree is subsequently reversed. Id. See Dun. Dig. 3660a(54).

Where half interest in newspaper business was included in inventory and two-thirds of such interest was decreed to children, and they agreed that widow should have the business during her lifetime, district court had jurisdiction of an action after death of widow for an accounting between children, title having passed and probate court's jurisdiction having ended with its decree. Lewis v. Lewis, 211M587, 2NW(2d)134. See Dun. Dig. 2734a, 7777a.

Indebtedness of a distributee to decedent may be set off against his distributive share of personal property even though statute of limitations has run, and this is true in an action for an accounting among coheirs following close of administration proceedings. Id. See Dun. Dig. 3661a.

Fact that probate court did not insert a general blanket clause in its decree of distribution of an intestate estate does not prevent district court, nine years after administration, from determining a child's right to an asset in an action for an accounting between children. Id. See Dun. Dig. 3660.

Where final decree in probate is general in its terms and not confined to property listed in inventory, title passes by decree whether specified in inventory or not. Id. See Dun. Dig. 3660.

Reasons for application of rule of retainer to an outlawed debt due from a distributee of a decedent's estate to decedent do not obtain in case of a claim of a guardian against estate of an incompetent for care and support of ward and expenses of guardianship, and guardian should not be charged under doctrine of retainer with outlawed note. Guardianship of Overpeck, 211M576, 2NW (2d)140, 138ALR1375. See Dun. Dig. 3661a.

Right of retainer should not be confused with setoff and recoupment. Id.

Section has no application where debts were specifically cancelled and forgiven in will. Staples' Estate, 214M337, 8 NW(2d)45. See Dun. Dig. 2722f.

8992-118. Allowance to representative.

Burden of proof as to amount executors were entitled to deduct for expenses of administration and as to allowable character of deductions claimed in determining federal estate tax was upon them, and hence upon reversal of determination of Board of Appeals disallowing claimed deduction, case would be remanded to afford opportunity to prove that the administration expenses claimed as deductions were allowable as such. Adams, (CCA8)110F(2d)578, rev'g 39BTA1239.

Expenditures by executors in locating assets of large estates held deductible as administration expenses, and disallowance of deductions on ground that such expenses were incurred in prolonging administration to provide funds for testamentary trusts and in carrying on a business by the executors for profit was improper, nor was such disallowance justified on ground that the deductions claimed were also claimed in connection with income taxes of the estate. Id.

Defendant as representative of her mother's estate and as representative of the estate of her brother occupies two distinct positions, and she cannot, at least in her representative capacities, cast into a hotchpot expenditures or obligations created or suffered by her in the two proceedings, as affecting attorney fees in one of them. Shapiro v. L., 206M440, 289NW48. See Dun. Dig. 3644c.

Compensation for representative's services is to repay him for time, labor, and responsibility involved, and to reward him for fidelity with which he discharges his trust, and court was justified in refusing to allow any compensation to a representative who negligently permitted land to be lost through foreclosure. Baker's Estate, 208M379, 294NW222. See Dun. Dig. 3646.

It is proper for court to credit executor with amount paid by him for coal used to maintain property of estate. Pittsburgh Coal Co. v. W., 209M340, 296NW178. See Dun. Dig. 3644d.

An administrator who has been remiss in performance of his duty is thereby subject to denial of compensation. Palm's Estate, 210M87, 297NW765 (2nd case). See Dun. Dig. 3646.

It is irregular to award fees to an attorney from an estate for suits brought against administrator, but attorney bringing suit against administrator at his suggestion was considered as having performed services beneficial to the estate where administrator's interest was hostile to other defendants. Simmons' Estate, 214 M388, 8NW(2d)222. See Dun. Dig. 3646.

While allowance of an administrator's compensation and that of his attorneys rests largely in sound discretion of court to which such claims are presented, it is discretionary only in sense that no fixed rules determine the proper allowance, and it is not discretionary in sense that courts are at liberty to give anything more than a fair and reasonable compensation. Id.

When an administrator comes into court with a charge for compensation for services, he should present a bill of particulars specifying time and dates and character of services rendered. Id.

Compensation allowed administrator and attorney was reduced by supreme court on appeal. Id.

It is improper to allow compensation either to the administrator or his attorneys on basis of services not yet performed. Id.

An administrator is entitled to compensation for work done before he was appointed administrator if the work done was for the benefit of the estate. Id.

Those interested in an estate of a deceased person are entitled to a full measure of honesty, diligence, and zeal as a matter of course when they engage a lawyer, and likewise when he becomes administrator, as affecting amount of compensation. Id.

Estates in probate are under the protection of the law, and it is the duty of courts to protect them from dissipation by exorbitant allowances to their officers. Id.

Where there is no reasonable ground for litigation undertaken by a guardian ad litem of an incompetent, the court may in its discretion deny him compensation and expenses. Johnson v. Johnson, 214M462, 8NW(2d) 620. See Dun. Dig. 4122.

8992-124. Discharge of representative.

Where there are no assets with which to pay claims through no fault of administrator in collecting the same, neither representative nor sureties on his bond are liable for nonpayment of claims against estate, administrator not being liable beyond the assets which he represents. Minneapolis St. Ry. Co. v. R., 208M187, 293NW 256. See Dun. Dig. 3580s.

Approval of final account and discharge of an executor or administrator is not conclusive that estate has been fully administered so as to preclude further administration upon unadministered assets. Daniel's Estate, 208M 420, 294NW465. See Dun. Dig. 7777a.

Probate court's denial of petition to reopen estate does not constitute res judicata on issue of fraud in inducing a party not to file a claim against estate of a deceased person because probate court did not have jurisdiction to determine such issue. Bulau v. B., 208M529, 294NW 845. See Dun. Dig. 5194a.

8992-125. Summary proceedings.

An action may now be maintained in district court against representatives and heirs of a deceased person to enforce a lien or charge for work and materials furnished for improvement of homestead at request of deceased; without presenting claim therefor to probate court for allowance, it appearing that deceased left no property other than homestead. Anderson v. J., 208M152, 293NW131. See Dun. Dig. 3592a.

Probate court did not have power summarily to close estate without general administration if there were assets subject to such administration in fact. Daniel's Estate, 208M420, 294NW465. See Dun. Dig. 3650.

8992-126. Unclaimed money.—If any part of the money on hand has not been paid over because the person entitled thereto cannot be found or refuses to accept the same, or for any other good and sufficient reason the same has not been paid over, the court may direct the representative to deposit the same with the county treasurer, taking duplicate receipts therefor, one of which he shall file with the county auditor and the other in the court. If the money on hand exceeds the sum of $2,000, the court may direct the representative to purchase with said money bearer bonds of the United States government or of the State of Minnesota or any of its political subdivisions, which bonds shall be deposited with the county treasurer, taking duplicate receipts therefor, one of which he shall file with the county auditor and the other in the court, and the county treasurer shall collect the interest on said bonds as it becomes due, and the money so collected or deposited shall be credited to the county revenue fund. Upon application to the probate court within 21 years after such deposit, and upon notice to the county attorney and county treasurer, the court may direct the county auditor to issue to the person entitled thereto his warrant for the amount of the money so on deposit including the interest collected on bonds and in the case of bonds, the county auditor shall issue to the person entitled thereto his order upon the county treasurer to deliver said bonds. No interest shall be allowed or paid thereon, except as herein provided, and if not claimed within such time no recovery thereof shall be had. The county treasurer, with the approval of the probate court, may make necessary sales, exchanges, substitutions, and transfers of bonds deposited as aforesaid, and may present the same for redemption and invest the proceeds in other bonds of like character. (Amended Act Apr. 15, 1941, c. 231, §1.)

