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CLAIMS AGAINST THE ESTATE †

I. INTRODUCTION

The purpose of this article is to review some of the fundamentals of probate practice having to do with claims against the estate and to emphasize particular points of interest and controversy in this area of the law. The article is not intended to cover all the phases of probate practice that have to do with "claims." It deals primarily with those situations covered by the following articles of Chapter 30 of the Nebraska Revised Statutes: Article 4, "Inventory and Collection of Assets," Article 6, "Allowance and Payment of Claims," and Article 7, "Contingent Claims."

Nebraska probate practice comprises 93 different systems. The variation arises because there are 93 counties and therefore 93 different county judges. It should be noted that these county judges may be either law judges or lay judges. For the most part, the law judges are good lawyers, especially in probate matters, but a few are now, and some in the future may be, young and inexperienced. The situation with the lay judges is much more variable for the reason that a new lay judge usually enters upon the discharge of his duties in probate matters with no experience whatsoever, either in the law generally or in probate practice in particular. However, after a few years experience, most of these, to the benefit of the Nebraska Bar, have acquired considerable skill and knowledge in the field.

In the more populous counties and in the county courts presided over by law judges, much of the detailed work with which the attorneys are concerned is handled by the judge, his clerk and his staff. The attorneys, either representing the estate or the claimant, traditionally pay little or no attention to these details but rely entirely upon the judge and his assistants. On the other hand, in the smaller counties and in direct ratio to the size of the county and the experience of the lay judge, the attorneys, particularly the attorney for the estate, have a duty to the heirs and the personal representatives to see to it that the judge actually discharges the duties enjoined upon him by statute and by court decision.

† Based upon material presented by Mr. Charles F. Adams, Aurora, Nebraska, in an address at the Institute on Probate Administration. Written by Staff Assistant Charles F. Noren, B.A. 1958, Nebraska Wesleyan University; presently a junior in the College of Law, University of Nebraska.

The entire body of law relative to the estates of deceased persons, both by statute and by court decision, has been erected to protect and enforce the rights of three distinct classes of persons. First, the creditors, next the collector of death taxes, and finally the beneficiaries.

II. PROBATE JURISDICTION OF COUNTY COURTS

County courts receive their general jurisdiction over matters of probate directly from the Nebraska Constitution which states:

County Courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, and such proceedings to find and determine heirship. . . .¹

This grant of original jurisdiction is made exclusive by statute.²

As to the particular topic under discussion in this article, power over claims against the estate is granted to the county courts by statute as follows:

The county court shall have power to hear and determine claims and set-offs in the matter of estates of deceased persons. . . .³

The judge of the county court has a duty to receive, examine, adjust and allow all lawful claims and demands of all persons against the deceased.⁴ This original, exclusive jurisdiction applies to tort claims,⁵ taxes against personal property,⁶ foreign judgments against the deceased,⁷ and generally any claim which a creditor may have maintained against the deceased had he lived.⁸

The actions that can be brought against the executor⁹ are rather limited, and well set out in the statutes. Both actions for the recovery of personal or real property, and actions requiring

¹ NEB. CONST. art. V, § 16.

² NEB. REV. STAT. § 24-503 (Reissue 1956).

³ NEB. REV. STAT. § 24-504 (Reissue 1956).

⁴ NEB. REV. STAT. § 30-601 (Reissue 1956).

⁵ *Mueller v. Shaklett*, 156 Neb. 881, 58 N.W.2d 334 (1953).

⁶ *Millet v. Early*, 16 Neb. 266, 20 N.W. 352 (1884).

⁷ *Creighton v. Murphy, Neal & Co.*, 8 Neb. 349, 1 N.W. 138 (1879).

⁸ *Rehn v. Bingaman*, 151 Neb. 196, 36 N.W.2d 856 (1949).

⁹ The word "executor" as used in this article applies generally to all personal representatives of estates regardless of title unless otherwise indicated.

special relief other than the recovery of money are permitted.¹⁰ Certain actions on contingent claims may also be instituted against the executor if the sections involved¹¹ have been carefully complied with.

III. PROCEDURE PRIOR TO FILING CLAIMS

A. DUTY OF COURT TO ENTER ORDER AND CAUSE NOTICE TO BE PUBLISHED.

Whenever letters testamentary or of administration are granted by a probate court, it becomes the judge's duty to receive, examine and allow all lawful claims against the estate of the deceased.

. . . *Provided*, the judge shall within forty days after the issuance of such letters . . . give notice of the date of the hearing of claims . . . and the limit of time for the presentation of claims . . . which notice shall be given by posting in four public places in the county, or by publication in a legal newspaper of the county three successive weeks, or in any manner which the court may direct.¹²

Prior to the notice required by the above-quoted statute, an order must be entered by the judge requiring such notice to be given.¹³ This order is also required when the heirs, devisees, or legatees select the newspaper in which the notice is to be published.¹⁴

The order preceding and requiring notice must include the date of hearing and the limitation of time for filing claims.¹⁵ There is strong dictum that the order must also include the manner in which notice is to be given, and if by publication, the name of the newspaper and the dates of publication.¹⁶

B. DUTY OF ATTORNEY FOR ESTATE.

Although the law enjoins the duty upon the court to give the notice, the attorney for the estate must make sure that the

¹⁰ NEB. REV. STAT. § 30-801 (Reissue 1956).

