

KANSAS JUDICIAL COUNCIL BULLETIN

APRIL, 1934

PART 1—EIGHTH ANNUAL REPORT

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KANSAS JUDICIAL COUNCIL BULLETIN

Published Quarterly by the KANSAS JUDICIAL COUNCIL, Topeka, Kan.

APRIL, 1934

FOREWORD

In this issue of the BULLETIN we present articles, later to be mentioned, dealing with subjects now consuming the attention of the Council. Probate procedure, the law pertaining to the estates of deceased persons and of guardianship estates principally will occupy the time of the Council for the next few months. That study is including an examination of the decisions of our supreme court with respect to those subjects. Perhaps a synopsis of this can be ready for our July BULLETIN. As a part of this study we are collecting data from our probate courts. In view of this particular study we are not collecting data from clerks of the district courts as we did last year. It is our hope that by our study of the law pertaining to estates and the procedure in probate courts we can formulate measures which will increase the certainty of the law and the efficiency of these courts.

Hon. Hal E. Harlan, whose portrait we present, one of the newer members of the Judicial Council and chairman of the judiciary committee of the senate, presents in this issue an article on a bill proposed by the Council to amend our statute relating to the force and effect to be given to a decree of divorce rendered on constructive service by a court of some other state or country, where the defendant in the action is a resident of this state. It is a timely article and sets forth the need of amending our present statute on that question.

Hon. Ray H. Beals, judge of the district court of the twentieth judicial district and a member of the Council, presents in this issue comments on a number of our cases dealing with the administration in Kansas of property belonging to nonresident decedents. Questions concerning this subject are constantly arising and frequently have proved to be troublesome because of the lack of certainty in our statutes and procedure covering various aspects of the question. The article is not designed as a complete treatise on the question nor does it attempt an examination of all of the cases dealing with it. Its main purpose is to discuss a sufficient number of the cases to show the importance of the question as a whole and the variety of specific questions which may be presented, and to stimulate further discussion on the subject. This is one of the several things of importance now under consideration by the Council in its study of the procedure in probate courts and the substantive law relating to estates.

At common law and in most of the states a presumption of the death of a person arises from his unexplained absence for seven years or more. The question has arisen several times in this state in actions on life insurance policies. But what about the administration of the estate of such a person? Mr. Chester Stevens, a member of the Council, has had occasion to give that ques-

tion some study, the results of which are set forth in his article published herein. It is a situation for which a provision should be made by statute.

We are again much indebted to Mr. Samuel E. Bartlett, of Ellsworth, whose interest in the subject and whose industry have caused him to draft a revision of our probate law relating to guardianship of minors, incompetents and imprisoned convicts. Our present statutes on this general subject are incomplete, resulting in uncertainty and frequently in litigation which might well be avoided if the statutes were more complete, and all too frequently resulting in substantial property losses. The proposed revision is not intended to be in final form to be presented to the legislature, but it is an excellent basis for study, which we trust the subject will receive, so that with the aid of the jurist and of the bar of the state it can be presented at the next session of our legislature.

A Proposed Amendment of the Kansas Statute Relating to the Faith and Credit to be Given to Foreign Judgments of Divorce

By HAL E. HARIAN

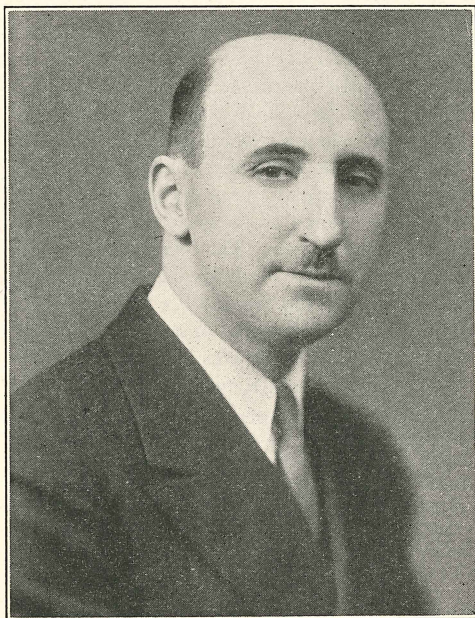
At a meeting of the Judicial Council held shortly prior to the first Special Session of the 1933 Kansas legislature, the question of recommending a change in the present statute governing the effect to be given decrees of divorces rendered by the courts of foreign states upon constructive service came up for extended discussion. Most of the members of the Council who are now actively engaged in practice had, at one time or another, handled divorce proceedings in which the question of the effect to be given a foreign decree played a prominent part. The jurist members in their respective capacities had often had such cases before them for consideration. All agreed that grave injustices had been done under the existing statute and that more were likely to follow. Instances were cited in which husbands owning considerable property in this state surreptitiously and, in many cases, by perjured testimony obtained decrees of divorce in some foreign state upon constructive service and without the actual knowledge of the wife. The husbands, upon their return to the state of Kansas, were successful in defeating the wife's legitimate claim for alimony, due to the fact that the present law requires the courts of this state to give full faith and credit to a decree of divorce rendered upon constructive service in any state of the United States in conformity with the law thereof.

The existing statute, R. S. 60-1518, reads as follows:

"Any judgment or decree of divorce rendered upon service by publication in any state of the United States in conformity with the law thereof shall be given full faith and credit in this state, and shall have the same force with regard to persons now or heretofore resident or hereafter to become a resident of the state as if said judgment had been rendered by a court of this state, and shall, as to the status of all persons, be treated and considered and given force the same as a judgment of the courts of this state of the date which said judgment bears."

This law was passed March 21, 1907. It might be interesting to note the history of this legislation. Section I of article IV of the constitution of the United States provides that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. Prior to April 16, 1906, many courts assumed that this clause of the federal constitution, rather than the doctrine of comity, enjoined upon the several states the duty of recognizing and giving effect to divorce decrees based upon constructive service when the decree was obtained in conformity with the law of the state in which the judgment was rendered. However, upon the last-mentioned date the supreme court of the United States rendered an opinion in the case of *Haddock v. Haddock*, 201 U. S. 562, in which it was in effect held that the full faith and credit clause of the federal constitution did not compel absolute recognition of such decrees of divorce in states other than the one in which the decree was rendered. In that case, the parties were married in the state of New York; they separated the same day and never lived together thereafter. The husband acquired a domicile in the state of Connecticut; the wife remained in New York. Some years later the husband obtained a de-

cree of divorce based upon publication service in a court of competent jurisdiction in the state of Connecticut. The requisite steps were taken to procure the divorce in accordance with the laws of that state. Later the wife sued the husband for a divorce in the state of New York, and obtained personal service upon him. The husband set up the decree of the Connecticut court in bar of the action and offered such decree in evidence at the trial. The decree was rejected and the wife was granted a divorce and alimony, which judgment was affirmed by the highest court of the state of New York. An appeal was taken to the supreme court of the United States, and a majority of that court held



HAL E. HARLAN

that the lower court did not violate the full faith and credit clause of the constitution in refusing to admit the Connecticut decree in evidence. In a lengthy opinion the court summed up as follows:

"Without questioning the power of the state of Connecticut to enforce within its own borders the decree of divorce which is here in issue, and without intimating a doubt as to the power of the state of New York to give to a decree of that character rendered in Connecticut, within the borders of the state of New York and as to its own citizens, such efficacy as it may be entitled to in view of the public policy of that state, we hold that the decree of the court of Connecticut rendered under the circumstances stated was not entitled to obligatory enforcement in the state of New York by virtue of the full faith and credit clause."

The effect of this decision is graphically described by Justice Burch of the Kansas supreme court in the case of *McCormick v. McCormick*, 82 Kan. 31, in which he said:

"It (the decision in the Haddock case) immediately arrested public attention throughout the nation, and, whether warranted or not, great anxiety was felt in many quarters respecting the social consequences which might follow from it. For the purpose of averting any possible disaster, due either to the decision itself or to misapprehension of its doctrine, and for the purpose of establishing the law and policy to be observed by the courts of this state, the legislature enacted the statute (R. S. 60-1518), which took effect March 21, 1927. . . . It is perfectly clear that this statute was intended to make the recognition and enforcement of foreign divorce decrees based upon substituted service obligatory in this state. The option left by the decision in *Haddock v. Haddock* to each state to give to such decrees within its own borders whatever efficacy they may be entitled to, consistent with its public policy, was exercised by the legislature, and such decrees were placed upon the same basis as the judgments of our own courts."

The McCormick case was one of the first to be decided by the supreme court of this state after the passage of the statute above mentioned. In that case, the McCormicks were married in Riley county, Kansas, and later removed to Kansas City, Mo. In September, 1907, Mrs. McCormick removed to Topeka, and in July, 1908, she brought suit in the district court of Riley county, Kansas, against McCormick for alimony. The defendant owned land in Riley county, which the plaintiff sought to appropriate. The defendant answered, and set up as a specific defense that the circuit court of Jackson county, Missouri, had, on December 10, 1907, entered a decree of divorce in his favor. The Missouri decree was based upon publication service, and in it no provision was made for alimony for the wife. The trial court refused to recognize and give validity to the decree of the Missouri court and rendered judgment against McCormick for alimony. The supreme court, in reversing the case, said:

"The judgment of the Missouri court, rendered on service by publication, was as effectual as if it had been rendered on personal service. It operated to dissolve the marriage tie, and absolved each party from every marital right and duty. The defendant in that suit was no longer the plaintiff's wife, each one was as free as before marriage, and thereafter they bore toward each other the same relations as if the marriage had never occurred. The court was not limited to the mere dissolution of the marriage, but had authority to determine the question of alimony and make an award to the defendant. The cause being open for the claim of alimony, it should have been made there. No application for alimony having been presented, the decree is as complete a bar as if evidence had been introduced and a decision rendered thereon. It is not necessary that the decree should refer in express terms to alimony in order to have this effect. It excludes everything not expressly mentioned or reserved in it. The matters of who was innocent, who was injured and who was responsible for the separation are *res judicata*. The district court of Riley county was without authority to enforce the matrimonial obligation upon which the right to alimony depends, and the plaintiff no longer has any of the rights which a wife possesses respecting her husband's property."

