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Selected Probate Questions

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SELECTED PROBATE QUESTIONS

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I. IN A CONTESTED PROBATE CASE, WILL THE FAILURE OF EITHER PARTY TO INTRODUCE ANY EVIDENCE AFFECT THE RIGHT TO APPEAL?

Generally, such an omission will not adversely affect the right of either party to appeal the judgment in the lower court. The reason for this conclusion is based upon the possibility of a trial de novo in district court on an appeal from judgment[1] and also upon the likelihood of some positive position as expressed in the original pleadings.

In re Gleason's Estate,[2] a recent case, held that the probate of a will of a deceased person is a proceeding in rem and all persons interested therein are parties thereto.[3] The court said any person affected by the proceedings may appeal to the district court regardless of whether he appeared in county court to contest the probate of the will.

However, the court also said:[4]

> But when such an appeal is taken, the person appealing must take the county court pleadings as he finds them. He may not change the issues on appeal.

A further qualification is that there can be a denial of probate in the county court unless a prima facie case is shown. An attesta-

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1 Cass v. Pense, 155 Neb. 792, 54 N.W.2d 68 (1952).

2 167 Neb. 312, 92 N.W.2d 705 (1958).

3 See also In re Estate of Shierman, 129 Neb. 230, 261 N.W. 155 (1935) and Weideman v. Estate of Peterson, 129 Neb. 74, 261 N.W. 150 (1935).

4 In re Gleason's Estate, 167 Neb. 312, 315, 92 N.W.2d 705, 707 (1958).

tion clause does not create a prima facie case. The will must be proved by the testimony of witnesses, or if not contested, by one witness.[5]

A will cannot be admitted to probate—even if there is no contest—until it is established that the testator was of sound mind.[6] It must be shown that the testator understood: (1) the nature of his acts, (2) the nature and extent of property involved, (3) the proposed disposition of the property, and (4) the natural objects of his bounty.

In re Coon's Estate[7] sets forth the general rule that the burden in Nebraska is upon the proponent of the will to prove not only the execution of the will, but the capacity of the testator to make it as well.

II. WHO ARE THE PROPER PARTIES TO AN APPEAL FROM A DECREE DENYING OR GRANTING PROBATE?

Our statutes specify the persons who may be entitled to an appeal from an order granting or denying probate of a will. Neb. Rev. Stat. § 30-1906 (Reissue 1956) provides:

> In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment or decree of the county court to the district court by any person against whom any such order, judgment or decree may be made or who may be affected thereby.

There is no doubt that such an order is a final order. The Nebraska Supreme Court has held that a party not prejudiced by such an order cannot appeal.[8]

The question has frequently arisen as to whether or not a named executor in a will has a right of appeal. In *Smith v. Gunderman*[9] the court held that an executor named in a will has a right of appeal from the denial of the probate of a will. The court imposed a limitation to this rule in *In re Estate of Raymond*[10] by holding that a named executor could not appeal from a judgment of the district court approving the action of the sole beneficiary in renouncing all claim under the will for the reason

[5] NEB. REV. STAT. § 30-218 (Reissue 1956).

[6] NEB. REV. STAT. § 30-201 (Reissue 1956).

[7] 158 Neb. 620, 64 N.W.2d 301 (1954).

[8] See In re Estate of Belton, 102 Neb. 590, 168 N.W. 359 (1931).

[9] 102 Neb. 590, 168 N.W. 359 (1918).

[10] 124 Neb. 125, 245 N.W. 442 (1932).

that the executor is not then an interested party. The *Raymond* case also holds that where there is a duty of an executor to administer a trust, he would also have the right to appeal from an order denying probate. In *Raymond,* the Nebraska Supreme Court cited with approval a Minnesota case [11] holding that an unsuccessful executor is not entitled to reimbursement for his expenses if he assumes the burden of a contest which properly belongs to the legatees and devisees, and that he must look to them and not to the estate for reimbursement. Likewise, an administrator cannot appeal from a decree revoking his letters because of the subsequent probate of a will.[12]

It is apparent that any heir-at-law may appeal from an order admitting a will to probate. Similarly, any named devisee or legatee may appeal from an order denying a will to probate, and such appeals may be made even though the appellant has not made an appearance before the court in connection with the hearing on the probate of the will.

III. TO WHAT EXTENT IS THE FOLLOWING EVIDENCE ADMISSIBLE IN A CONTESTED PROBATE CASE?

A. Declaration of the Testator.

Declarations of the testator are admissible to show his state of mind and consequent susceptibility to undue influence. The elements of proof necessary to show undue influence are:[13]

1. A susceptible person.
2. Another's opportunity to exert undue influence.
3. A disposition to exert the influence.
4. A result clearly showing the effect of such influence.

Statements may concern facts about his property, relations toward members of his family, or those likely to be objects of his bounty.[14] Statements by the testator after execution of the will that it was not what he wanted would probably be admissible.[15]

Evidence is admissible on the issue of whether the testator had the mental capacity to understand the proposed disposition

[11] Kelley v. Kennedy, 133 Minn. 278, 158 N.W. 395 (1916).

[12] In re Estate of Whitten, 86 Neb. 367, 125 N.W. 606 (1910).

[13] In re Estate of Bowman, 143 Neb. 440, 9 N.W.2d 801 (1943).

[14] In re Estate of Fehrenkamp, 154 Neb. 488, 48 N.W.2d 421 (1951).

[15] *Ibid.*

of his property. In determining this issue, it is necessary to consider the nature of his acts, the extent of his property, the sensibility of the proposed disposition of the property, and the natural objects of his bounty. Evidence of the foregoing facts must relate to the time that the will was made to prove mental capacity. If such evidence relates to the state of the testator's mind before or after execution of the will it is not admissible to prove mental capacity at the time of execution, but only to assist in revealing state of mind at the time to which the evidence relates.[16]

B. Expert Medical Opinion. In What Form Should the Questions Be Asked?

Expert medical testimony is proper and admissible concerning matters involving special knowledge, science or skill upon subjects not within the realm of ordinary experience and which require special research, experience and study to understand.[17] It is, of course, improper to permit an expert to give his opinion on the ultimate fact to be determined by the jury.[18] Expert testimony based upon assumed facts or upon impeached facts is worthless. Any expert testimony is considered with the testimony of all other witnesses and accorded the weight the jury thinks proper.