¹¹ NEB. REV. STAT. §§ 30-704, 30-705, 30-706 and 30-714 (Reissue 1956).

¹² NEB. REV. STAT. § 30-601 (Reissue 1956). The definition of "legal newspaper" is found in NEB. REV. STAT. § 25-523 (Reissue 1956).

¹³ *In re Estate of Neville*, 121 Neb. 15, 235 N.W. 666 (1931).

¹⁴ NEB. REV. STAT. § 30-602 (Reissue 1956).

¹⁵ *Supra* note 13.

¹⁶ 2 WHITFORD, NEBRASKA PROBATE AND ADMINISTRATION 662 (1957).

court does in fact discharge its duty. He must also see that the notice is published in conformity with the order and is free from defects and errors.

C. MAILING COPY OF NOTICE

In 1957 the legislature enacted new legislation which has application "in any action or proceeding . . . where notice by publication is given as authorized by law."¹⁷ It requires the "party maintaining the action or proceeding" to mail a copy of the published notice "to each and every party appearing to have a direct legal interest in such action or proceeding."¹⁸

Whether this statute requires the executor as the "party maintaining the . . . proceeding," to mail notice to the creditor, as a "party appearing to have a direct legal interest," has not been completely determined. In 1959, the Nebraska Supreme Court, in *Storm v. Cluck*,¹⁹ indicated that published notice, pursuant to a court order, is sufficient in probate matters and it makes no difference whether the creditors had actual knowledge of the time allowed for filing claims.²⁰ It must be noted, however, that the facts of this case occurred prior to the enactment of the statute.²¹

IV. FORMS OF ORDER, NOTICE AND CLAIM

A. IN GENERAL

As could be expected from 93 different probate courts, the forms that are used vary greatly. Some counties, including Hamilton, Clay and Hall, use the form promulgated by the Nebraska Supreme Court.²² Other counties, like Lancaster and Platte, still

¹⁷ NEB. REV. STAT. § 25-520.01-.01 (Reissue 1956).

¹⁸ NEB. REV. STAT. § 25-520.01 (Reissue 1956). This legislation was supported by the organized bar who felt that recent United States Supreme Court cases indicated that due process of law required such notice. See *Walker v. City of Hutchinson*, 352 U.S. 112 (1956) wherein the Supreme Court stated the rule of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) as follows: ". . . if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests." For action of the Judicial Council see 37 NEB. L. REV. 104 (1958).

¹⁹ *Storm v. Cluck*, 168 Neb. 13, 95 N.W.2d 161 (1959).

²⁰ *Id.* at 20, 95 N.W.2d at 166. But see *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293 (1953).

²¹ *Supra* note 17.

²² For rules of the Nebraska Supreme Court see 162 Neb. 29 (1956).

include in the first creditor's notice a time limit for payment of debts.²³

B. ORDER BARRING CLAIMS

Although nothing in the statutes requires an order barring claims and such an order would seem to be repetition of the order fixing the date for filing, an order barring claims may have its usefulness.²⁴ Several courts incorporate within the order entered at the expiration of the time for filing claims an additional order barring further presentation of claims. Other courts incorporate an order barring claims in the final decree. This order may serve the useful purpose of affirmatively establishing what otherwise might be presumed, namely that the court has not extended the time for filing claims.²⁵

C. VERIFICATION OF CLAIMS

There is nothing in the statutes which requires a claim to be verified under oath. Some courts, including Lancaster County, provide a form to be used by a person filing a claim which merely requires the signature of the claimant. This particular form also contains a space for the approval of the claim by the executor, thus enabling the county judge to enter the proper order allowing claims without a hearing.

V. CLAIMS THAT MUST BE FILED

A. GENERAL DEFINITION

The word 'claim' must, by necessity, have a uniform sense throughout the probate statutes and be held to include every species of liability which the executor or administrator can be called upon to pay, or provide for payment of, out of the general fund of the estate.²⁶

Prior to the above-quoted definition, the court had held that "claims" were only debts existing against the decedent at the

²³ NEB. REV. STAT. §§ 30-610, 30-612 and 30-622 (Reissue 1956) apparently authorize and perhaps require such an order and a published notice to this effect.

²⁴ 2 WHITFORD, PROBATE AND ADMINISTRATION 700 (1957).

²⁵ NEB. REV. STAT. § 30-604 (Reissue 1956) allows such extensions of time by the court.

²⁶ In re Estate of Edwards, 138 Neb. 671, 675, 294 N.W. 422, 425 (1940). See also 41 A.L.R. 183 (1926).

time of death.²⁷ But since 1940 the court seems to be following a more liberal definition like the one above.²⁸

The definition really depends upon whether the obligation *must* be filed as a claim even though not existing as a debt against decedent at the time of his death. For example, expenses of funeral and last illness must be filed to take advantage of the priority provisions of the probate code.²⁹ On the other hand, debts, such as expenses of administration, may be filed and allowed as claims, although they properly come before the court in the executor's report.

B. DECEDENT'S OBLIGATIONS, DUE OR PAST DUE, FOR THE PAYMENT OF MONEY

Only one type of obligation will be mentioned here, that of installment alimony payments. After the death of the husband, a prior judgment for periodic alimony payments cannot be revived unless the decree provided that payments should be made out of the estate of the decedent. However, those arrearages as of the death are proper claims against the estate of the deceased.³⁰

C. FUNERAL AND LAST ILLNESS

By statute³¹ the payment of "necessary funeral expenses" becomes a preferred claim "not exceeding two hundred and fifty dollars for casket and services of undertaker." Some questions might be raised as to whether "necessary funeral expenses" includes tombstones, burial vaults or perpetual care. It would seem that these expenses should be allowed as claims rather than placing the creditor in a position where he would have to enforce his "claim" against the executor or heirs.