The McCormick case has been cited many times by the supreme court of this state. Among the many cases in which the McCormick case was cited with approval are the following: *Gordon v. Munn*, 87 Kan. 624; *Carter v. Carter*, 89 Kan. 367; *Riggs v. Riggs*, 91 Kan. 593; *Blair v. Blair*, 96 Kan. 757; *Dutton v. Dutton*, 113 Kan. 146; *Noonan v. Noonan*, 127 Kan. 287; *Wear v. Wear*, 130 Kan. 205.

It is true that the supreme court has, to some degree, relaxed the rigor of the statute as construed in the McCormick case, but in most respects the force

of the statute still remains in effect. Thus in the case of *Cummings v. Cummings*, 138 Kan. 359, a wife obtained a divorce from her husband by a decree of a Texas court. Property accumulated while the marriage relation existed was situated in Kansas. Subsequently the divorced wife commenced an action in Sedgwick county, Kansas, for division of property in this state acquired while the marriage relation existed. The Texas decree was silent as to a division of property, and the trial court found as a fact that under the laws of Texas the court in which the divorce was granted was without jurisdiction or power to grant alimony or division of property in connection with the decree of divorce and that it did not have jurisdiction of the personal property in Kansas. The trial court awarded to the wife an equitable portion of the personal property accumulated by her husband and herself while the marriage relation existed. It was held by the supreme court that the wife was not attempting to secure alimony, but was only trying to recover property that she had helped to accumulate and in which she had an interest. The court said:

"Plaintiff and defendant were husband and wife in law and in fact until the divorce was granted. She did not sue as wife, but she sought to recover part of the property which justly belonged to her and which the Texas decree did not preclude her from recovering."

A rather hasty examination of the statutes of the various states leads to the conclusion that no other state of the Union goes so far as does the Kansas statute in compelling recognition of foreign decrees of divorce based upon constructive service. It was the thought of the Council that steps should be taken to correct the evils that are prone to occur under the present statute and to bring Kansas in line with a great majority of the other states. Accordingly the Council prepared and recommended for passage the following act amending section 60-1518, R. S. 1923:

"A judgment or decree of divorce rendered in any *other state or territory of the United States, or in any foreign country*, in conformity with the laws thereof, shall be given full faith and credit in this state; *except, that in the event the defendant in such action, at the time of such judgment or decree, was a resident of this state and had not been served personally with process, or did not personally appear and defend the action in the court of such foreign state, territory, or country, all matters relating to alimony, or to the property rights of the parties and to the custody and maintenance of the minor children of the parties, shall be subject to inquiry and determination in any proper action or proceeding brought in the courts of this state within two years after the date of the foreign judgment or decree, to the same extent as though the foreign judgment or decree had not been rendered.*"

The italicized words represent the proposed changes in the present statute. The bill was introduced at the first Special Session of the 1933 legislature and passed the senate without a dissenting vote. It was recommended for passage by the judiciary committee of the house, but the session closed before the house had had an opportunity to act upon the bill.

It will be observed that the proposed amendment preserves one important feature of the present law and the courts of this state will still be required to recognize the validity of foreign decrees in so far as the dissolution of the marriage relation is concerned. This declaration of public policy eliminates the possibility of the occurrence of dangerous consequences prophesied by Mr. Justice Holmes as a result of the majority holding in the Haddock case. During the course of a strong dissenting opinion he said: "I think that the decision

not only reverses a previous well-considered opinion of this court, but is likely to cause considerable disaster to innocent persons, and to bastardize children hitherto supposed to be the offspring of lawful marriage."

The ease with which divorce decrees may now be obtained in some of the states, and particularly in one of the states of the Republic of Mexico, necessitates a change in our present statute if the courts of this state are no longer to be hampered in affording relief against a peculiarly vicious species of fraud and imposition.

The Administration in Kansas of Property Belonging to Nonresident Decedents

By RAY H. BEALS

In this short article, and in the limited time allowed for its preparation, I can review only a few of the Kansas cases relating to the subject.

In the case of *Denny et al. v. Faulkner, as Administratrix*, 22 Kan. 75, a bill of sale was executed in Illinois upon personal property situated in Nebraska, and the court held that the bill of sale was valid as between the parties, although intended only as security for advances, and although the bill of sale was neither filed nor recorded in Illinois or Nebraska, and although possession of the property was not delivered; that the administratrix of the vendor in such a bill of sale had no greater rights in said property than did her intestate and could make no other defenses than he had against this bill of sale; also, that where a person died domiciled in Nebraska leaving personal property in Kansas and an administration was duly taken out at the place of his domicile in Nebraska and the administratrix so appointed took peaceable possession of the personal property in Kansas and there was no opposing administration of this estate and no local creditors, the courts of this state would *ex comitate* recognize the possession of the administratrix as rightful and protect it as fully as though she had taken out letters of administration in this state; also, that where a sheriff in Nebraska, with process issued by a Nebraska court, came into this state and levied upon personal property within the limits of this state, such levy was void and conferred no right of possession or title upon the sheriff, but where the sheriff with such process levied upon the property within the limits of his own jurisdiction he established his title and right of possession, which would be recognized and protected in the courts of this state, although while holding possession of such property so levied upon he temporarily moved the property into this state and while the property was in this state it was seized upon process issued out of a court in Kansas.

In the case of *Moore, as Administratrix, v. Jordan et al.*, 36 Kan. 271, it appeared that one Moore lived in Illinois, but died intestate in Colorado while there temporarily and had with him at the time of his death certain notes given by parties who lived in Kansas, which notes were secured by a mortgage upon Kansas land. Letters of administration were taken out in Colorado by the widow, and she, as administratrix, took possession of the notes and mortgage; and letters of administration were granted also to a son of the deceased in Illinois, but the notes and mortgage did not come into possession of the administrator appointed in Illinois. No administration was ever taken out in Kansas. The administratrix appointed in Colorado brought an action in Kan-

sas to recover upon the notes and to foreclose the mortgage. The defendants, among other things, claimed that the notes and mortgage were not assets in the hands of the plaintiff and denied her right to maintain the action. The court held that the title to the debt evidenced by the notes and mortgage could not vest in the plaintiff and that she could not maintain the action; that the letters of administration conferred no authority beyond the limits of the state granting them and that no state is required, under any rule, to surrender the effects or debts due to an intestate domiciled elsewhere to the detriment of its own citizens. The court calls attention to the fact that there was a statute in Kansas permitting a foreign administratrix to sue an estate, and that under our statute an administrator of this estate may be appointed in Kansas who may maintain an action to recover any debts due to the estate and persons resident in Kansas, and after the local creditors are paid the surplus, if any, should be paid to the administrator in Illinois. But the court said that in no view of the case could the plaintiff, under her appointment, have any authority to maintain the action.

In the case of *Higgins et al. v. Reed, as Administrator, et al.*, 48 Kan. 272, the court held that where an executrix is appointed in another state on the estate of a person dying out of the state, and no executor, executrix or administrator thereon is appointed in this state, a foreign executor may file an authenticated copy of her appointment in the probate court of any county in this state in which there is real estate of the deceased, and then may be authorized, under an order of the court, to sell the real estate for the payment of debts of the deceased and the charges of administration, in the manner and upon the terms and conditions prescribed by the statute in Kansas.

In the case of *Calloway v. Cooley et al.*, 50 Kan. 743, the court held that the statute which authorized foreign executors and administrators with the will annexed to convey real estate in pursuance of the power contained in the will, was constitutional and valid, and that the act was applicable to all wills which were executed and proved in another state or territory prior to its passage as well as those executed and proved after its passage. The court held, also, that where a will executed, proved and admitted to probate in another state was presented for record in the probate court of a county in this state in which land belonging to the estate was situated, and such court, upon the evidence submitted, finds and adjudges that the authentication of the copy presented for record is sufficient, its adjudication thereon cannot be collaterally attacked.

In the case of *Manley, Executor, v. Mayer*, 68 Kan. 377, one George Manley, a resident of New Jersey, died owning real estate in Kansas, and jurisdiction was obtained by attaching this property as that of the executor, also a non-resident. The statute provided that an executor or administrator duly appointed in any other state or county can sue or be sued in any court in this state in his capacity of executor or administrator in like manner and under like restrictions as a nonresident may sue or be sued. It was claimed that this statute is only intended to authorize a nonresident executor to be sued as a resident executor might be, and that a creditor of the estate could only collect by sharing in due proportion with other creditors in the proceeds of an orderly administration under the direction of the probate court, and not by seizing and selling specific property; that the title to the real estate was in the devisees under the will, not in the executor, and that it could not be levied on under

process against the latter. It was urged, also, that under the construction given it the statute conflicted with section 17 of the bill of rights, with section 2 of article 4 of the federal constitution, and with the fourteenth amendment to it, in that it made a distinction between citizens of Kansas and those of other states, denying to the latter the privileges and immunities of the former and depriving them of property without due process of law. The claim was made, also, that the statute discriminated against a nonresident executor by permitting suit to be brought against him in the district court, where a resident executor could only be sued in the probate court; in permitting specific assets under his control to be segregated for the benefit of particular creditors, whereas resident executors were allowed to apportion the proceeds of the property equitably among the creditors; also, in permitting him to be sued in attachment upon no other ground than that he was a nonresident. The court, however, upheld the statute, holding that it was not in conflict with the provisions of the state or federal constitution, and upheld the attachment.