The question asked the medical witness must be properly framed. A purely hypothetical question calling for many assumptions is not approved, but it is not necessarily reversible error.[19]

There are many possible objections to such hypothetical questions: it is too vague, or theoretical, misleading, ambiguous, complicated, argumentative or conjectural.[20]

It is much better to frame the question in terms of the evidence. This can be done as it was per an example in *In re Crosley Estate*[21], *i.e.* Was he in sufficient condition to understand reasonably business affairs and those to whom he was naturally obligated, or to know and understand about his property and his obligations reasonably toward those having lawful claims upon him?

16 In re Estate of O'Donnell, 158 Neb. 583, 64 N.W.2d 116 (1954).

17 McNaught v. N.Y. Life Ins. Co., 143 Neb. 213, 9 N.W.2d 160 (1943).

18 *Id.* at 226.

19 Van Dorn v. Kimball, 100 Neb. 590, 160 N.W. 953 (1916).

20 See GOLDSTEIN, TRIAL TECHNIQUE § 526 (1935).

21 In re Estate of Crosby, 126 Neb. 509, 253 N.W. 652 (1934).

C. THE ATTORNEY FOR THE TESTATOR.

In a contested probate case the attorney for the testator can testify to execution of the will in controversy and to other formal matters, but not to the contents of the will. The attorney for the testator cannot testify about any communicaions except those which have bearing on mental competence, and then only when the attorney has personal knowledge obtained outside of the professional relationship.[22] Unless he is also a witness to the will, however, the attorney for the testator cannot testify to mental competence. If he is a witness to the will, he may testify in this regard.[23]

D. THE TESTATOR'S PHYSICIAN.

As to the admissibility in evidence of testimony offered by the testator's physician in a contested probate case, the Nebraska Supreme Court answered the following question in the affirmative:

> In a contest over the probate of a will, between legatee or an executor and the heirs at law of testatrix, may the latter's physician testify to her mental competency, over the objection of such heirs, where the information which enables him to do so was acquired solely in his professional capacity, while attending her during her last illness?[24]

E. THE TESTATOR'S WIDOW. DO THE HUSBAND-WIFE DISQUALIFICATION OR PRIVILEGE STATUTES, OR THE DEAD MAN STATUTE APPLY?

The dead man statute[25] does not apply.[26] The disqualification statute should not be applicable after the death of a spouse.[27] Presumably, the privilege statute[28] would apply unless waived.

22 In re Estate of Coons, 154 Neb. 690, 48 N.W.2d 778 (1951); 158 Neb. 620, 64 N.W.2d 301 (1954). As to waiver by death, see dissent by Simmons, C. J., *id.* at 700. Also see NEB. REV. STAT. §§ 25-1201, 25-1206 (Reissue 1956).

23 In re Estate of Coons, *supra* note 22, at 838.

24 In re Estate of Gray, 88 Neb. 835, 130 N.W. 746, 747 (1911). Also note NEB. REV. STAT. §§ 25-1206, 25-1207 (Reissue 1956).

25 NEB. REV. STAT. § 25-1202 (Reissue 1956).

26 In re Estate of Wiese, 98 Neb. 463, 153 N.W. 556 (1915).

27 NEB. REV. STAT. § 25-1203 (Reissue 1956); But see Blohme v. Blohme, 166 Neb. 369, 89 N.W.2d 127 (1958), 167 Neb. 1, 91 N.W.2d 30 (1958).

28 NEB. REV. STAT. § 25-1204 (Reissue 1956).

The widow of a testator has been held incompetent to testify in proceedings to contest his will with respect to statements of her deceased husband, tending to show testamentary intent. However, it is the general rule that in a will contest, the widow of the testator is a competent witness.[29]

F. PRIOR WILLS.

Prior wills of the testator are admissible in some instances to show mental capacity if they were made at a time when the competency of the testator was unchallenged. In the case of *In re Estate of Bose*,[30] the Nebraska Supreme Court said, quoting from the syllabus of an earlier case:[31]

> A prior will, executed when the testator's testamentary or mental capacity was and is unquestioned, and as to which the existence of undue influence is not charged, and which conforms substantially as to results produced to the instrument contested, may be considered as competent evidence for the purpose of refuting charges of undue influence or want of testamentary or mental capacity by showing that the testator (and grantor) had a constant and abiding scheme for the distribution of his property.

G. SHOULD THE JUDGE EVER CALL A WITNESS ON HIS OWN MOTION?

There are times when in order to prevent an injustice a judge should call a witness on his own motion. The Supreme Court of Nebraska does not appear to have spoken directly on this point, but the case of *Dier v. Dier*[32] gives us some light on the subject. This was a divorce case in which the investigation provided for by the statute[33] was considered by the judge in determining the case, but he did not call the witnesses.

The following language is found in the opinion:

> . . . It may well be said that the apportionment of the task of adducing evidence is one of the most characteristic features of the Anglo-American system. It is placed wholly upon the parties to the litigation; it is not required or expected of the judge.[34]

[29] 97 C.J.S. *Witnesses* § 93 (1957).

[30] 136 Neb. 156, 173-74, 285 N.W. 319, 329 (1939). See also In re Estate of Wahl, 151 Neb. 812, 39 N.W.2d 783 (1949).

[31] Blochowitz v. Blochowitz, 122 Neb. 385, 240 N.W. 586, 587 (1932).

[32] 141 Neb. 685, 692, 4 N.W.2d 731, 735 (1942).

[33] NEB. COMP. STAT. 1929, § 42-307. The citation to the 1952 reissue is NEB. REV. STAT. § 42-307 (Reissue 1952).

[34] The court is quoting 9 WIGMORE, EVIDENCE § 2483 (3rd ed. 1940).