Payment or delivery to accredited diplomatic or consular representatives of foreign countries. Laws 1943, c. 477.

Where money of a missing heir has been deposited with county treasurer and heir has not been heard from for more than 7 years, proper procedure for distribution to heirs of such person is to have an administrator appointed for him, who may proceed under this section. Op. Atty. Gen. (346-B), July 22, 1940.

Where final account of administrator has been approved but probate court has not determined the heirs because they are resident of a country occupied by Germany, money of the estate should be treated as unclaimed money and deposited with county treasurer under order of court. Op. Atty. Gen. (349e), July 9, 1942.

8992-126a. Property of deceased persons to be transferred to representatives of foreign countries in certain cases.—Whenever any person who is declared by a decree of a probate court to be entitled to any property in an estate is a citizen of and a resident in any foreign country with the government of which the United States maintains diplomatic relations the representative of the estate may deliver or pay such property to an accredited diplomatic or consular representative of the government of such foreign country for delivery or payment to such person declared entitled thereto by such decree, or, if such money has been deposited with the county treasurer pursuant to Mason's Supplement 1940, section 8992-126, as amended, the probate court upon application as therein provided shall grant its order authorizing and directing the county auditor to issue his warrant to the county treasurer to pay such money or deliver such property to such accredited diplomatic or consular representative, and the representative of such estate or the county treasurer shall be discharged from his trust and all further liability thereunder upon filing the receipt of such diplomatic or consular representative for such property with such probate court, provided that such diplomatic or consular representative has been licensed by proper federal authority to receive such property of the nationals of such country, where such license is required. (Act Apr. 16, 1943, c. 477, §1.)
[525.484]

8992-126b. Same—Application of act.—This act shall not apply where such citizen of and resident in any such foreign country has appeared in person or by duly authorized representative other than such diplomatic or consular representative. (Act Apr. 16, 1943, c. 477, §2.)
[525.484]

ARTICLE XIV.—ADVANCEMENTS

8992-127. Definition.
When a person who has made advancements to her children during her lifetime subsequently executes a will and dies testate, such will precludes all consideration of such advancements unless expressly saved by terms of will. Staples' Estate, 214M337, 8NW(2d)45. See Dun. Dig. 2722f, 3661a.

ARTICLE XV.—GUARDIANSHIPS

8992-129. Persons subject.
If a guardian is appointed, domicile of an infant remains within state of appointment. State v. School Board of Consol. School Dist. No. 3, 206M63, 287NW625. See Dun. Dig. 4107b.

Where decree of divorce is silent with respect to support of a child, divorced mother has cause of action against divorced father quasi ex contractu for support furnished child arising out of natural and legal duty of father. Quist v. Q., 207M257, 290NW561. See Dun. Dig. 7302.

Presumption as to parents' fitness to have care of their child held not overcome nor does evidence require a finding that best interests of child will be served by leaving her with grandparents. State v. Sorenson, 208M 226, 293NW241. See Dun. Dig. 7297.

When there is a contest between parents and courts are required to determine matter of a child's custody, whether in a divorce or a separation case, or a habeas corpus proceeding, best interest of child is paramount consideration. State v. Price, 211M565, 2NW(2d)39. See Dun. Dig. 7297.

In habeas corpus by husband to obtain custody of child, evidence held to establish that plaintiff was more fit and capable to have custody of two-year-old child. Id.

Ordinarily courts award custody and care of children of tender age to mother, also girls of whatever age to her, if fit and able to give a mother's care, but will award custody to father where he has demonstrated his willingness and ability to care for the child and mother found more congenial company and surroundings in beer taverns. Id.

Emancipation is act of parent, the mother in case father is dead, and need not be in writing or in express words, but may be implied from conduct. City of Minneapolis v. Town of Orono, 212M7, 2NW(2d)149. See Dun. Dig. 7309.

Evidence held to sustain finding that child was not emancipated by widowed mother though he was permitted to work for farmers for his room and board. Id.

An adjudication of incompetency by the probate court is evidence, but not conclusive, in any litigation to prove the mental condition of the alleged incompetent at time the judgment was rendered or at any past time during which the judgment finds the person to be incompetent. Johnson v. Johnson, 214M462, 8NW(2d)620. See Dun. Dig. 4519.

The rule is the same in Iowa as in other states that a person under guardianship as an incompetent may have capacity to contract a marriage. Id.

One who has been adjudged an incompetent may contract a valid marriage if he has in fact sufficient mental capacity for that purpose. Id.

Mental incompetency or incapacity is established when there is found to exist an essential privation of reasoning faculties, or when a person is incapable of understanding and acting with discretion in the ordinary affairs of life. Parrish v. Peoples, 214M589, 9NW (2d)225. See Dun. Dig. 4519.

Whether a person is incompetent by reason of mental disability so as to require the appointment of a guardian of his estate is not subject to demonstrable proof, but his mental disability is in the final analysis a matter of opinion, which must be based upon his conduct, actions, and statements in connection with surrounding circumstances and conditions. Id. See Dun. Dig. 4524.

Test of mental capacity applied in suits for appointment of guardians should also be applied in those to avoid deeds and wills. Id. See Dun. Dig. 4524.

An injured minor, through a guardian ad litem, may bring an action directly against person whose negligence caused his injury, although as an unemancipated minor he might not have sued defendant's employer, who was his father, and in such an action it would be no defense that the defendant's employer was plaintiff's father. Turenne v. Smith, 215M64, 9NW (2d)409. See Dun. Dig. 4434. See 27MinnLawRev579.

A parent should not be deprived of the custody of his child unless there are grave and weighty reasons therefor, and, no such reasons appearing, custody of a five-year old daughter, in care of maternal grandmother, should be awarded to the father. State v. Sanders, 215M502, 10 NW(2d)387. See Dun. Dig. 7297.

8992-130. Petitioners.
One committed to state home school for girls is a ward of state until she becomes 21 years of age, and director of division of public institutions is her guardian though she is out on parole and may consent to operation of tonsillectomy by doctor at institution, over objections of parents of ward, providing the ward also consents and has an understanding of nature and consequences of operation by doctor in institution. Op. Atty. Gen. (88A-27e), Jan. 16, 1942.

8992-134. Hearing—Appointment.
A surety on a guardian's bond who holds a second mortgage as collateral security for the surety's liability on such bond owes his principal the duty of exercising ordinary care for the preservation of such security, provided it is in his possession and control, but this does not impose upon him the obligation of advancing substantial personal funds to prevent or to redeem from the foreclosure of first mortgage. Faunce v. Schueller, 214M412, 8NW(2d)523. See Dun. Dig. 9089.

Guardian has burden of establishing that his loss was occasioned by the negligence or breach of duty of his surety. Id.

The appointment of a guardian disables the alleged incompetent only from making contracts which relate to his estate, but not other kinds of contracts. Johnson v. Johnson, 214M462, 8NW(2d)620. See Dun. Dig. 4519, 4526.

Guardians for persons receiving old age assistance must file a bond, and one of employees of county might not act as guardian for a number of these persons and have a single corporate blanket surety bond. Op. Atty. Gen. (521J-4), Mar. 16, 1942.