In the case of *Allbright et al v. Bangs et al.*, 72 Kan. 435, it appeared that one Britton died testate in Illinois. His will was duly probated in Illinois. Executors were named and qualified. These executors represented to the probate court of Cowley county at the time of his death that the testator owned certain real and personal property in that county and asked that the will be there admitted to probate, and an order was made admitting the will to record upon the strength of it having been approved by the Illinois court, and letters testamentary were granted the executors, who qualified as required by the Kansas statute and entered upon the performance of their duties, and they sold certain real estate under their appointment. About fifteen years afterward one Peek made a showing to the probate court of Cowley county that the Illinois court had appointed him administrator *de bonis non* with the will annexed on account of one of the executors having died and the others having refused to act, and he asked the probate court of Cowley county to make an order recognizing him as such administrator with authority to sell real estate, and an order was made, accordingly, recognizing such administrator, and he, as administrator, then presented an application to the Cowley county probate court representing an indebtedness against the estate, reciting the order of sale made fifteen years before, and asking that appraisers be appointed to sell enough real estate to satisfy the debt. Appraisers were named, appraisements were had, a tract of land was sold, the sale was confirmed, a deed was ordered and executed, and the purchaser went into possession. Thereafter several conveyances of the property were made, the last grantees being Stafford and Allbright. Afterward an action was brought by the Britton devisees against Stafford and Allbright for recovery of the possession of the land under the claim that the administrator's sale was absolutely void, and they recovered a judgment. The court held that the administrator Peek gave no notice of the hearing of the petition, and the sale was void. The court called attention to the fact that when a will was duly approved in another state, and an authenticated copy of the will in probate produced in the probate court of any county in this state in which there is property upon which the will may operate, the procedure is to admit it to record; and that there was another method, by which, when an executor or administrator was appointed in any other state or territory and no executor or administrator was appointed in this state, the foreign

executor or administrator can file an authenticated copy of his or her appointment in the probate court of any county in which there is real estate, after which he could be authorized to sell real estate for the payment of debts, and so forth. The court held that the administrator should have been appointed in Kansas, and given notice, and the notice given by the executors fifteen years before did not avail him; that he did not succeed them in the capacity in which they had acted in giving the notice and obtaining the order of sale, and that he was not their successor with respect to their appointment and qualification in Kansas, and that the notice which the executors gave and the order they procured from the Kansas court were solely in virtue of their appointment in Kansas, and although they chanced to be the same persons to whom letters testamentary had already been issued in Illinois it does not follow that the person appointed to succeed them there acquired the authority to complete the acts begun in their capacity as Kansas appointees. The court held the administrator's deed void and constituted no defense to the action of ejectment brought by the owners of the land.

In the case of *Thomas et al. v. Williams, as Executor, etc.*, 80 Kan. 633, it appears that one Jones, a resident of New York, died owning land in Kansas which he devised to Jones and Thomas. His will was probated in New York, and one Williams qualified as executor. The devisees conveyed the land by warranty deed, and afterward the executor applied to the probate court of the county in which it was situated for an order to sell it for the payment of debts and charges of administration, under the statute. The petition was granted over the objection of the devisees, and Price, who bought the land, appealed to the district court, where the decision was affirmed, and the case was taken to the supreme court, where the appellants contended, first, that the proceedings for the sale of the real estate was not maintainable, being brought too late; second, that the only evidence introduced to prove the indebtedness against the estate was an order of the New York surrogate court allowing it, and was inadmissible against the devisees; and, third, that Price was an innocent purchaser for value. The court held the action not brought too late, and that the order of the foreign court allowing the claim was properly admitted in evidence, and that Price, the purchaser of the land, stood upon no better footing than the devisees, because he knew that their grantors acquired title through the will of William Jones, who was presumed to know that under the law the property might be charged with the payment of indebtedness of Jones owing to a creditor who had not lost his remedy by inaction, and that the purchaser was bound at least to inquire whether a settlement of the estate had been had.

In the case of *Parnell, as Executor and Administrator, v. Thompson et al.*, 81 Kan. 119, it appeared that a resident of England left two separate and distinct wills, one being called the English will, the other the American will. The American will contained a declaration relating solely and exclusively to the testator's property in the United States, not elsewhere. The English will disposed of all his property in that country. The American will was never probated in England. At the time of marriage the testator owned a large amount of real and personal property in Kiowa county, Kansas. The American will was brought to Kansas and probated in the probate court of the county where the real estate and personal property belonging to the deceased was situated.

The will was executed and attested in accordance with the laws of Kansas and disposed of the property situated here in a form not repugnant to the laws or policy of this state. The court held that the probate court had jurisdiction to probate the original will; further, that where a testator executed two separate and distinct wills, one relating solely to property at his domicile, and the other relating solely to property situated in a foreign state or country, both the wills are valid if executed, attested and approved in accordance with the laws of the place where the property disposed of was situated.

In the case of *McLain, as Executrix, v. Parker*, 88 Kan. 717, the court held that upon the death of the plaintiff, in an action upon a judgment rendered in another state, both parties being residents of Kansas, a revivor was properly had in the name of the executor appointed in this state notwithstanding an administrator has been appointed in the state where the judgment was rendered.

In the case of *Metrakos, Special Administrator, v. The Kansas City, Mexico & Orient Railway Company*, 91 Kan. 342, which was an action for death by wrongful act, it appears that a resident of Kansas was killed in Sedgwick county, and that no administration was taken out in Kansas, but that the plaintiff was appointed special administrator by a Nebraska court, where the deceased had left certain property. Afterward the plaintiff brought a suit in the district court to recover, for the next of kin, damages for the death. The court held that the plaintiff could not maintain the action, and stated that they could find no authority or reason for holding that either a special or general administrator of another state could demand judicial recognition to recover for the death of one whose residence and death was in Kansas.

In the case of *Pickens et al. v. Campbell, etc.*, 98 Kan. 518, a resident of Kansas died intestate and the widow was appointed administratrix by a California court. One Campbell was appointed administrator in Kansas and filed an inventory showing over twenty thousand dollars of personal property in his hands, and paid one thousand dollars to each of the collateral heirs and received from them writings releasing all claims against the estate in favor of the widow. Afterward two of the heirs brought an action against the administrator and his bondsmen to have the settlement set aside for fraud. The court held the action was maintainable and stated that the statute contemplated that the net proceeds of the property of a nonresident intestate administered in this state shall, in accordance with the usual practice, be paid over to the foreign administrator, and that while the heirs may have had no absolute right to a distribution at the hands of any one except the domiciliary administrator, the funds in the hands of the ancillary administrator were subject to the control of the court and might, in some circumstances, have been ordered paid directly to the final beneficiaries.

In the case of *Ames, as Administratrix, etc., v. Citizens National Bank et al.*, 105 Kan. 83, a resident of New Mexico died there intestate, the owner of certificates of deposit issued by a bank in Kansas, and the administrator was duly appointed by the probate court in New Mexico and brought suit in this state against the bank to recover the indebtedness represented by the certificates. An administrator who had been appointed by the probate court in this state intervened and claimed the right to recover the debt. The court held that the administration here was ancillary to the principal administration at the domicile of the deceased, and that it was error to render judgment in favor of the

ancillary administrator. The court held that the plaintiff, who was appointed administrator at the domicile of the deceased, and who had possession of the certificates, held the title superior to that of the administrator in Kansas, who was only the ancillary administrator and who never had in his possession the certificates; and the court held, further, that if the ancillary administrator had secured possession of the evidence of debt and had brought suit and recovered the amount due thereon, it would have been his duty, after satisfying any indebtedness against the estate owing to residents of Kansas, to remit the balance to the principal administrator.

In the case of *Loveland, as Administratrix, v. Hemphill, as Ancillary Administrator*, 122 Kan. 577, an action to subject a half-section of Leavenworth county to the payment of claims of Missouri judgment creditors of the estate of John T. Loveland of Pettis county, Missouri, who died seized of real and personal property in both Kansas and Missouri, an administration of the Loveland estate was begun in Missouri, and an ancillary administration was had in Kansas. The administration in Kansas was wound up and the ancillary estate closed and the Kansas administrator discharged before the claims of certain creditors presented in Missouri against Loveland's estate had been adjudicated. The ancillary administrator, duly qualified, paid all bills exhibited and allowed in the Leavenworth county probate court and closed and settled the ancillary administration of the estate in some two years and two months and, by order of the probate court of Leavenworth county, remitted the net balance of funds in his hands to the Missouri executor and received his final discharge. The court held that the action could not be maintained against a defendant purchaser for value who held a conveyance by general warranty deed from the devisee and who bought the property in Kansas relying on the record title, which included the record of the probated will and of the closed Kansas administration of the testator's estate, and who was likewise without notice or knowledge of any existence of any adverse claim or interest affecting the title, and that a warranty deed of the Kansas land devised by the testator, executed by his devisee under the testator's will, which was duly probated in Kansas, after the settlement of the testator's Kansas estate and the final discharge of the Kansas administrator, conveyed to the grantee a good title against claimants whose rights were barred under the Kansas statute and concerning whose rights the grantee had neither actual nor constructive notice.

