Orphans' Courts.

R. S. 203, 205, 336, 346, 350, 361, 374, 635, 638, 660.

P. L. 1849, p. 154, 165.
" 1851, p. 278.
" 1852, p. 36, 94, 476.
" 1853, p. 283.
" 1854, p. 245.
" 1855, p. 17, 342.
" 1856, p. 64, 153.
" 1859, p. 74, 87.
" 1861, p. 20, 243.
" 1862, p. 19, 41, 57.
" 1863, p. 461.
" 1864, p. 440.
" 1865, p. 31, 463, 737.
" 1866, p. 826, 1051.
" 1867, p. 979.
" 1869, p. 1102, 1213.
" 1870, p. 58.
" 1871, p. 14, 34, 36, 59, 102, 104, 125.
" 1872, p. 47, 49.
" 1873, p. 126.

An act respecting the orphans' court, and relating to the powers and duties of the ordinary, and the orphans' court and surrogates.

Revision—Approved March 27, 1874.

I. Court, how constituted; jurisdiction.

How constituted.

R. S. 205, § 1.

P. L. 1855, p. 17, § 5.

1. That the judges of the court of common pleas of the several counties of this state, or any two of them, shall be and they are hereby constituted judges of a court of record to be called "the orphans' court."

[The justices of the supreme court are *ex officio* judges of the orphans' court, and the justice holding the circuit court in any county is the president judge of the orphans' court of that county. See TITLE, COURTS, *Sec.* 42].

Jurisdiction over disputes concerning wills, the right of administration and guardianship, and the allowance of accounts.

R. S. 205, § 5.

Amended.

2. The orphans' court shall have full power and authority to hear and determine all controversies respecting the existence of wills, the fairness of inventories, the right of administration and guardianship, and the allowance of the accounts of executors, administrators, guardians or trustees, as hereinafter directed, and also all other matters and things hereinafter submitted to their determination; and may issue process to compel all executors, administrators, guardians and trustees under wills to account for the estates in their hands, and to cause to come before them all persons as witnesses to give evidence in any cause before the said court; and all causes in said court may be heard in a summary way and determined by the judges of the court.(a)

To compel executors, etc., to account.

(a) The act *organizing* the orphans' court was passed in 1784, *Warwick* v. *Hunt*, 6 *Hal.* 1, 6. The statute creating the orphans' court is remedial, and is to be *liberally* construed, *Wood* v. *Tallman*, *Coxe* 163. It being a court created by *statute* and invested with special powers and jurisdiction in derogation of the powers of the courts established by the constitution, it must be restrained in the exercise of those powers and jurisdiction by the words of the statute, *Ludlow* v. *Ludlow*, 1 *South.* 189, 190, 393. *Tenbrook* v. *M'Colm*, 5 *Hal.* 333, 334. *Bray* v. *Neill*, 3 *C. E. Gr.* 343, 348. The orphans' court is no *special* jurisdiction for a particular purpose, nor is it a court of limited jurisdiction in the common acceptation of the term—which applies to courts having special powers only for performing special duties, *Den*, *Obert* v. *Hammel*, 3 *Harr.* 73. *Hess* v. *Cole*, 3 *Zab.* 116. The true distinction between courts is, such as possess a *general*, and such as have only a *special* jurisdiction for a *particular purpose*, *Ibid.* If fairly obtained, a decree of the orphans' court on a matter over which it has jurisdiction, is not to be questioned; but it is a court of limited powers, and if it transcends its jurisdiction its acts will pass for nothing; and if an order is obtained by fraud or misrepresentation, it may be set aside or considered null, *Gray* v. *Fox*, *Sax.* 260. It has "full power and authority to hear and determine all disputes and controversies whatsoever respecting the existence of *wills*," *Coursen's Case*, 3 *Gr. Ch.* 408. Or, the right of *administration*, *Delaney* v. *Noble*, 2 *Gr. Ch.* 559. *Quidort* v. *Pergeaux*, 3 *C. E. Gr.* 472. It can try the right of administration after it has been granted by the *surrogate*, *Morris* v. *Morris*, 1 *Harr.* 527. *Lumpkins* v. *Gibbes*, 1 *Harr.* 529. Or, the right of *guardianship*, *Van Doren* v. *Everitt*, 2 *South.* 460, 462. *Tenbrook* v. *M'Colm*, 5 *Hal.* 333, 334; 7 *Hal.* 79. *Clement's Case*, 10 *C. E. Gr.* 508. *Eldridge* v. *Lippincott*, *Coxe* 397. See *Garrabrant* v. *Sigler*, *April* 1829, *Chancery*. When a *trustee* may be appointed, *Budd* v. *Hiler*, 3 *Dutch.* 43. *Brush* v. *Young*, 4 *Dutch.* 237. *Zabriskie* v. *Wetmore*, 11 *C. E. Gr.* 18. On a devise of lands "to E. S. for life, and after his death to his male heirs equally to be divided, after a sale of the same, by order of the orphans' court, &c., the court has no *power* to make such sale, *Den*, *Sharp* v. *Humphreys*, 1 *Harr.* 25. It has jurisdiction for the recovery of *legacies*, *Hunt* v. *Mayberry*, 5 *Dutch.* 403. It has no jurisdiction in case of lands which have *escheated*, *O'Hanlin* v. *Den*, *Spen.* 31; 1 *Zab.* 582. Where proceedings in *lunacy* have been transmitted from chancery, recording is not essential to give jurisdiction, *Shepherd* v. *Newkirk*, 1 *Zab.* 302. It has no power to settle *disputed claims* in estates of decedents, except where they are insolvent, *Miller* v. *Pettit*, 1 *Harr.* 421. *Reeves* v. *Townsend*, 2 *Zab.* 396. *Vreeland* v. *Vreeland*, 1 *C. E. Gr.* 512. But it may determine what are *assets* as between

For the recovery of legacies and distributive shares.

P. L. 1855, p. 348. ¿ 17.

3. The orphans' court shall have jurisdiction over suits for the recovery of legacies and distributive shares, in cases where the will has been proved in the same court or before the surrogate, or a decree of distribution has been made in the same court.(*a*) (For practice in suits to recover legacies, see *Infra*, *Sec.* 165).

Jurisdiction of ordinary not interfered with.

R. S. 205, ¿ 22.

4. Nothing in this act shall prevent the ordinary, in person, from granting probate of wills, letters of administration, and letters of guardianship, from the prerogative office, in cases where a convenience will arise from doing the same.(*b*)

Powers and authority in this act extended to the ordinary.

P. L. 1869, p. 1102. Amended.

5. All the powers and authority granted by this act to the surrogates or orphans' courts in relation to the administration of the estates of testators, intestates or minors, and the settlement of the accounts of executors, administrators, guardians or trustees, may be exercised by the ordinary, in the administration and settlement of estates of testators, intestates or minors, in cases where the will shall be admitted to probate, or letters of administration or of guardianship granted, by the ordinary.

Transcript of will proved before ordinary, and of letters granted by him, may be filed before surrogate.

P. L. 1869, p. 1213. Amended.

6. When probate of any will or letters of administration or of guardianship shall be granted by the ordinary, or any inventory shall be proved before him, any person interested may cause a transcript, certified by the register under the seal of the prerogative court, of such will and probate thereof, and of such letters, or inventory and the proof thereof, to be filed in the office of the surrogate of the county before whom such probate might lawfully have been made or such letters have been granted; and it shall be the duty of the surrogate to record the same, and the transcripts from such record shall be received in evidence in any of the courts of this state, the same as if such probate had been made before such surrogate, or such inventory had been proved before him, or such letters had been granted by him.(*c*)

Duty of the surrogate to record the same, and transcripts of such record competent evidence.

After will proved before ordinary, or letters granted by him, subsequent proceedings for administration and settlement may be taken before surrogate or orphans' court.

7. When any will shall be admitted to probate, or letters of administration or of guardianship shall be granted by the ordinary, all subsequent proceedings relating to the administration and settlement of the estate of such testator, intestate or minor may be had before the surrogate and orphans' court of the county in which by law such probate might have been granted or letters issued; but before any such proceedings shall be had, in such case, before the surrogate or orphans' court, a transcript of the will and probate, or of the letters of administration or guardianship, duly certified by the register under the seal of the prerogative court, shall be filed in the surrogate's office of such county and recorded by the surrogate; *provided, nevertheless*, that the inventory of any administrator *pendente lite* appointed by the prerogative court shall be exhibited to the register, and his account settled before the ordinary in that court.

But account of administrator pendente lite to be settled before ordinary.

II. Officers of court.

Clerk.

R. S. 205, ¿ 4.

8. The surrogate of the county shall be clerk or register of the orphans' court.

Surrogate not to act as proctor or sit as judge.

Ib. ¿ 35.

9. No surrogate shall be allowed to act as attorney, proctor or counsel, or to sit as a judge in the orphans' court of the county in which he is surrogate.

the administrator and next of kin, *Budd* v. *Hiler*, 3 *Dutch.* 43. After a decree for *sale* of lands to pay debts has been executed, the orphans' court have no power to set aside the decree, *Crombie* v. *Engle*, 4 *Harr.* 82; case reversed, 1 *Zab.* 614. Where a deed was made to D. and E., his wife, for life and to their children, and during their lifetime D. and E. obtained an order of the orphans' court to sell the lands for the support of said children. *Held*, that the children, being minors, and not orphans, at the time of the decree for sale by the orphans' court, were not bound by the decree; that the orphans' court had no jurisdiction over the subject matter, and that a sale under the decree was void, and conveyed no title, *Graham* v. *Houghtalin*, 1 *Vr.* 552. Its jurisdiction is not restricted to "orphans or persons under 21 years of age," *Ibid.* Being a statutory court in derogation of the powers of the courts established by the constitution, it must be restrained in the exercise of its powers by the words of the statute, *Ludlow* v. *Ludlow*, 1 *South.* 189, 190(*a*). A citation may issue as well against a *surviving* executor, as against the executor of a deceased co-executor, *Wood* v. *Tallman*, *Coxe* 153. Chancery has concurrent jurisdiction in the settlement of estates of decedents, *Saltar* v. *Williamson*, 1 *Gr. Ch.* 480. *Van Mater* v. *Sickler*, 1 *Stock.* 483. *King* v. *Berry*, 2 *Gr. Ch.* 44. *Black* v. *Whitall*, 1 *Stock.* 572, 585. *Merselis* v. *Merselis*, 3 *Hal. Ch.* 557. *Clarke* v. *Johnston*, 2 *Stock.* 287. *Frey* v. *Demarest*, 1 *C. E. Gr.* 236, 239, and cases cited. The orphans' court may revoke letters of guardianship obtained through false representations, *Matter of Clement*, 10 *C. E. Gr.* 508. The presumption is that their power has been properly exercised, *State* v. *Checseman*, 2 *South.* 445, 447(*a*). An executor or administrator may be cited to account notwithstanding he has declared the estate of the decedent insolvent, *Duncan* v. *Barnes*, *Spen.* 75. Nor are the powers given unconstitutional because depriving a party of a *trial by jury*, *Ibid.* 158.

(*a*) After a decree the jurisdiction of chancery is concurrent, but *before* decree that of chancery is exclusive, *Frey* v. *Demarest*, 1 *C. E. Gr.* 236. *Dorsheimer* v. *Rorback*, 9 *C. E. Gr.* 46. See *King* v. *Berry*, 2 *Gr. Ch.* 44. A *debtor* of the executor is not a proper party, *Hunt* v. *Mayberry*, 5 *Dutch.* 403.

(*b*) See *Coursen's Case*, 3 *Gr. Ch.* 408. *Mundy* v. *Mundy*, 2 *McCart.* 290, 294.

(*c*) See *Den, Snedeker* v. *Allen*, *Pen.* *35.

Masters and examiners in chancery

P. L. 1855, p. 342. §§ 14, 16.

10. The masters and examiners of the court of chancery shall be *ex officio* masters and examiners of all the orphans' courts in this state, and the orphans' court, or the president judge thereof, may refer it to a master and examiner to take or restate an account, or refer to him any other matter or question upon which it may be necessary or proper to have the report of a master, or direct the testimony in any matter pending before the court to be taken before a master and examiner, instead of before the court, and in all proceedings before masters and examiners under such order of reference, they shall have the same powers, perform the same duties, and be governed by the same rules as in suits and proceedings in the court of chancery.

Accounts, etc., may be referred to.

Master governed by rules of court of chancery.

III. Terms of.

Terms.

R. S. 205, § 2, 3. Amended.

11. The orphans' court shall hold annually in each county three stated terms, at the times and places prescribed by law for holding the circuit court in such county, and also such special terms as the court may from time to time appoint, or as may be convened pursuant to law; all special terms, except where otherwise specially authorized by law, shall be appointed by the court at a regular term, and shall be held at the place in the county where the court holds its regular terms. (As to adjournments from time to time, see TITLE, COURTS, *Sec.* 36).

Special terms.

When court open for process.

12. The court shall be open at all times except on Sunday, for the issuing of citations and the return of process in suits for legacies and distributive shares.

If term not held, business continued.

Ib. § 31.

13. If it shall happen that an orphans' court shall not be held at the regular term of said court, by reason of the non-attendance of a sufficient number of judges, the business and proceedings pending in said court and process returnable thereto shall be continued from term to term until a regular court shall be held.

IV. Probate of wills.

Surrogate to grant letters testamentary on wills unless in case of doubts or disputes in relation thereto.

Ib. § 16. Amended.

14. The surrogates of the several counties of this state shall take depositions to wills and admit the same to probate, and grant letters testamentary thereon; but in case doubts arise on the face of the will, or a *caveat* is put in against proving a will, or a dispute arises respecting the existence of a will, the surrogate shall not act in the premises, but shall issue citations to all persons concerned to appear in the orphans' court of the same county, which court shall hear and determine the matters in controversy.(*a*)

Application to be made to surrogate of the county in which deceased resided at his death

15. The application for the probate of the will of any person who was resident in this state at his decease, and for letters testamentary thereon, under the preceding section, shall be made to the surrogate of the county in which the testator resided at the time of his death.(*b*)

Will not to be proved until ten days after testator's death.

Ib. § 16. Amended.

16. No will shall be proved before the ordinary or surrogate until after ten days from the death of the testator; nor shall probate of any will be granted by the ordinary, until proof be made that no *caveat* against proving such will hath been filed in the office of the surrogate of the county where the testator resided at the time of his death, or that notice hath been given to all persons concerned, of the application to the ordinary for such probate.

Depositions of subscribing witnesses resident out of the state, may be taken.

R. S. 36, § 5. Amended.

17. If any subscribing witness to a will shall reside out of this state, whose testimony is material, the surrogate, orphans' court, or ordinary, before whom such will shall be produced for probate, may issue a commission annexed to such will, and directed to the judge of any court of law, mayor, recorder, or other chief magistrate of any city or town, where such witness may be found, authorizing the taking of the deposition of such witness to the said will; and the deposition of such witness taken under oath or affirmation, and duly certified by the person to whom such commission shall be directed shall have the same operation, as if the same had been taken before the surrogate, court or ordinary, who issued such commission.

(*a*) If a *caveat* is filed by a person claiming to be an attorney-in-fact of non-resident legatees under a former will, he must produce his authority to appear for them, *Pancoast* v. *Graham*, 2 *McCart.* 294. Filing a *caveat* by an executor is not an implied renunciation, and letters testamentary may be issued to him, if the will be admitted to probate, *Maxwell's Case*, 2 *Gr. Ch.* 611.

(*b*) *Macomb* v. *Macomb*, *April*, 1823, *Williamson*, *C.*

Form of letters testamentary.

R. S. 205, ¿ 18.

18. Letters testamentary issued by the surrogate on the probate of a will, shall be in the following form:

I, ———, surrogate of the county of ———, do certify the annexed to be a true copy of the last will and testament of ———, late of the county of ———, deceased, and that ———, the executors therein named, proved the same before me, and are duly authorized to take upon themselves the administration of the estate of the testator, agreeably to the said will. Witness my hand and seal of office, the —— day of ———, in the year of our Lord one thousand eight hundred ———.(*a*)

When caveat filed, cause may be certified into the circuit court. Revision.

19. When any *caveat* shall be filed against the probate of a will, the orphans' court may, on the application of the *caveator* or of the persons named as executors in the said will, certify the questions involved in such controversy into the circuit court of the same county, for trial before a jury; and upon filing of such certificate with the clerk of the said circuit court, the said court shall have jurisdiction to try the said cause upon an issue to be framed by the judge holding said court; the notice of trial and proceedings for summoning and empanneling a jury and for the trial of the cause shall be the same as in causes commenced in the circuit court; the same costs shall be taxable as in other causes in said court; the verdict of the jury shall be subject to be set aside and a new trial granted in the circuit court as in other cases in said court, and the judge may, on the application for a new trial, certify the same to the supreme court for its advisory opinion.

Proceedings in the circuit court.

Testimony taken in writing, if desired. Revision.

20. Upon the trial before the circuit court of the issue provided for in the preceding section the testimony of the witnesses shall be taken down in writing, if required by either of the parties, and exceptions may be taken to the admission and rejection of testimony which shall be entered upon the record; and it shall be the duty of the judge, before whom such issue is tried, forthwith, after the trial is finally concluded in said court, to certify and return to the orphans' court, the proceedings thereon had, and the verdict of the jury, together with the testimony, if the same shall have been reduced to writing; a copy of the charge to the jury; all exceptions which shall have been taken at the trial to the admission or rejection of evidence, or to the charge to the jury; a certified copy of the costs which shall have been taxed, and a statement of the expenses of the said trial; which certificate and return shall be filed by the surrogate, and thereupon the orphans' court shall proceed to make a decree touching the probate of the said will in accordance with the finding of the said issue, and may make such order concerning the costs and expenses and allowance of counsel fees as may be made in cases where the hearing upon a *caveat* against proving a will is had before the orphans' court.

Judge to return the proceedings to the orphans' court.

Orphans' court to make decree in accordance with the finding of the issue.

Transcript of will duly recorded, competent evidence of title to real or personal estate.

R. S. 635, ¿ 2; 204, ¿ 9; 205, ¿ 17.

21. The transcript of any will regularly proved and recorded in the prerogative office or in the office of the surrogate of any county in this state, duly certified by the register or surrogate under his official seal, shall be competent evidence in any court of this state in any suit or controversy in relation to the title to any estate, real or personal, devised or bequeathed thereby, the same as if the original will had been produced and proved by the attesting witness.(*b*)

Will proved before ordinary or surrogate may be recorded in any county in the state.

Certified copy of such record, evidence.

22. When any will devising lands shall have been duly admitted to probate before the ordinary or any surrogate of this state, it shall be lawful for the surrogate of any county in this state, on the application of any person interested therein, upon filing a certified copy of such will and letters testamentary thereon, to record such will and letters testamentary; and such record, or a certified copy thereof, shall be received in evidence in any trial or controversy respecting the title to lands in such county, in the same manner as if the said will had been originally admitted to probate before such surrogate.

(*a*) The form of the letters, first prescribed in 1820, was not intended to affect the powers and duties of the executors. These are derived from the will, and the probate is merely evidence of these powers, in any question respecting personal property, *Hill* v. *Smalley*, 1 *Dutch.* 374, 380. *Elmer, J.*

(*b*) A decree of the orphans' court on the question of the probate of a will was formerly held not to be evidence against the validity of the instrument as a will of real estate, *Den* v. *Ayers*, 1 *Gr.* 153. *Den, Snedeker* v. *Allen, Pen.* *35, *42. *Den, Cozens* v. *Colson, Pen.* *877, *879. *Bray* v. *Neill*, 6 *C. E. Gr.* 343. *Foster* v. *Joice*, 3 *Wash. C. C.* 498, 500. *Harrison* v. *Rowan*, 3 *Wash. C. C.* 580. *Turner* v. *Hand*, 3 *Wall., Jr.* 88. [Now competent, P. L. 1872, p. 35, 1873, p. 129]. It is not *conclusive*, and the heir may show incapacity in the testator, or the want of any legal requisite in its execution, *Allaire* v. *Allaire*, 8 *Vr.* 312. See *Otterson* v. *Hofford*, 7 *Vr.* 129.

FOREIGN WILLS.

Probate of foreign wills.

R. S. 361, § 1.

23. When any will shall have been admitted to probate in any state or territory of the United States or the District of Columbia, or in any foreign state or kingdom, and the executor or any person interested therein, shall desire to have such will proved and recorded in this state, it shall be lawful for the surrogate of any county in this state, upon application to him and filing in his office an exemplified copy of such will, to make an order that cause be shown before him at a certain time and place not less than thirty days nor more than six months from the time of making such order, why a certified copy of such will, and codicil or codicils thereto, if any, should not be filed and recorded in the office of such surrogate, and letters testamentary thereon, be issued to such executor or executors as aforesaid, or letters of administration with the will annexed, as the case may require; which order shall be published in such manner as the surrogate making the same shall direct.(*a*)

Surrogate to make an order to show cause.

To be published.

Proceedings to make probate.

Ib. §§ 2, 3.

Amended.

24. If the person making such application, shall, at the time and place designated as aforesaid, produce before the said surrogate a copy of such will or wills and codicil or codicils, exemplified and attested in the manner in which copies of such instruments are usually exemplified and attested in the state, territory or kingdom where the same shall have been admitted to proof, and shall prove, to the satisfaction of the surrogate, that the said order has been published in the manner therein directed; and if no sufficient cause shall appear or be shown to the contrary, it shall be lawful for the said surrogate to record such will or wills and codicil or codicils, and to file the said copy thereof, and thereupon to grant letters testamentary to the executor or executors therein named, or letters of administration with the will annexed, to some person or persons; which letters testamentary or of administration with the will annexed, shall be of the same and of no other force and effect than they would have been if such will or wills and codicil or codicils had been produced and proved by the subscribing witnesses thereto, in the usual manner, under the laws of this state, and the record of such will or wills and codicil or codicils, when the same shall have been recorded as aforesaid, and duly certified copies thereof shall be evidence in the same manner, and have the same force and effect in all courts of law and equity, as such record or copies thereof would have, if such will or wills and codicil or codicils had been proved in the usual manner, under the laws of this state.(*b*)

Surrogate to record will and grant letters thereon.

Record of certified copy to be evidence.

In granting probate of foreign wills, security required of executor, etc., residing out of this state.

R. S. 361, § 4.

25. In all cases where the person or persons applying for probate of any will, in the manner provided for in the last two preceding sections, shall reside out of the state of New Jersey, it shall be the duty of the surrogate to whom such application is made, before granting the same, to take from such person or persons a bond, with security, for the faithful administration of the estate of the testator, in the same manner as is required by law in case of administrators.

Foreign will may be recorded to make title to lands, without letters testamentary.

