GENERAL STATUTES OF NEW JERSEY.

Abatement.

An act to prevent in certain cases the abatement of suits and reversal of judgments.

Revision—Approved March 27, 1874. R. S. 952.

1. That in all actions depending or to be commenced in any court of record of this state, if any plaintiff happen to die after an interlocutory judgment, and before a final judgment obtained therein, the said action shall not abate by reason thereof, if such action might be originally prosecuted or maintained by the executors or administrators of such plaintiff; and if the defendant die after such interlocutory judgment, and before final judgment therein obtained, the said action shall not abate, if such action might be originally prosecuted or maintained against the executors or administrators of such defendant; and the plaintiff, or if he or she be dead after such interlocutory judgment, his or her executors or administrators, shall and may have a scire facias against the defendant if living after such interlocutory judgment, or if he or she died after, then against his or her executors or administrators, to show cause why damages in such action should not be assessed and recovered by him, her or them; and if such defendant, his or her executors or administrators, shall appear at the return of such writ and not show or allege any matter sufficient to arrest the final judgment, or the said writ having been returned served, or if no service thereof can be made, having been published as prescribed by law, shall make default, that thereupon an assessment of damages shall be had, or a writ of inquiry of damages shall be awarded, which assessment being duly made, or writ of inquiry being duly executed and returned, judgment final shall be given for the said plaintiff, his or her executors or administrators, prosecuting such writ or writs of scire facias against such defendant, his or her executors or administrators, respectively.

Death of plaintiff.

Of defendant.

Scire facias.

To show cause.

Assessment, &c., and judgment.

2. That if in any action or suit there be two or more plaintiffs or defendants and one or more of them shall die, if the cause of such action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs, against the surviving defendant or defendants. (*a*)

Case of several plaintiffs or defendants.

(*a*) Applies to an action of dower, where the husband of one of the tenants died between the time of filing a demurrer and joinder. *Cozens* v. *Long*, *Pen.* *772. When the suggestion of a defendant's death, in an action which survives the death of one of the defendants, must be made. *Brewer* v. *Porch*, 2 *Har.* 377. Where, in a suit on a promissory note against three defendants as joint and several makers, one of the defendants dies pending suit, the action survives against the other defendants and cannot be continued against the survivors and the representatives of the deceased. *Fisher* v. *Allen*, 7 *Vr.* 203. The death of one of several plaintiffs in a cause referred by rule of court to referees, is not a revocation of the authority of the referees, but may be suggested on the record. *Freeborn* v. *Denman*, 3 *Hal.* 116. See *Fisher* v. *Rutherford*, *Bald. C. C.* 188; *Stull* v. *Abbott*, 3 *Gr.* 338.

Not to abate after filing declaration.

P. L. 1855, p. 340.

3. That in all actions depending or to be commenced in any court of record of this state, if any plaintiff die after filing the declaration and before final judgment, the said action shall not abate by reason thereof, if such action might be originally prosecuted or maintained by the executors or administrators of such plaintiff; (*a*) and if the defendant die after filing the declaration and before final judgment, the said action shall not abate, if such action might be originally prosecuted or maintained against the executors or administrators of such defendant; (*b*) but the death of such plaintiff or defendant being suggested upon the record, and the names of the executors or administrators of such deceased plaintiff or defendant being entered upon the record, the action shall proceed to final judgment at the suit of the plaintiff, or if he or she die after filing the declaration, at the suit of his or her executors or administrators, against the defendant, or if he or she die after filing the declaration, against his or her executors or administrators respectively. (*c*)

Suits in chancery not to abate.

4. That if in any suit or action now depending or hereafter to be brought in the court of chancery, there are or shall be two or more plaintiffs or defendants, and one or more of them die, if the cause of such suit or action survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, such suit or action shall not be thereby abated; but such death being suggested, and shown by affidavit or otherwise, to the satisfaction of the court, such suit or action shall proceed, at the suit of the surviving plaintiff or plaintiffs, against the surviving defendant or defendants. (*d*)

Death of one of several plaintiffs or defendants.