> While the judge in ordinary civil and criminal cases is vested with ample power to call forth evidence, "That he has no burden or duty of doing so is plain in the law. But the general judicial power itself, expressly allotted in every state Constitution, implies inherently a power to investigate as auxiliary to the power to decide; and the power to investigate implies necessarily a power to summon and to question witnesses.[35]
>
> In the instant case we are dealing with a form of proceeding in which the state or society has an actual interest. Section 43-307, Comp. St. 1959, imposes the mandatory duty to have investigations made where minor children are involved. Under these circumstances, it would seem that the power to summon and question witnesses in open court on the trial of the merits, on the court's own motion but subject to the right of cross-examination by the parties to the proceeding, is necessarily implied and should be unquestioned.
>
> That method alone secures "due process" in the proceedings in courts or original jurisdiction and renders possible the right to be heard in courts of last resort which our state Constitution guarantees. Indeed, Wigmore lays down the principle: "The trial judge, then, may call a witness not called by the parties, or may consult any source of information on topics subject to judicial notice, or may put additional questions to a witness called by the parties, or may 'ex mero motu' exclude inadmissible evidence, or may take a view of a place or thing.[36]

The case of *In re Estate of Coons*[37] held that it was necessary to call all attesting witnesses to a will or to account for their absence in order to make the prima facie case required of the proponent. Should the will be denied probate because the proponent has failed to call an attesting witness, and a contest then ensues, this might be a situation in which the judge should call all attesting witnesses. If there there are minors or incompetents involved, it is the court's duty to protect their interests, and it would be an obligation of the court to call the witnesses to prevent a miscarriage of justice. It might simplify matters or make it easier to avoid error on the part of the judge, if a guardian ad litem were to be appointed for the minor or incompetent, and the suggestion made that he call such witnesses.

In conclusion, it might be said that the judge should call, and has a duty to call, a witness on his own motion to prevent injustice.

[35] The court is quoting 9 WIGMORE, EVIDENCE § 2484 (3rd ed. 1940).

[36] *Ibid.*

[37] 154 Neb. 690, 38 N.W.2d 788 (1951).

IV. IN A CLAIM AGAINST THE ESTATE ARISING FROM AN AUTOMOBILE ACCIDENT, CAN THE CLAIMANT TESTIFY? (THIS SUGGESTS THE DEAD MAN STATUTE.) WHERE THE CLAIMANT WAS A GUEST IN DECEASED'S CAR? WHERE CLAIMANT WAS DRIVER OF OTHER CAR? WHERE CLAIMANT WAS PASSENGER IN OTHER CAR? WHAT EFFECT DOES CLAIM OR PROOF OF CONTRIBUTORY NEGLIGENCE HAVE UNDER WAIVER CLAUSE OF NEB. REV. STAT. § 25-1202?

The Nebraska Supreme Court has held that a transaction or conversation within the meaning of the dead man statute[38] is an action participated in by the decedent and the witness to which the decedent could testify from his own personal knowledge if he were alive and that an automobile accident is a transaction within the meaning of the statute.[39] The court's position in *In re Estate of Mueller*[40] would seem to indicate that no testimony could be given by the claimant in regard to the actions of the decedent regardless of whether he had been a driver, guest or passenger.

V. IN A CLAIM AGAINST THE ESTATE, CAN THE ADMINISTRATOR COUNTERCLAIM?

A statute[41] provides that the court shall ascertain and allow the balance, in any amount, against, or in favor of, the estate. The administrator should set up any counterclaim or set-off the estate may have against the claimant, and on the hearing, the court may ascertain and allow the balance due. Thus, if the creditor sees fit to submit to the jurisdiction of the county court in the estate proceedings by filing this claim, the court has jurisdiction to allow any claim in favor of the estate against the claiming creditor.

[38] NEB. REV. STAT. § 25-1202 (Reissue 1956).

[39] In re Estate of Mueller, 166 Neb. 376, 89 N.W.2d 137 (1958).

[40] *Ibid.*

[41] NEB. REV. STAT. § 30-606 (Reissue 1956): *Claims; counterclaims; allowance; claims barred by statute of limitation.* When a creditor against whom the deceased has *had claims,* shall present a claim to the estate of such deceased, the executor or administrator shall exhibit the claim of the deceased in offset to the claims of the creditor, and the court shall ascertain and *allow the balance* against *or in favor of the estate* as it shall find the same to be, but no claim barred by the statute of limitations shall be allowed by the court *in favor* of or against the estate. (Emphasis added.)

There is no need to worry about the $1,000 constitutional limitation on the civil jurisdiction of the county court. It was said in *Fischer v. Sklenar*[42] that the limitations does not apply to matters concerned with the settlement of estates. The statutory power given the county court to "hear and determine claims and set-offs in the matter of estates of deceased persons"[43] is undoubtedly constitutional.

By express statutory provision[44] no claim barred by the statute of limitations shall be allowed by the court in favor of or against, the estate. In *Rehn v. Bingaman*[45] it was held that the district court had no original jurisdiction to hear a tort claim against the decedent's estate where the action was not started during the lifetime of the decedent. In the same case the court defined the word "claim" to include every species of liability which an executor or administrator can be called upon to pay out of the estate.

Under the statute it appears that the district court would have jurisdiction in a case where a personal representative started an action and the defendant had a counterclaim against the deceased.[46]

VI. WHAT IS THE OBLIGATION OF THE ADMINISTRATOR TO SERVE NOTICE OF THE HEARINGS ON CREDITORS.

There is a statutory requirement[47] that where notice by publication is given as authorized by law, a party, or his attorney, instituting or maintaining the action or proceeding with respect to which the notice is published, shall within five days after the first publication of notice ". . . mail a copy . . . to each and every party appearing to have a direct legal interest." Even though the notice to creditors is technically given by the judge in administration of estates, both the Lincoln and Omaha Bar Associations have agreed that the duty of mailing the notice is on the personal representative, or his attorney. This position is probably based on the theory that the personal representative is the person instituting the action within the meaning of the statue rather than the judge.

42 101 Neb. 553, 163 N.W. 861 (1917).

43 NEB. REV. STAT. § 24-504 (Reissue 1956).

44 NEB. REV. STAT. § 30-606 (Reissue 1956).

45 151 Neb. 196, 36 N.W.2d 856 (1949).