P. L. 1866, p. 826.

26. When any will shall have been admitted to probate in any state or territory of the United States or the District of Columbia, or in any foreign state or kingdom, and any person shall desire to have the same recorded in this state, for the purpose of making title to lands or real estate in this state, it shall be lawful for any surrogate of any county in this state, upon an exemplified copy of such will being filed in his office, exemplified and attested as a true copy in the manner required by the laws of the state, district or territory in which such will shall have been admitted to probate, to make it legal evidence in such state, district or territory, to record such will and file the said copy in his office, and any such will upon being so recorded, shall have the same force and effect in respect to all lands and real estate therein devised, as if the same had been admitted to probate in this state, and such record or certified copies thereof shall be received in evidence in all courts of this state.(1)

Certified copy of such record evidence.

(*a*) This act does not extend to a will executed in this state by a resident, notwithstanding letters have been granted in an adjoining state to reach assetts there, *Wallace* v. *Wallace*, 2 *Gr. Ch.* 616. The ordinary has jurisdiction in such cases, *Coursen's Case*, 3 *Gr. Ch.* 408.

(*b*) An exemplified copy of the foreign record of such will is not admissible as evidence, *Graham* v. *Whitely* 2 *Dutch.* 254. *Infra*, § 26. Nor, will the subsequent reversal of the original foreign probate, deprive the transcript here of its effect as evidence, *Allaire* v. *Allaire*, 8 *Vr.* 312.

(1) See P. L. 1873, p. 129, "an act respecting conveyances of lands made, and to be made by wills."

V. Letters of administration.

Surrogate to grant letters.

R. S. 205, ¿ 16. Amended.

27. The surrogate of the county in which the deceased shall be resident at the time of his death, shall have the power and authority to grant letters of administration on the estate of such deceased, in all cases where administration may legally be granted thereon, unless a dispute arises as to the right of administration, in which case he shall issue citations to all persons concerned to appear in the orphans' court of the same county, which court shall hear and determine the matter in controversy.

Administrator, who to be appointed.

R. S. 350, ¿ 7.

28. If any person die intestate, or if the executor named in any testament renounce the executorship, or neglect, for the space of forty days after the death of the testator, to prove such testament, then administration of the goods, chattels and credits of such intestate or of such testator, with the testament annexed, shall be committed or granted to the widow or the next of kin of such intestate or testator, or to some of them, if they or any of them will accept the same; and if none of them will accept thereof, then to such other proper person or persons as will accept the same.(*a*)

By a creditor of a person non-resident of this state at his death.

P. L. 1871, p. 34.

29. If any person not resident within this state shall depart, or shall have heretofore departed this life, possessed of personal property or choses in action within, or the evidence of which shall be in the hands of any person resident within this state, and the executors or administrators of such decedent shall neglect, or shall have neglected, for the space of sixty days after his death, to make application in this state for letters testamentary or of administration, upon or in respect to such decedent's estate, any person alleging himself or herself to have any debt or legal claim against such decedent, which by the laws of this state survives against the personal representatives of parties deceased, may make application to the surrogate of the county wherein said personalty, choses in action or evidences thereof are situate, and on proof to his satisfaction of the matters herein stated, said surrogate shall issue letters of administration upon the estate of such decedent to some other person, to be selected by him, either *cum testamento annexo* or otherwise, as the circumstances of the case may require, taking bond for the faithful performance of the duties of such administrator as in other cases required by law.

[For grant of letters of administration on estates of persons dying intestate within this state, leaving no relations entitled to administration, see EXECUTORS AND ADMINISTRATORS, *Sec.* 9].

In case intestate resided in another state at time of his decease.

R. S. 336, ¿¿ 1, 2.

30. When any person shall have died or may hereafter die intestate, who did not reside in this state at the time of his or her decease, and it shall be necessary or desirable to have letters of administration granted in this state, the ordinary or the surrogate, upon application in writing made to either for the purpose, may make an order that cause be shown before him, at a certain time and place therein to be expressed, not less than thirty days nor more than six months from the time of making such order, why letters of administration should not be granted to the person or persons making such application; which order shall be published in such manner as the ordinary or surrogate making the same shall direct; and if the person or persons making such application shall, at the time and place designated for that purpose as aforesaid, prove to the satisfaction of the ordinary or surrogate that the said order had been duly advertised and published, in manner therein directed, and no sufficient cause shall appear to the contrary, the said ordinary or surrogate may grant letters of administration of the estate of said intestate to the person or persons making the application as aforesaid, upon his, her, or their giving bond to the ordinary, with security for the faithful administration of the estate of the said intestate, in the same manner as is required in granting letters of administration in other cases.

Surrogate to make order, publication of.

By whom letters granted.

Ib. ¿ 1.

31. The application under the last preceding section may be made to the ordinary or to the surrogate of any county in which there shall be any goods, chattels, or assets of such intestate; and if any administrator so

(*a*) A grant to another person where the widow and next of kin are living, without notice, &c., to them, is not *void*, but voidable. *Den, Inskeep* v. *Lecony, Coxe* 111, 113, *Kinsey, C. J.* A *residuary legatee* is entitled to administration in preference to legatees, next of kin or creditors, *In re Kirkpatrick*, 7 *C. E. Gr.* 463. Next of kin are entitled before legatees, *Ibid.* Administration cannot be granted to a *stranger*, without notice or citation to the next of kin, or their consent, *Rinehart* v. *Rinehart*, 12 *C. E. Gr.* 475.

appointed shall die, or become incapable of acting, before fully administering the estate of his or her intestate, the surrogate of the same county or the ordinary may grant letters of administration *de bonis non* to any person or persons, in the manner prescribed for granting letters of administration to the first administrator in other cases.

In case of death of such administrator, administration de bonis non.
Ib. § 3.

32. Letters of administration issued by the surrogate, shall be in the following form:

Form of letters.
R. S. 205, § 18.

I, ———, surrogate of the county of ———, do certify, that on the —— day of ———, administration of the goods and chattels, rights and credits, which were of ———, late of the county of ———, who died intestate, was granted by me to ———, of ———, who is duly authorized to administer the same agreeably to law. Witness my hand and seal of office, the —— day of ———, in the year of our Lord, &c.

33. In all cases where any administration shall be granted, with a will or testament annexed, the will of the deceased in such testament expressed shall be observed and performed.

Grant of letters with will annexed.
R. S. 350, § 18.

[The executor of an executor is not as such authorized to administer on the estate of the first testator, but administration with the will annexed must be obtained. See EXECUTORS AND ADMINISTRATORS, *Sec.* 2].

34. Letters of administration with the will annexed hereafter issued by any surrogate in this state, shall be in form and of the purport following, to wit:

Form of, with will annexed.
P. L. 1861, p. 20, § 3.

To all to whom these presents shall come, greeting:

WHEREAS, ———, late of the county of ———, in the state of ———, departed this life, having made and executed a last will and testament, which has been duly proved, according to law, before the surrogate of the county of ———; *and whereas*, (the said testator failed to appoint any executor thereof), (or the executor named therein has renounced the trust imposed upon him by said will), or, as the case may be; therefore,

I, ———, surrogate of the county of ———, do hereby appoint ———, administrator of all and singular the goods, chattels and credits of said deceased, who is duly authorized to administer the same agreeably to said will.

In witness whereof, I have hereunto set my hand and seal of office, this —— day of ———, A. D. ———.

——— ———, Surrogate.

VI. Letters of guardianship.

35. The powers and duties formerly exercised and performed by the ordinary, relative to the admission of guardians, for persons under the age of twenty-one years, may be exercised and performed by the orphans' court of the county in which the minor applying for a guardian may reside, or shall have real or personal estate, or by the surrogate of said county, when the orphans' court of such county shall not be in session; *provided*, that if there be any dispute with respect to the right to letters of guardianship, the application shall be made to the orphans' court.(*a*)

Guardian appointed by orphans' court or by surrogate when court is not in session.
R. S. 205, § 22.
P. L. 1871, p. 102. Amended.

36. When an orphan is of the age of fourteen years or upwards, letters of guardianship shall be granted, on petition to the orphans' court or surrogate in cases where the surrogate is empowered to issue letters of guardianship, signed by such orphan in the presence of the surrogate; but where an orphan is under the age of fourteen years, the mother, or next of kin, of full age, and where there are several relations in equal degree of kindred, any one, giving due notice to the rest, may apply to the orphans' court or surrogate for the guardianship of such orphan, who, upon inquiry into the circumstances of the case, may admit one or more of them, or a stranger willing to accept the trust, at their or his discretion, to be guardian or guardians of such orphan, until he or she attains the age of fourteen years or other guardian or guardians be appointed in his stead; and the person or persons so appointed such guardian or guardians shall remain the lawful guardian or guardians of such orphan, under the said letters of guardianship, until the said orphan, after arriving at the age of fourteen, shall choose another guardian or guardians, and the bond given thereon

How letters obtained.
R. S. 205, § 23. Amended.
When minor of the age of fourteen.
When minor is under age of fourteen.
Powers of such guardian to continue until another guardian is appointed.

(*a*) The guardianship of a minor cannot be divided, so as to commit his property to one and his person to another, *Tenbrook* v. *M'Colm*, 7 *Hal.* 79. *Van Doren* v. *Everitt*, 2 *South.* 460, 462(*a*).

But minor at fourteen may choose another.

shall continue in full force; but where the orphan, after arriving at the age of fourteen years, shall choose any other person or persons to be guardian or guardians, letters of guardianship shall be applied for, as before directed, and all proceedings thereon be had accordingly.(*a*)

Guardian for child of absconding or absent parent.

R. S. 374, ¿ 9.

37. If any citizen of this state has, or shall hereafter abscond or absent himself from this state for the term of two years, leaving in this state any child or children under the age of twenty-one years, without competent and suitable provision for their maintenance and education, the orphans' court of the county where such child or children reside, on application of the said child or children, or of his, her or their next of kin, may appoint a guardian for such child or children, and to revoke such appointment as the said court shall see occasion; which guardian shall have the same

His authority.

authority over the said child or children as guardians have in other cases, until the revocation of his authority as aforesaid, notwithstanding any right or claim of authority of the said parent, and may lawfully do all acts for the maintenance and education of the said child or children, and the disposition of his or her time and services which the said parent could lawfully do.

Guardian of minor entitled to property in lifetime of father.

Ib. ¿ 10.

38. If any minor shall become seized or possessed of, or be entitled to any real or personal estate in the lifetime of the father of such minor, the ordinary, or the orphans' court of the county where such minor resides, or such real or personal estate may be, may appoint the father or other suitable person, guardian of the estate of such minor.(*b*)

Where minor of age of fourteen resides out of this state.

P. L. 1859, p. 87.

39. When an orphan is of the age of fourteen years, or upwards, and resides out of this state, and in some other state or territory of the United States, letters of guardianship shall be granted in this state, on petition to the orphans' court, signed by such orphan, in the presence of a judge of a court of record in the state or territory in which such orphan may reside, which signature shall be acknowledged before said judge, in the same manner and form as deeds are required to be acknowledged by the laws of this state.

Where next of kin of minor under fourteen resides out of this state.

P. L. 1864, p. 440.

40. Where it shall be made to appear upon oath, to the satisfaction of the orphans' court, that the next of kin of any orphan minor under the age of fourteen years, residing in this state, do not reside in the United States of America, or, if residing in the United States, are not within this state, the orphans' court may take such action in respect to the appointment of a guardian or guardians of said minor as shall seem to said court to be for his best interest and advantage.

Form of letters, when guardian appointed by orphans' court.

R. S. 205, ¿ 22.

41. Letters of guardianship, when a guardian is appointed by the orphans' court, shall be in the following form:

I, ———, surrogate of the county of ———, do certify, that on the —— day of ———, the orphans' court of the county of ———, admitted ———, of ———, as guardian of the person and property of ———, being a minor —— the age of ——. Witness my hand and seal of office, &c.

When appointment made by surrogate.

P. L. 1871, p. 102.

And in the form following, when the guardian is appointed by the surrogate:

I, ———, surrogate of the county of ———, do hereby certify, that on the —— day of ———, the orphans' court of said county not being in session, I admitted ———, of ———, as guardian of the ——— of ———, being a ——. Witness my hand and seal, &c.

Form of letter to testamentary guardian.

P. L. 1861, p. 20, ¿ 4.

42. Letters of guardianship issued in this state to testamentary guardians shall be in form and of the purport following, to wit:

To all whom these presents shall come, greeting:

WHEREAS, ———, late of the county of ———, in the state of ———, in and by his last will and testament, duly proved before the surrogate of the county of ———, did appoint ——— to be guardian of the person and property of ———, an infant, under the age of twenty-one years; *and whereas*, the said ——— has accepted the said appointment and entered into bond according to law; therefore,

(*a*) The mother or next of kin is entitled to the appointment where the orphan is *under* fourteen. *Read* v. *Drake*, 1 *Gr. Ch.* 78. *Eldridge* v. *Lippincott*, *Coxe* 397. *Van Houten's Case*, 2 *Gr. Ch.* 220. *Albert* v. *Perry*, 1 *McCart.* 540. *Turner's Case*, 4 *C. E. Gr.* 433. A lease made by a guardian of an infant under fourteen, extending beyond the time when such infant arrives at fourteen, may be avoided by another guardian appointed after that time, *Snook* v. *Sutton*, 5 *Hal.* 133. See *Van Dorens* v. *Everitt*, 2 *South.* *460, *462.

(*b*) This section was probably enacted because of the decision in *Garrabrant* v. *Sigler*, *April*, 1829, that the orphans' court had no power to appoint a guardian for a minor during the lifetime of the father; the prerogative court had no such power, nor could the consent of the father confer it, *Morris* v. *Morris*, 2 *McCart.* 239, 240.

I, ———, surrogate of the county of ———, do hereby certify, that the said ——— is duly authorized to execute the said trust according to law and the terms of the said last will and testament.

In witness whereof, I have hereunto set my hand and seal of office, this —— day of ———, in the year of our Lord one thousand eight hundred ———.

——— ———, Surrogate.

VII. Security on grant of letters.

Security required of administrators.

43. Upon granting administration of the goods and effects of any person dying intestate, the ordinary, surrogate, or court by whom the same shall be granted, shall take of the person to whom such administration shall be committed a sufficient bond, with two or more able sureties to the ordinary of the state, in such penalty as may be reasonable, regard being had to the value of the estate, with condition in form following, to wit:

R. S. 350, § 11.

Condition of bond.

The condition of this obligation is such, that if the above bounden A. B., administrator of all and singular the goods, chattels and credits of C. D., deceased, do make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come to the hands, possession or knowledge of the said A. B., or into the hands or possession of any other person or persons for the said A. B., and the same so made do exhibit or cause to be exhibited into the registry of the prerogative court, in the secretary's office of this state, or into the surrogate's office of the county of ———, at or before the expiration of three calendar months, from the date of the above written obligation, and the same goods, chattels and credits, and all other goods, chattels and credits of the said deceased, at the time of —— death, which at any time after shall come into the hands or possession of the said A. B., or into the hands or possession of any other person or persons for the said A. B., do well and truly administer, according to law; and further do make, or cause to be made, a just and true account of —— administration, within twelve calendar months from the date of the above written obligation; and all the rest and residue of the said goods, chattels and credits which shall be found remaining upon the account of the said administration, the same being first examined and allowed by the judges of the orphans' court of the county, or other competent authority, shall deliver and pay unto such person or persons, respectively, as is, are or shall, by law, be entitled to receive the same; and if it shall hereafter appear that any last will and testament was made by the said deceased, and the executor or executors therein named, or any other person or persons, do exhibit the same into the said prerogative court or the surrogate's office of the county of ———, making request to have it allowed and approved; if the said A. B., being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) to the said court, then the above obligation to be void and of none effect, or else to remain in full force and virtue.(a)

Ib. § 11.

P. L. 1871, p. 125, § 1.

To present inventory within three months.

And account within twelve months.

And make distribution.

Security on grant of letters of administration cum testamento annexo and in other cases.

44. In case of the grant of letters of administration, *durante minore ætate*, *durante absentia*, *pendente lite*, *cum testamento annexo*, and in all other cases of grant of administration, security shall be required as aforesaid, by bond to the ordinary, in penalty as aforesaid, with the same condition as is set out in the last preceding section, but adapted to the nature of the respective grants of administration.

R. S. 350, § 11.

What security required of administrator with will annexed.

45. In taking the bond of any administrator or administrators with the will annexed, to the ordinary, the ordinary and surrogate shall have regard to the value of the real estate ordered or directed to be sold in said will, as well as of the personal estate of the deceased, and may, in their discretion, examine the applicant or applicants for such letters of administration with the will annexed, under oath or affirmation, touching the value of said real and personal estate.

R. S. 350, § 22.

(a) History and origin of the different conditions of administration bonds commented upon, *Ordinary* v. *Cooley*, 1 *Vr.* 271. The first two conditions were provided to secure *creditors*, the last two to secure those entitled to distribution, *Ibid.* p. 275. The condition is not restricted merely to the rendering of an account, but is designed to secure a faithful administration of the estate, *Hazen* v. *Durling*, 1 *Gr. Ch.* 133. The bond need not conform strictly to this form, *Ordinary* v. *Smith*, 2 *Gr.* 479

Security required of husband on grant of administration on wife's estate.

P. L. 1856, p. 153, § 4.

46. Sufficient bonds, with two or more able sureties, to the ordinary of this state, with like penalty and condition as in other cases of administration, shall be required of all husbands to whom administration shall be granted of the goods, chattels and credits of their deceased wives.

[On probate of a foreign will and grant of letters testamentary thereon to a person residing out of this state, security is required. SUPRA, *Sec.* 25].

Security required of guardian.

R. S. 374, § 2.

47. Every court or other competent authority appointing a guardian, shall take bond of him with good sureties and in sufficient sum, for the faithful execution of his office.

Security required of testamentary guardian.

Ib. § 1.

Unless otherwise directed by the will.

48. Every guardian, appointed by last will and testament, which shall be legally proved and recorded, shall, before he exercises any authority over the minor or his estate, appear before the orphans' court and declare his acceptance of the guardianship, which shall be recorded, and shall give bond, with such sureties and in such sum as the said court may approve of and order, for the faithful execution of his office, unless it is otherwise directed by the testator's will.

VIII. Inventories.

Inventories to be specific in details.

P. L. 1855, p. 342, § 1.

49. No inventory shall be received or admitted to be proved before the surrogate, or orphans' court, or ordinary, which is not full and specific in its details.(*a*)

1. BY EXECUTORS AND ADMINISTRATORS.

Inventory by executors, &c.

R. S. 350, § 10. Amended.

Appraisement.

Proved before surrogate within three months.

P. L. 1871, p. 125, § 1.

50. It shall be the duty of every executor and administrator, to make a true and perfect inventory of the goods and chattels, rights and credits and effects of the deceased,(*b*) and to cause a just appraisement of the same, to be made by two discreet and impartial persons, which inventory shall be proved before the surrogate within three months after grant of letters testamentary or of administration, unless the orphans' court, for good cause shown, shall allow further time therefor; and if any executor or administrator shall fail to prove such inventory before the surrogate within the time aforesaid, the surrogate shall cite him to render such inventory; and if he continue in default, the orphans' court shall revoke the letters testamentary or of administration, and grant letters to some other person.

How appraisers appointed.

51. The appraisers by whom the appraisement of the goods, chattels, rights, credits and effects of any testator or intestate shall be made, shall be chosen by the executor or administrator, subject to the approval of the surrogate, unless in cases where it shall be necessary to set off goods and chattels for the benefit of the family of the deceased, as is provided in the next section.

Exemption for benefit of family.

P. L. 1851, p. 278, § 1 & 4.
" 1852, p. 36.
" 1856, p. 64.
" 1860, p. 243.
Amended.

52. The wearing apparel of any person who shall die, leaving a family residing in this state, and goods and chattels, money and effects of the estate of such deceased to the value of two hundred dollars, shall be reserved to and for the use of the family, against all creditors, and before any distribution or other disposition thereof; and it shall be the duty of the executor or administrator of such deceased, to apply to the surrogate of the county where such deceased resided at the time of his death, and the said surrogate shall thereupon appoint two discreet and judicious persons of said county, not interested in the estate of said deceased, and not of kin to his widow or children, who shall, before they enter upon the duties of their appointment, be severally sworn before the surrogate, or any person lawfully authorized to administer an oath, faithfully, honestly and impartially to appraise such property, according to the true and intrinsic value thereof, without reference to what the same might be supposed to bring at a sale by vendue; and said appraisers, being so appointed and sworn, shall make an inventory and appraisement, in

Appraisers appointed by surrogate.

To be sworn.

How appraisement made.

(*a*) The inventory presented to the surrogate by an executor, should contain a *specific enumeration* of the goods, chattels and credits of the testator; a paper containing items, thus—"cash, bonds and notes,"—"household goods and kitchen furniture," is not, strictly speaking, an inventory, and may properly be rejected as such by the surrogate, *Vanmeter* v. *Jones*, 2 *Gr. Ch.* 520. The practice of filing with the surrogate *general inventories* of the estates of deceased persons instead of those which are specific in their details strongly disapproved. The fact that the executor or administrator retains in his own custody a more specific inventory does not answer the design of the law. The parties interested are entitled to the information as well as the executor, *Pursel* v. *Pursel*, 1 *McCart.* 514.

(*b*) The notes of a debtor of an estate, who is *non-resident* and *insolvent*, may be omitted, both in the inventory and in the account, with perfect propriety. And no influence unfavorable to the executor should be drawn from it, *Black* v. *Whitall*, 1 *Stock.* 572. An *advancement* is not to be inventoried, *Ibid.* 586.

manner aforesaid, of the goods and chattels, moneys and effects whereof such deceased died possessed; which inventory and appraisement shall include all the property required to be inventoried and appraised by the executors or administrators of any deceased person; and the widow of the deceased, or his executor or administrator, may select from such inventory, goods and chattels, money or effects to the value of two hundred dollars, and annex to said inventory a list thereof; and the goods and chattels, money or effects so selected, shall thereupon become the property of said family and remain for their use.(*a*)

Goods selected and list annexed to inventory.

53. Every person residing in this state at the time of his death, dying testate or intestate, and leaving a widow or a child or children who shall reside in his family at his death, him surviving, shall be deemed and taken to have left a family entitled to the benefits of the last preceding section; but nothing in that section contained shall be permitted to conflict with the provisions of any last will.

Who shall be deemed to have left a family.

P. L. 1856, p. 64, § 2.
" 1860, p. 243.
Amended.

54. The inventory of every executor or administrator shall be proved before the surrogate by the oath of the executor or administrator that the same is just and true, and by the oath of the appraisers, or one of them, that the goods and chattels, rights, credits and effects in said inventory specified were appraised at their just and true respective values, according to the best of their or his (as the case may be) judgment; and if one only of the appraisers be sworn thereto, it shall be added that the other appraiser was present at the same time and consented to the said valuation and appraisement; which oaths shall be taken before the surrogate, and the same shall be endorsed on the said inventory which shall be filed with the surrogate; and in case goods and chattels or property of the deceased shall have been set off for the benefit of the family, the executor or administrator shall also verify by his oath the list of property selected for the use of the family, and file the same with the inventory.