8992-135. Guardian's duties.—A guardian shall be subject to the control and direction of the court at all times and in all things. A general guardian of the person shall have charge of the person of the ward. A general guardian of the estate shall (1) pay the reasonable charges for the support, maintenance, and education of the ward in a manner suitable to his station in life and the value of his estate; but nothing herein contained shall release parents from obligations imposed by law for the support, maintenance, and education of their children, (2) pay all just and lawful debts of the ward and the reasonable charges incurred for the suport, maintenance, and education of his wife and children, and upon order of the court pay such sum as the court may fix as reasonable for the support of any person unable to earn a livelihood who is or may become legally entitled to support from the ward, (3) possess and manage the estate, collect all debts and claims in favor of the ward, or with the approval of the court compromise the same, and invest all funds, except such as may be currently need-

ed for the debts and charges aforesaid and the management of the estate, in such securities as are authorized by G. S. 7714 and approved by the court, except as provided in G. S. 7735. (As amended Act Apr. 23, 1941, c. 395, §1.)

In action for injuries in collision suffered by motorcyclist and his ward who was riding with him, it was error, so far as guardian was concerned to exclude his pleading as to how accident happened where it was inconsistent with testimony on behalf of plaintiffs, but such exclusion was not erroneous as to ward, since guardian could not make admissions affecting substantial rights of minor. Stolte v. L., (CCA8), 110F(2d)226.

The law in this state imposes upon a father an obligation to support and educate his minor children, so that income of trust created by him to provide for the maintenance and education of such children is taxable income of the father. Mairs v. Reynolds, (CCA8), 120F (2d)857. See Dun. Dig. 7302, 9570e.

Self or double dealing by a fiduciary renders transaction voidable by beneficiary, but where facts were fully disclosed to court, and action of guardian was on advice of independent counsel whose duty was to, and whose whole interest was that of, the ward, and transaction was approved by court, it cannot thereafter be disaffirmed by ward. Fiske's Estate, 207M44, 291NW289. See Dun. Dig. 4110.

Position of attorney for guardian of minor beneficiaries is incompatible with duties as special administrator. Palm's Estate, 210M87, 297NW765 (2nd case). See Dun. Dig. 667a, 3584a.

Jurisdiction of probate court includes care, protection, and disposition of property of incompetent wards, and comprehends exercise of any right of ward with respect to his property interests which he might exercise if competent. Guardianship of Overpeck, 211M576, 2NW(2d)140, 138ALR1375. See Dun. Dig. 7771a.

Primary duty of guardian of an incompetent is to the ward. Id. See Dun. Dig. 4526.

On application by guardian of incompetent to revoke a tentative trust of a savings account, best interests of ward should be decisive factor in making any choice on his behalf by the court. Id. See Dun. Dig. 9886a.

Court having jurisdiction of guardianships of incompetent persons has power to order on behalf of an incompetent ward the revocation of a tentative trust of a savings account. Id. See Dun. Dig. 7771a.

It is not an abuse of discretion to order revocation of a tentative trust of a savings account in order to use money subject thereto for ward's comfort and support and expenses of her guardianship. Id. See Dun. Dig. 7771a, 9886a.

Revocation of a tentative trust of an incompetent person under guardianship pursuant to order of probate court has same effect as if it had been done by ward herself free from disability of incompetency. Id. See Dun. Dig. 7771a.

Lack of authority in guardian to sublet or give his consent to occupancy of rooms did not render tenancy illegal or void as against public policy but merely rendered it terminable at will, and guardian not having elected to terminate tenancy but having recognized it until tenants vacated, it is of no consequence that agreement to lease might have been avoided and lease terminated at an earlier date, as affecting liability of tenants for trespass. Martin v. Smith, 214M9, 7NW(2d)481. See Dun. Dig. 4107b.

New probate form code has not changed rule that an administrator or guardian is authorized to lease real property of estate for term of administration or guardianship. Id.

An incompetent's guardian who, contrary to provisions of a will giving incompetent exclusive use of certain rooms intestator's dwelling, consents to use and occupancy of rooms by a member of his own household under a rental arrangement cannot maintain an action of trespass against occupant, latter's entry not having been forcible or unlawful. Id.

A person under guardianship is conclusively presumed to be incompetent to make a valid contract or disposition of his property, but this rule is based upon convenience and necessity, for the protection of the guardian, and to enable him to properly discharge his duties as such, and when the reason for the rule ceases the rule does not apply, and convenience and necessity of the guardian extend only to those acts which he is authorized to do on behalf of the ward, such as managing and controlling his property and his estate, and guardian's authority does not extend to the marriage of the ward. Johnson v. Johnson, 214M 462, 8NW(2d)620. See Dun. Dig. 4108, 4526.

In action by guardian of an incompetent to cancel a deed executed by incompetent, in the title to the action plaintiff should be designated with name of ward first, followed by the name of the guardian, "her legal guardian". Parrish v. Peoples, 214M589, 9NW (2d)225. See Dun. Dig. 4332, 4453.

Florida Uniform Veterans' Guardianship Act—investments. McBride v. McBride, 195So(Fla)602.

Tennessee cases construing Uniform Veterans Guardianship Act generally hold guardian to strict compliance with statutory provisions with respect to authorized investment of ward's funds. State v. Meek, 146SW(2d) (TennApp)961.

Approval of annual report of guardian by county judge does not operate to make investment legal or lawful under Uniform Veterans Guardianship Act. Id.

Delinquent child who escaped from girls school at Sauk Center is not subject to extradition, but director of social welfare as guardian has right to custody of his ward and may obtain it in courts of the other states. Op. Atty. Gen. (193b-15), July 14, 1943.

8992-137. Filing of accounts.

There is no right to retain a note owing by guardian to his ward, which was outlawed prior to guardian's appointment, as against guardian's claim for expenses for care and support of ward and administration of guardianship. Guardianship of Overpeck, 211M576, 2NW (2d)140, 138ALR1375. See Dun. Dig. 4122.

8992-139. Adjudication on account.

An order of probate court allowing and settling guardian's intermediate account, and determining that guardian was not liable on a note issued by him to ward and outlawed prior to guardianship was res judicata regardless of any liability arising from acceptance of appointment as guardian. Guardianship of Overpeck, 211M 576, 2NW(2d)140, 138ALR1375. See Dun. Dig. 4117a.

An order of probate court settling and allowing an intermediate account of a guardian of an incompetent is final and conclusive as to all matters adjudicated. Id.

8992-143. Restoration to capacity.

Parole or discharge of patients with psychopathic personality is governed by same provisions as dangerously insane. Op. Atty. Gen., (248B-11), March 19, 1940.

In proceeding for restoration to capacity of a man committed to state hospital as insane notice should be given both to director of social welfare and to director of public institutions if patient is on parole, but only upon director of public institutions if patient is an actual inmate of state hospital. Op. Atty. Gen., (248B-8), May 9, 1940.

Services of notices of restoration to capacity of five classes of mentally defective patients following Reorganization Act of 1939 stated. Op. Atty. Gen. (640), July 17. 1940.

Release of psychopathic personality patients. Op. Atty. Gen. (248B-11), Dec. 26, 1941.

Procedure in case of a trial release. Op. Atty. Gen. (248b-8), Sept. 29, 1942.

ARTICLE XVI.—SALES, ETC., OF REALTY

8992-144. Definitions.