46 NEB. REV. STAT. § 30-804 (Reissue 1956).

47 NEB. REV. STAT. § 25-520.01 (Supp. 1957).

It appears obvious that all creditors of a decedent are parties in interest, and for that reason every known creditor should be mailed a copy of the published notice.[48] It is the theory of the United States Supreme Court[49] that publication is notice to unknown persons, and mailing is notice to the known parties interested. Thus the published notice to creditors is not complete as against known creditors until notice is mailed as required. If this proposition is sound it would then be affected by the three months statutory restriction which only permits an extension of time for the presentation of a claim, "for good cause shown".[50]

It is the duty of the personal representative or his attorney to mail copies of the published notice to creditors to all known creditors. The creditor who could show that the personal representative knew of his claim would not be barred by the order and the published notice.[51]

VII. IF THE EXECUTOR STARTS AN ACTION IN DISTRICT COURT, CAN THE DEFENDANT COUNTERCLAIM IN THAT ACTION?

The answer does not appear to lie in the mere filing of a counterclaim or set-off. Quite likely it would also be necessary for the defendant to file a timely claim in the county court before the district court would have jurisdiction to adjudicate his claim as a counterclaim or set-off in the action of the personal representative. Neb. Rev. Stat. § 30-804 (Reissue 1956) must be read in connection with Neb. Rev. Stat. § 30-609 (Reissue 1956) which states that any person whose claim is not filed "shall be forever barred . . ., from recovering on such claim or demand, or setting off the same in any action whatever." A leading authority says "statutes prohibiting set-off of claims barred by the Statute of Non-claim are also found in Michigan, Nebraska, North Dakota, and Wisconsin."[52]

[48] *Ibid.*

[49] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1949).

[50] NEB. REV. STAT. § 30-605 (Reissue 1956). See also State ex rel. Spillman v. Ord State Bank, 117 Neb. 189, 220 N.W. 265 (1928) and City of New York v. New York, N. H. & H. R.R., 344 U.S. 293 (1953).

[51] State ex rel. Spillman v. Ord State Bank, 117 Neb. 189, 220 N.W. 295 (1928). See also 37 NEB. L. REV. 134, at 135-138 (1958).

[52] 2 WOERNER, AMERICAN LAW OF ADMINISTRATION § 398 (3rd ed. 923).

In *Parker v. Wells*,[53] an action on a note brought by the administrator, the defendant pleaded payment.

The court said:

> . . . A further objection is made that the items set out in the answer as a payment on the note were never presented to the probate court as a claim against the estate of the deceased and allowed by the court. If these items were pleaded as a set-off this objection would be good; but such is not the case. The items are set up as payments made upon the note, it being specifically alleged in the answer that Haas agreed to credit these several items on the note as a payment of so much cash.

From this we at least have some dicta that claim must be filed against the estate in order to counterclaim therefor in an action brought by the personal representative. However, there is a difference of opinion on the subject.[54] The examination of cases collected by the annotator, supra, reveals that most of them can be distinguished from what the Nebraska rule is believed to be.

A careful reading of the statutes will reveal that there are other qualifications to the rule that the defendant may counterclaim against the personal representative.[55]

One authority states:

> It is a well settled general rule that in actions by executors and administrators upon a cause of action arising to them after the death of the testator, or intestate, a defendant cannot set off a demand against the decedent, existing at the time of his death . . . want of mutuality is generally relied upon as a ground of denying the right of set-off in such cases.[56]

Suppose the personal representative commences an action for wrongful death under Lord Campbell's Act.[57] This is a cause of action arising by virtue of death and would be such a cause of action in which a counterclaim would not lie. The proceeds are

[53] 68 Neb. 647, 649, 94 N.W. 717, 718 (1903).

[54] See 21 AM. JUR. *Executors and Administrators*, § 933 (1938).

[55] NEB. REV. STAT. § 30-803 (Reissue 1956). First note that this section refers to actions described in the preceding section, NEB. REV. STAT. § 30-802 (Reissue 1956), and that the preceding section refers to the commencing of actions and prosecuting actions commenced by the deceased in his lifetime. Also, if § 30-803 is read in connection with NEB. REV. STAT. § 25-813 (Reissue 1956), it follows that a counterclaim must be one existing in favor of the defendant against the plaintiff.

[56] 21 AM. JUR. *Executors and Administrators*, § 934 (1938).

[57] NEB. REV. STAT. §§ 30-809, 30-810 (Reissue 1956).

not an asset of the estate and a personal representative is in the position of a trustee for the benefit of those persons who suffered from the death. The annotator[58] concludes that a debt of the decedent cannot be set off in an action which is based on a transaction entered into by the personal representative.

To summarize: if a personal representative starts an action in the district court on a cause of action arising before the death of the deceased and the defendant has a claim against the deceased, which would be a proper counterclaim if the deceased were alive, the defendant can plead this counterclaim in the district court if he has also filed a claim in the county court. A counterclaim will probably not lie in the case of a cause of action arising after the death of the decedent.

VIII. WHEN DOES DISTRIBUTION TO INCOME BENEFICIARIES BEGIN UNDER A TESTAMENTARY TRUST?

Unless a contrary intention appears in the will, there is a presumption that a testator intends that a beneficiary of income, either for a definite period or for life, shall receive such income from the date of testator's death. The following language from *Folsom v. Strain* seems to settle this beyond dispute:[59]

> The general rule is now firmly settled, that the life beneficiary of a testamentary trust for the payment of income is entitled to the income accumulating on the trust assets from the date of the testator's death, unless it is otherwise provided in the will.

The court went on to state that the right of enjoyment may be postponed until the trustee has actually collected the income. Income for this purpose is not that which is derived from assets of the estate that are later used to pay debts, legacies and expenses of administration. Testamentary trust income is restricted to those assets which are specifically placed in trust or become a part of the residuary estate.[60]

IX. WHAT HAPPENS UNDER A PASSIVE TRUST?

A passive trust requires no action on the part of the trustee beyond closing the trust and delivering the corpus to the benefi-

[58] 53 L.R.A.(ns) 300 (1915).