Although the statute involved gives priority to the payment of necessary funeral expenses, it does not relieve the husband from a primary obligation to pay for the last sickness and burial of his wife.³² If the will of the wife relieves the husband of such

²⁷ *In re Estate of Gifford*, 133 Neb. 331, 275 N.W. 273 (1937); *In re Estate of Erickson*, 78 Neb. 642, 111 N.W. 356 (1907).

²⁸ *Rehn v. Bingaman*, 151 Neb. 196, 36 N.W.2d 856 (1949); *Mueller v. Shacklett*, 156 Neb. 881, 58 N.W.2d 334 (1953).

²⁹ NEB. REV. STAT. § 30-615 (Reissue 1956).

³⁰ *Master v. Masters*, 155 Neb. 569, 52 N.W.2d 802 (1952). See also 2 WHITFORD, PROBATE AND ADMINISTRATION 726.

³¹ *Supra* note 29.

³² *In re Estate of White*, 150 Neb. 167, 33 N.W.2d 470 (1948).

obligation, but the husband elects to take by the laws of intestacy, he revives the obligation to pay these expenses.³³

D. UNMATURED DEBTS

The court has the power to examine and allow, and the executor the power to pay, any debts that mature at some date in the future.³⁴ These claims must be absolute, but not yet due, rather than contingent claims.

*In re Estate of Larson*³⁵ involved a claim filed by the holder of negotiable notes when the notes were not yet matured. The administrator objected to the allowance on the grounds that since these claims could not have been brought against the decedent during his lifetime, the notes were not proper claims against the estate. The court stated on page 546:

. . . where it is expedient and assets are available for this purpose . . . the court at any time [may] determine the present value of the obligation and to make immediate payment thereof. . . . [T]he claimant may be required at any time to accept the actual present value of his debt. . . .

Although no constitutional question was raised by the parties, Justice Rose, in his dissent,³⁶ asserted that the unmatured claims statutes³⁷ were unconstitutional on the grounds that they impaired the obligation of contract.

E. TORT CLAIMS

The cases in this area indicate that some lawyers have had to learn the hard way that an action will not lie in the district court against an executor for damages allegedly caused by the decedent. The plaintiff *must* file his claim against the estate.³⁸ The tort

³³ *Id.* It should also be mentioned that the statutory priority given to the claims mentioned here is subject to NEB. REV. STAT. § 77-205 (Reissue 1958). The Nebraska Supreme Court has held that a valid claim for personal taxes is a lien and claim against the assets of an estate and takes priority over the preferred claims mentioned in NEB. REV. STAT. § 30-615 (Reissue 1956). See *In re Estate of Badberg*, 130 Neb. 216, 264 N.W. 467 (1936).

³⁴ NEB. REV. STAT. §§ 30-607, 30-608 (Reissue 1956).

³⁵ *In re Estate of Larson*, 138 Neb. 544, 293 N.W. 430 (1940).

³⁶ *Id.* at 547, 293 N.W. at 432.

³⁷ *Supra* note 36.

³⁸ *In Storm v. Malchow*, 163 Neb. 541, 542, 80 N.W.2d 477, 478 (1957), the court stated the rule of *Rehn v. Bingham*, 151 Neb. 196, 36 N.W.2d 856 (1949) as follows: "A cause of action for personal injuries al-

claimant must also file his claim within the time limited in the first instance since grounds are seldom available for obtaining an extension of time within which to file such a claim.³⁹

F. CONTINGENT CLAIMS

Prior to the 1933 amendments to the contingent claims statutes,⁴⁰ the holder of a contingent claim might, under certain circumstances, withhold filing his claim until after the initial period for filing general claims had expired and still recover on his contingent claim. The amendments, however, eliminated the element of contingent claim from section 30-609⁴¹ and limited section 30-704⁴² to claims "not capable of being exhibited within the time limited for creditors to present their claims."

In the case of *In re Estate of Edwards*,⁴³ the court held that sections 30-609 and 30-704⁴⁴ must be read in connection with each other. The court also defined a contingent claim as "one where the liability depends upon some future event which may or may not happen and which, therefore, makes it wholly uncertain whether there will ever be a liability."⁴⁵

As the law now stands, it would seem to make little difference whether a claim is contingent or not since it will be barred by the general section of the probate code⁴⁶ if not filed within the proper time unless, of course, the claim is "not capable of being exhibited." If the claim is not capable of being exhibited, a re-

leged to have been proximately caused by negligence of a decedent during his lifetime survives and when no action was brought thereon during his lifetime, it must be prosecuted by a claim filed against the estate of decedent in the county court which has exclusive original jurisdiction thereof."

³⁹ *Storm v. Cluck*, 168 Neb. 13, 95 N.W.2d 161 (1959). Bear in mind here that we are referring to claims against a decedent as distinguished from actions by the executor to recover tort damages sustained by the decedent or his next of kin.

⁴⁰ NEB. REV. STAT. §§ 30-704, 30-609 (Reissue (1956)).