In the case of *Quinton v. Kendall*, 122 Kan. 814, the court held that a judgment of a Michigan probate court having jurisdiction of the parties and the subject matter construing a will and administering an estate in accordance with the law of Michigan, was not open to collateral attack, and when such judgment was neither reversed nor modified by appeal it was *res judicata*.

Administration on Estate of Person Living—Presumption of Death

By CHESTER STEVENS

This article will review, very briefly, two decisions by the supreme court of the United States in reference to the right of a state to enact legislation providing for the administration of the estates of persons who have disappeared from their domicile and have remained absent for more than seven years, whereby a presumption of their death arises, as well as where the courts of the state charged with the administration of the estates of deceased persons undertake, in the absence of such state legislation, to administer on such estates.

Kansas has no statute relating to the subject, and evidently no effort has been made or attention given to the necessity for such legislation, if practicable, or to the question of the jurisdiction of the probate courts of Kansas to administer the estates of such persons.

Section 8, article 3, of the Kansas constitution provides:

"There shall be a probate court in each county, which shall be a court of record, and have such probate jurisdiction and care of estates of deceased persons, minors, and persons of unsound minds, as may be prescribed by law"

Under the foregoing provision of the constitution the legislature has provided, as to the jurisdiction of probate courts, as follows:

"Courts of record; jurisdiction. The probate courts shall be courts of record, and, within their respective counties, shall have original jurisdiction: *First*, to take the proof of last wills and testaments, and admit them to probate, and to admit to record authenticated copies of last wills and testaments executed, proved and admitted to probate in the courts of any other state, territory or country; *second*, to grant and revoke letters testamentary and of administration; *third*, to direct and control the official acts of executors and administrators, settle their accounts and order the distribution of estates; *fourth*, to appoint and remove guardians for minors, persons of unsound mind, and habitual drunkards, and make all necessary orders relating to their estates, to direct and control their official acts, and to settle their accounts; *fifth*, to bind apprentices, and exercise such control and make such orders respecting them and their masters as the law prescribes; *sixth*, to hear and determine cases of *habeas corpus*; *seventh*, to have and exercise the jurisdiction and authority provided by law, respecting executors and administrators, and the settlement of the estates of deceased persons." (R. S. 20-1101.)

With reference to the distribution of the property of a deceased person dying intestate and his granting of letters of administration, the legislature has provided as follows:

"Property distributed according to article. After allowing to the widow and children of any deceased intestate of this state the homestead provided in the next section of this act, and the personal property and other allowances provided by law respecting executors and administrators and the settlement of the estates of deceased persons, the remainder of the real estate and personal effects of the intestate, not necessary for the payment of debts, shall be distributed as hereinafter provided." (R. S. 22-101.)

"Grant of letters testamentary or of administration. That upon the decease of any inhabitant of this state, letters testamentary or letters of administration on his estate shall be granted by the probate court of the county in which the deceased was an inhabitant or resident at the time of his death; and when any

person shall die intestate in any other state or country, leaving any estate to be administered within this state, administration thereof shall be granted by the probate court of any county in which there is any estate to be administered; and the administration which shall be first lawfully granted in the last-mentioned case shall extend to all the estate of the deceased within this state, and shall exclude the jurisdiction of the probate court in every other county." (R. S. 22-301.)

It is evident from the simple and direct language of the constitutional provision, as well as the statutes enacted pursuant thereto, that the jurisdiction of the probate court with reference to estates of deceased persons is confined to those estates whose owners have died. In other words, there is no provision for the exercise of the jurisdiction of the probate court in the absence of proof of actual death.

The question of the jurisdiction of the state court charged with the power to administer on the estates of deceased persons in the absence of an express statute covering the proposition, came directly before the supreme court of the United States in the case of *Scott v. McNeal*, (1894) 154 U. S. 34, 38 L. Ed. 896, 14 Sup. Ct. 1108. Paragraphs 2 and 3 of the syllabus only are pertinent to the question, and they are as follows:

"2. The jurisdiction conferred by Code Wash. Terr. Pr. 1299, on probate courts, to grant letters of administration, is limited, in the light of the common law and of other code provisions relating to the subject, to estates of deceased persons. Such a court has no jurisdiction to determine that a living man is dead, and thereupon undertake to dispose of his estate; its decision on the question whether he is living or dead cannot bind or estop him, or deprive him, while alive, of the title or control of his property. Notice to those who, after his death, may be interested in his estate, cannot be notice to him, and neither creditors nor purchasers can acquire any rights in his property through the action of a probate court, or of an administrator appointed by such court, dealing, without notice to him, with his whole estate as if he were dead. 31 Pac. 837, 5 Wash. 309, reversed.

"3. The *prima facie* evidence of the death of a person by presumption from his being absent and not heard of for seven years, on which a probate court may assume him to be dead, and appoint an administrator of his estate, may be overthrown by proof, under proper pleadings, even in a collateral suit, that he was alive at the time of the appointment of the administrator. 31 Pac. 873, 5 Wash. 309, reversed."

The facts disclosed in the above case were that Moses H. Scott commenced an action against John McNeal *et al.*, on January 14, 1892, in the superior court of Thurston county, state of Washington, to recover possession of a tract of land. It appeared that Moses H. Scott, the owner of the land, disappeared from his domicile in March, 1881, and remained continuously away without any communication with those with whom he had associated until July, 1891, and it was decided that he was dead. On April 2, 1888, Mary Scott presented to the probate court of Thurston county, Washington, a petition for the appointment of an administrator, alleging the disappearance of Moses H. Scott for more than seven years; careful inquiry by relatives and friends at different times and places relative to his disappearance resulting in no information or trace of his whereabouts, and that the petitioner believed Scott to be dead; that he left real estate in the county and that his only heirs were three minor children of a deceased brother. Notice of the petition was given by posting, in three public places as required by law, and at the time appointed the pro-

bate court heard the evidence and found that he had disappeared more than seven years before, with no tidings in the meantime, and that, under the circumstances shown, it appeared that he was murdered and, therefore, he was dead to all legal intents and purposes, and an administrator was appointed for his estate. The administrator, after giving the usual notice, obtained an order for the sale of his real estate and sold the same at public auction to Samuel C. Ward, who thereafter conveyed to McNeal, who went into and ever since retained the possession thereof and made valuable improvements thereon.

Scott claimed that the probate court proceedings as to his death were absolutely void and that the judgment of the probate court deprived him of his property without due process of law and was contrary to the fourteenth amendment to the constitution of the United States.

The supreme court of the United States in passing upon the validity of the judgment, which had been affirmed by the supreme court of the state of Washington, reviewed the decisions, and said:

"The fundamental question in the case is whether letters of administration upon the estate of a person who is in fact alive have any validity or effect as against him."

That under the law of England and America before the Declaration of Independence and for almost a century afterwards, the absolute nullity of such letters was treated as beyond dispute, and that the nullity of letters of administration granted on the estate of a living person has been directly and distinctly recognized in the courts of many states.

It noted that in the case of *Devlin v. Com.*, 101 Pa. St. 273, the granting of letters of administration upon the estate of a person who had been absent and unheard of for fifteen years and therefore presumed to be dead, but who afterwards appeared to be in fact alive, was absolutely void, and that these letters could be impeached collaterally. That the supreme judicial court of Massachusetts, upon full consideration, had held that the appointment of an administrator of a person who is in fact alive, but who had been absent and unheard of for more than seven years, was void, and payment to an administrator of his estate was no bar to an action by the supposed decedent upon his return.

In the opinion the Civil Code of Louisiana is described wherein provision is made for the custody and care of the property of a person who has disappeared and been unheard of, and giving to such person upon his return the right to recover his whole property or the proceeds thereof and certain revenues thereon depending upon the duration of his absence, and that the object and purpose of the provisions of the Louisiana Code is to take charge of and preserve and protect the property of the absent owner and not for the purpose of depriving him of it because of the assumption that he is dead.

It was further held in the opinion that:

"The estate of a person supposed to be dead is not seized or taken into the custody of the court of probate upon the filing of a petition for administration, but only after and under the order granting that petition; and the adjudication of that court is not upon the question whether he is living or dead, but only upon the question whether and to whom letters of administration shall issue."

It was further held that under the statute of Washington the jurisdiction of the probate court was confined to the probating of wills and the granting of letters testamentary or of administration upon the estates of deceased persons,

and that under such a statute the jurisdiction of the probate court does not attach or take effect before the death of the person, and that all proceedings therein depend upon the fact that a person is dead, "and are null and void if he is alive. Their jurisdiction in this respect being limited to the estates of deceased persons, they have no jurisdiction whatever to administer or dispose of the estates of living persons of full age and sound mind, or to determine that a living man is dead, and thereupon undertake to dispose of his estate."

"A court of probate must, indeed, inquire into and be satisfied of the fact of the death of the person whose will is sought to be proved or whose estate is sought to be administered, because, without that fact, the court has no jurisdiction over his estate; and not because its decision upon the question, whether he is living or dead, can in any wise bind or estop him, or deprive him, while alive, of the title or control of his property."

"As the jurisdiction to issue letters of administration upon his estate rests upon the fact of his death, so the notice given before issuing such letters assumes that fact, and is addressed not to him, but to those who after his death may be interested in his estate, as next of kin, legatees, creditors or otherwise. Notice to them cannot be notice to him, because all their interests are adverse to his. The whole thing, so far as he is concerned, is *res inter alios acta*."

"Next of kin or legatees have no rights in the estate of a living person. His creditors may, upon proper proceedings and due notice to him, in a court of law or of equity, have specific portions of his property applied in satisfaction of their debts. But neither creditors nor purchasers can acquire any rights in his property through the action of a court of probate or of an administrator appointed by that court, dealing, without any notice to him, with his whole estate as if he were dead."