[59] 138 Neb. 497, 499, 293 N.W. 357, 358 (1940).

[60] See 158 A.L.R. 441 (1945).

cary.[61] In the case of *Hill v. Hill*[62] the court pointed out that the statute of uses is not in force in Nebraska, but that the power to direct the trustee to deliver possession of the estate and to convey legal title to the beneficiary is vested in a court of equity This was so ordered notwithstanding the fact that the county court had appointed a trustee who had been in possession of the property. The holding was based on the theory that it was necessary to construe the will and determine the right to legal possession of the corpus. This must be done in the district court and not in the county court. In view of the *Hill* case, title examiners should remember that the statute of uses will not automatically operate to convey legal title from the trustee to the beneficiary. Only a court of equity has this power, and it is questionable whether or not a county court order would be valid. In the *Hill* case the court pointed out that where there is no provision in the trust for any affirmative duties of the trustee, it is a passive trust.

In *Flanagan v. Olderog,*[63] the court permitted a creditor of the beneficiary to attach the premises which were the corpus of a passive trust and to have the legal title adjudged in the beneficiary. Where there is a failure of the trust the trustee holds the res under a resulting trust.[64]

In *Jones v. Shrigley*[65] the deceased had devised real estate in trust to two heirs-at-law as trustees and provided that each was to use and occupy an undivided one-half of said real estate for life. On the death of the survivor the trust was to terminate and legal title to each undivided one-half was to vest in such persons as each should appoint by will. The two devisees brought an action against the court appointed trustee alleging that they owned title in fee simple. The court pointed out that had there been only one beneficiary who was also the trustee, the trust would have been passive and a fee simple would have vested in him. However, this rule has no application where there are multiple trustees who are also beneficiaries.

The question of whether the trust can be terminated frequently arises when the assets of a trust become so meager that administrative costs prohibit economical operation. The general

[61] *Restatement (Second), Trusts,* § 69.

[62] 90 Neb. 43, 132 N.W. 738 (1911).

[63] 118 Neb. 745, 226 N.W. 316 (1929).

[64] See Jones v. Shrigley, 150 Neb. 137, 33 N.W.2d 510 (1948).

[65] *Ibid.*

rule seems to be that this is not a valid reason for termination and that the trust will continue until the assets are exhausted.

X. HOW LARGE SHOULD BE THE BOND OF A CORPORATE FIDUCIARY?

LB 286[66] authorizes commercial banks to act as executors and administrators. In this connection the Attorney General of Nebraska has issued an opinion[67] dated August 18, 1959, addressed to the Director of the Department of Banking which states that the only requirement for a commercial bank to act as a personal representative is amendment of its corporate articles. In spite of this opinion, a commercial bank should not qualify as executor or adminstrator unless it has complied with Nebraska law.[68] There has been no amendment to the statute[69] which says that "it shall be unlawful for any corporation to engage in business as a trust company or act in any fiduciary capacity unless it shall have first obtained from the Department of Banking a charter of authority to do business."

An executor or administrator acts in a "fiduciary capacity". Our court has held in *In re Estate of Dryden*[70] that a personal representative of an estate and his attorney are officers of the court and both are fiduciaries in their relation to the persons entitled to share in the estate of the deceased.[71] On this point it seems clear that a commercial bank which is not properly qualified under statute[72] may not qualify as an executor or administrator.

In determining the amount of bond to be required of a corporate fiduciary it is necessary to consider two classes of companies: (a) state banks and trust companies, and (b) national banks. L.B. 577[73] authorizes state commercial banks to qualify as fiduciaries and places them in the same category as state trust companies.

[66] NEB. LAWS c. 18, p. 142 (1959).

[67] 1959 Neb. Att'y Gen. Ops. 124.

[68] NEB. REV. STAT. §§ 8-201 to 8-226 (Reissue 1954).

[69] NEB. REV. STAT. § 8-201 (Reissue 1954).

[70] 155 Neb. 552, 52 N.W.2d 737 (1952).

[71] See also In re Estate of Rhea, 126 Neb. 571, 253 N.W. 876 (1934) and In re Estate of Blochwitz, 124 Neb. 110, 245 N.W. 440 (1932).

[72] NEB. REV. STAT. §§ 8-201 to 8-226 (Reissue 1954).

[73] NEB. LAWS c. 19, p. 143 (1959).

All corporate trustees, state and national, may serve without bond, but the court making the appointment may require such bond as is required of natural persons.[74] The testamentary trustee shall give bond "in said sum and with such sureties as the court may order,".[75] It appears that the amount of bond for a corporate fiduciary is entirely discretionary with the county judge.

XI. WHAT IS THE EFFECT OF A TESTAMENTARY CLAUSE WAIVING BOND?

There must be some bond for an executor or administrator, since there is no provision in the statutes authorizing a waiver for these fiduciaries. Thus the direction by the testator in his will that the executor may act without bond has no legal effect.[76] However, the statute applicable to testamentary trustees[77] provides that no bond need be furnished if the will so directs, unless the court determines that a bond is required by a change in circumstances, or the situation of the trustee, or for other sufficient reasons. Therefore, the county judge has discretion to determine whether or not the waiver clause in the will will be followed. Generally the court should not interfere with the wishes of the testator unless for good reason.

In re Estate of Grainger,[78] states:

> The exception to the requirement of a bond so conditioned in all cases is that if the testator has directed in his will that no bond be required of the trustee, none need be given. Had the Legislature stopped there, the issue here presented would not arise. The Legislature went further and made an exception to the exception by providing that if the county court shall determine that a bond is required by a change in the circumstances or situation of the trustee, or for other sufficient reason, then a bond may be required notwithstanding the provision of the will. It is clear that whatever discretion this provision grants is vested in the county court and the question on appeal is whether or not there has been a clear abuse of that discretion.

This wide discretion invested in the county judge should be exercised with care and in accordance with the testator's wishes unless there is some good reason for not complying with his intentions.

[74] NEB. REV. STAT. § 8-211 (Reissue 1954).