Inventory, how proved before the surrogate.

R. S. 350, § 10.
Amended.

Oath of executor and appraisers.

Oaths endorsed on inventory.

Oath of executor to list of goods selected for benefit of family.

P. L. 1851, p. 278, § 4.
" 1856, p. 64, § 2.

2. BY GUARDIANS.

55. Every testamentary guardian, guardian in socage, or other guardian shall, within three months after his acceptance of or appointment to his office, deliver to the clerk of the orphans' court an inventory, upon oath, of all the estate, real and personal, which he shall have received or taken possession of.

Inventory of guardian to be filed within three months after letters granted.

R. S. 374, § 3.

56. If any guardian fail to deliver to the surrogate an inventory of the estate of the ward in the time and manner required by law, such surrogate shall, without any application or order therefor, cite such guardian to deliver such inventory at the ensuing term of the orphans' court, and the costs of such citation and of the proceedings thereon, shall be paid by such guardian out of his own private estate; and if he fail to deliver such inventory, according to such citation, the court shall revoke the letters of guardianship, and remove him from office, and appoint some suitable person in his place, who shall have all the powers of the person so removed; and the person so removed shall not be entitled to any commissions or compensation for his past services.

In default, surrogate shall cite.

P. L. 1855, p. 343, § 25.

And court may revoke letters.

And guardian not allowed compensation.

IX. Payment of debts.

57. To enable executors or administrators to examine into the condition of the estate and ascertain the amount and value thereof, and the debts to be paid out of the same, no action, either at law or in equity, except for funeral expenses, shall be brought or maintained against executors or administrators of the estate of any decedent, within six months after probate shall have been granted to such executor or executors in case of a will, or letters of administration shall have been granted to such administrator or administrators in case of intestacy, or with a will annexed, as the case may be, unless upon suggestion of fraud to the satisfaction of the court wherein such action is intended to be brought.(*b*)

No action to be brought for six months unless for funeral expenses.

R. S. 346, § 2.

P. L. 1852, p. 94.
Amended.

Unless on suggestion of fraud.

(*a*) In all cases where the intestate dies, leaving a wife or child entitled to the benefit of the provisions of the acts of 1856 and 1860, the inventory must be made by *appraisers* appointed by the *surrogate*, not selected by the administrators, who are to be sworn by him before entering upon the performance of their duties, and to execute their office in pursuance of the requirements of the act of 1856, *Dilts* v. *Stevenson*, 2 *C. E. Gr.* 407.

(*b*) The death of a person against whom a cause of action has accrued, does not bar or suspend the operation of the statute; nor does this section suspend it, *Dekay* v. *Darrah*, 2 *Gr.* 288. See *Den, Clark* v. *Richards*, 3 *Gr*, 317. *Cowart* v.

Preferred debts.

R. S. 346, ¿ 2.

58. Judgments entered of record against the decedent in his lifetime, funeral charges and expenses, and the physician's bill during the last sickness, shall have preference and be first paid out of the personal and real estate of the testator or intestate.(*a*)

1. CREDITORS HOW BARRED.

Rule to limit creditors.

R. S. 92, ¿ 15.

P. L. 1849, p. 154, ¿ 2.

P. L. 1855, p. 342, ¿ 22.

Publication of.

59. The orphans' court, or the surrogate of the proper county, is hereby empowered to order executors and administrators to give public notice to the creditors of the decedent to bring in their debts, demands, and claims against his estate, under oath, within nine months from the date of such order, by setting up such notice in five of the most public places in said county for two months, and also by advertising the same, for the like time, in one or more of the newspapers of this state as may be directed in said order, and any further notice in case the court or surrogate shall judge the same necessary, which order may be made in term time or vacation, at any time after the granting of letters testamentary or of administration, whether the estate be insolvent or not, and such notice shall be given and advertised within twenty days after the date of such order.(*b*)

On rule to limit, claims to be in writing.

P. L. 1849, p. 154, ¿ 3.

Amended.

60. When any order to bring in debts and claims against the estate of any decedent shall be made in pursuance of the last preceding section, all claims and demands of the creditors of the deceased shall be presented in writing, specifying the amount claimed and the particulars of the claim, and shall be verified under oath, or the bringing in of the same shall be of no effect.

Debts payable in the future may be presented.

61. Debts, and demands liquidated, not due and payable, but which are payable in the future, may be presented for allowance; a reasonable rebate of interest being made when interest is not accruing on the same; and if any such debt or demand be disputed, and action be brought therefor, the plaintiff shall not fail in such action on account of such debt and demand being payable in the future, if the same be otherwise a legal debt or demand.

After expiration of time limited court may make final decree in bar.

P. L. 1849, p. 154, ¿ 2.

P. L. 1855, p 342, ¿ 22.

Amended.

62. After the expiration of the time in such order limited, the orphans' court, upon proof to its satisfaction that such notice has been set up and advertised as directed, may, by final decree, order that all creditors who have not brought in their claims within the time in said order directed, shall be barred from any action therefor against the executor or administrator; and any creditor who shall have neglected to bring in his debt, demand or claim, within the time so limited, shall by such decree be forever barred of his or her action therefor against such executor or administrator, except as hereinafter provided; *provided nevertheless*, that in case such creditor so failing to present his debt, demand or claim, shall, after the final settlement of the account of the executor or administrator find some other estate not accounted for, he shall be entitled to have his debt, demand or claim paid thereout, or to a ratable proportion thereof in case other creditors shall be barred of their debts, demands or claims.

Creditor barred, finding some estate not accounted for, entitled to ratable proportion.

Perrine, 6 *C. E. Gr.* 101. Where A. has a demand against B. which is not barred by the statute, and B. dies intestate, the statute will not run until letters of administration are taken out, although there may be an executor *de son tort*, *Burnet* v. *Bryan*, 1 *Hal.* 377.

(*a*) Debts due to the *state* have no preference. *Aliter*, as to debts due to the United States, 4 *Grif. Law Reg.* 1281, *note* (2). The order of *priority* at common law is as follows: (1) Funeral charges and the expenses of administration. (2) Debts of record. (3) Debts by specialty. (4) Simple contract debts. *Ibid.* *Haines* v. *Price*, *Spen.* 480, 483. Where a legatee was entitled to the income of a certain amount for her life, with a limitation over to A., and a direction to the executors "to accumulate." *Held*, that first the *physician's bill* and then the *funeral expenses* of such legatee must be taken from any unexpended part of such income before its payment to A., *Fowler* v. *Colt*, 7 *C. E. Gr.* 44. *Judgments* to be preferred, must be actually entered of record during the lifetime of the defendant, *Wood* v. *Hopkins*, *Pen.* *689; affirmed, *Pen.* *692, *note*. *Milnor* v. *Milnor*, 4 *Hal.* 93. The administrator having, in his inventory and first settlement of accounts, treated as a part of the estate of the intestate a sum of money which he knew was in the hands of his intestate as a commissioner for the sale of property, will not be permitted, when the estate proves *insolvent*, to treat such moneys as a separate trust fund, and to give a preference to the same over other debts, *Cooley* v. *Vansyckle*, 1 *McCart.* 496. If no *suit* is commenced against him, the executor may pay any creditor in equal degree his whole debt, although he has nothing left for the rest, *Haines* v. *Price*, *Spen.* 480, 483.

(*b*) To bar a claim against an estate, under the rule limiting creditors, there must be proof that the *notice* was advertised or set up as required by law, *Petrie* v. *Voorhees*, 3 *C. E. Gr.* 285. The demand is not barred merely by the adoption of a *rule* by the orphans' court, *Campfield* v. *Ely*, 1 *Gr.* 150. The neglect to exhibit a claim to the personal representative of a decedent, within the time limited by the rule to bar creditors, is an absolute bar to a suit; but, in pleading such bar, all the facts showing due notice and *publication* must be pleaded and proved, *Ryan* v. *Flanagan*, 9 *Vr.* 161. By the 23d section of the act of 1855, the 2d section of the act of February 28th, 1849, is preserved in full force, *Ibid.* A *final decree*, taken under section 2d of the act of 1849, of itself establishes all the facts essential to the protection of the executor. The executor may, if he choose, rely upon his ability to prove all the facts which constitute a bar, but if he desires to perpetuate his testimony, and to have a decree which will save him the necessity of proving the facts, he must proceed according to the said 2d section, *Ibid.*

63. If any executor or administrator to whom any such claim is presented dispute the same, or any part thereof, and shall give notice in writing to the creditor, claimant, his attorney or agent, that said claim, or any part thereof, is disputed, such creditor shall bring suit therefor in three months from the time of giving such notice; and in any suit not commenced within said time, said decree shall bar any recovery of the account or part so disputed, as if said debt or claim had not been presented within the time so limited by said court.

If disputed, and notice in writing given, must be sued for in three months or barred.

P. L. 1849, p. 154, § 2.

64. Nothing herein contained shall prevent or bar any person from bringing and maintaining any action against an executor or administrator, for or in respect of the personal estate of his testator or intestate, or for or in respect of any waste or misapplication thereof by such executor or administrator.

Nothing herein to affect action for waste, &c., of estate.

R. S. 660, § 21.

65. In any citation to account, or suit for any legacy or distributive share, it shall be no defence, that there are disputed claims outstanding or in suit against the estate, if the executor or administrator shall have neglected for six months to obtain an order to limit creditors, and to proceed thereon according to law, unless a suit brought within a year from the grant of probate or administration be pending on such claim.

That there are outstanding claims, when no defence to citation for account, or suit on legacy.

P. L. 1849, p. 154, § 6.

66. Any legacy or distributive share which shall not have been attached in the hands of the executor or administrator, or paid over to the person entitled to the same, shall, notwithstanding such decree in bar of creditors, be assets in the hands of the executor or administrator for the payment of a ratable proportion of the debt or claim of any creditor who shall not have presented the same within the time limited; but such creditor in any action to charge such assets shall not recover any costs, and if judgment pass against him in such action, he shall pay costs.

Legacy or distributive share not attached or paid, to be assets for payment of debts.

Ib. § 5.

Amended.

67. It shall be the duty of every executor or administrator, on the payment of any legacy or distributive share to the person entitled to the same, to take a refunding bond therefor; which bond shall be filed in the surrogate's office of the county in which letters testamentary or of administration were granted; and any creditor, who may be barred by virtue of any decree of limitation, may, by order of the orphans' court, bring suit on such refunding bond in the name of the executor or administrator, but with the name of such creditor stated in the process and pleadings as the prosecutor thereof, and may recover thereon the proportion of his debt, which ought to be paid out of the legacy or distributive share for which said bond was given, but shall not recover costs in such suit; and if judgment be given for the defendant therein, he shall have judgment against the prosecutor for his costs of suit, and not against the plaintiff; but there shall not be recovered on such bond, in the whole, a greater amount than the legacy or share actually received by the person by or for whom it was given; *provided*, that nothing herein contained shall enable any person to recover any debt or demand barred by any limitation other than said decree.(*a*)

Duty of executor, etc., to take refunding bond.

R. S. 92, § 15.

P. L. 1849, p. 154, §§ 4. 5.

Amended.

Creditor barred may sue on refunding bond.

And recover ratable proportion of his debt, but without costs.

68. In any action by a creditor to charge a legacy or distributive share as assets in the hands of an executor or administrator, for the payment of a ratable proportion of his debt, it shall be presumptive evidence that such legacy or distributive share, if not attached, was not paid to the legatee or distributee, if it appear that at the commencement of the suit no refunding bond had been filed therefor; and in such case such executor or administrator shall be chargeable with such legacy or distributive share as assets, unless it shall be proved that such legacy or distributive share was actually paid over before the commencement of such suit, and such executor or administrator shall at the time of pleading such decree in bar file therewith a proper refunding bond, and pay the plaintiff in such action his costs of suit which shall have accrued before plea filed.

In action against executor, etc., to charge legacy or distributive share as assets, the non-filing of refunding bond proof that such legacy or share has not been paid.

P. L. 1849, p. 154, § 5.

Amended.

69. In case any executor or administrator shall neglect to make a final settlement of his account within one year after letters testamentary or of administration granted, or if any administrator shall not within three months after the final settlement of his account apply for a decree of distribution thereon, any creditor, whose debt or demand shall be barred by such decree of the orphans' court, may present a petition to the

If executor neglects to file his account within one year or administrator neglects to obtain decree of distri-

(*a*) See *Supra*, p. 295, § 6, and p. 582, *note* (*a*).

bution, creditor may file petition for relief.

If delay unreasonable court may decree relief.

And may make order for proof of claim and costs of proceeding.

And decree costs to be paid by executor.

orphans' court, or the president judge thereof alleging such facts and praying relief; and the said court, or the president judge, shall investigate the circumstances of the case, and the condition of the estate, and if it be made to appear that such delay was unreasonable and without sufficient cause, the said court, or president judge, may by decree give such creditor relief against any assets that may be in the hands of the executor or administrator, in the nature of the relief he would be entitled to in case the final account of such executor or administrator had been passed, and a refunding bond taken for any legacy or distributive share, and may make such order touching the proof of the claim of such creditor (if disputed), and the costs of such proceeding, as may be equitable; and the said court, or judge, may in their or his discretion order and decree that such costs be paid by the executor or administrator out of his own estate.

2. SALE OF LANDS FOR PAYMENT OF DEBTS.

Lands may be sold for payment of debts by order of the orphans' court.

R. S. 660, § 26.

70. The lands, tenements, hereditaments and real estate of any person who shall die seized thereof, or entitled to the same, as well as any share or shares, or part or parts of a share of propriety of undivided rights, or warrant to locate lands in this state, shall be and remain liable for the payment of his or her debts, for one year after his or her decease, and may be sold by virtue of an order of the orphans' court of the county where such lands, tenements, hereditaments and real estate shall lie, or in case of any share or shares, or part or parts of a share of propriety of undivided rights, or warrant to locate lands, by an order of the orphans' court of the county where such decedent last resided, if obtained within the said period of time, any alienation or encumbrance made, or attempted to be made, by his or her heir or heirs, devisee or devisees, to the contrary notwithstanding; *provided always*, that nothing herein contained shall affect any right of dower in the said lands, tenements and real estate.(*a*)

Notwithstanding alienation by heir or devisee if order obtained within one year.

(*a*) After lands have escheated, the orphans' court cannot order them sold for the payment of debts, *O'Hanlin* v. *Den, Spen.* 31; 1 *Zab.* 582. The orphans' court cannot try title to lands, under proceedings for sale thereof for payment of debts, *Swackhamer* v. *Kline*, 10 *C. E. Gr.* 503. *Liddel* v. *McVickar*, 6 *Hal.* 44. A sale and conveyance by executors by virtue of an order of the orphans' court, for the payment of debts of the testator, passes to and vests in the purchaser such estate, and such estate only, as the heir or devisee has in the lands at the time of the making of the order for sale, *Warrick* v. *Hunt*, 6 *Hal.* 1. But since the act of the 12th of December, 1825, a sale under an order of the orphans' court, obtained within one year after the death of the testator or intestate, will vest in the purchaser such an estate as the testator or intestate died seized of, or entitled to, notwithstanding any alienation or incumbrance thereof made or attempted to be made by the heir or devisee, *Ibid. Skillman* v. *Van Pelt, Sax.* 511. If obtained *more* than a year afterwards, it vests in the purchaser only such estate or interest as the heir or devisee had at the time of such order, *Bockover* v. *Ayres*, 7 *C. E. Gr.* 13. Such decree is erroneous, if the order to show cause why the real estate should not be sold, and the order for sale respect the payment of a single debt, and not the debts generally of the intestate, *Taylor* v. *Hanford*, 6 *Hal.* 341. It is the duty of the orphans' court, before making the order for sale, to examine and ascertain that the personal estate which came to the hands of the executor or administrator, has been applied by him in the course of administration, *State* v. *Conover*, 4 *Hal.* 338. *Stiers* v. *Stiers, Spen.* 52. *Wilmurt* v. *Morgan, March*, 1827, *Chancery. Bray* v. *Neill*, 6 *C. E. Gr.* 343. So, where a testator devised certain lands for the payment of his debts, until they have been exhausted, the sale of other lands cannot be ordered, *Ibid.* A decree made without such proof, is erroneous, *Taylor* v. *Hanford*, 6 *Hal.* 341. An administrator, on an application to the orphans' court for an order to sell lands to pay debts, exhibited to the said court an account of the debts only, and the said court, on the same day, made an order for the sale of lands; and the administrator made sale, and made report of the sale, to the said court; and on exceptions to the report of sale, the said court confirmed the sale and ordered that a deed be given. *Held*, on appeal, that the proceedings were irregular, *McDonald* v. *Hutton*, 4 *Hal. Ch.* 473. The account of the personal estate and the amount of debts must be rendered, under oath, and the statutory notice given, *Den, Obert* v. *Hammel*, 3 *Harr.* 73, 77. An account of the personal estate of an intestate, which refers only to an inventory filed in another state, is not a compliance with the statute, unless a copy of the inventory is annexed, *Bray* v. *Neill*, 6 *C. E. Gr.* 343. On application for sale of lands to pay debts, it is necessary that the orphans' court should ascertain and determine the amount of the deficiency of the personal estate required to be raised by the sale of lands, *Ibid. Stiers* v. *Stiers, Spen.* 52. When the applicant had received and sold lands devised by the testator, which ought to contribute to the payment of debts, it is error to order lands of other devisees to be sold for the payment of debts paid by the applicant, without deducting the proportion the applicant ought to pay, *Ibid.* If the day to show cause is one day less than two months from the date of the rule, the order to sell is erroneous, and must be set aside on appeal. And as this rule is the proceeding by which jurisdiction is acquired, the defect appearing on the record would avoid the proceeding collaterally, *Ibid.* No time is limited within which the order for sale must be made. It must rest upon the circumstances of each case, *Liddel* v. *McVickar*, 6 *Hal.* 44. Where land in B. was devised for certain purposes, and on application for sale to pay debts, the orphans' court ordered the proceeds of the sale of the land in B. to be exhausted before selling testator's other land. *Held*, in the prerogative court, reversing this decision, that the proceeds of the sale of the B. property could only be regarded as personalty for the *specific purposes* designated in the will, and that an order should be made to sell lands to pay the general debts, *Winants* v. *Terhune*, 2 *McCart.* 186. It is irregular to order *all* the real estate of the decedent to be sold; but not sufficient to avoid the proceedings after sale and confirmation, *Runyon* v. *Newark India Rubber Co.*, 4 *Zab.* 467. The court should ascertain how much is necessary to be sold, and then, what part, *State* v. *Conover*, 4 *Hal.* 338. *Liddel* v. *McVickar*, 6 *Hal.* 44, 50. A decree of the orphans' court, ordering an administrator to sell the whole or so much of the lands of the intestate as will be sufficient to pay the debts, will be reversed as erroneous and unlawful. But such decree cannot be impeached collaterally, or treated as a nullity, *Pittenger* v. *Pittenger*, 2 *Gr. Ch.* 156. On a bill filed by an executor for the direction of the court as to the disposition of the surplus proceeds of the sale of real estate over debts and legacies claimed by the administrator of an insolvent devisee who died before the sale. *Held*, that the administrator, not having obtained an order of the orphans' court to sell the land of such devisee, was not entitled to receive that part of the surplus because vested in the heirs of such devisee, *Cook* v. *Cook*, 5 *C. E. Gr.* 375. The administrator as heir, having sold and conveyed his share of the real estate, an order for sale of that share to pay a debt due him or to reimburse moneys advanced by him, ought not afterwards to be made. Being the person both to pay and receive, the portion of the debt which his share of the land might otherwise be chargeable with, ought to be deemed extinguished, *Liddel* v. *McVickar*, 6 *Hal.* 44. A *second order* may be obtained, if the quantity sold be not sufficient to satisfy the debts, *Ibid.* The conveyance by the executor is of the husband's right only, and hence a widow's *dower* is not affected, *Palmer* v. *Casperson*, 2 *C. E. Gr.* 204, 206. *Stp* v. *Lawback*, 2 *Harr.* 442.

Proceedings to obtain order to sell.

R. S. 660, § 15.

71. When any executor or administrator shall discover or believe that the personal estate of his testator or intestate is insufficient to pay his debts, it shall be his duty to exhibit, under oath, a true account of the personal estate and debts, as far as he can discover the same, to the orphans' court of the county where the lands, tenements, hereditaments and real estate, of which the said testator or intestate died or shall die seized, do lie, and request their aid in the premises; and the said court shall thereupon make an order, directing all persons interested in such lands, tenements, hereditaments and real estate, to appear before them at a certain day and place, in the said order to be mentioned, not less than two months after the day of making such order, to show cause why so much of the said lands, tenements, hereditaments and real estate of the said testator or intestate should not be sold as will be sufficient to pay his debts, or the residue thereof, as the case may require; which order, signed by the surrogate or clerk of the said court, shall be immediately thereafter set up at three of the most public places in the said county for six weeks successively, and be published for the same time in one or more of the newspapers printed in this state.

Application to be made to orphans' court of the county in which lands lie.

Rule to show cause how published

Court to examine into condition of estate.

Ib. §§ 16, 21.

Amended.

72. The said orphans' court shall, at the time and place mentioned in the said order, or at such other time and place as they may then appoint, hear and examine the allegations and proofs of the said executor or administrator, and other persons interested; and if, on full examination, the said court shall find that the personal estate of the said testator or intestate is not sufficient to pay his debts, the said court shall order the executor or administrator to sell the whole, if necessary, of the lands, tenements, hereditaments and real estate of the said testator or intestate, for the payment of his debts, or so much thereof as will be sufficient for that purpose; and when a part only of the said lands, tenements, hereditaments and real estate is sufficient, such order shall specify the part to be sold; and no more of the said lands, tenements, hereditaments and real estate shall be sold than may be necessary to pay the residue of the said debts after the executor or administrator shall have applied the personal estate, or such part thereof as may have come to his hands, towards the payment thereof; *provided always*, that where any houses and lots or lands are so circumstanced that a part thereof cannot be sold without manifest prejudice to the heirs or devisees, the said court may, at their discretion, order the whole or a greater part than is necessary to pay such debts, to be sold.

No more lands to be sold than sufficient to pay residue of debts after personal estate applied.

Heir or devisee may give bond for payment of debts.

Condition of bond.