⁴¹ NEB. REV. STAT. § 30-609 (Reissue 1956).

⁴² NEB. REV. STAT. § 30-704 (Reissue 1956).

⁴³ *In re Estate of Edwards*, 138 Neb. 671, 294 N.W. 442 (1940).

⁴⁴ *Supra* note 40.

⁴⁵ *Supra* note 43. See also *In re Estate of Larson*, *supra* note 35; *In re Estate of Gifford*, *supra* note 27.

⁴⁶ NEB. REV. STAT. § 30-609 (Reissue 1956).

view of Article 7⁴⁷ would seem to indicate that the executor is liable only to the extent of assets still in his possession when this claim becomes perfected. The heirs, devisees, or legatees, however, may be liable directly to the creditors.⁴⁸

G. CLAIMS FOR PERSONAL SERVICES

The general rule here is that services rendered by one in close relationship to the decedent are presumed to have been gratuitous, but this presumption is rebuttable upon clear and satisfactory proof of an express or implied contract to pay for such services.⁴⁹ If payment has been made for such services prior to the death of the decedent, it will be presumed that payment was complete and a claim to the contrary must be established by clear and satisfactory evidence.⁵⁰

H. CLAIMS FOR PERSONAL TAXES

The county judge is required to furnish the county assessor with a copy of the inventory of the estate, and the county assessor then determines the taxes due. If there are taxes due, the county treasurer must file a claim against the estate, and this claim takes priority over the other claims against the estate.⁵¹

A recent amendment to sections 30-603 and 30-604⁵² provides that the county treasurer shall certify that he has filed claims for unpaid taxes, and that the county assessor shall certify that an assessment of personal property in the estate has been made for the current year and will be entered in the tax list. The amendment further provides that the county judge shall not order any distribution of estate assets nor discharge the executor until these certificates are filed. The last session of the legislature also changed section 77-318⁵³ to extend the time from three to five years within which the county assessor may go back and add omitted property for tax purposes.

⁴⁷ NEB. REV. STAT. §§ 30-701 to -715 (Reissue 1956).

⁴⁸ The time limit for filing contingent claims is discussed in section VII of this article.

⁴⁹ *In re Estate of Baker*, 144 Neb. 797, 14 N.W.2d 585 (1944).

⁵⁰ *In re Estate of Olson*, 167 Neb. 799, 95 N.W.2d 128 (1959).

⁵¹ NEB. REV. STAT. §§ 77-316 to -319 (Reissue 1958).

⁵² NEB. SESS. LAWS 1959, ch. 126.

⁵³ NEB. SESS. LAWS 1959, ch. 357. For other changes in NEB. REV. STAT. §§ 77-316, 77-318, see NEB. SESS. LAWS 1959, ch. 358.

I. PROMISES TO PAY AT DEATH

Bare promises of the deceased to pay certain sums of money to another after the decedent's death do not give rise to a claim that may be filed against the estate. However, if the promise was given for sufficient consideration to form a contract, a claim based upon this contract may be filed against the estate.⁵⁴ Also, if the promise constituted a subscription or pledge, even though not given for sufficient consideration to form a contract, the pledge or subscription may constitute a claim against the estate. If so, this claim will be subject to the implied condition that it is not to be paid until the debts of the estate have been fully satisfied.⁵⁵

VI. CLAIMS WHICH NEED NOT BE FILED⁵⁶

A. SPECIFIC PERFORMANCE OF CONTRACTS TO DEVISE OR BEQUEATH

A contract to compel the specific performance of an agreement to devise or bequeath is an equitable action and as such must be brought in the district court.⁵⁷ Such actions have involved personalty alone⁵⁸ as well as combinations of a bequest of money and a devise of land.⁵⁹ In such cases, the court continues to hold that where a court of equity can afford complete relief and by one decree adjudicate the rights of the parties, it may do so and order specific performance of the contract.⁶⁰ If the district court takes jurisdiction over the entire subject matter of the contract, it may, if the estate is solvent, determine any amount owing under the contract and direct that the same be allowed as an established claim against the estate.⁶¹

⁵⁴ *Keller v. Estate of Hiles*, 103 Neb. 465, 172 N.W. 363 (1919); *In re Estate of Griswold*, 113 Neb. 256, 202 N.W. 609 (1925).

⁵⁵ *In re Estate of Luce*, 137 Neb. 846, 291 N.W. 562 (1940).

⁵⁶ Pending actions against decedent and personal taxes which could be included in claims that need not be filed are covered elsewhere in this article. A discussion of decedent's contracts for sale of land could also be included here but were covered by others at the Probate Institute and are therefore deleted from this article. See NEB. REV. STAT. art 9-10 (Reissue 1956).

⁵⁷ 2 WHITFORD, PROBATE AND AND ADMINISTRATION 701-717 (1957).

⁵⁸ *Peters v. Wilks*, 151 Neb. 861, 39 N.W.2d 793 (1949).

⁵⁹ *Lacey v. Zeigler*, 98 Neb. 380, 152 N.W. 792 (1915).

⁶⁰ *Lacey v. Zeigler*, *supra* note 59; *Sopeich v. Tangeman*, 153 Neb. 506, 45 N.W.2d 478 (1951).