[75] NEB. REV. STAT. § 30-1801 (Reissue 1956).

[76] See 21 AM. JUR. *Executors and Administrators,* § 135 (1939).

[77] NEB. REV. STAT. § 30-1801 (Reissue 1956).

[78] 151 Neb. 555, 561, 38 N.W.2d 435, 438 (1959).

XII. IF A BOND IS REQUIRED, HOW SHOULD PREMIUM BE ALLOCATED BETWEEN INCOME BENEFICIARIES AND REMAINDERMEN? SHOULD THE WILL PROVIDE FOR THIS?

Current expenses should be charged to income.[79] Premiums on the testamentary trustee's bond are not specifically mentioned by statute, although premiums on insurance against fire and other casualty losses are mentioned. Premiums on trustee's bonds are generally considered to be payable from income, but it should be observed that some cases rely on the construction of the instrument.[80]

Where a bond is for the sole protection of the remainderman, the premium should then be paid from the remainder.[81] Since there is no Nebraska case or statute on this point, and not much authority, it is wise to provide for allocation in the will.[82]

XIII. QUESTIONS WHICH ARISE WHEN THE TESTATOR DIED, DOMICILED IN ANOTHER STATE, AND THERE ARE ASSETS IN NEBRASKA

A. Is Nebraska Administration Necessary?

If a foreign personal representative can enter Nebraska and take possession of moveable chattels or is able to collect debts owed by a Nebraska resident without court action it might not be necessary to have administration in Nebraska. But how will Nebraska courts treat the bailee or debtor who delivered the assets to the foreign personal representative. Will Nebraska courts allow a second recovery by a personal representative subsequently appointed in Nebraska? There is no Nebraska statute or case in point.

A very exhaustive work by Banks McDowell, Jr.[83] states:

> In those states which retain the common law, the most unfortunate feature of the rules is the uncertainty as to legal consequences. A bailee or debtor in such a jurisdiction who surrenders assets to a foreign personal representative can rarely be sure that he had discharged his obligations.

[79] *Restatement (Second), Trusts* § 233.

[80] 33 AM. JUR. *Life Estates, Remainders, Reversions* § 430 (1941).

[81] See 124 A.L.R. 1205 (1940).

[82] 2 SCOTT, TRUSTS § 233.2 (1957); *Restatement (Second), Trusts* § 233.

[83] MCDOWELL, FOREIGN PERSONAL REPRESENTATIVES 169 (1957).

Ancillary administration should usually be had in such cases for the protection of resident creditors.[84]

> The orthodox view is that in the absence of statute, the powers of a personal representative cease at the borders of a state which appointed him. And other states in which the decedent's property may be located have sometimes insisted on local administration in order to simplify the problem.[85]

The protection of local creditors has been the primary argument for denying the personal representative of a foreign domiciliary the right to collect assets or maintain an action therefor.[86] Where the bailee or debtor is concerned, he delivers to, or pays the foreign personal representative at his peril. There is no way of knowing whether or not there are local creditors until a Nebraska personal representative has been appointed and notice to creditors has been given.

The Omaha banks have taken the position that they will not pay substantial sums to a foreign personal representative for two years after death. The basis for this thinking is that by statute,[87] the creditor who does not apply for letters of administration within two years after death is barred. The banks assume that there are no local creditors if there has been no application for letters within two years, after death. It should be remembered that the foreign personal representative may bring suit in Nebraska[88] if there are no local representatives. If a debtor is being sued by a foreign personal representative he should ask for the appointment of a local personal representative and have him substituted as the party plaintiff.

B. To What Extent Do Local Creditors Have Preference to Local Assets?

If the "entire estate" is solvent, the local creditors would be paid out of Nebraska assets without regarding the assets in another state.[89] Furthermore the administration of assets for the benefit of creditors is governed by the law of the state in which such assets are found, and the rights and priorities of all creditors are determined, not by the law of decedent's domicile, but by the

[84] 21 AM. JUR. *Executors and Administrators,* § 852 (1938).

[85] 44 MICH. L. REV. 329, 408 (1945).

[86] *Id.* at 409.

[87] NEB. REV. STAT. § 30-807 (Reissue 1956).

[88] *Ibid.*

[89] DAME, PROBATE AND ADMINISTRATION, § 391 (3rd ed. 1928).

law of the situs.[90] Moreover, each state may, by statute, properly establish classes of preference or priority among creditors, and such preference would be controlling even though it happened to work a hardship upon non-residents.[91] However, the United States Supreme Court in *Blake v. McClung*[92] held that a state may neither by statute nor judicial decision give local creditors, as such, a preference over non-resident creditors. Such action would be a violation of the privileges and immunities granted by the Federal constitution.[93]

Where the assets are insufficient to pay all the obligations of the "entire estate", there is an inter-dependence among the various jurisdictions which gives rise to the application of the maxim that "equality is equity". The courts administering the several estates should consider all assets as one entire fund in which all creditors having just claims and equal standing should share pro rata.[94]

Two Nebraska cases[95] in the general area under discussion are not directly on point, but from what is said in the opinions the holdings in the two cases would not affect the above rules.

C. Is a Foreign Decree Admitting a Will to Probate Res Judicata?

This question assumes that a will has been admitted to probate in a foreign state and is now brought to Nebraska for probate.[96] Jurisdiction of the court of original probate can always be questioned unless the contestant was personally served in the state of original probate or appeared in the action. The theory of the United States Supreme Court is clearly indicated in *Riley v. New York Trust Company*.[97] In this case the Georgia court,

90 See 16 A.L.R. 761 (1922).

91 See Duchay v. Acacia Mut. Life Ins. Co., 105 F.2d 768 (D.C. Cir. 1939); *contra*, In re Estate of Gibbs, 73 Wyo. 425, 280 P.2d 556 (1955).

92 172 U.S. 239 (1898).

93 U.S. CONST. art. IV, § 2.

94 In re Gleason's Estate, 167 Neb. 312, 92 N.W.2d 705 (1958); see also 2 WHITFORD, NEBRASKA PROBATE AND ADMINISTRATION, § 621 (1957).