"The appointment by the probate court of an administrator of the estate of a living person, without notice to him, being without jurisdiction, and wholly void as against him, all acts of the administrator, whether approved by that court or not, are equally void. The receipt of money by the administrator is no discharge of a debt, and a conveyance of property by the administrator passes no title."

In the opinion it was further said:

"No judgment of a court is due process of law if rendered without jurisdiction in the court, or without notice to the party."

Another important case that came before the supreme court of the United States was *Cunnius v. Reading School District*, 198 U. S. 458, 49 L. Ed. 1125, 25 Sup. Ct. 721, 3 Ann. Cas. 1121, involving the validity of the statute of Pennsylvania, as against the fourteenth amendment to the constitution of the United States, which provided for the administration of the estates of absentees, irrespective of the fact of death, in the proper courts of that state. The state law related to the grant of letters of administration upon the estates of persons presumed to be dead, by reason of long absences from their former domicile, and authorized application to the register of wills for letters of administration, requiring notice of the application to be published in a newspaper of the county once each week for four successive weeks, the day of hearing to be at least two weeks after the last publication, and upon that date the court may, if satisfied by proof that the legal presumption of death is sustained, to so decree, and further providing that thereupon a notice should be inserted for two successive weeks in the newspaper of the county, and when practicable in a newspaper published at or near the place beyond the state

where the absentee was last heard from, requiring the absentee, if alive, or any other person for him, to produce in court within twelve weeks from the last insertion of the notice satisfactory evidence of the continuance in life of the absentee. Power was given the court to revoke the letters at any time on proof that the absentee is alive and required security to be given, approved by the court, from those to whom the estate should be distributed, conditioned that if the absentee should be in fact alive a refund, with interest, would be made by the distributees to such absentee.

The Pennsylvania act was upheld on the ground that it did not violate the fourteenth amendment to the constitution for the reasons that it provided for adequate security to the absentee for his property and was based upon adequate notice to vest the court with jurisdiction, and it was held that legislation upon this difficult and important subject is created by necessity for the following reasons: the interest of the person who has disappeared; the duty of the lawmaker to consider the rights of third persons against the absentee; the general interest of society which may require that property be not abandoned without someone representing it and without an owner.

Construing these two interesting decisions by the supreme court of the United States, it seems to be the inevitable conclusion that without such a statute the courts of the respective states vested with jurisdiction over the property of decedents have no jurisdiction because the fact of the actual death of the absentee is not established except by a rebuttable presumption, and that to take charge of the property of an absentee it is essential that there be enacted a law by the legislature meeting the requirements of the fourteenth amendment to the constitution and providing adequate security for indemnity to the absentee upon his return, if in fact alive, for the property so taken.

This legislation has nothing to do with the right of a creditor in a proper proceeding in a court of law or of equity to subject the property of the absentee to the payment of his just debts. Presumably it would be unnecessary to enact any legislation to take care of partition suits. However, upon partition, under the present laws of Kansas, and in view of the decisions of the supreme court of the United States, there would be no place for the safe-keeping of the absentee's share of the proceeds of the sale on partition except, possibly, by leaving it with the clerk of the district court to await the indefinite time when the absentee, if alive, would return and claim it.

No doubt the Bar of Kansas knows of many instances where persons have disappeared and have been unheard of for more than seven years, leaving property with no fixed or definite or sufficient procedure to take possession thereof and preserve and protect it. It is particularly important from the viewpoint of the absentee's real estate, and no doubt if this matter is called to the attention of the legislature, a proper law would be enacted wherein provision could be made for the relatives, business associates or friends of the absentee to protect and preserve the property, and to prevent the sacrifice of the property for taxes, and indemnify the absentee for the property if he returned.

Revised Draft of Probate Law Relating to Guardianship of Minors, Incompetents, and Imprisoned Convicts

By SAMUEL E. BARTLETT

NOTE.—This is an attempt to restate the probate law relating to the guardianship of minors, incompetents, and imprisoned convicts. It contemplates that the proposed code of probate procedure, with proper revision and necessary amendments, will be adopted. Attorneys, probate judges, and others are urged to make criticisms and suggestions for the improvement of this draft.

SECTION 1. This act shall be known as the guardianship act of the state of Kansas.

SEC. 2. All proceedings relating to the guardianship of minors, incompetents, and imprisoned convicts shall be had under and in accordance with the provisions of the code of probate procedure and this act.

SEC. 3. As used in this act, the term "guardian" means any person, association, or corporation (other than a guardian under the uniform veterans' guardianship act) appointed by the probate court to have the care and management of the person, or of the estate, or both, of a minor, incompetent, or imprisoned convict. The term "ward" means any person for whom a guardian as herein defined is acting. The term "resident guardian" means a guardian appointed by a probate court in this state to have the care and management of property in Kansas belonging to a nonresident ward. The term "foreign guardian" means a guardian appointed by a nonresident court for a nonresident ward. The term "incompetent" includes insane, lunatic, idiot, imbecile, distracted person, feeble-minded person, drug habitue, and habitual drunkard. The terms "insane," "lunatic" and "feeble-minded person" include every species of insanity or mental derangement and mean any person, who, by reason of advanced age, improvidence, or mental disability or infirmity, is incapable of taking care of himself or his property or neglects or fails to provide for his family or for other persons for whom he is charged by law to provide. The term "idiot" means a person foolish from birth, or supposed to be naturally without a mind. The term "imbecile" means any person who, not born idiotic, has become so. The term "distracted person" means any person incapable of acting rationally in the ordinary affairs of life or of comprehending the nature and value of property and incapable of transacting or procuring to be transacted ordinary business. The term "drug habitue" means any person who, by reason of the continued use of drugs, is incapable of taking proper care of himself or of his property, or who neglects or fails to provide for his family or for other persons for whom he is charged by law to provide. The term "habitual drunkard" means any person who, by reason of intemperance or habitual drunkenness, is incapable of taking proper care of himself or of his property, or who neglects or fails to provide for his family or for other persons for whom he is charged by law to provide. The term "imprisoned convict" means any person who is imprisoned in the penitentiary under the sentence of any court. The term "state hospital" includes the state hospitals at Topeka, Osawatimie and Larned, the state hospital for epileptics at Parsons, and the state training school at Winfield. Singular number includes plural, and masculine gender includes feminine.

SEC. 4. When it is necessary, the probate court shall appoint a guardian of the person, or of the estate, or of both, of a minor or incompetent, or a guardian of the estate of an imprisoned convict.

SEC. 5. The father and mother are the natural guardians of the persons of their minor children. If either dies, or is incapable of acting, the natural guardianship devolves upon the other.

SEC. 6. The survivor may, by last will, appoint a guardian for any of his children, whether born at the time of making the will or afterward, to continue during the minority of the child, or for a less time; and every such

testamentary guardian shall have the same power and shall perform the same duties with regard to the person and the estate of the ward, as natural guardians, subject to the provisions of the will. If without such will both parents be dead or disqualified to act as guardian, the probate court may appoint one. Whenever a testamentary guardian is appointed, his duties, powers, and liabilities in all other respects shall be governed by the law relating to guardians not appointed by will, except as otherwise specially provided.

SEC. 7. Although the parents are living and of sound mind, yet if the minor has property not derived from either of them, a guardian shall be appointed by the court to manage such property, except as otherwise provided.

SEC. 8. The father or mother, or both, may be appointed the guardian to take charge of the property of their minor child, if deemed by the court suitable for that purpose.

SEC. 9. If the minor be over the age of fourteen years and of sound intellect, he may select his own guardian, subject to the approval of the court; but if the surviving parent, by last will, appoints a guardian for such minor, the person so named shall have preference in appointment over the person selected by such minor.

SEC. 10. Guardians of the persons of minors have the same power and control over them that parents would have, if living.

SEC. 11. If the whole estate of the ward does not exceed five hundred dollars in value, and the ward be a minor, the court may in its discretion, without the appointment of a guardian, or the giving of bond, authorize the deposit thereof in a savings bank, payable to the ward upon his attaining the age of majority; or the court may authorize the payment or delivery thereof to the natural guardian of the minor, or to the person by whom the minor is maintained, or to the minor himself.

SEC. 12. Any appointment of a corporation as guardian shall apply to the estate only and not to the person.

SEC. 13. Any person alleged to be incompetent shall have the right to be present at the trial, to be assisted by counsel, and if no counsel be selected the court shall appoint an attorney to act for him.

SEC. 14. Every guardian, before entering upon the execution of his trust, shall take and subscribe to an oath that he will faithfully and impartially and to the best of his ability discharge the duties of guardian, and shall receive letters of guardianship from a probate court having jurisdiction of the subject matter of the trust. No act or transaction of a guardian shall be valid prior to the issuance of letters of appointment to him.

SEC. 15. Unless otherwise provided by law or by the will making the appointment, every guardian shall, prior to the issuance of his letters, file in the probate court in which the letters are to be issued, a bond with penal sum in such amount as may be fixed by the court, but in no event less than two hundred per centum of the probable value of the personal estate and the annual real estate rentals which will come into his hands as such guardian, if executed by personal sureties, or one hundred twenty-five per centum thereof if executed by corporate surety or sureties: *Provided*, That the penal sum of the guardian for the person only may be the same per centum of the probable expenditures to be made by such guardian for the ward during one year. Such bond shall be in such form as the court shall approve, shall be signed by such sureties as are required by law and approved by the court, and shall be conditioned that the guardian will faithfully and impartially and to the best of his ability discharge the duties devolving upon him as such guardian.