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5. That in every suit or action in the court of chancery, in which any bill is or shall be filed, and in which there are or shall be two or more plaintiffs or defendants, and any of them die, and the cause of action doth not survive, but other persons shall become parties in interest, in right or by the death of such deceased party, such suit shall, by reason of such death, be abated only with respect to such deceased party, and the surviving plaintiff or plaintiffs may proceed against the surviving defendant or defendants, without reviving the suit against the representatives of the deceased party, or any other who may become interested by the death of such party; but in such case such representatives, or such person or persons as shall become interested by the death of such party, shall not be bound by any order or decree in such cause to which they are not made parties; and if the plaintiff or plaintiffs choose to make the representatives of the deceased party, or others who may become interested by the death of such decedent, parties to such suit, no bill of revivor or subpœna ad revivendum shall be necessary; but the court shall and may, by rule or order, as often as there shall be occasion for it, direct the suit to stand revived, (*e*) which rule or order shall be served on such person or persons, and in such manner as the court may direct; and unless the representatives of such deceased party, or others who may become interested by the death of such party, shall, within such time after such service as aforesaid as the court shall limit and appoint, appear and proceed thereon as when a suit has been revived by bill, the plaintiff or plaintiffs may cause their appearance to be entered, and in such case the answer of the deceased party, if any there be, shall be deemed and taken as and for the answer of such representatives or other person or persons interested by the death of such party; and if any plaintiff or plaintiffs, in any suit now depending or hereafter to be brought, wherein the cause of action doth not survive as aforesaid, happen to die pending such suit, the lawful representative or

How survivors may proceed.

Order to revive.

Representatives of plaintiff may amend.

(*a*) Death of plaintiff's lessor, after notice of trial, no bar to the trial. *Den, Terrill* v. *Sayre, Pen.* 598. An administrator *de bonis non*, is within the equity of the statute. *Crane* v. *Alling*, 2 *Gr.* 593.

(*b*) An action on the case against a sheriff for an escape, or for taking an insufficient bail bond, does not survive, and cannot, therefore, be continued against his personal representatives. *Cunningham* v. *Jaques*, 4 *Har.* 42. An action to recover damages claimed to have been sustained by water being flowed back upon plaintiff's land from the mill-dam of the defendant, does not abate by the death of the defendant after issue joined. *Ten Eyck* v. *Runk*, 2 *Vr.* 428. An action for breach of promise of marriage abates by the death of the defendant after issue joined. *Hayden* v. *Vreeland*, 8 *Vr.* 372.

(*c*) The costs of a suit, abated by death of testator, cannot be recovered by executor. *Riggs* v. *Tyson, Coxe* 34. Nor will the court make a rule on executors to enforce the payment of costs in an action brought by their testator. *Cottrell* ads. *Den, Thompson*, 3 *Gr.* 344. *Sears* v. *Jackson*, 3 *Stock.* 45. *Benson* v. *Woolverton*, 1 *C. E. Gr.* 110.

(*d*) Held not to apply where in an action of dower a testator and devisee were defendants, and testator, in possession of premises, died after issue joined. *Ross* v. *Hatfield*, 1 *Gr. Ch.* 363. See *Scott* v. *Blaine, Bald. C. C.* 288.

(*e*) Suit cannot be revived by petition, nor is service of subpœna necessary. *Evan* v. *Browning, July Term*, 1823, *Hal. Dig.* 236.