Where a will appoints an executor and a trustee and defines duties and powers of each of them, the executor has no right and cannot be compelled to exercise a discretionary power of sale devised exclusively to the trustee. Hencke's Estate, 212M407, 4NW(2d)353. See Dun. Dig. 3567, 3614b.

A sale of a nonresident's real estate may be authorized in the course of ancillary administration the same as in the case of a resident decedent, but no statutes expressly authorize an ancillary representative here to sell real estate of a nonresident decedent and to transmit proceeds of sale to domiciliary representative. Id. See Dun. Dig. 3679j, 3679m.

8992-145. Lease for three years or less.

Though will specifically prohibited subletting or occupancy of certain rooms in testator's dwelling during absence of daughter of testator, only effect of entry and continued occupancy of room by a third person with consent of guardian of daughter was to create a tenancy at will under the rule that such tenancies arise by implication of law where one enters under a void lease. Martin v. Smith, 214M9, 7NW(2d)481. See Dun. Dig. 5377.

8992-146. Reasons for sale, mortgage, lease.

Where there was a devise of non-homestead real estate to the widow for life, with remainder over, land had to be sold for payment of debts and expenses of administration and after such payment residue is less than value of widow's life estate, having elected to take under will and so surrendering right to renounce, she takes her devise as purchaser and for consideration, and in consequence value of remainder should first have been resorted to for payment of debts and expenses, thereby preferring devise to widow. Paulson's Estate, 208M231, 293NW607. See Dun. Dig. 10285a.

Statute permits a sale of realty only for the purpose of paying debts allowed in administration in the state. Hencke's Estate, 212M407, 4NW(2d)353. See Dun. Dig. 3615.

Proceeds of the sale are impressed with the character of realty for purposes of distribution. Id. See Dun. Dig. 3629.

Vested remainder in guardianship estate may be sold under direction of probate court. Op. Atty. Gen. (349A-27), Aug. 26, 1941.

ARTICLE XVII.—APPEALS

8992-164. Appealable orders.—An appeal to the district court may be taken from any of the following orders, judgments, and decrees of the probate court:

1. An order admitting, or refusing to admit, a will to probate.

2. An order appointing, or refusing to appoint, or removing, or refusing to remove, a representative other than a special administrator or special guardian.

3. An order authorizing, or refusing to authorize, the sale, mortgage, or lease of real estate, or confirming, or refusing to confirm, the sale or lease of real estate.

4. An order directing, or refusing to direct, a conveyance or lease of real estate under contract.

5. An order permitting, or refusing to permit, the filing of a claim, or allowing or disallowing a claim or counter-claim in whole or in part when the amount in controversy exceeds one hundred dollars.

6. An order setting apart, or refusing to set apart property, or making, or refusing to make, an allowance for the spouse or children.

7. An order determining, or refusing to determine, venue; an order transferring, or refusing to transfer, venue.

8. An order directing, or refusing to direct, the payment of a bequest or distributive share when the amount in controversy exceeds one hundred dollars.

9. An order allowing, or refusing to allow, an account of a representative or any part thereof when the amount in controversy exceeds one hundred dollars.

10. An order adjudging a person in contempt.

11. An order vacating a previous appealable order, judgment, or decree; an order refusing to vacate a previous appealable order, judgment, or decree alleged to have been procured by fraud or misrepresentation, or through surprise or excusable inadvertence or neglect.

12. A judgment or decree of partial or final distribution.

13. An interlocutory decree entered pursuant to Article XIII, Section 115.

14. An order granting or denying restoration to capacity.

15. An order made pursuant to Section 118 directing or refusing to direct the payment of representatives' fees or attorneys' fees, and in such case the representative and the attorney shall each be deemed an aggrieved party and entitled to take such appeal.

16. An order determining, or refusing to determine, inheritance taxes upon a hearing on a prayer for reassessment and redetermination; but nothing herein contained shall abridge the right of direct review by the supreme court.

17. An order extending the time for the settlement of the estate beyond five years from the date of the appointment of the representative. (As amended, Act Apr. 24, 1941, c. 411, §1.)

Where proceedings for probate of purported wills are started in two counties, county in which proceedings are first commenced has jurisdiction to decide the question of venue, and its decision thereof is reviewable by appeal or certiorari, and proceedings in the second county should be stayed. State v. Probate Court of Olmsted County, 215M322, 9NW(2d)765. See Dun. Dig. 7786.

(1).

On appeal from order of probate court vacating a previous appealable order admitting one of two wills to probate after time for appeal had expired upon ground that its failure to notify party of order constituted excusable neglect, district court should decide merits of application to vacate and it was error to vacate probate court's vacating order on ground that it acted without jurisdiction. Showell's Estate, 209M539, 297NW111. See Dun. Dig. 7786.

Necessary effect of admitting one will to probate after consideration of separate petitions for probate of separate wills was exclusion of other because there can be only one last will and testament, and order was appealable. Id.

(9).

That an appeal lies from an order allowing an intermediate account of guardian indicates that there should be final consideration and determination of intermediate the same as final accounts, and that they should be res judicata as to matters determined. Guardianship of Overpeck, 211M576, 2NW(2d)140, 138ALR1375. See Dun. Dig. 4117a.

(11).

Probate court has power to vacate a previous order allowing a final account where it is made to appear that the order was procured without a hearing because of mistake and inadvertance on the part of the court, and such power does not terminate upon the expiration of the time to appeal from the order sought to be vacated. Henry's Estate, 207M609, 292NW249. See Dun. Dig. 7784.

8992-166. Requisites.

A party entitled to join in an appeal may do so by entering a voluntary appearance in appellate court after appeal has been perfected. Owens v. O., 207M489, 292NW 89. See Dun. Dig. 7788.

Consent by administratrix to allowance of a claim filed by her against another estate in a definite amount does not prevent heir in former estate who contends that claim should have been allowed in a large sum from appealing to the district court from order of allowance. Id. See Dun. Dig. 7785a.

A bond which does not fulfill requirements because not conditioned to prosecute appeal with due diligence to a final determination is ineffective to perfect an appeal where no move is made to supply a proper bond. Nelson's Estate, 208M347, 294NW221. See Dun. Dig. 7791.

On appeal from order of probate court vacating a previous appealable order admitting one of two wills to probate after time for appeal had expired upon ground that its failure to notify party of order constituted excusable neglect, district court should decide merits of application to vacate and it was error to vacate probate court's vacating order on ground that it acted without jurisdiction. Showell's Estate, 209M539, 297NW111. See Dun. Dig. 7784a.

Lack of notice admitting one of two wills to probate does not limit or otherwise affect time for appeal, which expired six months from date of filing independently of the notice. Id. See Dun. Dig. 7788.

A person financially interested in allowance of a will is a person aggrieved by an order of probate court allowing will and may take an appeal from such order although he was present in probate court upon hearing on will, filed no written objections thereto, and entered no appearance therein. Langer's Estate, 213M482, 7NW (2d)359. See Dun. Dig. 7785.

It takes more than actual notice of an order to start the 30-day period for appeal running. Id. See Dun. Dig. 7788.

Dating a notice of appeal from probate court more than 30 days before it is served and filed in probate court does not constitute a waiver of service of notice of the filing in probate court of order appealed from so as to start running of 30-day period in which an appeal may be taken from that court to district court. Id. See Dun. Dig. 7789.

An interested party may appeal from probate court to district court although he did not appear or took a different position in probate court. Hartley's Estate, 214M14, 7NW(2d)679. See Dun. Dig. 7785.