73. When any rule to show cause why lands and real estate should not be sold for the payment of debts shall be obtained, the heirs or devisees of the intestate or testator, or any of them, may appear before the said court at the time fixed for hearing, and enter into bond to the executor or administrator in such sum and with such sureties as the court shall approve, conditioned for the payment to the said executor or administrator of so much money as may be required to pay the residue of the debts of the testator or intestate and the just expenses and allowances for the settlement of the estate which shall remain after the personal estate shall be applied thereto, and to indemnify and save harmless the said executor or administrator from any damages or costs which he may individually be lawfully subjected to by reason of the delay; and thereupon the hearing of the said rule to show cause and all proceedings thereunder shall stand adjourned until the amount of such deficiency shall be ascertained; and if such heir or devisee, on demand made of such heir or devisee or of the sureties on the said bond, shall refuse or neglect to pay to the executor or administrator the moneys required to pay the residue of the debts, expenses and allowances as aforesaid, the said orphans' court shall order the said bond to be prosecuted in any court of competent jurisdiction, or proceed to make such order for the sale of the lands and real estate whereof the testator or intestate died seized, as might have been made if the said bond had not been given.

If heir or devisee refuses to pay bond, may be prosecuted.

Or court may proceed to make order to sell.

In suit on bond judgment for penalty.

74. In any suit upon any bond which shall be given under the last preceding section, if judgment shall be recovered by the plaintiff, such judgment shall be for the penalty of the bond, together with costs of suit, and the sheriff or other officer to whom the execution thereon shall be

Amount collected to be paid into orphans' court having jurisdiction over account.

How money when collected to be applied.

issued, shall make the amount thereof out of the property of the defendants as in other cases, and shall pay the same into the orphans' court having jurisdiction over the accounts of such executor or administrator, and the said court shall apply the same, or so much thereof as may be needed, towards the payment of the residue of the debts, expenses and allowance aforesaid, which shall remain unpaid after the personal estate in the hands of the executor or administrator has been applied thereto, and the costs and damages of the executor or administrator, individually sustained as aforesaid; and the surplus, if any, shall be repaid to the defendants from whom such judgment was collected.

Security required of executor, etc., on order to sell.

R. S. 660, § 22.

75. When any orphans' court in this state shall order any executor or administrator to sell any lands, tenements, hereditaments or real estate of any testator or intestate, the said court shall take, of the executor or administrator applying for such order, a bond, with two or more sufficient sureties, being residents in the county, to the ordinary of the state and his successors, in a penalty double the amount of the estimated value of the lands, tenements, hereditaments, or real estate ordered to be sold, with condition in form and manner following, to wit:(*a*)

Condition of bond.

The condition of this obligation is such, That if the above bounded A. B., executor of the last will and testament of C. D., deceased, (or administrator of all and singular the goods, chattels and credits of C. D., deceased, as the case may be), shall well and truly administer the moneys arising from the sales of any lands, tenements or real estate of the said C. D., directed by the order of the orphans' court of the county of M. to be sold according to law; and further, do make or cause to be made, a just and true account of his administration, within twelve months from the date of the above obligation, and the surplus of money which shall be found remaining upon the account of such sale or sales, (the same being first examined and allowed by the judges of the orphans' court of the county, or other competent authority), shall distribute and pay unto such person or persons respectively, as is, are, or shall be by law entitled to receive the same, then the above obligation to be void and of none effect, otherwise to be and remain in full force and virtue.

[For mode of advertising sale, and power to adjourn sale, see Title SALES UNDER JUDICIAL PROCEEDINGS, *Sec.* 1–7].

Sale to be reported.

R. S. 660, § 17.

P. L. 1852, p. 476.
" 1862, p. 19.
" 1866, p. 1051.

76. The executor or executors, administrator or administrators, and the survivor or survivors of them, who may be ordered to sell any lands, hereditaments or real estate of any testator or intestate, shall, after making such sale, report the same to the orphans' court by which the order to sell was made; and if the said court shall approve of such sale, it shall confirm the same as valid and effectual in law, and shall by rule of court direct the said administrator or administrators, executor or executors, and the survivor or survivors of them, to execute good and sufficient conveyances in the law to the purchaser or purchasers for the tract or tracts of land or real estate so sold.(*b*)

If approved to be confirmed by court.

77. The deeds or conveyances made by such executor or administrator for any lands or real estate, sold by virtue of any order of the orphans'

(*a*) A bond which varies from the form prescribed by the statute, if voluntarily given, and not made void by the statute, is good, *Ordinary* v. *Cooley*, 1 *Vr.* 179, 271. When, by the condition of such bond, the executor or administrator is required to render a just and true account concerning the sale, an assignment of a breach of such condition, that he had not rendered a just and true account of his administration of the moneys arising from the sale, is bad on demurrer, *Ibid.* An administrator whose intestate owned the equity of redemption in lands sold under a decree for foreclosure, is entitled to the surplus for the payment of the intestate's debts, and must execute a bond, with sufficient sureties and with condition as required by the statute in the case of lands sold by the order of the orphans' court, *Camden Ins. Co.* v *Jones*, 8 *C. E. Gr.* 171.

(*b*) Whether the administrator or executor can purchase at his own sale, see *Winants* v. *Brookfield*, 2 *South.* 847, (*a*). Where two administrators sell land under an order of the orphans' court, and only one of them executes the deed, equity will enjoin the heirs from prosecuting an ejectment to recover the land upon the ground of such irregrlarity, *Wortman* v. *Skinner*, 1 *Beas.* 358. When the law requires that a report of such sale should be made to a court, that they may look into the circumstances, and either confirm it or set it aside, and the sale is not to be available until approved by the court and the conveyance is to be made under their direction—the proper practice unquestionably is, that the *true purchaser* should be made known, either to the officer (that he may report the facts to the court) or to the court themselves, before the conveyance is ordered, that they may judge of the propriety of making any substitution, instead of leaving that matter to the discretion of the officer, *Den* v. *Lambert*, 1 *Gr.* 182. See *Kearney* v. *Taylor*, 15 *How.* 494. The order of the orphans' court directing commissioners to execute good and sufficient conveyances in the law to the purchaser, must be strictly followed; and hence, where the order of the court directed the deed to be made to the purchaser, who was W. L. H., and the commissioners made the deed to W. L. H. and G. L., it was declared to be void, *Ibid.* The authority to execute the deed and to convey the title, depend not upon the recitals of the deed, but upon the *order* of the court authorizing the sale, and the confirmation of the sale by the court, *Stryker* v. *Vanderbilt*, 3 *Dutch.* 68. After a sale is reported to, and confirmed by the court, according to the requirements of the statute, it cannot be *set aside* or inquired into collaterally, except for fraud, *Runyon* v. *Newark India Rubber Co.*, 4 *Zab.* 467. The report of the sale was made to the court *before* the act of 1837, not to confirm such sale, but to charge the administrator with the *proceeds* as assets, *Wortman* v. *Skinner*, 1 *Beas.* 358, 387.

court, shall set forth that the sale of said lands or real estate was made by the said executor or administrator by virtue of an order of the orphans' court of the county in which the sale shall be authorized, and the date of such order and the term of the orphans' court in which the same was granted, and the date of the order of confirmation; which said deeds of conveyances, duly executed as aforesaid, shall vest in the purchaser or purchasers all the estate that the testator or intestate was seized of at the time of his or her death, if the order be obtained within one year thereafter; and if the said order be not obtained within that time, then the said conveyance shall vest in the purchaser or purchasers all the estate that the heirs or devisees of the testator or intestate were seized of at the time of the making of the said order of the orphans' court; and any deed or conveyance made in pursuance of the order of the court confirming such sale shall be good and valid and received in evidence as such in any court in this state, notwithstanding the omission of the recital in the said deed of the orders of such orphans' court authorizing such sale, and confirming the same, and notwithstanding any variance between the recital in said deed of the said orders and the record thereof.

Deed what to recite.

R. S. 660, §§ 17, 18, 19. Amended.

What estate passes by.

Not avoided by mis-recital or omission to recite order of court.

78. The moneys arising from such sale of the lands, tenements, hereditaments and real estate of such testator or intestate, shall be received by the executor or administrator, and be considered as assets in his hands for the payment of debts, and the surplus money arising from such sale, remaining after the payment of debts and just expenses (the personal estate in the hands of the executor or administrator being first applied thereto), if any, shall be distributed among the heirs or devisees according to the law of descents in the former, and the will of the testator in the latter case; and the orphans' court in which the executor or administrator is required to account, after such executor or administrator shall have legally accounted for and touching the sale or sales of the said lands, tenements, hereditaments and real estate of the person so deceased, shall order a distribution of the surplus, after debts and just expenses of every sort first allowed and deducted, among the heirs or devisees to whom the lands, tenements, hereditaments and real estate so sold, descended or were devised, according to the law of descents in the former, and the will of the testator in the latter case, and the persons entitled to such distribution, shall have their remedy at law, in case of non-payment, for the recovery of the same, against the executor or administrator so accounting saving to every one, if aggrieved, his, her, or their right of appeal; and further, the heir or devisee, whose lands, tenements, hereditaments and real estate, descended or devised to him, have been sold as aforesaid, for the payment of the debts of his intestate or testator, may compel all others claiming or holding under such intestate or testator to contribute in proportion to their respective interests, so as to equalize the burden or loss.(a)

Proceeds of sale to be assets for payment of debts. Ib. §§ 16, 20, 23.

Surplus to be divided among the heirs or devisees.

Orphans' court may decree such distribution.

Heir or devisee whose lands are sold may compel others to contribute.

79. When any creditor shall have obtained judgment against an executor or administrator, and the execution issued on the same shall remain unsatisfied in whole or in part, for want of personal estate to be levied on and sold, and there is real estate, the creditor or his legal representative (if the executor or administrator, being thereto required, shall neglect or refuse to take proceedings to obtain a sale thereof according to law, for the space of one month after being so required) may apply to the orphans' court of the proper county to order such sale to be made; and the said court, upon due notice given to said executor or administrator of such application, shall examine the circumstances of the case, and if it appears that the said debt or any part thereof is unpaid, and the personal estate deficient as aforesaid, and no sufficient cause being shown to the contrary, the said court shall make such order to show cause in the name of such executor or administrator as is above mentioned, and such further proceedings shall be had as is above prescribed in relation to the sale of real estate where the personal estate is insufficient to pay debts.

Creditor may apply to orphans' court to have order made.

R. S. 205, § 15. Amended.

(a) *Lands* are assets for the payment of debts, and may be sold in a suit against the executor or administrator, without making the heir a party, *Den, Ely* v. *Jones, Coxe* 131, 133. *Wright* v. *Hartshorne*, 1 *Hal.* 457. *Den* v. *Jacques*, 5 *Hal.* 259, 269. See *Warwick* v. *Hunt*, 6 *Hal.* 1, 7. Lands are not assets in the hands of executors and administrators for the payment of debts; but when sold for the payment of debts, under a decree of the orphans' court, the *money* received by the executor or administrator from their sale, will be considered assets. *Haines* v. *Price, Spen.* 480. The excess is considered as realty, and goes to the heir at law, and, if he die under age, to *his* heir, *Oberly* v. *Lerch*, 3 *C. E. Gr.* 346, 575. *Fidler* v. *Higgins*, 6 *C. E. Gr.* 138. See *Cook* v. *Cook*, 5 *C. E. Gr.* 375.

Executor or administrator refusing to give security may be removed.

R. S. 660, ¿ 24. Amended.

80. Where the orphans' court of the proper county has made an order for sale under the provisions of this act, either on the application of the executor or administrator, or of a creditor or creditors, if the executor or administrator shall, at the term mentioned in the said order, neglect or refuse to give bond with sureties, as aforesaid, the said court shall forthwith revoke the letters testamentary or letters of administration of such executor or administrator, and thereupon the surrogate shall grant letters of administration or letters testamentary with the will annexed, to such person or persons having right thereto, as will give bond in manner and form aforesaid; and the order for the sale of lands shall be made in the name of such administrator so appointed, who shall be empowered to proceed with such sale as if the rule to show cause and other prior proceedings had been in his name.

And order of sale made to new administrator.

[By the act of March sixteenth, one thousand eight hundred and seventy, (P. L. 1870, p. 28), the orphans' court may order lands sold free from dower or curtesy, making compensation to the tenant in dower or by the curtesy for the value of such estate. See Title SALES UNDER JUDICIAL PROCEEDINGS, *Sec.* 18.

If the purchaser shall die before confirmation of the sale, or before the deed is delivered, the deed may be made to his heirs or devisees. See same Title, *Sec.* 21].

X. Insolvent estates.

Estate real and personal of insolvent to be distributed equally among his creditors.

R. S. 346, ¿¿ 1, 2.

81. The estate, real and personal, of a testator or intestate, in case the same shall be insufficient to pay all his or her debts, shall be distributed among his or her creditors, in proportion to the sums that shall be due to them respectively, except that the debts, which by this act are made preferred debts shall be first paid.

[What debts are preferred, see *supra*, *Sec.* 58].

Executor, etc., believing insufficient to pay debts, may obtain order for creditors to bring in claims.

Ib. ¿ 3.

82. When any executor or administrator shall, by application in writing, represent to the orphans' court of the proper county, or oath or affirmation, that the personal and real estate of the decedent is insufficient to pay the debts of the deceased, according to the best of his knowledge and belief, the said court shall thereupon direct the said executor or administrator to give public notice to the creditors of the estate, to exhibit to such executor or administrator, under oath or affirmation, their claims and demands against the estate within such time as the court shall direct and appoint, not exceeding eighteen months nor less than six months, by setting up such notice in five of the most public places in the county, for the space of two months, and also by advertising the same for the like period in one or more of the newspapers printed in this state, as may be appointed by the said court, and such further notice, if any, as the said court shall direct.(*a*)

(*a*) The orphans' court has no power (except in cases of insolvent estates of decedents) to settle disputed claims, to determine who are creditors, and who not, to adjust the amounts due to such as are; and consequently no authority to decree a dividend or distribution among creditors. *Miller* v. *Pettit*, 1 *Harr.* 421. See *P. L.* 1869, *p.* 1445. The orphans' court has authority to try disputed claims in the case of insolvent estates. In such case, either the executor or administrator, or any person interested, may file exceptions against the claim of any creditor, and the court must hear the proofs, and decree and determine in regard to the validity of the claims. *Vreeland* v. *Vreeland*, 1 *C. E. Gr.* 512. The court will not interfere and prevent the payment of money raised by an execution upon a judgment against the executor of an insolvent estate, if no proceedings have been taken before the orphans' court to declare the estate insolvent. Until such proceeding is had, judgment and execution creditors are entitled to be paid out of the estate according to their legal priority. *Dibble* v. *Woodhull*, 4 *Zab.* 618. Unless property to the amount of two hundred dollars is actually appropriated, for the widow and family of a deceased debtor, according to the provisions of the statute, that sum cannot be retained by the administrator on a settlement of his account. *Cooley* v. *Vansyckle*, 1 *McCart.* 496. Creditors are required by the act concerning the estates of persons who die insolvents, to exhibit to the executor or administrator, under oath or affirmation, their claims against the estate, within the period limited by the order of the court; which period commences running from the date of the order (unless otherwise directed in said order), and not from the time of putting up the notices required by the said section, *Coppuck* v. *Wilson*, 3 *Gr.* 75. After the court has granted a rule for time, and exceptions filed are ready to be argued, it is their duty "to proceed and hear the proofs and allegations in the premises," and their refusal to do so is contrary to the statute, *Ibid.* The affidavit need not show *where* it was sworn, *Smith* v. *Abbott*, 2 *Harr.* 358. Where the notice requiring creditors to present their claims has been given in pursuance of an order of the orphans' court, under the "act concerning the estates of persons who die insolvent," the creditor cannot be admitted to a dividend of the estate, unless his claim has been presented under oath, within the time limited by the order, *Gould* v. *Tingley*, 1 *C. E. Gr.* 501. Nor does it obviate the necessity of presenting the claim under oath, that the order and notice requiring claims to be exhibited were made by the surrogate under section 22 of the act of 1855, (*Supra*, ¿ 59). *Ibid.* The act of 1855, on proceeding under a rule to bar creditors, having required the claim of the creditor to be made under oath, dispensed with the necessity of a second presentment of the same claim under proceedings to declare the estate insolvent, *Ibid.* The requirements of both acts are imperative, not merely directory, *Ibid.* That the administrator's petition sets forth that the estate is insufficient to pay just debts and expenses, will not render void the subsequent proceedings, *O'Hanlin* v. *Den*, *Spen.* 31, 50. An application to the orphans' court, by the administrators, does not bar the action; nor can the administrators set up such application by plea, as a defence to the action. The statute simply provides, that "no execution shall in any case issue after the making of said application." If within the provisions of the statute, the relief provided may be obtained by motion, *Howell* v. *Potts*, *Spen.* 569. The application must be before the recovery of the judgment, or the proceedings in the orphans' court form no protection to the administrators, *Ibid.* Where, on application of executors or administrators, the orphans' court has regularly declared an estate to be insolvent, no action can be brought and maintained

[If an order to limit creditors has been obtained, proceedings to have the estate decreed insolvent may be taken without the above order. See *infra*, *Sec.* 91].

Claims, how presented.
P. L. 1849, p. 154.

83. The claims presented to the executor or administrator shall be in writing specifying the amount and particulars thereof and verified by oath; and any debt or claim which shall be due and payable in the future, may be presented, a reasonable rebate of interest being made, when interest is not accruing on the same.

Debts growing due admitted.
R. S. 346, § 9.

Executor to report claims and present inventory of real and personal estate.
R. S. 346, § 4, 5.

84. The said executor or administrator shall make report to the said court of the several claims and demands which may be exhibited against said estate, particularly specifying the demand and amount thereof at the time of such report, and whether by judgment, decree, bond, note, book account or otherwise; and shall exhibit therewith under oath to the said court, a true and just account of the moneys, goods, chattels, rights and credits of the decedent, which have come to his knowledge, hands or possession, and also an inventory of the real estate of said decedent, which may have come to his or her knowledge, and the value thereof, as near as may be.

When report shall be made.
R. S. 346, § 4.
P. L. 1865, p. 31, § 1, 2.
Amended.

85. The report required to be made by the last preceding section may be made at the term in which such limited time may expire, or at the term next after such time may expire, in case the same expire in vacation, or at some future time to be fixed by the court on special application; and the said executor or administrator shall give two months' notice of his intention to make such report by advertisement, signed with his name, and put in three of the most public places in the county where such decedent resided at the time of his death, and shall specify therein the day on which such report will be made to such court, and shall file such report in the surrogate's office, at least twenty days before the day named for presenting the same.

Report when filed.

Exceptions to claim of creditor or account of executor
R. S. 346, § 6.
P. L. 1865, p. 31. Amended.

86. Any creditor, or other person interested, may file exceptions to the account and exhibition of the said executor or administrator, in respect of the amount and value of the real and personal estate of the said decedent; and the executor or administrator, or other person interested, may file exceptions to the claim or demand of any creditor, or any part thereof, and the court shall hear the proofs and allegations in the premises, at the same or any subsequent court, and upon such exceptions, decree and determine in regard to said claims and demands of creditors, respectively, and on the account of such executor or administrator, in respect of the personal estate, as may be just and lawful; and in case no exception be made against any claim or demand of a creditor, as aforesaid, it shall be held and deemed as justly due; and in like manner, the account of said executor or administrator, not excepted to, shall be allowed and held as true; *provided*, that such exceptions shall be filed on or before the day specified for presenting such report to the court, or within such time as the court on application may allow; *and provided further*, that either party may appeal from such decree to the ordinary, within twenty days from rendering the same, and not after.

How determined. If not excepted to, allowed.

Exceptions when to be, in twenty days.

Appeal to ordinary.

Creditor whose account is excepted to may proceed at law or in equity, or

87. If any creditor, whose claim or demand is excepted to as aforesaid, shall elect to proceed at common law or in equity, in preference to having the same determined by the orphans' court, such creditor shall so proceed immediately; and the sum recovered against the executor or administra-

against the executor or administrator, except upon a claim presented and disputed for the purpose of adjusting it; and the decree of insolvency may be pleaded in bar, *Reeves* v. *Townsend*, 2 *Zab.* 396. If a creditor of an insolvent estate neglects to exhibit to the administrator of his deceased debtor, his claim under oath, within the time prescribed by the rule of orphans' court for that purpose, he will not be allowed to come in for a ratable proportion of the estate of the deceased, *Vandyke* v. *Chandler*, 5 *Hal.* 49. If a widow presents her claim against her husband's estate it will be deemed an *election*, and will bar her dower, *Camden Ins. Ass'n.* v. *Jones*, 8 *C. E. Gr.* 171. The orphans' court, in case of the insolvency of a decedent, has no authority to reconsider and alter their final decree settling the claims on the estate, and changing the amount of assets in the administrator's hands, without notice to, or the appearance of the creditors who are interested in the estate, and entitled to dividends thereof. Nor may the said court make any alterations in the account, as sworn to, in such manner as carries the appearance of the accountant having sworn to that to which he did not, *Eakin* v. *Brick*, 1 *Harr.* 98. A decree of the orphans' court on a final settlement of the accounts of an administrator, ordering the surrogate to strike dividend of the estate among the several creditors named in the account, will not be set aside because a dividend has not been struck, *State* v. *Mayhew*, 4 *Hal.* 70. If any action against an executor or administrator be pending at the time of making an order to limit creditors, under the twenty-second section of the supplement to the orphans' court act, approved March 17th, 1855, or be commenced after such order is made, no execution can issue upon a judgment therein for the plaintiff, until the expiration of ten months after the making of the order; and if within those ten months, the executor or administrator represents the estate to be insolvent, according to the twenty-fourth section of the same supplement, no such execution can issue thereafter, *Taylor* v. *Volk*, 9 *Vr.* 204.

executor, etc., may require him to sue.

R. S. 346, ¿ 8.

tor, if any, shall be the amount on which a ratable proportion shall be paid as aforesaid; and in case any executor or administrator shall desire to have the claim or demand of any creditor against the estate, determined in law or in equity, he shall give notice thereof at the term to which report is made, and the said creditor shall proceed immediately in either court, as his case may be, and the sum recovered shall be the amount on which a ratable proportion shall be paid as aforesaid; and the court in which any such action may be brought, shall take order, that the same may be determined as speedily as possible.

Suits pending may proceed to judgment.

R. S. 346, ¿ 12.

But no execution shall issue.

88. If any action be pending against said executor or administrator, at the time of the making the application, in the eighty-second section mentioned, or be brought against such executor or administrator, after the making of the said application, the plaintiff may proceed to final judgment therein, unless the claim shall be adjusted as is hereinbefore directed, or otherwise; but no execution shall in any case issue after the making of said application; and the amount of such judgment, when recovered, shall be the sum on which the creditor shall receive his ratable proportion as aforesaid. (See *supra, Sec.* 82, *note a*).

Estate insolvent, sale of lands ordered.

Ib. ¿ 7.

89. If upon the adjustment of the claims and demands of creditors, and consideration of the amount of the personal and real estate, and value thereof, it shall appear to the court that the real and personal estate is insufficient to pay the debts, and that the estate is likely to be insolvent, the said court shall so decree, and shall order and direct the said executor or administrator to proceed as if the estate was insolvent, and to make sale of the whole or any part of the real estate of the testator or intestate, from time to time, as may appear expedient, in such manner as is now or may hereafter be directed in case of an executor or administrator, directed to sell lands by an order of the orphans' court, for the payment of the debts of a testator or intestate.