SEC. 16. No bond of a guardian shall be approved unless executed by two or more personal sureties, or one or more corporate sureties. The qualifications of personal and corporate sureties shall be such as are provided by law.

SEC. 17. When the testator in the will appointing the guardian shall have ordered or requested that such bond shall not be given, the bond shall not be required, unless from a change in the situation or circumstances of the guard-

ian, or for other sufficient cause, the court shall deem it proper to require such bond; but no provision in an instrument authorizing a guardian therein named to serve without bond, shall be construed to relieve a successor guardian from the necessity of giving bond, unless the instrument clearly evidences such intention.

NOTE.—There should be some uniform provisions relating to executors, administrators, guardians, and trustees, stating the law relative to the qualifications of sureties on their bonds, the requirements for new or additional bonds, successor bonds, deposit of funds in lieu of bonds, release of sureties, and depositories of trust funds.

SEC. 18. Every guardian of the person and estate, or of the estate only, of a ward shall, within thirty days from the time of his appointment and qualification as such, cause notice of his appointment to be published for three consecutive weeks in some newspaper of the county authorized by law to publish legal notices.

SEC. 19. When a guardian is appointed to take charge of the estate of a ward, his duties are as follows: 1. To cause forthwith an appraisalment to be made, by three commissioners appointed by the court, of the real and personal estate of the ward and of the yearly rent of the real estate. 2. Within sixty days after his appointment to make and file a full inventory, verified by oath, of the real and personal estate of his ward, with its value and the value of the yearly rent of the real estate. Failing to do so for thirty days after he has been notified of the expiration of the time by the probate court, the court shall remove him and appoint a successor. 3. To manage the estate for the best interest of the ward. 4. To pay all just debts due from such ward out of the estate in his hands, and collect all debts due the ward; in case of doubtful debts, to compound them, to appear for and defend, or cause to be defended, all suits against his ward. 5. To settle and adjust, when necessary or desirable, the assets which he may receive, in kind, from an executor or administrator, as may be most advantageous to his ward; but before such settlement and adjustment shall be valid and binding, it must be approved by the court. 6. With like approval, to hold the assets as received from the executor or administrator, or what may be received in the settlement and adjustment of such assets. 7. To obey all orders and judgments of the proper courts touching the guardianship. 8. When for the best interests of the ward, to bring suit in his behalf. 9. Such other duties as are provided by law.

SEC. 20. When a guardian is appointed to have the custody, maintenance, and (if the ward be a minor) to have charge of the education of a ward, his duties are: 1. To protect and control the person of his ward. 2. To provide a suitable maintenance for his ward, when necessary, which must be paid out of the estate of such ward in the hands of the guardian thereof, on the order of the guardian of the person of such ward. 3. When the ward is a minor and has no father or mother, or having a father or mother such parent is unable or fails to maintain and educate the ward, the guardian so appointed shall provide for him such maintenance and education as the amount of his estate justifies, which shall be paid out of his estate in the hands of the guardian thereof, on order of the guardian of the person of such ward. 4. To obey all the orders and judgments of the court touching the guardianship. 5. Such other duties as are provided by law. However, no part of the ward's estate shall be used for the support, maintenance, or education of a ward unless ordered and approved by the court.

SEC. 21. When a person is appointed to have the custody of the person and to take charge of the estate of a ward, his duties shall be those required by law of a guardian of the estate and of those required by law of a guardian of the person.

SEC. 22. A guardian may sue in the name of his ward, describing himself as a guardian of the ward in whose name he sues. When his guardianship ceases by his death, removal, or otherwise, or by the death of his ward, actions or

proceedings then pending shall not abate, if the right survives. His successor as guardian, or the executor or administrator of the ward's estate or the ward himself, if the guardianship has terminated other than by the ward's death, as the case may require, shall be substituted as party to the suit or other proceedings, as is provided by law for making an executor or administrator party to a suit or proceeding of a like kind, where the plaintiff dies during its pendency.

Sec. 23. When personal injury is caused to a ward by wrongful act, neglect, or default, such as would entitle the ward to maintain an action and recover damages therefor, the guardian of the estate of such ward is authorized to adjust and settle said claim with the advice, consent, and approval of the probate court, and in such settlement, if the ward be a minor, his parent or parents may waive all claim for damages on account of loss of service of such minor, and such claim may be included in such settlement. The spouse, if any, of the ward may likewise waive all claim for damages, and such claim may be included in such settlement.

Sec. 24. The guardian of the person and estate, or estate only, when for the best interest of the ward, may sell all or any part of the personal estate of the ward.

Sec. 25. If the estate of a ward is insolvent, or will probably be insolvent, it shall be settled in like manner, and like proceedings may be had as are required for the settlement of the insolvent estate of a deceased person.

Sec. 26. A guardian, whether appointed by a court in this state or elsewhere, shall have authority, by order of the court and with its approval, to complete any real contract of his ward, or any authorized contract of a guardian who has died or been removed, or to agree to its alteration or cancellation with the consent of the other party. If at the hearing the court is satisfied that it is to the best interests of the ward or his estate, it may order the guardian to complete said contract or to agree to its alteration or cancellation, and to execute and deliver such deeds or other instruments for and on behalf of his ward to the purchaser as are required to make the order of the court effective. Before making such order the court shall cause to be secured to or for the benefit of the estate of the ward its just part of the consideration of the contract. Such deeds or other instruments as are executed and delivered pursuant to such order shall recite the order and be as binding as if made by the ward prior to his disability.

Sec. 27. A guardian having funds belonging to the trust which are to be invested may invest them in the following: 1. Bonds or other interest-bearing obligations of the United States or of the state of Kansas. 2. Bonds or other interest-bearing obligations of any county, city, school district, or other legally constituted political taxing unit within the state of Kansas, provided such county, city, school district or other taxing unit has never defaulted in the payment of the principal or interest on any of its bonds or other interest-bearing obligations. 3. Bonds or other interest-bearing obligations of any other state which has never defaulted in the payment of principal or interest on any of its bonds or other interest-bearing obligations. 4. Notes or bonds secured by first mortgage on real estate of at least double the value of the total amount secured by such mortgage, provided such notes or bonds, if they comprise a part only of the obligations secured by such mortgage, belong to the highest and most preferred class of obligations secured by such mortgage, and have equal priority with all other obligations in the same class so secured. The buildings on the mortgaged property, if any, must, by the terms of the mortgage, be insured in an amount equal to their full insurable value against loss by fire, the proceeds of any insurance policies in the event of loss to be applied first for the benefit of the owners of the notes and bonds of the class in which the guardian has invested. On failure of the mortgagor to keep the premises insured as herein required, the mortgagee shall insure them and the expense of such insurance shall be repaid by the mortgagor to the mortgagee and be a lien on the property concurrent with the mortgage. 5. With

the approval of the probate court, in productive real estate located within the state of Kansas, provided neither the guardian nor any member of his family has any interest in such real estate or in the proceeds of the purchase price paid therefor. The title to any real estate so purchased must be taken in the name of the ward. 6. In such other securities or property as the court having control of the administration of the trust approves.

SEC. 28. A guardian may retain, until maturity, any security or investment which was a part of the trust estate as received by him, even though such security or investment is not of the class permitted to guardians under the law, unless the circumstances are such as to require the guardian to dispose of such security or investment in the performance of his duties according to law.

SEC. 29. A guardian entitled to a distributive share of the assets of an estate or trust shall have the same right as other beneficiaries to accept or demand distribution in kind, and may retain any security or investment so distributed to him as though it were a part of the original estate received by him.

SEC. 30. A guardian of the person and estate, or of the estate only, without application to the court, may lease the possession or use of any real estate of his ward for a term not exceeding three years, provided such term, if the ward be a minor, does not extend beyond the minority. If the lease extends beyond the death of the ward, or beyond the removal of the disability of a ward other than a minor, such lease shall determine on such death or removal of disability, unless confirmed by the ward or his legal representative. In the event of such determination, the tenant shall have a lien on the premises for any sum expended by him in pursuance of the lease in making improvements, and for which compensation was not paid in rent or otherwise.

SEC. 31. When it is to the best interest of the ward a guardian shall have authority, by order of the court and with its approval, to do the following: 1. To survey, plat, and lay out in town lots any real estate of which the ward is seized. 2. To borrow money and mortgage any real estate, which may be subject to sale by the guardian. 3. To use the moneys and personal estate of the ward in improving the ward's real estate.

SEC. 32. When it is sought to have real estate laid out in town lots and the court has authorized the survey and platting thereof, on subsequent return of such survey and plat, the court, if it approves such survey and plat, shall authorize the guardian, on behalf of his ward, to sign and acknowledge the plat in that behalf for record.

SEC. 33. Before the court makes an order authorizing a guardian to mortgage real estate for the purpose of borrowing money to make repairs or improvements on real estate, it shall appoint three judicious and disinterested commissioners whose duty it shall be fully to investigate the question as to the necessity for and the advisability of making such repairs or improvements, and their probable cost, and they shall make their report to the court.

SEC. 34. If on the final hearing it appears to be for the best interests of the ward that authority to mortgage be granted, the court shall fix the amount necessary to be borrowed, direct what real estate or interest therein shall be encumbered by mortgage to secure the debt, and issue an order to such guardian directing him to ascertain and report to the court the rate of interest and time for which he can borrow such amount.