⁶¹ *Id.*

Upon failure of the decedent to perform his agreement the "beneficiary" of the contract may, if he elects, file a claim for the reasonable value of services that were to be paid for by a devise of property.⁶² However, a suit to enforce a contract to devise real estate and a claim of money for reasonable value of services are inconsistent and therefore not allowed.⁶³

B. DEBTS SECURED BY MORTGAGE

Where the debt of the decedent is secured by mortgage, the mortgagee is not required to abandon the security and file his claim against the estate. The mortgagee may bring a foreclosure action against the property even though he does not file a claim against the estate.⁶⁴ If the mortgagee commences an action of foreclosure after the death of the mortgagor, and thereafter files a claim for the debt against the estate, he is not precluded from prosecuting his foreclosure action.⁶⁵

If the will provides for payment of the debt, or if the devise expresses no intention that the devisee should take real estate subject to the encumbrances, the debt is properly payable out of the assets of the estate.⁶⁶ This still does not deprive the mortgagee of his right of election to seek recovery of the debts out to the personal assets of the estate by filing a claim, or to rely on his security and foreclose, or both if necessary.

VII. EXTENSION AND LIMITATION PROVISIONS

A. LIMITATION BY FIRST COURT ORDER

Section 30-603⁶⁷ directs the court to fix a time for filing claims which, "in the first instance," shall not be more than eighteen months or less than three months. Such time must be stated in the order and presumably begins to run from the date of the order, but this is not entirely clear.

⁶² *In re Estate of Baker*, 144 Neb. 797, 14 N.W.2d 585 (1944).

⁶³ *Flessner v. Wenquist*, 156 Neb. 378, 56 N.W.2d 294 (1953).

⁶⁴ *Crawford State Bank v. McEwen*, 132 Neb. 399, 272 N.W. 226 (1937).

⁶⁵ *Quesner v. Novotny*, 116 Neb. 84, 225 N.W. 796 (1927).

⁶⁶ *Lienhart v. Conway*, 146 Neb. 821, 21 N.W.2d 749 (1946).

⁶⁷ NEB. REV. STAT. § 30-603 (Reissue 1956).

B. EXTENSION OF TIME FOR FILING

The court may, of its own volition, extend the time for filing claims but the whole time shall not exceed two years.⁶⁸ The creditor may, within three months after the expiration of the time for filing, apply for an extension of time to file his claim.⁶⁹ "Good cause" must be shown for such extension and notice of the extension, if allowed, must be in accordance with section 30-601.⁷⁰ What constitutes "good cause" depends on the circumstances of the case and the use of sound judicial discretion.⁷¹

C. FURTHER LIMITATION PROVISIONS

A person who fails to file his claim within the time limit first ordered by the court in the administration proceedings shall be forever barred. In the event that no administration proceedings have been started, the creditor is barred if he fails to institute such proceedings within two years from the death of the decedent.⁷² However, the statute⁷³ specifically provides that it shall not be construed to affect the time within which a creditor may enforce a lien nor to affect actions pending against the decedent at the time of death.

After the last published notice of the time limit for payment,⁷⁴ a creditor has two years within which to demand his debt be paid or the same is barred.⁷⁵ If the claim is allowed but unpaid, the creditor has five years in which to file notice to this effect or he will be barred.⁷⁶ If the claim has been on file for five years and no order of allowance has been entered, the claim will be considered disallowed unless the creditor within such period files a statement that the claim has not been paid.⁷⁷

⁶⁸ NEB. REV. STAT. § 30-604 (Reissue 1956).

⁶⁹ *Ibid.*

⁷⁰ NEB. REV. STAT. § 30-601 (Reissue 1956).

⁷¹ *In re Estate of Tucker*, 128 Neb. 387, 258 N.W. 645 (1935); *Lesoing v. Dirks*, 157 Neb. 183, 59 N.W.2d 164 (1953).

⁷² NEB. REV. STAT. § 30-609 (Reissue 1956).

⁷³ *Ibid.*

⁷⁴ NEB. REV. STAT. § 30-622 (Reissue 1956).

⁷⁵ NEB. REV. STAT. § 30-623 (Reissue 1956). This section probably has no application to estate proceedings when notice of time limit for payment of debt is not given.

⁷⁶ NEB. REV. STAT. § 30-623.01 (Reissue 1956).

⁷⁷ NEB. REV. STAT. § 30-623.02 (Reissue 1956). The creditor or his attorney has the duty to see that the order allowing the claim, if any, is properly entered.

Particular notice should be called to section 30-714.⁷⁸ This section is included in the article dealing with contingent claims.⁷⁹ However, the statute refers to any contingent "or other claims." It provides that if notice to creditors is not given for one year after granting letters testamentary or of administration, a creditor has five years from said date to bring an action against the executor, heirs, devisees or legatees.⁸⁰

VIII. EXECUTOR'S DUTIES AND LIMITATIONS OF AUTHORITY

A. MUST PLEAD DEFENSE OF SET-OFF

When a creditor, against whom the deceased had a claim, presents his claim against the estate, it is the duty of the executor to exhibit the claim of the decedent "in offset to the claims of the creditor."⁸¹ Whether such claim of the decedent is a "set-off" or "counterclaim" is not completely clear. Presumably the executor has the duty to interpose any defense, whether counterclaim or set-off, that might have been available to the decedent.⁸²

B. CANNOT WAIVE STATUTE OF NON-CLAIM

The Nebraska Supreme Court has held that the statute of non-claim cannot be waived by the executor as a defense in an action brought by a creditor.⁸³ A leading authority in this field⁸⁴ cites two Massachusetts cases⁸⁵ in support of his argument that should the executor neglect to plead the statute of non-claim and an order is entered allowing a barred claim, such order is not binding on the estate or the executor's surety.