How lands in other counties sold.

Ib. ¿ 14.

90. It shall be lawful for the orphans' court of any other county, upon the production of an authenticated copy of such order and decree as is mentioned in the last preceding section, to order and decree the sale and conveyance of any lands or real estate of such decedent, situate in such other county, the report of which sale shall be made to the orphans' court making the first or original decree.

If rule to limit obtained, executor or administrator may by application to court have estate decreed insolvent.

P. L. 1855, p. 342, ¿ 24.

P. L. 1865, p. 31, ¿ 1.

Amended.

91. If an order to limit creditors under the fifty-ninth section of this act shall be obtained by the executor or administrator, and at the time of obtaining such order, or at any time thereafter, such executor or administrator shall, by application in writing, under oath, represent to the orphans' court of the proper county, that, according to the best of his knowledge and belief, the real and personal estate of the decedent is insufficient to pay his debts, the orphans' court, on report of claims and presentation of the inventory of the real and personal estate of the decedent, as herein above prescribed, may decree the estate to be insolvent, and make order for the sale of lands and real estate, as in case of insolvent estates, without the application and notice to creditors in the eighty-second section; *provided*, that the notice to creditors, which is required to be given by the order to limit creditors, shall have been given, and the executor or administrator, with the notice that the report of claims will be made, shall also give notice that he will thereupon make application to have the said estate decreed insolvent.

Proceeds of real and personal estate, how distributed.

R. S. 346, ¿ 10.

Court may compel payment of dividend to creditor by attachment.

92. The proceeds of the said personal and real estate of the testator or intestate which shall come to the hands of the said executor or administrator (the preferred debts and the reasonable allowance which may be decreed by the court to the executor or administrator, for care and expenses, being first paid), shall be distributed to the said several creditors by the said executor or administrator, in proportion to the sums that shall be found due to them respectively, as aforesaid, under the direction of the said court, from time to time, as may be found convenient and just; and the said court may enforce obedience to such orders and directions by attachment.

Residue shall go to heir or devisee.

Ib. ¿ 13.

93. If it should happen that there is enough produced from such real and personal estate, to make full payment, and any residue of the said estate shall remain in the hands of the executor or administrator, after

paying all the said debts and expenses, the said residue shall be divided among the heirs of the intestate, in such proportions as the said real estate would have descended, or, in case of a will, as the said will directs.

Creditor not presenting his claim barred. Ib. § 11.

94. Any creditor who shall not exhibit his claim to the executor or administrator as aforesaid, within the time limited and prescribed by the said court, shall be forever barred from prosecuting or recovering his said demand, unless the estate shall prove sufficient, after all debts exhibited and allowed are fully satisfied, or such creditors shall find some other estate not inventoried or accounted for by the executor or administrator before distribution, in which case such creditor shall receive his ratable proportion out of the same.

Unless he finds some estate not accounted for.

Nothing herein to affect any action against executor, etc., for waste or misapplication of estate.

95. Nothing herein contained shall prevent any person from maintaining any action against any executor or administrator, for, or in respect of, any waste or misapplication of the estate of the testator or intestate.

XI. Accounting.

1. BY EXECUTORS, ADMINISTRATORS, GUARDIANS AND TRUSTEES.

Account to be settled within one year, unless court allow further time. P. L. 1856, p. 153, § 1.

96. Every executor, administrator, guardian or trustee under a will shall state and settle his account in the surrogate's office within one year after his appointment, or at the first regular term of the orphans' court after the expiration of said year, unless the court, for good cause shown, allow further time therefor.

Guardians to present account annually. R. S. 374, § 3.

97. Every testamentary guardian or other guardian shall exhibit to the orphans' court once in each year, and oftener if required, an account of all moneys, goods and chattels he shall receive, and of the rents, issues and profits of any real estate in his possession belonging to his ward.

In case of failure to make settlement any person interested may cite. P. L. 1856, p. 153, § 1

98. In case of the failure of any executor, administrator, guardian or trustee to make such settlement within the time above limited or allowed by the court, or in case any guardian shall neglect to present annual accounts as aforesaid, any person interested in the estate, or any other person as the next friend of any infant interested, may cite such executor, administrator, guardian or trustee to make such settlement at the ensuing term of the court; and the costs of such citation and of the proceedings thereon shall be paid by such executor, administrator, guardian or trustee out of his own private estate, unless the court, for good cause shown, shall order otherwise.(a)

(a) It is the duty of an executor, not only to exhibit his account for allowance, but to use diligence in bringing it to a final settlement, *Egerton* v. *Egerton*, 2 *C. E. Gr.* 419. Where there are no special reasons for going into equity, the orphans' court is the proper tribunal, and should be selected by all parties for settling the accounts of executors and administrators, *Salter* v. *Williamson*, 1 *Gr. Ch.* 480. The fact that an executor or administrator has exhibited his account in the orphans' court, and that steps have been taken toward a final settlement of the account in that court, will not deprive the court of chancery of its jurisdiction. Until the final decree of the orphans' court there is nothing to prevent the court of chancery taking cognizance of the case, *Ibid.* But where an account has been exhibited in the orphans' court, and especially if considerable advance has been made towards the adjustment of the account, a court of equity will not interfere unless there exist some substantial reason for invoking its aid, *Ibid.* Partial accounts, exhibited and allowed by the orphans' court, although distribution has been ordered of the balances thereby found in the executor's hands, will not prevent a person interested in the estate from bringing the executors into chancery at any time before final settlement, *Merselis* v. *Merselis*, 3 *Hal. Ch.* 557. But there must be good cause shown for its interference, *Clarke* v. *Johnson*, 2 *Stock.* 287. A single claim that a married woman at the time of her marriage, twenty years ago, was possessed of $400, which was then given to her husband, is not sufficient ground to interfere with accounts nearly settled, *Search* v. *Search*, 12 *C. E. Gr.* 137. As to the right of an administrator, to whom letters have been granted after prior administration revoked, to call the former administrator to account, see *Crombie* v. *Engle*, 1 *Zab.* 614. 620, *note.* On a bill filed on behalf of an infant complainant to compel executors and trustees under a will to account for the estate of the testator which has come to their hands, and for the execution of their trust, complainants are entitled to an account as a matter of course, *Holcombe* v. *Coryell*, 2 *Stock.* 392. Where by the terms of a will the real estate is ordered to be sold, and the residue of the estate, real and personal, is bequeathed, and directed to be paid after the payment of certain pecuniary legacies, which cannot be paid till a future time, the residuary legatees are entitled to an account, and to have the real estate sold and the proceeds applied in the course of administration, before the time arrives for the payment of the particular legacies, *Vanderpool* v. *Davenport*, 2 *Gr. Ch.* 120. The retention of the fund in the administrator's hands, mingled with his own funds and used for his own profit, will entitle the party beneficially interested in the fund to a discovery and an account, and to such decree as may be necessary to maintain and enforce the complainant's rights, *Frey* v. *Demarest*, 1 *C. E. Gr.* 236. Where the purchase money of real estate had been wrongfully paid over to one not entitled thereto, an account was ordered, *Scudder* v. *Stout*, 2 *Stock.* 377. An executor or administrator may be cited to account, notwithstanding he has declared the estate of his testator or intestate insolvent; and the citation may be issued and made returnable before the expiration of the time limited for creditors to exhibit their claims, *Duncan* v. *Barnes*, *Spen.* 75. If the orphans' court dismiss the citation with costs, because the estate has been declared insolvent and the time limited for the presentation of claims has not expired, this court will reverse the decree, *Ibid.* In order to ascertain whether property was purchased with money of the first intestate, an investigation of the accounts of his administratrix may be made in the courts of this state, if necessary. An account thus taken is not had for the purpose of settling the account, or making a decree of distribution here, but to ascertain whether real property in this state over which this court has jurisdiction, and exclusive jurisdiction so far as the title is concerned, is held in trust by one resident of this state for another resident, *Brownlee* v. *Lockwood*, 5 *C. E. Gr.* 239. Where a bill was filed against defendants in their representative characters as trustees, and as the representatives of a testator, and the prayer of the bill was in conformity thereto, the complainant is entitled to an account in that respect only, *Scott* v. *Gamble*, 1 *Stock.* 218. An executor, who was also an agent or trustee of the testator in his life time, after the final settlement of his accounts as executor in the orphans' court, cannot be called on to account in equity as such trustee. There can be no separate accounting in the two different capacities, *Vanmeter* v. *Jones*, 2 *Gr. Ch.* 520. Upon a decree for an account, upon a bill filed by a creditor against an administrator, the account

If executor or administrator neglect to account for two years, surrogate to cite him unless the court allow further time.

P. L. 1871, p. 125.

99. If any executor or administrator shall neglect to render an account of the estate of the deceased for the space of two years after his appointment, it shall be the duty of the surrogate to issue a citation to such executor or administrator to render his account, unless the court, for good cause shown, allow further time therefor; and if he fail to state and settle his account according to such citation, or within the time so allowed by the court, it shall be the duty of the orphans' court to remove such executor or administrator from office; and such executor or administrator shall pay the costs of such citation and proceedings out of his private estate, and shall forfeit his commissions and not be allowed any compensation for his services.

Executor or administrator entitled to personal estate after debts are paid, or guardian filing a release by his ward shall not be cited except by person interested.

P. L. 1856, p. 153.

100. *Provided*, that nothing in the preceding sections shall make it the duty of any executor or administrator, who is entitled to all the personal estate of the testator or intestate, after payment of debts, to settle his accounts in the surrogate's office, unless required to do so by some person interested in said estate; nor shall it be the duty of any guardian or trustee to settle an account, who shall file with the surrogate of the proper county a release or discharge from his ward or *cestui que trust*, of full age, or, if married, from such ward or *cestui que trust* together with her husband, duly executed and acknowledged as deeds for land are by law executed and acknowledged.

Accounts to be stated by surrogate

R. S. 205, ¿ 21-5.

And filed in his office twenty days before court.

101. The surrogate shall audit and state the accounts of executors, administrators, guardians and trustees exhibited to him, and place the same on the files of his office, subject to the inspection of any person interested therein, at least twenty days previous to the same being presented to the court, and shall report the same to the orphans' court for confirmation and allowance.

Two months' previous notice to be given and advertised.

P. L. 1856, p. 153, ¿ 3.

102. No account of any executor, administrator, guardian or trustee shall be allowed by the orphans' court, unless such executor, administrator, guardian or trustee shall first give at least two months' notice of such settlement by advertisements set up in five of the most public places of the county in which such settlement is to be made, one whereof shall be set up in the surrogate's office of said county, and also by publishing the same in one or more newspapers published in such county for the same length of time, and in case no newspaper be published in the county, then, instead of advertising such notice in the newspaper, the said executor, administrator, guardian or trustee shall give notice by setting up advertisements in ten of the most public places in said county for the like space of time, two of which places shall be the clerk's and surrogate's offices of said county.

In case of accounts of guardians and trustees, citations also to be issued.

R. S. 205, ¿ 24.

P. L. 1862, p. 57, ¿ 2.

Amended.

How served.

103. In cases of the accounts of guardians and trustees, in addition to the notice aforesaid, the surrogate shall issue citations to all persons concerned to appear at the said orphans' court; which citations shall be served at least ten days before the sitting of the court; and such guardian or trustee, or any person on his behalf, may serve such citation on such wards or other parties by delivering a copy thereof to them, or by leaving a copy at their usual place of abode with some person of the age of fourteen years or upwards, and make and file with the surrogate an affidavit setting forth the time, place and manner of such service, whereupon the same shall have the force and effect of a service by the proper officer.

Accounts to be passed by the court.

R. S. 205, ¿ 24.

If balance appear in favor of accountant not to be passed until the next term.

104. The court at the term to which the account of any executor, administrator, guardian or trustee shall be reported, shall examine the said account and the vouchers and receipts for payments and disbursements claimed therein, and if the same be found to be correct in all respects, the court, on due proof that notice of such settlement has been given and advertised as aforesaid, and no exception being made to the report of the surrogate, shall decree an allowance of the account as stated; *provided*, that in all cases where it appears that there is a balance due the accountant the court shall not decree an allowance of the account until the next regular term after that to which the report is made.

cannot be taken for the benefit of the complainant alone, but must be for the benefit of all such creditors as choose to come in before the master, *Hazen* v. *Durling*, 1 *Gr. Ch.* 133. If an executor's account rendered in the orphans' court appear on the face of it to be a final account it will be deemed such, although not so styled in the caption, *Stevenson* v. *Phillips*, 1 *Zab.* 70. *S. C.*, 4 *Hal. Ch.* 593; 2 *McCart.* 236.

Exceptions may be filed. Ib. § 24.

105. If any person interested in the settlement of the account of any executor, administrator, guardian or trustee shall, by himself or attorney, appear and make exceptions to said account, the court shall either proceed to hear the proofs and allegations, at such time as they may appoint, and correct any mistake or errors that may happen in the account as reported, or refer the same to auditors or a master in chancery to examine and restate the account, after hearing parties and witnesses, and make report to the next or some subsequent court for confirmation and allowance.

How heard.

May be referred.

Accountant may be examined. Ib. § 26.

106. The court to whom any account is reported for an allowance as aforesaid, or the auditors or masters to whom an account is referred as aforesaid, at the instance of any party interested in the same, or by their own proper authority, may examine any executor, administrator, guardian or trustee exhibiting such account, on oath or affirmation, touching the truth and fairness of the same or any part or item thereof.(*a*)

Annual accounts of guardians to be examined and approved.

R. S. 374, § 3.

107. The annual accounts of every guardian which shall be exhibited to the orphans' court as aforesaid, shall be examined by the court, or by such person or persons as they shall appoint, and being found and certified or reported to be properly and fairly stated, and the articles thereof to be supported and justified by the vouchers, and the report in case of a reference being approved and confirmed by the court, shall, with such confirmation, be entered of record; and if any article of such accounts be at any time afterwards excepted to by the ward or his representative, it shall be incumbent on him to prove or show the falsity or injustice thereof, unless notice on his behalf shall have been given at the time of passing the accounts, that such article would be excepted to and a memorandum of that notice shall have been entered on record or desired to be entered.

Decree on final settlement conclusive, except for assets coming to hand thereafter, or fraud or mistake shown.

R. S. 205, § 27.

108. The sentence or decree of the orphans' court on the final settlement and allowance of the accounts of executors, administrators, guardians or trustees, shall be conclusive upon all parties, and shall exonerate and forever discharge every such executor, administrator, guardian or trustee from all demands of creditors, legatees or others, beyond the amount of such settlement, except for assets or moneys which may come to hand after settlement as aforesaid, excepting, also, in cases where a party applying for a resettlement, shall prove some fraud or mistake therein, to the satisfaction of the said orphans' court.(*b*)

(*a*) The accountant may be examined as to the truth and fairness of the account, *Conover* v. *Conover*, 3 *Gr.* 420, 422. This summary mode is intended to be a substitue for the more expensive remedy by bill of discovery, in chancery, *Davison* v. *Davison*, 2 *Harr.* 169.

(*b*) A decree upon a settlement not final, is not conclusive, *Ross* v. *Ross*, *July*, 1827. A decree of allowance is a proceeding *in rem*, and unless removed by appeal, conclusively determines the rights of all persons, *Exton* v. *Zule*, 1 *McCart.* 501. *Search* v. *Search*, 12 *C. E. Gr.* 137. When executors have settled their account in the orphans' court, if there be no evidence of fraud or mistake, equity will not disturb the settlement, but will take the balance stated in the account to be the true balance in the hands of the executors, *Conover* v. *Conover*, *Sax.* 403. *Frey* v. *Demarest*, 1 *C. E. Gr.* 236. *Search* v. *Search*, 12 *C. E. Gr.* 137. An account settled in the orphans' court, and within the jurisdiction of that court, cannot be inquired into in a collateral suit in this court, *Voorhees* v. *Voorhees*, 3 *C. E. Gr.* 223. *Ordinary* v. *Kershaw*, 1 *McCart.* 527. *Gill* v. *Drummond*, 1 *South.* *295. A palpable mistake appearing upon the face of an executor's account, after final settlement and allowance, may be corrected in equity, *Black* v. *Whitall*, 1 *Stock.* 572. If by mistake or other cause an omission exists in a partial account, it may be corrected in the final one, *Liddel* v. *McVickar*, 6 *Hal.* 44. A decree of the orphans' court confirming a report of auditors at the citation of one of the next of kin, that a sum of money was due from an executor to his co-executor, is not a judgment of the court against such executor, *Clark* v. *Clark*, *Pen.* 112. The orphans' court cannot open the final account of executors or administrators except for fraud or mistake, *Stevenson* v. *Phillips*, 2 *McCart.* 236. The true meaning of the words "to the satisfaction of the said orphans' court." is not to enable that court to dispense with proof; but to indicate to them that the proof should be clear and satisfactory, and that in a doubtful case, they ought not to open an account, *Johnson* v. *Eicke*, 7 *Hal.* 316. *Crombie* v. *Engle*, 4 *Harr.* 82. A decree of the orphans' court adjudging that due and legal *notice* of a settlement of accounts has been given, is final, *Boulton* v. *Scott*, 2 *Gr. Ch* 231. The provision of the statute, that the account when settled and allowed by the orphans' court, shall be final and conclusive, "except when fraud or mistake can be shown to the satisfaction of the court," does not refer the matter to the mere discretion of the court, but is equivalent to a positive enactment, that the account shall not be conclusive, if fraud or mistake can be shown by legal and sufficient evidence, *Crombie* v. *Engle*, 4 *Harr.* 82; 1 *Zab.* 614. If the court discharges the rule to show cause why the account should not be opened and re-stated on the ground of fraud or mistake, and orders the applicant to pay the costs, notwithstanding the fraud or mistake is apparent on the face of the account or is proved by legal evidence, it is error, and a *certiorari* will lie, *Ibid.* The court will not intend that the orphans' court refused to be satisfied with legal and sufficient evidence, but that they erred in considering the evidence not legal, or in deciding the matter not to be fraudulent or a mistake, *Ibid.* The application, in case of an alleged fraud or mistake, is one addressed to the discretion, and must be proved to the satisfaction of the orphans' court. When, therefore, no question of law is raised, the decision of that court upon the facts is final, and not the subject of review or *certiorari*, *Ibid.* A petition to the orphans' court to set aside an account as illegally and improvidently allowed, and also to open the same for mistake and fraud therein, need not specify in what the fraud or mistake consists or the items alleged to be affected thereby, *Trimmer* v. *Adams*, 3 *C. E. Gr.* 505. When an account is opened solely on the ground of fraud or mistake, proved to the satisfaction of the court, the settlement should be confined to correcting the items in which the fraud or mistake is proved and such part or parts of the account as are affected by the change so made. The residue of the account not affected by such proof, should be allowed to stand as settled, *Ibid.* But when an account is set aside as improvidently allowed, contrary to the express provisions of the statute, it should be set aside altogether, and the parties allowed to contest every item of it, *Ibid.* A party seeking to open, an account that has been allowed and settled by the orphans' court, must point out the particulars in which the account is fraudulent or erroneous, so as to apprise the opposite party of what is intended to be proved, and must lay such evidence of the fraud or mistake before the court, as to make out at least a *prima facie* case, *Hyer* v. *Moorehouse*. *Spen.* 125. The burthen of proof lies on the party alleging such fraud or mistake, and therefore a rule, calling on the other party to show cause why the account should not be opened, does not impose on such party the necessity of sustaining the account and decree. *Ibid.* If fraud or mistake is proved to the satisfaction of the court, the original account ought not

2. COMMISSIONS.

Allowance to be made with reference to actual trouble, etc.

R. S. 205, § 26.

109. The allowance of commissions to executors, administrators, guardians or trustees, shall be made with reference to their actual pains, trouble and risk in settling such estate, rather than in respect to the *quantum* of estate.

Limitation of rates.

P. L. 1862, p. 41.

110. On the settlement of the accounts of executors, administrators, guardians or trustees under a will, their commissions, over and above their actual expenses, shall not exceed the following rates: on all sums that come into their hands, not exceeding one thousand dollars, seven per centum; if over one thousand dollars, and not exceeding five thousand, four per centum on such excess; if over five thousand dollars, and not exceeding ten thousand, three per centum on such excess; and if over ten thousand dollars, two per centum on such excess; *provided*, that the commissions of executors and administrators in any estate where the receipts exceed the sum of fifty thousand dollars, shall be determined by the orphans' court on the final settlement of their accounts according to the actual services rendered, not exceeding five per centum on all sums which come into their hands.

If estate over $50,000.

P. L. 1867, p. 979.

Provision for specific compensation by will.

P. L. 1855, p. 342, § 10.

111. Where provision shall be made by a will for specific compensation to an executor, guardian or trustee, the same shall be deemed a full satisfaction for his services in lieu of the allowance aforesaid, or his share thereof, unless he shall, by writing filed with the surrogate, renounce all claim to such specific compensation.

Difference between executors, etc., as to proportion of.

R. S. 205, § 26.

112. Where any difference arises between executors, administrators, guardians or trustees in regard to the proportion of commissions between them, the orphans' court shall determine the same, having regard to their respective services.

Executor, etc., removed shall forfeit his commissions.

113. Any executor, administrator, guardian or trustee, who is removed from his office by the orphans' court for any cause for which he may be removed by this act, shall forfeit his commissions and shall not be entitled to any commissions or compensation for his services.(*a*)

[For forfeiture of commissions, for not filing inventory, or neglect to settle, see *supra*, *Sec.* 99].

to be mutilated or set aside, but a new account should be stated making the footings of the old account the basis of such new account, adding thereto or deducting therefrom such sums, as have been improperly omitted to be charged or credited to the accountant, *Ibid.* *Stevenson* v. *Phillips*, 1 *Zab.* 70; 4 *Hal. Ch.* 593; 2 *McCart.* 236. As the statute does not specify the time within which an account may be opened for fraud or mistake, it must depend upon the sound discretion of the court and the circumstances of each particular case, considered in reference to the nature and extent of the account, the condition and situation of the parties, and the character and evidence of the alleged fraud or mistake, *Ibid.* A party cannot, by a general exception, impose upon the court the burthen of examining every item in the account to detect the error, *Holcomb* v. *Holcomb*, 3 *Stock.* 281.