SEC. 35. If the report of the guardian and the terms proposed be satisfactory to the court and accepted and confirmed, the guardian, as such, shall be ordered to execute a note or notes for such amount, and a mortgage on the real estate or interest therein so designated, which shall be a valid lien thereon. The guardian in no way shall be personally liable for the payment of the sum so borrowed or any part of it, but such real estate solely shall be held and bound therefor. The court shall direct the distribution of the fund, and the guardian shall report to the court for its approval the execution of such notes and mortgages and his distribution of the fund.

SEC. 36. The amount and money and personal estate of the ward expended in making any improvements on the ward's real estate shall be fully and specifically reported under oath by the guardian to the court within sixty days after the improvement is completed. In case of the ward's death before the removal of the disability, if there are heirs or devisees who inherit real estate only from him, then such money and personal estate so expended, shall descend and pass the same as his other personal estate, and may be a charge and lien on the premises so improved in favor of the heirs and legatees who inherit the personal estate.

SEC. 37. Whenever it is necessary for the education, support, or the payment of the just debts of the ward, or for the discharge of liens on his real estate, or wherever the real estate of the ward is suffering unavoidable waste, or a better investment of its value can be made, or whenever a sale of the real estate will be for the benefit of the ward or his children, if any, the guardian of the person and estate, or of the estate only, of a ward shall have authority, by order of the court and with its approval, to do the following (except as otherwise provided): 1. To sell any real estate of the ward or any interest therein of which the ward is seized, including minerals and the right to mine them. 2. To lease the possession and use of the real estate of his ward or any part thereof for a term of years, renewable or otherwise, or by perpetual lease, with or without the privilege of purchase, and to lease, on such terms and for such time as the court approves, any real estate belonging to the ward for mining purposes and for the purpose of drilling, mining, or excavating for and removing any mineral substance or substances therefrom.

SEC. 38. A guardian shall not have authority to sell, lease, or mortgage the following: 1. Any real estate in contravention of the terms of any will. 2. An equitable estate in real estate placed by deed of trust or other instrument beyond the power of the ward to do so. 3. The homestead of the ward without the consent of the spouse, if any, of the ward. To be effective, such consent must be in writing, signed by the spouse, and filed with the court at the time of the filing of the application to sell, lease, or mortgage, or prior thereto; and no guardian's deed or other instrument executed by virtue of any order shall be valid unless such spouse shall join in the deed or other instrument as one of the grantors therein.

SEC. 39. In proceedings to lease real estate belonging to the ward, the commissioners shall appraise the value of the real estate, the value of the annual rental upon the terms and conditions of the proposed lease, and if said lease be for the mining or removal of mineral or other substances, they shall report their opinion as to the probability of the real estate containing such substances, the amount thereof, and the terms on which it would be advantageous to the ward to lease for mining or removing such mineral or other substances. In their report they shall state whether in their opinion the proposed lease will be for the best interests of the ward, or his estate, and they may suggest any change in the terms or conditions proposed in the application.

SEC. 40. On report of the commissioners the court shall determine whether a lease shall be executed and the terms and conditions of any lease to be executed. If the lease be for the mining or removal of mineral or other substances and the guardian is unable to lease the real estate on the terms and conditions ordered, he may report such fact to the court, and it may change the terms of leasing, but not below the customary royalty in the vicinity of such real estate.

SEC. 41. If an appraisal of such real estate is contained in the inventory, the court may order a sale in accordance therewith; or it may order a new appraisal. If a new appraisal is not ordered, the value set forth in the inventory shall be the appraised value of the real estate. If the court orders a new appraisal the value returned shall be the appraised value of the real estate.

SEC. 42. If a new appraisal is ordered, the court shall appoint three judicious and disinterested commissioners to appraise the real estate in whole

and in parcels at its true value in money. Where the real estate lies in two or more counties the court may appoint commissioners in any or all of the counties in which the real estate or a part thereof is situated.

SEC. 43. No real estate shall be sold at private sale for less than the appraised value thereof, nor at public sale for less than two-thirds of the appraised value thereof, except as otherwise specially provided.

SEC. 44. When the actual market value of the real estate to be sold is less than five hundred dollars as determined by the court, it may in its discretion by summary order authorize the sale of the real estate at private sale, on such terms as it deems proper; and in such proceedings the other requirements of this act as to sale proceedings shall be waived.

SEC. 45. If, in private sales, the guardian makes a *bona fide* effort to sell and no sale has been effected; or if, in public sales, the real estate remain unsold for want of bidders when offered pursuant to advertisement, then the court may fix the price for which such real estate may be sold, or it may set aside the appraisement and order a new appraisal. If such new appraisal does not exceed five hundred dollars, and on the first offer thereunder at public sale there are no bids, then the court may, on its own motion or otherwise, order the real estate to be readvertised and sold at public sale to the highest bidder.

SEC. 46. Before any sale, lease, or mortgage of real estate, the guardian may be required by the court, if it deems it necessary, to give an additional bond in such sum as the court shall determine, to secure the further assets arising from the sale, lease, or mortgage of the real estate. In case of sale under the terms of any lease, the guardian may be required to give such additional bond before the confirmation of the sale.

SEC. 47. If the court is satisfied that it is to the best interests of the ward to sell the real estate and that a sale thereof may be authorized, it shall order the real estate described in the application, or so much thereof as the court may deem proper, to be sold at public or private sale, as the court may direct, by the guardian, for cash in hand or upon deferred payments with interest as shall be ordered by the court.

SEC. 48. The court, with the consent of the mortgagee, may authorize the sale of real estate subject to mortgage, but such consent shall release the estate of the ward from the debt secured by such mortgage, should a deficit later appear.

SEC. 49. The order of sale shall describe the real estate to be sold, and shall prescribe the terms and conditions of the sale and payment of the purchase money, either in whole or in part, for cash in hand or on deferred payments.

SEC. 50. In all public sales of real estate the guardian shall give notice containing a particular description of the real estate to be sold, and stating the time, place, and terms of sale, by advertising the same in the manner provided by law for the sale of real estate upon execution.

SEC. 51. The guardian shall make return of his proceedings under the order of sale, stating that he did not directly or indirectly purchase such real estate, or any part thereof, or any interest therein, and that he is not directly or indirectly interested in the property sold, except as stated in the report.

SEC. 52. The court shall examine such return, and if it be satisfied that the sale has been in all respects legally made, it shall confirm the same and order the guardian to execute and deliver a deed to the purchaser. The deed shall refer to the order of sale and the court by which it was made, and shall convey to the purchaser all the right, title, and interest of the ward in the premises sold.

SEC. 53. Such order shall require that before delivery of such deed the deferred installments, if any, of the purchase money be secured by mortgage on the real estate sold, and mortgage note or notes bearing interest at such rate as the court may prescribe. But if, after the sale is made and before delivery of such deed, the purchaser offers to pay the full amount of the purchase

money in cash, the court may order that it be accepted, if for the best interest of the estate or the ward, and direct its distribution.

SEC. 54. The court in such order may also direct the sale, without recourse, of any or all of the notes taken on deferred payments, if for the best interest of the estate or the ward, at not less than their face value with accrued interest, and direct the distribution of the proceeds.

SEC. 55. The money arising from the sale of the real estate shall be applied and distributed as provided by law and in the manner and upon such terms as shall be approved by the court.

SEC. 56. The court may in its discretion allow a real-estate commission, but such allowance shall be passed upon by the court prior to the sale and found to be reasonable.

SEC. 57. The court shall have authority to allow reasonable payment for certificate or abstract of title or policy of title insurance in connection with the sale of any real estate or the mortgage thereof.

SEC. 58. All commissioners appointed by the court shall be under the direction thereof; they shall take and subscribe to an oath that they will faithfully and impartially and to the best of their ability discharge their duties as commissioners, and they shall make their report in writing under oath.

SEC. 59. When a person appointed by the court as a commissioner fails to discharge his duties, the court, on its own motion or otherwise, may appoint another.

SEC. 60. Commissioners shall be paid for the services performed by them such compensation as the court shall find reasonable and proper.

SEC. 61. When compensation is not otherwise fixed by law, the court shall make such allowance to guardians for their services and expenses in executing their trust as it deems reasonable and proper.

SEC. 62. No guardian shall at any time make any personal use of the funds or property belonging to the trust, and for any violation of this provision he shall be liable, and also his bond, in an action for any loss occasioned by such use and for such additional amount by way of penalty not exceeding the amount of the loss occasioned by such use as may be fixed by the court hearing such cause. Such amounts shall be payable for the benefit of the ward or his estate.

SEC. 63. Guardians shall not buy from or sell to themselves or have any dealings with the corpus of the estate.

SEC. 64. If the whole estate of a ward or of several wards jointly, under the same guardianship, does not exceed five hundred dollars in value, the guardian shall only be required to render account upon the termination of his guardianship, or upon the order of the court made on its own motion or otherwise for good cause shown.

SEC. 65. The probate court at any time may accept the resignation of any guardian, upon his proper accounting, if such guardian was appointed by, or is under the control of, or accountable to such court. The court may remove any such guardian for habitual drunkenness, neglect of duty, incompetency, fraudulent conduct, removal from the state, because the interest of the trust demands it, or for any other cause authorized by law.