⁷⁸ NEB. REV. STAT. § 30-714 (Reissue 1956).

⁷⁹ NEB. REV. STAT. §§ 30-701 to -715 (Reissue 1956).

⁸⁰ *Supra* note 78.

⁸¹ NEB. REV. STAT. § 30-606 (Reissue 1956).

⁸² DAME, PROBATE AND ADMINISTRATION (3d ed. 1928) § 397 at 410.

⁸³ *Estate of Fitzgerald v. First Nat. Bank of Chariton*, 64 Neb. 260, 89 N.W. 813 (1902); *In re Estate of Breuer*, 155 Neb. 836, 54 N.W.2d 75 (1952); *In re Estate of Cluck*, 168 Neb. 13, 95 N.W.2d 161 (1959).

⁸⁴ DAME, PROBATE AND ADMINISTRATION (3d ed. 1928) § 394 at 407.

⁸⁵ *Dawes v. Shed*, 15 Mass. 6 (1818); *Robinson v. Hodge*, 117 Mass. 222 (1875).

C. EXECUTOR HAS BURDEN OF PROOF OF DEFENSE OF PAYMENT

Where the executor pleads that the claim against the estate was paid during the lifetime of the decedent, the executor assumes the burden of proof.⁸⁶ However, in the case of close family relationships or of domestic servants, the rebuttable presumption is that the services have been gratuitously performed or that they have been completely paid for.⁸⁷

Any person who may be affected by the final order, judgment, or decree of the county court in a probate matter "shall" have the right to appeal.⁸⁸ Apparently the executor is under no duty to appeal should the final order be adverse to the estate.⁸⁹ If the executor decides not to appeal, "any person interested in the estate as creditor, devisee, legatee or heir may appeal from such decision" and the proceedings will be in the executor's name as if the appeal had been taken by the executor.⁹⁰

IX. ASSETS SUBJECT TO CLAIMS

A. IN GENERAL

Generally all the property in the decedent's name only is considered to be assets subject to claims. This would include all the tangible and intangible personal property as well as the real estate.⁹¹ Also included are proceeds of judgments in suits instituted by the decedent and still pending at the time of his death. Proceeds of judgments in causes of actions which survive the death of the decedent are properly included as assets subject to claims if the actions *must* be maintained by the estate, rather than directly by the widow or heirs.⁹²

The executor has the right to possession of all the real estate of the deceased and may collect rents, issues and profits then accruing if such are needed to pay the debts and expenses of

⁸⁶ *In re Estate of Johnson*, 144 Neb. 372, 13 N.W.2d 412 (1944).

⁸⁷ *In re Estate of Olson*, 167 Neb. 799, 95 N.W.2d 128 (1959).

⁸⁸ NEB. REV. STAT. § 30-1601 (Reissue 1956).

⁸⁹ NEB. REV. STAT. § 30-1610 (Reissue 1956) clearly indicates that the executor may decline to appeal and provides for other interested parties to bring the appeal should the executor so decline.

⁹⁰ NEB. REV. STAT. § 30-1610 (Reissue 1956).

⁹¹ NEB. REV. STAT. § 30-406 (Reissue 1956).

⁹² See *infra* section X(E) this article. The wrongful death actions are brought in the name of the widow or heirs who are the real party in interest.

administration.⁹³ If no rentals are then accruing, the executor may lease the land and use the rentals therefrom until such debts have been paid and the estate settled. A lease beyond the time of settlement is voidable, but may be ratified by the heirs or devisees.⁹⁴

B. INSURANCE COMPANIES' OBLIGATION UNDER LIABILITY POLICY INSURING THE DECEDENT

In the recent case of *In re Kresovich's Estate*⁹⁵ the Nebraska Supreme Court determined for the first time that insurance on the life of the decedent was an asset of his estate in the jurisdiction where he was killed. In this case the insured was a resident of Illinois, the accident happened in Cherry County, Nebraska, and the application for administration and later allowance of claims took place in Lancaster County, Nebraska. The court allowed the claimants to institute the proceedings and to file their claims for injury and damages arising out of the action in which the insured was killed, although the liability for the claims had not been previously determined.⁹⁶

C. FRAUDULENT CONVEYANCES

Where there is a deficiency of assets and the decedent shall have made a fraudulent conveyance prior to his death, the executor may maintain a suit to have this conveyance set aside.⁹⁷ To do so, the executor must prove that there are creditors and that there is a deficiency of assets as well as the fact that the conveyance was with intent to defraud such creditors.⁹⁸ The creditor may cause this suit to be brought by the executor, but the creditor will have to pay part of the costs. If the conveyance has been to the executor, the creditors may maintain the action in their own names.⁹⁹

D. GIFTS CAUSA MORTIS

Gifts *causa mortis* are valid as against the creditors if there are sufficient assets to pay the creditors. If there is a deficiency,

⁹³ *Hahn v. Verret*, 143 Neb. 820, 11 N.W.2d 551 (1943); *In re Estate of Large*, 149 Neb. 783, 32 N.W.2d 751 (1948).