95 In re Estate of Vance, 149 Neb. 220, 320 N.W. 677 (1958); In re Estate of Schram, 132 Neb. 268, 211 N.W. 694 (1928).

96 NEB. REV. STAT. §§ 30-221 to 30-224 (Reissue 1956).

97 315 U.S. 343 (1942).

in a probate proceeding in which the heirs and devisees were parties, had found that the decedent had died testate while domiciled in Georgia. Thereafter, administration proceedings were instituted in New York and an administrator was appointed. The New York administrator and certain New York creditors were not parties to the Georgia proceeding. Both the Georgia executors and the New York administrator claimed the right to have transferred to them, in their representative capacity, stock in the Coca-Cola Corporation. This stock was on Coca Cola's books in the name of the decedent. Coca Cola, incorporated in Delaware, filed a bill of interpleader in a Delaware court against the Georgia executors and the New York administrator. The Delaware court found that the decedent was domiciled in New York and awarded the stock to the New York administrator.

Mr. Justice Reed, speaking for the Court, which affirmed the judgment, said:

> . . . So far as the assets in Georgia are concerned, the Georgia judgment of probate is in rem; so far as it affects personalty beyond the state, it is in personam and can bind only parties thereto or their privies. . . . Phrased somewhat differently, if the effect of a probate decree in Georgia in personam was to bar a stranger to the decree from later asserting his rights, such a holding would deny procedural due process.[98]

It would be possible for a Nebraska court to find that Nebraska was the domicile of the testator even though some other court had found the domicile to be elsewhere. Such a finding would require original probate in Nebraska.

The law is not clear about other matters which may be placed in issue. Judge Whitford[99] discusses the problem in *Roberts v. Flannigan*,[100] and says it was suggested that the county court should require proof of execution and of testamentary capacity. Judge Whitford adds that "we cannot rely with any satisfactory assurance on a dictum so old". This reasoning is sound. In the other Nebraska case[101] cited, the court said that the proceeding more than two years after death,[102] was said to be "purely formal". This does little to clarify matters either. Judge Whitford is of the opinion that due execution or testamentary capacity cannot

[98] *Id.* at 353.

[99] 2 WHITFORD, NEBRASKA PROBATE AND ADMINISTRATION, § 220 (1957).

[100] 21 Neb. 503, 32 N.W. 563 (1887).

[101] Kummer v. Kummer, 112 Neb. 220, 199 N.W. 35 (1924).

[102] See NEB. REV. STAT. § 30-220 (Reissue 1956).

be examined where it is determined that the court of testator's domicile had jurisdiction. Again, this reasoning is sound.[103]

It is fundamental that construing the will where real property is involved, is a matter for the courts where the property is located.

D. SHOULD DISTRIBUTION UNDER AN ANCILLARY ADMINISTRATION BE MADE DIRECTLY TO THE HEIRS, LEGATEES AND DEVISEES, OR TO THE ORIGINAL ADMINISTRATOR?

Nebraska real estate would descend directly to the heirs or devisees, unless sold for the payment of debts or costs. In the absence of creditors rights, the court of ancillary administration may, at its discretion, distribute personal property within its jurdiction, or it may transfer such property to the domiciliary court for distribution in that jurisdiction.

> The determination of the question whether the surplus should be remitted to the domiciliary jurisdiction or be distributed in the ancillary jurisdiction is a matter of judicial discretion for the court of the latter jurisdiction, depending on the circumstances of each case.[104]
>
> It may be stated generally, however, that the practice of remitting assets to the principal administrator should be adhered to unless it will work an injustice or injury to the parties having such an interest in the estate as will entitle them to object to its observance.[105]

There is also the matter of clearing title to Nebraska real estate which passes under the residue when there are satisfaction of legacies. These legacies should be evidenced in Nebraska if they have been paid by the domiciliary estate. If legacies have not been paid in order to clear title to the Nebraska real estate, they might be paid out of the Nebraska estate.

XIV. WHEN DO CLAIMS AGAINST ESTATES DRAW INTEREST?

At common law, claims against the estates of deceased persons did not draw interest, and there must be statutory authority for allowance of claims. The Nebraska statute on interest,[106]

[103] See 57 AM. JUR. *Wills* § 923 (1938); In re Estate of Gertsen, 127 Wis. 602, 106 N.W. 1096 (1906).

[104] 21 AM. JUR. *Executors and Administrators,* § 884 (1938).

[105] *Id.* § 885; see also 90 A.L.R. 1046 (1934).

[106] NEB. REV. STAT. § 45-103 (Reissue 1952).

provides for interest on all decrees and judgments for the payment of money at the rate of six per cent per annum. The Nebraska Supreme Court has repeatedly held that the allowance of a claim has the form and effect of a judgment even though there can be no execution and some attributes of a judgment are absent. Logically, claims should draw interest at the rate of six per cent per annum from the time that they are allowed. The Nebraska Supreme Court has never ruled on this question, and authorities are divided.

The general rule[107] seems to be that where legal interest on judgments is permitted by statute, interest should be allowed from the time of the adjudication by the court which allows a claim against the estate. A distinction is made between the allowance of a claim for a debt of the deceased, and an expense of administration.

Claims on written contracts calling for interest may be allowed and are entitled to the contractual rate of interest even though it exceeds the legal rate.

> There is no statute fixing the rate of interest on claims after their allowance. Inasmuch as its allowance is substantially a judgment for the amount against the estate it would seem that the same rule would apply as in judgments in actions, and seven percent interest paid from date of allowance, and such is the general practice in this state, and has the approval in other jurisdictions.
>
> Demands which by their terms bear interest until paid, like promissory notes, would continue to bear interest at the same rate from date of allowance until paid.
>
> If the estate is insolvent it would seem more in accord with equity to disallow such interest for the benefit of creditors of a lower class.[108]

In *Turk v. Grossman*,[109] the Maryland Court states the minority rule as follows:

> In administering the estate of decedents in this state interest is not allowed on claims other than those on contract which undertake the payment of interest, and render the amount of it part of the debt. There is no statutory provision for the allowance, and common law principles seem to deny. . . . The law requires them for the administration, and the delay is the law's delay.