An interested party who was induced through fraud to refrain from contesting a decedent's will has a right as an aggrieved person to appeal from probate court to district court from an order allowing will and admitting it to probate. Id.

8992-169. Trial.

Right of appeal from orders and decisions of probate court to district court and to trial there de novo is statutory, not constitutional. Burton's Estate, 206M516, 289 NW66. See Dun. Dig. 7794.

On appeal from probate court to district court it is duty of district court to render such judgment as probate court ought to have rendered, but its jurisdiction is appellate, not original. Id. See Dun. Dig. 7795(93).

On trial of a claim against estate based upon a trust relationship, neither party was entitled to a jury as a matter of right. Halweg's Estate, 207M263, 290NW577. See Dun. Dig. 7794.

Even if probate court had no jurisdiction of a claim based upon a trust relationship, district court had jurisdiction on appeal where parties acquiesced in trial in both courts. Id. See Dun. Dig. 7786.

Permitting amendment of propositions of law and fact to conform to evidence and findings of fact as made was within discretion of trial court. Owens v. O., 207M489, 292NW89. See Dun. Dig. 7794.

Failure to comply with a condition contained in order permitting a party to serve and file propositions of law and fact on appeal to district court from order of probate court held waived by answering propositions of law and fact and failing to raise question of omission to comply with condition. Id. See Dun. Dig. 7794.

Inasmuch as appeal from probate court, presenting an issue as to compensation of administrator, requires a trial de novo, there can be no affirmance where there is absence of evidence upon which to base a finding. Paulson's Estate, 208M231, 293NW607. See Dun. Dig. 7794.

On appeal from order of probate court vacating a previous appealable order admitting one of two wills to probate after time for appeal had expired upon ground that its failure to notify party of order constituted excusable neglect, district court should decide merits of application to vacate and it was error to vacate probate court's vacating order on ground that it acted without jurisdiction. Showell's Estate, 209M539, 297NW111. See Dun. Dig. 7794.

On appeal from order vacating a previous order admitting one of two wills to probate court had before it de novo motion to vacate for surprise or excusable inad-

vertence or neglect, and had it there considered that motion on merits and reversed probate court there could have been no question as to propriety of result and supreme court would have been compelled to affirm. Id.

On appeal from probate court issues are framed for trial de novo in district court. Cooke's Estate, 210M397, 298NW571. See Dun. Dig. 7794.

Proponent of will having claimed no prejudice from amendment in district court making forgery an issue, and having stated that she did not desire a continuance, she is in no position on appeal to supreme court to claim surprise or prejudice. Boese's Estate, 213M440, 7NW(2d) 355. See Dun. Dig. 7792a.

Objection in probate court that will "was not duly and legally executed" is broad enough to include an objection that will was forged, so as to authorize an amendment to the propositions of law and fact upon appeal to district court to include specifically objection of the forgery. Id. See Dun. Dig. 7794.

On appeal from probate court to district court from a finding of psychopathic personality, matter is triable de novo. Dittrich v. Brown County, 215M234, 9NW(2d)510. See Dun. Dig. 7794.

8992-172. Direct appeal to supreme court.

It would be highly improper for supreme court to disturb finding of trial court in will contest of lack of testamentary capacity. Dahn's Estate, 208M86, 292NW776. See Dun. Dig. 411.

While supreme court does not try cases involving allowances to administrators and their attorneys de novo, if there is no controversy as to the facts or if court considers facts in light most favorable to claimant, general rule as to review of a court's findings does not apply in full force to such allowances. Simmons' Estate, 214M388, 8NW(2d)222. See Dun. Dig. 7706a.

ARTICLE XVIII.—COMMITMENTS

8992-173. Voluntary hospitalization.—Any insane, inebriate, feeble-minded, or epileptic person desiring to receive treatment at a state institution may be admitted upon his own application, in such manner and upon such conditions as the director of public institutions may determine. During the time of such treatment and until the expiration of three days after such person in writing demands his release, the superintendent of such institution is authorized and empowered to detain him as though he had been duly committed. If any such person demands his release, the superintendent if he deems such release not to be for the best interest of such person, his family, or the public, shall file a petition for commitment in the probate court of the county wherein such institution is located, within three days after such demand. (As amended Apr. 24, 1943, c. 612, §6.)

8992-174. Institution of proceedings. — Unless otherwise indicated by the context, the word "patient" as used in this article means any person for whose commitment as an insane, inebriate, feeble-minded, or epileptic person, proceedings have been instituted or completed. Any reputable citizen may file in the court of the county of the patient's settlement or presence a petition for commitment setting forth the name and address of the patient and of his nearest relatives and the reasons for the application. If the court determines it to be for the best interest of the patient or of his family or of the public, the court may direct the sheriff or any other person to apprehend the patient and to take him to and confine him for observation and examination, in any hospital or any other place or institution consenting to receive him in the county wherein the proceedings are pending.

The person, hospital, or institution ordered by the court to make such apprehension, conveyance, or confinement, must execute the order on any day and at any time thereof, by using all necessary means, including the breaking open of any door, window or other part of the building, vehicle, boat or other place in which the patient is located, and the imposition of necessary restraint upon the person of such patient.

Upon the filing of such petition, written notice thereof shall be given to the county attorney who shall appear for and protect the rights of the patient, unless other counsel has been retained by or for the patient. If the court determines that the patient is financially unable to obtain counsel and that the interests of the patient require counsel other than the county attorney, or if the county attorney by absent, ill, or disqualified, the court may appoint counsel for him. If the patient has no settlement in this state, all proceedings shall be stayed until the director of public institutions shall have consented thereto. (As amended Apr. 24, 1943, c. 612, §7.)

Division of public institutions and sheriff are without authority to receive or authorize the return of mental members of armed forces of the United States from United States authority, since they have no authority to act without a committment by a probate court in this state. Op. Atty. Gen. (248b-10), June 2, 1943.

Director of public institutions may not sign an agreement between the state of Washington and the state of Minnesota for exchange of persons suffering from mental disease and defects or epilepsy, which agreement attempts to define the term "resident" and to determine many things which are determined by law. Op. Atty. Gen. (248b-7), June 16, 1943.

Since the enactment of this code county of settlement instead of county of residence of a feeble-minded person has jurisdiction to commit defective. Op. Atty. Gen. (679k), July 14, 1943.

It is proper for superintendent of inebriate hospital or other hospital attaches to petition probate court of county wherein patient is situated to have him committed to the state hospital for insane, costs to be borne by county of settlement. Op. Atty. Gen. (248B-6), Dec. 17, 1940.

8992-175. Examination.—The patient shall be examined at such time and place and upon notice to such persons and served in such manner as the court may determine. If he be obviously inebriate, feeble-minded, or epileptic, and if the county attorney consent thereto in writing, the examination may be made by the court; otherwise the court shall appoint two duly licensed doctors of medicine, or in feeble-minded proceedings two persons skilled in the ascertainment of mental deficiency, to assist in the examination. Upon the filing of a petition for the commitment of a feeble-minded or epileptic patient, the court shall fix the time and place for the hearing thereof, of which ten days' notice by mail shall be given to the director of public institutions, and to such other persons and in such manner as the court may direct.

The examiners and the court shall report their findings upon such forms as may be prescribed by said director, one of which shall be filed in court and another shall be transmitted to said director. The court shall determine the nature and extent of the property of the patient committed and of the persons upon which liability is imposed by law for his care and support, making such findings upon any such forms as may be prescribed by said director, one of which shall be filed in court and another shall be transmitted to said director. (As amended Apr. 24, 1943, c. 612, §8.)