(*a*) At common law an executor, trustee, &c., is allowed nothing for his care or trouble, and the court of chancery independent of any law or custom has adopted this rule. In New Jersey it is entirely regulated by statute. *Warbass* v. *Armstrong*, 2 *Stock.* 263. *State Bank* v. *Marsh*, *Sax.* 288. Upon the mere amount of executors' commissions, in the absence of fraud or mistake in fact or law, the orphans' court are the sole judges, *Mathis* v. *Mathis*, 3 *Harr.* 59. *Stevenson* v. *Phillips*, 2 *McCart.* 236. The rates of commissions as established in other states and countries, *Ibid.* The supreme court cannot re-state an account, or correct commissions, *Conover* v. *Conover*, 3 *Gr.* 420, 422. Where the amount of commisions allowed the executors is grossly inadequate, it is the duty of the ordinary to substitute his own judgment, and exercise his own discretion upon the subject matter, *Anderson* v. *Berry*, 2 *McCart.* 232. An account connot be opened by a third person on the allegation of fraud or mistake for the purpose of re-adjusting commissions between executors, *Stevenson* v. *Phillips*, 1 *Zab.* 70; *S. C.*, 2 *McCart.* 236. Nor, because the orphans' court have apparently allowed excessive commissions, *Johnson* v. *Eicke*, 7 *Hal.* 316. *Aliter*, where a commission of fifteen per cent. was allowed, the law authorizing but seven per cent., *Culver* v. *Brown*, 1 *C. E. Gr.* 533. The orphans' court opened the account of executors on an allegation of fraud or mistake, and determined that a certain sum, $2,000, did not belong to the estate, and should not have been brought into the account by the executors, and struck it out, and also struck out a portion of the commissions. On appeal to the prerogative court, the decree of the orphans' court striking out the $2,000 was reversed. *Held*, that the commissions struck out might be restored, *Stevenson* v. *Hart*, 3 *Hal. Ch.* 471. Commissions are allowed on the sums received, not on the amounts for which allowance is claimed. *Conover* v. *Conover*, 3 *Gr.* 420, 422. Where the executor was a debtor of the testator, and the trust fund established by the testator consists of the debt, which the executor has never paid into the estate, but upon which he paid the interest as it accrued, he is not entitled to commissions. *McKnight* v. *Walsh*, 8 *C. E. Gr.* 136; 9 *C. E. Gr.* 498. An executor or his representative is not entitled to commissions on any part of the assets not collected, *Ibid.* The principal of a specific sum bequeathed as a trust fund is not liable to commissions; they must come out of the residue of the estate, *Ibid* *Fowler* v. *Colt*, 7 *C. E. Gr.* 44. After the residue, the legacies of caveators must be resorted to, and then the other legacies abate proportionably, *Stackhouse* v. *Horton*, 2 *McCart.* 202, 233. The executor, by agreement with the infant's father, having kept $1,000 as commissions, the amount must be included in the balance on which compound interest is to be computed, *Ibid.* *Jackson* v. *Jackson*, 2 *Gr. Ch.* 96, 113. After settlement of his account, an administrator is entitled to no commissions upon funds remaining in his hands, where he has neglected to invest them, or has converted them to his own use, *Frey* v. *Frey*, 2 *C. E. Gr.* 71. *Brauvelt* v. *Ackerman*, 8 *C. E. Gr.* 495; 10 *C. E. Gr.* 570. Commissions at the highest rate were allowed executors, although expense and litigation was caused the estate by the conduct of one of the executors in omitting a debt due from himself to testator, *Post* v. *Stevens*, 2 *Beas.* 293, 295. A., by will, gave the bulk of his estate to his two sons, and smaller portions to his daughters, and appointed the sons executors of the will; and the will contained this clause, "and I do order and direct, that all my just debts and expenses be duly paid and satisfied out of the legacies bequeathed to my two sons." *Held*, that the executors were not entitled to commissions for settling the estate, *In Matter of Haines*, 4 *Hal. Ch.* 506. Where a power of appointment is given to H., she is not entitled to commissions for investing and managing the fund, *Lippincott* v. *Stokes*, 2 *Hal. Ch.* 122, 152. For mode of calculating commissions, as authorized by the statute, see *Holcombe* v. *Holcombe*, 2 *Beas.* 415, 419. Commissions cannot be deducted until after they are fixed and allowed by the court, *Lathrop* v. *Smalley*, 8 *C. E. Gr.* 192.

XII. Powers of the court.

1. APPOINTMENT OF NEW TRUSTEES.

Trustee refusing to act or dying, place may be supplied.

114. When any trustee, heretofore or hereafter appointed by last will, shall neglect or refuse to act, or shall die before the execution and completion of the trust committed to him, the orphans' court of the county where such testator resided at the time of his death, shall have power to appoint some suitable person or persons to execute such trust; and the said court is hereby authorized and required to take from such trustee or trustees a bond, with one or more sufficient sureties being freeholders, conditioned for the due performance of the said trust; and the trustee or trustees so appointed shall have all the power of the said trustee or trustees so neglecting, refusing, or dying; *provided always*, that nothing in this section shall be construed to apply to the office of executor.(*a*)

R. S. 205, ¿ 13.

P. L. 1872, p. 49, ¿ 1.

[For appointment of new trustees in other cases, see TRUSTEES, *Sec.* 4].

2. DIRECTING INVESTMENT OF MONEY.

Executors, etc., may put money at interest, by order of court.

115. Executors, administrators, guardians or trustees may, by direction of the orphans' court, put out at interest all moneys in their hands which they are or may be lawfully required to retain, whether the same belong to minors, legatees or other person or persons, upon such security, and for such length of time as the said court will allow, and if the security so taken, *bona fide* and without fraud, shall prove insufficient, it shall be the loss of the minors or other person entitled thereto, and it shall be the duty of executors, administrators, guardians and trustees, in cases where the estates of minors or other persons in their hands may be materially benefited thereby, to make application to the orphans' court for such direction, and in case they shall neglect to so do they shall be accountable for the interest that might have been made thereby; but if no person who may be willing to take the said money at interest, giving such security, can be found by the said executors, administrators, guardians or trustees, nor by any other friend or friends of such minors or others, then the said executors, administrators, guardians or trustees shall, in such cases, be accountable for the principal money only, until it can be put out at interest as aforesaid; *provided, nevertheless*, that in any case where executors, administrators, guardians or trustees use the money of minors or others which shall come to their hands, they shall be accountable not only for the principal, but for the interest thereon.

R. S. 205, ¿ 14.

And security bona fide taken under order of court, will exonerate executors, etc.

Using money accountable for interest.

Money may be invested in bonds of this state.

116. Any executor, guardian or trustee, whose duty it may be to loan the money entrusted to him, may invest the same in any of the bonds issued by this state; *provided*, that this section shall not apply to cases where the deed of trust, or the last will and testament of any testator, or any court having jurisdiction of the matter, specially directs in what manner the trust fund shall be invested.(*b*)

P. L. 1865, p. 737.

(*a*) Where the will enjoins duties pertaining purely to the office of executor, and also directs him to hold the balance in trust for the purposes declared in the will, if after the duties of the executor have been fully discharged and the estate settled, the executor dies, the orphans' court may appoint a new trustee, *Zabriskie* v. *Wetmore*. 11 *C. E. Gr.* 18. Where the offices of executor and trustee are united in the same person, and the duties inseparable, if a vacancy exist the orphans' court has no jurisdiction to appoint a new trustee, *Brush* v. *Young*, 4 *Dutch.* 237. *Aliter*, where the duties are distinct and separable, as where a portion of the estate is devised to him for a specific purpose, not connected with the settlement of the estate, *Ibid.* He may sue for money received by a third person before his appointment. *Budd* v. *Hiler*, 3 *Dutch.* 43. Nor can his appointment be questioned collaterally, *Ibid.*

(*b*) The balance of assets remaining in the hands of executors after payment of debts, should either be paid to those entitled thereto, or be put out at interest for their benefit, *King* v. *Berry*, 2 *Gr. Ch.* 261. It is the duty of an administrator to invest the funds of an infant within a reasonable time after the settlement of his accounts, where there is no probability that he will soon be called on for payment, *Frey* v. *Frey*. 2 *C. E. Gr.* 71. Nor will he be entitled to a diminution in the legal rate of interest upon such funds, on the ground that it would have been difficult to invest small sums, in his neighborhood, except at less than the legal rate, *Ibid.* In this instance he was allowed six months from the time of settlement for making an investment, and charged with interest from that date. *Ibid.* When a sum is directed to be invested for the benefit of a child, it must be invested at the end of a year from the testator's death, and the child is entitled to the interest to accrue from the end of the year, *Halsted* v. *Meeker*, 3 *C. E. Gr.* 136. Where the testator, by his will, directs the executors "to place and keep money out upon interest, until his children shall come of age, and the interest yearly accruing thereon, to be also put out by them on interest until the same period," it is the duty of the executors to follow the directions of the will as nearly as circumstances will permit, *Voorhees* v. *Stoothoff*, 6 *Hal.* 145. The fund must be invested on bond and mortgage at the highest rate of interest allowed by law, if such investment can be procured, and exempt from taxation if the executor resides in a part of the state where such exemption exists, *Lathrop* v. *Smalley*, 8 *C. E. Gr.* 192. Or, in the bonds of this state, or of the United States, *Halsted* v. *Meeker*, 3 *C. E. Gr.* 136. 140. Loans made on private or personal security are at the risk of the trustees, who are individually liable if the security prove defective, *Vreeland* v. *Vreeland*, 1 *C. E Gr.* 512. The proper course to be pursued is to obtain the leave and direction of the court for the purpose of putting out the money, and not to put out the money first and obtain a decree of confirmation afterwards, *Gray* v. *Fox*, *Sax.* 259. An order of the court obtained by the administrator after additional security had been given him on a private loan, approving such loan, will not protect or exonerate him, *Ibid.* See *Shepherd* v. *Newkirk*, 1 *Zab* 302. An executor authorized to invest for the use and benefit of a grandchild, one-fourth of the personal estate, cannot purchase real estate therewith; and will be liable for all loss that may happen, notwithstanding his own good faith, and the occupation of the house by the beneficiary, *Quick* v. *Fisher*, 4 *Hal. Ch.* 674, 778; 1 *Stock.* 802. A change in the character of the fund can only be made after application to the court and its sanction, *Ibid.* *Snowhill* v. *Snowhill*, 2 *Gr. Ch.* 20. *Manning* v. *Craig*, 3 *Gr. Ch.* 436.

3. ACCOUNT BY EXECUTOR, ETC., TO HIS CO-EXECUTOR, ETC.

Executor, etc., may require account of co-executor, etc.

R. S. 205, § 11.

117. Whenever there are two or more acting executors, administrators, guardians or trustees, the orphans' court may, from time to time, on application of any one or more of them, upon sufficient reasons given therefor, order and direct every such executor, administrator, guardian or trustee to account with his co-executor, administrator, guardian or trustee for all assets which have come to the hands of such executor, administrator, guardian or trustee, and the said court may also, upon good cause shown, require any executor, administrator, guardian or trustee under a will, to give bond, in such sum and with such sureties as the court may approve, to his co-executor, administrator, guardian or trustee, conditioned to indemnify him from all loss that may happen to him by the neglect, default or breach of trust of such executor, administrator, guardian or trustee, or the like bond to the ordinary, conditioned for the faithful performance of his duties as such executor, administrator, guardian or trustee, and for the payment and delivery, to the person that may be entitled to receive the same, of any money or property that may then or thereafter be in his hands, as such executor, administrator, guardian or trustee; *provided, however*, that twenty days' notice be given to such executor, administrator, guardian or trustee, of such application to the court, and of the reasons therefor.(*a*)

Court may order security to be given to co-executor.
Or bond to the ordinary.

P. L. 1855, p. 342, § 5.

4. EXAMINATION INTO CONDITION OF ESTATE.

Examination into condition of estate.

P. L. 1855, p. 342, §§ 19, 20.
Amended.

118. Whenever application shall be made to the orphans' court by which letters testamentary, or of administration or guardianship were issued, or to the president judge thereof, by petition by or in behalf of any person interested in any estate in the hands of any executor, administrator, guardian or trustee, verified by affidavit, alleging that such executor, administrator, guardian or trustee has wasted, embezzled or misapplied the estate entrusted to him, the said court or judge, by an order, may compel discovery to be made of the condition of the estate, by the production of books, papers and documents relating to the estate, or the examination of such executor, administrator, guardian or trustee and witnesses, and may take such proceedings for the protection of such estate, by order or decree, as may be taken in like cases in the court of chancery, and compel obedience to such order or decree by the same process and in the same manner as orders or decrees of the court of chancery are enforced.

Proceedings to protect estate.

5. SECURITY BY EXECUTORS, ETC.

When executor or trustee may be required to give security.

P. L. 1870, p. 58.
Amended.

119. Whenever proof shall be made, to the satisfaction of the orphans' court, that the property in the hands of any executor or trustee under a will is unsafe, insecure, or in danger of being wasted, the court, at the instance of any person interested in the estate of the testator, or in such trust estate, may require such executor or trustee to give security to the ordinary of this state by bond with sureties, in such amount as said court shall deem proper, conditioned for the faithful performance, by such executor or trustee, of his duty under the will of the testator.(*b*)

Additional security by administrators and guardians.

R. S. 205, § 6.
" 374, § 5.

120. The orphans' court shall have power, where letters of administration or guardianship shall have been granted upon insufficient security, or the sureties on any administration or guardianship bond shall be or become in failing or dubious circumstances, or insufficient for the security of the estate, to order and direct such administrator or guardian to give such further or other security to the ordinary, by bonds in the usual form, as the said court, after hearing creditors or persons concerned, shall approve.

(*a*) The orphans' court cannot authorize one executor or administrator to sue another for refusing or neglecting to account; but only for refusing or neglecting to give security, when ordered so to do pursuant to the provisions of the act, *Martin* v. *Martin*, 4 *Harr.* 44. The application and order for a citation to account can only be made "upon sufficient reasons given therefor," *Ludlow* v. *Ludlow*, 1 *South.* *189. No one can call upon his co-executors to account jointly, nor is such account good, for each must give security for himself, *Ibid.* But this objection comes too late, if made after they submit to the citation and exhibit a joint account, *Ibid* A failure to settle a final account is a breach of the bond given under this section, *Ordinary* v. *Barcalow*, 7 *Vr.* 15. The non-payment of a legacy is not, without showing a settlement of the executor's accounts, and a balance in his hands after the payment of debts, *Ibid.*

(*b*) Irrespective of the statute the executor may, in equity, be required to give security, *Howard* v. *Howard*, 1 *C. E. Gr.* 486. Or, a receiver may be appointed, *Price* v. *Price*, 8 *C. E. Gr.* 428.

By female executrix, guardian, etc., about to marry

R. S. 205, § 7.

P. L. 1854, p. 245, § 1.

Amended.

121. In case any female executrix, administratrix, guardian or trustee under a will, is about to be married, if complaint be made to any one of the judges of the orphans' court by any surety on the bond of such administratrix, guardian or trustee, or by or in behalf of any person interested, representing that the estate in the hands of such executrix, administratrix, guardian or trustee, is in danger of being wasted or mismanaged by reason of such marriage, the said judge shall forthwith call an orphans' court, which court shall, on being satisfied of the reasonableness of such apprehension, order such executrix, administratrix, guardian or trustee to give security, either by mortgage or by bond, with sufficient sureties, in such form and to such person as the court shall direct, for the security of the trust funds, or to enter into bond to the ordinary, in such sum and with such sureties as the court shall approve, conditioned for the due performance of the duties of her office, and the payment of all moneys she has received or shall receive as such executrix, administratrix, guardian or trustee, to such person or persons as shall be entitled to the same.

Executrix, etc., powers of, suspended by marriage.

P. L. 1855, p. 342, § 4.

Amended.

122. In case of the marriage of any female executrix, administratrix, guardian or trustee under a will, her power as such over the estate or property shall immediately cease and be suspended, and the orphans' court, at its next term, shall revoke the letters testamentary of administration or of guardianship, or the power and authority of such trustee, and remove her from office, unless she and her husband shall give bond to the ordinary, with two or more sufficient sureties, and in such sum as the court may direct, conditioned for the faithful execution by him and his wife of the trust reposed, and the true payment of all moneys of the estate which shall have come into the hands of such female executrix, administratrix, guardian or trustee, before her marriage, or shall be received by her or her husband after the marriage, in which case the said power shall be continued in the names of him and his wife; *provided*, that nothing herein contained shall be construed to release said husband and wife, or either of them, from any previous neglect, default, or breach of trust, or from any liability to account as heretofore, or to release or discharge the sureties of such female (if any there be) from their liability.

When powers continued in name of husband and wife.

Neither husband or wife, or her sureties released from previous default.

[By act of 1870, p. 16, all deeds of real estate made by any executrix after marriage, and recorded before January 1, 1869, were made valid].

6. RELIEF OF SURETIES.

In case of waste or mismanagement, etc.

R. S. 205, § 10.

123. If the surety, in any bond given by an administrator or guardian, for the execution of his office, shall believe that such administrator or guardian is wasting or mismanaging the estate, whereby the said surety may become liable to loss or damage, the orphans' court, upon application of such surety and upon sufficient reason therefor, may order such administrator or guardian to render an account of his or her administration or guardianship to such surety, and if it shall appear that such administrator or guardian has embezzled, wasted, misapplied or mismanaged the estate, the said court shall direct the said administrator or guardian to give separate security to his or her surety, for the true payment of the balance remaining in his or her hands to creditors, representatives of the deceased, or the ward of such guardian or persons entitled to the same.

[By act of March 17, 1860, sureties on any bond given by a trustee may compel him to account, and the court appointing the trustee may compel him to indemnify his sureties against loss. See Title TRUSTEES, *Sec.* 6].

Sureties desiring to be relieved from responsibility for future acts.

P. L. 1859, p. 74.

Citation.

124. When either or all of the sureties of any executor, administrator or guardian, shall desire to be released from responsibility on account of the future acts or defaults of such executor, administrator or guardian, such surety or sureties may make application to the orphans' court of the county in which the letters testamentary, or of administration, or of guardianship were granted, for relief; and the said court shall thereupon direct to be issued a citation to such executor, administrator or guardian, requiring him to appear before said court, at a time and place to be therein specified, to state and settle his account of the estate that has come into his hands, and of the claims presented to him against the same, and to give new sureties, in the usual form, for the discharge of his duties; and if such executor, administrator or guardian shall appear and give new

If new security given court may relieve former sureties from further liability.

sureties to the satisfaction of said court, the court may thereupon make order that the surety or sureties, who applied for relief in the premises, shall not be liable on their bond for any subsequent act, default or misconduct of such executor, administrator or guardian.

7. DISCHARGE OF EXECUTOR, ADMINISTRATOR, GUARDIAN OR TRUSTEE.

Application where made.

P. L. 1871, p. 59.
" 1873, p. 126.
Amended.

125. When any executor, administrator, guardian or trustee, who has entered on the duties of his office, shall desire to be discharged from the further performance of the same, it shall be lawful for him to apply for such discharge by petition to the prerogative court, when the letters testamentary, of administration or guardianship, have been issued by the ordinary, or to the orphans' court, when letters have been issued by the surrogate; and upon such application the court shall examine into the matter, and if it shall appear that there is sufficient reason for such discharge, it may, by an order made for that purpose, grant the same; and such executor, administrator, guardian or trustee so discharged shall thereupon be relieved and discharged from all further duties of his office, except accounting for and paying over the moneys or assets received by him by virtue of his office; *provided*, that if it shall appear to the court that such discharge will be prejudicial to the estate or to those interested therein, or if the court, for any other reason, shall be of opinion that the same ought not to be granted, such discharge shall not be made; and if such executor, administrator, guardian or trustee, shall be discharged, the court shall make such order in relation to the commissions as shall be just and equitable.

May be discharged for sufficient reason.

Provided such discharge will not prejudice the estate, etc.

Commissions, order for.

[By the act of 1871, p. 59, all discharges of executors, administrators and guardians, made subsequent to March 17, 1870, are legalized and confirmed].

8. REMOVAL OF EXECUTOR, ADMINISTRATOR OR GUARDIAN.

For refusal to obey order of court.

126. When any order or decree shall be made by the orphans' court that any executor, administrator or guardian shall file an inventory or account, or that any executor, administrator, guardian or trustee shall give security or additional security, or shall do or perform any act or thing which the court by this act is authorized to order or direct, and such executor, administrator, guardian or trustee having legal notice of such decree or order, shall refuse or neglect to perform or obey the same within such time as the court shall name, or if it shall be made to appear before said court by proof, on complaint duly made by any person interested, that any executor, administrator, guardian or trustee, has embezzled, wasted or misapplied any part of the estate committed to his custody, or has abused the trust and confidence reposed in him, the said orphans' court may revoke the letters of such executor, administrator or guardian, and remove such executor, administrator, guardian or trustee from office.

For waste or embezzlement.

Or abuse of trust.

One of several administrators refusing to proceed with administration, or removing or residing out of state neglecting to settle.

R. S. 205, § 12.

127. In all cases in which letters of administration shall have been or hereafter shall be granted to two or more administrators, and complaint shall be made to the orphans' court of the county where the same have been granted, that one or more of the said administrators neglects or refuses to proceed with the administration of the estate, or when one or more of such administrators shall remove or reside out of this state and shall neglect or refuse to proceed in the settlement of the estate on which such letters have been granted, it shall be lawful for such orphans' court to cause a citation or notice to be served agreeably to their own order, on such administrator or administrators, and thereupon the said orphans' court may proceed to hear such complaint, and shall have full power, upon satisfactory proof of such neglect or refusal, to revoke the letters of administration of such defaulting administrator or administrators; and the remaining administrator or administrators shall proceed in the same manner, as if he, she or they had been appointed the sole administrator or administrators.

May be removed.

Executor residing, or removing, out of state, neg-

128. In case the executor or executors of any last will has or have removed, or shall hereafter remove out of this state, or do not reside within the same, and shall neglect or refuse to proceed with the adminis-

tration of the estate, and to execute and fulfil the trusts mentioned in the last will, the orphans court of the county where letters testamentary have been granted, upon complaint made by any person interested in the estate of the testator, may revoke the letters testamentary granted to such executor or executors, and thereupon may grant letters testamentary with the will annexed, to such fit, responsible and discreet person or persons as such orphans' court shall see fit and proper; *provided*, that before letters testamentary shall be issued in pursuance of this section citations shall be issued to all parties interested in the estate of the testator, and served on all the parties named therein resident within the jurisdiction of the court, requiring such persons on a certain day to be named therein, to show cause why the letters testamentary theretofore issued, should not be revoked, and letters testamentary with the will annexed, issued; a copy of which citation shall also be published in some newspaper of this state to be designated by the court, once in every week, for at least thirty days prior to the time appointed for the hearing of said complaint, and the truth of said complaint shall be duly proved and established before said court.

lecting to execute will, may be removed.

P. L. 1849, p. 165, §§ 1, 2, 3.

Citations issued.

How served and published.