⁹⁴ *Chestnut v. Masters Laboratories*, 148 Neb. 378, 27 N.W.2d 541 (1947).

⁹⁵ *In re Estate of Kresovich*, 168 Neb. 673, 97 N.W.2d 239 (1959).

⁹⁶ See Annot. 34 A.L.R.2d 1270 (1954).

⁹⁷ NEB. REV. STAT. §§ 30-415 to -417 (Reissue 1956).

⁹⁸ *Goodman-Buckley Trust Co. v. Poulos*, 124 Neb. 697, 243 N.W. 64 (1933).

⁹⁹ *Becker v. Anderson*, 6 Neb. 499 (1877).

the executor may recover the subject of a gift *causa mortis* if he can prove that the rights of the creditors are paramount to the equitable rights of the donee.¹⁰⁰

X. ASSETS NOT SUBJECT TO CLAIMS

This section covers the following three types of assets; first, assets that are not subject to claims but under some circumstances are includable in the estate for the determination of death taxes; second, assets not subject to claims but collectible by the executor for the benefit of survivors; and third, assets which under some circumstances may be subject to claims.

A. LIFE INSURANCE PAYABLE TO BENEFICIARY OTHER THAN ESTATE

Where a third person is named the beneficiary of a life insurance policy, this third person takes the benefits therefrom by contract and not derivatively. The proceeds from such a policy form no part of the estate of the insured and the probate court therefore has no jurisdiction over them.¹⁰¹

B. PERSONAL PROPERTY EXEMPT FROM EXECUTION

When the decedent dies intestate, the widow, widower, or children, "shall" be allowed, free from the claims of creditors, all wearing apparel, ornaments, furniture and articles previously exempt to the deceased.¹⁰² It has been inferred that where there is no homestead, the widow should be allowed \$500.00 in personal property in lieu of the homestead exemption.¹⁰³ The county court "may make the same allowances" in a testate estate as in an intestate estate¹⁰⁴ although it may be argued that the word "allowances" used here does not include specifically exempt articles.¹⁰⁵

C. HOMESTEAD INTEREST

If the homestead is needed for the payment of claims, \$2,000.00 above encumbrances is exempt to the surviving spouse or depend-

¹⁰⁰ *Tyrell v. Judson*, 112 Neb. 393, 199 N.W. 714 (1924).

¹⁰¹ *In re Estate of Reynolds*, 131 Neb. 557, 268 N.W. 480 (1936).

¹⁰² NEB. REV. STAT. §§ 30-103, 30-104, 30-229 (Reissue 1956).

¹⁰³ *In re Estate of Nielsen*, 135 Neb. 110, 280 N.W. 246 (1938).

¹⁰⁴ NEB. REV. STAT. § 30-229 (Reissue 1956).

¹⁰⁵ *In re Estate of Manning*, 85 Neb. 60, 122 N.W. 711 (1909).

ents.¹⁰⁶ If not needed for the payment of claims, the survivor's life estate is set aside before distribution to the beneficiaries.¹⁰⁷ The \$2,000.00 limitation is solely for the purpose of fixing the rights of the homestead claimants and the creditors respectively, and not as between survivor and heir.¹⁰⁸ The homestead may be selected from the property in which the surviving spouse and the decedent had an undivided interest, and is so, the full \$2,000.00 is exempt rather than a fractional share thereof.¹⁰⁹ However, if the title to homestead was in the name of the decedent and a predeceased spouse as joint tenants with right of survivorship, there is no homestead exemption unless there are dependent relatives.¹¹⁰

D. JOINTLY HELD PROPERTY

Prior to the enactment of section 30-624¹¹¹ in 1955, the general rule was that a joint tenancy with right of survivorship vested the whole title in the survivor free from the debts of the deceased joint tenant.¹¹² The statute,¹¹³ however, changes this rule and gives a limited right to the creditor of a deceased joint tenant to bring an action within three months after death against the surviving joint tenant. This action would impress a lien upon the deceased joint tenant's interest in the real estate, or personal property, for the payment of debts when there is insufficient property in the estate.

In a recent Lancaster District Court case,¹¹⁴ District Judge Paul W. White, in effect, held section 30-624¹¹⁵ unconstitutional. Judge White pointed out that the statute allows the creditor to bring an action in a "court of competent jurisdiction" but does not define this term. Since the county court is vested by the

¹⁰⁶ NEB. REV. STAT. §§ 40-101, 40-117 (Reissue 1956).

¹⁰⁷ NEB. REV. STAT. § 40-117 (Reissue 1956).

¹⁰⁸ *Meisner v. Hill*, 92 Neb. 435, 138 N.W. 583 (1912).

¹⁰⁹ *Stocker v. Hilger*, 144 Neb. 202, 13 N.W.2d 106 (1944).

¹¹⁰ *Edgerton v. Hamilton County*, 150 Neb. 821, 36 N.W.2d 258 (1949).

¹¹¹ NEB. REV. STAT. § 30-624 (Reissue 1956).

¹¹² *DeForge v. Patrick*, 162 Neb. 568, 76 N.W.2d 733 (1956). Although this case was decided after the enactment of 30-624, the facts occurred prior to 1955 and as a result this section of the statutes was not discussed in the opinion.

¹¹³ *Supra* note 107.

¹¹⁴ *Buehler v. Kirby*, Memorandum Opinion, Doc. 198, p. 187, Dist. Ct. of Lancaster County, Nebr. (1959).