representatives of such deceased plaintiff or plaintiffs, or any other person or persons interested by the death of such plaintiff or plaintiffs, shall and may, upon affidavit thereof by him, her, or them, or any other person or persons, and on motion made in court, be, by the rule or order of the court, inserted as a complainant or complainants in the said suit, and be permitted to make such amendment in the bill or bills of complaint, as his, her or their title or interest therein may require, to which amendment or amendments the defendant or defendants shall be compellable, by rule or order of the said court, to answer, proceed to issue and examination of witnesses and production of proofs, and all other proceedings shall be had thereon, as in ordinary cases; and in case such person or persons shall not, within such time after the death of such plaintiff or plaintiffs as the court shall limit and appoint, cause himself, herself, or themselves to be entered as plaintiff or plaintiffs, in the room of such deceased plaintiff or plaintiffs, then, and in every such case, the surviving plaintiff or plaintiffs may insert the representative or representatives of such deceased plaintiff or plaintiffs, or other person or persons interested, by his, her, or their death, as defendant or defendants in such suit, and proceed in the manner hereinbefore directed in cases where the lawful representative or representatives of a deceased defendant or defendants, may be made party or parties. (*a*)

Defendant to answer, &c.

When representatives may be made defendants.

6. That in every suit or action in the court of chancery, in which any bill has been or shall be filed and the subpœna returned served, and in which there was, is, or shall be but one plaintiff or one defendant, and the said plaintiff hath died or shall die, the lawful representative or representatives of such deceased plaintiff, or any other person or persons interested by the death of such plaintiff, shall and may, upon affidavit thereof by him, her, or them, or any other person or persons, and on motion made in court, be, by rule or order of the court, inserted as a complainant or complainants in the said suit, and be permitted to make such amendment in the bill or bills of complaint, as his, her, or their title or interest therein may require, and upon such terms as the court may direct, to which amendment or amendments the defendant or defendants shall be compellable, by rule or order of the said court, to answer, proceed to issue and examination of witnesses and production of proofs, and all other proceedings shall be had thereon as in ordinary cases. (*b*)

Death of sole plaintiff, representative may be substituted.

Who may amend.

7. That if in any such suit in which there was, is, or shall be but one defendant, and the said defendant hath died or shall die, and the plaintiff or plaintiffs choose to make the representative or representatives of the deceased party, or others who have or may become interested by the death of such decedent, parties to such suit, no bill of revivor or subpœna ad revivendum shall be necessary; but the court shall and may, by rule or order, as often as there shall be occasion for it, direct the suit to stand revived, which rule or order shall be served as the court may direct; and unless the representative or representatives of such deceased party, or others who may become interested by the death of such party, shall, within such time, after service as aforesaid, as the court shall limit and appoint, appear and put in their answer, or signify their disclaimer of the suit, and the matters in controversy therein, the plaintiff or plaintiffs may cause his or their appearance to be entered, and in such case the answer of the deceased party, if any there be, shall be deemed and taken as and for the answer of such representative or representatives, or other person or persons interested by the death of such party; and such further proceedings may and shall be had in the said suit, as are according to equity and the rules and practice of the said court.

Death of sole defendant, his representative made a party.

Answer or disclaimer.

8. That in case of the death of any sole plaintiff, if his lawful representative or representatives, or such other person or persons as shall become interested by his death, shall not, within such time as the court may limit

When suit at an end.

(*a*) All the former proceedings in the cause stand, and the only question open for litigation is, whether the new party has the representative character imputed to him. *Marlatt* v. *Warwick*, 4 *C. E. Gr.* 445.

(*b*) The rule, irrespective of the statute, is that where a sole plaintiff dies before decree, the suit cannot be revived at the instance of the defendant or of his legal representative. The statute has not altered the practice, except by providing a more expeditious mode of proceeding by *order*, instead of resorting to a bill of revivor. *Benson* v. *Woolverton*, 1 *C. E. Gr.* 110.

and appoint for the purpose, cause himself, herself, or themselves to be entered as complainant or complainants in the said suit, in the room of such deceased plaintiff, or in case of the death of any sole defendant, if the plaintiff or plaintiffs shall not make the representative or representatives of the deceased defendant, or others who may have become interested by the death of such decedent, party or parties to such suit, and cause the said suit to stand revived within such time as the court shall limit and appoint for that purpose, then and in every such case, the said suit shall be considered as at an end, and shall not be revived in the manner provided for by this act. (*a*)

Revivor by bill in chancery.