[107] See 54 A.L.R.2d 814 (1957).

[108] DAME, PROBATE AND ADMINISTRATION, § 498 (3rd ed. 1928); see also 34 C.J.S. *Executors and Administrators*, § 464 (1942).

[109] 179 Md. 229, 17 A.2d 123, 126 (1941).

There is variance in the practice of the Nebraska county courts as to the allowance of interest on claims based upon open accounts. Our interest statute, supra, should apply to claims when properly allowed, and claims on open accounts should also draw interest at the legal rate from the time the court has allowed the claim. Of course, this question cannot be said to be settled until the Nebraska Supreme Court rules. In *Bell v. Rice*,[110] the court held that where there was a gratuitous loan to the deceased, and no demand for payment was made during his lifetime, interest will run from the time of filing the claim. However, it is the general practice of the Nebraska courts not to allow interest on claims on open accounts until after the same has been allowed by the court.

XV. WHAT IS THE EFFECT ON THE ADMINISTRATOR'S PERSONAL LIABILITY IF THE ESTATE IS NOT SETTLED WITHIN ONE YEAR?

The answer to this question necessitates a review of applicable statutes. Neb. Rev. Stat. § 30-610 (Reissue 1956), provides that at the time of issuing letters to an executor or administrator the court shall, by order, fix a time within eighteen months disposing of the estate and paying the debts and legacies of the deceased. When the estate is not settled within the time fixed by the court many attorneys ignore Neb. Rev. Stat. § 30-611 (Reissue 1956), which provides that the court may extend the time for settling the estate not more than three years *by giving notice.* Neb. Rev. Stat. § 30-1409 (Reissue 1956), states that a report of the executor or administrator shall be filed within one year of the time of his receiving his letters unless the court shall give permission for delay. Unless permission is given for delay, the statute directs the court to compel the executor or administrator to make final settlement.

Our court has held that legacies should draw interest beginning one year after the appointment of the personal representative.[111] The reason given is that our statute contemplates that distribution should ordinarily be made within one year. However, *In re Estate of Kierstead*,[112] a will case in which there was

[110] 50 Neb. 547, 70 N.W. 25 (1897).

[111] Lehman v. Wagner, 136 Neb. 131, 285 N.W. 124 (1939); Lewis v. Barkley, 91 Neb. 137, 135 N.W. 379 (1912); Smullin v. Wharton, 83 Neb. 328, 119 N.W. 773 (1909).

[112] 128 Neb. 654, 259 N.W. 740 (1940).

litigation, held that to charge the executor with interest would be inequitable. Nevertheless, the executor was charged with interest on specific legacies after the litigation had been resolved by the district court because of his delay in distribution of the assets.

In re Estate of McLean,[113] held that where there is undue delay the administrator becomes unsuitable and incapable to discharge the trust and may be removed from office.[114] The court has in several instances surcharged personal representatives with interest at the rate of six per cent per annum for delay or for mishandling the assets of an estate.[115] The court also has disallowed executors any fees where there has been a mishandling of an estate.

In *Coolidge v. Rueth,*[116] the Wisconsin court held that the "failure of the administrator to complete his administration within the time prescribed by law, no extension having been granted for cause shown as required by statute, the bond of the administrator was breached, and thereafter the risks were on the administrator and his bondsman." In this case, the bank was closed by the banking department and payment of the administrator's funds were withheld.

In conclusion, Nebraska probate statutes provide that the report of an executor or administrator shall be filed within one year from the time of his receiving his letters, and for good cause the court may grant permission to extend this time. If there is good cause for delay, such as litigation which has not been resolved, the executor or administrator will not be penalized. Where there is no good cause for delay, the courts may penalize the representative for additional expense incurred. This would include interest on legacies, claims, taxes and bond renewal premiums. The court may also remove the administrator, and in its discretion, disallow any fees for his services.

XVI. NEW LEGISLATION

L.B. 359,[117] treats pour-over wills and is for the purpose of explaining Neb. Rev. Stat. §§ 30-1806 and 30-1807 (Reissue 1956).

113 138 Neb. 757, 295 N.W. 273 (1940).

114 See NEB. REV. STAT. § 30-313 (Reissue 1956).

115 In re Estate of Wiley, 150 Neb. 898, 36 N.W.2d 483 (1949); In re Estate of Jurgensmeier, 145 Neb. 459, 17 N.W.2d 155 (1945).

116 209 Wis. 458, 466, 245 N.W. 186, 189 (1932).

117 NEB. LAWS c. 127, p. 461 (1959).

This 1957 legislation was discussed before the Probate and Real Estate Section of the Nebraska Bar Association in 1957.[118] The object of the original legislation was to modernize the substantive law; to eliminate doubt about the validity of a bequest to a trustee of a trust that was subject to amendment, modification, revocation and termination; and to clarify the jurisdictional and procedural questions that arise from this type of bequest.

If the will pours over into a trust, the property devised or bequeathed to the trust is to be administered under the provisions of Neb. Rev. Stat. §§ 30-1801 to 30-1805 (Reissue 1956), *unless* the designated trustee or one of the designated co-trustees is a corporate trustee authorized by law to exercise trust powers. Thus, if the will "pours over" to an existing trust and a corporate trustee is one of the co-trustees, the property so poured over shall be administered under another section.[119] However, the will may provide that even where a corporate trustee is involved, the court shall supervise the trust under the testamentary trust provisions of the statute. This will apply only to the property so bequeathed or devised, and the rest of the existing trust will not be subject to the jurisdiction of the county court. This may create an awkward situation, because as a result, the trustee must manage two trusts which may not be computable. This is of importance to draftsmen. If the testator has confidence in the trustee, it is advisable to omit provisions requiring compliance with the testamentary trust statute[120] where property is poured into an existing trust.

[118] See 37 NEB. L. REV. 144 (1958).

[119] NEB. REV. STAT. §§ 30-801 to 30-810 (Reissue 1956).

[120] NEB. REV. STAT. §§ 30-1801 to 30-1805 (Reissue 1956).