SEC. 66. If a sole guardian dies, is dissolved, declines to accept, resigns, is removed, or becomes incapacitated or otherwise unable to act, prior to the termination of the trust, the court shall require a final account of all dealings of such trust to be filed forthwith by such guardian if a living person and able to act; or if such guardian be a living person but unable to act, by his guardian, if any, or if there be no guardian, by some other suitable person in his behalf, appointed or approved by the court; or if such guardian be a deceased person, by his executor or administrator; or if such guardian be a dissolved corporation, by such person or persons as may be charged by law with winding up the affairs of such corporation. Thereupon the probate court shall cause such proceedings to be had as are provided by law as to other accounts filed by guard-

ians. Whenever such a vacancy occurs and such contingency is not otherwise provided for by law, or by the instrument creating the trust, or whenever such instrument names no guardian whatever, the court shall, either on its own motion or otherwise, appoint and issue letters of appointment as guardian to some competent person or persons who shall qualify according to law and execute the trust to its proper termination. Such vacancy, and the appointment of a successor guardian shall not affect the liability of the former guardian, or his sureties, previously incurred.

SEC. 67. When two or more guardians have been appointed jointly to execute a trust, and one or more of them dies, declines, resigns or is removed, the title shall pass to the surviving or remaining guardian or guardians who shall execute the trust, unless the creating instrument expresses a contrary intention or unless the court otherwise determines. The surviving guardian or guardians shall, within ninety days after the death, resignation or removal of a co-guardian, file in the court a complete account covering all matters to the time of such death, resignation or removal.

SEC. 68. At least once each year, unless otherwise provided by law, every guardian must render an account of the execution of his trust to the probate court of the county in which he was appointed, including in such account an itemized statement of receipts and expenditures verified by vouchers or proof of all investments and of any changes in investments since the filing of his last account. An account shall be rendered by the guardian at any other time or times, on order of the court made upon its own motion or otherwise for good cause shown. At the expiration of his trust, the guardian must fully account for and pay over the trust estate to the proper person or persons. No account of a guardian shall be approved until there are exhibited to the court, for its examination, the security or securities shown in said account as being in the hands of the guardian, or the certificate of the person in possession of such securities if held as collateral, and a pass book or certified bank statement showing as to each depository the fund deposited therein to the credit of the trust.

SEC. 69. The probate court may examine under oath all guardians touching their accounts. If it deems it proper to do so, it may reduce such examination to writing, and require the guardian to sign it. Such examination shall be filed in the case.

SEC. 70. If a guardian neglects or refuses to file an account when due, according to law or when ordered by the court, the court may on its own motion or otherwise issue citation by publication or otherwise to compel the filing of the overdue account. If the guardian fails to file such account within thirty days after he has been notified by the probate court to do so, no allowance shall be made for his services unless the court finds that the delay was reasonable.

SEC. 71. The probate court may hear and determine all matters relative to the manner in which the guardian has executed his trust, and as to the correctness of his accounts, and also require any guardian appointed within such county, on the determination of his trust, or removal, resignation, or on his death his executor or administrator, to render a final account of the manner in which he executed his trust; and such court may hear and determine all matters relating thereto.

SEC. 72. The determination of the court on the settlement of an account shall have the same force and effect as a judgment at law or decree in equity, as the particular case may require, and shall be final as to all persons having notice of the hearing, except: (1) Upon appeal according to law; (2) when an account is settled in the absence of a person adversely interested and without actual notice, it may be opened as provided by law; (3) upon any settlement of an account mistakes or errors in any former account may be corrected with leave of the court upon good cause shown; (4) in case of fraud or collusion; (5) as against rights which are saved by statute to persons under disability.

SEC. 73. When a minor arrives at the age of majority the guardianship thereof shall cease, the accounts of the guardian be settled by the court, and full control of his property delivered to the person entitled thereto.

SEC. 74. The probate court may determine that any person under guardianship for incompetency has been restored to his right mind or to temperate habits and that the necessity for the guardianship no longer exists. Thereupon the guardianship shall cease, the accounts of the guardian be settled by the court, and the full control of his property restored to the person entitled thereto. Such determination shall have the full force and effect of an adjudication by the court that such person is restored to sanity and legal capacity.

SEC. 75. When an imprisoned convict is lawfully discharged from his imprisonment, the guardianship thereof shall cease, the account of the guardian be settled by the court, and full control of his property restored to the person entitled thereto.

SEC. 76. When a ward, for whom a guardian has been appointed in this state, removes to another state or territory, and a guardian of such ward is there appointed, the guardian in this state may be removed and required to settle his account.

SEC. 77. The foreign guardian of any nonresident ward may be appointed guardian of such ward by the probate court of the county having jurisdiction, to sell, or collect, manage, lease, and take care of his property.

SEC. 78. When a nonresident ward has real estate or personal property in this state and no foreign guardian thereof has been appointed in this state, the probate court of the county having jurisdiction may appoint a guardian of such ward, to sell or collect, manage, lease, and take care of his property. Such appointment may be made whether or not the ward has a guardian or other conservator in the state of his residence; and the control and authority of the resident guardian appointed in this state shall be superior as to all property of the ward in this state.

SEC. 79. The appointment of a foreign or resident guardian, first made, shall extend to all the property of the ward in this state and exclude the jurisdiction of the probate court of any other county.

SEC. 80. Such resident or foreign guardian shall qualify in the manner provided by law for guardians of the estate of a ward residing in this state; and when so appointed and qualified shall have and exercise the same rights, powers, and duties as are prescribed by law for other guardians of the estate.

SEC. 81. When a nonresident ward for whom a resident or foreign guardian was appointed by a probate court of this state, becomes a resident of this state, and a guardian has been appointed for him, the court shall remove the resident or foreign guardian previously appointed in this state and require an immediate settlement of his accounts.

SEC. 82. Guardians appointed by nonresident courts for nonresident wards, without further appointment in this state, may bring and maintain actions and enforce the collection of judgments, rendered in such cases in their favor in the manner and to the extent that they could do if appointed under the laws of this state, upon giving security for costs which may accrue therein in the manner other nonresidents are required to do.

SEC. 83. A resident guardian, by order of the court and with its approval, may be authorized or required, for good cause shown or when the purpose of the guardianship has been accomplished, to pay or deliver to a foreign guardian of his ward all or any of the moneys or property in the hands of such resident guardian. At the hearing the court shall make such order as it deems for the best interests of such nonresident ward of his estate.

SEC. 84. When any ward is married and does not have the property in his own right or name, it shall be lawful for the ward's guardian, jointly with the spouse of such ward, to sell, mortgage, or lease, for mining purposes or otherwise, any real estate, and such sale, mortgage, or lease shall be valid when

ordered and approved by the probate court, without the proceedings being had as required by other provisions of this act; and any resident guardian or foreign guardian of any such nonresident ward, who has been duly appointed and qualified in a probate court of this state, is authorized in like manner to sell, mortgage, or lease, for mining purposes or otherwise, any such real estate: *Provided*, That no guardian's deed or other instrument executed by virtue of such order shall be valid unless the spouse of the ward shall join in the deed or other instrument as one of the grantors therein.

SEC. 85. A certified copy of any proceedings relating to guardianship in a probate court may be filed and recorded in the probate court of any other county, and when so filed and recorded shall have the same force and effect in such county as in the county of origin.

SEC. 86. Unless otherwise provided by the instrument creating the trust or inconsistent with the provisions thereof or otherwise provided by law, the probate court shall have jurisdiction over trusts created by deeds of trust, declarations of trust, wills, or otherwise, in favor of persons under disability, and shall have jurisdiction of the accounts in favor of such persons under disability; and the trustees for such persons shall be subject to the provisions of law relating to guardians. The same proceedings may be had by or with reference to such trustees as may be had by or with reference to guardians of wards.

SEC. 87. The expense attending the support, care, and safe-keeping of an incompetent person shall be paid by the guardian out of his estate, or by any person who is bound by law to provide for and support such person, or the same shall be paid out of the county treasury. In case of any appropriation out of the county treasury for such purpose, the amount thereof may be recovered by the county from the estate of such person, or from any person who is bound by law to provide for and support such person.

SEC. 88. In the case of any insane person admitted to a state hospital, either with or without bond, the state may recover a sum of not more than five dollars per week, to be fixed by the state board of administration, as payment of a part of the cost of the maintenance, care, and treatment of such person at such state hospital, and may recover any sum expended in behalf of such person for clothing or funeral expenses, from the estate of such person, unless said estate is needed for the support in whole or in part of the spouse, children, parents, grandchildren, grandparents, brothers, or sisters of such person; or the state may recover such sums for said purposes from any person who is bound by law to provide for and support such person.

SEC. 89. In any event the amount of expense incurred by the state for the treatment and maintenance of any person, as limited in this act, shall be a charge against his estate, in his lifetime and after his death. Such amount shall be collected quarterly, and the state board of administration is authorized to bring suit against the estate of any person failing to make payment as herein required. If judgment is obtained it shall constitute a lien against such part of the estate as may be described in the petition.

SEC. 90. It shall be the duty of the county attorney to coöperate with and assist the state board of administration and the attorney-general in collecting any such money due the state.

SEC. 91. The following relatives shall be bound by law to provide for and support the persons referred to in the three preceding sections of this act: The husband for the wife and the wife for the husband, the parent for his children and the children for their parents.

SEC. 92. Whenever there appears probable cause to believe, in a court of record during the hearing of any person charged with a crime, that the person is incompetent and subject to detention in a state hospital or otherwise, the court shall summarily remand such person to the probate court for examination according to law. If such person be not adjudged incompetent and sub-

ject to such detention, the court shall in like manner remand such person to said court of record for further proceedings therein.

SEC. 93. This act shall not modify the provisions of chapter 353 of the Session Laws of 1901, providing for inquest in lunacy in certain cases, and as to such cases and the commitment of insane persons to state hospitals, that act shall govern. All guardians appointed under section 62 of said act shall have and exercise the same rights, powers, and duties as guardians appointed under this act: *Provided*, Such appointment shall be made by the probate court of the county in which such insane person is a resident.