A doctor appointed by a court commissioner to act as examiner in an insanity proceeding and to report his findings to court is a quasi-judicial officer and as such immune from civil suit for acts performed by him in connection with such proceeding. Linder v. F., 209M43, 295 NW299. See Dun. Dig. 4959.

8992-176. Commitment.—If the patient is found to be insane or inebriate, the court shall issue to the sheriff or any other person a warrant in duplicate, committing the patient to the custody of the superintendent of the proper state hospital, or to the superintendent or keeper of any private licensed institution for the care of inebriates or insane persons; provided, however, that such patients are required to pay the necessary hospital charge. If such patient be entitled to care in any institution of the United States in this state, such warrant shall be in triplicate, committing him to the joint custody of the superintendents of the proper state and federal institution. If such federal institutions be unable or unwilling to receive the patient at the time of commitment, he subsequently may be transferred to it upon its request. Such transfer shall discharge his commitment to the state institution and constitute a sole commitment to the federal institution.

If the patient is found to be feeble-minded or epileptic, the court shall appoint the director of public institutions guardian of his person and commit him to his care and custody.

Whenever a defendant in a criminal proceedings has been examined in the probate court, pursuant to an order of the state or federal district court, the probate court shall transmit its findings and return the defendant to such district court, unless otherwise ordered. A duplicate of the findings shall be filed in the probate court but there shall be no petition, property or report, nor commitment, unless otherwise ordered. (As amended Apr. 24, 1943, c. 612, §9.)

Probate court has authority to issue dual warrants of commitment to state hospitals and to veterans' hospital of patients committed under the Psychopathic Personality Law, by original order or by amendment thereof. Op. Atty. Gen., (248B-3), Nov. 21, 1939.

Services of notices of restoration to capacity of five classes of mentally defective patients following Reorganization Act of 1939 stated. Op. Atty. Gen. (640), July 17, 1940.

A check for $2,000, payable to state board of control, from estate of a deceased person, for benefit of an inmate of state school for feeble-minded, pursuant to a will, should be deposited with state treasurer for acceptance as a gift or bequest and for administration of proceeds as provided by Mason's St. 1927, §§89 to 92, as amended, and expenditures authorized by will should be made under direction of director of social welfare, and remainder upon death of feeble-minded person, left to state board of control to be used "for its general corporate purposes" should be handled as might be agreed between director of social welfare and director of public institutions, and in absence of agreement between them should be divided equally between division of social welfare and division of public institutions. Op. Atty. Gen. (88A-4), Jan. 5, 1942.

8992-177. Payment of fees and mileage.—In each proceedings the court shall allow and order paid to each witness subpoenaed the fees and mileage prescribed by law, to each examiner the sum of five dollars per day for his services and fifteen cents for each mile traveled, to the person to whom the warrant of apprehension is issued the sum of three dollars per day and actual disbursements for the travel, board, and lodging of the patient, of himself, and of authorized assistants, and to the person conveying the patient to the place of detention the sum of three dollars per day and actual disbursements for the travel, board, and lodging of the patient, of himself and of authorized assistants, and to the patient's counsel when appointed by the court, the sum of ten dollars per day. Upon such order the county auditor shall issue a warrant on the county treasurer for the payment thereof.

Whenever the settlement of the patient is found to be in another county, the court shall transmit to the county auditor a statement of the expenses of the apprehension, confinement, examination, commitment, and conveyance to the place of detention. Such auditor shall transmit the same to the auditor of the county of the patient's settlement and such claim shall be paid as other claims against such county. If the auditor to whom such claim is transmitted shall deny the same, he shall transmit it with his objections to the director of public institutions who shall determine the question of settlement and certify his findings to each auditor. If the claim be not paid within thirty days after such certification, an action may be maintained thereon by the claimant county in the district court of the claimant county against the debtor county. (As amended Apr. 24, 1943, c. 612, §10.)

County attorney cannot charge fee for services in hearing for a nonresident against county of his legal settlement, but county auditor can bill county of legal settlement and collect all expenses of the proceedings, such as court costs, sheriff's fees, examiner's fees, etc. Op. Atty. Gen., (248B-5), Nov. 10, 1939.

Where four petitions are presented in feeble-minded proceedings and will all be heard the same day, an examining physician is entitled to a single fee of $5 if persons examined are related and the petitions are combined and disposed of in one hearing, but if persons covered by petitions are unrelated, law requires a separate hearing on each with separate fee. Op. Atty. Gen., (248B-2), Nov. 23, 1939.

Fees of all witnesses, expert and otherwise, in a proceeding under Psychopathic Personality Act are payable by county on order of probate court, and it is immaterial who calls the witnesses. Op. Atty. Gen., (248B-11), April 12, 1940.

County of settlement must pay costs of commitment. Op. Atty. Gen. (248B-3), Dec. 17, 1940.

It is proper for superintendent of inebriate hospital or other hospital attaches to petition probate court of county wherein patient is situated to have him committed to the state hospital for insane, costs to be borne by county of settlement. Op. Atty. Gen. (248B-6), Dec. 17, 1940.

Settlement of a person who is not dependent or a pauper cannot be changed from one county to another in less than 2 years, as affecting liability of county for expenses of commitment for an insane person. Op. Atty. Gen. (248B-3), Jan. 10, 1941.

There is no provision for fees to county attorney, but costs of probate court can be collected in hearing against county of residence of insane person. Op. Atty. Gen. (248B-5), Aug. 18, 1941.

Where married woman was committed to school for feeble-minded and husband moved to another county, and upon her discharge she went to live with husband, and later family moved to a third county, where it was determined that she should be recommitted, county where recommitted, which was residence of husband, must bear expense of transportation and pay legal charge for support at school. Op. Atty. Gen. (679K), Feb. 6, 1942.

County of settlement rather than county of residence is responsible for expenses incurred in connection with the commitment of a feeble-minded person. Op. Atty. Gen. (679k), July 14, 1943.

8992-178. Release before commitment.

Court has no authority to release a psychopathic personality patient on bond before commitment. Op. Atty. Gen. (248B-11), Dec. 26, 1941.

8992-179. Release after commitment.—Any insane, inebriate, feeble-minded, or epileptic patient committed to the director of public institutions or any institution under his control, may be released to any person if said director consents thereto or if a bond to the State be filed with said director in such amount as he may fix, conditioned upon the care and safekeeping of the patient and the payment of all expenses, damages, and other items arising from any act of such patient. (As amended Apr. 24, 1943, c. 612, §11.)

Provision for release if state board of control shall consent or if bond be given for safe-keeping of patient is discretionary with state board and not mandatory. State v. Carlgren, 209M362, 296NW573. See Dun. Dig. 4523.

Patients committed under the Psychopathic Personality Law may be paroled. Op. Atty. Gen., (248B-3), Nov. 21, 1939.

Parole or discharge of patients with psychopathic personality is governed by same provisions as dangerously insane. Op. Atty. Gen., (248B-11), March 19, 1940.

Release of psychopathic personality patients. Op. Atty. Gen. (248B-11), Dec. 26, 1941.

Guardian of person and estate of a married insane woman committed to a state institution has no legal authority to dictate a policy of administration to director of division of public institutions as affecting temporary releases of patient. Op. Atty. Gen. (248a-2), Apr. 29, 1942.