9. That nothing in this act contained shall prevent the reviving of any such suit in the court of chancery, as before mentioned, by bill of revivor, when the plaintiff or his representative or representatives, or others who may become interested by the death of such plaintiff, may prefer that course of practice, or when the court may deem it expedient to direct that course of practice to be pursued. (*b*)

Death between verdict and judgment.

10. That in all actions, real, personal, or mixed, the death of either party between the verdict and the judgment shall not be alleged for error, so as such judgment be entered within two terms after such verdict. (*c*)

Days between teste and return of certain writs.

11. That in all actions of debt, and all other personal actions whatsoever, and in all actions of ejectment for lands and tenements, now depending, or which at any time hereafter shall be depending by original writ, in any court of record, after any issue joined therein, to be tried by a jury, and also after any judgment had or obtained, or to be had or obtained in any such court, in any such action as aforesaid, there shall not need to be fifteen days between the teste day and the day of the return of any writ or writs of venire facias, habeas corpora juratorum, or distringas juratores, or writs of fieri facias, or of capias ad satisfaciendum; and the want of fifteen days between the teste day and day of return of any such writ, shall not be, nor shall be assigned, taken, or adjudged to be any matter or cause of error.

Supplement.

P. L. 1883, p. 18.

Approved January 31, 1883.

Action against receiver not abated by his death.

12. SEC. 1. That no action heretofore or hereafter brought in any court of this state against any receiver of any corporation within the same, shall be held, adjudged or decreed to abate or to have abated by reason of the death of such receiver; but upon suggestion of the facts on the record, such suit shall be continued against the new receiver for such corporation appointed by the chancellor, or against such corporation in case no new receiver shall be or shall have been appointed, as if such death had not happened.

Supplement.

P. L. 1890, p. 14.

Approved February 24, 1890.

Action against administrator pendente lite, &c., not to abate.

13. SEC. 1. That in all suits in any court of law or equity, which are now pending or which may hereafter be commenced, against any administrator having letters pendente lite or other limited administration, if limited administration shall for any reason terminate, such suit shall not for that cause abate or be discontinued, but the plaintiff or plaintiffs in any such suit may, at his or their option, enter a rule upon any administrator, executor or other person or representative who may succeed to the possession or control of any assets which would have been applicable to

(*a*) The court ordered judgment to be entered where the plaintiff died after obtaining a rule to show cause why the verdict should not be set aside, and his executors failed to follow up the rule. *Lloyd* v. *Johnson*, 2 *Har.* 349. Where, after an injunction had issued defendant died, and complainant had not revived the suit, the proper proceeding is by order that complainant revive within a specified time, or that the injunction be dissolved. *Cummins* v. *Cummins*, 4 *Hal. Ch.* 173. See *Hand* v. *Jacobus*, 4 *C. E. Gr.* 79.

(*b*) If a suit becomes abated and nothing but the death of the party is necessary to be established to show the liability of the survivors, a bill of revivor alone is sufficient. *Ross* v. *Hatfield*, 1 *Gr. Ch.* 363. Where a complainant filed a bill for the specific performance of an agreement for the conveyance of lands, and died before the decree was signed, the heirs-at-law of complainant were held to be the proper persons to revive the suit. *Lanning* v. *Cole*, 2 *Hal. Ch.* 102. A bill of revivor will lie where the sole design of reviving the suit is that an appeal may be taken from the decree, if the parties have the right of appeal. *Peer* v. *Cookerow*, 2 *Beas.* 136. Wherever there has been a devise of the real estate in litigation, and the design is to revive the suit, either in favor of or against the devisee, the heir and devisee must both be made parties. *Peer* v. *Cookerow*, 1 *McC.* 361. *McCurdy* v. *Agnew*, 4 *Hal. Ch.* 728.