¹¹⁵ *Supra* note 107.

constitution with original,¹¹⁶ and by statute exclusive,¹¹⁷ jurisdiction over probate matters and settlement of claims against the decedent, the only "court of competent jurisdiction" is the county court. The claim being one against the decedent and not a personal claim against the surviving joint owner, it should be dealt with like any other claim against the estate in the probate court.

Judge White stated that, as to the right to sue the surviving joint tenant, the statute is contrary to the purposes for which we have probate proceedings. The statute permits a multiplicity of suits against the surviving joint tenant by any and all of the unpaid creditors. Regardless of priorities, the unpaid creditor could get a judgment against the surviving joint tenant and the estate would have no opportunity to contest the validity of the claim as against a widow's allowance or items of that nature.¹¹⁸

E. RECOVERY UNDER LORD CAMPBELL'S ACT AND FEDERAL EMPLOYER'S LIABILITY ACT

The final sentence in section 30-810¹¹⁹ specifically provides that any amount recovered in an action for wrongful death "shall not be subject to any claims against the estate of such decedent." This same proviso appeared in the act prior to the 1945 amendment. The principal effect of the amendment was to shift the formula for distribution out of the provisions of the intestate laws of descent and to establish it on the basis of individual pecuniary loss suffered by the persons for whose benefit the recovery was made.¹²⁰ The Federal Employer's Liability Act¹²¹ also provides that the recovery for death allowed thereunder shall be for the benefit of the surviving relatives.¹²²

¹¹⁶ Neb. Const. art V, § 16.

¹¹⁷ NEB. REV. STAT. § 24-503 (Reissue 1956).

¹¹⁸ *Supra* note 114. Judge White states: "The statute, by its very terms, contemplates that there is jurisdiction within the county court . . . but provides . . . that then an independent action may be taken up in the district court. . . . Obviously, this is an elaboration of and an addition to the rights which are vested under the constitution in the county court. . . . The statute contains no limiting provisions as to the number of suits or claims . . . and there is an entire absence of protective provisions with reference to . . . the estate [T]his statute comes . . . squarely within the range of vices which in the determination of estates the constitution sought to prevent. . . ."

¹¹⁹ NEB. REV. STAT. § 30-810 (Reissue 1956).

¹²⁰ 1 WHITFORD, PROBATE AND ADMINISTRATION 436 (1954).

¹²¹ 45 U.S.C. §§ 51-60 (1958).

¹²² 45 U.S.C. § 59 (1958). See I WHITFORD, PROBATE AND ADMINISTRATION 465-478 (1954).

F. ADVANCEMENTS

The sections related to this topic¹²³ discuss advancements and provide that they shall be taken into account for purposes of distribution among the heirs. However, an heir cannot be required to refund an advancement or portion thereof. Thus creditors have no recourse to advancements to satisfy their claims. It should be noted here that the word "advancement" is technically applied to intestate estates only, but testators frequently make similar provisions in their wills.

G. UNITED STATES SAVINGS BONDS AND BANK ACCOUNTS

When United States Savings Bonds are registered in the names of the deceased and another as co-owners, his death vests complete ownership in the surviving co-owner by virtue of the Treasury Department regulations.¹²⁴ The law effects the same result when a bank account is in the name of two or more persons.¹²⁵ However, the executor may impose a constructive trust upon such bonds and joint bank accounts by clear, satisfactory and convincing evidence.¹²⁶ Under these conditions, the bonds and bank accounts may be available for the payment of claims.

XI. PRIORITIES

The statutes¹²⁷ provide that for the purpose of paying debts and expenses, personal property shall be first subject to claims. Should the total assets of the estate prove to be insufficient, the funds will be distributed in the following order: taxes,¹²⁸ funeral expenses, expenses of last illness,¹²⁹ debts having preference by laws of the United States¹³⁰ and debts to other creditors.¹³¹

¹²³ NEB. REV. STAT. §§ 30-112 to -117 (Reissue 1956).

¹²⁴ *Nelson v. Rasmussen*, 164 Neb. 274, 82 N.W.2d 418 (1957); *Slocum v. Bohuslov*, 164 Neb. 156, 82 N.W.2d 39 (1957).

¹²⁵ NEB. REV. STAT. § 8-167 (Reissue 1954). See *Scriven v. Scriven*, 153 Neb. 655, 45 N.W.2d 760 (1951).

¹²⁶ *Supra* note 124.

¹²⁷ NEB. REV. STAT. 30-405 (Reissue 1956).

¹²⁸ NEB. REV. STAT. § 30-103 (Reissue 1956).

¹²⁹ NEB. REV. STAT. § 30-615 (Reissue 1956).

¹³⁰ *Ibid.* See also *United States v. Swanson*, 75 F. Supp. 118 (1947) appeal dismissed, 171 F.2d 718 (1949).

¹³¹ *Supra* note 122.

The testator may make provisions by will for the payment of debts, expenses of administration and family expenses, and designate the estate assets out of which they shall be paid.¹³² In the absence of a provision in the will to the contrary, claims shall be satisfied out of assets of the estate in the following order: first, the residuary estate; then other general legacies pro rata; and last, the specific bequests or devises.¹³³

¹³² NEB. REV. STAT. § 30-230 (Reissue 1956).

¹³³ *In re Estate of Grenier*, 168 Neb. 633, 97 N.W.2d 225 (1959).