Marriage of one committed to guardianship of state board of control as feeble-minded does not revoke commitment. Op. Atty. Gen. (679k), June 16, 1943.

8992-180. Detention.—Upon delivery of an insane or inebriate patient to the institution to which he has been committed, the superintendent thereof shall retain the duplicate warrant and endorse his receipt upon the original which shall be filed in the court (of) commitment. Upon such filing, the court shall transmit a copy of the warrant with all endorsements of the director of public institutions. After such delivery, the patient shall be under the care, custody, and control of said director until discharged by him or by a court of competent jurisdiction; but no patient found by the committing court to be dangerous to the public shall be released from custody of said director or any institution except upon order of a court of competent jurisdiction. Whenever a patient is paroled, discharged, transferred to another institution, dies, escapes, or is returned, the institution having charge of the patient shall file notice thereof in the court of commitment.

Upon commitment of a feeble-minded or epileptic patient, the director of public institutions may place

him in an appropriate home, hospital, or institution, or exercise general supervision over him anywhere in the state outside any institution through any child welfare board or other appropriate agency thereto authorized by said director of institutions. (As amended Apr. 24, 1943, c. 612, §12.)

Provision giving the state board of control discretionary power with respect to release of patient is not unconstitutional. State v. Carlgren, 209M362, 296NW573. See Dun. Dig. 4523.

Services of notices of restoration to capacity of five classes of mentally defective patients following Reorganization Act of 1939 stated. Op. Atty. Gen. (640), July 17, 1940.

An inebriate may not be transferred to hospital for insane without a new proceeding for commitment. Op. Atty. Gen. (248B-6), Dec. 17, 1940.

Superintendent of St. Peter State Hospital is not authorized to transfer one committed as dangerously insane from asylum for criminal insane to the main hospital. Op. Atty. Gen. (248a-7), May 22, 1941.

Release of psychopathic personality patients. Op. Atty. Gen. (248B-11), Dec. 26, 1941.

A check for $2,000, payable to state board of control, from estate of a deceased person, for benefit of an inmate of state school for feeble-minded, pursuant to a will, should be deposited with state treasurer for acceptance as a gift or bequest and for administration of proceeds as provided by Mason's St. 1927, §§89-92, as amended, and expenditures authorized by will should be made under direction of director of social welfare, and remainder upon death of feeble-minded person, left to state board of control to be used "for its general corporate purposes" should be handled as might be agreed between director of social welfare and director of public institutions, and in absence of agreement between them should be divided equally between division of social welfare and division of public institutions. Op. Atty. Gen. (88A-4), Jan. 5, 1942.

Director of public institutions may not sign an agreement between the state of Washington and the state of Minnesota for exchange of persons suffering from mental disease and defects or epilepsy, which agreement attempts to define the term "resident" and to determine many things which are determined by law. Op. Atty. Gen. (248b-7), June 16, 1943.

8992-181. Commissioner may act.

When court commissioner is acting for judge of district court, he is acting for the judge and effects of his acts are same as that of acts of judge, and when he acts for probate judge, his action has same effect as action of judge when performing same identical duties. Op. Atty. Gen. (128B), Jan. 27, 1942.

8992-183. Restoration of feeble-minded and epileptics.—The director of public institutions may petition the court of commitment, or the court to which the venue has been transferred, for the restoration to capacity of a feeble-minded or epileptic patient. Upon the filing of such petition, the court shall fix the time and place for the hearing thereof, notice of which shall be given as the court may direct. Upon proof of the petition, the court shall restore the patient to capacity.

Upon the filing of such petition by any person other than the director of public institutions and upon payment by the petitioner to said director all expenses in connection with the hearing in such amount as may be fixed by said director for the transportation, board, and lodging of the patient and authorized attendants, the court shall fix the time and place for the hearing thereof, ten days' notice of which shall be given to the director of public institutions and to such other persons and in such manner as the court may direct. Any person may oppose such restoration. Upon proof that the patient is not feeble-minded or epileptic, the court shall order him restored to capacity at the expiration of thirty days from the date of service of such order upon the director of public institutions. If restoration be denied, the patient shall be remanded to the director of public institutions; if restoration be granted, he shall be so remanded for the thirty days aforesaid.

The court may appoint two duly licensed doctors of medicine or two persons skilled in the ascertainment of mental deficiency to assist in the determination of the mental capacity of the patient. The court shall allow and order paid to each person so appointed the sum of five dollars per day for his services and fifteen cents for each mile traveled. Upon such order the county auditor shall issue a warrant on the county treasurer for the payment thereof. If the court notifies the county attorney he shall attend the hearing and if he deems it for the best interest of the public he shall oppose the restoration in the probate court and appellate courts. (As amended Apr. 24, 1943, c. 612, §13.)

Laws 1943, c. 166 provides that epileptic inmates of state institutions shall be discharged on recommendation of superintendent, approved by director of public institutions.

Services of notices of restoration to capacity of five classes of mentally defective patients following Reorganization Act of 1939 stated. Op. Atty. Gen. (640) July 17, 1940.

Marriage of one committed to guardianship of state board of control as feeble-minded does not revoke commitment. Op. Atty. Gen. (679k), June 16, 1943.

Act provides for a discharge and not a mere release on parole. Op. Atty. Gen. (88a-14), July 13, 1943.

8992-184. Appeal.—Notwithstanding the provisions of Article XVII, there shall be no appeal from an order granting or denying the petition of any person other than the director of public institutions for the restoration to capacity of a feeble-minded or epileptic patient, except as provided in this section. The director of public institutions may appeal to the district court in the manner prescribed by Article XVII for appeals by the State. Such appeal shall suspend the operation of the order appealed from until final determination of the appeal.

Any person aggrieved other than the director of public institutions, upon payment by him to said director of all expenses in connection with the hearing in the district court in such amount as may be fixed by said director for the transportation, board, and lodging of the patient and authorized attendants, may appeal to the district court in the manner prescribed by Article XVII. Such appeal shall not suspend the operation of the order appealed from until reversed or modified by the district court. Upon perfection of the appeal, the return shall be filed forthwith. The district court shall give the appeal precedence over every other proceeding therein, and shall hear the matter de novo, without a jury, and in a summary manner. Upon determination of the appeal, judgment shall be entered pursuant to the provisions of Article XVII. (As amended Apr. 24, 1943, c. 612, §14.)

Services of notices of restoration to capacity of five classes of mentally defective patients following Reorganization Act of 1939 stated. Op. Atty. Gen. (640), July 17, 1940.

8992-184a. Psychopathic personality—Definition.

Minnesota v. Probate Court, 309US270, 60SCR523, aff'g 205Minn545, 287NW297.

Where only two medical experts testified and both testified for the state, trial court was warranted in adopting the views of the expert who stated that person tried for having a psychopathic personality was dangerous to others and in rejecting those of the other expert to the contrary. Dittrich v. Brown County, 215M234, 9 NW(2d)510. See Dun. Dig. 4516a.

A finding of psychopathic personality was sustained though evidence was undisputed that person being tried had made no advances or attacks upon any other woman than his wife. Id.

8992-184b. Same—Laws relating to insane persons, etc., to apply to psychopathic personalities.

Minnesota v. Probate Court, 309US270, 60SCR523, aff'g 205Minn545, 287NW297.