129. In case any executor, administrator, guardian or trustee shall be removed or discharged by the prerogative court or orphans' court for any cause authorized by this act, the court shall appoint some suitable and proper person or persons in the place and stead of such executor, administrator, guardian or trustee so removed or discharged, and the person or persons so appointed shall before letters testamentary, of administration or of guardianship shall be issued or the appointment as trustee take effect, give bond to the ordinary, in such amount and with such sureties as the court shall approve, for the faithful execution of the trust reposed; which bonds in case of letters of administration *cum testamento annexo* or *de bonis non* or of guardianship shall be in the same form and condition, as near as may be, as is required on the grant of such letters in other cases; and the person or persons so appointed shall have power and authority to demand, receive and recover the property and assets of the estate, and to maintain all proper actions at law or in equity for the recovery of the same, and shall be authorized to do all acts necessary for the administration and settlement of such estate, and the execution of the powers and performance of the trusts contained in the will of the testator, in the same manner and to the same effect as if such person or persons had been appointed administrator or guardian in the first instance or named as executor or trustee in such will, and shall be liable in the same manner for any neglect or failure to perform the duties of such appointment and subject in all respects to the orders of the court; *provided nevertheless*, that where one or more of the executors, administrators, guardians or trustees shall be removed or discharged, the office shall survive and devolve upon the others, who shall proceed with the performance of the duties thereof, and shall be entitled to the property and assets, and to sue for and recover the same, in the same manner, as if such remaining executor or executors, administrator or administrators, guardian or guardians, trustee or trustees had been solely appointed to such office.

Appointment of successor to executor, etc., removed.

Bond to be given

Form of.

Powers of such successor.

For execution of trusts and powers in the will.

Liability of.

If one removed or discharged, office to devolve on others.

130. When any executor, administrator, guardian or trustee shall be removed or discharged by the prerogative court or orphans' court, such executor, administrator, guardian or trustee shall immediately thereafter, deliver over to the newly appointed administrator, guardian or trustee, or to his co-executor, co-administrator, or joint guardian or trustee, who shall remain such, all goods and chattels, moneys and effects, and other assets which he may hold as such executor, administrator, guardian or trustee; and shall, at the next term of said court, state and settle his account; and within sixty days, after such settlement, shall pay the balance, shown to be due, to the newly appointed administrator, guardian or trustee, or his co-executor, co-administrator, or joint guardian, or trustee, as the circumstances of the case may require or the court may order; and on failure thereof the court may enforce the performance of such order by a fine not exceeding the amount of the estate in the hands of such executor, administrator, guardian or trustee so removed, to be collected by execution against the goods and chattels and lands of such defaulter in favor of the person to whom the defaulter should have made such payment or delivery

Executor, etc., removed shall deliver property of estate to his successor.

P. L. 1855, p. 342, § 3.

Amended.

Court may enforce performance by a fine.

To be collected by execution or by attachment.

as aforesaid, or the payment of such fine or performance of such order may be enforced by attachment for contempt; and such fine, when collected, shall be paid to the representative of the estate, who shall account for the same when received as assets of the estate.

Removal of executor, etc., not to release officer or his sureties.

131. The discharge or removal of any executor, administrator, guardian or trustee, for any cause authorized by this act, shall not release or discharge such executor, administrator, guardian or trustee, or the surety or sureties of any of them, if any shall have been given, from liability for the estate or any part thereof which has been received, or which ought to have been received by him or them, or for any neglect, default, miscarriage or breach of trust in the execution of their office; and the administrator, guardian or trustee appointed in the place of such executor, administrator, guardian or trustee, or his co-executor, co-administrator, or joint-guardian or trustee, may have actions of trover, detinue or in case, for such goods and chattels as shall have come to the possession of the executor, administrator, guardian or trustee so discharged or removed, and for any breach of trust, waste, embezzlement or misapplication of the same, and may proceed by actions at law or in equity for the recovery of the assets of the estate, either against such executor, administrator, guardian or trustee, or against any other person into whose possession such assets shall have come or may be.

Successor may have action for embezzlement or waste and for assets.

9. FULFILMENT OF CONTRACT OF DECEDENT FOR SALE OF LANDS.

Contract to be in writing.

R. S. 638, § 1.

P. L. 1853, p. 283. Amended.

132. When any testator or intestate shall, in his or her lifetime, have made any contract in writing for the sale or conveyance of any lands within this state, the executor or administrator of such testator or intestate, or the purchaser, or his legal representatives, may apply to the orphans' court of the county in which such lands lie, for the fulfilment of such contract; *provided*, such application be made within five years from the date of such contract.(*a*)

Notice, how given.

133. Notice of application to the court, for the fulfilment of such contract, shall be given for at least two months prior to such application by advertisements, set up and published in the same manner as advertisements of the sale of lands by a sheriff under execution are or may be required by law to be set up and published; and the court, upon proof of such publication and the production of the said contract in court, shall cause proclamation to be made in open court of the purport of such application, and that any person having cause to show why the same should not be granted, may appear for that purpose at the next regular term of the said court; and at the next regular term, or at such subsequent time to which the hearing shall then be adjourned, the court shall hear the allegations and objections (if any) of parties interested, and if such contract shall be duly proved to the satisfaction of the court, and no sufficient cause to the contrary shall appear, it shall be lawful for the court to decree the fulfilment of such contract; which decree together with the contract shall be entered of record in the minutes of the court, and the contract shall be filed in the office of the clerk of the said court, and the court shall thereupon order the executor or executors, administrator or administrators, or the survivor or survivors of them, or the legal representatives of the deceased (upon the purchase money being paid or secured according to the terms of such contract), to make a good and sufficient deed of conveyance to the purchaser or his legal representatives; and any deed made and executed by virtue of such order of the court, shall convey the lands, directed to be conveyed, as fully as if the testator or intestate had executed the same in his lifetime; *provided*, that the order of the court, directing a conveyance, be signed by the president judge of the said court.

Proclamation made.

When application heard.

If contract proved and no cause to contrary appear.

Court may decree fulfilment of contract.

And order deed made.

Decree signed by president judge.

XIII. Duties of the surrogate.

Probate of wills and letters issued

134. The probate of wills, and letters testamentary, of administration

(*a*) Where A. enters into articles of agreement to purchase certain property, and actually takes possession, but dies before the deed is delivered, the heirs of A. cannot be compelled in a court of law to receive a deed for the property, or to complete the purchase and pay the consideration, *Cooper* v. *Vanderbelt*, 2 *Hal.* 121. An administrator is entitled to enforce specific performance of a contract made with his intestate for the purchase of real estate, *Miller* v. *Miller*, 10 *C. E. Gr.* 354. *Case reversed*, 12 *C. E. Gr.* 514.

and of guardianship issued by the surrogate under this act, shall have the same validity and effect as the probate of wills and letters of administration or guardianship issued by the register of the prerogative office in the name of the ordinary, with the seal of office affixed.

by surrogate of same effect as issued by register. R. S. 205, § 18. Amended.

135. The surrogate shall file all administration and guardianship bonds by him taken, and other instruments of writing required by law in conducting the business of his office, or which were heretofore used, to be filed in the prerogative office.

Shall file bonds and papers. Ib. § 20.

136. The surrogate of each county shall record in books to be provided for that purpose, at the expense of the county for which they shall be used, all wills proved before him or before the orphans' court, together with the proofs thereof, all letters of guardianship, letters testamentary and letters of administration, by him issued or granted, and all things concerning the same, and also all inventories proved before him; which records shall be of the same force, validity and effect as the like records in the prerogative office, and the transcript of such records, certified under the hand and seal of office of the surrogate, shall be received in evidence in every court of this state, and have the same validity and effect as transcripts certified by the register of the prerogative court.(*a*)

Shall record wills and letters granted. Ib. § 17.

Effect of such records and transcripts thereof.

137. The surrogate, as clerk of the orphans' court, shall keep regular minutes of the trials and proceedings in said court, and shall record, in books to be kept for that purpose, all orders and decrees of the court; and all bonds required by law to be taken by the surrogate or given in pursuance of any order or decree of the orphans' court, and all accounts of executors, administrators, guardians, assignees and trustees, and all partitions, sales of land and acceptances, revocations, requests, renunciations and releases required by law to be made by parties legally appointed or entitled by law to act as executors, administrators, guardians, assignees and trustees, if desired by any party in interest.

Shall keep minutes of the proceedings of court. P. L. 1855, p. 342. § 15.

Accounts, partitions, etc. P. L. 1871, p. 14, 102.

138. The surrogate for the time being is authorized to sign all entries of record and the certificate of the filing of papers in his office, either as surrogate or clerk of the orphans' court; and such signature by the surrogate in office shall be as good and effectual as if signed by the surrogate or clerk of the orphans' court at the time the said entries of record or the filing of such papers were or should have been made.

Surrogate for time being may sign entries of record, etc. P. L. 1871, p. 14.

139. The records kept by the surrogate under the provisions of this act, and the transcript of such records under the hand and seal of office of the surrogate, shall be received as evidence in any of the courts of this state.

Records and transcripts thereof shall be evidence.

140. Every executor, administrator or guardian, who hath settled or shall settle his or her account before the orphans' court, and who hath or shall hereafter pay any legacy, distributive share, or sum of money to any person or persons entitled by law to receive the same, his, her or their executors or administrators may produce the receipts and discharges therefor to the surrogate of the county in which letters testamentary or of administration or guardianship have been or shall be granted, and the said surrogate shall immediately record the same in a book to be kept for that purpose; *provided*, that the same be first proved or acknowledged in the manner that deeds of conveyance of land are by law required to be proved or acknowledged; which proof or acknowledgment shall be recorded with such receipts or discharges; and the said surrogate shall endorse, on such receipts and discharges, the book and page in which the same is recorded, with the time of recording the same, and sign his name thereto; and the said record, or a copy thereof, under the hand and seal of office of the surrogate, shall be received in evidence in any court of record in this state, if it shall be made to appear to the satisfaction of said court that the original receipt or discharge hath been lost, or that it is not in the power of the party offering the copy in evidence to produce the same.

Receipts for legacies, distributive shares, etc., to be recorded. R. S. 205, § 34.

Record thereof or copy when to be evidence.

141. Any oath, affirmation or affidavit required to be made or taken, for any purpose whatever, in any proceeding before any surrogate or in the orphans' court of any county, may be made and taken by and before the surrogate of such county.

To administer oath or take affidavit. Ib. § 38.

(*a*) The competency of the surrogate's record is not destroyed or affected by the pendency of an appeal taken from his order admitting it to probate, *Allaire* v. *Allaire*, *Vr.* 312.

Oaths and affidavits may be taken before master in chancery.

P. L. 1863, p. 461.

142. All oaths, affirmations and affidavits, required to be made or taken by any statute of this state before any surrogate of any county in this state, or necessary or proper to be made, taken or used before any such surrogate, shall and may be made and taken, in the absence of such surrogate, by and before any master in chancery of this state.

To transmit to register wills, etc.

R. S. 205, ¿ 19.

143. It shall be the duty of every surrogate, on the first Monday of February, May, August and November, in each year, to transmit to the register of the prerogative court all wills and inventories proved by him, and a return of all letters of administration granted during the preceding three months, to be filed in the said register's office.

To set up list of fees.
Ib. ¿ 33.

144. The surrogate shall cause to be affixed and at all times kept up in his office, in some conspicuous place, a true list of all fees which may be lawfully demanded by him, as well in his capacity of clerk of the orphans' court as of surrogate of the county, and if he shall neglect to put up and keep in view such list of fees, or shall take other or greater fees than by law allowed, or shall take fees for services not performed, he shall, for every such offence, forfeit and pay the sum of thirty dollars, to be recovered in an action of debt, with costs of suit, before any court having cognizance thereof, by the party aggrieved.

Penalty for neglect and for taking illegal fees.

If surrogate is executor, administrator or guardian.

Duties of surrogate in such cases to be performed by any judge of the orphans' court.

145. If any surrogate before whom by this act the probate of any will is required to be made, or by whom the letters of administration or of guardianship are required to be issued, or any other official act as surrogate is required to be done in the administration or settlement of any estate, shall be the executor, administrator or guardian, the duties required to be performed by the surrogate, by this act, with respect to the probate of the will, or the issuing of letters, or the administration or settlement of the accounts of such surrogate, may, in such cases, be performed by any judge of the orphans' court of the same county.

XIV. Distribution.

Distribution of estates of intestates.

R. S. 350, ¿ 12.

146. After executors or administrators shall have legally accounted for the goods and chattels and credits of the deceased, the orphans' court of the proper county, shall, by a decree of distribution, order a just and equal distribution of the personal estate whereof any deceased shall die intestate, which may remain after the payment of debts, funeral charges and just expenses, among the wife and children, or children's children, if any such there be, or otherwise to the next of kindred to the intestate, in equal degrees, or legally representing their stocks, each according to his or her respective right, pursuant to the laws in such cases, and the rules and limitations hereinafter set down, and the persons entitled to such distribution shall have their remedy at law, in cases of non-payment, for the recovery of the same, against the executor or executors, administrator or administrators, so accounting, saving to every one, supposing him, her or themselves aggrieved, his, her and their right of appeal.(*a*)

Manner of distribution.
Ib. ¿ 13.

147. The whole surplusage of the goods, chattels and personal estate of every person dying intestate, shall be distributed in manner following, that is to say:

If there be widow and children or their representatives.

I. One third part of the said surplusage to the widow of the intestate, and all the residue, by equal portions, to and among the children of such intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children, who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate,(*b*) in his lifetime, by portion or portions equal to the share, which shall, by such distribution, be allotted to the other children, to whom such distribution is to be made; and in case any child shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate, in his lifetime, by portion not equal to the share which will be due to the other children, by such distribution as

Settlements or advances deducted.

(*a*) Unless the decedent dies intestate there can be no decree for distribution, *Ordinary* v. *Barcalow*, 7 *Vr.* 15. The order of distribution is not made by any authority or power inherent in the court, and the statute authorizes such order in cases of intestacy, *In re Eakin*, 5 *C. E. Gr.* 481.

(*b*) A grant of an *estate tail*, held to be such a settlement as would bar *pro tanto* a daughter's share in her father's real estate, *Den, McGinnis* v. *McPeake, Pen.* *291. So, where a father made a deed to a purchaser and the son received the consideration, after many years' possession by a son, *Gordon* v. *Barkelew*, 2 *Hal. Ch.* 94. But an advancement in money will not affect the share of the real estate which descends to the son so advanced, *Havens* v. *Allen*, 8 *C. E. Gr.* 321. *Linell* v. *Linell*, 6 *C. E. Gr.* 83. Unless by express agreement between such father and son, *Havens* v. *Thompson*, 11 *C. E. Gr.* 383.

aforesaid, then so much of the surplusage of the estate of such intestate shall be distributed to such child or children, as shall have any land by settlement from the intestate, or where advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal, as near as can be estimated.

If there be widow and no children.

II. In case there be no children, nor any legal representative of them, then one moiety of the said estate shall be allotted to the widow of the said intestate, and the residue of the said estate shall be distributed equally to every of the next of kindred of the intestate, who are in equal degree, and those who represent them; *provided*, that no representation shall be admitted among collaterals after brothers' and sisters' children.(*a*)

No representation after brothers' and sisters' children.

If there be children and no widow.

III. And in case there be no widow, then all the said estate to be distributed equally to and among the children; and in case there be no child, then to the next of kindred, in equal degree, of or unto the intestate and their legal representatives as aforesaid, and in no other manner whatsoever.

Estate of deceased child, how divided. Ib. § 14.

IV. If, after the death of a father, any of his children shall die intestate, without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her; anything in this act, or any law to the contrary notwithstanding.

When illegitimate child shall representmother.

P. L. 1865, p. 463.

V. If the mother of any illegitimate child or children shall die without leaving a husband surviving her, and leaving no lawful issue, or the issue of any, then the surplusage of her goods, chattels and personal estate shall be paid to her illegitimate child or children.

Estate of illegitimate person. Ib. § 1.

VI. The whole surplusage of the goods, chattels and personal estate of any illegitimate person who shall die intestate and unmarried, and leaving no lawful issue or the issue of any, him or her surviving, shall go to and be paid over to the mother of such illegitimate person.

Of estates of femes covert.

R. S. 350, § 15.

148. Nothing in this act contained, respecting the distribution of intestates' estates, shall extend to the estates of *femes covert*, who shall die intestate; but their husbands may demand and have administration of their rights, credits and other personal estates, and recover and enjoy the same, as fully as they might have done before the passing of this act.

One year to elapse before distribution. Ib. § 16.

149. To the end that a due regard be had to creditors, no distribution of the goods, chattels and credits of any person dying intestate shall be made until one year after granting administration thereof.

Refunding bonds required. Ib. § 17.

150. Every person to whom any distribution or share of the goods, chattels and personal estate of any intestate shall be allotted, shall give bond, in double the sum at least of such distributive share, to the administrators, with condition, that if any debt or debts, truly owing by the intestate, shall be afterwards sued for and recovered or otherwise duly made to appear, and which there shall be no other assets to pay, that then and in every such case, he or she shall respectively refund and pay back to the administrators, his or her ratable part of such debt or debts, and of the costs of suit and charges by reason of such debt or debts, out of the part and share so allotted to him or her; thereby to enable the said administrators to satisfy such debt or debts; which bond shall be good and sufficient if signed and executed by the next of kin giving the same, or the husband or guardian of such next of kin, without any sureties whatever.

Signed by next of kin, sufficient without sureties.

P. L. 1849, p. 154, § 1.

In case of a will.

P. L. 1872, p. 47. Amended.

151. In all cases where any executor or administrator *cum testamento annexo*, shall have filed any account, exhibiting the balance of any estate in his or her hands, up to the date of filing the same, and such account shall have been duly allowed by the decree of the orphans' court of any county of this state, it shall be lawful for the said orphans' court upon the application of any party in interest, to adjust, order and make just distribution in accordance with the directions and provisions of the last will

Orphans' court may decree distribution.

(*a*) Where the property under a bequest passes to the persons entitled under the statute of distributions to receive it, in the absence of any express directions in the will it will go in the proportions prescribed by the statute. In such case, where they are not all in equal degree the children of a deceased parent will take by right of representation *per stirpes*, and not *per capita*, *Scudder* v. *Vanarsdale*, 2 *Beas.* 109. Under the statute of distributions of this state, first cousins will take the personal estate of the intestate, to the exclusion of the children and grandchildren of other first cousins deceased. Collateral relatives can not take by representation, except in the case of the children of a deceased brother or sister of the intestate, *Davis* v. *Vanderveer*, 8 *C. E. Gr.* 558. The effect of the proviso "that no representation shall be admitted among collaterals after brothers' and sisters' children." is to limit or qualify the right of representation among collaterals, so that they can take only as next of kin, *per capita*, except in the one case of the children of the deceased brothers and sisters of the intestate, among whom alone of the collaterals the right to take *per stirpes*, by way of representation, exists, *Ibid.*

and testament in each case, of what shall remain after all debts and expenses shall have been allowed and deducted; and the said orphans' court shall have power to enforce its decree as aforesaid, by attachment, sequestration or other process, or in any manner and with like effect that similar decrees can be enforced by the court of chancery of this state; reserving and hereby giving to every one feeling aggrieved by any such decree of distribution as aforesaid, the right to appeal to the prerogative court concerning any such decree or the enforcement thereof; *provided*, that if any executor or administrator as aforesaid, shall appeal from such decree of distribution or proceeding in the orphans' court as aforesaid, said appeal shall be filed within twenty days next after the date of said decree of distribution, and the appellant shall give a bond to the ordinary of this state, with two sufficient sureties, to be approved of by the said orphans' court, in double the sum adjudged due to the parties entitled to the same, and conditioned to pay such sum, costs, interests and damages accruing by reason of any such appeal, if the said order of distribution and enforcement be affirmed.

How decree enforced.

Appeal from.

[For refunding bonds on payment of legacies, see Title LEGACIES.

Estates of deceased leaving no relations.

[For disposition of estates of persons dying intestate, leaving no relations, see Title EXECUTORS AND ADMINISTRATORS.

[By an act passed April sixth, one thousand eight hundred and sixty-five, where it is not known whether a person who if living would be entitled to a distributive share, is living or not, the court may direct investment of such share. See PARTITION, *Sec.* 34].

XV. Practice.

1. PROCESS.

Process for appearance shall be by citation.

152. Process for the appearance of any person before the orphans' court or to compel any executor, administrator, guardian or trustee to perform any duty required by this act, may be by citation issued by the surrogate under the seal of his office, which, unless otherwise specially provided, shall be served ten days before the day whereon it shall be returnable, in the same manner as writs of summons are required to be served by the act entitled "An act to regulate the practice of courts of law."

How issued and served.

By whom served.

R. S. 205, ¿ 29.

153. The sheriff and constables of the county shall be officers of the orphans' court of such county, and shall serve all process and orders of the court or judges, directed to them or any of them, to be served within such county.

May be issued into any county.

Ib. ¿ 30.

P. L. 1855, p. 342, ¿ 18. Amended.

154. Citations issued out of the orphans' court and process of attachment to compel obedience to any citation or the performance of any order or decree of the court may be issued into any county of this state, and shall be served by the sheriff or other proper officer of such county; and the said sheriff or other officer is hereby authorized and empowered to serve and execute such citation or process; and the court may enforce obedience to all such citations and process in the same manner as if the same had been served within the county where such citation or process is issued.

Service, how made on non-resident.

P. L. 1871, p. 104, ¿ 1. p. 126, ¿ 4. Amended.

155. When any person against whom any citation or other process for appearance in any suit, matter or proceeding in the prerogative court or any of the orphans' courts of this state shall issue, resides out of the state, service thereof may be made by any person whom the ordinary or surrogate, under his hand, shall appoint, either personally or by leaving a copy of the same at his usual place of abode, with some person of the age of fourteen years or upwards, thirty days before the return of such citation or process; and the person serving such citation shall make and file an affidavit setting forth the time, place and manner of such service, whereupon the same shall have the force and effect of a service by the proper officer within this state.

Affidavit of.

Court may order absent defendant to appear.

P. L. 1871, p. 104, ¿ 2.

156. When it shall appear to the satisfaction of the ordinary or any orphans' court that the person against whom a citation or other process has been issued resides out of this state, or cannot be found therein to be served therewith, the said court may by order direct such absent defendant to appear in such suit, matter or proceeding at a certain time not less than

sixty days from the date of said order, or that such proceeding will be had against the said absent defendant as if he had appeared in said suit or proceeding; and notice of such order shall be served and published in the same manner as like notices are required to be served and published in proceedings against absent defendants in the court of chancery; and if such absent defendant shall not appear and cause his appearance to be entered in said court at or before the time mentioned in such order, he shall be proceeded against in the same manner as if he had appeared, and the determination of any of said courts upon proofs that such person against whom process shall be issued resides out of the state or cannot be found therein, or that he has been served with a copy of such process, or that the notice of the order to appear has been served or published as required by law, shall be sufficient evidence and in collateral proceedings conclusive evidence of the fact so determined.

Notice of order, how served and published.

Determination of court of fact of non-residence and service or publication conclusive in collateral proceedings.