(*c*) Where an action was brought by the husband of a woman married previous to March 25th, 1852, and the husband died after verdict and before judgment, the suit would not abate, but might be continued and judgment entered by the administrator. *Teneick* ads. *Flagg*, 5 *Dutch.* 26.

pay any judgment for the plaintiff or plaintiffs in such suit, to show cause why such administrator or executor, or other person or representative, should not be suggested upon the record of such suit as a defendant therein; and the court in which such suit is or may be pending, upon proof of service of such rule to show cause upon such proposed defendant, shall, upon such terms as shall be equitable and just, make an order that the name of such succeeding administrator, executor, person or representative, shall be entered on the record as a defendant in such suit; and after the entry of such order such suit shall proceed in the same manner, and judgment or decree therein shall have the same force and effect as if such defendant whose name has been so as aforesaid suggested upon the record, had been originally brought into court as a defendant in such suit in the manner required by law.

Account.

1. Executors may have writ of.
2. Executors or guardians liable to.
3. Joint tenants and tenants in common.
4. Proceedings in actions of. Sheriff liable for escape.
5. Powers of auditors.
6. Proceedings in case defendant do not plead or demur.

An act concerning the action of account.

Rev. 156.

Passed December 1, 1794. R. S. 46.

Executors may have a writ of account.

1. That from henceforth, executors shall have a writ of account, and the same action and process in the same writ, as the testator might have had, if he had lived.

Account may be brought against the executors of guardians, &c.

2. That actions of account shall and may be brought and maintained against the executors or administrators of every guardian, bailiff and receiver.

One joint tenant or tenant in common may bring action of account against the other.

3. That actions of account shall and may be brought and maintained by one joint tenant or tenant in common, his or her executors or administrators, against the other, as bailiff, for receiving more than comes to his or her just share or proportion, and against the executor or administrator of such joint tenant or tenant in common. (*a*)

Proceedings in actions of account.

4. That where any person is or shall be bound or liable to account as guardian, bailiff, receiver, or otherwise, to another, and will not give account willingly, and the party, to whom such account ought to be made, shall sue out a writ of account, if the person, against whom such writ is issued, being summoned, do not appear at the return of the writ, or if it be returned that the defendant hath nothing, then the defendant shall be attached, by his or her body, to come and make his or her account; and when such accountant shall appear in court, and submit or be adjudged to account, auditors shall be assigned by the court to take his or her account and if such accountant shall be found in arrears, and cannot pay the arrears and the costs of suit forthwith, then a fieri facias de bonis et terris, or a capias ad satisfaciendum shall be awarded; and if such accountant shall neglect or refuse to account before the auditors, he or she shall be committed to jail, there to be kept under safe custody until he or she shall satisfy the plaintiff of his or her demand, with costs; and further, if it shall be found that there is a surplusage due on such account, from the plaintiff to the defendant, then the defendant shall have judgment to recover such surplusage, with costs of suit, against the plaintiff, unless where the suit is brought by executors or administrators, in right of their testator or intestate; in which case, the defendant shall not recover costs against them; and the defendant shall or may have such execution for the same as he or she might have had, if he or she had recovered such sur-

(*a*) Where one tenant in common actually receives the rents, issues and profits, he may be compelled to account. *Izard* v. *Bodine*, 3 *Stock.* 403. *Davidson* v. *Thompson*, 7 *C. E. Gr.* 33. *Barrell* v. *Barrell*, 10 *C. E. Gr.* 173. Account lies where a partner is excluded from the business of the firm by the illegal act of his copartner. *Hartman* v. *Woehr*, 3 *C. E. Gr.* 383. *Hargrave* v. *Conroy*, 4 *C. E. Gr.* 281. *Gordon* v. *Hammell*, 4 *C. E. Gr.* 216. See *Young* v. *Brick, Pen.* *664. One who is next of kin, or a legatee, or creditor, cannot file a bill against the surviving partner of a testator or intestate for the sole purpose of compelling him to account and settle with the personal representative of the deceased partners. *Harrison* v. *Righter*, 3 *Stock.* 389. The right of a tenant in common, out of possession, to require the tenant in possession to account, is purely a statutory regulation. *Edsall* v. *Merrill*, 10 *Stew.* 115.