Statute provides for a regular trial under special safeguards to protect the person alleged to be a psychopathic personality, such as the appointment of counsel for him where he is unable to procure counsel because of lack of means and the compulsory attendance of witnesses on his behalf, and the court should be careful to accord such a person the full protection of all statutory provisions for his benefit. Dittrich v. Brown County, 215M 234, 9NW(2d)510. See Dun. Dig. 4516a.

State has the affirmative of the issue of psychopathic personality and should be required to put in its evidence before that of the person charged with such personality. Id.

Where the evidence as to the existence of a psychopathic personality is in conflict, the question is one of fact to be determined by trial court upon all the evidence. Id.

Probate court has authority to issue dual warrants of commitment to state hospitals and to veterans' hospital of patients committed under the Psychopathic Personality Law, by original order or by amendment thereof. Op. Atty. Gen., (248B-3), Nov. 21, 1939.

Patients committed under the Psychopathic Personality Law may be paroled. Id.

Parole or discharge of patients with psychopathic personality is governed by same provisions as dangerously insane. Op. Atty. Gen., (248B-11), March 19, 1940.

Fees of all witnesses, expert and otherwise, in a proceeding under Psychopathic Personality Act are payable by county on order of probate court, and it is immaterial who calls the witnesses. Op. Atty. Gen., (248B-11), April 12, 1940.

A phychiatrist under subpoena as an expert in a psychopathic personality proceeding is entitled to fee fixed by court under general statute, and it is immaterial that he is employed in the service of the state. Op. Atty. Gen. (248B-11), June 1, 1940.

Court has no authority to release a psychopathic personality patient on bond before commitment. Op. Atty. Gen. (248B-11), Dec. 26, 1941.

Due process, equal protection, and indefinite legislation. 24MinnLawRev687.

8992-184c. Same—Not to constitute defense.

One committed to a state hospital may be brought back to county to be tried for criminal offense. Op. Atty. Gen., (248B-3), Nov. 1, 1939.

ARTICLE XIX.—MISCELLANEOUS

8992-185. Definitions.

A woman does not become of legal age when she marries. Op. Atty. Gen. (33B-9), Sept. 28, 1940.

8992-188. Notice.—Whenever notice of hearing is required by any provision of this act by reference to this section, such notice shall be given once a week for three consecutive weeks in a legal newspaper designated by the petitioner in the county wherein the proceedings are pending; or if no such designation be made, in any legal newspaper in such county; or if the city or village of the decedent's residence is situated in more than one county, in any legal newspaper in such city or village. The first publication shall be had within two weeks after the date of the order fixing the time and place for the hearing.

At least 14 days prior to the date fixed for the hearing, the petitioner, his attorney, or agent, shall mail a copy of the notice to each heir, devisee, and legatee, whose name and address are known to him, and in the case of notice required by Sections 53 and 70, shall mail two copies of the notice to the commissioner of taxation at St. Paul, Minnesota: and if the decedent was born in any foreign country, or left heirs, devisees, or legatees, in any foreign country, to the consul or representative referred to in Section 68, or if there be none, to the chief diplomatic representative of such country at Washington, D. C., or to the secretary of state at St. Paul, Minnesota, who shall forward the same to such representative.

Proof of such publication and mailing shall be filed before the hearing. No defect in any notice, nor in the publication or service thereof, shall invalidate any proceedings. (As amended Act Apr. 24, 1941, c. 422, §1.)

Though probate court acquired jurisdiction of estate on filing of petition for administration as an intestate estate, it could not proceed to probate a will without complying with §8992-53, requiring that upon filing of a petition for probate of a will court shall fix time and place of hearing thereof, notice of which shall be given pursuant to §8992-188. Stenzel's Estate, 210M509, 299NW 2. See Dun. Dig. 3562c, 10245.

Mandamus lies to compel judge of probate by order to fix time and place of hearing on a petition for probate of a will that notice thereof might be given pursuant to statute. *Id.* See Dun. Dig. 5766.

Notice by mail which formerly was only a requirement by rule is now made mandatory by this section. Id. See Dun. Dig. 7783h.

While failure to give notice required by statute does not affect jurisdiction of probate court, it does affect regularity of proceedings so as to render them voidable and subject to be set aside on motion or appeal. Id. See Dun. Dig. 7783h, 10245.

A probate notice involving estate of a descendent born in Germany, or the heirs, devisees, or legatees of such decedent, living in Germany, should be forwarded to German ambassador at Washington, to be then governed by federal law and federal regulations. Op. Atty. Gen. (346B), Jan. 2, 1942.

8992-188a. Validation of certain proceedings as to defective notices.—That every probate proceeding had in this state prior to the passage of this act and otherwise legally conducted according to statute, except that a copy of the notice of any hearing, or hearings, in said proceedings was not mailed to each heir, devisee and legatee, or to the consul or representative of the country of decedent's birth, or to the chief diplomatic representative of such country, or to the secretary of state at St. Paul, Minnesota, or that proof of mailing such notice was not filed in the probate court, shall be of the same force and effect as though such mailed notice had been given and proof thereof filed as provided by statute; and every order made in said probate proceedings and every conveyance of real estate made pursuant thereto and every decree of distribution made therein are hereby legalized and validated, as against the objection that a copy of the notice of any hearing, or hearings in said proceedings, was not mailed as above provided, or that proof of mailing such notice was not filed in the probate court. (Act Mar. 28, 1941, c. 79, §1.)
[647.48]

8992-188b. Same—Proceedings prior to June 1, 1939.—Nothing herein contained shall apply to any probate proceedings held subsequent to June 1, 1939, or affect any action now pending to determine the validity of any instrument validated hereby. (Act Mar. 28, 1941, c. 79, §2.)

8992-196. Repeal.

In counties where no special act prevails, salaries of clerks and employees shall be fixed by judge of probate, and this duty cannot be delegated to county board. Op. Atty. Gen. (348A), Aug. 4, 1941.

CHAPTER 75

Courts of Justices of the Peace

GENERAL PROVISIONS

8993. Jurisdiction limited to county.

Justices of the peace are state officers and their courts are state courts, and city council of home rule charter city cannot remove a justice of the peace, regardless of charter provision. State v. Hutchinson, 206M446, 288 NW845. See Dun. Dig. 5263.

Alexandria being a home-rule charter city and its charter providing for justice of the peace courts, such justice courts have both criminal and civil jurisdiction within the city, notwithstanding that it also has a municipal court. State v. Weed, 208M342, 294NW370. See Dun. Dig. 5263.

8994. Place of holding court.

Justice of the peace at Wayzata has no authority to hold court in city of Minneapolis for convenience of parties or an accused, but if he holds court in a town, village, or ward within his county adjoining the town or ward in which he resides, or in any village located within his town, he is entitled to 10 cents a mile for travel to and from place of holding trial. Op. Atty. Gen., (266a-13), Oct. 23, 1939.

8999. Action, where brought.

Justice of the peace at a county seat has jurisdiction if defendant is a non-resident and is served within the county, and defendant has no right to a change of venue to the county of his residence, but if an appeal is taken from the justice's decision to a municipal or district court, then a change of venue may be taken to the county of defendant's residence upon compliance with statute. Op. Atty. Gen. (266b-11), Nov. 10, 1943.

COMMENCEMENT OF ACTIONS

9002. Actions, how commenced.

When a complaint is made to a justice for purpose of having a summons issued, issuance of summons is a ministerial duty, and it is not his duty at such time to determine whether or not a cause of action exists, though he may refuse to issue summons if the action is not