157. In any proceedings against executors, administrators, guardians or trustees, by virtue of this act, after grant of letters testamentary, of administration or guardianship, the court may proceed by a rule to show cause, a copy of which shall be served upon the person or persons therein named, in such manner as the court may direct; and upon such service duly verified by affidavit, the court may proceed therein the same as if such person or persons had been summoned by citation.

May in certain cases proceed by rule to show cause.

How served.

2. TESTIMONY, HOW TAKEN.

158. Upon all causes heard before the orphans' court, the evidence and proceedings, upon the application of either party, shall be reduced to writing by the clerk of the court; and the court, upon just cause, may put off the hearing of the cause to another time, upon the application of either party.

Reduced to writing.

159. All examinations to be taken and made use of at the hearing of any cause in the orphans' court of any county, may be taken and reduced to writing before the surrogate of such county, or a master in chancery; which examinations shall be taken on ten days' notice of the time and place of taking the same, given by the party or his attorney to the opposite party or his attorney; and either of the parties may, in person or by his attorney, be present and examine and cross-examine such witnesses; and the examination so taken shall be of the like force and effect as if taken in the orphans' court, before the judges thereof, and shall be filed with the clerk of the said court, and read in evidence upon the hearing of the cause, saving all just exceptions.

May be taken before surrogate or master.

R. S. 205, §§ 36, 37.

P. L. 1855, p. 342, § 14.

3. ORDERS AND DECREES, HOW ENFORCED.

160. Every person duly cited or summoned to appear at any of the said orphans' courts, who shall make default, shall be liable to attachment for contempt, and the said courts are hereby authorized and empowered to compel obedience to their process, orders and sentences, by imprisonment of body or distress and sale of lands and goods, as fully and amply as any other court of record in this state.

By attachment, imprisonment or distress.

R. S. 205, § 28.

161. All decrees or orders of the orphans' court whereby any fine is imposed or a sum of money is ordered to be paid by one party to another shall be recorded in a book kept for that purpose and shall be signed by the president judge of the court, and the said decrees and orders shall have the same liens and priorities as judgments of the circuit court of the same county, and the like executions may issue thereon, or if need be, the president judge of the court may enforce performance of the same by writs of attachment, injunction, and *ne exeat*, in the same manner as may be done by the court of chancery.

Decrees imposing fine or ordering payment of money to be recorded and signed.

P. L. 1855, p. 342, § 15.

Amended.

162. No execution issued out of the orphans' court shall bind lands unless the same shall before it is delivered to the sheriff, be recorded by the clerk of the court of common pleas of the county, in the book by him kept for recording executions issued out of the court of common pleas.

Execution to bind lands to be recorded by clerk of common pleas.

163. When any person shall be imprisoned by virtue of any order, writ or process, made by or issued out of the orphans' court, the court making such order, or out of which such writ or process has issued, is hereby

Person imprisoned, how relieved.

P. L. 1871, p. 36.

Amended.

authorized to discharge the person so imprisoned at the discretion of said court, whenever in the judgment of said court the ends of justice require such discharge; *provided*, that when such imprisonment shall be legal, no order for the discharge of the person imprisoned shall be made, unless the president judge of the said court shall be present and consent thereto.

President judge to consent to discharge.

4. PROSECUTION OF BONDS.

Bonds prosecuted by order of ordinary.

R. S. 205, § 21.

P. L. 1855, p. 342, § 13.

164. In case any bond given by executors, administrators, guardians or trustees, in pursuance of this act, shall become forfeited, the ordinary may cause the same to be prosecuted in any court of record, at the request and expense of any party grieved by such forfeiture; and the moneys recovered upon such bond shall be applied towards making good the damages sustained by the not performing the said condition in such manner as the ordinary shall by his sentence or decree direct.(*a*)

5. SUITS FOR LEGACIES AND DISTRIBUTIVE SHARES.

Commenced by petition.

P. L. 1855, p. 342, §§ 17, 18.

165. Suits for the recovery of legacies and distributive shares before the orphans' court shall be commenced by petition setting forth concisely the petitioner's claim and the relief prayed for and shall be verified by the oath of the petitioner, his agent or solicitor, and on filing thereof a citation or citations shall issue under the seal of the court, signed by the clerk and by the petitioner or his solicitor, and may be served in the same manner as citations are served in other cases, and may be made returnable in term or vacation; and the proceedings in such suits thereafter shall in all respects be governed by the rules and practice of the court of chancery so far as the same are applicable; *provided*, *however*, that any question arising in any such suit or proceeding may be tried and determined in a summary way before the court without being referred to a master.

Citation thereon, how served.

Practice like that in chancery.

Duties and fees of clerk and solicitor.

P. L. 1855, p. 342, § 21.

166. In suits under the last preceding section, the clerks of the orphans' court shall perform the same duties as are required to be performed by the clerk of the court of chancery in similar cases, and in such suits the fees of the solicitor for drawing and engrossing a petition, or answer thereto, shall in no case exceed three dollars, and all other fees and costs shall be the same as are allowed for similar services in the court of chancery, except that the fees of the court and clerk shall be two-thirds of the sum allowed for like services in the court of chancery.

6. ORDINARY TO MAKE RULES.

Ordinary to make rules.

P. L. 1871, p. 104.

167. It shall be the duty of the ordinary, from time to time, to make such rules and orders to regulate the pleadings and practice in the prerogative court and in the orphans' courts as may, in his judgment, render the practice and proceedings therein more simple, expeditious and efficient, and prevent unnecessary costs and delay, and for that purpose he shall have full power to change and regulate such pleadings and practice.

(*a*) An action at law on the bond for not paying a distributive share, will not lie until after a decree of distribution has been made, *Ordinary* v *Smith*, 3 *Gr.* 92, 97; 4 *Grif. Law Reg.* 1192, *note* (2). It must appear that an order for the prosecution of an administrator's bond was made at the request of a party aggrieved, *Ex parte Webster*, 3 *Gr. Ch.* 568. A general creditor of an estate is a "party grieved" in the contemplation of the statute, which provides that if an administration bond shall become forfeited, it shall be lawful for the ordinary to cause the same to be prosecuted at the request of any party grieved by such forfeiture. It is not necessary that he should have established his claim by a judgment, *In re Honnass*, 1 *McCart.* 493. But see *Webster's Case*, 1 *Hal. Ch.* 89, 97. It is not a breach that one creditor has not been paid; the breach must be such as forfeits the whole penalty, *MS. Williamson, C., July*, 1825. All that can properly be required is, that the creditor should show a *prima facie* case of indebtedness on the part of the estate, and of a forfeiture of the bond by the administrator, *In re Honnass*, 1 *McCart.* 493. It is the duty of the ordinary to see that the bond is not prosecuted at the instance of a stranger, or for the purposes of vexation or oppression. Beyond this no possible good can result from throwing obstacles in the way of enforcing a remedy upon the bond of an administrator, *Ibid.* The want of verification of the facts stated in a petition for leave to prosecute an administration bond is not a ground on which an ordinary, at the instance of the obligors in the bond, will vacate the order for prosecution, *Ex parte Green*, 4 *Hal. Ch.* 550. *Webster's Case*, 1 *Hal. Ch.* 89, 97. An order for the prosecution of an administration bond, founded on a petition stating that the administrator has not paid to the persons entitled thereto the balance found in his hands, will not be vacated on the ground that no decree of distribution had been made by the orphans' court, *Ibid.* The ordinary's not requiring a bond of indemnity against costs, on granting an order to prosecute an administration bond, is not a reason for vacating the order, *Ibid.* The distributee's not having tendered a refunding bond, is not good ground for vacating such order, *Ibid.* See *Wilson* v. *Fisher*, 1 *Hal. Ch.* 493. If leave is given to prosecute, "upon giving bond to the surrogate general, and his successors in office, in the penalty of four hundred dollars with such surety or sureties as shall be approved of by the surrogate of the county of Hunterdon, conditioned to indemnify the surrogate general from all costs to be incurred in the prosecution of the said bond," the prosecutor must deliver the bond to the ordinary. To deliver the bond to the surrogate of the county Hunterdon, is not a compliance with the direction of the ordinary. It is for his indemnity. It is to be held, and preserved by him, or in such manner as he may prescribe, *Dickerson* v. *Miller*, 1 *Gr.* 3. The order, should be filed in the prerogative court, and kept by the register, *Ibid.*

XVI. Costs.

Court to adjudge who shall pay the costs.

R. S. 205, § 32.

168. In all litigated suits in the orphans' court, the court shall adjudge and direct which party shall pay the costs and expenses of such litigation, and shall have the power to apportion and determine the costs and expenses to be paid by either party.

Costs, how to be adjudged in causes respecting the probate of a will.

P. L. 1855, p. 342, § 12.
" 1861, p. 20.

169. In causes respecting the probate of a will, if probate be refused the court may order the costs and expenses of the litigation to be paid by the person propounding the will, or to be paid out of the estate of the deceased; but if probate be granted, the court shall order the parties contesting such will to pay the costs and expenses of the litigation, unless it shall appear to the court that the person contesting such will had reasonable cause for contesting the validity of the same; *provided, however,* that if, upon the trial or hearing of such cause, the party contesting the validity of such will does not offer any evidence other than the subscribing witnesses to the will, then he shall not be liable to pay the costs of the successful party. (See *Sec.* 177).(*a*)

To be taxed by surrogate.

How collected.

R. S. 205, § 32.
Amended.

170. The bills of costs shall be drawn, taxed and filed by the surrogate, who shall, in case the same be not paid, issue execution therefor against the goods and chattels, and lands and tenements, of the party adjudged to pay the same; and the court shall have power to enforce the payment thereof by attachment or other process in the same manner as other orders and decrees of the court are enforceable.

Costs to be paid to surrogate.
Ib. § 32.

171. The costs, when paid or levied, shall be received by the surrogate, who shall pay to the court, sheriff and crier, each their fees, as the same shall be taxed, and the residue to the persons entitled thereto.

Fees allowed.
Ib. § 39.

172. The judges, surrogates and other officers of the orphans' court shall be entitled to demand and receive, for the services hereinafter mentioned, the fees thereunto annexed, and no more; and a sheet or folio shall contain one hundred words:(*b*)

FEES TO BE DIVIDED AMONG THE JUDGES WHO ARE PRESENT IN COURT WHEN THE SERVICE IS PERFORMED:

The first motion in every cause (but no case to be deemed a cause in court, unless there be adverse parties in the same),	$ 50
Every order in a cause,	20
The trial and argument of every cause,	50
Every decree,	80
Every appointment of auditors, guardians, trustees or commissioners,	80
For order for sale in partition proceedings,	1 00
For confirmation of sale and ordering conveyance in partition proceedings,	1 00

FEES TO BE RECEIVED BY THE SURROGATE FOR SERVICES DIRECTED BY LAW TO BE PERFORMED BY THE REGISTER OF THE PREROGATIVE COURT, AND TO BE PAID OVER TO HIM:

For recording the name of each testator, the year in which the will was proved, and filing the will,	25
Recording the name of each intestate where administration hath been granted, and the year when granted,	12
Filing every inventory,	12

FEES OF SURROGATE AND CLERK OF THE ORPHANS' COURT.

For drawing and taking depositions on will or inventory,	1 60
Engrossing a will and proof, each sheet,	14
Recording a will and proof, each sheet,	10
Granting probate,	1 20
Engrossing probate,	14
Recording probate,	10

(*a*) In the following cases costs, or costs and counsel fees, were allowed contestants out of the estate: *Day* v. *Day*, 2 *Gr. Ch.* 550. *King* v. *Berry*, 2 *Gr. Ch.* 261. *Stackhouse* v. *Horton*, 2 *McCart.* 202, 232. *Goble* v. *Grant*, 2 *Gr. Ch.* 629. *Whitenack* v. *Stryker*, 1 *Gr. Ch.* 9. *Boylan* v. *Meeker*, 2 *McCart.* 310. *Wyckoff* v. *Wyckoff*, 1 *C. E. Gr.* 401. *Perrine* v. *Applegate*, 1 *McCart.* 531. *Annin* v. *Vandoren*, 1 *McCart.* 136. Denied in, *Ely* v. *Ely*, 5 *C. E. Gr.* 44. *Collins* v. *Townley*, 6 *C. E. Gr.* 353. *Canfield* v. *Ball*, 4 *Hal. Ch.* 582.

(*b*) No fees can be allowed the judges beyond those fixed by statute, *Liddel* v. *McVickar*, 6 *Hal.* 44. *Pursel* v. *Pursel*, 1 *McCart.* 515.

Drawing and taking depositions to codicils,	$ 74
Recording and engrossing codicil and proof, each sheet,	10
Drawing administration bond and taking deposition thereon,	1 60
Granting letters of administration,	1 20
Engrossing letters of administration,	14
Recording letters of administration,	10
Filing administration bond,	10
Recording administration bond, each sheet,	12
Drawing and making appointment of appraisers, and drawing the oath for the appraisers,	1 20
Recording inventory and proof, each sheet,	10
Drawing bond and petition for guardianship,	1 60
Reading bond and petition for guardianship,	12
Filing bond and petition for guardianship,	10
Granting letters of guardianship,	1 20
Engrossing letters of guardianship,	14
Recording letters of guardianship,	10
Recording inventories made by guardians, each sheet,	10
Drawing petitions, stating a list of debts, credits on application for sale of real estate, entering sale and making copies,	1 76
Exhibiting proofs of advertising rule to show cause, entering decree and copies thereof, and receiving, filing and recording report of sales,	$5 04
For advertising the rule of court when done by the surrogate,	1 20
For services enjoined by the act concerning contracts of real estate made by testators and intestates in their lifetime, the same fees as allowed for the sale of land.	
Drawing petition, reading, filing and recording decree appointing commissioners for the division of real estate, and a certified copy of such decree,	4 08
Recording report of commissioners, each sheet,	10
Recording drafts for each and every course,	04
Drawing petition on application for rule to limit time to creditors, entering the rule, advertising, entering decree, making the rule absolute, and a certified copy of the decree,	5 04
Drawing citation or other process,	36
Sealing the same,	17
Entering every action,	10
Entering the return of a writ,	12
Entering every rule or order of court,	12
Copy of such rule or order,	10
Searching the records,	14
Swearing each witness,	07
Reading every petition or other writing given in evidence,	12
Filing every citation, exception, or other paper,	10
Entering every discontinuance,	12
Entering every decree,	12
Taxing every bill of costs,	60
Issuing execution for costs,	60
Entering and filing appeal,	24
Copies of citations, exceptions, records and other papers, each sheet,	10
Seal and certificate,	30
Taking depositions, each sheet,	14
Recording certified copy of proceedings in cases of lunacy transmitted to the court, each sheet,	10
Recording receipts and discharges,	10
Recording all bonds required to be taken by the surrogate,	12
Recording accounts of executors, administrators, guardians and trustees, partitions, requests, renunciations and releases, each folio,	12
For auditing, stating and reporting the accounts of executors, administrators, guardians, trustees and assignees on estates not exceeding $10,000,	15 00
Over $15,000 and not exceeding $50,000,	30 00
Over $50,000, such fees as the court shall think reasonable.	

XVII. Appeal.

1. FROM SURROGATE.

To orphans' court, on grant of administration or proof of inventory.

P. L. 1855, p. 342, § 2. Amended.

173. Any person aggrieved by any order or proceeding of a surrogate in proving an inventory or granting letters of administration or of guardianship may, by filing a petition of appeal with the surrogate within twenty days after such order or proceeding, appeal therefrom to the orphans' court, which appeal the said court shall hear in a summary way at the next term thereafter, and affirm or reverse the order or proceeding complained of, either wholly or in part.(*a*)

To orphans' court, on probate of will.

Ib. § 11. Amended.

174. Proceedings of surrogates respecting the probate of wills shall be subject to appeal to the orphans' court by any person interested, or other person legally representing him, and to proceedings thereon, as if the will had not been proved; *provided*, that such appeal be made within three months after such proceedings, before the surrogate, or within six months after such proceedings in cases where the person appealing resides out of this state at the death of the testator.(*b*)

To prerogative court in other cases.

R. S. 205, § 16. Amended.

175. All proceedings of surrogates, from which an appeal is not provided for in the last two sections, shall be subject to appeal to the prerogative court by any persons interested, or other person legally representing them; *provided*, such appeal be made within six months after any such proceedings.

2. FROM ORPHANS' COURT.

To prerogative court.

Ib. § 16. Amended.

Within what time made.

P. L. 1849, p. 165, § 6. Amended.

176. Any person aggrieved by order or decree of the orphans' court, of whatever nature, may appeal from the same to the prerogative court; *provided*, that the appeal, if from an order or decree of the court respecting the probate of a will or right of administration or the fairness of an inventory, shall be demanded within thirty days after such order or decree, and if from any other order or decree, the same shall be demanded within three months from the making of such order or decree, unless otherwise specially provided.(*c*)

Supplement.

Approved April 5, 1876. P. L. 1876, p. 79.

Section amended.

177. SEC. 1. That the one hundred and sixty-ninth section of the act to which this is a supplement, and which section is in the words following, viz.: "In causes respecting the probate of a will, if probate be refused, the court may order the costs and expenses of the litigation to be paid by the person propounding the will, or to be paid out of the estate of the deceased; but if probate be granted, the court shall order the parties contesting such will to pay the costs and expenses of the litigation, unless it shall appear to the court that the person contesting such will had reasonable cause for contesting the validity of the same; *provided, however*, that if, upon the trial or hearing of such cause, the party contesting the validity of such will, does not offer any evidence other than the subscribing witnesses to the will, then he shall not be liable to pay the costs of the successful party," be, and the same hereby is so amended as that it shall be, and shall stand enacted, as follows, viz.: In causes respecting the probate of a will, or of a codicil to a will, if probate be refused, the court may order the costs and expenses of the litigation to be paid by the person or persons propounding the will or codicil, or to be paid out of the estate of the deceased; but, if probate be granted, the court shall order the party or parties contesting such will or codicil to pay the costs and expenses of the litigation, unless it shall appear to the court that the person or persons contesting such will or codicil had reasonable cause for contesting the validity of the same, or shall not have offered on the trial or hearing any evidence other than the subscribing witnesses to the will or codicil; and in case it shall appear to the court that the person or

Costs in causes respecting the probate of a will, etc.

(*a*) See *Morris* v. *Morris*, 1 *Harr.* 526. *Lumpkins* v. *Gibbs*, 1 *Harr.* 529. *Anonymous, Ibid. Cooley* v. *Vansyckle*, 1 *McCart.* 496.

(*b*) Does not extend to probate of a foreign will, *In re Howell*, 5 *Dutch.* 399.

(*c*) From a decision granting letters of guardianship, *Read* v. *Drake*, 1 *Gr. Ch.* 78. *Albert* v. *Perry*, 1 *McCart.* 540. *In re Clement*, 10 *C. E. Gr.* 508. Or the appointment of an administrator, *Quidort* v. *Pergeaux*, 3 *C. E. Gr.* 472. *Rinehart* v. *Rinehart*, 12 *C. E. Gr.* 475. Or, setting aside a decree of distribution, *Exton* v. *Zule*, 1 *McCart.* 501. Or, proceedings in partition, *Conover* v. *Walling*, 2 *McCart.* 167. *Diament* v. *Lore*, 2 *Vr.* 220. Or, the settlement of an administrator's account, *Ex parte Coombs*, 4 *Hal. Ch.* 78. *Reeve* v. *Townsend*, 4 *Hal. Ch.* 81. Or, an order fixing the amount of an executor's commissions, *Anderson* v. *Berry*, 2 *McCart.* 232. *Stevenson* v. *Hart*, 3 *Hal. Ch.* 471. Or, a guardian's commissions, *Runkle* v. *Gale*, 3 *Hal. Ch.* 101. *Culver* v. *Brown*, 1 *C. E. Gr.* 533.

persons contesting such will or codicil had reasonable cause for contesting the validity thereof, the court may order that the cost and expenses of the litigation, as well on the part of such contestant or contestants as on the part of the person or persons propounding such will or codicil for probate, be paid out of the estate of the deceased.

Repealer.

178. SEC. 2. That so much of the above recited section of said act as is in conflict or inconsistent with the amendment and enactment hereby made, be, and the same is hereby repealed.

Supplement.

Approved March 8, 1877.

P. L. 1877, p. 69.

Court may order land lying in more than one county in the state, or in any county other than the county where will was proved or letters granted, to be sold for payment of debts.

179. SEC. 1. That when any executor or administrator shall discover or believe that the personal estate of his testator or intestate is insufficient to pay his debts, and the said testator or intestate died seized of lands lying in more than one county of this state, or in any county other than the county where the will of the testator was proved or letters of administration granted, and it shall become necessary or desirable to sell such lands, or any part thereof, lying in any county other than that in which administration is had, for the payment of the debts of such testator or intestate, it shall be the duty of the executor or administrator to exhibit, under oath, a true account of the personal estate and debts, as far as the same can be discovered, to the orphans' court of the county in which the will of such testator was proved or letters of administration were granted, and request their aid in the premises by petition, which petition shall set forth the description of all the lot or lots of land of which the said testator or intestate died seized, where the same is situate, its character, quantity and value, as nearly as may be; and the said court shall thereupon make an order directing all persons interested in such lands, tenements, hereditaments and real estate, to appear before them at a certain day and place, in the said order to be mentioned, not less than two months after the day of making such order to show cause why so much of the said lands, tenements, hereditaments and real estate of the said testator or intestate should not be sold as will be sufficient to pay his debts, or the residue thereof, as the case may require, which order, signed by the surrogate or clerk of the said court, shall be immediately thereafter set up at three of the most public places in each county in which such lands, tenements, hereditaments and real estate may lie, for six weeks successively, and be published for the same time in one or more of the newspapers of this state as the said court may direct.

Proceedings to obtain order, etc.

180. SEC. 2. That upon the return of the rule to show cause, the said court shall proceed as directed in section seventy-two of the act to which this is a supplement, and order and decree the sale of such lands, tenements, hereditaments and real estate, if any, as may be situate in the county where such administration is had, as in their judgment will be for the interest of the estate of the testator or intestate; and in such order and decree shall further direct the executor or administrator to apply to the orphans' court of any other county wherein such land or parcel of said land of such testator or intestate is situate, for an order to sell said land or parcel thereof lying in such other county, which order shall specify the particular lots to be sold and the county wherein they severally lie.

Report of sale to be made to and confirmed by court of county wherein lands lie.

181. SEC. 3. That it shall be lawful for the orphans' court of any county of this state, upon the production of an authenticated copy of such an order directing the sale of lands lying therein, and directing an application to such court, to order, decree and confirm the sale and conveyance of any such lands or real property; the report of such sale shall be made to, and the same shall be confirmed by the court of the county wherein the lands lie.

Copy of report to be filed in county where administration granted.

182. SEC. 4. That an authenticated copy of the report of sale, and the order confirming such sale, shall be recorded and filed in the office of the surrogate of the county where administration was granted, and the executor or administrator shall account for the proceeds of said sale or sales to the orphans' court making the original order.